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**BRAVE  
NEW  
WORK**

**KEY ISSUES SERIES**

# **OLD GIGS, NEW GIGS:**

**Are Courts and Legislators Reinterpreting  
an Age-Old Debate for the New World of Work?**

CAROLE PIOVESAN  
SEPTEMBER 2019

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1400 - 130 Albert Street  
Ottawa, ON, Canada, K1P 5G4  
613.238.7858

ISBN: 978-1-988886-75-6

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# ABOUT BRAVE NEW WORK

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## ABOUT THE AUTHOR



### **CAROLE PIOVESAN**

Carole is a partner and co-founder of INQ Data Law in Toronto, Canada, where her practice concentrates on privacy, cyber readiness, data governance and artificial intelligence. She regularly counsels clients on a wide range of matters related to privacy, data protection, data governance, ethical AI and risk management for AI adoption.

Carole plays an active role in shaping national data policy and standards. She is the co-chair of the data governance working group for the Data Governance Standardization Collaborative at the Standards Council of Canada. She is a member of the Taskforce on AI for Health at the Canadian Institute for Advanced Research and an advisor to the Law Commission of Ontario's working group on AI as well as the AI Impact Alliance. In 2018, Carole was appointed by the federal Minister of Innovation to be one of six Digital Leaders in the national data and digital transformation consultations. As a Digital Leader, she helped to inform the federal government's first national Digital Charter that was announced on May 21, 2019.

Carole is co-editing a book on AI and law that will be published by Thomson Reuters in 2020. She regularly speaks and writes on topics related to data law and artificial intelligence.

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# EXECUTIVE SUMMARY

**Whether in transportation, food delivery or graphic design, the emergence over the past decade of digital platforms that connect sellers of piecemeal goods and services with purchasers—known as the “gig economy”—is spurring an important debate about the definition of work.**

For at least two centuries, parties have battled in the streets, in legislatures and in courts to shape the relationship between employer and employee and the obligations that flow from it. Now that fight has gone digital. Courts and legislatures in Canada and around the world are deciding whether your Lyft driver is an independent contractor or an employee. The classification is a big deal.

Whether gig workers are defined as employees or contractors determines their rights and the obligations of employers. If classified as employees, workers are entitled to statutory employment protections such as minimum wage and specific termination rights, which independent contractors do not receive. Traditional employee status gives workers greater job stability and protection—at a cost to employers.

In this respect, classification has an important bearing to the sustainability of certain companies, which may not have a viable business model if those providing the services—the workers—are found to be employees. In its recent filing for an initial public offering, the ride-sharing company Lyft disclosed that the classification of drivers as employees “may require us to significantly alter our existing business model” and warned of potential “monetary exposure.”<sup>1</sup>

The gig economy is likely here to stay. People value the convenience of its services, on the one hand, and because platform companies are valued at billions of dollars, on the other. For workers, fast and easy access to piecemeal employment can bridge periods of un- or underemployment. For buyers, these platforms provide convenient, on-demand marketplaces of vetted vendors. Together, these factors are forcing a debate about whether the gig economy should reshape the way we think about employment classification today.

This paper surveys the current state of the gig economy and considers how some legislatures, courts and tribunals in North America are handling employment classification of gig workers. In this evolving area of company-worker relationships, it has fallen to courts and tribunals to interpret existing laws, with legislatures slow to take a position.

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<sup>1</sup> United States Securities and Exchange Commission, May 14, 2019. ‘Form 10-Q: Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, Lyft, Inc.’, p. 45.[https://www.sec.gov/Archives/edgar/data/1759509/000156459019019135/lyft-10q\\_20190331.htm](https://www.sec.gov/Archives/edgar/data/1759509/000156459019019135/lyft-10q_20190331.htm).

Unsurprisingly, given the size and power of the gig economy, there is little consensus on the path forward. This paper considers the nature and scope of the gig economy with these questions in mind:

- Is the gig economy a new way of characterizing old relationships or a new way of organizing new relationships?
- Should Canada advance a third way for gig companies to support those producing the work?
- Could that involve classifying gig workers as contractors while new legislation allows (or even requires) companies to offer social benefits and protections, without catapulting them up the classification ladder?



# WHAT IS THE GIG ECONOMY?

“Gig economy” generally describes virtual (app- or web-based) platforms that connect sellers and buyers of goods and services, where the platform controls much of the transaction process.<sup>2</sup> This new economy meets demand for just-in-time, task-oriented labour. Jiffy on Demand, Uber, Handy, Skip the Dishes and Etsy are a few examples of companies that have created virtual marketplaces to connect people seeking certain goods or services with those offering them.

The gig economy touches every sector, including highly skilled professional services. A recent study by the consulting firm McKinsey & Company found that knowledge-intensive industries and creative jobs are among the fastest-growing segments of the gig economy.<sup>3</sup>

The value proposition of the gig economy is fundamentally in the way the exchange is coordinated.

For **platforms** (e.g. Skip the Dishes), the purpose is to create an online space where quality vendors and interested purchasers can meet. The platform provides predictable pricing, ease of transaction, consistent look and feel of service, and recourse for complaint. It enables the vetting of sellers and buyers and handles the transaction process, including payment.<sup>4</sup> The platform itself creates the virtual marketplace and benefits from the volume of exchange that occurs within.

For **sellers** (e.g. delivery drivers or the new gig-workers), the flexibility of these opportunities is often referenced as one of the most attractive features. A worker can sell artwork on Etsy, paint walls through Jiffy, drive an Uber and work as a freelance writer — all in the same week and on their own schedule. The barriers to entry are low and frequency of participation is flexible to remain in the marketplace. The appeal is that sellers are their own bosses and run their own micro-businesses selling piecemeal goods or services in a bespoke virtual marketplace. Back-end administration is managed by the platform. Some have also argued that these platforms, which are highly data-driven, traceable and include built-in accountability and safety

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<sup>2</sup> U.S. Department of Labor. 2018. Monthly Labour Review: Electronically Mediated Work: New Questions in the Contingent Worker Supplement. <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>

<sup>3</sup> Manyika, J., Lund, S., Bughin, J., Robinson, K. et al. 2016. Independent Work: Choice, Necessity, and the Gig Economy. <https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>. McKinsey Global Institute.

<sup>4</sup> De Laiglesia, J. and Tassot, C. June 22, 2016. The Gig Economy. <https://oecd-development-matters.org/2016/06/22/the-gig-economy/>. OECD Development Matters. See also: European Observatory of Working Life. March 23, 2018. Gig Economy. <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/gig-economy>.

mechanisms such as rating systems and location sharing, promote safety for women (as sellers and buyers) and thus encourage their participation.<sup>5</sup>

However, as micro-business owners under existing employment laws, these workers are not entitled to the health and wellness benefits that they would be afforded as employees. They arguably lack the necessary control to run their operation in an independent manner. For instance, gig workers often do not exert control over the price of each transaction or have influence over target markets or customers. This means a gig worker's control over revenue-generation decisions is limited to the volume of work he or she can provide and does not extend to other competitive features such as quality or value-added services. Control over essential aspects of a business is an important criterion for deciding the status of the employment relationship at law. The less control the worker has over key aspects of the business, the more likely the relationship will be considered that of an employer and employee.

For **buyers**, the most compelling features of the gig economy are the convenience of online, consistent, on-demand, task-based services with brand recognition from sellers who are vetted by the platform and by other users. These services also promote competition to create more diversified and tailored options for buyers. A 2015 paper by Canada's Competition Bureau applauded the benefits of companies like Uber bringing competition to the taxi industry. The paper concluded with: "Consumers can expect to enjoy the benefits of this increased competition, including lower prices, greater convenience and availability, and better quality of service through improved technology. With the right balance of competition and regulation, passengers can expect that the industry will ensure safe, competitive, and innovative transportation options in the future."<sup>6</sup>

As noted, the gig economy has sparked a debate about the legal relationship between platforms and sellers: should sellers be regarded as employees or independent contractors? Controversy has arisen primarily in those societies where significant strides have been made over the past century to organize and formalize economic activity and reduce employment insecurity inherent to piecemeal work.

Esther Lynch, Deputy General Secretary of the European Trade Union Confederation, succinctly captured the heart of the matter when she noted: "The gig economy sounds cool but in reality many of these jobs just offer a fast route back to the problems faced by piece workers and day labourers of 100 years ago."<sup>7</sup>

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<sup>5</sup> Csanady, A. April 26, 2016. "If the Uber Debate is Really about Safety, Why are Women's Voices being Sidelined?" <https://nationalpost.com/news/toronto/ashley-csanady-if-the-uber-debate-is-really-about-safety-why-are-womens-voices-being-sidelined> National Post.

<sup>6</sup> Competition Bureau Canada. Nov. 26, 2015. "Modernizing Regulation in the Canadian Taxi Industry." <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/04007.html>. Government of Canada.

<sup>7</sup> European Trade Union Confederation. Sept. 28, 2016. 'The Commission Needs to get Serious about Tackling New Forms of Undeclared Work', <https://www.etuc.org/en/pressrelease/commission-needs-get-serious-about-tackling-new-forms-undeclared-work#.WiA3qXmBrZ4>

Advocates of gig companies counter that the way the relationship is structured allows workers to control key aspects of their work life, such as choosing how much to participate.

## UNDERSTANDING WHY PEOPLE PARTICIPATE IN THE GIG ECONOMY

Before diving deeper into the nature of the debate, a brief consideration of the scope of the gig economy is warranted. Who participates as sellers and why?

It is difficult to estimate the number of gig workers. This is largely because there is no clear definition of what makes gig work or gig workers. The definition matters to assessing the number of gig participants. Researchers Lawrence Katz and Alan Krueger calculated that the number of people using “alternative work” as their primary work increased by 50% between 2005 and 2015, accounting for “all of the net employment growth in the US economy.”<sup>8</sup> Some sources set the number of gig workers as high as 150 million in North America and Western Europe, or about 20 to 30% of the working age population.<sup>9</sup> Whatever the figure, the number of gig workers is big enough to warrant an assessment of the social, economic and legal implications of participation in this new economy.

### The Gig Economy in Canada

A 2019 Bank of Canada study suggests that the gig economy may be on the rise in Canada, citing some correlation between labour market slack and gig work.<sup>10</sup> The study finds that participants in the gig economy tend to be young (between 18 and 24 years old) and enter the gig economy as a means to earn extra money.<sup>11</sup> Approximately 31% of respondents who participated in the gig economy were described as “prime-age individuals,” defined as those aged 25 to 54.

Policymakers need to know the various reasons for participating in gig work. The gig economy offers opportunities to activate idle capital (in other words, get workers back to work), expand markets by offering global work platforms and increase the efficiency of otherwise traditional and more stagnant economies.<sup>12</sup> In Canada, 37% of gig workers entered the gig economy to earn extra income after suffering a job loss,

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<sup>8</sup> Cited in Berins Collier, R., Dubal, V.B., and Carter, C. 2017. Labor Platforms and Gig Work: The Failure to Regulate. IRLE Working Paper No. 106-17. <http://irle.berkeley.edu/files/2017/Labor-Platforms-and-Gig-Work.pdf>. Institute for Research on Labor and Employment.

<sup>9</sup> Petriglieri, G., Ashford, S.J., and Wrzesniewski, A. 2018. Thriving in the Gig Economy. <https://hbr.org/2018/03/thriving-in-the-gig-economy>. Harvard Business Review.

<sup>10</sup> Kostyshyna, O. and Luu, C. 2019. The Size and Characteristics of Informal (“Gig”) Work in Canada. Staff Analytical Note 2019-6, Canadian Economic Analysis Department. Bank of Canada.

<sup>11</sup> *Ibid.*, p. 3-4.

<sup>12</sup> De Laiglesia, J. and Tassot, C. June 22, 2016. The Gig Economy.

reduced hours, reduced pay or stagnant wages.<sup>13</sup> Gig workers also reportedly entered the gig economy to acquire new skills and experience.<sup>14</sup>

A 2018 study by the Bank of Montreal estimates that 2.18 million Canadians could have been categorized as gig workers in September 2017.<sup>15</sup> The report defined gig workers as “temporary or contracted employment, where an on-demand, freelance or contingent workforce is becoming the norm. A gig can be defined as any job, especially one of short or uncertain duration.” The BMO study corroborates some of the Bank of Canada’s main findings, including the lack of formal employment options as one important reason to enter the gig economy.

However, the BMO study also cited other reasons for gig work including personal preference, attending school, and managing personal and family responsibilities such as illness or caring for children. These other findings support the argument that some people choose the gig economy to accommodate a more flexible lifestyle, to try new career opportunities or to juggle competing life priorities. Importantly, the study assessed the various reasons respondents gave for self-employment:

**Voluntarily making the choice was the most popular reason (cited by 60% of respondents), followed by needing a new challenge or change (49%), and to find purpose after a previous business venture (19%). More men than women (55% vs. 43%) needed a new challenge, and more millennials voluntarily made the choice (62%) compared to generation-Xers (58%) and boomers (54%).<sup>16</sup>**

This suggests some important features of the gig economy in Canada. First, a segment of gig workers are investing in their future employability by working to build new skills or gain access to new job opportunities. Second, the majority of gig workers in Canada, analyzed in the 2018 BMO report, seem to have entered these marketplaces by choice. Moreover, the gig economy is powered by data-driven platforms that can track labour market transitions with great precision.

Aspects of the gig economy also support employers’ needs. For example, 85% of companies surveyed in the 2018 BMO report foresaw an increasing move to an “agile workforce” in the next few years.<sup>17</sup> This is consistent with changes in the workplace away from traditional firms to more diversified and technology-enabled workspaces.<sup>18</sup>

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<sup>13</sup> Kostyshyna, O. and Luu, C. 2019. The Size and Characteristics of Informal (“Gig”) Work in Canada. p. 5.

<sup>14</sup> Ibid., p. 8, fn. 15.

<sup>15</sup> BMO Wealth Management. July 2018. The Gig Economy: Achieving Financial Wellness with Confidence. [https://www.bmo.com/assets/pdfs/wealth/bmo\\_gig\\_economy\\_report\\_en.pdf](https://www.bmo.com/assets/pdfs/wealth/bmo_gig_economy_report_en.pdf).

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Government of Canada. Canada Beyond 150: The Future of Work. <http://canadabeyond150.ca/reports/future-of-work.html>.

## THE STATE OF THE LAW: HOW ARE COURTS INTERPRETING GIG WORKERS?

From a labour market perspective, the gig economy is exposing ambiguity in traditional labour and employment legal tests. Specifically, are gig-based companies simply doing indirectly what they are not permitted to do directly (that is, hire workers without providing the statutory employment benefits and protections)? Or have these companies introduced a new way to participate in the labour market? This question is being tested in tribunals, courts and legislatures across North America and Europe, with differing outcomes.

What makes gig work arguably unique at law? The argument that a company like U.K.-based food delivery service Deliveroo is simply a technology platform or a virtual marketplace where sellers operate their own micro-businesses, creates a grey zone about the nature of the transactional relationship between the platform and the sellers. Are these companies really just hubs where transactions can happen, or are they more? Are they employers of a vast, disorganized workforce?

There are two reasons for this grey zone. The first has to do with the power and control dynamics between platform and sellers. As noted above, the legal test for determining whether someone is an employee or contractor is principally one of control. The more control the platform maintains, the more likely the relationship will be found to be that of an employee-employer.

How is “control” assessed? The Supreme Court of Canada has set out the control test as follows:

**The central question [to determine whether a person is an employee or an independent contractor] 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.<sup>19</sup>**

Where the platform controls such salient business issues as price, quality standards and assumption of liability, the argument will weigh in favour of an employment relationship. But many platform companies share key aspects of control with the sellers. For instance, the platform may control pricing, but the seller may control frequency and nature of participation (such as how often and who may participate on the seller’s behalf). If they choose, the seller can log onto a platform only once a month without risking

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<sup>19</sup> Supreme Court of Canada. 2001. 671122 Ontario Ltd. v. Sagaz Industries Canada Inc. 2001 SCC 59 at para. 47. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1898/index.do>. See also: Canada Revenue Agency. Employee or Self-Employed? <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4110/employee-self-employed.html>.

termination. Usually, the criteria for termination—being kicked off the platform—are limited to very poor ratings or illegal conduct.

The second reason has to do with the other factors that courts consider when determining the nature of the relationship. Again, the Supreme Court of Canada has provided guidance:

**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 tasks.<sup>20</sup>**

The fact that sellers use their own equipment, control their level of participation on the platform, and may be able to ask a “helper” to work in their stead, may ultimately weigh in favour of a finding of an independent contractor relationship. Conversely, the fact that the platform’s algorithms may reward participation, possibly affecting the seller’s ability to make money from the platform, may weigh in favour of an employment relationship.

### **The Deliveroo Case**

In the first round of cases to be determined, adjudication focuses on the terms of the contract between the parties and the way those terms are applied practice. Regardless of jurisdiction, much of the analysis has to do with the relative bargaining power of the parties and the authority or control the seller can exert over their own work associated with the platform.

In the U.K., for instance, the Independent Worker’s Union of Great Britain (IWGB) moved against RooFoods Ltd (who do business as Deliveroo), complaining to the Central Arbitration Committee (CAC)<sup>21</sup> about several issues. The union sought to have Deliveroo food delivery partners (“Riders”) classified as “workers,” as defined in the *Trade Union and Labour Relations (Consolidation) Act* 1992. The IWGB brought this complaint on behalf of a select group of Riders who work in the Camden and Kentish Town zone in London, who sought to form a collective bargaining unit within the union. IWUGB argued that Deliveroo employed 4,500 workers, of whom 100 would be part of the proposed bargaining unit.<sup>22</sup>

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<sup>20</sup> Ibid.

<sup>21</sup> The CAC is an independent body with statutory powers to determine complaints and disputes involving the workplace. Unions can seek a determination from the CAC for statutory recognition of collective bargaining and related rights. See <https://www.gov.uk/government/organisations/central-arbitration-committee/about>.

<sup>22</sup> Croft, J. Dec. 5, 2018. Deliveroo Riders not Entitled to Collective Bargaining, Court Rules. <https://www.ft.com/content/51fb5da8-f879-11e8-af46-2022a0b02a6c>. Financial Times.

The Tribunal gave due consideration to the relationship between Deliveroo and its Riders, from initial reach-out to onboarding and quality management throughout the relationship. On the one hand, it found that:

- Riders are described as “[t]he very lifeblood of our company. Without them Deliveroo wouldn’t exist—a fact at the very heart of how we operate as a business”;
- Riders are required to fill out an application and undergo a telephone job interview before being accepted into the “Roo Community”;
- Riders must pass a trial shift and undergo relatively extensive training regarding company quality standards;
- Riders are given an “equipment pack” with goodies to help them on their rides, as well as a branded hi-visibility jacket and various other items; and
- Riders do not set their own rates or know anything about the purchaser (defeating the argument that there could be business relationship between Rider and food purchaser that did not involve Deliveroo).

Despite all this, the Tribunal was swayed by another factor. Riders could choose at any point to bring on a substitute—someone who would complete a delivery their behalf. This constituted a fatal flaw in the argument that Riders are “workers” as defined under the applicable legislation. The Tribunal held:

**By allowing an almost unfettered right of substitution, Deliveroo loses visibility, and therefore assurance over who is delivering services in its name, thereby creating a reputational risk, and potentially a regulatory risk, but that is a matter for them. The Riders are not workers within the statutory definition of either s.296 TULRCA or s.230(3)(b) of the *Employment Rights Act 1996*.<sup>23</sup>**

In making this ruling, the CAC determined that the Riders were self-employed.

The union challenged the CAC’s decision in the High Court on the sole basis that the CAC failed to address the union’s argument that collective bargaining is a fundamental right under Article 11 of the European Convention on Human Rights, which, they said, should extend to Riders. The High Court rejected this argument, stating that Article 11 only applies to individuals in an employment relationship. It upheld the CAC’s decision.

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<sup>23</sup> Central Arbitration Committee. Nov. 14, 2017. Independent Workers’ Union of Great Britain (IWGB) v RooFoods Ltd T/A Deliveroo, TUR1/985(2016).

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/663126/Acceptance\\_Decision.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf)

Interestingly, a similar case was brought against Deliveroo in the Netherlands with a very different outcome. In early 2019, an Amsterdam court ruled that Deliveroo Riders are not self-employed and are entitled to the same pay and benefits as employees. The applicable Dutch legislation is different from that of the United Kingdom, making jurisprudential comparison difficult. But the gist of Dutch decision is that the Riders' authority over their own labour, though apparent in the contract between Deliveroo and its Riders, is illusory in practice.

The Dutch court was persuaded that Deliveroo exerts greater control over Riders than Riders exert over their own labour. This is because Deliveroo algorithms allocate work depending, in part, on the number of deliveries completed. Riders who participate on the platform infrequently are 'penalized' with fewer delivery tickets.<sup>24</sup>

### **The Uber Case**

This underlying tension between employee and contractor was also argued in the recent British case against Uber B.V. and Uber L.L., two legal entities affiliated with the ride-sharing company.

In this case, two drivers initiated individual and class proceedings against the Uber entities, seeking to be classified as employees.<sup>25</sup> The case went to the Court of Appeal, which upheld the decision of the Employment Appeal Tribunal (the Tribunal) that Uber Driver Partners (DPs) should be classified as workers.<sup>26</sup>

In this case, the court also looked at the actual relationship between the parties and how the terms of the agreement were written, and acted upon, in order to understand the actual arrangement between the parties. The Tribunal found that the drivers were employees to whom employment rights and obligations extend. The Court of Appeal agreed and cited 13 reasons for confirming the Tribunal's decision, including:

- Uber recruits and interviews DPs;
- Uber controls the fare and DPs cannot increase the fare;
- Uber assumes risk of loss (which, if the DPs were running their own businesses they would have to assume);
- DPs were subject to a rating scheme, which was found to be akin to a performance management/disciplinary proceeding; and

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<sup>24</sup> Wiarda, H. Jan. 31, 2019. Netherlands — Contractor or Employee? The Gig Economy Saga Continues. *Lus Laboris*.

<sup>25</sup> Uber B.V., Uber London Limited, Uber Britannia Limited ("Uber Entities").

<sup>26</sup> England and Wales Court of Appeal (Civil Division). 2018. *Uber BV v Aslam*. EWCA Civ 2748. <https://www.bailii.org/ew/cases/EWCA/Civ/2018/2748.html>.



- Uber reserves the power to amend the driver’s terms unilaterally.

In both the Deliveroo and Uber cases, the adjudicative body engaged in a detailed assessment of the business relationship between the parties by scrutinizing the contract as well as the actual practice.<sup>27</sup>

### The Uber Eats Case

Some platform companies have also been challenged in Canada as well. One example is the class action case *Heller v. Uber Technologies Inc.*, in which David Heller, a 35-year-old Uber Eats driver, is claiming employment entitlements under Ontario’s *Employment Standards Act*.<sup>28</sup> Heller is bringing the lawsuit on behalf of “[a]ny person, since 2012, who worked or continues to work for Uber in Ontario as a Partner and/or independent contractor, providing any of the services outlined in Paragraph 4 of the Statement of Claim pursuant to a Partner and/or independent contractor agreement.”<sup>29</sup>

For now, the case is considering procedural questions, namely whether an arbitration clause in Uber’s service agreement is valid and enforceable. The Ontario Court of Appeal has recently found that Uber cannot require the issue to be arbitrated in the Netherlands, as the impugned arbitration provision would have required.<sup>30</sup> At the time of writing, Uber is appealing the Court of Appeal’s decision to the Supreme Court of Canada.<sup>31</sup> This means that Ontario courts have yet to decide the core issue of classification in this case.

### The Skip the Dishes Case

A class-action lawsuit against Manitoba-based Skip the Dishes — a food delivery platform — has also begun but is in its infant stage. The lawsuit alleges misclassification of drivers as independent contractors under Ontario’s *Employment Standards Act*.<sup>32</sup>

The issue of employment classification has been litigated in Canadian courts for decades and is by no means a novel issue. What makes these cases worth following in the context of the future of work is the courts’ assessment of “control” as stipulated in service contracts with workers versus actual control. Court ruling will inform the concurrent discussion in the legislature about whether and how to deal with the gig economy in law.

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<sup>27</sup> Both cases considered the precedent of *Autoclenz Ltd. v Belcher* [2011] UKSC 41, [2011] ICR 1157, which establishes the test for evaluating the employer relationship. Among other things, the *Autoclenz* case looks at the relative bargaining powers of the parties, recognizing that the written contract between them may not reflect their actual relationship.

<sup>28</sup> Court of Appeal for Ontario. 2019. *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (CanLII), para 4. <http://www.ontariocourts.ca/decisions/2019/2019ONCA0001.htm>.

<sup>29</sup> *Ibid.*, para 3. <http://canlii.ca/t/hwqzt>.

<sup>30</sup> *Ibid.*

<sup>31</sup> Supreme Court of Canada 2019. Case Information Docket, *Uber Technologies Inc., et al. v. David Heller*. <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38534>.

<sup>32</sup> Latest reported decision at time of writing: Court of Queen’s Bench of Manitoba. 2019. *Dowd et al v Skip the Dishes Restaurant Services Inc. et al*, 2019 MBQB 63 (CanLII).

# CHANGES TO LEGISLATION TO CLASSIFY GIG WORKERS

While the courts grapple with the employment status of gig workers, legislatures are addressing the issue as well. In Canada, recent amendments to the Canada Labour Code to promote more flexible work arrangements, among other things, has led the federal government to create an [Expert Panel on Modern Federal Labour Standards](#).

The expert panel was formed following several important findings arising from consultations with Canadians about the future of work, documented in a report entitled, *“What We Heard: Modernizing Federal Labour Standards.”* The Minister of Employment, Workforce Development and Labour stated in that report:

We heard that since the Arthurs Commission more than a decade ago, the pace of this change has increased. Many stakeholders and experts spoke about both the challenges and opportunities associated with competitive global markets, the widespread use of digital technologies, and the shift away from traditional employment, with several mentioning new types of work arrangements including gig and on-demand work. Several unions, labour organizations and advocacy groups told us that precarious work is on the rise. In personal stories, Canadians shared their first-hand experience with the changing nature of work and how it affects them in the workplace and in their personal lives. They asked us to protect and support them at work.<sup>33</sup>

The expert panel is tasked with reporting to the Minister on the following five issues related to the changing nature of work:

- Federal minimum wage;
- **Labour standards protections for non-standard workers, including gig workers** (emphasis added);
- Disconnecting from work-related e-communications outside of work hours (sometimes known as the “right to disconnect”);
- Access and portability of benefits; and
- Collective voice for non-unionized workers.

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<sup>33</sup> Employment and Social Development Canada. 2018. What we heard: Modernizing federal labour standards. <https://www.canada.ca/en/employment-social-development/services/labour-standards/reports/modernizing-federal-standards.html>.

In the United States, federal and state legislation has been introduced—and passed in some cases—to clarify the classification of gig workers.

Federally, U.S. Senate Finance Committee member John Thune (R-S.D.) has introduced the *New Economy Works to Guarantee Independence and Growth Act* (or, the NEW GIG Act of 2017). The Bill seeks to amend the Internal Revenue Code of 1986 to provide gig companies with a so-called safe harbour<sup>34</sup> for determining worker classifications. The safe harbour focuses on three areas intended to demonstrate the independence of the seller:

1. **The relationship between the parties** (i.e., the provider incurs expenses; does not work exclusively for a single recipient; performs the service for a particular amount of time, to achieve a specific result, or to complete a specific task; or is a salesperson compensated primarily on a commission basis);
2. **The place of business or ownership of the equipment** (i.e., the provider has a principal place of business, does not work exclusively at the recipient's place of business, and provides tools or supplies); and
3. **The services are performed under a written contract that meets certain requirements** (i.e., specifies that the provider is not an employee, the recipient will satisfy withholding and reporting requirements, and that the provider is responsible for taxes on the compensation).<sup>35</sup>

The bill has not yet passed the Senate. But its passing may be just a matter of time as the Trump administration's policy toward the classification of gig work seems to be shifting in favour of the contractor category.

For example, on April 29, 2019, the U.S. Department of Labor published an opinion letter about an unidentified “virtual marketplace company” believed to be offering domestic cleaning services. An opinion letter is an official interpretation of law in a specific context. It is also a faster way to issue guidance than legislative change and is arguably one step in that process. In this opinion the Department of Labor analyzed and classified the company's service providers as independent contractors.

While the opinion letter relates specifically to the particular unnamed company, it is a window into the current administration's thoughts on the classification of gig workers. The letter is persuasive for other

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<sup>34</sup> A safe harbour is a provision of a statute or a regulation outlining the actions that do not violate a given rule.

<sup>35</sup> Thune, J. July 13, 2017. “Thune Introduces Bill to Add Certainty to Worker Classification Rules.” <https://www.thune.senate.gov/public/index.cfm/2017/7/thune-introduces-bill-to-add-certainty-to-worker-classification-rules> see also: <https://www.thune.senate.gov/public/index.cfm/2019/7/thune-we-can-continue-to-strengthen-our-tax-code>.

companies that are structured like the one that received the opinion. It provides some legal cover to such companies in the event of future lawsuits against the company by their workers.<sup>36</sup>

A number of U.S. states have passed state-level legislation to set the status of gig workers as either employees or independent contractors.<sup>37</sup> For example, in May 2019 the California Assembly passed a law which would make it harder for companies to classify workers as independent contractors. Assembly Bill 5 would codify findings in the *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* case to create “a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission.”<sup>38</sup> If companies challenge the law, courts will apply an existing test to determine if an employee is in fact an independent contractor.<sup>39</sup> Bill 5 is now with the state Senate. California’s approach is contrasted with the state of Texas, which recently adopted a broad administrative rule to classify most gig workers as independent contractors.<sup>40</sup>

Legislatures, like courts, are deciding the issue of gig worker status both ways. Meanwhile, certainty and consistency are critical for this new economy to continue to thrive.

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<sup>36</sup> Schieber, N. April 29, 2019. Labor Dept. Says Workers at a Gig Company Are Contractors. <https://www.nytimes.com/2019/04/29/business/economy/gig-economy-workers-contractors.html>. The New York Times. For the opinion letter, see also: [https://www.dol.gov/whd/opinion/FLSA/2019/2019\\_04\\_29\\_06\\_FLSA.pdf](https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf).

<sup>37</sup> **AZ** *HB 2652 (2016)* Bill passed; law effective 8/6/16; **CA** *AB 2765 (2018)* Bill withdrawn 11/30/18; **CO** *SB 18-171 (2018)* Bill passed Senate, stalled in House; **AL** *SB 363 (2018)* Bill stalled in Senate; **FL** *HB 7087 (2018)* Bill passed; law effective 7/1/18; **GA** *HB 789 (2018)* Bill passed House, stalled in Senate; **IN** *HB 1286 (2018)* Bill passed; law effective 7/1/2018; **IA** *SF 2257 (2018)* Bill passed; law effective 7/1/2018; **KY** *HB 220 (2018)* Bill passed; law effective 7/14/2018; **NC** *SB 735 (2018)* Bill passed House, stalled in Senate; **TN** *HB 1978 (2018)* Bill passed; law effective 7/1/2018; **UT** *HB 364 (2018)* Bill passed; law effective 5/8/2018; **TX** Amendment to TX Admin. Code (2018) Rule pending UI Proposed administrative rule change; **MO** *SB 313 (2019)* Bill pending; **WV** *HB 2786 (2019)* Bill pending. Source: National Employment Law Project. March 25, 2019. Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It. [https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk\\_4-2-2019.pdf](https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk_4-2-2019.pdf).

<sup>38</sup> The California bill (AB-5 Worker Status: Employees and Independent Contractors) codifies the decision in a 2018 case, *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5).

<sup>39</sup> Ibid.

<sup>40</sup> The National Law Review. May 7, 2019. New Texas Rule Classifies Gig Economy Workers as Independent Contractors.

# A THIRD WAY?

Louis Hyman is professor at the School of Industrial and Labor Relations at Cornell University and author of *Temp: How American Work, American Business, and the American Dream Became Temporary*. Prof. Hyman suggests that the gig economy poses more than a classification problem—it also raises a larger question of how we organize our societies. He explained his opinion in a 2018 interview:

We're told that it's all about apps, but it's actually about the reorganization of work, corporations and work, that begins in this moment that defines our lives today. When we talk about today's economy, we focus on smartphones, artificial intelligence, apps. Here, too, the inexorable march of technology is thought to be responsible for disrupting traditional work, phasing out the employee with a regular wage or salary and phasing in independent contractors, consultants, temps and freelancers—the so-called gig economy.

But this narrative is wrong. The history of labor shows that technology does not usually drive social change. On the contrary, social change is typically driven by decisions we make about how to organize our world. Only later does technology swoop in, accelerating and consolidating those changes.<sup>41</sup>

If we accept Prof. Hyman's theory, we can further appreciate the complexity of this evolving policy issue. Increasingly, society seems to be organizing around flexible, on-demand, task-based services that are facilitated through a virtual platform. Those who participate as sellers in these marketplaces do so for a variety of reasons. The Canadian survey results show that some gig workers may be using the opportunity to look for new skills, while others are highly skilled professionals seeking flexibility. In addition, some companies are willing to extend benefits to workers if they have the confidence this will not result in them being classified as employees for legal purposes.<sup>42</sup> Should the law permit or require this?

For example, in a 2018 Uber white paper, the company discussed partnerships with insurers such as AXA to extend certain benefits to driver partners. Uber reports that:

**Uber Eats and AXA have created a new insurance package designed to specifically cater to the needs of couriers who use the Uber Eats app to access flexible earning opportunities. The insurance policy is free of charge and provides cover for personal accident, cash benefits due to**

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<sup>41</sup> On Point. 2018. The Origin Story of the Gig Economy. <https://www.wbur.org/onpoint/2018/08/20/gig-economy-temp-louis-hyman>. WBUR.

<sup>42</sup> Schieber, N. March 26, 2019. "Is Gig Work a Job? Uber and Others Are Maneuvering to Shape the Answer" New York Times.

## hospitalization and third party injury and property damage for couriers who partner with Uber Eats in EU markets.<sup>43</sup>

The package was launched in January 2018 in nine EU countries: Austria, Belgium, Italy, Netherlands, Poland, Portugal, Spain, Sweden and the U.K.<sup>44</sup>

Taken together, these developments suggest the possibility of a third way. Yet questions abound:

- How can policymakers strike the right balance between facilitating on-demand, flexible work while ensuring appropriate controls to promote safe and decent work?
- Is there a third way beyond the classifications of independent contractor versus employee? Should we create a third category to reflect how we are organizing society to access on-demand, same-day services?
- Should government codify the extension of limited rights and benefits to gig workers, as some European countries appear to have done in the case of Uber?
- Rather than trying to make platforms fit the model of the classic employer-employee relationship, is there a way to strike a new balance for changed times—one that promotes the protection of workers while enabling the flexibility and ease of entry of the gig economy?

Proposals such as Uber's to extend benefits and certain protections to sellers, as well as assistance with tax reporting and other related professional services, warrant consideration as the basis for a new classification of work in a world in which the gig economy is becoming more prevalent.

While there may not be consensus on much about the gig economy, one thing is for certain: these are complex and important, yet not impossible, issues. So far, it is falling to courts and tribunals to interpret existing law as best they can. Increasingly, legislatures are taking a position on the nature of the classification. These matters will have a direct bearing on the way we organize our society and how well we flourish, economically and socially. It is time for legislatures to deepen consultations with a view to modernizing the legal framework in the new economy.

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<sup>43</sup> Uber. February 2018. White Paper on Work and Social Protection in Europe, p. 22.

<sup>44</sup> Ibid.



