

Demanding a Fair Share

Protecting Workers' Rights in the
On-Demand Service Economy

Fay Faraday





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ISBN 978-1-77125-354-3

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ACKNOWLEDGMENTS

The Canadian Centre for Policy Alternatives would like to thank the Metcalf Foundation for supporting this work.

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Introduction

Ontario's Changing Workplaces Review spent two years examining legislative changes that are needed to update the provincial *Employment Standards Act, 2000* (“ESA”) and *Labour Relations Act* (“LRA”) to ensure that the law provides meaningful protection in the 21st century economy.¹

These key workplace laws were developed in an era dominated by male standard employment relationships — full-time, year-round, permanent jobs with a single employer. But with the rise of the service economy, precarious, non-standard employment relationships, technological change, and a proliferation of exemptions from employment standards, many workers have increasingly fallen outside of their effective protection.

Workers in the gig economy — more accurately understood as the on-demand service economy² — are among those with the least protection in this new world of work.

This report presents an initial analysis of whether the Changing Workplaces Review and the subsequent legislative reforms proposed in Bill 148 — the *Fair Workplaces, Better Jobs Act, 2017* — adequately address the precariousness of workers in the on-demand service economy.

Context of the Changing Workplaces Review and Bill 148

The Changing Workplaces Review was headed by two Special Advisors: C. Michael Mitchell and the Honourable John Murray, senior members of the legal profession who had previously represented unions and employers, respectively, in labour relations.³ Over the course of 2015-2016, they conducted broad public consultations, commissioned research, and received written submissions. They issued an interim report⁴ in July 2016 and a final report⁵ in May 2017, after receiving additional written submissions and engaging in further consultations.

Entitled *An Agenda for Workplace Rights*, the final report emphasized that its objective is “to improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians.”⁶ As a result, the report’s “important focus is on vulnerable workers in precarious jobs.”⁷

The special advisors emphasized several key principles, established in Canadian law, that set the foundation from which to build a framework for decent work and workplace rights:

1. The conditions under which one works are central to shaping the quality of one’s life. Setting this as a guiding principle, the special advisors adopted one of the Supreme Court of Canada’s most frequently cited statements:

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person’s dignity and self-respect.⁸

2. There is an “inherent power imbalance and inequality of bargaining power between employer and employee.”⁹ This power imbalance is present in almost all aspects of the employment relationship, particularly with non-unionized workers. This reality must inform the legislation’s content so that the law acts as a countervailing force to the power imbalance.¹⁰

3. Decent work is “a fundamental principled commitment that Ontario should accept as a basis of enacting all of its laws governing the workplace.”¹¹ As stated by Harry Arthurs in the 2006 federal *Fairness at*

Work review, labour standards “should ensure that, no matter how limited his or her bargaining power, no worker...is offered, accepts or works under conditions that Canadians would not regard as ‘decent’.”¹²

4. The right to unionize, the right to bargain collectively, and the right to strike are all constitutionally protected rights anchored in the Charter’s protection of freedom of association.¹³

The special advisors also emphasized the importance of the following:

- Access to justice in both a procedural and substantive sense;¹⁴
- The need for consistent enforcement and the fostering of a “culture of compliance” to protect workers and establish a level playing field for business;¹⁵
- Creating an environment supportive of business;¹⁶ and
- Ensuring “stability and balance” through reforms that can be sustained into the future.¹⁷

With a particular focus on vulnerable workers in precarious work, the recommendations from the Changing Workplaces Review ultimately were “aimed at creating better workplaces in Ontario, where there are decent working conditions and widespread compliance with the law.”¹⁸

A week after the final report was released, the Ontario government introduced Bill 148 for first reading. Entitled the *Fair Workplaces, Better Jobs Act, 2017*, the bill proposed a range of amendments to both the *Employment Standards Act* (ESA) and the *Labour Relations Act* (LRA). Public hearings on Bill 148 are being held in 10 communities across Ontario in July. Clause-by-clause review is scheduled for August and the legislation is expected to be passed early in the fall.

To determine if these reform initiatives will assist workers in the gig economy, it is helpful to first address who these workers are and what gaps they have faced under the law.

What is the gig economy or on-demand service economy?

The so-called gig economy is a business model that uses online platforms to provide on-demand services.

Popular labels such as the sharing economy and the gig economy are not helpful because, for the most part they obscure the actual nature of these

work relations. Greater precision is needed in analyzing the business models behind these generic terms to ensure that workplace laws correspond with the reality of the work relations.

There is a range of different business models that use online platforms. Some of them do involve peer-to-peer sharing and the sale or resale of goods similar to online classified listings. Others facilitate the development of a collaborative economy (for example, rental of assets like cars or tools rather than private ownership). But many online platforms do not involve sharing. And many of the workers engaged in the sector are not doing the work as a casual gig.

In many cases, underneath the novelty of interfacing with an online platform lies a much more traditional and recognizable business — the labour broker. In essence, the businesses provide a wide range of traditional services including transportation, cleaning services, food services, delivery, and home repairs, among many others, using online platforms to dispatch workers to the business' clients. As Sheila Block and Trish Hennessy have observed, businesses in the on-demand service economy engage in traditional “business transactions — payment for goods and services” — but do so in a way that shifts significant cost and risk to the worker.¹⁹

Another point of consistency across this technological change is that the on-demand service economy replicates many of the structural divisions of the broader labour market. In particular, as Block and Hennessy's survey of Greater Toronto Area workers revealed, racialized workers provide the majority of services through precarious work in the on-demand service economy while non-racialized consumers buy the majority of services.²⁰ Further, 68 per cent of racialized workers and 59 per cent of immigrant workers in the on-demand service economy relied on this precarious work for more than 50 per cent of their income.²¹

What barriers do workers in the on-demand service economy face?

The fundamental challenge faced by workers in the on-demand service economy is that they are not recognized as “employees.” They are characterized as “independent contractors.” To the extent that this label misclassifies the nature of the actual work relationship, it effectively places them beyond the protection of both the ESA and the LRA.

Both the ESA and the LRA apply to employees. Each statute has a technical definition of employee that is narrower than the set of all workers.

The ESA defines an employee to include someone who is or was:

- (a) A person, including an officer of a corporation, who performs work for an employer for wages;
- (b) A person who supplies services to an employer for wages;
- (c) A person who receives training from a person who is an employer, ...or;
- (d) A person who is a homemaker.²²

An employer is defined “as 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 includes related employers.²³

In the on-demand service economy, businesses present themselves not as employers who exercise control or direction in relation to workers, but as technological platforms that enable those who are seeking services to connect with those who wish to provide services. In this narrative, workers are characterized as independent entrepreneurs who are exercising autonomy to sell their services.

As independent contractors, workers in the on-demand service economy bear significant financial costs for the business because they are required to supply the materials necessary to deliver the service. This includes paying for the cost and upkeep of vehicles, providing cleaning supplies, tools, phones, and their own insurance to cover the business’s gaps in insurance. So, while business costs are pushed down to the workers, businesses reap significant profits.²⁴

Beyond these immediate financial costs to the worker, the legal consequence of being characterized as an entrepreneur or independent contractor is that the worker is entirely excluded from employment standards protection. This means that they are excluded from protection for:

- Minimum wage;
- Overtime pay;
- Maximum hours of work, rest periods and meal breaks;

- Public holidays and holiday pay;
- Vacation pay;
- Rights to equal pay for equal work;
- Pregnancy and parental leave;
- Emergency leave; and
- Termination and severance pay.

Neither are they entitled to be reimbursed for expenses.

Further, access to key social programs is linked to employee status. For example, access to employment insurance and workplace safety insurance is contingent on employee status. A worker who is wrongly misclassified as an independent contractor loses the protection of those social supports.

Moreover, the costs of misclassification are not borne by the individual worker alone. When a worker is either unintentionally or intentionally misclassified as an independent contractor, an employer not only avoids employment standards obligations but also avoids payroll taxes. This creates a significant financial incentive to characterize workers as independent contractors. Employee misclassification is not restricted to the on-demand service economy, but it is an increasingly widespread problem that results in billions of dollars being withheld each year from funding key social programs.²⁵ As the Changing Workplaces Review noted, in the United States “the misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers and the entire economy.”²⁶

Meanwhile, the *Labour Relations Act* also relies on a definition of employee to determine who can access its protection. Under the LRA, an employee includes a dependent contractor, who is defined as:

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.²⁷

While this definition is broader than the ESA definition, it does not extend to independent contractors. Workers in the on-demand service economy are, once again, effectively denied access to the constitutionally protected rights to unionize, bargain collectively, and strike.

These exclusions from the ESA and LRA mean that workers in the on-demand service economy are left to accept whatever terms are offered within an extreme imbalance of power. Despite the promotion of workers' flexibility to work when they choose, the opportunity to set the terms of their work is largely illusory. In reality, the degree of agency that workers have in the relationship can be considerably constrained.

Among other examples of control, the business may: unilaterally change the rate of pay for services²⁸; control work flow and whether workers can receive tips; direct how the work is done; penalize workers for declining work or deviating from directions; determine how (and how quickly) work should be done; set customer rating standards that workers must meet; and terminate or de-activate workers who fail to maintain those standards. This power imbalance can result in a highly precarious and low-paid workforce, including workers who are earning less than the minimum wage.

But the consequences of this are significant and felt well beyond the scope of just the ESA and the LRA. The misclassification of the work relationship can also erode workers' protection against discrimination and employers' responsibility for ensuring human rights compliance in the workplace.²⁹

Moreover, on-demand service providers avoid providing training since it is an indicator of an employee relationship, leaving workers to bear the costs of their own training or foregoing training altogether.

What is needed to overcome the precariousness?

The crux of the solution is recognizing the extent to which these work relationships are in fact or are akin to employee-employer relationships.

For a worker in the on-demand service economy to obtain protection under the existing ESA or LRA, they must initiate litigation to prove they are in fact an employee for the purposes of the legislation. This question would be decided based on statutory definitions as well as the common law test, which examines the degree of control exercised by an employer.

The Supreme Court of Canada has recognized that “there is no universal test to determine whether a person is an employee or an independent contractor.”³⁰ The analysis will always depend on the specific facts. In each case,

[t]he central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her task.³¹

Meanwhile, the common law recognizes that employment relationships do not fall neatly into two binary categories of employee and independent contractor. Instead, it also recognizes an intermediate category of dependent contractor, which entitles a worker to some common law protections such as reasonable notice of termination.³² Whether a worker is a dependent contractor requires a case-by-case assessment of the control factors identified above and whether the relationship “exhibit[s] a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity.”³³

Tackling the poster-child for the on-demand service economy, Uber, litigation in both the U.K. and the U.S.A. has sought to prove that Uber drivers are employees rather than independent contractors and, as such, are entitled to minimum standards protection.³⁴ The litigation in the U.S.A. remains ongoing. However, after exhaustively detailing the nature of control exercised over drivers by Uber, the Central London Employment Tribunal used unequivocal language in ruling that the drivers are not independent contractors and, therefore, they are entitled to minimum wage protection.³⁵ The tribunal concluded that:

...the terms on which Uber rely do not correspond with the reality of the relationship between the organisation and the drivers. Accordingly, the Tribunal is free to disregard them. As is often the case, the problem stems at least in part from the unequal bargaining positions of the contracting parties ... Many Uber drivers (a substantial proportion of whom, we understand, do not speak English as their first language) will not be accustomed to reading and interpreting dense legal documents couched in impenetrable prose. This is, we think, an excellent illustration of the phenomenon ... of “armies of lawyers” contriving documents in their clients' interests which simply misrepresent the true rights and obligations of both sides.³⁶

In other litigation, the New York State Department of Labour has ruled that Uber drivers should be treated as employees rather than independent contractors for the purpose of receiving unemployment insurance benefits.³⁷ Uber drivers in the U.S.A. have also been campaigning for the right to unionize.³⁸

Similar litigation could also be launched in Ontario to recognize workers in the on-demand service economy as employees entitled to employment standards and union rights. But recall that employment standards and the right to unionize are intended to be the floor — the foundation of workplace rights — and not the ceiling. Making litigation a precondition for precarious workers in order to secure their rights imposes an unduly heavy burden on them and rewards employer strategies such as misclassification, rights avoidance and tax avoidance. Moreover, without amendments to the ESA and LRA, such litigation could still leave on-demand service workers in the cold.

Litigation is tremendously expensive and time-consuming. It may also require workers' employee status to be addressed one online platform at a time. The degree of control and economic dependence may need to be assessed in relation to each business's operating reality. This is hardly a law reform strategy that mitigates the "inherent power imbalance and inequality of bargaining power between employer and employee" that Ontario's law reform initiative aimed to address.³⁹

What does Bill 148 offer and is it adequate?

The objective of the Changing Workplaces Review was to proactively amend the ESA and LRA to ensure they protect workers who are precariously employed in the 21st century economy. The key question is whether the Changing Workplace Review and Bill 148 promise reforms that truly protect decent work and freedom of association for workers in the on-demand service economy.

At minimum, these reforms would require:

1. Amending the definition of employee in the ESA;
2. Shifting the onus onto employers to prove that workers are not employees or dependent contractors; and
3. Amending the LRA to facilitate meaningful collective bargaining for a labour force in which workers are widely dispersed and isolated from each other.

Some advocates have also argued in favour of sectoral standard setting. Depending on the credibility of the process by which sectoral standard setting is pursued, this may have value, particularly for regulating conduct in a specific industry, such as establishing qualifications and health and safety standards. However, sectoral standards for terms and conditions of work that don't include effective and meaningful collective action, unionization, and collective bargaining provide incomplete protection. Sectoral standard setting on its own fails to give workers access to collective representation, resources, research capacity, and other supports that make rights enforcement and a culture of compliance a reality.

Definition of employee

To provide meaningful protection, the definition of employee in the ESA must be extended to cover, at a minimum, dependent contractors.

The Changing Workplaces Review agreed that this expanded definition must be explicitly included in the ESA. The special advisors wrote:

We reject the notion that the Ministry of Labour in Ontario can effectively redress the problem of misclassification of workers who would be called “dependent contractors” under the LRA at the administrative level by interpreting the existing ESA definition to include such people.⁴⁰

As minimum standards legislation, the ESA should clearly identify who has rights and responsibilities under it. The special advisors also noted that the conflicting definitions of employee between the ESA and LRA would, on principles of statutory interpretation, suggest that a failure to include dependent contractors in the ESA was intentional.⁴¹ As a result, recommendation #125 in the review stated that the ESA definition of employee should be amended to include a dependent contractor as defined in the LRA.⁴²

Bill 148 has not adopted this recommendation.

Accordingly, workers in the on-demand service economy, many of whom would meet the definition of dependent contractor, remain excluded from the law's protection. In this context, litigation to seek coverage under the ESA would have to meet the higher threshold of proving that they are direct employees of the business.

Shifting the onus on employee misclassification

All the litigation to advance on-demand service economy workers' rights as employees is necessitated by the fact that, under the law, workers must prove they are employees. The existing law puts the onus on workers to prove they are entitled to basic rights. Meanwhile, employee misclassification by employers is known to be widespread. The gap in the ESA definition and the unlikelihood of workers being able to mount litigation, combined with the minimal chance that an employment standards officer would proactively investigate an employer, creates an open invitation to employers to misclassify workers. This is, in fact, a strategy that enables businesses to compete on the basis of lower costs by evading both rights and tax obligations.

The effective remedy is to create a default presumption of employee status under the ESA and to place the onus on employers to prove that a worker is, in fact, an independent contractor.

Recommendation #126 in the Changing Workplaces Review states that:

The Employment Standards Act, 2000 should provide that in any case where there is a dispute about whether or not a worker is an employee, the person receiving the worker's services has the burden of proving that the person is not an employee covered by the Act and has a concomitant obligation to adduce all relevant evidence with regard to the matter.⁴³

While this is an advance on the present legislation, it still requires a worker or group of workers to initiate a legal claim for protection before the burden of proof shifts to the employer to prove that a worker is not an employee. This approach would relieve some of the burden of litigation, but it is still embedded in a complaint-driven framework in which workers bear the litigation onus to secure their entitlement to rights. This does not advance a culture of proactive rights compliance.

Bill 148 proposes to amend the ESA to introduce a new s. 5.1 as follows:

5.1 (1) An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act.

(2) Subject to subsection 122(4), if, during the course of an employment standards officer's investigation or inspection or in any proceeding under this Act, other than a prosecution, an employer or alleged employer claims that a person is not an employee, the burden of proof that the person is not an employee lies upon the employer or alleged employer.

This proposed amendment captures some of the intent of recommendation #126. However, it does not provide proactive protection. A model provision that would provide clarity, pre-empt litigation, and mitigate the power imbalance would include clear statements that:

1. Employee includes a dependent contractor;
2. There is a rebuttable presumption that workers in the on-demand service economy are employees for the purposes of the Act;
3. A person presumed to be an employer bears the onus to rebut the presumption and to prove that a person is not an employee;
4. A person presumed to be an employer has an obligation to disclose and adduce all relevant evidence with regard to employee status.

Protecting freedom of association

Dependent contractors are included in the definition of employee under the LRA and so, on paper, they have the right to unionize, bargain collectively, and strike. However, to the extent that the LRA was designed to facilitate collective bargaining in full-time standard employment in the manufacturing sector, the structural reality of the on-demand service economy makes the right to unionize inaccessible.

In ruling that the constitutionally guaranteed freedom of association protects the right to unionize, the Supreme Court of Canada has also ruled that government has a proactive obligation to ensure that vulnerable workers have meaningful protection to exercise the right to unionize and to bargain collectively in practice. Even though freedom of association is a fundamental constitutional freedom, the court has recognized that because of the power imbalance between employers and employees, that freedom is difficult to exercise without statutory support, particularly in the private sector. As a result, governments have a proactive duty to ensure that legislation is not under-inclusive; to avoid creating a system that fails to actually support meaningful access to the right to unionize and bargain collectively.⁴⁴

Workers in the on-demand service economy face particular hurdles trying to unionize under the existing LRA. Workers' relationships with their employers are mediated through the online platform. Workers do not share a common physical workplace. Workers are unknown to each other. They are in a highly dispersed workforce, operating in isolation from each other.

In this context, elements of legislative reform that would make freedom of association accessible and meaningful in practice would include:

1. A right of access to employee lists and contact information;
2. Protection for concerted action by workers;
3. Card-based certification; and
4. Examination of whether a sectoral model of bargaining is appropriate to the on-demand service economy.

A union's access to employee lists after demonstrating a threshold of employee support is an obvious necessity in organizing a workforce of isolated employees.

Protection for concerted action allows workers who are not yet unionized to exercise their freedom of association to assert their collective workplace goals. This can be particularly important for workers in the on-demand service economy who are seeking to become visible to each other through public collective action. Section 7 of the U.S. *National Labour Relations Act* provides that, in addition to the right to unionize and bargain collectively, workers also have the right to “self-organization” and to “engage in other concerted actions...for mutual aid and protection.” The LRA does not protect collective action by non-unionized workers, but this is arguably a void that must be filled in order to ensure that freedom of association is given full life as a constitutional right.

The restoration of card-based certification has long been a demand of labour unions. The mandatory requirement of certification votes has demonstrably increased the opportunity for employer intimidation, particularly when votes are held at the workplace, and has resulted in lower rates of successful certification than under card-based certification. Research has demonstrated that “the union certification success rates in card-based regimes tend to be about 20 percentage points higher than under compulsory vote systems and studies show that this difference is concentrated in the private sector.”⁴⁵ Under card-based certification, where a union has signed up a stipulated majority of members in the proposed bargaining unit, certification is automatic. This model of organizing is particularly important where workers' employment is precarious.

Throughout the Changing Workplaces Review various demands were raised to make unionization and collective bargaining effective by developing legislative models for broader-based bargaining and sectoral bargaining to

respond to the fissuring of the individual workplace. Further study is needed to determine what specific model of broader-based bargaining may be appropriate or effective in the on-demand service economy. This is certainly an area that warrants investigation. Various jurisdictions have attempted to create legislative support for collective bargaining in the on-demand service economy, including the City of Seattle, which passed a by-law establishing a collective bargaining regime applicable to “for-hire drivers and for-hire transportation networks.”⁴⁶

The Changing Workplaces Review reiterated that governments have a positive obligation to “eliminate barriers to [the] exercise and realization of rights of freedom of association” in light of their constitutional status.⁴⁷ The special advisors adopted the following analysis of Prof. Michael Lynk, which stresses that the imbalance of power between workers and employers, combined with the principle of universality of Charter rights, requires real access to collective bargaining for all workers:

...the concept of employment vulnerability, and the corresponding antidote of statutory protection and access to collective bargaining, would be a defining characteristic for anyone who is in an employment or employment-like relationship, wherever he or she may be located across the spectrum of the labour force.

Hand in hand with this understanding of the scope of employee vulnerability in the law is the concept of universality. This concept postulates that collective bargaining as a protective institution should be available to every occupational category of employee, a sort of labour law without borders.⁴⁸

The special advisors recognized that access to employee lists and contact information is a necessary prerequisite for unionization, particularly when workers work on a “part-time or temporary basis or away from the workplace altogether.” They observed that:

Employees cannot practically band together to pursue their workplace goals if they don’t know who the other employees are, where they work, how to contact them, or how many of them there are.... Absent the ability to know who the other employees are and how they can be contacted, the constitutional freedom of association is potentially sterile and ineffective.⁴⁹

Recommendation #149 proposed that where “it appears to the Ontario Labour Relations Board that a union has the support of approximately 20 per cent of the employees in a bargaining unit, the Board shall require the

employer to disclose to the union the list of employees in the bargaining unit, together with the work location, address, phone number and personal email address of each employee.”

Bill 148 has adopted this recommendation and proposes to introduce a new s. 6.1 under which a union can apply for an order directing the employer to disclose a list of employees and their contact information to the union. The Ontario Labour Relations Board would grant the order if it determined that 20 per cent or more of the employees in the proposed bargaining unit appear to be members of the union. The bill sets out detailed provisions on the application process, restrictions on the use of employee information, and how the information may be used in a subsequent certification application.

This amendment is an improvement to the extent that it enhances access to information necessary to facilitate unionization. However, questions remain about whether this sets too high a threshold for organizing in the on-demand service economy, where the scope of the workforce is invisible. It is difficult for a union to know when it has organized 20 per cent of the workforce when the workers themselves have no idea how many workers are engaged or where they are. A more reasonable approach may be to require that the employer provide employee lists and contact information when the union is able to demonstrate that it is engaged in a bona fide organizing drive.

Neither the Changing Workplaces Review nor Bill 148 address reforms to protect concerted action by non-unionized employees.

The Changing Workplaces Review Final Report undertook an extended analysis of unions’ opposition to the current system of mandatory certification votes and the demand for card-based certification.⁵⁰ The special advisors recognized the imbalance of power between workers and employers and the extent to which misuse of employers’ power can undermine employees’ free choice to join a union. They referred to the highly respected 1992 review of labour legislation in B.C. in which the B.C. special advisors unanimously recommended a return to card-based certification, stating that:

The surface attraction of a secret ballot vote does not hold up to examination. Since the introduction of secret ballot votes in 1984, the rate of employer unfair labour practices has increased by more than 100 per cent. When certification hinges on a campaign in which the employer participates, the lesson of experience is that unfair labour practices designed to thwart the organizing drive, will inevitably follow.⁵¹

Nevertheless, the Changing Workplaces Review recommended retaining the secret ballot vote, but recommended that only one secret ballot vote should be held. Rather than holding a second vote when employer misconduct undermines employee choice and the integrity of the first vote, remedial certification should follow.⁵²

Bill 148 deviates somewhat from this recommendation. Bill 148 proposes to introduce a new s. 15.3 to the LRA that would restore card-based certification to unionizing the building services industry, home care and community services industry, and temporary help agency industry.

This opening is important because it recognizes that card-based certification is particularly necessary for workers in precarious employment because the power imbalance and impact of employer misconduct are such that no after-the-fact remedy could undo the damage of the unfair labour practice. Yet the scope of these amendments is not broad enough to provide protection to workers in the on-demand service economy.

First, while some on-demand service workers provide work in the cleaning, food service, and home care sectors, many work in a wide range of other sectors. There is no principled logic to restricting card-based certification to precarious work in specific industries when the same (and even more extreme) structures of precarious employment are replicated across many industries and when precarious employment is proliferating.

Second, litigation would still likely be required to establish that a business is, in fact, directly or indirectly providing the services rather than simply acting as an online platform for facilitating connections between consumers and service providers. This could be remedied by specifically identifying the on-demand service industry as one in which card-based certification applies and by defining the industry to encompass “businesses engaged in providing services directly or indirectly, including through the use of online platforms and online networks.”

Still, in light of the continuing evolution of the on-demand service industry, and in light of the desire to ensure that the legislation remains responsive into the future, a return to card-based certification in all unionization applications may be most appropriate. This is also the model that most strongly respects the exercise of employees’ constitutionally protected choice free from employer interference.

Finally, the Changing Workplaces Review endorsed the principle of broader-based bargaining. The special advisors pointed out that “the current Wagner Act single employer and single enterprise model of certification does not provide for effective access to collective bargaining for a large

number of employees or small employers and employers with multiple locations.”⁵³ They specifically recommended that models of broader-based bargaining be developed for franchising in restaurants, fast food, and other similar specified sectors and industries; for publicly funded home care; and for creative industries.⁵⁴ More generally, though, the special advisors concluded that “the concept of broader-based bargaining merits a wider and more focused discussion than was possible in this Review.”⁵⁵ They recommended:

the creation of an Ontario Workplace Forum where leaders of the employer community, unions and employee advocates, together with government, could discuss important issues and opportunities regarding the workplace. We recommend that this issue of sectoral bargaining and regulation be a standing issue in those discussions.⁵⁶

Bill 148 fails to address the issue of broader-based bargaining.

Looking ahead

The Changing Workplaces Review did not undertake an in-depth analysis of the needs of workers in the on-demand service economy. The final report makes passing reference to these workers among a list of precariously employed workers. But it does not engage in a focused analysis of the uniquely challenging structures of work in this rapidly expanding business model. Nor was research commissioned to specifically address this complex environment.⁵⁷ In this respect, there is considerable catching up to be done. To the extent that the review was intended to provide protections against precariousness in the 21st century, it risks already falling behind the times.

Bill 148 provides even less immediate protection for workers in the on-demand service economy. While there are some positive changes, they are largely tinkering at the margins of work in the on-demand service economy without getting to the root of the precariousness. While Bill 148 makes a range of changes to substantive employment standards that would benefit service workers (such as a \$15 minimum wage, equal pay for part-time, temporary, seasonal, casual and temporary help-agency workers, and access to personal emergency leave), these changes remain out of reach for online platform-based on-demand service economy workers. The definition of the ESA remains too restrictive and fails to protect a rebuttable presumption of employee status. On-demand service workers still must litigate to establish their entitlement to minimum standards protection.

Moreover, Bill 148 focuses most of its reforms on the ESA, while making only minor changes to the LRA. This is particularly concerning when the rights to unionize, collectively bargain, and strike are constitutionally protected rights that the government has a duty to make accessible and meaningful in practice.

In view of long-standing concerns that the LRA is anchored in a mid-20th century model of work that is no longer relevant to the majority of workers,⁵⁸ the need to develop effective collective bargaining models for workers in precarious employment is urgent. Bill 148's failure to take the opportunity of this generational review of the ESA and LRA to shore up access to meaningful collective bargaining leaves a significant amount of unfinished business.

Ultimately, legislated standards in the absence of collective representation and effective rights of collective action offer only incomplete protection. They fail to guarantee robust protection for workers' right to redress the imbalance of power in the workplace. This missed opportunity should serve as a call to action to renew efforts to deliver real protection for workers in the on-demand service economy.

Notes

- 1** Ontario, Ministry of Labour, “Terms of Reference – Changing Workplaces Review” (original 2015; last updated 17 February 2017): <https://www.labour.gov.on.ca/english/about/workplace/terms.php>.
- 2** Sheila Block and Trish Hennessy, “Sharing economy” or on-demand service economy?: A survey of workers and consumers in the Greater Toronto Area” (Canadian Centre for Policy Alternatives: April 2017).
- 3** Ontario, Ministry of Labour, “The Changing Workplaces Review: Special Advisors”: <https://www.labour.gov.on.ca/english/about/workplace/advisors.php>.
- 4** Ministry of Labour, *Changing Workplaces Review: Special Advisors’ Interim Report* (July 2016): https://www.labour.gov.on.ca/english/about/cwr_interim/index.php.
- 5** Ministry of Labour, *The Changing Workplaces Review: An Agenda for Workplace Rights, Final Report* (May 2017): https://www.ontario.ca/document/changing-workplaces-review-final-report?_ga=2.255570368.951571386.1498853058-1819814115.1478030442.
- 6** *Changing Workplaces Review Final Report*, above note 5 at p. 18.
- 7** *Changing Workplaces Review Final Report*, above note 5 at p. 18.
- 8** *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per Chief Justice Dickson at para. 91.
- 9** *Changing Workplaces Review Final Report*, above note 5 at p. 19. This principle has been emphasized repeatedly in Canadian jurisprudence. For a recent statement, see: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 1 SCC 1 at para. 70–72.
- 10** *Changing Workplaces Review Final Report*, above note 5, at pp. 19–20.
- 11** *Changing Workplaces Review Final Report*, above note 5, at p. 20.
- 12** Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau: HRSDC, 2006), p. 47. This passage is adopted by the Special Advisors in *Changing Workplaces Review Final Report*, above note 5, at p. 20.
- 13** *Changing Workplaces Review Final Report*, above note 5, at p. 24–26.
- 14** *Changing Workplaces Review Final Report*, above note 5, at p. 22–23.

- 15 *Changing Workplaces Review Final Report*, above note 5, at p. 21–23.
- 16 *Changing Workplaces Review Final Report*, above note 5, at p. 26–27.
- 17 *Changing Workplaces Review Final Report*, above note 5, at p. 28.
- 18 *Changing Workplaces Review Final Report*, above note 5, at p. 8.
- 19 Block and Hennessy, “Sharing economy” or on-demand service economy? at pp. 8–9.
- 20 Block and Hennessy, “Sharing economy” or on-demand service economy? at p. 19.
- 21 Block and Hennessy, “Sharing economy” or on-demand service economy? at p. 12.
- 22 *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 1(1) “employee”. [emphasis added]
- 23 ESA, s. 1(1) “employer”. [emphasis added]
- 24 For example, Uber is valued at \$68 billion.
- 25 A study of the construction industry in Ontario alone found that from 2007 to 2009, employee misclassification as independent contractors resulted in \$1.4 to \$2.4 billion each year in lost revenue to the Workplace Safety Insurance Board, income tax, Canada Pension Plan and Employment Insurance: see, Ontario Construction Secretariat, “Underground Economy in Construction — It Costs Us All” (July 2010) as cited in Workers Action Centre, *Still Working on the Edge: Building Decent Jobs from the Ground Up* (March 2015) at pp. 18–19.
- 26 United States, Department of Labour, “Misclassification of Employees as Independent Contractors” cited in *Changing Workplaces Review Final Report* at p. 264.
- 27 *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 1(1) “dependent contractor.”
- 28 For example, UberEATS in Toronto came under fire in November 2016 for cutting workers’ rate of compensation between 25 per cent and 50 per cent overnight: Adam Miller and Sean O’Shea, “Toronto UberEATS delivery drivers protest new rate cut, call for boycott”, *Global News* (November 29, 2016).
- 29 Various studies have found that customer rating of workers in the on-demand service economy, which can affect their ability to continue providing services, replicates gender and race discrimination in the broader economy: see, for example, Thea Singer, “Researchers find racial, gender bias in online freelance marketplaces”, *Phys.org* (December 16, 2016), online: <https://phys.org/news/2016-12-racial-gender-bias-online-freelance.html>. In addition, studies have found that customers also face racial discrimination: see, for example, Chitra Ramaswamy, “‘Prejudices play out in the ratings we give’ — the myth of digital equality”, *The Guardian* (February 20, 2017), online: <https://www.theguardian.com/technology/2017/feb/20/airbnb-uber-sharing-apps-digital-equality>.
- 30 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 at para. 47.
- 31 *Sagaz Industries Canada Inc.*, above note 28 at para. 47.
- 32 *Carter v. Bell & Sons (Canada) Ltd.*, 1936 CanLII 75 (ON CA), [1936] O.R. 290, at p. 297.
- 33 *McKee v. Reid’s Heritage Homes Ltd.*, 2009 ONCA 916 (CanLII) at para. 22–30.
- 34 See, for example, *Aslam and Farrar v. Uber et al*, Central London Employment Tribunal, Case 2202550/2015 (October 28, 2016). The New York Taxi Workers Alliance filed a class-action suit against Uber in U.S. District Court in June 2016: Faiz Siddiqui, “Uber admits it underpaid tens of thousands of New York City drivers”, *Washington Post* (May 23, 2017), online: https://www.washingtonpost.com/news/dr-gridlock/wp/2017/05/23/uber-admits-it-underpaid-tens-of-thousands-of-drivers-in-new-york/?utm_term=.3c7ca7f18bf7. A further class-action suit was launched by Uber drivers in California and Massachusetts in 2013. A \$100 million settlement was overturned in August 2016 on the basis that it was “not fair, adequate and reasonable” and would have provided only a fraction of the potential damages: Mike Isaac, “Judge Overturns Uber’s Settlement With Drivers”, *New York Times* (August 18, 2016), online: https://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html?_r=0. Class action suits have also been brought against other on-demand service providers, including Lyft.

- 35** *Aslam and Farrar v. Uber*, above note 34, esp. at para. 85–96.
- 36** *Aslam and Farrar v. Uber*, above note 34, at para. 96 Uber has filed an appeal of this decision which will be heard on 27–28 September 2017.
- 37** See Noam Scheiber, “Uber Drivers Ruled Eligible for Jobless Payments in New York State”, *The New York Times* (12 October 2016), online: <https://www.nytimes.com/2016/10/13/business/state-rules-2-former-uber-drivers-eligible-for-jobless-payments.html>; Dana Rubenstein, “State labor judge finds Uber an ‘employer’”, *Politico* (13 June 2017), online: <http://www.politico.com/states/new-york/city-hall/story/2017/06/13/state-labor-court-finds-uber-an-employer-112733>
- 38** See, for example, David Gutman, “Judge temporarily blocks Seattle law allowing Uber and Lyft drivers to unionize”, *Seattle Times* (4 April 2017), online: <http://www.seattletimes.com/seattle-news/transportation/judge-puts-blocks-for-now-seattle-law-allowing-uber-and-lyft-drivers-to-unionize/>
- 39** *Changing Workplaces Review Final Report*, above note 5 at p. 19
- 40** *Changing Workplaces Review Final Report*, above note 5 at p. 267.
- 41** *Changing Workplaces Review Final Report*, above note 5 at pp. 268–269.
- 42** *Changing Workplaces Review Final Report*, above note 5, recommendation #125 at p. 272.
- 43** *Changing Workplaces Review Final Report*, above note 5, Recommendation 126 at p. 272
- 44** *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para. 20–22, 35–38, 40–48; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia (Attorney General)*, 2007 SCC 7 at para. 34–35, 40–63, 90, 92.
- 45** *Changing Workplaces Review Final Report*, above note 5 at p. 318; also see research cited at pp. 317–318.
- 46** The Chamber of Commerce of the United States of America has challenged the by-law and it is currently subject to an interim injunction pending the resolution of the litigation: Autumn Callan, “Federal judge blocks Seattle ride sharing union law”, *Jurist* (April 5, 2017), online: <http://www.jurist.org/paperchase/2017/04/federal-judge-blocks-seattle-ride-sharing-union-law.php>.
- 47** *Changing Workplaces Review Final Report*, above note 5 at pp. 283–284.
- 48** *Changing Workplaces Review Final Report*, above note 5 at p. 285.
- 49** *Changing Workplaces Review Final Report*, above note 5 at p. 332.
- 50** *Changing Workplaces Review Final Report*, above note 5 at pp. 317–322.
- 51** *Changing Workplaces Review Final Report*, above note 5 at p. 322.
- 52** *Changing Workplaces Review Final Report*, above note 5 at pp. 323–326, Recommendations 144 and 145.
- 53** *Changing Workplaces Review Final Report*, above note 5 at p. 352
- 54** *Changing Workplaces Review Final Report*, above note 5 at pp. 357–366, Recommendations 157–159
- 55** *Changing Workplaces Review Final Report*, above note 5 at p. 366
- 56** *Changing Workplaces Review Final Report*, above note 5 at p. 368
- 57** The list of commissioned research conducted for the Changing Workplace Review is posted on the Ministry of Labour website: *Research Projects Commissioned to Support the Changing Workplaces Review*, <https://www.labour.gov.on.ca/english/about/workplace/research.php> The papers themselves are available on the University of Toronto Industrial Relations & HR Library website: <https://cirhr.library.utoronto.ca/academic-research-projects>
- 58** Precarious Employment and Poverty in Southern Ontario, *The Precarity Penalty* (May 2015) reports that only 48 per cent of workers aged 25–65 in the Greater Toronto and Hamilton Area are employed in full-time permanent jobs.



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