

The Gig Economy: Dependent Contractors, Workers' Rights, and the Canadian Approach

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I. INTRODUCTION

*The world envisaged by science fiction authors like Ray Bradbury or experienced by the occupants of the Starship Enterprise seemed unimaginable 30 years ago. However, the emergence of the Internet opened new avenues for what might be possible. Since the Internet was introduced to the world at large, individuals and organizations are constantly discovering new ways to use the Internet to their advantage in their daily lives. It is trite to say that individuals worldwide rely every day on the power of the Internet and the speed with which it adapts and responds to changes in its environment. It is not surprising, therefore, that legislation drafted to accommodate a more static, paper and people driven environment, sometimes lags behind the technological response to individual preferences and demands. – Mr. Justice Creighton in *Edmonton (City) v. Uber Canada Inc.*, 2015 ABQB 214 at para. 23*

The advent of the gig economy has broad reaching legal implications as new businesses challenge existing understandings of who constitutes an employer, whether workers providing familiar services are no longer employees because they operate through online platforms, and how governments should regulate and respond to these industries. Both courts and legislators in Canada are only starting to grapple with these issues, but given the existence of the “dependent contractor” concept in Canadian law and the major implications for governmental inability to recover taxes and other payments, it is likely that our governments will adapt and move quickly to regulate the gig economy in a manner that maximizes recovery and ensures that Canadian workers’ rights are protected.

II. BACKGROUND

A. The “gig economy”

The “gig economy”, also known as the on-demand, platform, or sharing economy, connects workers with clients or employers on a flexible, autonomous, and short-term basis.² The defining characteristic of a gig economy business is that it offers online applications to connect individuals seeking services with those providing services, but generally the business itself does not consider itself to be a service provider.³ Most readers of this paper will be familiar with gig economy businesses. In the last ten years, they have proliferated around the world and are now often household names. Ride-sharing services such as Uber and Lyft, and accommodation rental services such as Airbnb, are commonly cited examples. In Canada, Foodora connects customers with food delivery and can be found in most of the country’s major cities. Similar models include dog-kennel services, and peer-to-peer rental services of everything from parking spaces, musical instruments, gardening tools, and kitchen appliances.⁴

The impact of the gig economy cannot be underestimated. The sheer volume of consumers who use these services lends perspective to the impact on traditional business models. Uber now operates in more than 84 countries;⁵ while Airbnb’s highest volume night in 2017 saw 2.5 million people use its services.⁶ By 2025 these “online talent platforms” could raise global GDP by up to \$2.7 trillion and increase employment by 72 million full-time equivalent positions.⁷ Studies in the U.K. show that 1.1 to 1.3 million people in the U.K. work in the gig

² Emily Atmore, “Killing the Goose That Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy” (December 2017) 102 Minn. L. Rev. 887-922 at 888; and see Nathan Heller, “Is the Gig Economy Working?: Many liberals have embraced the sharing economy. But can they survive it?” *The New Yorker*, (15 May 2017) online <<https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working>>.

³ Molly Tran, “The Gig Economy and Contingent Work: An Occupational Health Assessment” (2017) *J Occup Environ Med.*, online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5374746/#R8>>.

⁴ “All eyes on the sharing economy”, *The Economist: Technology Quarterly* Q1 (2013) online: <<https://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items>>.

⁵ “Uber Cities” *Uber Estimator* online: <<https://uberestimator.com/cities>>.

⁶ Avery Hartmans, “Airbnb now has more listings worldwide than the top five hotel brands combined”, *Business Insider*, online: <<http://www.businessinsider.com/airbnb-total-worldwide-listings-2017-8>>.

⁷ James Manyika et al., “A Labor Market that Works: Connecting Talent with Opportunity in the Digital Age”, *McKinsey Global Institute* (June 2015).

economy.⁸ The immediately notable impact of the gig economy is the scale of money that, in a relatively short amount of time, is now changing hands premised on business models that barely existed a decade ago. The gig economy is also challenging the way in which these segments of the economy have traditionally been run. The Ontario Superior Court of Justice has stated that Uber has “transformed” the transportation and restaurant delivery businesses.⁹ This transformation is altering the way in which we interact with goods and services that are used on a daily basis. Particularly, consumers are moving away from ownership of goods; apartments, vehicles, tools, and even music are now hireable on an as-needed basis with ownership remaining in the hands of the provider. The mentality for many consumers has shifted to the mantra that “access trumps ownership.”¹⁰

B. Employment relationships in the gig economy

This transient relationship between consumers and goods or services is a hallmark of the gig economy and perhaps for many, one of its greatest features. However, its impermanent nature also extends to the workers providing those goods and services, leading to major repercussions in the employment context. These impacts are only increasing. In a shift referred to as a “significant change”, greater numbers of Canadians are moving to non-standard employment relationships such as part-time employment, working multiple jobs, temporary employment and self-employment.¹¹

The very nature of these “gigs” mandates that workers are no longer employed in traditional 9 to 5 jobs with one employer, but instead have flexible hours where people move between contracts mediated through a faceless online platform. Some commentators opine that the gig economy will lead to sustainable employment opportunities by addressing a mismatch in

⁸ Doug Pyper, *Briefing Paper No. CBP 8045: Employment Status* (10 November 2017) U.K. House of Commons Library at p. 26.

⁹ *Heller v. Uber Technologies Inc.*, 2018 ONSC 718 at para. 1

¹⁰ “The rise of the sharing economy: On the internet, everything is for hire”, *The Economist*, (9 March 2013) online: <<https://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>>.

¹¹ See Lorris Adams’ helpful summary in Lorris Adams, *Distinguishing Employees and Independent Contractors for the Purposes of Employment Standards Legislation*, (LL.M Thesis, Faculty of Law, University of Alberta, 2013) at pp. 16-24.

labour supply and demand, raising labour force participation and improving productivity.¹² Indeed, one survey shows that, not only does online gig work offer more autonomy, but in some instances, offers higher incomes and an important source of income for some workers.¹³ However, other commentators suggest that the gig economy increases risks to workers in a number of ways, including by applying downward pressure on wages through oversupply, employment insecurity, and overwork.¹⁴ These risks arise, in part, from the categorization of workers in the gig economy. Generally speaking, from the viewpoint of gig economy businesses, gig workers are not employees of the online platform. Instead, they are treated as independent contractors. In Canada and many other jurisdictions the distinction is a critical one. While, in general terms, “employees” are afforded the benefit of employment standards legislation, workers’ compensation legislation, and employment insurance, “independent contractors” are considered to not need the same type of labour protection and are instead subject to the rigours of competition and the principles of commercial law.¹⁵

Perhaps most importantly from the employers’ point of view, the distinction between an employee and an independent contractor leads to significantly different consequences for liability and taxation purposes. In simplistic terms, at common law an employer will be held vicariously liable for torts committed by an employee, while an employer will not be held vicariously liable where that worker is an independent contractor¹⁶ (although other sources of liability may arise, such as through the relationship of principal-agent).¹⁷ For taxation purposes, an employer is responsible for, among other things, deducting Canada Pension Plan contributions, Employment Insurance premiums, and income tax from remuneration paid to employees, while these obligations can be passed on to an independent contractor. Presumably due to the foregoing reasons, gig workers have been generally treated as independent contractors by gig economy companies. In fact, it appears that some of the companies have been quite careful to structure their businesses and agreements in a way that preserves this interpretation.

¹² M. Graham, et al., “The Risks and Rewards of Online Gig Work At The Global Margins”, *Oxford Internet Institute* (2017).

¹³ Graham et al., at p. 6.

¹⁴ Graham et al, at pp. 6-8.

¹⁵ Judy Fudge et al., “Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada”, (2003) 10 CLELJ 193 – 230.

¹⁶ *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59

¹⁷ See for example, *Thiessen v. Mutual Life Assurance Co. of Canada*, 2002 BCCA 501

One tribunal noted that it was “struck by the remarkable lengths to which Uber has gone in order to compel agreement with its...description of itself and with its analysis of the legal relationships between the two companies, the drivers and the passengers.”¹⁸

C. The characterization of workers

Employers’ efforts to shift the risks of productive activity and employment onto workers by categorizing their relationships as commercial arrangements, rather than primarily employment arrangements, are not a new phenomenon.¹⁹ Particularly in the twentieth century, increasing numbers of workers categorized themselves as self-employed contractors, although arguably the issue of whether a worker ought to be classified as an employee or independent contractor is one that goes back at least half a millennium.²⁰ Employees work under contracts of service, while independent contractors work through contracts for services.²¹ Concerns with the shift have also been the subject of commentary long before the rise of the gig economy, including how the shift impacts working conditions, training, security, and income, and whether the rise of the contractor relationship is a form of disguised employment.²² Deliberate misclassification has only become more common with increasing pressures such as globalization and increasing emphasis on flexible work arrangements.²³

The starting point in employment law is that while free competition and free bargaining are to be encouraged, the individual employment context is not one in which the market always yields socially acceptable outcomes.²⁴ Employees are vulnerable, or subject to a power imbalance, and therefore ought to be protected by prescribed remedial legislation; independent contractors on the other hand can theoretically take care of themselves in the free market.²⁵ The shift away from traditional employment arrangements has led to an increase in workers who do

¹⁸ *Uber B.V. and Others v Mr Y Aslam and Others*: UKEAT/0056/17/DA at para. 87.

¹⁹ Fudge et al.

²⁰ Guy Davidov, “The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection” (Fall 2002) 52 *Univ. of Toronto L.J.* 357.

²¹ Pyper at p. 4.

²² Judy Fudge et al.

²³ Davidov.

²⁴ Davidov.

²⁵ Davidov.

not neatly fit into either category – while the worker may not be an employee in the traditional sense, that worker is not a true businessperson, entrepreneur, or risk-taker taking chances in the marketplace with a view to making a profit.²⁶ In the gig economy context, workers often appear to be independent contractors, but whereas traditionally an independent contractor enjoys the benefits of the free market, gig economy workers generally cannot negotiate rates or contracts; they must simply electronically accept the online platform’s terms to access assignments or gigs.²⁷ Further, rather than being fired or terminated in the commonly understood sense, they may be unceremoniously “deactivated”.²⁸ For the purposes of employment law, and its focus on remedial legislation and common law principles that protect vulnerable workers, this outcome is not satisfactory.

The inadequacy of the employee-independent contractor dichotomy for dealing with this middle ground was articulated in Canada in the seminal paper written by H.W. Arthurs in the 1960s: “The Dependent Contractor: A Study of the Legal Problems of Countervailing Power”.²⁹ Professor Arthurs noted that unequal power between private persons is an “unhappy fact of modern society” that has been alleviated by the introduction of collective bargaining.³⁰ However, it is not only employees who are at the mercy of big businesses and the free market. Businesspersons viewed as independent contractors, rather than employees, are often also in a vulnerable position due to the dominance of a monopoly or because of disorganized market conditions. What troubled Professor Arthurs was that, unlike employees, these vulnerable independent contractors could not take advantage of collective bargaining.³¹ Indeed, the legal designation of employee or independent contractor effectively prejudged a worker’s rights and did not address the “no-man’s-land” between the two options (that we are now seeing in the gig economy).³² Professor Arthurs suggested that a new intermediate category was required, which

²⁶ *Maureen Copeland and Canada Post Corporation* (1989), 5 CLRBR (2d) 79.

²⁷ Tran.

²⁸ Tran.

²⁹ H.W. Arthurs, “The Dependent Contractor: A Study of the Legal Problems of Countervailing Power” (1965) *University of Toronto Law Journal* 89-117.

³⁰ Arthurs, *The Dependent Contractor* at p. 89.

³¹ Arthurs, *the Dependent Contractor* at p. 89.

³² Arthurs, *The Dependent Contractor* at p. 90.

he referred to as the “dependent contractor”, an idea he apparently got from studying Swedish labour law.³³

When he wrote the paper, Professor Arthurs cited self-employed truck drivers, peddlers, taxicab operators as examples of dependent contractors. In today’s gig economy, delivery persons and Uber drivers seem to be in the same position. Just as was the case in the 1960s, current employers recognize that “the magic of contractual language” can transform employees into independent contractors, creating numerous advantages for the employer.³⁴ These vulnerable workers, albeit not employees, were recognized as needing additional protection and power, such as the power provided through collective bargaining.³⁵ Professor Arthurs argued that the strict legal distinction between employees and independent contractors must be abandoned for labour market rationalization and for social purposes.³⁶ Dependent contractors should be eligible for unionization where they share a labour market with employees; where that is not the case, alternative legislation should be implemented.³⁷

Canadian courts had already developed common law tests to determine whether, notwithstanding the parties’ characterization of the relationship, a worker is an employee or independent contractor. The analysis arises frequently in the courts’ assessment of whether an employer is vicariously liable for the wrongdoing of the tortfeasor.³⁸ At its core, the distinction between an employee and an independent contractor lies with the extent of control that the employer has over the worker,³⁹ although control is not the only relevant factor and the Supreme Court of Canada has confirmed that there is no one conclusive test that can be universally applied to determine whether a worker is an employee or an independent contractor.⁴⁰ While the central question is whether the worker is performing services on his or her own account (*i.e.*, how much control does the employer exert?), other non-exhaustive factors for consideration include whether the worker provides his or her own equipment, whether the worker hires his or

³³ Cherry and Aloisi at pp. 651-652.

³⁴ Arthurs, *The Dependent Contractor* at p. 96.

³⁵ Arthurs, *The Dependent Contractor* at pp. 113-114.

³⁶ Arthurs, *The Dependent Contractor* at p. 114.

³⁷ Arthurs, *The Dependent Contractor* at pp. 114-115.

³⁸ See generally, J.W. Neyers, “A Theory of Vicarious Liability”, (2005) 43 *Alta. L. Rev.* 287 – 326.

³⁹ *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* at para. 34.

⁴⁰ *Sagaz Industries Canada Inc.*, *supra.* at para. 46.

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 tasks.⁴¹

In keeping with Professor Arthurs' thesis that intervention to deal with dependent contractors' role in the labour force was required, courts and legislatures began putting a "check upon the unbridled power of monopoly and oligopoly" represented by big business at the expense of small-scale enterprises.⁴² We now see for example, in British Columbia's *Labour Relations Code*, RSBC 1996, c 244, that the definition of an "employee" includes a dependent contractor for the purposes of the legislation and contemplates circumstances where collective bargaining units may include dependent contractors. Likewise, the Canadian common law expanded upon the employee and independent contractor test to create a framework for determining when a worker is a dependent contractor.⁴³ Notably, an intermediate position had been canvassed in Canadian decisions that pre-dated Professor Arthurs' paper; one of the earliest instances of this intermediate position was articulated in 1936 by the Ontario Court of Appeal in *Carter v. Bell & Sons (Canada) Ltd.*⁴⁴ Since then, in large part due to Professor Arthurs, other Canadian jurisdictions have followed suit, often in instances where the courts are considering whether the employer was under an obligation to provide reasonable notice of termination.⁴⁵

In British Columbia, the relevant indicia of a dependent contractor were recently articulated as follows:⁴⁶

1. Whether the agent was largely limited exclusively to the service of the principal;
2. Whether the agent was subject to the control of the principal, not only as to the product sold but also as to when, where and how it was sold;

⁴¹ *Sagaz Industries Canada Inc.*, *supra.* at para. 47.

⁴² Arthurs, *The Dependent Contractor* at p. 117.

⁴³ *Glimhagen v. GWR Resources Inc.*, 2017 BCSC 761 at para. 45.

⁴⁴ [1936] 2 DLR 438 (Ont. C.A.).

⁴⁵ *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 at para. 25

⁴⁶ *Glimhagen v. GWR Resources Inc.*, *supra.* at para. 45.

3. Whether the agent had an investment in or interest in the tools necessary to perform his service for the principal;
4. Whether by performing his duties the agent undertook risk of loss or possibility of profit apart from his fixed rate remuneration;
5. Whether the agent's activity was part of the principal's business organization - in other words “whose business was it?”;
6. Whether the relationship was long standing - the more permanent the term of service the more dependent the contractor; and
7. Whether the parties relied on one another and closely coordinated their conduct.

While the analysis of any worker will of course be fact-dependent, a consideration of the foregoing seven indicia in light of a layperson’s knowledge of gig workers might suggest that courts will be able to conclude that gig workers are dependent contractors. Using Uber drivers as an example, a driver may work for Uber exclusively on the weekends and is completely reliant on Uber for the cost of the ride, the identity of the passenger, and the means through which the purchase is made. In turn, Uber is completely reliant on its drivers to make money and Uber (through its app) and the driver must be closely coordinated to offer effective service. There are, of course, factors that may mitigate such a finding, such as a driver for also works for competitors or perhaps where a “driver” in fact employs multiple other drivers to perform the work on his or her behalf. The determination will always be somewhat uncertain and circumstantial. In the British context, it has been noted that the boundary between dependent and independent labour has “no universal dividing-line of general application.”⁴⁷ However, given the apparently strong factors alluding to a dependent contractor relationship, it is reasonable to assume that Canadian courts can and will find that gig workers are dependent contractors,

⁴⁷ Pyper at p. 5.

although the variety of business models in the gig economy precludes stating a general rule to that effect.⁴⁸

D. Consideration of the gig economy worker outside of Canada

The proliferation of the gig economy and its emphasis on categorizing workers as independent contractors is only just now starting to lead to adjudicative decisions on the topic. These decisions will be influential in Canada in both the courts and the legislatures. Recently, a decision of a United Kingdom employment tribunal was upheld on appeal, where the three member panel found that Uber drivers are “workers”, such that Uber is responsible for paying minimum wages and ensuring other employment standards apply.⁴⁹ Under section 230(3)(b) of the U.K. *Employment Rights Act 1996*, a worker includes an individual working under a contract for service who is not in business on his or her own account (known as “limb (b) workers”). These workers sit at the “legal dividing line between some employment rights and almost none”.⁵⁰ The tribunal held that it could not be denied that Uber is in business as a transportation provider, rather than as a technology company.⁵¹ Interestingly, despite its protestations that it is a technology company, Uber appears to have initially marketed itself as “UberCab” when it was entering the marketplace in 2009 and 2010.⁵² Uber’s position that drivers enter into a contract directly with the passenger was characterized by the tribunal as a “pure fiction”.⁵³ Specifically regarding with the (in Canadian terms) dependent contractor issue, the tribunal held that “it is plain to us that the agreement between the parties is to be located in the field of dependent work relationships; it is not a contract at arm’s length between two independent business undertakings.”⁵⁴ Notably, even when they are classified as workers, British Uber drivers will not

⁴⁸ Pyper at p. 26.

⁴⁹ *Uber B.V. and Others v Mr. Y Aslam and Others*.

⁵⁰ Pyper at p. 8.

⁵¹ *Uber B.V. and Others v Mr. Y Aslam and Others* at paras. 89-92.

⁵² Leena Rao, “UberCab Take The Hassle Out Of Booking A Car Service”, *TechCrunch* (5 July 2010) online: <<https://techcrunch.com/2010/07/05/ubercab-takes-the-hassle-out-of-booking-a-car-service/>>. See also Avery Harmans and Nathan McAlone, “The story of how Travis Kalanick built Uber into the most feared and valuable startup in the world”, *Business Insider* (1 August 2016) online: <<http://www.businessinsider.com/ubers-history>>.

⁵³ *Uber B.V. and Others v Mr. Y Aslam and Others* at para. 91.

⁵⁴ *Uber B.V. and Others v Mr. Y Aslam and Others* at para 94.

enjoy many of the same rights that employees do, including parental leave, unfair dismissal rights, notice periods, and more.⁵⁵

An American court also concluded that Uber drivers are presumptive employees, rather than independent contractors, because they perform services for the benefit of Uber. In *Douglas O'Connor v Uber Technologies Inc.*, the North Carolina District Court noted that the contracts between Uber and its drivers explicitly provide that the relationship is “solely that of independent contracting parties”. Notwithstanding that language, and despite Uber relying again on the argument that it is only a technological intermediary between potential riders and potential drivers, the court held: “Uber does not simply sell software; it sells rides. Uber is no more a ‘technology company’ than Yellow Cab is a ‘technology company’ because it uses CB radios to dispatch taxi cabs.”⁵⁶ Moreover, the court held that the drivers are an integral component of Uber’s business, that Uber exercises significant control over the amount of revenue earned, and that Uber exercises substantial control over the qualification and selection of its drivers. In the result, the court held “as a matter of law, that Uber’s drivers render service to Uber, and thus are Uber’s presumptive employees” (although this is not dispositive of the issue; rather, it gave rise to a rebuttable presumption that will be before the court at a later date).⁵⁷ Ultimately, the plaintiff settled for a \$100 million payment to the workers and an agreement that the workers would receive a hearing before an arbitrator prior to dismissal, although the court subsequently rejected the settlement as inadequate.⁵⁸

E. Consideration of the gig economy worker in Canada

The Canadian courts have not yet had much opportunity to determine whether gig economy workers are employees, independent contractors, or dependent contractors. In part this is because most gig businesses rely on large urban centres and less interventionist governments – both of which Canada is lacking when compared to its southern neighbour.⁵⁹ The Canadian legal

⁵⁵ Pyper at p. 4.

⁵⁶ *Douglas O'Connor v Uber Technologies Inc.*, 82 F.Supp.3d 1133 (2015) at para. 44.

⁵⁷ *Douglas O'Connor v Uber Technologies Inc.* at para. 53.

⁵⁸ Miriam Cherry and Antonio Aloisi, “‘Dependent Contractors’” in the Gig Economy: A Comparative Approach” (2017) 66:3 American University Law Review 635 at p. 644.

⁵⁹ Cherry and Aloisi at p. 654.

community was anticipating guidance from the outcome from *Heller v. Uber Technologies Inc.*,⁶⁰ where the plaintiff Mr. Heller was seeking \$400 million in damages from Uber in a proposed class action for Uber's alleged failure to adhere to Ontario's *Employment Standards Act, 2000*, on the basis of Uber drivers being employees. As discussed below, this class action was recently stayed by the courts in favour of arbitration, leaving the Canadian legal landscape on the status of gig workers uncertain.

The court found that Uber drivers enter into a contractual relationship with an Uber entity based in the Netherlands whereby drivers must acknowledge that they are not in an employment relationship with Uber. The agreements periodically change and the driver must accept the changes to continue using the service. Dispute resolution services are initially provided by a support centre in the Philippines and can be escalated to a support centre in Chicago. If need be, a dispute will be escalated to a legal team in the Netherlands. The service agreement provides for mediation pursuant to the International Chamber of Commerce's mediation rules, followed by arbitration pursuant to their rules of arbitration.

The Supreme Court of Canada has previously held that, absent legislative language to the contrary, courts must enforce arbitration agreements.⁶¹ Courts should only refuse to refer a matter to arbitration if the matter clearly falls outside of the arbitration agreement; any restriction of the parties' freedom to arbitrate must be found in legislation.⁶² Under the "competence-competence principle", where there is an arguable or *prima facie* case that the arbitrator has jurisdiction a court should defer the issue of jurisdiction to the arbitrator and stay its own proceedings.⁶³ While the plaintiff acknowledged that he entered into an arbitration agreement, the parties disputed which arbitration statute applied. For the *International Commercial Arbitration Act, 2017* to apply (as Uber argued), the relationship between the parties must be "commercial". The plaintiff argued that he was an employee and therefore the *Arbitration Act, 1991* applied. However, the court noted that the competence-competence principle applies to

⁶⁰ *Heller v. Uber Technologies Inc.*, 2018 ONSC 718.

⁶¹ *Seidel v. TELUS Communications Inc.*, 2011 SCC 15.

⁶² *Heller v. Uber Technologies Inc.* at para. 51.

⁶³ *Heller v. Uber Technologies Inc.* at para. 52.

either statute.⁶⁴ The plaintiff argued that the matter dealt with an employment relationship, which was beyond the jurisdiction of the arbitrator, but as noted by the court, the *Employment Standards Act, 2000* does not preclude arbitration and the very issue of whether employment claims are “arbitrable” is an issue subject to the competence-competence principle.

The plaintiff also argued that the agreement between him and Uber was unconscionable, the elements of which require (1) pronounced inequality of bargaining power; (2) a substantially improvident or unfair bargain; and (3) the defendant knowingly taking advantage of the vulnerable plaintiff.⁶⁵ Here, while there was undoubtedly inequality in bargaining power, the court held that Uber had not extracted an improvident agreement or preyed upon Uber drivers by inserting an arbitration clause.⁶⁶ Further, the court rejected the plaintiff’s argument that the arbitration clause was an illegal contracting out of employment legislation. Given the strong legislative and common law direction that arbitration clauses should be enforced, other than where a dispute clearly falls outside of the scope of that clause, there was nothing illegal about the contract. In the result, the action was stayed pending resolution by the arbitrator. The court did note that there may be an employment relationship despite the express language to the contrary in the Uber service agreements: “[w]hether a worker is an employee, independent contractor, or dependent contractor is a fact-based determination that depends upon a variety of factors and not just the written or oral agreement between the parties.”⁶⁷ However, the court went on to clarify that some employment relationships are also commercial agreements and appropriate for arbitration (collective agreements being an obvious example).

The decision in *Heller v. Uber Technologies Inc.* may be confineable to the narrow issue of whether a court has jurisdiction to stay an action where parties have agreed to submit their dispute to arbitration. In fact, the court expressly framed its decision in this way.⁶⁸ However, the decision likely has broad-reaching implications that are counter to the protective policies behind employment law. The practical effect of the court’s decision is that each individual Uber driver in Ontario with a dispute about employee status or other employment issues, such as payment of

⁶⁴ *Heller v. Uber Technologies Inc.* at para. 52.

⁶⁵ *Heller v. Uber Technologies Inc.* at para. 68.

⁶⁶ *Heller v. Uber Technologies Inc.* at para. 70.

⁶⁷ *Heller v. Uber Technologies Inc.* at para. 47.

⁶⁸ *Heller v. Uber Technologies Inc.* at para. 79.

wages, parental leave, vacation time, and so on, will have to engage in arbitration in the Netherlands. On its face, it seems unlikely that many Uber drivers have the resources (not to mention the time or inclination) to do so, despite the clear policy choice of Canadian legislatures and courts that remedial employment law should be given full effect to protect vulnerable workers against more powerful businesses. In the result, while the narrowly-construed application to arbitration clauses may be legally correct, the decision has the troubling practical impact of ousting the employment standards implemented in Ontario. The outcome of this case suggests that a putative employer can insert an arbitration clause into an agreement that, practically speaking, blockades meaningful access to remedial employment legislation so long as it does not coerce the worker into entering into the agreement. Further, the decision challenges the policy behind class actions, which are also aimed at providing access to justice to those who otherwise would not due to the costs of doing so. That being said, counsel for the plaintiff has indicated that an appeal is underway, so it remains to be seen whether the Ontario courts will provide a detailed analysis on Uber drivers' employment status in the near future.

F. Applicable regulations enforced in Canadian courts

While Canadian courts have yet to rule definitively on the proper characterization to be afforded gig workers, there has been Canadian jurisprudence dealing with the regulatory implications of gig economy businesses.

In *Toronto (City) v. Uber Canada Inc.*, 2015 ONSC 3572, the City of Toronto sought an injunction requiring Uber to apply for a licence to operate either as a taxicab broker or limousine service company, on the basis that Uber accepts calls or requests for taxicabs or limousines. The court found that the existing regulatory regime did not capture the Uber business model – Uber simply does not act as a taxicab broker or limousine service company in the manner contemplated by the regulations. Notably, the court emphasized that policy choices about how to respond to the gig economy are best dealt with politically and that it is open to the City to implement more robust regulations in an attempt to capture Uber's activities.

In a decision arising out of Edmonton, the City applied for an interlocutory injunction enjoining Uber from conducting business in the City without a valid business licence or taxi broker licence pursuant to its bylaws.⁶⁹ Uber had met with City officials in 2014, at which time the City informed Uber that the City considered Uber to be a taxi broker (requiring a licence) and that its business model violated City bylaws. Notwithstanding that meeting, Uber began providing services in Edmonton. The court found that Uber Canada (the named defendant) did not appear to receive a fee in relation to any rides in the City nor did it own the servers in California. Further, there was no evidence that the Canadian affiliate was controlled by the Netherlands affiliates or vice versa. In any event, the evidence was insufficient to establish that Uber Canada was carrying on business in the City, as contemplated by the bylaw, other than providing only limited online advertising and support. Finally, the court found that Uber Canada does not cause drivers to breach the bylaws by providing the app for download; indeed, Uber Canada does not directly communicate with riders or drivers. Ultimately, the court held that the City was asking the court to take judicial notice of the fact that drivers who download and use the driver's app are operating in contravention of the City's bylaws and therefore the Canadian company supporting and advertising the driver's app also be found to be in contravention of the City's bylaws. The court found that the City failed to make out its evidentiary obligations and denied the application. A similar bylaw infringement case arose in Mississauga, although the charges were ultimately stayed for the City's failure to commence a trial within a reasonable time.⁷⁰

In *Abdullah v. Maziri*,⁷¹ Ottawa taxicab drivers and their union sought an injunction against Uber drivers to prevent alleged economic damage arising from the Uber drivers' alleged unlawful operation of taxicabs contrary to City bylaws. In Canada, the test for an injunction requires that the applicant must present evidence that it will suffer irreparable harm in the absence of injunctive relief. The court found that the taxicab drivers did not show that they would suffer irreparable harm that could not be compensated by monetary damages because it appeared monetary damages would suffice, the alleged losses were too speculative, only one taxicab driver had provided evidence giving him standing before the court, and the City had

⁶⁹ *Edmonton (City) v. Uber Canada Inc.*, 2015 ABQB 214.

⁷⁰ *Mississauga (City) v. Uber Canada Inc.*, [2016] O.J. No. 6229 (Ont. SCJ).

⁷¹ 2016 ONSC 2168.

provided evidence that it was obtaining an expert report to analyze the impact of Uber before deciding what approach to take. Further, the balance of convenience between the parties did not militate in favour of granting an injunction. In the result, the application was dismissed.

Rather than pursuing Uber, Ottawa's taxicab drivers and taxi brokers successfully certified a class action against the City in *Metro Taxi Ltd. v. Ottawa (City)*.⁷² The plaintiffs argued that the City is responsible for damages suffered as a result of the City's alleged negligent enforcement of its bylaws against Uber drivers and subsequent bylaw amendment allowing Uber to operate in the City.

In the accommodation industry, a Vancouver strata council has taken steps to commence class action proceedings against Airbnb, alleging that Airbnb has rented out properties throughout British Columbia and Canada without consent of the property owners⁷³, while a Quebec putative class action claims that Airbnb's service fees violate Quebec consumer protection legislation prohibiting a merchant from charging a higher price than advertised.⁷⁴

G. Disruption and the Canadian response

As the court noted in *Toronto (City) v. Uber Canada Inc.*, the gig economy is not the first instance of disruptive market forces – the arrival of the private automobile in the early twentieth century was a disruptive change in the technology of the era.⁷⁵ At that time, the government determined that vulnerable consumers urgently needed protection and responded with regulations that controlled prices, mandated licences, and placed strict limits on the numbers of licences issued.⁷⁶ With the introduction of the gig economy and its new disruptive technologies, cities now find themselves

⁷² 2018 ONSC 7468.

⁷³ Michelle Ghossoub, "Yaletown condo strata files class-action lawsuit against Airbnb", *CBC News* (3 November 2017) online: <<http://www.cbc.ca/news/canada/british-columbia/yaletown-condo-strata-files-class-action-lawsuit-against-airbnb-1.4385775>>.

⁷⁴ Kevin Mio, "Quebec lawyer spearheading class action against Airbnb over 'service fees' (28 August 2017) online: <<http://montrealgazette.com/news/local-news/airbnb-fees-contravene-consumer-protection-act-quebec-lawyer-claims>>.

⁷⁵ *Toronto (City) v. Uber Canada Inc.*, at para. 4.

⁷⁶ *Toronto (City) v. Uber Canada Inc.*, at para. 4.

...caught between the Scylla of the existing regulatory system, with its numerous vested interests characterized by controlled supply and price, and the Charybdis of thousands of consumer/voters who do not wish to see the competition genie forced back into the bottle now that they have acquired a taste for it.⁷⁷

Gig economy businesses are often lauded for this “disruptive innovation” of the sectors in which they operate. Disruption in this context refers to a process where a small company with few resources successfully challenges established businesses by targeting overlooked segments – once the new company is successful enough that the mainstream companies start adopting the new company’s offerings, disruption has occurred.⁷⁸ The concept of disruption is often held out as something to strive for, as evidenced by the multitude of articles explaining how to achieve disruption or discussing disruption’s benefits. For the most part, what disruption actually involves is avoidance of the cost of compliance with regulations governing the traditional industry in question.

The law has evolved over centuries to both protect employees needing state intervention and to regulate various industries. Common law principles and regulations do not arise in a vacuum. Instead, courts and legislatures have identified that employees are vulnerable and need certain protections built in. To that end, labour standards should ensure that no matter how limited a worker’s bargaining power, that worker should work in conditions that Canadians regard as, at a minimum, “decent”.⁷⁹ The best prospect for ensuring compliance with these labour standards is to undertake programs in cooperation with employers – a difficult undertaking in the virtual gig economy,⁸⁰ which is the latest, and most extreme, manifestation of the rise of so-called “precarious work” that combines relatively low pay with an unstable income source, few or no benefits, limited legal protections, and uncertain prospects for future advancement or advantages.⁸¹ One commentator opined that this new economy “clearly sets in

⁷⁷ *Toronto (City) v. Uber Canada Inc.*, at para. 9.

⁷⁸ Clayton M. Christensen et al., “What is Disruptive Innovation?”, *Harvard Business Review* (December 2015) online: < <https://hbr.org/2015/12/what-is-disruptive-innovation>>.

⁷⁹ H.W. Arthurs, “Fairness at Work: Federal Labour Standards for the 21st Century”, *Report of the Federal Labour Standards Review*, (Gatineau, QC: Government of Canada, 2006) at p. x.

⁸⁰ Arthurs, *Fairness at Work* at p. xiv.

⁸¹ Arthurs, *Fairness at Work* at p. 27.

motion pressures that threaten the long-established rights of workers to decent working conditions.”⁸²

Indeed, once the novelty of the online interface is swept aside, arguably these gig economy businesses are not, in fact, disruptive in an innovative sense and the business model is recognizable as the well-established labour broker.⁸³ The debate over the employment status of a worker in a labour broker scheme is nothing new to Canadian law. The issue often arises in the construction context where a construction company may provide the materials and equipment, but a labour broker nominally provides personnel and deals with payroll. The leading case in Canada on determining who the true employer is in circumstances such as these, *York Condominium Corporation*, [1977] OLRB Rep. October 645, sets out seven factors that must be taken into consideration:

1. The party exercising direction and control over the employees performing the work;
2. The party bearing the burden of remuneration;
3. The party imposing discipline;
4. The party hiring the employees;
5. The party with the authority to dismiss the employees;
6. The party who is perceived to be the employer by the employees;
7. The existence of an intention to create the relationship of employer and employees.

The gig economy model and its “automated brokers” are simply another way in which putative employers are shifting potential costs and risk to the workers by avoiding being those workers’ employers.⁸⁴ The “true employer” test developed in the labour law context is one example of how the common law can robustly deal with employers’ attempts to sidestep statutory and other obligations that the state has determined ought to apply to workers. The free

⁸² Arthurs, *Fairness at Work* at p. 28.

⁸³ Fay Faraday, “Demanding a Fair Share: Protecting Workers’ Rights in the On-Demand Service Economy”, Canadian Centre for Policy Alternatives (July 2017) at p. 8.

⁸⁴ Faraday at p. 9.

market has been found to prove inadequate for ensuring industries implement protections that our society has deemed to be important. Indeed, as noted above, the very reason that platforms such as Airbnb and Uber are successful is that they can offer services against established competitors who adhere to state requirements, but without the associated costs of paying unionized workers or minimum wages, meeting regulatory compliance such as permitting, health and safety standards, or being subject to zoning requirements and restrictions.⁸⁵ As government and the courts adapt to the gig economy and ensure that their requirements are met, these new employers may not be able to pass on the new costs to customers or to absorb the costs, thereby causing the businesses to fail or perhaps take alternative steps such as increasing reliance on technology (*e.g.*, Uber’s vision to move to a driverless fleet of cars).⁸⁶

Just as these automated brokers themselves are really just old industries through new interfaces, the gig economy’s efforts to avoid retaining employees in favour of independent contractors is nothing new, as discussed earlier. For decades, Canadian courts and commentators have noted that dependent contractor status is critical to ensuring that workers falling within an intermediate category are afforded the protections that are deemed important. From businesses’ point of view, certainty with regards to the classification of these workers will only provide more stability and reduce litigation costs incurred to make the determination.⁸⁷ Canadian law has recognized now for decades that small business people who are effectively wholly dependent on the patronage of a larger company, with little or no control over that company’s business, were often treated unjustly by falling outside of traditional notions of the labour relationship.⁸⁸ Professor Arthurs’ concept of “dependent contractors” has been firmly established in Canadian law since the 1970s, both in jurisprudence and legislation.⁸⁹ Consequently, it is reasonable to assume that this pre-existing notion can be adapted to achieve the same goals for gig economy workers.⁹⁰

⁸⁵ Teresa Scassa, “Sharing Data in the Platform Economy: A Public Interest Argument for Access to Platform Data” (2017) 50 UBC L Rev 1023 – 1079 at para. 12.

⁸⁶ Arthurs, *Fairness at Work* at p. 29.

⁸⁷ Cherry and Aloisi at p. 646.

⁸⁸ Cherry and Aloisi at p. 652.

⁸⁹ Cherry and Aloisi at p. 653.

⁹⁰ Cherry and Aloisi at p. 655.

In addition, in our view there will be significant financial reasons for governments to legislate this new application of the dependent contractor to various types of employment and taxation laws. From a financial perspective, the implications of market disruption go beyond the so-called disruption to industry and include potentially severe negative repercussions to current regulatory and tax regimes.⁹¹ From an employer's point of view, there are a variety of reasons that it may be preferable to deal with a contractor rather than an employee: the obligation to comply with social welfare and tax statutes, and exposure to vicarious liability or consumer complaints, depends upon an employment relationship, while a contractor relationship provides the benefit of increased sales or faster service from a worker whose income depends on his or her own exertions rather than a wage.⁹² With accommodation services, for example, owners renting through a platform such as Airbnb may not contribute to a tax base, either through tax avoidance or the fact that government levies (*i.e.*, tourism taxes) are not collected or remitted to authorities.⁹³ Given that Airbnb hosts in Vancouver, Toronto, and Montreal earned a collective \$430 million in 2016, the economic implications of not recovering on taxes is significant.⁹⁴ On the employment front, in Canada, traditionally income taxes comprise the largest proportion of state revenue and are the most effective redistributive tax instrument in the country.⁹⁵ By shifting more workers from "employees" to "independent contractors", the state is losing its most important source of revenue – income tax remittances from employers. Further, because many of these gig economy online platforms are based offshore, they pay no corporate income tax in Canada, despite getting all the benefits of Canadian infrastructure, our stable economy, our workers, and so on. Costs, such as health insurance and taxes, that are shifted onto the workers (who may not report all income) may increasingly be unrecoverable.⁹⁶

While perhaps a small amount of lost revenue would not warrant such a hard look at adapting employment law principles to a class of workers, the gig economy has moved well past the original concept of the "sharing economy". The initial iteration, where a student might rent

⁹¹ Scassa at para. 2.

⁹² Arthurs, *The Dependent Contractor* at p. 96.

⁹³ Scassa at para. 12.

⁹⁴ David Wachsmuth, et al., "Short-term cities: Airbnb's impact on Canadian housing markets" *A report from the Urban Politics and Governance research group School of Urban Planning McGill University* (2017) at p. 16.

⁹⁵ Fudge et al.

⁹⁶ Alex Kirven, "Whose Gig is it Anyway? Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy" (2018) 89 U. Colo. L. Rev. 249.

out his spare room during a popular weekend in the city or a worker might pick up a passenger or two before heading home after work, is long gone. In its place, we have seen these platforms leveraged by savvy entrepreneurs or pre-existing market players who can dominate a market to the detriment of the local population. One recent Canadian study found that roughly 10 percent of Airbnb hosts earned approximately 50 percent of all revenue – one operator in Montreal had over 100 listings and earned millions of dollars each year.⁹⁷ In other words, operators are running virtual hotels or “ghost hotels”, without having to adhere to applicable regulations.⁹⁸ One company in Montreal has 184 active Airbnb listings earning a collective \$2.4 million.⁹⁹ This is also having negative impacts on housing availability and housing prices.¹⁰⁰ In Montreal, Toronto and Vancouver, as many as 13,700 units of housing have been removed from the rental pool and in some areas conversion to Airbnb rental units is outpacing new home construction.¹⁰¹

One report has suggested imposing new regulations that would include requiring that hosts must actually share their homes, properties cannot be rented for a large amount of the year, and compel platforms to ensure enforcement.¹⁰² Similar approaches have worked elsewhere. In Amsterdam, following an agreement between the City and Airbnb, bookings on Airbnb were automatically blocked once 60 days of booking had been reached.¹⁰³ Canadian jurisdictions are slowly and cautiously following suit. In British Columbia, an all-party Standing Committee of the provincial legislature tasked with examining and making recommendations on ride-sharing released a report entitled “Transportation Network Companies in British Columbia in February 2018.”¹⁰⁴ The Committee agreed that gig economy transportation enterprises should be permitted to operate in the province, but within a regulatory regime. Notable recommendations included requiring that these companies meet accessibility standards, that regulations must consider the impact on the taxi industry including taxi exclusivity at taxi stands, hotel queues, and street-

⁹⁷ Sylvain Comeau, “Airbnb: Not good for the neighbourhood?” *McGill News Alumni Magazine* (February 2018) online: <<http://mcgillnews.mcgill.ca/s/1762/news/interior.aspx?sid=1762&gid=2&pgid=1891>>.

⁹⁸ Wachsmuth, et al. at p. 28.

⁹⁹ Wachsmuth, et al. at p. 28.

¹⁰⁰ Comeau.

¹⁰¹ Wachsmuth, et al. at pp. 2-3.

¹⁰² Wachsmuth, et al. at p. 45.

¹⁰³ Wachsmuth, et al. at p. 46.

¹⁰⁴ Report of the Select Standing Committee on Crown Corporations, “Transportation Network Companies in British Columbia” (15 February 2018) online: <https://www.leg.bc.ca/content/CommitteeDocuments/41st-parliament/2nd-session/CrownCorporations/Report/SSC-CC_41-2_Report-2018-02-15_Web.pdf>.

hailing, and that regulations should require disclosure of pricing before the trip and consider implementing caps on rates. The report also recommends that the government ensure that ICBC (the auto insurance provider in the province) provides appropriate insurance products for the industry. Finally, the report recommends that appropriate licensing be implemented, perhaps by licensing the company and then making the company responsible for its drivers meeting provincial safety criteria. Interestingly, the Committee considered but steered clear of determining whether drivers would be employees or independent contractors. The Committee did note that the companies “need to be monitored for their labour practices, including the degree to which they set minimum commitments or hours” and that the companies should be required to provide data on work hours and income.¹⁰⁵

Elsewhere in the country, Quebec legalized and imposed constraints on short-term rentals in 2016, while Calgary implemented a bylaw directed at Uber and its competitors just over a year ago following an injunction brought by the City preventing Uber drivers from operating in 2015; various other jurisdictions across Canada are proposing requirements or considering reports on gig economy providers as well.¹⁰⁶ Governments face difficulties in regulating these gig platforms, in part due to the challenges in accessing the data to do so.¹⁰⁷ Indeed, the first comprehensive study of the impact of Airbnb on Canadian cities admits it relied heavily on data “scraped” from Airbnb’s public website.¹⁰⁸ British Columbia’s recent all-party report on ride-hailing appears to have picked up on this data deficit, as it recommended that the provincial government require companies such as Uber and Lyft to provide data to government for monitoring purposes, including trip fares, drivers’ hours and earnings, and wait times.¹⁰⁹

Simply put, governments in Canada have and will recognize the need to regulate the gig economy. While the employment law policy reasons cited above are undoubtedly incentive enough, financially it would appear to be in governments’ interests to ensure that gig workers are not independent contractors. The ever-increasing scope of the gig economy means that a larger potential source of revenue is not being reported and collected by government. Particularly given

¹⁰⁵ Transportation Network Companies in British Columbia at p. 9.

¹⁰⁶ Wachsmuth, et al. at p. 6.

¹⁰⁷ Scassa at para. 1.

¹⁰⁸ Wachsmuth, et al. at pp 7-8.

¹⁰⁹ Transportation Network Companies in British Columbia at p. 20.

the transient and part-time status of many workers in the industry, it is difficult and likely not cost-effective to pursue individual workers for income tax or contributions to the social safety net. This is particularly problematic in a country like Canada, with its historical inclusion of social ideals such as national healthcare. If the trend continues and the world continues to move towards an expanding gig economy, Canada risks decreasing the import of the Canada Pension Plan or other similar state-run social programs. Just as the courts and legislatures have adapted to the power imbalance arising from characterizing dependent workers as independent contractors, the government will no doubt adapt to this new risk of lost revenue to ensure that tax and other payments continue. The obvious and most efficient solution is to target the gig businesses, rather than the workers. Once governments realize the risk of losing income tax and lost payment into the social welfare programs, it must be expected that they will react to ensure revenue is collected. In our view, the easiest and most efficient way is to ensure that the “automated brokers” are responsible for remitting income tax, occupational health and safety payments, and so on.

III. CONCLUSION

Advocates of the gig economy laud the new businesses’ ability to “disrupt” existing industries. However, that disruption may perhaps more aptly be understood as an undercutting of existing services through a disregard of societal structures put in place to protect vulnerable consumers and workers. The online platforms themselves may be novel, but the core concept of shifting risk onto consumers and workers through (effectively) a labour broker or a (advertent or inadvertent) mischaracterization of workers as independent contractors rather than employees are not new phenomena. Governments and the courts have consistently crafted new approaches to deal with these industry efforts. Indeed, it is imperative that they do so in order to ensure that needs of society and the state are met, including collecting tax revenue, ensuring safety or environmental goals are met, and protecting consumers. While it is too early to tell what the Canadian response overall will be, it is our view that there is no doubt that Canadian law will continue to adapt to ensure that these goals are achieved in response to the increasingly fast-paced changes brought by technology and the gig economy. In the result, we can expect to see courts and governments adapt to ensure that the gig economy treats workers in the manner

contemplated by hard-fought victories for Canadian workers' rights and does not drastically reduce valuable government revenue through a shift away from employees to independent contractors. What is more difficult to ascertain is whether these "automated brokers" – the Ubers, Airbnbs, and so on – will prove to be robust enough to deal with the cost implications of these changes. Indeed, the disruption model upon which the gig economy is predicated operates on the margins of regulations and employment standards legislation that pre-existing competitors are subject to. Notwithstanding the risk that gig economy enterprises in Canada may struggle to coexist with governmental and court responses, and may even fail, we speculate that Canadian law will forge ahead in the spirit of the "dependent contractor" concept articulated by Professor Arthurs. Our governments will be motivated to ensure that workers continue to enjoy the rights afforded to them under Canadian employment law and that the social safety net remains robust by ensuring that the gig economy pays its fair share.