

Queen's | LAW

CLCW

CENTRE FOR LAW IN THE  
CONTEMPORARY WORKPLACE

# Rethinking Workplace Protection

Queen's International Institute on Social Policy  
September 3, 2020

Prof. Kevin Banks  
Faculty of Law, Queen's University

# Overview

- I. Outline of policy problems
- II. Gaps in workplace law
- III. An agenda for policy reconsideration and response



# I. Policy Problems: Changes at Work and their Discontents

Changes in organization of production to fissured / outsourced / core-periphery / networked models, together with globalization, financialization and tech change (as both accelerants and independent drivers), have produced two sets of policy problems:

1. They have expanded precarious work and secondary labour markets in ways that undermine the capacity of labour and employment law to ensure decent and fair working conditions to many workers who need workplace protections the most:
  - Compliance and enforcement problems
  - Coverage and access problems
  - New forms of unfairness and barriers to full and equal participation
  - Limited the capacity of employment to deliver income security protections and other protections

(See annexed slides and: Expert Panel on Modern Federal Labour Standards; Federal Labour Standards Review Commission; Lewchuk 2013, Lewchuk 2018; Mitchell and Murray; Stansbury and Summers; Weil 2014)



# Policy Problems: Changes at Work and their Discontents

2. They have restricted rent-sharing and weakened worker power in relation to capital in ways that limit the capacity of labour and employment law to enable workers to share in the fruits of economic growth.

- Within industries, networks and supply chains rents remain within lead firms
- Within firms more rents go to shareholders and executives
- Globalization limits union bargaining power (and thus wage premiums) in internationally integrated industries and beyond, especially in states with enterprise-level bargaining
- While collective bargaining laws can still make a difference, key policy levers may lie elsewhere, in corporate governance, tax law, and social security systems.

(See annexed slides, and see: Ackers; Freeman; Green, Riddell and St. Hilaire; Harrison; Milanovic; Osberg; Stansbury and Summers; Weil).



## II. Gaps in Workplace Law

1. Compliance Gaps
2. Gaps in coverage
3. Gaps in the web of rules
4. The shrinking platform: what employment is less able to deliver



# 1. Compliance Gaps

*Fissuring and precariousness aggravate longstanding compliance challenges*

- Both more difficult and more necessary to enforce rights in secondary labour markets.
- Incentives for non-compliance (thin margins) + precariousness = problems with compliance and lack of redress for workers.

(See generally Banks 2016, and the slides on compliance in the annex.)



## 2. Coverage Gaps

- Some contract workers may fall out of coverage despite forms of control and dependence that result in economic vulnerability similar to that of employees.
- More often the problem is confusion and time lags in dealing with misclassification: multi-factor tests for employment lead to ambiguity, often requiring litigation or labour inspector time to resolve.



# 3. Gaps in the Web of Rules

## *New fairness and predictability issues*

- Permatemps
- Equal pay for part time and temporary workers
- Eligibility requirements for standards
- Control over time (call in pay etc, rights to refuse overtime..)
- Moving minimum wages towards living wages
- Distribution of compensation within enterprises.

(See for example: Expert Panel on Modern Federal Labour Standards; Federal Labour Standards Review Commission; MacDonald; Mitchell and Murray)



# Gaps in the Web of Rules

## *Access to effective association and representation*

- Precariously employed workers, especially short-term workers, are unlikely to organize, especially outside of traditional sectors like construction or performing arts.
- Collective bargaining is not accessible to or effective for many of them due to procedural requirements of demonstrating majority support, the transience of relationships with particular employers, or lack of employee leverage at the enterprise level.

(Expert Panel Report, Chapter 6; Gomez, 2016)



Queens | LAW

CLCW CENTRE FOR LAW IN THE  
CONTEMPORARY WORKPLACE

# 4. The Shrinking Platform of Employment

## *Income security*

Fewer workers with pensions and benefits. (Shilton; Expert Panel, Chapter 5)

## *Accommodation of disability*

Many accommodations are more than the law requires, despite net benefits to PWD and society as a whole. (Banks, Chaykowski and Slotsve)



# Some Ways in Which the Pandemic Has Thrown These Issues into Sharper Relief

- Compliance problems in occupational health and safety law (Lippel)
- Gender and racial disparities in who is at risk (St. Denis)
- Low pay (or no pay, for those laid off) means crowded living quarters and further contagion, especially in expensive cities.
- Visibility of coverage issues for gig economy delivery workers
- Income insecurity in the event of sickness or contagion risk, and as a generator of contagion risk, shines a light on income insecurity more generally.



# III. An Agenda for Policy Reconsideration and Response

1. Move to proactive compliance and enforcement systems
2. Clarify and expand coverage of workplace laws
3. Carefully expand employment standards protections
4. Enable new forms of collective representation
5. Provide greater income security to those most vulnerable to insecurity



# 1. Move to Proactive Compliance and Enforcement

## *Elements of a Strategy*

- Maximize awareness: clarify, inform, educate and engage
- Gather compliance data and use it strategically
- Enforce proactively, like a law enforcement agency
- Use effective deterrent sanctions
- Provide an expeditious and accessible adjudication or appeal mechanism
- Be prepared to consider increasing resources.

(Banks 2016; Federal Labour Standards Review Commission; Mitchell and Murray)



## 2. Clarify and Expand Coverage

### *Problems with the common law definition of employment*

- Subordination, as historically understood, has in many cases been replaced by other forms of control that are perhaps no less problematic in terms of outcomes for workers – e.g. algorithmic deployment of surveillance and ratings.
- And it is often the absence of continuity and bilaterality that make employment status unclear or contentious in the case of gig workers, even as they continue to produce vulnerability not that different from that found in traditional employment relationships.
- Legal analysis requires detailed comparison to traditional employment, when the question should really be: is this person actually an entrepreneur in business for him or herself?
- The continuing emphasis on old multi-factor definitions of employment allows those who hire workers to manipulate legal relationships so as to avoid forms of legal responsibility suited to the purposes of workplace law.
- The complexity of the test also creates delays and expense in determining employment status.



# Clarify and Expand Coverage

*One possible reform approach: Update the employment test by focusing on first and foremost on whether a worker is an entrepreneur or not.*

For example:

- Refocus the Supreme Court of Canada's *Sagaz* test for employment back onto its stated central question - whether the person performing the services is in business on his own account - by asking as a threshold matter whether there is any significant opportunity for profit through negotiated rates of pay or control over costs or ways of performing work.
- Or consider adopting the ABC test used in a number of US states:
  - The worker is free from the control and direction of the hiring entity in connection with the work's performance, both under the contract for the performance of the work and in fact.
  - The worker performs work that is outside the usual course of the hiring entity's business.
  - The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.



# Clarify and Expand Coverage

*A second possible approach: let go of the idea that there needs to be a single test, and create a set of simple, purpose-built ones.*

- For each field of workplace regulation, identify which economic actors control outcomes so as to put at risk policy-protected interests of workers, and adjust coverage according to the purpose of the rule or rules in question.
- This means moving away from a one-size fits all approach, especially in the field of employment standards. The scope of legal responsibilities and coverage will vary, rather than having a single boundary based on a single category (like employment) with a uniform definition.
- The identity of the employer may differ or could be multiple depending on the type of work regulation.
  - For some kinds of regulation, employment should may not be the boundary anymore.
  - Or who is an employee could vary by the subject matter of employment regulation.
  - Where an employer does not seek to control aspects of the employment relationship, those aspects may remain unregulated.
- The approach could provide clarity by reducing the number of factors that need to be considered to determine whether a particular rule applies.



For examples, see the annexed slides.

Queen's | LAW

CLCW CENTRE FOR LAW IN THE  
CONTEMPORARY WORKPLACE

# 3. Carefully Expand Employment Standards Protections

- Employment standards are an increasingly important pillar of workplace law as secondary labour markets expand and workers lack effective access to union representation.
- Global competitiveness provides no reason to avoid effective and responsive labour protections. (Banks, 2013).
- Gradually addressing fairness and predictability issues (see “Gaps in the Web of Rules”, above) may contribute to social cohesion and stability without harming productivity or employment.



## 4. Enable Access to Alternative Forms of Union Representation

- Making union representation more available and effective in secondary labour markets may require enabling associational activity and minority unionism within workplaces, and/or regional or sectoral bargaining. (Dimick; Gomez; Slinn)
- New forms of representation and bargaining should not interfere with access to or functioning of bargaining under current labour relations laws.



# 5. Provide Greater Income Security

- Expanding CPP and drug coverage are already on the agenda.
- Current reforms to EI and experience with CERB and expanded sick leave may provide insights into how to improve income security as a hedge against increased precarity in work relations.



Thank you.



Queen's | LAW

CLCW CENTRE FOR LAW IN THE  
CONTEMPORARY WORKPLACE

# References

- Peter Ackers, “Trade Unions as Professional Associations” in S Johnstone & P Ackers, ed, *Finding a Voice at Work? New Perspectives on Employment Relations* (Oxford Scholarship Online, 2015)
- Banks, Kevin “Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness” (Queen’s Printer, 2016)
- Banks, Kevin Richard Chaykowski, and George Slotsve “The Accommodation Gap in Canadian Workplaces: What Does it Mean for Law, Policy and an Aging Population?”, 17 *Canadian Labour and Employment Law Journal* 295 (2013)
- Banks, Kevin “Must Canada Change its Labour and Employment Laws to Compete with the United States?”, 38 *Queen’s Law Journal* 419-460 (2013)
- Countouris, Nicola “Defining and Regulating work relations for the future of work” (ILO, 2019)
- Bernhardt, Annette et al. “Broken Laws, Unprotected Workers: Violations of Employment in Labor Laws in America’s Cities”, Report. Chicago, New York & Los Angeles: Centre for Urban Economic Development, University of Illinois Chicago, National Employment Law Project and UCLA Institute for Research on Labor & Employment, 2009. Retrieved from: <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1>.
- Dimick, Matthew. *Productive Unionism*, 4 U.C. Irvine L. Rev. 679 (2014). Available at: [https://digitalcommons.law.buffalo.edu/journal\\_articles/88](https://digitalcommons.law.buffalo.edu/journal_articles/88)
- Expert Panel on Modern Federal Labour Standards, Report of the Expert Panel on Modern Federal Labour Standards (2019)
- Federal Labour Standards Review Commission, *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century* (2006)
- Freeman, Richard: *The Great Doubling: The Challenge of the New Global Labor Market*, in Eva A. Paus (ed) *Global Capitalism Unbound: Winners and Losers from Offshore Outsourcing* (NY: Palgrave MacMillan, 2007)
- Gomez, Rafael: *Employee Voice and Representation in the New World of Work: Issues and Options for Ontario*. (2016)
- Galarneau, Diane and Thao Song, *Long Term Trends in Canadian Unionization* (Statistics Canada, 2013)
- Macdonald, David. ‘Climbing Up and Kicking Down’. Canadian Centre for Policy Alternatives. Accessed 17 July 2020. <https://www.policyalternatives.ca/publications/reports/climbing-and-kicking-down>. "
- Mitchell, C. Michael and John Murray, *The Changing Workplaces Review – An Agenda for Workplace Rights, Final Report* (Toronto: Queen’s Printer, 2017)



# References

- Green, David, W. Craig Riddell and France St. Hilaire: “Income Inequality in Canada: Driving Forces, Outcomes and Policy”, in Green, Riddell and St. Hilaire, *Income Inequality – The Canadian Story* (IIRP, 2016)
- Harrison, Bennett: *Lean and Mean: The Changing Landscape of Corporate Power in the Age of Flexibility* (1997)
- Lewchuk, Wayne “The Political Economy of Precarious Employment: Will it Be No Work or Precarious Employment?” *Canadian Labour and Employment Law Journal*, Vol. 21 (2018)
- Lewchuk, Wayne “The Limits of Voice: Are Workers Afraid to Express Their Health and Safety Rights?” *Osgoode Hall Law Journal*., Vol. 50 (2013)
- Lippel, Katherine: “Occupational Health and Safety and COVID-19: Whose Rights Come First in a Pandemic?” in Colleen Flood et al. eds, *Vulnerable: The Law, Policy and Ethics of COVID19* (2020)
- MacDonald, David ‘Climbing Up and Kicking Down’. Canadian Centre for Policy Alternatives (2018)
- Milanovic, Branco: *Global Inequality – A New Approach for the Age of Globalization* (Harvard Belknap, 2016)
- Osberg, Lars. “What’s so Bad about Increasing Income Inequality in Canada?”, in Green, Riddell and St. Hilaire, *Income Inequality – The Canadian Story* (IIRP, 2016)
- Shilton, Elizabeth: *Empty Promises: Why Workplace Pension Law Doesn’t Deliver Pensions* (Montreal and Kingston: McGill-Queen’s University Press, 2016)
- Slinn, Sara: *Collective Bargaining – Research Report to the Changing Workplaces Review* (2016)
- St. Denis, Xavier “Sociodemographic Determinants of Occupational Risks of Exposure to COVID-19 in Canada” (Research note, 2020)
- Stansbury, Anna and Lawrence Summers: *Declining Worker Power and American Economic Performance* (Brookings BPEA Conference Draft, March 19, 2020)
- Vosko, Leah, Andrea M. Noack, and Eric Tucker: “Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and Their Resolution under the Employment Standards Act, 2000.” (2016)
- Weil, David *Improving Workplace Conditions through Strategic Enforcement*, a Report to the Wage and Hour Division. Boston: Boston University, 2010
- Weil, David: *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014)



# Annex

*Some data, historical background, and examples of alternative approaches*



Queen's | LAW

CLCW CENTRE FOR LAW IN THE  
CONTEMPORARY WORKPLACE

# Increased job, income and rights insecurity

- The own-account self-employed and temporary employees are over-represented among those who report that they are in precarious work, measured using an index of security of job, income, hours, and ability to enforce labour protections.
  - Self-employed without employees increased from 6% to 11% between 1976 and 2016
  - Temporary employment increased from 7 to 13% between 1989 and 2016.
- About one in four full time, permanent workers also report being in precarious work.
- Race dimension: about one in four white workers but closer to one in three racialized workers.

(Lewchuk 2018)



# Concentration of Disadvantage

- Of those working at least 30 hours per week, those in *Precarious* employment earned about 60 percent of what those in *Secure* employment earned.
- Workers not in a Standard Employment Relationship were four times as likely to report their hours might be reduced in the next six months.
- Less than 10 per cent of those in precarious employment received at least some supplemental health benefits, such as a drug plan.
- About 15 percent of those in precarious employment had a pension plan versus 25 per cent overall.
- Fifteen percent of those in *Precarious* employment were unionized compared to almost 34 percent of those in *Secure* employment.

(Source: Lewchuk, 2018)



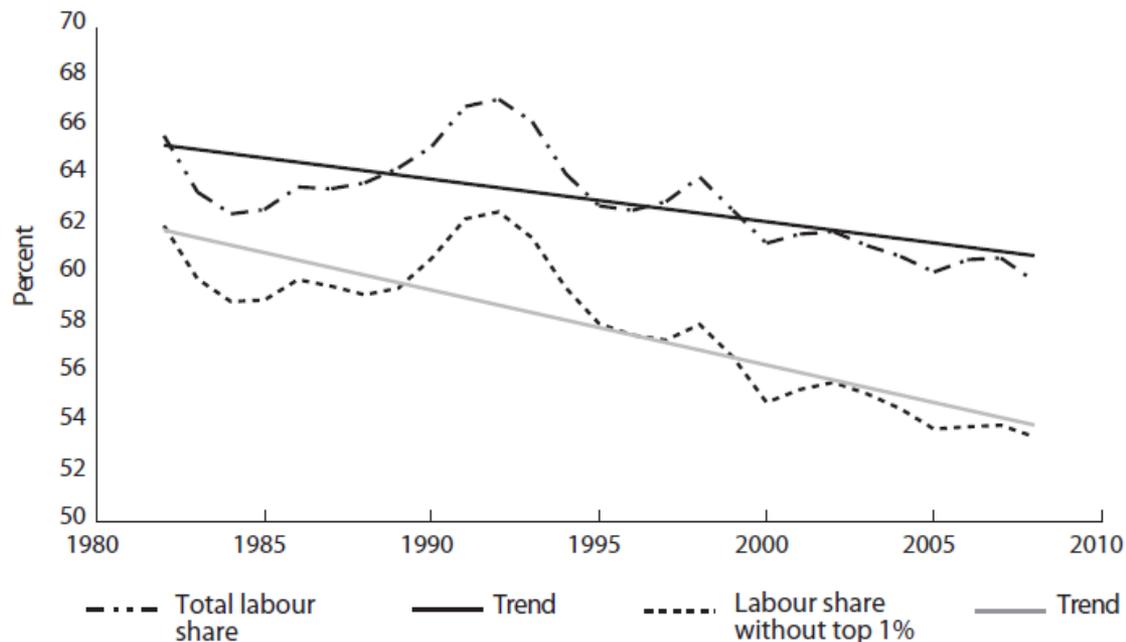
Queen's | LAW

CLCW CENTRE FOR LAW IN THE  
CONTEMPORARY WORKPLACE

# Increased Market Income Inequality

(source: Green, Riddell and St. Hilaire)

**Labour share of total income with and without the top 1 percent of earners, Canada, 1982-2008**



Source: Authors' calculations based on Organisation for Economic Co-operation and Development, OECD Data, Productivity Unit Labour Costs (<https://data.oecd.org/lprdy/unit-labour-costs.htm>).

Note: This is figure 4 in Lemieux and Riddell (in this volume).



# Increased Market Income Inequality

Average annual rate of growth or real taxable income by fractile for Canada, 1982-2010:

Bottom 90%: 0.08%

Top 10-5%: 0.59%

Top 5-1%: 0.9%

Top 1-0.5%: 1.36%

Top 0.5-0.1%: 1.85%

Top 0.1-0.01%: 2.66%

Source: Osberg.



# Compliance Gaps

*Non-compliance is a long-standing problem*

- In Ontario the proportion of proactive inspections that detected violations ranged from 65% to 77% in the years between 2011/12 and 2014/15. (Vosko, Noack and Tucker 2016)
- A 1997 survey of federally-regulated employers found that 25 percent of employers were not in compliance with most obligations under the federal labour standards code. (Federal Labour Standards Review Commission, at 192)
- Non-compliance with anti-discrimination law is also a problem. Discrimination at the point of hire is very difficult to regulate. 35% of employed persons with disabilities report that they do not receive needed accommodations. Much of this is likely due to non-compliance with human rights laws. (Banks, Chaykowski and Slotsve).



# Compliance Gaps

## *Non-Compliance and Fissuring*

- A US survey found that rates of employment standards and workers compensation law violations are much higher than average in many industries with a fissured structure: home health care; grocery stores; restaurants and hotels, residential construction, building and grounds security, and retail and drug stores. (Bernhardt et al 2009)
- Similarly, complaints in Ontario related to the accommodation and food services industry are most likely to have violations, with 78% of assessed complaints resulting in violations (see Vosko, Noack and Tucker 2016)



# Compliance Gaps

## *Non-Compliance and Precarity*

- In a survey of low-wage workers in Toronto and Windsor:
  - 22% of the workers surveyed reported being paid less than minimum wage,
  - 33% of workers reported being owed wages that were past due,
  - 39% of workers working more than 44 hours in a week reported never receiving overtime pay,
  - 36% of workers reported being dismissed with no notice or termination pay.  
(Workers Action Committee, 2011)
- Data from a survey of Ontario workers indicate that, after controlling for other factors, workers with high precarity index scores were more than 6 times as likely to report that expressing concerns about health and safety matters at work would have negative consequences for their future employment. (Lewchuk 2013)



# Compliance Gaps

*Complaint-driven enforcement has limited reach*

- Over 90% of the approximately 15,000 complaints made every year are by people who have left their jobs voluntarily or after they have been terminated. (*Vosko, Noack and Tucker, 2016*)
- Similarly, the Federal Labour Standards Review Commission found that 92% per cent of complaints filed under Part III of the Canada Labour Code by persons no longer employed in the same workplace. (FLSRC at 192).
- And as noted above, those most in need of protection are least likely to complain.



# Universal common law definition of employment as historical artifact, or relic?

- The origins of employment law in feudal master and servant relationships have left emphases on subordination, continuity and bilaterality that are increasingly irrelevant to the purposes of workplace regulation today. (Countouris)
- The inherited legal definition of employment relationship worked in the mid 20<sup>th</sup> century because it happened to combine most forms of problematic control and dependence. So it could be used as a gateway to labour protections. It was a workable simplification of complex economic and social realities.
- It is not anymore. A growing segment of the workforce in many countries no longer fits well within the binary classification of common law employee / independent contractor, and happens to contain many of the workers most in need of protection.



# Examples of purpose-built coverage in Canadian workplace law

## Health and safety law

- Obligations apply well outside of traditional employment, e.g. to owners, suppliers, constructors, and licensees, based on who controls conditions affecting health and safety.

## Collective bargaining law

- The law enables economically dependent workers to bargain with the party that most controls working conditions: dependent contractors can bargain collectively; agency workers bargain with the client of the agency.

## Non-discrimination law – legal responsibility attaches to the commercial party causing the discrimination:

- Laws cover provision of service – so even if a platform operator is just providing a service this would be covered.
- Some cases recognize responsibility of franchisors and other third parties as employers where they exert sufficient control as to cause the discrimination.



# Some examples of regulations whose scope of application might be redefined according to their purpose

## Timely payment/collection of wages

- These standards serve to protect economically vulnerable workers from failures to pay by those benefitting from work and having the capacity to pay, and from the costs of recovering moneys owed for work.
- Would it not make sense to provide this protection to workers who are in a dependent contractual relationship?

## Minimum wage

- Here the purpose is arguably that a worker should not be paid below a certain amount per hour, in the interests of basic decency, unless he or she has a meaningful opportunity for profit and therefore can be expected to bear a corresponding risk of loss.
- So would it not make sense to ask whether the party accepting the work does so on terms that offer a meaningful opportunity for profit? Refocusing the Supreme Court of Canada's test in *Sagaz* onto whether the worker is in fact an entrepreneur might again be appropriate.



# Some examples of regulations whose scope of application might be redefined according to their purpose

## Working time

- Where a worker is genuinely free to set his or her own working time (in duration and timing), there may be no need to regulate it, but this would have no implications for whether the worker is otherwise treated as an employee.

## Notice of termination of the relationship

- Canadian common law provides notice of termination to dependent contractors. This can be overridden by express contract terms.
- Perhaps the time has come for statutory minimums to apply to dependent contractors. Dependent contractors, because of their dependence, have legitimate and important interests in reasonable notice and there are social policy interests in facilitating their adjustment to termination.

