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When Your Boss is an Algorithm: Preserving Canadian Employment Standards in the Digital Economy

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Abstract

The platform or "gig" economy is a rapidly growing economy in Canada. Between 2005 and 2016, the share of gig workers among all workers in Canada rose from 5.5% to 8.2%.[1] *These include independent contractors, select freelancers and platform workers. In 2018, 28% of Canadians aged 18 and older reported making money through online platforms.*[2] *Research by Payments Canada in 2021 showed gig workers as representing more than one in 10 Canadian adults with more than one in three Canadian businesses employing gig workers.*[3] *As the share of platform workers in the economy has grown, so has the discussion regarding the employment status of workers, particular in the platform economy.*

Among other things, platform work has fundamentally altered the system for managing workers, with algorithms replacing human beings in the control and direction of service providers. Algorithmic management of the workforce is considered a defining feature of both web-based and "location-based" digital labour platforms.[4]

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1 See Sung-Hee Jeon, Huju Liu and Yuri Ostrovsky, *Measuring the Gig Economy in Canada using Administrative Data* (2019); online (pdf): *Statistics Canada* < www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2019025-eng.pdf?st=iwcDxF9e > .

2 Statistics Canada, "Digital Economy, July 2017 to June 2018" (2018), online: *Statistics Canada* < www150.statcan.gc.ca/n1/daily-quotidien/180829/dq180829b-eng.htm > .

3 See "Canada's gig economy has been fuelled by the pandemic — but workers and businesses are challenged by payments mismatch" (28 May 2021), online: *Payments Canada* < payments.ca/canadas-gig-economy-has-been-fuelled-pandemic-workers-and-businesses-are-challenged-payments > .

4 Janine Berg, Marianne Furrer, Ellie Harmon, Uma Rani and M Six Silberman, *Digital labour platforms and the future of work: Towards decent work in the online world* (2018); online, International Labour Organization < digital_labour_platforms_and_the_future_of_work.pdf > (wtf.tw).

This article briefly examines potential challenges created by the platform economy in determining the existence of an employer under employment standards legislation. This article also analyzes existing and prospective legal responses to these challenges, assessing the advantages and limitations of legal regulation of the platform economy in Canada.

Résumé

L'économie des plateformes ou « gig » est une économie en croissance rapide au Canada. Entre 2005 et 2016, la part des travailleurs à la demande parmi tous les travailleurs au Canada est passée de 5,5 % à 8,2 %. Il s'agit notamment d'entrepreneurs indépendants, de pigistes sélectionnés et de travailleurs de plateformes. En 2018, 28 % des Canadiens âgés de 18 ans et plus ont déclaré gagner de l'argent grâce à des plateformes en ligne. Une recherche menée par Paiements Canada en 2021 a montré que les travailleurs à la demande représentaient plus d'un adulte canadien sur 10, avec plus d'une entreprise canadienne sur trois employant des travailleurs à la demande. À mesure que la part des travailleurs de plateforme dans l'économie a augmenté, la discussion concernant le statut d'emploi des travailleurs a augmenté, en particulier dans l'économie de plateforme.

Entre autres choses, le travail sur plateforme a fondamentalement modifié le système de gestion des travailleurs, les algorithmes remplaçant les êtres humains dans le contrôle et la direction des fournisseurs de services. La gestion algorithmique de la main-d'œuvre est considérée comme une caractéristique déterminante des plates-formes de travail numériques basées sur le Web et « basées sur la localisation ».

Cet article examine brièvement les défis potentiels créés par l'économie de plateforme pour déterminer l'existence d'un employeur en vertu de la législation sur les normes d'emploi. Cet article analyse également les réponses juridiques existantes et prospectives à ces défis, évaluant les avantages et les limites de la réglementation juridique de l'économie des plateformes au Canada.

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> *Information technology has transformed every aspect of the employment relationship. It has changed how we look for employees and jobs, how we organize production, and the skills that are demanded for work in the globalized economy. It is now possible to solicit and select employees online from around the world to perform work online that is managed and paid according to a computer algorithm.*[5]

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[5] Kenneth G Dau-Schmidt, "The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law" (2017) *Articles by Maurer Faculty* 2657.

1. INTRODUCTION

The pervasive influence of information technology on our understanding of the world of work is undeniable. It has generated a rapid change in the dynamics of the labour market and almost single-handedly established a "virtual economy" where employment relationships are managed by algorithms and workers are connected by broadband, not geography. Technology has been vital in creating "platform work," a version of employment involving organizations or individuals using a "virtual platform" to "access other organizations or individuals to solve problems or to provide services in exchange for payment."[6]

The platform or "gig" economy is a rapidly growing economy in Canada. Between 2005 and 2016, the share of gig workers among all workers in Canada rose from 5.5% to 8.2%.[7] These include independent contractors, select freelancers, and platform workers. In 2018, 28% of Canadians aged 18 and older reported making money through online platforms.[8] Research by Payments Canada in 2021 showed gig workers as representing more than one in ten Canadian adults, with more than one in three Canadian businesses employing gig workers.[9] As the share of platform workers in the economy has grown, so has the discussion regarding the employment status of workers, particular in the platform economy.

Among other things, platform work has fundamentally altered the system for managing workers, with algorithms replacing human beings in the control and direction of service providers. Algorithmic management of the workforce is considered a defining feature of both web-based and "location-based" digital labour platforms.[10] Notwithstanding these revolutionary changes, the problems associated with other non-standard forms of employment are also applicable to platform workers: under-employment, poor remuneration, and insufficient availability of work. That these problems necessitate some form of

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[6] See Willem Pieter de Groen et al, "Employment and working conditions of selected types of platform work" (2018) at 9, online (pdf): *European Foundation for the Improvement of Living and Working Conditions* < www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18001en.pdf > .

[7] See Sung-Hee Jeon, Huju Liu & Yuri Ostrovsky, "Measuring the Gig Economy in Canada using Administrative Data" (2019) at 6, online (pdf): *Statistics Canada* < www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2019025-eng.pdf?st=iwcDxF9e > .

[8] Statistics Canada, "Digital Economy, July 2017 to June 2018" (2018), online: *Statistics Canada* < www150.statcan.gc.ca/n1/daily-quotidien/180829/dq180829b-eng.htm > .

[9] See "Canada's gig economy has been fuelled by the pandemic — but workers and businesses are challenged by payments mismatch" (28 May 2021), online: *Payments Canada* < payments.ca/canadas-gig-economy-has-been-fuelled-pandemic-workers-and-businesses-are-challenged-payments > .

[10] Janine Berg et al, "Digital labour platforms and the future of work: Towards decent work in the online world" (2018) at 8, online (pdf): *International Labour Organization* < wtf.tw/text/digital_labour_platforms_and_the_future_of_work.pdf > .

intervention or remedy is scarcely contested. The nature and scope of such intervention, however, is not as straightforward.

In regulating the platform economy and ameliorating the problems outlined above, a major challenge for legislators, adjudicators, and policy makers has been determining the nature of the working relationship between parties for the purpose of enforcing minimum employment standards. In this respect, Canadian case-law has focused primarily on establishing a distinction between an employee and an independent contractor. Although a number of tests have been developed under common law to determine an employment relationship, very few cases specifically outline tests for determining the existence of an employer. The bipartite nature of most employment relationships in Canada has ensured that this has not been a major problem. However, the rapid growth of non-standard working arrangements in the Canadian labour economy is bound to create more complex working relationships and increase the jurisprudential importance of employer-related questions.

This article briefly examines potential challenges created by the platform economy in determining the existence of an employer under employment standards legislation. Part I outlines the statutory definition of an employer in Ontario, Quebec, and British Columbia, where most Canadian platform workers are situated.[11] The application of the statutory definitions, particularly by administrative tribunals in these jurisdictions, is also discussed in Part I. Part I is concluded with a brief review of the case-law respecting platform workers in Canada. Part II examines the challenges of verifying the identity of an employer in the platform economy, discussing the capacity of current legal frameworks in addressing these challenges. Part III analyzes existing and prospective legal responses to these challenges, assessing the advantages and limitations of legal regulation of the platform economy in Canada.

(a) Determining The "Employer" in Employment Standards Legislation: The View From Ontario, British Columbia, and Quebec

There are relatively few Canadian decisions specifically addressing the determination of an employer under employment standards legislation, with greater focus being placed on distinguishing employees from other categories of workers. As a general principle, the Supreme Court of Canada ("SCC") has stated that an interpretation of employment standards legislation that encourages employers to comply with the minimum requirements of the Act and extends its protection to as many employees as possible is to be favoured over one that does not.[12]

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[11] Jeon et al, *supra* note 1.

[12] *Machtinger v. HOJ Industries Ltd.*, 1992 CarswellOnt 892, 1992 CarswellOnt 989, [1992] 1 S.C.R. 986 (S.C.C.).

(i) Ontario

Section 1(1) of Ontario's *Employment Standards Act*[13] defines an employer as including the following:

(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and

(b) any persons treated as one employer under section 4, and includes a person who was an employer; (''employeur'')

In *Eglinton Dog Walker Inc. v. Sullivan*,[14] the Ontario Labour Relations Board (''the Board'') had to determine whether the applicant, who ran a dog walking business, had an employer-employee relationship with the respondent, who had provided administrative services on behalf of the applicant. The Board upheld the decision of the Employment Standards Officer determining that the applicant was the respondent's employer. In applying Section 1(1) of the *Employment Standards Act* to the facts, the Board noted that, although the respondent had not supervised the complainant directly, his actions, including requiring her to keep her mobile phone activated for certain periods during the week, ''suggested the type of control and direction envisioned in the definition of employer'' under the Act.[15] The Board also considered as critical the applicant's ability to discipline the respondent and the fact that the respondent's initial compensation was set by the applicant without any negotiation.[16]

In *Spectrum Event Paramedical Services (GP) Inc. v. Sutton,*[17] the applicant sought to set aside a finding of an employment relationship with a paramedic. In dismissing the application, the Board stated as follows:

> Indeed, despite the stated intention of the parties to engage in a contractor relationship through the Agreement, the reality is that Spectrum exercises a level of direction and control over Mr. Sutton that reflects an employment relationship. Moreover, Spectrum owns most of the tools required for Mr. Sutton to perform his work. As such, Spectrum meets the definition of ''employer'' under the Act.[18]

Crucially, the Board also noted that contractual agreement to a contractor relationship does not bar a finding of an employment relationship where the reality differs from the intention of the parties.[19]

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13 SO 2000, c 41.

14 2018 CarswellOnt 10976 (Ont. L.R.B. (E.S.A.)).

15 *Ibid* at para 52.

16 *Ibid* at paras 52 & 55.

17 2019 CarswellOnt 16089 (Ont. L.R.B. (E.S.A.)).

18 *Ibid* at para 74.

19 *Ibid* at para 73.

(ii) British Columbia

Section 1(1) of British Columbia's *Employment Standards Act*[20] defines an "employer" as including a person who has control or direction of an employee or who is responsible for the employment of an employee. In *Friends of Animals, Inc., Re*,[21] the British Columbia Employment Standards Tribunal described the critical criteria for determining an "employer status" in the context of hiring and control. The control test considers four indicators of employment status: the employer's power of selection; payment of wages or remuneration; the employer's right to control the method of doing work; and the employer's right to suspend or dismiss the employee.[22]

(iii) Quebec

Quebec's *An Act respecting Labour Standards*[23] defines an employee as "any person who has work done by an employee."[24] In *Belmaaza c. Centre de recherche du centre hospitalier de l'Université de Montréal,*[25] the complainant had been affiliated with both the Université de Montréal and the Centre de recherche du centre hospitalier de l'Université de Montréal ("the Centre de recherche"). Quebec's Labour Relations Board had to determine the identity of the true employer, as the complainant performed work for both organizations. The Board ruled that the Centre de recherche was the complainant's true employer, as he received remuneration for work performed and there was a relationship of subordination.

In *Pointe-Claire (Ville) c. Syndicat des employées & employés professionnels-les & de bureau, local 57*,[26] the appellant had hired a temporary employee through a personnel agency to work for 6 weeks as a receptionist and for 18 weeks as a clerk. The employee's wages during the assignments were determined and paid by the agency, which then submitted an invoice to the city. Other working conditions were dictated by the city. A decision by Quebec's Labour Court determining the appellant to be the true employer under Quebec's *Labour Code* was upheld by Quebec's Superior Court and Court of Appeal. The SCC dismissed the appeal, holding that the Labour Court's decision was not unreasonable. However, Justice Lamer, then the Chief Justice of the SCC,

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20 RSBC 1996, c 113.

21 2015 CarswellBC 1890 (B.C. Empl. Stnds. Trib.), reconsideration / rehearing refused 2015 CarswellBC 2318 (B.C. Empl. Stnds. Trib.).

22 *3717 Investments Ltd. (Student Works Painting) (Re)* (July 29, 1998), Doc. 98/104 (B.C. Empl. Stnds. Trib.).

23 CQLR, c N-1.1.

24 *Ibid*, s 1(7).

25 2011 QCCRT 0467, 2011 CarswellQue 12413 (C.R.T.Q.).

26 1997 CarswellQue 86, 1997 CarswellQue 87, (*sub nom.* Pointe-Claire (City) v. Quebec (Labour Court)) [1997] 1 S.C.R. 1015 (S.C.C.).

noted the existence of a legislative gap respecting tripartite employment relationships:

> Unfortunately, tribunals and courts must often make decisions by interpreting statutes in which there are gaps. The case at bar shows that situations involving tripartite relationships can cause problems when it comes to identifying the real employer if the labour legislation is incomplete in this regard. The tripartite relationship does not fit very easily into the classic pattern of bilateral relationships. The Labour Code was essentially designed for bipartite relationships involving an employee and an employer. It is not very helpful when a tripartite relationship like the one at issue here must be analysed. The traditional characteristics of an employer are shared by two separate entities — the personnel agency and its client — that both have a certain relationship with the temporary employee. When faced with such legislative gaps, tribunals have used their expertise to interpret the often terse provisions of the statute. In the final analysis, however, it is up to the legislature to remedy those gaps. The Court cannot encroach upon an area where it does not belong.[27]

(b) Platform Workers in Canada: The Common-law Position

While there is no Canadian decision specifically addressing employment relationships in the platform economy, platform companies have been the subject of litigation in a number of cases. In *Uber Technologies Inc. v. Heller*,[28] the respondent had initiated a class proceeding against Uber for violating Ontario's *Employment Standards Act*.[29] Uber filed a motion to stay the class proceeding, relying on an arbitration clause in its services agreement requiring that any dispute involving Uber be resolved through mediation and arbitration in the Netherlands. The agreement also required the up-front payment of administrative and filing fees of US$14,500, which was most of the respondent's annual income. The proceeding was stayed by the motion judge, but the respondent's appeal was allowed by the Ontario Court of Appeal.[30] The SCC dismissed the appeal and allowed the class action to proceed, determining

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[27] *Ibid* at para 63. In most cases involving tripartite employment relationships, Canadian administrative tribunals have generally concluded that the client is a temporary employee's real employer: *L.I.U.N.A., Local 183 v. York Condominium Corp. No. 46,* 1977 CarswellOnt 938, [1977] O.L.R.B. Rep. 645 (Ont. L.R.B.); *H.R.E.U., Local 299 v. Sutton Place Hotel,* 1980 CarswellOnt 1085, [1980] O.L.R.B. Rep. 1538 (Ont. L.R.B.); *U.E. v. Sylvania Lighting Services*, 1985 CarswellOnt 1276, [1985] O.L.R.B. Rep. 1173 (Ont. L.R.B.); *C.A.W. v. Nichirin Inc.*, 1991 CarswellOnt 1119, [1991] O.L.R.B. Rep. 78 (Ont. L.R.B.); *L.I.U.N.A., Local 607 v. Grant Development Corp.*, 1993 CarswellOnt 1317, [1993] O.L.R.B. Rep. 21 (Ont. L.R.B.); *I.B.E.W., Local 586 v. Dare Personnel Inc.*, 1995 CarswellOnt 1565, [1995] O.L.R.B. Rep. 935 (Ont. L.R.B.).

[28] 2020 SCC 16, 2020 CarswellOnt 8828, 2020 CarswellOnt 8829 (S.C.C.).

[29] SO 2000, c 41.

[30] See *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, 2019 CarswellOnt 1 (Ont. C.A.),

the arbitration clause as constituting a separate collateral contract that was unconscionable. The SCC notably made reference to the inequality in bargaining power between the parties as relevant in grounding the finding of unconscionability.[31]

The status of platform workers in Canada has also been considered by Canadian administrative tribunals with respect to labour relations. In *CUPW v. Foodora Inc.*,[32] the applicants were seeking to be the exclusive bargaining agent for a group of couriers working for Foodora Inc. The Ontario Labour Relations Board ruled that the couriers were employees under *Ontario's Labour Relations Act*, as they were dependent contractors. In the Board's view, the key question was whether the employment relationship more closely resembled the relationship of an employee or an independent contractor.[33]

(i) Elusive employers?

The applicability of employment standards legislation is based on an important premise: the existence of an employment relationship. This is completely antithetical to the modus operandi of the gig economy, which seeks to establish a working relationship distinct from the traditional employment relationship. Platform companies typically employ algorithmic management practices for allocating, evaluating, monitoring, and rewarding workers.[34] This has its impact on workers in terms of accessing work and benefiting from flexible working conditions.[35] While some workers are directly hired by platforms, platforms in most cases present as "mediators" between workers and third-party clients and consequently have no "employment relationship" with the workers.[36]

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affirmed *Uber Technologies Inc. v. Heller*, 2020 CarswellOnt 8828, 2020 CarswellOnt 8829 (S.C.C.).

[31] *Ibid* at para 93. The SCC highlighted the purpose of unconscionability as being to protect those vulnerable in the contracting process from loss or improvidence. Two key elements ground the doctrine of unconscionability: inequality of bargaining power and an improvident transaction. In applying the first, the SCC noted the powerlessness of the respondent in negotiating the arbitration agreement which formed part of a standard form contract. The SCC also considered the fact that someone in the respondent's position could not be expected to appreciate the financial implications of agreeing to arbitrate under international or inter-territorial law. In applying the second, the Court emphasized the closeness of the up-front administrative fees under the arbitration clause to the respondent's annual income and the lack of proportionality between the legal costs and any arbitral award. See *ibid* at para 94.

[32] 2020 CarswellOnt 2906 (Ont. L.R.B.).

[33] *Ibid* at para 80. The Board notably remarked that, notwithstanding the fact that the case represented its first decision with respect to the "gig economy," the case was no different in many respects than some of their older cases. See *ibid* at para 172.

[34] "Digital Platforms and the World of Work in G20 Countries: Status and Policy Action" (June 2021) at 20, online (pdf): *International Labour Organization* <www.ilo.org/wcmsp5/groups/public/—dgreports/—ddg_p/documents/publication/wcms_829963.pdf>.

[35] *Ibid* at 21.

Coupled with the designation of platform workers as "independent contractors," platform companies are able to devolve their responsibility for providing employment or social protection benefits to their workers.[37]

Digital labour platforms consider themselves as simply facilitating the connection of workers with third-party clients. As a matter of fact, the use of the word "platform" in describing firms is intended to make corporate firms appear less culpable by making the relationship between the service provider and the platform casual and possibly intermittent.[38] Platform companies mostly contend for a distinction in business models and worker relationships between them and platform workers, using various branding strategies to characterize themselves as "intermediaries" rather than employers.[39] This strategy is aimed at building support for a notion that "the distinctive nature of on-demand work warrants distinct legal treatment."[40]

If this were the position in practice, employment standards legislation is likely inapplicable to platform work, particularly if, as often claimed by platforms, its involvement intrudes on entrepreneurial autonomy and undermines the value of platform-based transactions.[41] However, the practical realities are somewhat different from platforms' stance regarding their relationships with workers. Generally speaking, the exercise of direction and control powers is inherent in the business models of platforms.[42] Even where the interactivity envisaged in standard employment relationships is lacking, platform companies still control the performance of workers both geographically and qualitatively.[43] Commenting generally on "location-based" platform companies such as Uber, for example, Lofredo and Tufo observe as follows:

> There is no doubt that the relationship between the platform and the partner company produces what is in effect an integrated enterprise, regardless of the commercial contract formally adopted between the parties. The transport activity, which is a phase of the productive cycle, is performed by the partner companies, whereas the platforms deal with other phases, such as logistics, booking and commercialisation. This

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[36] "World Employment and Social Outlook 2021: The role of digital labour platforms in transforming the world of work" (2021) at 92, online (pdf): *International Labour Organization* <www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms_771749.pdf>.

[37] *Ibid.*

[38] Shu-yi Oei, "The trouble with gig talk: choice of narrative and the worker classification fights" (2018) 18:3 Law & Contemp Probs 107.

[39] Keith Cunningham-Parmeter, "Gig-Dependence: Finding the Real Independent Contractors of Platform Work" (2019) 39:3 N Ill UL Rev 379 at 390.

[40] *Ibid.*

[41] *Ibid* at 392.

[42] Antonio Loffredo & Marco Tufo, "Digital work in the transport sector: in search of the employer" (2018) 12:2 Work Organisation, Labour & Globalisation 23.

[43] *Ibid.*

> would suffice to consider platforms as employers, due to the common organisational interest they share with the partner companies.[44]

While digital platforms will go to great lengths to deny employment relationships, with the aim of circumventing minimum employment standards, an examination of their practice typically indicates the performance of relevant employer functions.[45] For instance, the supposed "onboarding" of platform workers is equivalent to a hiring process involving conventional employees.[46] Similarly, as a result of algorithm management, workers are "deactivated" from platforms for poor performances or user ratings in a manner similar to an employee dismissal.[47] Schreyer in addition notes how platform companies such as Foodora use algorithmic quantification to coordinate their workforce on a job-specific basis and exercise a high degree of control of all work processes.[48]

The emphasis of platform work on technology has been used to obscure the existence of platform work as regulated labour.[49] However, technology is not an independent force but one developed by humans who make design decisions that impact the experiences and lives of others.[50] Therefore, even where managerial discretion is shifted to algorithms, the discretion has not been eliminated but transferred to the data scientists and engineers who built the system.[51] In truth, once the novelty of interfacing with an online platform is eliminated, a more traditional and recognizable business is revealed.[52] This is encouraging news for Canadian employment law. Archibald has noted how the common law in Canada has been willing to "pierce the corporate veil and find solvent controlling entities to be liable for its employer obligations."[53]

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44 *Ibid* at 34.

45 Jeremias Prassl & Martin Risak, "Uber, Taskrabbit, and Co.: Platforms as Employers — Rethinking the Legal Analysis of Crowdwork" (2016) 37:3 Comp Lab L & Pol'y J 619 at 637.

46 Miriam A Cherry, "Corporate Social Responsibility and Crowdwashing in the Gig Economy" (2018) 63:1 Saint Louis ULJ 1 at 13.

47 *Ibid*.

48 Jasmin Schreyer, "Algorithmic work coordination and workers' voice in the COVID-19 pandemic: The case of Foodora/Lieferando" (2021) 15:1 Work Organisation, Labour & Globalisation 69 at 81.

49 Bethany Hastie, "Platform Workers and Collective Labour Action in the Modern Economy" (2020) 71 UNBLJ 40 at 45.

50 Janine Berg, "Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work" (2019) 41:1 Comp Lab L & Pol'y J 69 at 90.

51 *Ibid*.

52 Fay Faraday, "Demanding a Fair Share: Protecting Workers' Rights in the On-Demand Service Economy" (2017) at 8, online (pdf): *Canadian Centre for Policy Alternatives* <policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2017/07/Demanding%20a%20Fair%20Share_FINAL.pdf>.

53 Bruce P Archibald, "Labour Law as a Subset of Employment Law? Up-dating Langille's Insights with a Capabilities Approach" (2020) 43:2 DLJ 445. In *Foodora*, *supra* note 32 at

Nevertheless, the complexities added to employment relationships courtesy of the platform economy cannot be underestimated. Prassl notes how "diffuse and potentially inexplicable control mechanisms are inherent in the use of increasingly sophisticated rating systems and algorithms."[54] Determining a "true employer" can be challenging for adjudicators even in cases where direction and control are exercised by legal persons. For instance, in *Kranz Investments Ltd., Re,*[55] the applicant contested a determination by the Director of Employment Standards holding the applicant liable as an employer for non-payment of wages to a caretaker employed by the applicant's property manager, who was regarded as an independent contractor. The British Columbia Employment Standards Tribunal held the view that the applicant benefiting from the caretaker's services did not create an employment relationship, as the crucial elements of control and direction were exercised by the applicant's property manager.[56]

Furthermore, the global reach of digital platforms has created a decentralized workforce and increased the distance between worker, client, and employer. The decentralization and disaggregation of gig workers through digital platforms has led to a lack of visibility between worker and employer, reducing the lines of accountability and making regulation more difficult.[57] The decentralization of the platform workforce is a major problem with respect to enforcing uniform employment standards, particularly in Canada, where employment law issues are under provincial jurisdiction. As it stands, Canadian workers are not guaranteed uniform employment standards across Canada notwithstanding various efforts to harmonize employment standards legislation and the reciprocity agreements between provinces. By connecting a global workforce, platform work adds a new layer of jurisdictional complexity respecting accountability that Canadian law and policy may be unable to address in its current state.[58]

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para 156, the Ontario Labour Relations Board observed that algorithms allowed Foodora to still control operations with minimal human interaction.

54 Jeremias Adams-Prassl, "What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work" (2019) 41:1 Comp Lab L & Pol'y J 123 at 139.

55 2016 CarswellBC 368 (B.C. Empl. Stnds. Trib.).

56 *Ibid* at para 54.

57 Elle Ziegler et al, "Understanding the Nature and Experience of Gig Work in Canada" (2020), online (pdf): *Public Policy Forum* <ppforum.ca/wp-content/uploads/2020/07/UnderstandingTheNatureAndExperienceOfGigWorkInCanada-PPF-July2020-EN.pdf>.

58 Conflicts-of-law and jurisdiction issues respecting platform work are extensively discussed by Miriam Cherry (see Miriam A Cherry, "A Global System of Work, a Global System of Regulation: Crowdwork and Conflicts of Law" (2020) 94:2 Tul L Rev 183). Cherry concludes, among other things, that effective regulation of crowdwork will remain elusive as long as the focus for regulation remains on "workplaces" and physical locations where work is performed.

(ii) Dealing with the ''algorithm boss''

While there may be debates over the nature of worker protection and the process for balancing employment standards with business profitability and efficiency,[59] there is a general understanding that workers, employers, and intermediaries should be regulated by clear and unambiguous laws.[60] With regards to employment standards, the primary concern has always been the far-reaching implications of including certain categories of workers in the ''employer-employee'' relationship spectrum. Commenting on the ascription of ''employer'' to platform employers, Hiessel cautions against implementing all-encompassing conceptualizations of the employment relationship, stating as follows:

> Most fundamentally, it cannot be ignored that dealing with the usually considerable range of obligations flowing from an employment relationship for a huge number of workers who decide freely upon their participation, face no duty of availability and can hardly be made subject to any form of control would imply a very substantially elevated level of costs and risks for the undertakings in question.[61]

Aside from the issue highlighted by Hiessel, the reality that the design and structure of these platforms are geared toward avoiding a streamlined employment relationship cannot be ignored. Tasks in crowdwork arrangements are typically short in duration, with the resultant relationships potentially characterized as a series of temporary employment relationships.[62] This transfers the risk of business downturns from platform companies or clients to workers.[63] In addition, the ability to commission and complete tasks at different places does not match traditional assumptions about employment relationships.[64] The definitions of ''employer'' and ''employee'' under employment standards legislation in many Canadian provinces do not contemplate these form of working arrangements.[65]

(iii) The ''employment relationship'' concept: Irrelevant?

Notwithstanding the above, maintaining the relevance of the ''employment relationship'' concept remains crucial to regulating platform work. The

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[59] Harry W Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau, QC: Government of Canada, 2006).

[60] *Ibid.*

[61] Christina Hiessl, ''Labour law for TOS and HITs? reflections on the potential for applying 'labour law analogies' to crowdworkers, focusing on employee representation'' (2018) 12:2 Work Organisation, Labour & globalization 42.

[62] Prassl & Risak, *supra* note 45 at 632.

[63] *Ibid.*

[64] *Ibid.*

[65] Employment standards legislation, however, contemplates tripartite employment relationships.

"employment relationship" has a "primarily technical nature that can also accommodate novel forms of management enabled by digital transformation."[66] Platform work should not be conceived as a "separate silo" in the economy, as there are many important dimensions of platform work that share similar attributes with other non-standard forms of employment.[67] The capitalist need to minimize costs and accountability without minimizing control which has existed since the 70s is still very much in existence.[68] Platform businesses may present themselves as technological platforms that only facilitate the provision of services, but similarities between them and the conventional employer can still be identified.[69] According to Aloisi and Di Stefano:

> The organizational function of employment, as a cornerstone of business' flexibility, instead, has not experienced any decline. As shown above, the foundational characteristics of the employment relationship are general and adaptive enough to be relevant for a wide panoply of business models. The key element of the employment relationship is the worker's personal subjection to the command, organizational and disciplinary powers of the employer.[70]

The major difference between contemporary platform work and historical use of crowds to contribute to larger projects is the technological medium designed to coordinate the projects.[71] Whether the close control is exercised through algorithmic management or any other form, the focus is on control and the impact of such control on the decision-making powers of workers. Commenting on the indirect control of platform operators such as Uber Technologies, Rahman notes how, through algorithms, platform operators control factors such as terms of exchange, price-setting, wages, and standards, and to an extent they shape the experience of consumers.[72] Algorithmic management is merely a novel method of applying an age-old concept.

Perhaps what is then needed is a new understanding of "employer" that moves from a formalistic approach to a flexible, functional concept,[73] as has

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[66] Antonio Aloisi & Valerio De Stefano, "Regulation and the Future of Work: The Employment Relationship as an Innovation Facilitator" (2020) 159:1 Int'l Lab Rev 47 at 57.

[67] Valerio De Stefano, "The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy" (2016) 37:3 Comp Lab L & Pol'y *J* 471 at 499.

[68] David Peetz, *The Realities and Futures of Work* (ANU Press, 2018) at 177.

[69] Faraday, *supra* note 52 at 9.

[70] Aloisi & De Stefano, *supra* note 66 at 61.

[71] *Digital Labour Platforms and the Future of Work* (2018) at 6, online (pdf): *International Labour Organization* <http://wtf.tw/text/digital_labour_platforms_and_the_future_-of_work.pdf>.

[72] K Sabeel Rahman, "The Shape of Things to Come: The On-Demand Economy and the Normative Stakes of Regulating 21st-Century Capitalism" (2016) 7:4 Eur J Risk Reg 652 at 656.

been done with the definition of "employees." Prassl advocates a functional approach where an employer is defined not via the absence or presence of a particular factor, but via the exercise of different factors.[74] Under this functional approach, determination of an "employer" is made on a case-by-case basis, and it will be possible for employer responsibility to be attached to different parties depending on the context.[75] Where such factors are exercised by algorithms, Berg's approach can be adopted by tracing the legal personalities responsible for implementing such algorithms.

The Canadian legal system provides a great platform for applying a "functional approach." For the most part, the function of interpreting and applying employment standards statutes is exercised by specialized administrative tribunals not bound by the doctrine of judicial precedent. Appellate courts or tribunals exercising judicial review will typically defer to the discretion and expertise of such bodies unless the decision is unreasonable.[76] These administrative tribunals are mostly established by statute and are subject to the provisions of the statute establishing them. Most Canadian jurisdictions also define "employer" in very broad terms, leaving adjudicators with great room of discretion in determining related questions.[77]

This flexibility is, however, also the major challenge of an open-ended approach in that parties are uncertain about the nature of their relationship and are at the mercy of the legal process. Furthermore, dispute resolution, either through litigation or otherwise, can be time consuming, expensive, and constructively inaccessible to many platform workers. Assuming adjudicators can make the correct determination in all cases, which is by no means guaranteed, the relevance of adjudication is diminished where there is no legal action. For every legal action, there are most likely hundreds of cases of labour exploitation that will go unchallenged due to workers being unaware or uncertain of their rights.

(c) Any Place for Legislation?

Another possibility is the amendment of current employment standards legislation to categorize contractors, including platform workers, as employees for the purpose of enforcing certain minimum employment standards, particularly those relevant to workers' fundamental rights, such as non-discrimination and freedom of association. As noted by Hendrickx, fundamental rights at work are crucial instruments in positive law to guide

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73 Prassl & Risak, *supra* note 45 at 632.

74 *Ibid* at 647.

75 *Ibid*.

76 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 CarswellNat 7883, 2019 CarswellNat 7884, [2019] 4 S.C.R. 653 (S.C.C.).

77 The use of the term "include" in defining an employer or employee is a common theme, indicating the non-exhaustive nature of statutory definitions.

new developments and shape regulation.[78] ILO's *Recommendation No 198* also enjoins members to develop national policies that ensure certain standards are applicable to all forms of contractual arrangement and that those standards establish parties responsible for their protection.[79] There are a number of implications associated with this approach. Policy makers are saddled with the unenviable task of determining the minimum employment standards applicable to platform workers. Making such judgment calls with respect to an extremely diverse and constantly evolving sector is extremely challenging. Digital platforms differ in nature and operation, and one must be wary of "lumping different business models under the rubric of the platform or digital marketplace without asking whether they have anything in common apart from using the internet."[80]

From an economic standpoint, such selective classification may also disadvantage Canadian platform workers, who are also part of a global market and are competing with workers from developing countries.[81] Including online-based platform workers in all-encompassing definitions of employee or worker may, as Aloisi points out, enhance a "global labor arbitrage" and potentially lead to worker discrimination due to employers prioritizing workers in countries with lower labour costs.[82] Subjecting all platform workers to the same employment standards may also have varying impacts on platform workers, depending on their skill level and the nature of their engagement with platforms. Additionally, classifying all platform workers as employees may come at increased costs to digital platforms, forcing location-based platforms, for example, to transfer their services to other locations, leaving many vulnerable workers without a source of income. A more conservative option is including "dependent contractors" in employment standards legislation and leaving the question of interpretation to the courts.[83] This is popular among some authors[84] and regarded as problematic by others.[85]

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78 Frank Hendrickx, "From Digits to Robots: The Privacy-Autonomy Nexus in New Labor Law Machinery" (2019) 40:3 Comp Lab L & Pol'y J 365 at 374.

79 See *R198 - Employment Relationship Recommendation, 2006 (No 198)*.

80 Julia Tomassetti, "Does Uber Redefine the Firm: The Postindustrial Corporation and Advanced Information Technology" (2016) 34:1 Hofstra Lab & Empl LJ 1 at 77.

81 Antonio Aloisi, "Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of on-Demand/Gig Economy Platforms" (2016) 37:3 Comp Lab L & Pol'y J 653 at 661.

82 *Ibid* at 665.

83 A couple of Canadian jurisdictions have already adopted this approach.

84 See, e.g., John A Pearce II & Jonathan P Silva, "The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard" (2018) 14:1 Hastings Bus LJ 1 at 22.

85 See Eric Tucker, Judy Fudge & Leah F Vosko, "Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada" (2011) 10 CLELJ 193 at 230.

Aside from the above, classifying a platform worker as an employee is one thing, but determining the worker's true employer is another. As shown in the previous section, platforms are more interested in devising ways of artificially relinquishing "employer" activities than in denying that platform workers perform work for a known entity. Therefore, simply selectively addressing the definition of an employee may be insufficient, as platforms may simply modify the terms of their agreement with workers to avoid such responsibility.[86] Davidov extensively engages with the limitations of this selective approach and advocates for a simultaneous consideration of universalist and specific perspectives in both the employment relationship and labour law in general.[87] Applying a more universalist perspective to defining the employment relationship would not only consider employee protection but also market efficiency and societal relevance. Inclusive definitions of an employee must also be accompanied by the creation of a fair and balanced employer verification mechanism adapted to the platform economy. Any definition or test for determining the existence of an employer must minimize indeterminacy as much as possible. Developing such a mechanism is an herculean task, and in truth, a degree of indeterminacy is inevitable for any conception of employer that has judicial and legislative relevance.

Questions about the ability of both legislation and adjudication to balance employee protection with market efficiency is a factor in some scholars calling for dissolution of the worker classification system, as the system is ill fitted for the modern workplace.[88] Others have described attempts to apply the classification system to platform workers as futile, citing the malleability of the common law test as creating a situation where platform workers win the battle to be classed as employees but ultimately lose the war.[89]

An alternative approach to amending current legislation is the development of separate legislation assigning employer responsibility to digital platforms and preserving employment standards for platform workers. Additional legislation diversifies regulation of employment relationships, which, as highlighted by Domenech-Pascual, can potentially boost efficiency in the protection and fulfillment of workers' rights.[90] Employment standards legislation is undoubtedly limited in its ability to regulate the platform economy for many reasons. First, most employment benefits depend upon continuous employment with a single employer, which excludes many workers in non-standard employment, including platform workers.[91] The emphasis on length of

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[86] Guy Davidov, "The Goals of Regulating Work: Between Universalism and Selectivity" (2014) 64:1 UTLJ 1.

[87] *Ibid.*

[88] Tucker, Fudge & Vosko, *supra* note 81.

[89] Martin H Malin, "Protecting Platform Workers in the Gig Economy: Look to the FTC" (2018) 51:2 Ind L Rev 377 at 382.

[90] Gabriel Domenech-Pascual, "Sharing Economy and Regulatory Strategies towards Legal Change" (2016) 7:4 Eur J Risk Reg 717 at 723.

employment as a means of determining employment benefits also encourages employers to use labour flexibly and avoid burdens ordinarily borne by an employer.[92]

Ontario's *Digital Platform Workers' Act, 2022* ("the Act"), which is set to come into force in 2023, is an example of additional legislation regulating platform workers. The Act is specifically aimed at establishing workers' rights, regardless of whether those workers are employees.[93] Under the Act, digital workers have a right to minimum wage,[94] a right to information about pay and work assignments,[95] and a right to notice prior to removal from the platforms.[96] The Act also protects workers from reprisal for exercising their rights under the Act.[97] As progressive a step as the Act represents, there are questions regarding the prospect of its implementation. For example, the minimum wage requirement under the Act is with reference to work assignments completed, whereas the rate referred to under Ontario's *Employment Standards Act* is based on work hours. Tasks completed on platforms vary in complexity, and the minimum wage provisions under the Act may result in workers being overpaid or underpaid depending on the context. Minimum wage laws in the United States having similar effect have been challenged by digital platform companies.[98] Furthermore, the provisions of the Act, as is expected of such legislation, derives from a particular conception of platform work, which may not be representative of the platform economy. Stewart and Stanford summarize this problem:

> Ironically, the best studied platform-based business — Uber, the ride-sharing service — is not very representative of general business practices or working conditions across the broader gig economy. Uber's rapid growth, its aggressive lobbying of governments and its high equity valuations have all spurred tremendous interest from journalists, policymakers and researchers. However, Uber driving differs significantly from many other forms of gig work, with the intermediary demonstrating a higher degree of managerial control over the hiring and firing, direction, supervision and payment of workers than is true of most digital platforms. Hence, conclusions based on the

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91 Judy Fudge, "Reconceiving Employment Standards Legislation: Labour Law's Little Sister and the Feminization of Labour" (1991) 7 JL & Soc Pol'y 73 at 85.

92 *Ibid.*

93 SO 2022, c 7, Schedule 1, s 2.

94 *Ibid*, s 9.

95 *Ibid*, s 7.

96 *Ibid*, s 11.

97 *Ibid*, s 13.

98 In 2019, Lyft filed a lawsuit challenging a policy by the New York City Taxi & Limousine Commission requiring minimum wage payments for ridehailing drivers. However, this suit was dismissed by the New York Supreme Court. See *Tri-City LLC v. New York City Taxi and Limousine Commission*, 189 A.D.3d 652 (N.Y., A.D., 1st Dept., 2020).

> experience of Uber (including precedent-setting regulatory and legal actions aimed at the firm) should be applied only very cautiously to other instances of gig work.[99]

Notwithstanding challenges respecting implementation, however, the Act and any subsequent legislation affecting platform workers will hold digital platforms accountable to some degree for their use of labour. At the very least, digital platforms are prevented from using technology to mask exploitation and circumvent legal standards. Legislation may be insufficient in addressing every single regulatory challenge posed by the platform economy but remains an invaluable asset in solving the problems that are of greatest relevance to most platform workers.

2. CONCLUSION

There is no doubt a power imbalance in the labour market created by various factors, including globalization, deregulation, and demographic changes. The emergence of the platform economy, although having the beneficial effects of an expanded job market and increased efficiency, has arguably exacerbated this power imbalance. Platform companies obfuscating their profound control over the production, value, and monetization of services provided by their platforms is the root of precarity and exploitation encoded into the algorithmically managed labour process to which their workers are routinely subject.[100] Whether this can be addressed through employment standards legislation depends on the existence of an employment relationship.

Statutory and common law protection of minimum standards of employment in Canada, as with many other jurisdictions, fundamentally derives from the "master-servant" standard notions of employment.[101] The evolution of work arrangements and dynamics have challenged and continue to challenge the suitability of this notion to the development of effective frameworks of worker protection and employer accountability.[102] In dealing with this challenge, recourse has been made to the development of common-law principles to supplement statutory provisions in protecting workers, with adjudicators given "free rein" to determine cases based on statutory and policy goals of protecting workers. Nevertheless, courts and tribunals must exercise those powers within statutory limits. Adjudicators have experienced a degree of success in maneuvering complexities created by other non-standard work

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[99] Andrew Stewart & Jim Stanford, "Regulating work in the gig economy: What are the options?" (2017) 28:3 Economic & Labour Relations Rev 420.

[100] Niels Van Doorn, "At what price? Labour politics and calculative power struggles in on-demand food delivery" (2020) 14:1 Work Organization, Labour & Globalisation 136 at 147.

[101] Judy Fudge, "New Wine into Old Bottles: Updating Legal Forms to Reflect Changing Employment Norms" (1999) 33:1 UBC L Rev 129.

[102] *Ibid.*

arrangements.[103] The digital economy, however, represents a different form of challenge, particularly with regards to defining working relationships.

This article has examined in brief the Canadian approach to defining employers in employment standards legislation. The conceptualization of "employer" under Canadian law has also been applied to the platform economy. It has been argued that notwithstanding the apparent novelty of platform businesses in theory, these businesses retain many similarities with the existing hegemony. This implies that many of the existing common law principles regarding employment relationships can be transmitted to the platform economy to ensure the preservation of minimum employment standards. There is the temptation to quickly associate the perceived novelty of the platform economy with the need for a radical alteration of the existing hegemony, in particular the abolition of worker classification systems and the elimination of the "employment relationship" conceptualization. Such radicalism is not only impractical, but unwarranted. This does not, however, obviate the need for the evolution of employment standards legislation and practice to address peculiar challenges in defining the relationship between platforms and platform workers.

Dealing with the regulatory challenges created by platform work is hardly a straightforward task, and both legislative and judicial measures have their advantages and limitations. In my view, developing a useful regulatory framework in this respect requires a combination of legislative, judicial, and policy measures. By enacting legislation and regulations specifically aimed at the digital economy, adjudicators are provided with more tools for "unmasking" elusive employers and protecting workers' rights. Policy makers can also develop sector-specific measures derived from common law and statute to improve oversight and accountability in the platform economy. A multi-dimensional approach of this sort may create a level of uncertainty for platform workers and is a potential nightmare for adjudicators saddled with the unenviable task of interpretation and application of broad legislative provisions in line with both existing law and public policy. The proliferation of non-standard working arrangements in the Canadian economy nevertheless warrants this multi-faceted and cross-sectorial response.

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[103] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358 (S.C.C.), reconsideration / rehearing refused 2001 CarswellOnt 4155, 2001 CarswellOnt 4156 (S.C.C.), the SCC expressly stated that there was no universal test to determine whether a person was an employee or an independent contractor, and the central question for adjudicators should be whether a person engaged in performing services was doing so on his own account. Sagaz opened the floodgates for courts and tribunals to develop various tests for determining employment status. See *Wolf v. R.*, 2002 FCA 96, 2002 CarswellNat 1512, 2002 CarswellNat 556 (Fed. C.A.); *Royal Winnipeg Ballet v. Minister of National Revenue*, 2006 FCA 87, 2006 CarswellNat 492, 2006 CarswellNat 2425 (F.C.A.); *1392644 Ontario Inc. v. Minister of National Revenue*, 2013 FCA 85, 2013 CarswellNat 663, 2013 CarswellNat 6944 (F.C.A.); *Lightstream Telecommunications Inc. v. Telecon Inc.*, 2018 BCSC 1940, 2018 CarswellBC 2987 (B.C. S.C.).