

Legal Oshidashi, Labour Law's Boundaries, and Law's Response

Prof. David J. Doorey

York University

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I. Introduction and Background

My role today is twofold. Firstly, I was asked to set the stage for the panel by describing the current state of the Canadian labour market and the extent of non-standard work, including so-called “gig” work, and the prevalence of independent contractors. Secondly, I was asked to discuss some legislative responses, proposed or in effect, that are intended to address concerns that changes in the ways work is performed are leaving too many outside the boundaries of labour laws intended to protect vulnerable workers.

As this audience will know, the main pillars of the Canadian employment law model were designed in the post-World War II era around what became known as the “standard employment relationship” (SER). The SER presumed a labour market characterized by large, often unionized, industrial workplaces staffed primarily by men who were employed full-time, earning good wages and benefits, and usually subject to the discipline of an internal job market that rewarded tenure and incentivized long-term employment with a single employer leading to retirement with a decent pension. The SER was reinforced by Canadian labour policy that promoted the ideal of a single-income male breadwinner supported by a female spouse performing unpaid domestic work in the home perhaps supplemented with “pin money” earned through occasional part-time employment.

A policy tension arises because the SER no longer accurately describes the Canadian labour market and the pursuit of the single-male breadwinner model no longer reflects Canadian labour policy. I summarized this tension recently in my text, *The Law of Work*:

... the ideal of the SER no longer reflects the reality of the labour market for many Canadians. Whereas in 1960 more than 70 percent of Canadian families had a male parent working in full-time employment and a female parent at home raising children, by 2014 only 16 percent of families had a stay-at-home mother, and in 69 percent of families both parents worked. Nearly 40 percent of Canadians now work under work

arrangements that differ substantially from the SER, including part-time, seasonal, or temporary jobs as well as “gig” workers or own account self-employed workers, who might meet the legal definition of an independent contractor but who are economically precarious and struggle to earn enough to provide for themselves and their families. Often, workers who are legally classified as contractors are more economically vulnerable than employees who have full-time, good-paying jobs.¹

The growth in non-standard work, much of which is precarious (low paying, low job security, few or no benefits), has focused policy debates on central boundary issues in employment and labour law.

II. Labour Law “*Oshidashi*” and the “New” Economy

Labour Law, the legal discipline most of us studied in law school, has traditionally been defined by both a descriptive and a normative boundary.² These boundaries are what make labour law “Labour Law”.³ The descriptive boundary, how we know what laws interest us, has long been defined by *the employment relationship*. Labour laws are those laws the govern the relationship between employees and employers (and sometimes their associations), including legal rules found in employed-related statutes, employment contracts, and torts. The normative boundary (or what Brian Langille calls “the constituting narrative”) of Labour Law is reflected in two phrases familiar to anyone who has taken a Labour Law course: “labour is not a commodity” and “inequality of bargaining power”. Labour Law is about legal rules that govern employment, but it views those laws through a distinctive normative lens that is concerned with protecting employees from the harshness of labour market forces.

Therefore, Labour Law examines how legal rules can be deployed to blunt raw labour forces in pursuit of working conditions that are acceptable to society at a given point in economic development. Because entrepreneurs, or “independent contractors”, are presumed to not be

¹ David Doorey, *The Law of Work: 2nd Edition* (Emond, 2020, forthcoming), at 63.

² I’m using “Labour Law” here to describe both the discipline and the entirety of the three regimes of work law: collective bargaining, regulatory standards, and the common law of employment.

³ See Brian Langille, “Labour Law’s Back Pages” in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006), 2, for an excellent discussion of labour law’s boundaries. Also: D. Doorey, “Just Transitions Law: Putting Labour Law to Work on Climate Change” (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2938590

vulnerable and in need of protection from market forces, their relationships with their “clients” has fallen outside of the boundaries of Labour Law. For the past century, two legal mechanisms have been used to protect employees: (1) mandatory labour standards that restrict freedom of contract in the employment setting; and (2) collective bargaining rules that facilitate collective bargaining by employees while also controlling the collective power that results to ensure that the balance does not tip too far in the employees’ favour.⁴

The challenge created by gig work, which is one aspect of a larger movement towards the “fissurization” of work⁵—is that it aims to move workers outside of the traditional legal boundaries of Labour Law. To borrow from Japanese Sumo, gig companies have attempted to orchestrate a legal *oshidashi*. In Sumo, an *oshidashi* move involves pushing one’s opponent outside of the circle while maintaining hand contact at all times. Similarly, companies that use “gig” workers and fissured work organization are attempting to push workers outside of the boundaries of Labour Law. Gig companies claim that workers are independent contractors and therefore not the subject of Labour Law’s concerns over employee vulnerability. However, in many cases, the lead company still wishes to maintain continuous contact/control through less direct forms of control than are typically exhibited in the classical employment relationship.

The policy question in debate is whether the *oshidashi* should succeed: Should workers be pushed outside of Labour Law’s boundaries by business structures designed to achieve this result? Many gig workers’ connection to the labour market is characterized by vulnerability and precarity equal to or even more dire than that of regular “employees”. If the purpose of Labour Law is to protect vulnerable workers from the harshness of labour market forces, then should the focus not be on vulnerability and precariousness rather than on the legal fiction that is the historical distinction between “employment” and “not employment”? Professors Judy Fudge, Eric Tucker, and Leah Vosko capture the tone of a wide-scale movement within academic and some policy circles in Canada and abroad to revisit the boundaries of Labour Law to ensure that vulnerable

⁴ For example, much of the legal regime in Canada regulating strikes is designed to control employee power rather than bolster it.

⁵ See D. Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done About It* (Harvard U. Press, 2014)

workers are covered by protective labour legislation even if they would be classified as “independent contractors” applying traditional legal tests:

A close examination of self-employment in Canada suggests that the time has come to consider dissolving the distinction between employees and the self-employed for the purpose of labour protection and social wage legislation. The majority of the self-employed much more closely resemble employees than they do entrepreneurs, although for legal purposes many would be classified as independent contractors and, as such, they would be denied the legal protection available to employees.⁶

A variety of legal mechanisms have been proposed to ensure that the boundaries of Labour Law are wide enough to include self-employed workers. These range from relatively simple reforms, such as adjusting the legal presumption so that workers performing work on their own account for a business are presumed to be the business’ employee unless the business can prove that the worker is not their employee.⁷ More extensive reforms to ensure dependent workers engaged on their own account are treated as employees include the recently enacted AB5 in California, which as discussed below, defines “employee” more broadly than under existing U.S. law by applying a test that is similar to that which long used in Canada to define “dependent contractors”, who are treated here as “employees” for some purposes. First though let’s spend a moment considering the Canadian labour market and the prevalence of the ‘gig’ economy.

III. Non-Standard Work and the “Gig” Economy in Canada

The *Changing Workplaces Review Final Report* noted that more than a quarter (26.6%) of Ontario’s workforce was engaged in non-standard work in 2015, which includes part-time and temporary work as well as own-account self-employment.⁸ The category of own-account self-employment (independent contractors) grew from 6% in 1976 to 10.9% of the workforce in 2015.⁹ Another recent study concluded that the category of “self-employed without employees” increased by

⁶ J. Fudge, E. Tucker & L. Vosko, “Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada” (2003) 10 CLELJ 193 at 229.

⁷ The existing law places the burden on a worker to establish that they are in an employment relationship. The Ontario Liberals introduced a reverse onus in their reforms to the *Employment Standards Act*, however the reverse onus provisions were subsequently repealed by the Doug Ford Conservatives.

⁸ Ontario, *Changing Workplaces Review: Final Report*, Chapter 4: Vulnerable Workers in precarious jobs: <https://www.ontario.ca/document/changing-workplaces-review-final-report/chapter-4-vulnerable-workers-precarious-jobs#return>

⁹ Ibid.

45% between 1989 and 2007.¹⁰ The “independent contractor” category is expected to grow in step with the growth of gig work. The rise in self-employment in Canada has been singled out by the OECD as a cause of growing income inequality in Canada. The OECD noted in 2011 that “more than one-quarter of the increase” in income inequality in Canada since the 1990s was explained by “the rise in self-employment”, which overall offers lower pay and benefits than traditional full-time employment with an employer.¹¹

The growth of “independent contractors” is partly explained by a desire of the workers themselves to achieve greater flexibility and tax benefits, however as the *Changing Workplaces Review* explained, in many cases, the shift reflects a deliberate strategy by industry to push workers outside of the reach of Labour Laws and other responsibilities typically associated with employment:

[Some] of the growth in self-employment is the result of deliberate misclassification by businesses that do not wish to incur liability for employees and wish to shed liability for mandatory deductions and contributions to public pensions, employment insurance, and workers compensation schemes, together with shedding responsibility for employment standards such as maternity and parental leaves. Also, some of the growth is from a genuine desire by the providers of the service to get tax advantages that might not be available if they operated as employees, despite the fact that the dependency inherent in the relationship makes the providers of the service much closer to being employees than to being really in business for themselves. Some of this growth is highly controversial with changes in industry practice (such as the change from employed taxi drivers to allegedly independent providers who provide services to Uber).¹²

It’s impossible to measure with any accuracy what percentage of workers being treated as independent contractors are really “employees” according to the legal tests of employment. In Ontario, there was enough of a concern about misclassification that the former Liberal government created a new offence of employee misclassification and introduced a reverse onus on employers to demonstrate that a worker truly was an independent contractor (the Conservatives left the offence but inexplicably repealed the reverse onus).¹³

¹⁰ Poverty and Employment Precarity in Southern Ontario, McMaster University, “It’s More than Poverty” (13 February 2013), <https://www.unitedwaygt.org/document.doc?id=91>

¹¹ <http://www.oecd.org/social/soc/49177689.pdf>

¹² *Supra* note 11.

¹³ Ontario *Employment Standards Act*, S.O. 2000, c. 41, s. 5.1

Measuring the prevalence of gig work is also challenging because much of it is undocumented and sporadic, and even the definition of gig work is disputed. Statistics Canada introduced a new category of “gig worker” in a report issued in late 2019.¹⁴ It defined gig work by using tax reporting categories. Unincorporated self-employed workers who report business, professional, or commission income must submit a T1 form and attach a T2125 Statement of Business and Professional Activities. There are 3 categories of workers who file T2125 forms: partners in legal partnerships; sole proprietors reporting business income and who provide their Business Number (BN); and sole proprietors reporting business income without providing a BN number. Stats Can demarcates between workers who file a T2125 form reporting self-employment income using a BN number and workers filing T2125 income without a BN number. The latter meet the definition of gig workers.

The basis for this approach is twofold. Firstly, a person who files for a BN usually has an expectation of continuity in their business income, anticipating that it will be ongoing and not inconsequential. This does not describe most gig workers. Secondly, some businesses that are not expected to be associated with gig work—including businesses that employ people—are required to have a BN. *Therefore, Stats Can defines a ‘gig worker’ as an unincorporated worker who reports business, professional or commission income on their tax returns without including a Business Number.* This definition excludes a gig worker who earned more than \$30,000 in a year because at that cut-off a person is also required to have a BN. It is unclear how many gig workers who meet Stats Can’s definition earn more than \$30,000 per year, but it is unlikely to be a large number given that the study finds that median income line for gig work is about \$4,303, which the reports notes is “a very small amount”. For many gig workers, the net total gig income was negative.

A summary of the study’s key findings appears in the Executive Summary:

This study found that, from 2005 to 2016, the percentage of gig workers in Canada generally rose from 5.5% to 8.2%. The increase was observed for both men (from 4.8% in 2005 to 7.2% in 2016) and women (from 6.2% in 2005 to 9.1% in 2016), and driven by the growth in the percentage both of gig workers who earned no [employment] wages or salaries (T4 income) and of gig workers who combined gig work with wages or salaries.

¹⁴ Sung-Hee Jeon, Hujun Liu, Yuri Ostrovsky, “Measuring Gig Economy in Canada Using Administrative Data” (December 16 2019): <https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2019025-eng.pdf?st=JVeZqSPH>

The results showed that the annual income of a typical gig worker was usually low. The median net gig income in 2016 was only \$4,303. Workers in the bottom 40% of the annual income distribution were about twice as likely to be involved in gig work as other workers.

The study concludes that the gig economy is growing, but that it still amounts to a relatively small proportion of the total Canadian labour market. Here are some other findings of note:

- Many people do gig work only temporarily and then stop. About one-half of people who entered gig work in a given year had no gig income the next year, and only about one-quarter remained gig workers for 3 or more years.
- Gig work was more prevalent among immigrants than among-Canadian born workers and among women compared to men. In 2016, the share of female gig workers was 9.1% compared to the share of men at 7.2%. About 10.8% of male immigrant workers who had been in Canada for less than five years were gig workers in 2016, compared with 6.1% of male Canadian-born workers.
- About 48.6% of gig workers had no wage-earning job and reported no employment income, while 36.3% had one wage job and about 15.1% had multiple wage jobs. Therefore, gig workers were split almost evenly between those who had no other earnings except for their gig earnings and those who supplemented their wages and salaries with the earnings from their gig activities.
- For about half of all gig workers, gig earnings represented more than three-quarters of their total annual earnings. For more than one-quarter of all gig workers, their gig earnings represented all of their earnings and more than 89% of their total income. Earnings from employment dropped dramatically in the year an individual entered gig work (year 0).
- Gig workers were spread more or less evenly across the entire age spectrum. However, the prevalence of gig workers was especially high in the category for those aged 65 and older because fewer individuals in this age category worked and, when they did, they were more likely to be gig workers than younger workers.

We can summarize from the preceding that precarious work, “gig” work, and the prevalence of workers categorized as independent contractors are all on the rise in Canada. This state of affairs has focused attention on how we define the boundaries of protective labour legislation.

IV. Oshidashi Countermeasures: Attempts to Extend the Boundaries of Labour Law

A variety of tactics have been proposed (or enacted) as responses to the emergence of the gig economy aimed at keeping gig workers within labour law's boundaries both in Canada and abroad. A veritable cottage industry has emerged over the past 15 years that debates the merits of alternative models that would dissolve the distinction between employment and "contractors" in order to extend the reach of protective work standards.

Policymakers in many U.S. states have been grappling with possible policy responses to concerns over misclassification that takes workers outside of the reach of Labour Law. Probably the most discussed legislative response is the recent AB5 measure in California.¹⁵ That Bill followed on the heels of the decision of the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* in 2018 where the Court introduced the "ABC test" for determining employment status.¹⁶ Under that test, the business claiming that the workers are independent contractors must demonstrate all three of the following tests:

- 1) Part A: that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact (*control test*); *and*
- 2) Part B: that the worker performs work that is outside the usual course of the hiring entity's business (like the traditional Canadian "integration/organizational test": is the worker performing work that is integral to the business of the alleged employer); *and*
- 3) Part C: that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. (*Is the person providing services to others, did they make an independent decision to start their own business, and do they act as if they are running a business (marketing, incorporation, etc).*)

This test is believed to pose a serious concern for many gig/platform companies, because companies like Uber maintain significant control and the drivers are performing work that is

¹⁵ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5

¹⁶ <https://scocal.stanford.edu/sites/scocal.stanford.edu/files/opinion-pdf/S222732-1525112644.pdf>

essential to the business of Uber. Not surprisingly, Uber is trying to argue that its business is not transportation services but rather it is merely a technology company that offers an App.

California's Assembly Bill 5 (AB5) came into effect on January 1 2020. It effectively codified the *Dynamex ABC Test*. The Bill included a series of specific exceptions for specified occupations (including lawyers and real estate agents), some freelancers who satisfy a list of criteria, as well as some construction sub-contractors. Several other states have introduced legislation modeled after AB5, including New York, and we can assume more will follow.¹⁷ The clear motivation for AB5 was to sweep in many gig workers, especially platform transportation services such as Uber and Lyft, but it also reaches many other workers who work independently, have some *de facto* flexibility of hours, and own all or most of the tools of the trade, but who are nevertheless economically dependent and not really entrepreneurs.

Of course, in Canada, unlike in the U.S., we have long had a category that lies between true independent contractors and true employees: the *dependent contractor*.¹⁸ This intermediate category appears in most Canadian collective bargaining legislation¹⁹ and has also been recognized by our common law courts. Dependent contractors in the common law regime are entitled to notice of termination, like true employees. The tests used to identify "dependent contractors" at common law and in Canadian statutes is quite similar to the definition in California's AB5. Both focus on the question of whether the worker is truly in business for themselves as demonstrated by relative autonomy over how and when the work is performed (a lack of control over the work by the purported employer) and by indicia of entrepreneurship, such as the existence of a variety of

¹⁷ See <https://legislation.nysenate.gov/pdf/bills/2019/S6699A>

¹⁸ See discussion in chapter 4 of *The Law of Work*, supra note 1: What is Employment (And Why Does it Matter)? Ontario was first Canadian jurisdiction to introduce "dependent contractor" as a category of "employee" in the *OLRA*, in 1975.

¹⁹ See e.g. British Columbia *Labour Relations Code*, RSBC 1996, c. 244, s. 1(1), and Ontario *Labour Relations Act*, SO 1995, c. 1, Sch A, which define "employee" to include "dependent contractors." For a discussion of the origins of and justification for the "dependent contractor" definition, see H. Arthurs, "The Dependent Contractor: A Study of the Legal Problem of Countervailing Power" (1965) 16:1 UTLJ 89; and M. Bendel, "The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law" (1982), 32 UTLJ 374. See also Quebec's *Act Respecting Labour Standards*, RSQ N-1.1, s. 1, which defines "employee" as a worker "who is a party to a contract" to perform work for a person when that person controls how the work is to be performed and supplies the tools and materials needed to perform the work and the worker keeps as their pay the amount remaining after deduction of expenses.

customers or clients, advertising of services and wares, ownership of tools, and evidence of investment and risk of loss and profit.

For example, in deciding whether a worker is a dependent contractor in the common law, Canadian courts decide first whether the worker is an employee or an independent contractor applying the test in *671122 Ontario Ltd. v. Sagaz Industries Canada*.²⁰ That test considers the degree of control over the worker (Part A of the ABC test) and the various signs of entrepreneurship just listed. When I teach this test to students new to the field, I suggest that they create a sort of “scorecard” that tracks the various factors judges consider, which is reproduced below. If the worker looks more like a contractor than an employee, then the court asks next whether they are an independent or a dependent contractor. That distinction depends upon exclusivity of clientele and the degree to which the person seeks additional customers and therefore looks like they are operating a business.²¹ If the purported employer is the worker’s only (or almost the only) customer, then the courts will likely find that person is a dependent contractor. Part C of the California test similarly emphasizes the degree to which the worker actually behaves as if they are running an independent business with multiple clients, a marketing budget, and the like. Part B of the AB5 test is essentially a restatement of the “organization test”, which has been applied periodically in Canada and Britain and which asks whether the work being performed is “an integral part of the business” of the purported employer.²²

²⁰ *671122 Ontario Ltd. V. Sagaz Industries Canada*, 2001 SCC 59; *Braiden v. La-Z-Boy Canada Limited* 2008 ONCA 464 [worker is an employee]; *Fisher v. Hertz* 2016 ONSC 4768 [worker is an independent contractor]

²¹ *Keenan v. Canac Kitchens Ltd.* 2016 ONCA 79

²² *Stevenson Jordan & Harrison, Ltd. v. Macdonald*, [1952] 1 TLR 101: “One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.” See also *Decision No. 934/98*, 2000 ONWSIAT 3346, aff’d in *Blue Line Taxi v. Deek*, [2002] O.J. No. 2036 (Ont. Sup Ct J) [applying the “organization test” in finding that an owner-operator taxi driver was a “worker” and not an independent contractor under worker compensation legislation. The Supreme Court of Canada noted in *Sagaz* that the organization test is helpful insofar as it can be boiled down the question: “Whose business is it?”: *Sagaz*, supra note at 40-44.

BOX 4.3 » Employee or Independent Contractor? The “Scorecard” Method

Courts and administrative tribunals are often asked to decide whether a worker is an “employee” or an “independent contractor” because different laws and rules apply to employment contracts than to contracts between two businesses. Although courts apply a variety of legal tests to arrive at a decision on the matter, all of these tests attempt to answer one fundamental question: Does the worker look more like an employee or like an entrepreneur in business for themselves?

One way to assess whether a worker is an employee or an independent contractor is to use a “scorecard” to track the

factors adjudicators consider. Judges and tribunals do not refer explicitly to a scorecard like this, but they do weigh the following factors. No individual factor is determinative of the status of the worker. When using this scorecard, consider all of the facts and ask yourself whether, based on the distribution of checkmarks in the scorecard, the worker more closely resembles an independent contractor in business for themselves or an employee dependent on the company for income. See the Exercise at the end of this chapter for scenarios to test this approach.

FACTORS THAT MAKE THE WORKER LOOK MORE LIKE AN EMPLOYEE		FACTORS THAT MAKE THE WORKER LOOK MORE LIKE AN INDEPENDENT CONTRACTOR	
	The company sets working hours and assigns work.		The worker has considerable discretion over when and how to perform work.
	The company owns the tools needed to do the job.		The worker owns the tools needed to do the job.
	The company controls how the work is done and closely supervises the work.		The worker receives little direct supervision by the company.
	The customers/clients are the company's.		The worker has a variety of customers/clients.
	The worker works exclusively for the company.		The worker advertises his or her services on the open market.
	The work is performed at the company's premises.		The worker has his or her own office and pays own expenses.
	The worker has no personal assets invested in the company.		The worker has invested his or her own money in the business, so is at risk of loss but could also earn a profit.
	The worker must perform assigned tasks himself or herself.		The worker can hire others to perform work.
	Regular employee deductions are made from pay.		The worker issues invoices to the company; no employee deductions are made.

Source: D. Doorey, *The Law of Work*, 2nd Ed (Emond, 2020)

There is a long history of “dependent contractor” litigation under the *OLRA* relating to workers who are qualitatively quite similar to the contemporary gig worker, as noted earlier. The *OLRA* defines “dependent contractor” as follows:

“dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor. . .

Applying that language, the OLRB has found many workers who enjoy considerable latitude in relations to many conditions of their work to be “dependent contractors”, including burlesque dancers²³, taxi drivers²⁴, owner-operator truck drivers²⁵, delivery drivers operating as franchisees²⁶, newspaper home delivery workers²⁷, home-care workers²⁸.

²³ *Algonquin Tavern*, 1981 CanLII 812 (ON LRB)

The lead decision remains *Algouquin Tavern*, where the OLRB summarized the factors to be considered in assessing dependent contractor status as follows:

64. From this survey of the legal landscape, and the special environment of the entertainment industry, we can now attempt to distil some of the features which individually, or in combination, have been relied upon to support a finding of independent contractor status. It is recognized of course, that a listing such as this must necessarily be somewhat artificial. The factors are interrelated, and one is often only the converse of the other. No one factor, in itself, will be significant. However, all of these matters were mentioned or relied upon in one or more of the cases to which we have already referred and, if present, support a finding that an individual is "self employed":

1. ***The use of, or right to use substitutes.*** It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour rather than one's own work and skill. This is significant however, only to the extent that it is the alleged employee who makes that decision.

2. ***Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials.*** These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual's own labour. On the other hand, reliance upon another's financial loss on capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.

3. ***Evidence of entrepreneurial activity.*** This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop "clients", the use of agents, and organizing one's "business" (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a "chance of profit" or "risk of loss"; that is whether business acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.

4. ***The selling of one's services to the market generally.*** If the purchasers of individual's services are numerous and of diverse character, the individual looks more like

²⁴ *Hamilton Cab*, 2011 CanLII 7282 (ON LRB); *Diamond Taxicab Association (Toronto) Limited*, [1992] OLRB Rep. November 1143; *J. W. Ferguson Services v. Kolyn*, [2005] Ont. LRB Rep. Jan/Feb 97. But see: *531584 Ontario Ltd.*, 2013 CanLII 36487 (ON LRB) (airport limo drivers not "employees" of dispatcher because only 17% of income derives from dispatch service).

²⁵ *1022804 Ontario Inc. o/a Motor Express Toronto*, 2019 CanLII 78509 (ON LRB)

²⁶ *Canada Bread Company Limited*, 2017 CanLII 62172 (ON LRB),

²⁷ *Toronto Star Newspapers Ltd.*, 2001 CanLII 6537 (ON LRB); *Dynamex Canada Inc. v. Mamona*, [2002] F.C.J. No. 534 (QL)

²⁸ *Huntsville District Memorial Hospital (Algonquin Health Services)*, 1998 CanLII 18381 (ON LRB)

an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a "dependent" contractor or employee especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his "prime customer" is given priority.

5. ***Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.*** Of course, few independent contractors are entirely free in this regard, but the question is one of the degree. A "self-employed" person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has "tied his fortunes".

6. ***Evidence of some variation in the fees charged for the services rendered.*** This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as "independent contractors", and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser's ability to pay, may indicate independent contractor or self employed status.

7. ***Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer*** or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit. Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and "place" of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer's organization. In the case of entertainers, the cases suggest that it may also be useful to determine the extent to which the artist's material or co-workers are influenced by the employer; that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered "integrated" into the employer's operation in the manner of an employee, if he is required to devote the *whole* of his working time during the period to the service of the employer, promote its organization, or fill in his "non performing" time with unrelated ancillary duties. (See: *Whittaker, supra.*)

8. ***The degree of specialization, skill, expertise or creativity involved.*** If these are dominant element in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of "integration" into the respondent's organization, the disputed individual is "self-employed" professional.

9. ***Control of the manner and means of performing the work — especially if there is active interference with the activity.*** However, it is the *right* to interfere rather than the *ability* to do so which is significant. The fact that a particular occupation

involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship *at will and without cause* may indicate an employment relationship whether or not the employer exercises this power.

10. ***The magnitude of the contract amount, terms, and manner of payment.*** If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be "employees"; and independent professionals may charge an hourly rate rather than a block fee).

11. ***Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.*** The employer's established employee complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. If the so-called independent contractor substitutes for a firm's employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee. [emphasis in the original]²⁹

In one recent decision, the OLRB posed the following hypothetical question to consider in deciding whether a worker is a dependent contractor:

One way I assessed this was by asking: *if tomorrow Canada Bread changed its arrangements and made all of the drivers employees, what would change about their work and the conditions under which they perform that work? The answer, I am satisfied, is not very much.* In my view, these essential conditions of the drivers' work is indistinguishable in any material sense from how directly employed persons would fulfill the same role (delivery of Canada Bread products to retail customers).³⁰

In that case, delivery drivers operating as franchisees and who delivered Canada Bread products were found to be dependent contractors even though the drivers could hire substitutes, the drivers were incorporated, and they owned their own vehicles. Applying this same question to Uber drivers and other platform workers leads to an interesting discussion. Certainly, Uber's position will be that if forced to treat its drivers as "employees", its entire business model would be threatened. However when considering the entirety of the *Algonquin Tavern* criteria, platform companies like Uber appear as vulnerable as the many dispatch companies that came before

²⁹ *Algonquin Tavern*, 1981 CanLII 812 (ON LRB)

³⁰ *Canada Bread*, *supra*, at para. 115

them, who also argued that they were merely a technological conduit between driver and customer.

The “dependent contractor” status is not included in employment standards legislation. The *Changing Workplaces Review Final Report* recommended that it should be added, but surprisingly, given that they claimed the main thrust of the Review was to better protect precarious workers, the Liberals did not adopt the recommendation. However, in practice the OLRB, taking a purposive approach, has tended to define “employee” broadly in a manner that includes a similar analysis to that applied under the *OLRA* notwithstanding the lack of an expressed “dependent contractor” definition.³¹ Occupational health and safety legislation defines “employer” more broadly than other statutes by expressly including a relationship with a “contractor or subcontractor who performs work or supplies services”.³² In *Ontario (Labour) v. United Independent Operators Limited*, the Ontario Court of Appeal ruled that owner-operator truck drivers were employees of a “load broker” who assigned drivers to pick up and deliver aggregate, applying a purposive approach.³³

Similarly, workers’ compensation legislation applies to “workers”, a category that has been interpreted to apply to workers who resemble dependent contractors. I argued a case some 20 years ago in which the WSIAT ruled that an owner-operator taxi driver who owned his own car, paid all his own expenses, could hire replacement drivers, and treated himself as an independent contractor for tax purposes was nevertheless a “worker” employed by the taxi dispatch service and covered by workers’ compensation legislation.³⁴ The driver was subject to considerable control at the hands of the dispatcher and subject to the dispatcher’s rules while driving under

³¹ J. Fudge, E. Tucker, L. Vosko, “Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada” (2003) 10 Can. L.E.L.J. 193

³² *OHSA*, s. 1(1): “employer” means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services”.

³³ *Ontario (Labour) v. United Independent Operators Limited*, 2011 ONCA 33 (CanLII). The specific question was whether the load broker “regularly employed” 20 or more workers thereby triggering the legal requirement to establish a joint health and safety committee. The Court ruled in the affirmative. See discussion of this decision by B. Langille, “Take These Chains from my Heart and Set Me Free: How Labor Law Theory Drives Segmentation of Workers’ Rights” (2015), 36 *Comp. Labor Law & Policy J.* 257.

³⁴ Decision No. 934/98, 2000 ONWSIAT 3346 (CanLII)

the dispatcher's banner. The relationship between a dispatcher and a taxi driver which has been found on many occasions to be one of "employment" in Canada has many parallels to relationship between platform companies and the gig workers they use to perform services.³⁵ It would not be surprising, in my opinion, if labour boards in Canada find that gig workers are "dependent contractors".

Conclusion

A number of cases are already working their way through the system that will bring the question of whether gig workers are "employees" under Canadian labour law into focus. The class action lawsuit, *Heller v. Uber*, has raised the issue directly whether UberEats drivers are "employees" under the Ontario *ESA*.³⁶ We await the SCC's decision on the legality of the mandatory arbitration clause in the Uber contract. The Canadian Union of Postal Workers is pursuing an application for certification for Foodoro drivers that will require the OLRB to decide whether platform food delivery drivers are "dependent contractors" and therefore entitled to unionize.³⁷ Several days of argument on this question had already taken place at the time of writing. The UFCW has been busy organizing Uber drivers across the country and we can expect more applications to follow.

The struggle over the boundaries of Labour Law has attracted considerable policy attention over the past two decades as more and more workers have found themselves performing work under non-standard arrangements, including as "independent contractors". The emergence and expansion of "gig" work has put this tension under the microscope because it demonstrates so clearly how the manner in which work is arranged can mask worker vulnerability and precariousness. If the purpose of Labour Law is to protect economically precarious and vulnerable workers from harsh labour market forces, then a narrow scope of application of

³⁵ See also discussion in E. Tucker, E.Tucker, "Uber and the Unmaking and Remaking of Taxi Capitalism: Technology, Law, and Resistance in Historical Perspective" in D. McKee, F. Makela & T. Scassa, eds, *Law and the "Sharing Economy": Regulating Online Market Platforms* (Ottawa: University of Ottawa Press, 2018) 357 at 379

³⁶ *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (CanLII), appeal argued before SCC in November 2019 on the issue of the legality of the mandatory arbitration clause.

³⁷ S. Mojtehdzadeh, "Heavyweights Uber, Foodora in separate battles that could impact gig economy" (Toronto Star, November 6 2019)

protective legislation and common law doctrine based on an out-dated legal fiction known as “employment” will becoming increasingly difficult to justify. The oshidashi of Labour Law will be resisted in order to protect precarious workers from being pushed outside of Labour Law’s boundaries. The form that resistance will take will continue to be among the hot topics in the field for years to come.

Brief Bio

David Doorey is an Associate Professor of Work Law at York University and Director of Osgoode Hall Law School’s part-time executive LLM in Labour and Employment Law. In 2019-20, he is a Visiting Research Fellow at Harvard Law School’s Labor and Worklife Program where he is also a Senior Research Associate. His articles on labour and employment law, corporate social responsibility, and legal theory have been published in leading law journals. His book *The Law of Work* is widely used across Canada in universities and colleges and his law blog *Law of Work*, launched in 2006, has received many awards as the top law blog in Canada. His new collaborative blog *Canadian Law of Work Forum* is scheduled to launch in early 2020 (guest posts from practitioners are welcome). Professor Doorey was educated at the Univeristy of Toronto (B.A., M.I.R.), the London School of Economics (LL.M.) and Osgoode Hall Law School (LL.B. and Ph.D). He is called to the Bars of Ontario and British Columbia and practiced labour law in both provinces before returning to academia.