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VIA EMAIL

July 30, 2021

Workforce Recovery Advisory Committee
Legislative Building, Queen's Park
Toronto, ON M7A 1A8
Email: OWRAC@ontario.ca

Dear Committee Members:

RE: Submissions to Ontario's Workforce Recovery Advisory Committee

We write on behalf of Cavalluzzo LLP to provide submissions to Ontario's Workforce Recovery Advisory Committee (the "Committee"). Cavalluzzo LLP is an Ontario labour, employment and litigation firm dedicated to social advocacy and the protection of working people.

As discussed in greater detail in our submissions, we have significant concerns about the Committee's impartiality and purpose. Nevertheless, we feel compelled to respond to the limited information about the Committee's mandate that has been disclosed.

To date, the Committee has issued no discussion papers, engaged in no publicized research, and provided no meaningful guidelines to stakeholders aside from identifying "three pillars":

a. Economic recovery: How to make Ontario the top jurisdiction with a world-class workforce and talent supply?

b. Strengthening Ontario's competitive position: In an increasingly remote, global and technologically advanced economy, how will we ensure that Ontario remains the best place in North America to recruit, retain, and reward workers?

c. Supporting workers: How to ensure Ontario's technology platform workers benefit from flexibility, control, and security?[1]

[1] See Committee Overview at: https://www.ontario.ca/page/ontarios-workforce-recovery-advisory-committee-leading-future-work-ontario [Accessed July 7, 2021].

Given our firm's involvement with the *Foodora* case – both at the Ontario Labour Relations Board ("OLRB") and during the subsequent bankruptcy – we have chosen to focus our submissions on those aspects of the Committee's mandate which relate specifically to app-based workers. As a result, these submissions will largely focus on the third pillar listed above.

Summary of Recommendations

We have reviewed the submissions made by the Ontario Federation of Labour ("OFL") and support those submissions, both as they relate to app-based work and more broadly. We make the following additional submissions and recommendations:

I. That the current consultation process is fatally flawed and that a more robust and detailed review is needed;

II. That there is no need for a new and separate category of worker, such as "dependent contractors", "autonomous workers" or, as suggested by companies like Uber ("Flexible Work+" or "Contractor+") and that the creation of a new category of worker for employment standards purposes would undermine protections for all workers and put app-based workers in an even more vulnerable position than the one they currently occupy;

III. That the Committee should recommend the adoption of a clearer test for determining whether individuals are employees or independent contractors for the purposes of minimum standards legislation that is clearer and expressly places the onus on employers to rebut the presumption that a worker is an employee;

IV. That the Province should ensure that all employees are provided with equal and adequate minimum standards and that these standards are enforced; and

V. That workers must be paid for all time spent engaged with their employing platform, including time spent waiting for assignments, and compensated for all expenses related to their employment.

I. The Consultation Process is Fatally Flawed

1. In making these submissions, we must first address the flawed process applied by this government and the Committee. The previous government engaged in extensive consultation and research as a part of the Changing Workplaces Review (the "CW Review") which touched directly on the mandate of this Committee.

2. The CW Review made extensive submissions for law reform. To the extent that the CW Review's proposals were adopted, they were quickly overturned by the current government without consultation with workers or trade unions. While the

CW Review had significant flaws, it demonstrated robust and thoughtful approach to law reform.

3. Now, the current government purports to seek input but has produced no clear parameters for debate, funded no additional research, and implemented a response period of just over a month, in the middle of the summer, during an on-going pandemic. At the same time, the Committee has engaged in no meaningful community consultation, choosing to hold two limited capacity Zoom meetings on July 20, 2021.

4. Even more concerning is the timing of the Committee's consultation and the circumstances surrounding its appointment. The Committee was founded only weeks before a major class action lawsuit against Uber commenced certification hearings and only months after Uber unveiled a new "Flexible Work+" proposal which, if implemented, would significantly curtail workplace protections for app-based workers.[2]

5. The timing and speed with which the Committee is proceeding has raised serious concerns that it will simply adopt the submissions of industry groups and employers like Uber.[3] This is particularly worrisome given the aforementioned litigation and therefore clear interest that Uber and other app-based employers have in changing the law to circumvent liability. The obvious inference to be drawn in the circumstances is that industry has successfully lobbied for changes in order to reduce or eliminate liability accrued as a result of years and years of deliberate misclassification of workers.

6. Furthermore, the Committee has taken no steps to ensure that it possesses accurate data about app-based work. We expect that Uber will seek to position its own data as legitimate. Serious questions, however, have been raised regarding the reliability of surveys completed by Uber and its competitors to justify excluding gig workers from Ontario's workplace protection regimes. As an example, earlier surveys have been attacked for including "loaded" or leading questions[4] or as lacking in transparency.[5]

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[2] Recent hearings were held in which it will be determined whether the interests of Uber drivers are sufficiently common that they justify a class proceeding. See also: https://www.uber.com/en-CA/newsroom/when-platform-work-starts/.

[3] Sara Mojtehedzadeh, *A New Committee is exploring the future of work – but critics say it lacks a crucial voice: workers.* Available: https://www.thestar.com/news/gta/2021/06/25/a-new-committee-is-exploring-the-future-of-work-but-critics-say-it-lacks-a-crucial-voice-workers.html.

[4] Sarah Butler, *Uber accused of using 'loaded questions' in survey of drivers* Available: https://www.theguardian.com/technology/2021/mar/01/uber-accused-of-using-loaded-questions-in-drivers-survey.

[5] Edward Ongweso Jr., *Gig Economy Researchers Want Corporations to Stop Influencing Research* Available: https://www.vice.com/en/article/935z7y/gig-economy-researchers-want-corporations-to-stop-influencing-research and the related open letter from leading academics at:

7. All of the above represent serious flaws which, on their own, ought to be fatal to the integrity and credibility of the Committee. Taken together, they strongly suggest that the current government has no interest in engaging in genuine consultation with workers or the public and instead wishes to implement ideologically-driven changes which address the concerns of app-based companies only. Such an approach is detrimental to these companies' employees and all workers in Ontario, who will face diminished bargaining power vis-à-vis their employers as a result.

8. We do not believe that the Committee and its process has the legitimacy or expertise to alter the long-established balance of power between workers and employers in this Province in any fundamental way. The Committee must seek to broaden its review, engage in a full and robust consultation with affected workers and trade unions, and reject self-serving industry-based "solutions", like those which have been cynically proposed by Uber.

II. Defining App-based Work and the Gig Economy

9. Very little information is known about the contemporary gig economy (hereafter referred to as the "app-based economy") and its scope, other than that it is becoming increasingly prevalent, growing from 5.5% of the total workforce in 2005 to 8.2% of all workers in 2016.[6]

10. The OLRB's decision in *Foodora*[7] and subsequent decision in *Uber*[8] provide limited data regarding the way in which app-based employers operate in this province, such as the control exerted over workers, their delivery and hiring models, the number of employees in specific cities, and the length of service and degree of turnover of workers.

11. No clear definition of the app-based economy exists, though it is typically characterized by a number of features, including workers who are often short-term employees and are often scheduled on an "on-demand" basis. Workers with app-based companies are heavily integrated into a larger business (whether it be delivery, transportation or other industries), though they may have little day-to-day oversight other than interactions with a central dispatcher and/or algorithm.

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https://medium.com/@gigeconomyresearchersunited/open-letter-and-principles-for-ethical-research-on-the-gig-economy-3cd27924cc08.

[6] Sung-Hee Jeon, Huju Liu and Yuri Ostrovsky (Statistics Canada), *Measuring the Gig Economy in Canada Using Administrative Data* (December 2019), available: https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2019025-eng.pdf?st=TjGxW__4.

[7] *Foodora Inc. d.b.a. Foodora*, 2020 CanLII 16750 (ON LRB).

[8] *Uber Canada Inc.*, 2020 CanLII 54980 (ON LRB) at para. 19; see also *Uber BC and Others v Aslam and Others* [2021] UKSC 5 at para 35.

12. The app-based economy is associated with high employee turnover, poor job security and significant occupational health and safety concerns. In *Foodora,* the OLRB found that while a sizeable number of workers were long service employees, roughly 77% had 19 months of service or less. Evidence presented by Foodora, but not referenced in the decision, suggested that the average tenure of a Foodora courier was only 2 months.[9] In *Uber,* the OLRB determined that drivers were often short tenure and that it was common for drivers to have large breaks of service (often a month or longer).[10]

13. Importantly, work that fits the description above is not new – it has existed for decades.[11] While it has evolved (for example, app-based work is now heavily reliant on smartphones for scheduling) it raises the same kinds of issues and problems that Provincial and Federal governments first tried to solve in the late 1970s and early 1980s.

14. The app-based economy is quickly expanding into other areas of the economy outside of its historical base in transportation and delivery, including restaurant work,[12] data review,[13] general labour[14] and healthcare.[15] In some jurisdictions, more traditional employees performing core business functions have also been replaced by misclassified third-party app-based employees.[16] As summarized by Gig Workers United President Jennifer Scott: "I don't want to make folks nervous, but at the end of the day I think the gig economy is coming for your job."[17]

15. Even where workers are not displaced by app-based work, the sector has a downward effect on labour markets and undermines existing workplace protections by acting as a "gateway to destabilizing our existing protections that

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[9] *Foodora Inc. d.b.a. Foodora*, 2020 CanLII 16750 (ON LRB) at para 135.

[10] *Uber Canada Inc.*, 2020 CanLII 54980 (ON LRB) at para 19.

[11] A computer-based dispatch system for taxi-based service was first referenced in the jurisprudence nearly 30 years ago. See the "Gandalf" system in *Diamond Taxicab Association (Toronto) Limited*, 1992 CanLII 6786 (ON LRB) at para 12.

[12] See: https://www.pared.com/.

[13] See: https://www.mturk.com/.

[14] See: https://staffy.com/ and https://www.taskrabbit.ca/ca/en/.

[15] See: https://staffy.com/.

[16] Cassandra Stone, *Union Grocery Delivery Drivers are Being Fired and Replaced with DoorDash Employees. Available:* https://ca.style.yahoo.com/california-grocery-stores-firing-employees-124541966.html.

[17] Richard Trapunski, *Toronto's gig workers union fights Uber's proposed labour category* Available: https://nowtoronto.com/news/toronto-gig-workers-union-fights-uber-s-propose-labour-category.

workers have", either because better protected workers are displaced or because of a general downward pressure on working conditions.[18]

16. The rapid growth and expansion of the app-based employment model has become one of the leading economic issues within Ontario and must be addressed by the Committee in a principled, pragmatic and purposive manner.

17. If the problems associated with the app-based economy are not addressed, the safety and economic well-being of Ontario's workers will be further undermined and, in the process, Ontario's recovery from the COVID-19 pandemic will be impaired.

18. Our view is that the current approach to regulating employment standards applicable to gig workers in Canada is flawed for a number of reasons, including:

    a. the definition of employee is not consistently applied across different provincial statutes, creating confusion;

    b. current tests for employee status are unclear and difficult to predict; and

    c. employment standards are not being enforced by government agencies, and workers are bypassing employment standards regimes and choosing to self-help through unionization and/or class actions.

III. There is No Need for a New Category of Worker in Ontario

i. Existing legislation can and should include app-based workers

19. As we have already mentioned, we fear that this Committee was struck to rubber-stamp Uber's "Flexible Work+" proposal. While Uber has not disclosed the specifics of their proposal, aside from vague public relations platitudes online, it is apparent that the company would like to create a standalone category of contractor which would exist alongside employees and independent contractors.

20. This new "Contractor+" group would clearly cover individuals which courts and tribunals have already determined to be employees. It would enable app-based employers to exert control over the people who deliver their services to the public while at the same time avoid the requirement to provide employment-related

[18] Veena Dubal as quoted in Motherboard, *Gig Economy Researchers Want Corporations to Stop Influencing Research*. Available: https://www.vice.com/en/article/935z7y/gig-economy-researchers-want-corporations-to-stop-influencing-research.

benefits (i.e., vacation pay, minimum wages) and employment-related contributions to our social safety net (payroll and income taxes).[19]

21. Uber's proposal will have the effect of excluding app-based workers from basic minimum employment standards and enshrining their status as second-class citizens under Ontario's work law regimes. We hope that the Committee approaches its mandate earnestly and with an open mind. We urge the Committee to reject Uber's proposal to create a new category of worker, which will leave app-based workers in Ontario in a more vulnerable position than the one they currently occupy. The Committee should instead recommend that the government take steps to better enforce the law as it is currently written.

22. While Uber has proposed radical and unnecessary changes to employment standards regimes, they have also publicly proposed changes which would exempt app-based workers from unionization. We have therefore not addressed the right of app-based workers to unionize in detail in these submissions.

23. To be clear, this right is a fundamental right. Similarly situated workers have successfully unionized since the mid-20th century. Limiting the ability of app-based workers to unionize, in any way, would therefore be inconsistent with more than 60 years of jurisprudence in the Province and would be a clear breach of the Charter-protected right to organize which the Courts would quickly and clearly overturn.

24. Before considering whether access to Ontario's labour and employment laws ought to be modified, the Committee must consider who is currently covered by these protective statutes. As the Committee is no doubt aware, working conditions in Ontario are regulated by a patchwork of statues, including:

    a. the *Occupational Health and Safety Act,* RSO 1990, c O.1, which sets out minimum health and safety standards to protect workers against hazards on the job;

    b. the Ontario *Human Rights Code,* RSO 1990, c H.19, which seeks to protect and promote human rights in the workplace by preventing discrimination and harassment;

    c. the *Labour Relations Act, 1995*, SO 1995, c 1, Sched. A, which governs access to and the exercise of the constitutional right to collective bargaining; and,

[19] Ben Spurr, "*Canada's laws allow Uber, Lyft to avoid paying as much as $135M a year in taxes, says advocacy group*". Available: https://www.thestar.com/news/gta/2021/07/05/canadas-laws-allow-uber-lyft-to-avoid-paying-as-much-as-135m-a-year-in-taxes-says-advocacy-group.html.

> d. the *Employment Standards Act, 2000*, SO 2000, c 41, which outlines basic minimum standards and entitlements that all employees in Ontario should enjoy.

25. The *Occupational Health and Safety Act* and *Human Rights Code* achieve their broad application through expansive definitions that capture the workers and activities to which they apply. For example, rights under the *Occupational Health and Safety Act* attach to "a person who performs work or supplies services for monetary compensation" regardless of whether they are classified as employees, dependent contractors or independent contractors for the purposes of other regulatory regimes.[20]

26. Similarly, the *Human Rights Code* provides a right to equal treatment with respect to employment. The *Code* does not define "employment" but, as the Ontario Human Rights Commission explains on its website, the *Code* has been interpreted broadly, and the phrase "with respect to employment" applies to "employees, temporary, casual and contract staff, and other persons in a work context, such as people who work to gain experience or for benefits."

27. The *Labour Relations Act* ("*LRA*") and *Employment Standards Act* ("*ESA*") are more prescriptive in their approach to worker status. Nonetheless, their scope of application is broad and reflects the statutory purposes underlying each regime. The *LRA* provides access to Ontario's statutory collective bargaining regime for "employees" including so-called "dependent contractors" who

> whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.[21]

28. These statutes are intended to apply broadly and to a variety of different employment relationships in a wide variety of sectors.[22] In addition, the rights and

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[20] *Occupational Health and Safety Act*, section 9(2). Also see *Ontario (Labour) v. United Independent Operators Limited*, 2011 ONCA 33 (CanLII) at paras 34-48.

[21] See *Labour Relations Act,* section 1(1).

[22] The Ontario Labour Relations Board has certified bargaining units of truck-drivers, casual daycare providers, newspaper delivery people, taxi drivers and now app-based couriers. See, for example: *Abdo Contracting Company Ltd.*, 1977 CanLII 422 (ON LRB); *Niagara Veteran Taxi*, 1981 CanLII 958 (ON LRB); J*ournal LeDroit,* 1985 CanLII 1047 (ON LRB); *Toronto Star Newspapers Ltd.,* 2001 CanLII 6537 (ON LRB); *Cradleship Creche of Metropolitan Toronto*, 1986 CanLII 1397 (ON LRB); *Foodora Inc. d.b.a. Foodora*, 2020 CanLII 16750 (ON LRB).

duties these statutes impose apply to all such relationships regardless of the parties' intentions. This is because they express the fundamental value held by our society that no worker in Ontario should endure working conditions less generous than those provided by these statutes.

29. With specific reference to minimum standards legislation, Professor Harry Arthurs provided two justifications for the broad and mandatory application of our work law regimes in his 2006 report to the federal government: *Fairness at Work: Federal Labour Standards for the 21st Century*.[23] Professor Arthurs' first justification reflects the "decency" principle:

> Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent." No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.[24]

30. Professor Arthurs' second justification addressed the economic danger that a group of workers exempt from statutory protections, as is proposed by Uber, would pose to the labour market as a whole:

> Second, the working conditions bargained for, imposed on or accepted by non-employees may directly or indirectly influence the labour standards of employees and, for that matter, the intensity of business competition experienced by employers.[25]

31. Like the *Occupational Health and Safety Act* and the Ontario *Human Rights Code*, the statutory purpose of the *ESA* suggests that it should be applied as broadly as possible. As Professor Arthurs expressed, the *ESA* outlines the minimum standard of work that Ontarians consider decent or acceptable. No worker should have to work under standards below those provided by the *ESA.* Creating an exception to the *ESA* for a group of already-marginalized workers would undermine the values of equality, human dignity and fairness that govern our society.

32. As a result, we submit that, the *ESA* it is entirely compatible with flexible work both in theory and in practice. For example, the statute has long been applied to other dispatch-based forms of work such as trucking, couriers, and taxi driving where

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[23] Harry W. Arthurs, Fairness at Work: Federal Labour Standards for the 21st Century. Gatineau, QC: Government of Canada, 2006 at p 61 and 67.

[24] *Ibid* at p 61.

[25] *Ibid* at p 67.

owner-operators enjoy both autonomy and basic employment standards.[26] This is so even though the *ESA* does not expressly include so-called "dependent contractors."

33. The Supreme Court of Canada has endorsed a broad and purposive approach to employment standards legislation:

> The harm which the [*ESA*] seeks to remedy is that individual employees, and non-unionized employees, are often in an unequal bargaining position in relation to their employers […] Accordingly, an interpretation of the [*ESA*] which encourages employers to comply with the minimum requirements of the [*ESA*], and so extends its protections to as many employees as possible, is to be favoured over one that does not.[27]

34. Similarly, in *Majestic Maintenance Services Limited,*[28] Referee Burkett held that a group of cleaners were employees within the meaning of an earlier version of the *ESA*, holding that:

> The Legislature has decided that it is in the public interest that all persons who perform work or supply services to an employer be entitled to minimum standards of employment. The Act implicitly recognizes the inherent inequalities which may exist in a modern industrial society and redresses the inequality between the individual and his employer to the extent that the employer is required by statute to comply with the minimum standards. Whereas the *Act* is not designed to protect or underwrite the independent businessman… it is designed to protect those who are dependent in their employment.
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> […]
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> The ever-changing contractual configurations for the provision of services over the past few decades in response to changing economic times call for nuanced interpretive approaches to discern if there is economic dependence where those configurations were specifically developed to

[26] Trucking: *1512081 Ontario Limited o/a Abrams Towing* (*Abrams Towing*) 2010 Can LII 21175; Couriers: *Global Courier & Messenger Service Ltd* (*Global Courier*) [2006] OESAD 326; Taxis: *J.W. Ferguson Services Ltd. v. Kolyn* [2005] O.L.R.B. Rep. 97, [2005] O.E.S.A.D. No. 362 at para. 26 – 29; *858532 Ontario Limited O/A Checker Limousine* (April 7, 1995, ESC 95-73); *Belqoma Transportation Limited o/a Checker Cab*, April 8, 1991 (E.S.C. 2838); *598832 Ontario Inc. (c.o.b. Red Line Taxi)* [2004] OESAD 1023; *Seventy-Five Hundred Taxi Inc* (*Seventy-Five Hundred Taxi*) [2011] OESAD 925.

[27] *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC).

[28] *Majestic Maintenance Services Limited*, E.S.C. 479A, February 8, 1977 (Burkett).

include many indicia traditionally associated with independent contractors.[29]

35. In light of the above, we submit that the current definition of "employee" within the *ESA* is sufficiently broad to cover a wide variety of contractual relationships while still granting expert tribunals like the OLRB the flexibility required to appropriately and adequately review the working conditions of precarious workers. More directly, the current definition of employee likely already applies to gig workers and those employed via digital platforms and in other non-standard work arrangements. This means that any policy proposals along the lines of Uber's "Flexible Work+" proposal leave these workers worse off. Such proposals would also put downward pressure on wages and working conditions across the Province and, if implemented, represent a significant disruption of the balance of power between employers and workers to the exclusive benefit of the former.

ii. Creating a new category of worker would have negative consequences

36. As noted earlier, Uber has proposed the creation of a third category of worker. This suggestion should be rejected.

37. To the extent that this Committee is considering recommending the creation of a new category of worker in Ontario, the history of this dependent contractor definition is instructive. Canadian jurisdictions, including Ontario, adopted the statutory dependent contractor definition for the purposes of collective bargaining legislation following a 1965 law review article written by Harry Arthurs entitled *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*.[30]

38. A dependent contractor category had existed under Canadian common law to provide employment rights such as reasonable notice upon termination since at least the 1930s.[31] This judicial innovation was designed, in part, to assist workers whose employers sought to avoid employment entitlements by inserting clauses into their contracts of service to classify workers as contractors and mask their status as true employees.

39. Commentators such as Michael Bendel have suggested that the creation of the new category was unnecessary because these workers were already included in a purposive definition of employee and that the new category could actually undermine the statutory purpose by creating confusion.[32] Similarly, Guy Davidov

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[29] *Andrew Beyers Carpentry Inc.,* 2010 CanLII 23842 (ON LRB) at paras 26, 29.

[30] University of Toronto Law Journal. Volume 16 (1965), p 89-117.

[31] See for example *Carter Bell & Sons (Canada) Ltd.*, 1936 CanLII 75 (ON CA).

[32] Michael Bendel, "The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law", University of Toronto Law Journal 32 (1982).

has argued that a proliferation of worker status categories creates opportunities for misclassification and non-compliance:

> [T]he idea of ensuring sensitivity to context and to unique circumstances and needs, and accordingly creating sector-specific regimes, is logical and understandable in principle. However, bearing in mind also the need to ensure determinacy, to allow people to know their rights and obligations, and to minimize problems of non-compliance, a balance must be struck between universalism and selectivity…[33]

40. Our review of the case law suggests the addition of the "dependent contractor" definition under the *LRA* had little impact, if any, on outcomes for employers and workers.[34] Between 1961 and 1976, 79% of all *LRA* cases raising contractor status issues resulted in a clear finding of employment.[35] Following the introduction of the "dependent contractor" classification in Ontario, 83% resulted in a finding of employment.[36] In 1972, the Federal government introduced its own "dependent contractor" classification. In reviewing the changes made to the *Canada Labour Code,* the Canada Industrial Relations Board was skeptical of the impact of a "dependent contractor category":

> … at the time of the 1972 amendments, the common law criteria, although developed in the area of civic liability, had, by chance, evolved to the point that including a definition of "dependent contractor" in the *Code* and modifying the term "employee" were no longer necessary and had lost their reason for existence except as a legislative technique designed to dissipate any possible doubt remaining as to the status of these individuals. The [CIRB], moreover, as we shall see later, treated self employed truck drivers as "employees" both before and after the 1972 amendments… the common law tests had evolved to the point that, even then, any fisherman, self-employed truck driver or other individual whose relationship with his employer was characterized by a tie of economic dependence, if not legal subordination, was considered *stricto sensu* an employee"[37]

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[33] Guy Davidov, “Reform in Small Steps: The Case of The Dependent Contractor” at p 9-10.

[34] While we oppose the creation of a third category like that proposed by Uber, we do not believe that the definition of "employee" under the *LRA* needs to be modified. In that instance, the term is used to describe a subset of employees, not a separate category. The term is therefore inclusive and broad and has been applied in a predictable and principled fashion within the province for more than 40 years.

[35] A total of 26 cases were reviewed, of which 24 had a clear (i.e. non-mixed) finding of contractor or employee. Of these cases 19 resulted in a finding of employment.

[36] A total of 42 non-construction industry decisions were reviewed and produced a clear finding, with a further two mixed. Of these 42 cases, 35 resulted in a finding of employment (by way of the "dependent contractor" classification.

[37] *Société Radio-Canada/Canadian Broadcasting Corp.* 1982 CarswellNat 564 at para 184.

41. The creation of a third category will therefore have little impact upon the outcome of litigation, nor will it address a shortcoming in the jurisprudence. Rather, more than 70 years of case law make it clear that the OLRB (and the courts) are very capable of interpreting the term "employee" in a broad, purposive and predictable manner.

42. There is therefore no clear jurisprudential need for a third category. The term "employee" is sufficiently broad such that it can be applied to a wide range of employment or employment-like relationships. The creation of a third category would serve only Uber and other app-based employees who, having failed to convince the courts and tribunals that their drivers and couriers are independent contractors, are now seeking to maintain the benefits of misclassification by inventing a new category of worker with fewer rights than employees.

43. We believe that app-based workers are already employees for the purposes of the *ESA*. As a result, they are entitled to overtime protections, vacation pay, and the minimum wage. Any uncertainty on this point is a result of poor enforcement and non-compliance, not supposedly novel aspects of app-based work.

44. Creating a new underclass of workers would exacerbate employers' incentives to misclassify workers and obscure their employment status. Such a policy would divert resources away from productive activity and towards legal wrangling about the application of laws which are intended to provide basic entitlements that everyone should enjoy. It is notable that app-based employers like Uber and Foodora have been engaging in these tactics since they arrived in Ontario by originally arguing that they were merely platforms connecting independent contracting parties.[38] It was only after this line of argument was repeatedly rejected that Uber pivoted to its current strategy of seeking a legislative exemption from Ontario's work law regimes.[39]

45. This Committee must resist lobbying attempts by companies seeking a special licence to exploit workers in Ontario and export the proceeds without investing in our society. Instead, the Committee should recommend that laws already on the books with respect to worker status in Ontario be enforced. Practical experience in both Ontario and around the world demonstrates that concerns about pro-rating vacation pay and other benefits or about integrating concepts like overtime with

[38] In its recent *Foodora* decision, the OLRB held that there was nothing novel about gig economy employers for the purposes of labour and employment law:

> [T]he services performed by Foodora couriers are nothing new to the Board and in many ways are similar to the circumstances of the Board's older cases. This is not the Board's first case examining the relationship of couriers.

[39] Similarly, in Australia, Foodora couriers were found to be employees for the purposes of minimum standards legislation and the Supreme Court of the United Kingdom held in *Uber BV v Aslam* that Uber drivers in London were employees for the purpose of English employment laws.

non-standard work arrangements are illusory and quickly addressed by app-based employers once existing laws are enforced. Creating a new category of worker in Ontario would not address any novel legal issues created by app-based work. It would simply provide foreign corporations such as Uber with an exemption from laws that set a floor of decent work standards in this province, and which already apply to app-based workers.

IV. The Need for a Clear, Predictable and Purposive Test for Employment

46. As noted above, the OLRB resolves classification issues by applying several different but often overlapping tests, including a review of the factors of control, capital investment and entrepreneurial activities;[40] an analysis of the ways in which an individual is integrated into a larger organization;[41] and an analysis which recognizes the important remedial role played by the *ESA* and focuses on issues of vulnerability and dependence.[42]

47. While the tests used by the OLRB permit a thorough and flexible review of the factors relevant to a finding of employment, they are not easily summarized or communicated to the public and are, on occasion, inconsistently applied.[43] However, the "ABC test" (defined below) does satisfy these criteria and should be adopted in Ontario.

48. The ABC test was first developed in the US and provides that an individual will be found to be an employee unless the hiring entity can demonstrate that:

    a. the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*

    b. the worker performs work that is outside the usual course of the hiring entity's business; *and*

[40] The so-called *Montreal Locomotive Test or Fourfold Test* which looks at issues of control, ownership of tools, chance of profit and risk of loss. See ESA Interpretation Manual (2019) at page 24. Available Online: http://catalogue.owtlibrary.on.ca/owtl/currentawareness/ESA2019Release1.pdf.

[41] The *Organizational Test,* see ESA Interpretation Manual (2019) at page 25. Available Online: http://catalogue.owtlibrary.on.ca/owtl/currentawareness/ESA2019Release1.pdf.

[42] The *Statutory Purpose Test,* see ESA Interpretation Manual (2019) at pages 25 and 26. Available Online: http://catalogue.owtlibrary.on.ca/owtl/currentawareness/ESA2019Release1.pdf.

[43] For example, the Board has issued two decisions which are both analogous to platform work but also contradictory, compare: *Global Courier & Messenger Service Ltd* [2006] OESAD 326 and *Globex Plus Messenger Service (Wilson)* [2005] OESAD 802.

c. the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[44]

49. The ABC test ultimately reviews the same factors as the OLRB's test under the *ESA*. Part A looks at control; Part B mirrors the organizational test; and Part C shares elements of both the control test and the statutory purpose test.

50. As a result, applying the ABC test to classification issues arising in Ontario would have little *substantive* benefit as compared to the *status quo.* However, it would make the purpose of the *ESA* much clearer to potential claimants, employers and the public.

51. The ABC test operates from the presumption that all workers are employees. The employer bears the onus of rebutting this presumption. While the OLRB has, historically, presumed employment in the absence of the employer demonstrating independence,[45] introducing a statutory reverse onus provision in Ontario would help remedy the poor enforcement and access to justice concerns that currently undermine app-based workers' access to their *ESA* entitlements by clarifying this opaque area of law.

52. Currently, workers are left to determine on their own whether or not they are employees, facing language barriers, a lack of familiarity with the *ESA*, and misleading messaging from employers relating to worker status. Placing this onus on app-based workers undermines the integrity and effectiveness of our minimum standards regimes. By contrast, employers have the resources, expertise and access to internal information needed to efficiently and effectively demonstrate that a worker is in fact an independent contractor.

53. The Committee should recommend that the government adopt the ABC test for determining whether individuals are employees or independent contractors for the purposes of minimum standards legislation. The test should start from the presumption that all workers in Ontario are employees in order to ensure that gig workers can effectively access the rights and benefits to which they are entitled.

V. App-Based Workers Must Be Paid for All Time Spent On the App and All Expenses

[44] *Dynamex Operations West, Inc. v. Superior Court*, (2018) 4 Cal.5th 903; See also *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558.

[45] *Cima Limited* [1963] OLRB Rep. 100 at p102; *Baron Drywall* [1965] OLRD No. 3 at para 8 – 12; [1965] OLRD No. 3 at paras 8–12; Automatic Fuels Limited [1966] OLRB Rep. 22 at para 14; *Nick's Haulage* [1970] OLRB Rep. 871 at para 3; *Dearie & Warren Ltd.* [1970] OLRB Rep. 816; *Gulf Oil Limited* [1973] OLRB Rep 245 at para 25.

54. Employer-sponsored studies have found that as much as 33% of an app-based driver's time can be spent waiting for new passengers.[46] According to driver estimates, the actual amount of time spent waiting is even greater.[47] Under legislative models which exclude waiting time from minimum wage calculations, researchers have found that hourly wage rates can plummet, to roughly half (or less) of the minimum wage.[48] This is supported by anecdotal evidence from Canada.[49]

55. In the UK, Uber has attempted to limit their liability for benefits such as the minimum wage by pushing a restrictive definition of engaged time and only compensating drivers for time spent directly servicing customers.[50]

56. The Committee should reject any model which fails to compensate app-based gig workers for all time spent on their respective apps, including time spent waiting for the completion of orders, time spent travelling to areas of their city where they are more likely to get better orders or time spent waiting for new deliveries.

57. Sub-minimum wage compensation does not serve the purposes of economic recovery or decent work. The Committee should reject any loophole tied to so-called "engaged time." Such an approach would be consistent with the American *Fair Labor Standard Act*, which expressly recognizes "engaged waiting time" as compensable time[51] and is consistent with the current *ESA* regulations which require payment for all work.

58. Similarly, app-based workers must be compensated for all work-related costs or, at the very least, have these costs factored into the calculation of the minimum wage. App-based models of employment are predicated on downloading the necessary costs of business – for example, the cost of essential equipment and

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[46] See: https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/. We are aware of no such data for food delivery couriers.

[47] Veena B. Dubal, "The New Racial Wage Code" (2021). Harvard Law and Policy Review, Forthcoming at page 24. Preprint available at SSRN: https://ssrn.com/abstract=3855094.

[48] Researchers in California determined that under the Prop 22 model the average hourly wage of Uber and Lyft drivers would be roughly $5.64US: https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/. A more recent study of drivers in Seattle found an average income after expenses of only $9.73US per hour: https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf.

[49] Jason McBride, *My Brief Career as a Food Courier*, Available: https://www.readersdigest.ca/culture/my-brief-career-as-a-food-courier/.

[50] Drivers in the UK have estimated the an "engaged time" model would result in an underpayment of 40% to 50%: https://www.ft.com/content/8d39472b-12a1-4754-bb11-b9149dab2872.

[51] "Engaged waiting time" is recognized by the *Fair Labor Standards Act*'s minimum wage and overtime regulations. "Waiting time" is classified as compensable work time if that time is spent primarily for the benefit of the employer. *Armour & Co. v. Wantock,* 323 U.S. 126, 132, 65 S.Ct. 165, 168, 89 L.Ed. 118 (1944).

supplies – onto individual workers. This approach has been soundly rejected for dispatch-based employees in Ontario and there is no principled reason why app-based employers should be exempted from their legal obligations to employees.[52]

VI. The Need for Enforcement

59. The COVID-19 pandemic clearly established the degree to which Ontario has come to rely on the app-based economy, particularly for the delivery of goods and food. As a result, app-based workers were essential workers.

60. The pandemic also underscored the degree to which app-based workers were left unprotected. For example, in Toronto during the pandemic, food couriers were required to perform potentially dangerous jobs and provide their own protective equipment.[53] These issues were not isolated to Ontario - the World Economic Forum found that 70% of app-based workers surveyed were unsatisfied with their company's response to the pandemic and that some gig workers had quit their jobs due to safety concerns.[54]

61. No meaningful steps were taken by the Provincial government to address concerns related to both working conditions and health and safety for app-based workers. We are not aware of occupational health and safety enforcement or education programs implemented by the Ministry of Labour targeting app-based workers, either during the pandemic or before.

62. This lack of action is an extension of the Province's historical failure to take any meaningful steps to protect app-based workers.

63. Foodora is generally considered to be the first contemporary app-based employer to begin working in Ontario. It did so in 2014. Since 2014, however, we are not aware of any claims involving platform employers have been referred to the OLRB or, it would appear, any other provincial or federal employment standards tribunal.

64. The absence of employment standards claims is likely due to a number of factors, including confusion over legal rights and concerns regarding the cost of individual litigation. During the same period, we are not aware of any human rights or occupational health and safety complaints or investigations related to app-based work, though public pressure and a review by the Workplace Safety and Insurance

[52] See, for example: *J.W. Ferguson Services Ltd.* 2005 CanLII 3612 (ON LRB) at paras 35-38.

[53] https://www.thestar.com/business/2020/04/02/foodora-couriers-worry-about-new-order-medication-sometimes-delivered-face-to-face.html.

[54] https://www.weforum.org/agenda/2020/04/gig-workers-hardest-hit-coronavirus-pandemic/.

Board in 2019 did result in the expansion of benefits provided to food delivery workers.[55]

65. The high degree of turnover and/or short tenure of employment amongst app-based workers witnessed in cases like *Foodora* may explain the absence of employment standards-based claims reported in Ontario. Individuals with short service may have little incentive to pursue claims related to their employment, although the accrued benefits of misclassification to employers may be significant.

66. In addition, due to the lack of clarity and failure of Ontario's *ESA* enforcement process, workers have been required to engage in costly and lengthy class action lawsuits in order to enforce their basic statutory entitlements. Uber (both Eats and their taxi service), Skip the Dishes[56] and Amazon's Delivery Drivers[57] are all the subject of misclassification class actions. In addition, two applications for certification have been filed since 2019: the Foodora[58] application and the UFCW's application targeting the UberBlack program[59] (a subset of Uber's broader taxi services).The proliferation of class actions and union activity demonstrates that workers wish to impact and improve their working conditions but are only able to do so when a collective route is available.

67. The absence of a clear approach to precarious workers, including app-based workers was highlighted by Ontario's Changing Workplaces Review as a reason to amend the *ESA*. The CW Review found that minimum standards legislation should "communicate to employers and employees with as much clarity as is reasonable the scope of coverage of the" legislation.[60]

68. This disparity makes it clear that the enforcement of employment standards and occupational health and safety legislation in Ontario is not working, for a variety of reasons, including a lack of clarity and consistency in adjudicating classification issues.

69. As a result, in addition to the issues discussed earlier in these submissions – such as the adoption of the ABC test – we submit that any legislative or policy-based

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[55] Caitlin Taylor, *Uber Eats announces insurance for bike couriers.* Available: https://www.cbc.ca/news/canada/uber-eats-insurance-couriers-1.5122197.

[56] Cameron MacLean, *Proposed class-action against Skip the Dishes moving forward after Supreme Court's ruling.* Available: https://www.cbc.ca/news/canada/manitoba/skip-the-dishes-lawsuit-moving-forward-1.5642294.

[57] Sara Mojtehedzadeh, *Amazon delivery drivers in Canada launch $200 million class action claiming unpaid* Available: https://www.thestar.com/business/2020/06/26/amazon-delivery-drivers-in-canada-launch-200-million-class-action-claiming-unpaid-wages.html.

[58] *Foodora Inc. d.b.a. Foodora*, 2020 CanLII 16750 (ON LRB).

[59] *Uber Canada Inc.*, 2020 CanLII 54980 (ON LRB).

[60] Changing Workplaces Review, *supra* at p 365.

changes must be paired with increased resources for the enforcement of existing employment laws and the application of these laws to app-based employers.

Should you have any questions or concerns arising out of the foregoing, please do not hesitate to contact the undersigned directly.

Yours very truly,

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