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Constitutional Labour Rights in the Gig Economy: Digital Platform Workers and Section 2(d) of the *Charter*

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ABSTRACT

Gig work is not new, but the introduction of digital platforms to broker its delivery vastly expands its domain. Workers can experience vulnerability in their relationships with these platforms, especially when power imbalances are acute. Collective bargaining is one way platform workers might protect themselves. However, due to their uncertain status as "employees," platform workers are likely excluded from some, if not most, statutory collective bargaining regimes in Canada. A section 2(d) *Charter* right to bargain collectively could protect them from such exclusion. While early section 2(d) decisions rejected a *Charter* right to bargain collectively, more recent ones affirm that section 2(d) protects that right, especially for workers who experience workplace vulnerability. Many platform workers fall within that category and should therefore be entitled to *Charter* protection. A *Charter* right to bargain collectively would compel governments to act, and not act, in ways favourable to protecting those workers' collective voice and interests.

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RÉSUMÉ

Le travail à la tâche n'est pas nouveau, mais l'introduction de plateformes numériques pour faciliter son exécution élargit considérablement son domaine. Les travailleurs peuvent se sentir vulnérables dans leurs relations avec ces plateformes, surtout lorsque les déséquilibres de pouvoir sont aiguës. La négociation collective est un moyen pour les travailleurs des plateformes numériques de se protéger. Cependant, en raison de leur statut incertain en tant qu'« employés », les travailleurs des plateformes numériques sont susceptibles d'être exclus de certains, voire de la plupart, des régimes légaux de négociation collective au Canada. Un droit de négociation collective prévu par l'alinéa 2d) de la *Charte* pourrait les protéger d'une telle exclusion. Si les premières décisions rendues au titre de l'alinéa 2d) ont rejeté un droit de négocier collectivement prévu par la *Charte*, les décisions plus récentes affirment que l'alinéa 2d) protège ce droit, en particulier pour les travailleurs qui se trouvent dans une situation de vulnérabilité sur leur lieu de travail. De nombreux travailleurs des plateformes numériques entrent dans cette catégorie et devraient donc bénéficier de la protection de la *Charte*. Un droit à la négociation collective prévu par la *Charte* obligerait les gouvernements à agir, ou à s'abstenir d'agir, de manière à protéger la voix et les intérêts collectifs de ces travailleurs.

INTRODUCTION

DO digital platform workers have a constitutional right to bargain collectively with the platforms that broker their services? The question is important as work-brokering platforms proliferate and the uncertain legal status of platform workers risks excluding them from statutory collective bargaining. A constitutional right to bargain collectively, rooted in the *Canadian Charter of Rights and Freedom*'s (*Charter*) section 2(d) guarantee of freedom of association, could protect them from such exclusion.[1] Early section 2(d) decisions rejected such a right,[2] but more recent ones affirm that section 2(d) protects collective bargaining rights for workers who, because of vulnerability due to workplace power imbalances, need those rights to protect their interests.[3] Many platform workers fall within that logic, we argue, and should therefore be entitled to a *Charter* right to bargain collectively. Such an extension of extant section 2(d) jurisprudence would compel governments to act, and not act, in ways favourable to protecting platform workers' collective voice and interests.

Our argument proceeds as follows. Part I claims that while gig work is not new, the introduction of digital platforms to broker its delivery through online apps vastly expands its domain. Workers can experience vulnerability and disempowerment on those platforms, it is further argued, especially when power imbalances between them and the platforms

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1 *Canadian Charter of Rights and Freedoms*, s 2(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 The Supreme Court refers to these decisions as the "Labour Trilogy" (see e.g. *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras 31, 37, 39 [*MPAO*]). The Labour Trilogy is composed of *Reference Re Public Service Employee Relations Act (Alta)*, *PSAC v Canada*, and *RWDSU v Saskatchewan*. For their respective holdings on a constitutional right to bargain collectively, see *Reference Re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 at para 185 (SCC) [*Alberta Reference*]; *PSAC v Canada*, 1987 CanLII 89 at para 54 (SCC) [*PSAC*]; *RWDSU v Saskatchewan*, 1987 CanLII 90 at para 47 (SCC) [*RWDSU*].

3 See *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 37 [*Dunmore*]; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 2 [*BC Health Services*]; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 2 [*Fraser*]; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 1 [*Saskatchewan Federation*]; *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec,* 2024 SCC 13 at paras 5–6 [*Société des casinos*].

are acute. Part II describes three strategies currently pursued by individuals, organizations, and governments to establish legal protection for platform workers: (1) *litigation* to classify them as "employees"; (2) *regulation* to grant them legal rights to organize and bargain collectively (sometimes through re-classification, other times regardless of classification); and (3) *informal organizing*. While these strategies are important and potentially impactful, we argue, none—either on their own, or in combination with others—provide platform workers the legal protection they need. Part III argues that a new strategy, which could complement and add to the others, is section 2(d) litigation to require governments, labour boards, legislatures, and courts to grant platform workers meaningful rights to bargain collectively. We examine key dimensions of this argument, including: the elements of the Supreme Court of Canada's section 2(d) jurisprudence that support it, the relevance of Canada's obligations under International Labour Organization (ILO) treaties, the mechanisms through which section 2(d) is likely breached by current labour laws, and possible approaches to remedying such breaches. Throughout, we emphasize that while platform (and other precarious) workers may be unable to exercise existing collective bargaining rights effectively, the solution is not to abandon pursuit of those rights, including through constitutional protection, but rather to create new collective bargaining models responsive to those workers' unique circumstances and needs.[4]

I. THE EVOLUTION AND NATURE OF DIGITAL PLATFORM WORK

Prior to the Industrial Revolution, workers, if not indentured as serfs or owned as slaves, sold their labour on a task-by-task basis to whomever might purchase it. Having one job at a time, as part of a single career, with a stable employer legally obliged to respect and protect a worker's

4 On the latter point, see e.g. Benjamin J Oliphant, "The Nature of the Fundamental Freedoms and the *Sui Generis* Right to Collective Bargaining: The Case of Vulnerable and Precarious Workers" (2018) 21:2 CLELJ 319 at 359–60; David J Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2013) 38:2 Queen's LJ 511 at 513–15; Guy Mundlak & Hila Shamir, "Organizing Migrant Care Workers in Israel: Industrial Citizenship and the Trade Union Option" (2014) 153:1 Intl Lab Rev 93 at 113.

interests, was largely unknown.[5] Work was casual, with people often working multiple poorly paid, intermittent, and non-specific jobs.[6] The nature of work changed with industrialization, the development of mass enterprise, and the standardization of production methods. Employers needed stable workforces with job-specific skills, and soon large numbers of workers toiled side-by-side, day after day, their work governed by contracts of employment that, among other features, had no fixed end dates. This type of work has come to be known as the *standard employment relationship* (SER).[7]

Proximity among SER workers led to common and shared sensibilities and grievances, which spawned an increasingly powerful labour movement that pushed for workplace rights and protections.[8] The movement worked to expand suffrage, resulting in the creation and success of socialist and social democratic political parties committed to protecting workers' interests. Now with allied political parties, the labour movement pushed successfully for statutory regimes protective of workers' rights to form unions, bargain collectively, and strike.[9] The SER was the building block for these regimes, and only workers in SERs had access to them. The regimes were therefore incomplete from the start, as women, immigrants, and racialized workers were—and continue to be—disproportionately denied the benefits of SERs and the legislative rights built upon them. Such workers inordinately suffered—and continue to

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5 Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution*, Oxford Monographs on Labour Law (Oxford, UK: Oxford University Press, 2005) at 44–51; Kenneth Morgan, *The Birth of Industrial Britain: Social Change, 1750–1850*, 2nd ed, Seminar Studies in History (Abingdon: Routledge, 2013) at 9–20; Jim Stanford, "The Resurgence of Gig Work: Historical and Theoretical Perspectives" (2017) 28:3 Econ & Lab Relations Rev 382 at 385 [Stanford, "The Resurgence of Gig Work"].

6 Jonas Lindström, Rosemarie Fiebranz & Göran Rydén, "The Diversity of Work" in Maria Ågren, ed, *Making a Living, Making a Difference: Gender and Work in Early Modern European Society* (New York: Oxford University Press, 2017) 24.

7 Deakin & Wilkinson, *supra* note 5 at 95–105.

8 On the increasing power and organization of the labour movement and related political activity, see The Rt Hon Philip Snowden, "Social and Revolutionary Unrest" in Franklin H Hooper, ed, *These Eventful Years: The Twentieth Century in the Making, as Told by Many of Its Makers* (London, UK: Encyclopaedia Britannica, 1924) vol 1, 440 at 440–41.

9 Deakin & Wilkinson, *supra* note 5 at ch 4.

suffer—the burdens and vulnerabilities of precarious work.[10] Moreover, labour law regimes were, and are, often limited on their own terms, and poorly enforced, with effective exercise of legislated rights stymied by the same workplace power dynamics they aim to remedy. Still, such regimes remain important vehicles for workers to protect their interests, and their reach should be broadened beyond SERs to precarious and vulnerable workers.

That need is particularly acute today. Beginning in the early 1980s, market-driven policies combined with new production technologies to facilitate outsourcing, sub-contracting, restructuring, and offshore production. The direct result was diminishment of the SER and resulting increase in workplace precarity.[11] Today, those same dynamics are exacerbated by the rise and proliferation of digital platform work, which threatens a "back to the future" workplace where workers are isolated and vulnerable, and lack an effective collective voice.[12] As the economist Jim Stanford observes:

> [T]he major organisational features of digital platform work—contingent or on-call labour, piece-based compensation and the requirement that workers provide their own capital equipment—are not new at all. These practices are as old as capitalism, perhaps even older.[13]

The main effect, or disruption, of ride-hailing firms like Uber and Lyft, for example, is not so much to transform what delivery drivers do—transport people from one place to another for remuneration—but rather

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10 Sheila Block & Grade-Edward Galabuzi, *Canada's Colour Coded Labour Market: The Gap for Racialized Workers* (Ottawa & Toronto: Canadian Centre for Policy Alternatives & Wellesley Institute, 2011) at 10, online (pdf): <policyalternatives.ca> [perma.cc/5CTE-8UHV]; Philippa Kelly, "'So Many Reports of Violence and Abuse': How the Gig Economy Fails Women Around the World", *The Guardian* (26 June 2023), online: <theguardian.com> [perma.cc/LBD3-RN7F]; Stanford, "The Resurgence of Gig Work", *supra* note 5 at 390.

11 Deakin & Wilkinson, *supra* note 5 at 264–71; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 81–85 [Bakan, *Just Words*].

12 See the text accompanying notes 13–14.

13 Stanford, "The Resurgence of Gig Work", *supra* note 5 at 383. See also Bethany Hastie, "Platform Workers and Collective Labour Action in the Modern Economy" (2020) 71 UNBLJ 40 at 44–45 [Hastie, "Platform Workers"].

to transform a job protected by regulations, labour laws, and employment laws (i.e., taxi driving) into one that is unprotected and precarious (i.e., app-based ride-hail driving).[14] As one commentator notes, "[w]hile the technology these companies utilize may be innovative, a business model that creates profit by denying workers basic wage and hour protections is far from inventive."[15]

Platform work is not, of course, limited to ride-hailing firms like Uber and Lyft. Other, and expanding, kinds of work are brokered by digital platforms as they "spread ... quickly into ... courier services, food and package delivery, technology services, design, teaching and tutoring, home repair and maintenance tasks, and human and caring services (such as aged care, home care, and childcare)."[16] Important differences exist among these varied kinds of platform work, not least that some (such as design) are "cloud-based," involving mainly online work, while others (such as delivery services) are "place-based," requiring work in particular locations.[17] For the latter, place-based platform work, there were (in 2022 in Canada) 207,000 workers performing delivery services for food or other goods, and 79,000 workers performing taxi or rideshare services. Comparable numbers for the former, cloud-based work, were 58,000 for creation of content such as videos, blogs or podcasts; 42,000 for programming, coding, web or graphic design; and 41,000 for

14 Joel Bakan, *The New Corporation: How "Good" Corporations Are Bad for Democracy* (Toronto & New York: Allen Lane & Vintage Books, 2020) at 101–02 [Bakan, *The New Corporation*]; Stanford, "The Resurgence of Gig Work", *supra* note 5 at 386–87; Andrew Stewart & Jim Stanford, "Regulating Work in the Gig Economy: What Are the Options?" (2017) 28:3 Econ & Lab Relations Rev 420 at 424–25 [Stewart & Stanford, "Regulating Work"].

15 Ben Zipperer et al, *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay* (Washington, DC: Economic Policy Institute, 2022) at 10, online (pdf): <epi.org> [perma.cc/J9HN-3RWK].

16 Jim Stanford, "Open Letter on Regulating Platform Work from B.C. Experts in Labour Law, Policy, and Economics" (19 June 2023), online: <centreforfuturework.ca> [perma.cc/6DQE-7JSC]. For more on types of platform work in the EU, see EU, Eurofound, *Employment and Working Conditions of Selected Types of Platform Work*, by Willem Pieter de Groen et al, Catalogue No TJ-03-18-239-EN-N (Luxembourg: Publications Office of the European Union, 2018) at 13–14.

17 Sara J Slinn, "Exploring Sectoral Solutions for Digital Workers: The *Status of the Artist Act* Approach" (2020) 65:1 Saint Louis ULJ 93 at 96–97.

teaching or tutoring.[18] Platform work happens *within* companies, as well as between them and their customers. Amazon Flex, for example, promises various benefits—"Great Earnings. Flexible Hours. Be Your Own Boss"—for its nonemployee delivery drivers, who use an app to claim delivery shifts, drive their own vehicles to Amazon warehouses, pick up packages, and then deliver them.[19]

Overall, the number of workers involved in platform gig work is expanding. In the United States, the number of workers more than tripled between 2017 and 2021, rising from just under 1.5 million to 5 million.[20] In Canada, between 2005 and 2020, the percentage of workers performing gig work roughly doubled, from 5.5 percent to 10 percent of the workforce.[21] As platform gig work expands, SERs and other more stable work arrangements likely diminish. "The digital economy will sharply erode the traditional employer-employee relationship," according to professor Arun Sundararajan, with "most of the workforce shift[ing] from a full-time job as a talent or labor provider to running a business of

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18 Statistics Canada, "Labour Force Survey, December 2022", *The Daily* (6 January 2023) at 8, online (pdf): <www150.statcan.gc.ca> [perma.cc/7JWF-4NH4]. Research commissioned by H&R Block indicated that approximately 13 percent of Canadians reported working in the gig economy, and one-third of Canadians would consider working in the gig economy (see H&R Block Canada Inc, "Gig Economy Workforce Rockets to More than One in Ten of Canadians; A Further Third Are Open to Joining, Reveals New Study", *Cision* (11 April 2022), online: <newswire.co> [perma.cc/M6NQ-KJ46]).

19 Amazon, "Amazon Flex: Be Your Own Boss. Great Earnings. Flexible Hours" (16 November 2017), online: <flex.amazon.com> [perma.cc/WMF6-PZH3]. See Bakan, *The New Corporation*, *supra* note 14 at 102; Dan Pontefract, "Why Your Organization Needs an Internal Gig Economy Platform", *Forbes* (2 February 2018), online: <forbes.com> [perma.cc/9U54-8Q2K]. Another such app developed to encourage internal platform work is Phenom, which is currently used by companies including Southwest, Electrolux, and MGM Resorts, among others (see Phenom, "Customer Stories" (last visited 17 February 2025), online: <phenom.com> [perma.cc/EN4Z-VYJA]).

20 Andrew Garin et al, "The Evolution of Platform Gig Work, 2012–2021" (2023) Becker Friedman Institute, Working Paper No 2023-69, online (pdf): <bfi.uchicago.edu> [perma.cc/N7EM-UKUA]. See also Samantha Delouya, "The Rise of Gig Workers is Changing the Face of the US Economy", *CNN* (25 July 2023), online: <cnn.com> [perma.cc/QM89-DALX]; Monica Anderson et al, "The State of Gig Work in 2021" (8 December 2021), online: <pewresearch.org> [perma.cc/GW56-NGTN].

21 Employment and Social Development Canada, *What We Heard: Developing Greater Labour Protections for Gig Workers*, Catalogue No Em8-75/2022E-PDF (Ottawa: ESDC, March 2023), online (pdf): <canada.ca> [perma.cc/V8A2-6S8E].

one—in effect a microentrepreneur."[22] The proliferation of digital labor platforms across increasing numbers of sectors, both low skilled and professional, means that "[n]onemployment work arrangements will expand ... possibly taking full-time jobs out of companies and converting them into sets of projects or tasks."[23]

We argue below that, following the Supreme Court's section 2(d) jurisprudence, extending *Charter* protection of collective bargaining to platform workers depends upon their *needing* of such rights to help overcome workplace disempowerment and vulnerability. It is therefore important to recognize that not all platform workers share those characteristics. More and more, professionals and managers are joining ride-share drivers, deliverers, and couriers in soliciting gigs on digital platforms. Tuomo Alasoini et al describe different degrees of worker control and autonomy across three different kinds of platforms: (1) a food-delivery platform; (2) a platform for skilled freelancers from various fields of expertise, like design, marketing, engineering, coding, or translation; and (3) a platform for management experts to perform high-level managerial tasks.[24] Comparisons among the different groups highlight unique vulnerabilities of members of the first group, according to Alasoini et al—they are low-skilled, isolated, and lack collective voice; their work is controlled by opaque algorithms; and they are in "a dead-end job in terms of learning or advancement" and therefore "completely replaceable."[25] Vulnerability among workers on platforms akin to Alasoini et al's first group (which would include various delivery and ride-hailing platform workers) is underlined by scholarly studies, legal cases, and government and NGO reports that point to their unequal power, isolation, and

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22 Arun Sundararajan, "The Future of Work", *Finance & Development* (1 June 2017), online: <elibrary.imf.org> [perma.cc/6VUR-4U58].

23 *Ibid.*

24 Tuomo Alasoini et al, "Platform Workers and Digital Agency: Making Out on Three Types of Labour Platforms" (2021) 8 Frontiers in Sociology at 4–6. Increasingly, legal professionals solicit work on platforms (see Pragya Sehgal, "More Lawyers Are Embracing the Gig Economy While Working Remotely, Experts Say", *ITBusiness* (2 September 2020), online: <itbusiness.ca> [perma.cc/2P3C-7H2E]; Yao Yao, *Uberizing the Legal Profession?: Three Essays on Lawyers in Digital Platform-Based Legal Services* (PhD Dissertation, University of Toronto, 2021) [unpublished] at 12, online (pdf): <utoronto.scholaris.ca> [perma.cc/ZW5L-E4FK]).

25 Alasoini et al, *supra* note 24 at 9.

general precarity.[26] Importantly, the causes underlying that vulnerability are complex and multi-faceted. They are not solely, or even primarily, connected to exclusion from statutory collective bargaining (though the latter could, in some circumstances, help them overcome that vulnerability), and they may include workers from Alasoini et al's second group as well as from the first.

To begin with, much platform work is governed by one-sided contracts of adhesion that foster chronic low pay (partly a result of no pay while workers look for gigs or wait for tasks to be assigned), unpredictable schedules and earnings, late or non-payment, unsafe and unhealthy conditions, and limited access to dispute resolution.[27] Platform workers are typically excluded from legislative protection of employment standards due to their uncertain status as "employees," and while in Ontario and British Columbia there is special legislative protection for them (discussed further below), the sufficiency of that protection and the prospect of its adequate enforcement are uncertain.[28] Compounding their vulnerability, many platform workers are from migrant and racialized groups.[29]

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26 Zipperer et al, *supra* note 15 at 2; Iglika Ivanova & Kendra Strauss, *But Is It a* Good *Job?: Understanding Employment Precarity in BC* (Vancouver: Canadian Centre for Policy Alternatives, 2023) at 30–37, online (pdf): <policyalternatives.ca> [perma.cc/UXH3-MDHR]; Kelvin Taylor et al, "Physical and Psychological Hazards in the Gig Economy System: A Systematic Review" (2023) 166 Safety Science at 2, 12; Robert D Thomas et al, "Assessing Associations Between Insecure Income and US Workers' Health: An IPUMS-MEPS Analysis" (2022) 309 Soc Science & Medicine at 2. For a discussion of platform work, see *Canadian Union of Postal Workers v Foodora Inc dba Foodora*, 2020 CanLII 16750 at paras 6–9 (ONLRB) [*Foodora*]; *Uber BV and others v Aslam and others*, [2021] UKSC 5 at paras 6–33 [*Aslam*].

27 Employment and Social Development Canada, *supra* note 21 ("[g]ig workers facing one or more of these challenges can find themselves in precarious and vulnerable economic positions" at 3–4).

28 With respect to the latter point, see Fife Ogunde, "When Your Boss is an Algorithm: Preserving Canadian Employment Standards in the Digital Economy" (2023) 21:1 CJLT 47 at 52, 55, 63.

29 Macarena Bonhomme & James Muldoon, "Racism and Food Delivery Platforms: Shaping Migrants' Work Experiences and Future Expectations in the United Kingdom and Chile" (2025) 48:10 Ethnic & Racial Studies 1897 at 1897–98. Toronto reported in 2024 that

> [o]ver 70% of PTC [private transportation company, mainly Uber and Lyft] and taxicab drivers in Toronto self-reported as being racialized in a stakeholder survey conducted as part of this review. For those who are newcomers,

Racism in formal labour markets, as well as related issues of precarious citizenship status, discriminatory welfare and employment regimes, language barriers, and unfamiliarity with local employment contexts, operate to drive migrants to platform work, which can often seem a better alternative than the even more precarious, low paying, and dangerous and degrading work available to them in retail and service sectors.[30] Finally, platform workers are isolated from each other, "tend[ing] to be geographically dispersed, isolated ... highly mobile (including moving among 'gigs' within and across sectors), and [doing] work [that] is often short-term and/or task-based."[31] Such isolation serves as an impediment to collective agency and action, and helps explain why statutory collective bargaining is rare—and, in Canada, entirely absent—for platform workers even where they are included within its scope.[32]

II. CURRENT "SOLUTIONS" AND THEIR LIMITS

Three kinds of strategies are currently relied upon by individuals, governments, and organizations, respectively, to extend legal protection to platform workers. These are: (1) *litigation* aimed at classifying platform workers as "employees," thereby ensuring their eligibility for legal protection that is restricted to that category; (2) *regulation* designed to protect platform workers, sometimes by classifying them as employees, other times regardless of classification; and (3) *informal organizing* of platform workers, including creation of alliances between them and established labour organizations. These strategies are important and potentially impactful, but none—either on its own or in combination with the others—is likely to provide platform workers the sustained legal protection they need. Moreover, as the next two sections show, litigation and regulation strategies often neglect collective labour rights, pursuing only individual employment standards protection. The latter can be better

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and facing additional language, cultural or educational barriers, the low entry requirements, immediate availability of work, and flexible hours in the VFH industry make it a potential way to earn an income (see *2024 Review of the Vehicle-for-Hire By-law and Industry* (Toronto: Toronto, 2024) at 9, online (pdf): <toronto.ca> [perma.cc/9MXL-ANDU]).

30 Bonhomme & Muldoon, *supra* note 29 at 1897–98.

31 Slinn, *supra* note 17 at 98.

32 *Ibid* at 99–100.

than nothing, but it may not be enough. Excluding platform workers from rights to bargain collectively denies their ability to bargain for legal protections beyond the minimum floor of employment standards, and specifically for protections demanded by unique aspects of their work.[33]

A. Classification Litigation

Courts and tribunals worldwide—including in Canada, the United Kingdom, Uruguay, Spain, the Netherlands, and South Africa—have held that platform workers are employees, or employee-like workers, and, on that basis, that they should fall within the scope of employment and/or labour legislation.[34]

In Canada, the Ontario Labour Relations Board (OLRB) held in *Canadian Union of Postal Workers (CUPW) v. Foodora Inc. d.b.a. Foodora* (*Foodora*) that platform workers are employees under the *Ontario Labour Relations Act* (*OLRA*) because they are "dependent contractors" (a category of "employee" in the act), and are therefore entitled

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33 We thank Bethany Hastie for this observation.

34 The cases in Canada (*Foodora*, *supra* note 26) and the United Kingdom (*Aslam*, *supra* note 26) are discussed in detail, *below*. For information on cases from other jurisdictions, see generally Valerio De Stefano et al, "Platform Work and the Employment Relationship" (2021) International Labour Organization, Working Paper No 27 at 30–37, online (pdf): <ilo.org> [perma.cc/ZD2A-JP48]. For further information on the individual cases, see Labour Appeal Court of Montevideo (First Chamber), Montevideo, 3 June 2020, *Queimada, Esteban v Uber BV and others*, [2021] 7 ILaRC 230 at 231, No 2-3894/2019 (Uruguay); International Organisation of Employers, "Spain: Supreme Court Decision on the Employment Status of Workers for a Delivery Company and Social Dialogue Process on a 'Riders Law'" (October 2020), online: <industrialrelationsnews.ioe-emp.org> [perma.cc/X5N6-Q9EV]; Tribunal Supremo [Supreme Court], Madrid, 25 September 2020, STS 2924/2020 at 19, ECLI:ES:TS:2020:2924 (Spain); Anthony Deutsch & Toby Sterling, "Uber Drivers are Employees, Not Contractors, Says Dutch Court", *Reuters* (13 September 2021), online: <reuters.com> [perma.cc/DTR8-ZESE]; Court of Amsterdam, Amsterdam, 13 September 2021, *FNV v Uber BV*, No 8937120 CV EXPL 20-22882 at para 51, ECLI:NS:RBAMS:2021:5029 (Netherlands). In the United States, a recent National Labor Relations Board ruling narrows the previously authoritative definition of "independent contractor" in ways that could open up rights to unionize, bargain collectively, and strike for gig workers, including platform workers (see *The Atlanta Opera, Inc*, 372 NLRB No 95 at 2 (US National Labor Relations Board 2023)).

to union representation and collective bargaining under the act.[35] Although Foodora couriers use their own vehicles, and do not enter employment contracts, the OLRB held they are in positions of economic dependence and under a degree of control by Foodora that make them *dependent* rather than *independent* contractors.[36] In reaching its decision, the board emphasized that the main work "tool" is the app, which is owned by Foodora; and that "[t]he couriers are selected by Foodora and required to deliver food on the terms and conditions determined by Foodora in accordance with Foodora's standards," which means "[i]n a very real sense, the couriers work for Foodora, and not themselves."[37] Foodora workers were thus entitled to rights to organize and bargain collectively under the *OLRA*, and the Canadian Union of Postal Workers was certified as their exclusive bargaining agent.

In the United Kingdom, a group of Uber drivers argued successfully in *Uber BV and others v. Aslam and others* (*Aslam*) that they should be classified as "workers" under employment standards legislation and thereby entitled to minimum wages, paid annual leave, and whistleblower protection.[38] The United Kingdom Supreme Court (UKSC) held that vulnerable workers need protection, and that the key to vulnerability is

> subordination to and dependence upon another person in relation to the work done ... a touchstone of [which] ... is ... the degree of control exercised by the putative employer over the work or services performed by the individual concerned.[39]

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35 *Supra* note 26 at paras 76–79, 173. The Ontario *Labour Relations Act, 1995* includes "dependent contractor" as a category of "employee" (see SO 1995, c 1, Schedule A, s 1(1) [*OLRA*]). Federal labour relations legislation, and provincial legislation in British Columbia, Alberta, and Newfoundland and Labrador, also have dependent contractor provisions (see *Labour Relations Code*, RSBC 1996, c 244, s 1(1) [*BC Labour Relations Code*]; *Labour Relations Code*, RSA 2000, c L-1, s 1(1) [*AB Labour Relations Code*]; *Labour Relations Act*, RSNL 1990, c L-1, s 2(1)(k) [*NFLD Labour Relations Act*]).

36 *OLRA*, *supra* note 35 ("'employee' includes a dependent contractor", s 1(1)).

37 *Foodora*, *supra* note 26 at para 171. See Bethany Hastie, "Platform Work and Labour Law Challenges: A Comment on *CUPW v. Foodora*" (2021) 23:1 CLELJ 121 at 128.

38 *Supra* note 26 at paras 34, 119. At issue was the definition of a "worker" under the *Employment Rights Act 1996*, *National Minimum Wage Act 1998*, and *The Working Time Regulations* (see *Employment Rights Act 1996* (UK), s 230(3); *National Minimum Wage Act 1998* (UK), s 54(3)(b); *The Working Time Regulations 1998* (UK), reg 2(1)).

39 *Aslam*, *supra* note 26 at para 87.

Uber drivers fell squarely within these criteria, the UKSC held, and should therefore be regarded as workers under the legislation. Key to the UKSC's decision was its understanding that the services performed by drivers through the Uber app are "very tightly defined and controlled by Uber," and that the inability of drivers to offer distinctive services or set their own prices means "they have little or no ability to improve their economic position through professional or entrepreneurial skill ... [and] can [only] increase their earnings ... by working longer hours while constantly meeting Uber's measures of performance."[40] Collective bargaining legislation in the United Kingdom uses the same definition of "worker" as the employment standards legislation at issue in *Aslam*.[41] On that basis, GMB was able to gain recognition from Uber to represent its drivers.[42]

Aslam and *Foodora*—along with similar rulings from other jurisdictions—signal that classification litigation can succeed. It is a question, however, what practical effect such success might have. In Canada, for example, no board or court other than the OLRB has fully ruled on the issue, meaning *Foodora*'s fate and influence are uncertain. The OLRB's ruling is only applicable in Ontario, and it is binding neither on courts in Ontario nor on courts or boards in other provinces. Also noteworthy is the fact both *Foodora* and *Aslam* were decided in relation to generous legislative criteria concerning *who* is entitled to the statutory rights at issue. *Foodora* was decided on the basis of a definition of "employee" that expressly included "dependent contractor," a concept that easily encompasses platform workers—as discussed more fully below.[43] In *Aslam*, the relevant legislation used the term "worker," rather than the narrower "employee," facilitating the UKSC's decision that Uber drivers fell within the legislation's scope. By notable contrast, in a subsequent case concerning riders for the food-delivery app Deliveroo, the UKSC, following decisions of the European Court of Human Rights, held that an "employment relationship" was a condition of labour rights protection under

40 *Ibid* at para 101.

41 *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), ss 1, 68(4), 116B(10).

42 GMB Union, "The Union for Uber Drivers" (last visited 17 February 2025), online: <gmb.org.uk> [perma.cc/GQK9-VWV8].

43 Not all jurisdictions in Canada have similar provisions (see *Foodora*, *supra* note 26 at para 79).

article 11 of the *European Convention on Human Rights*, and that such a relationship did not exist for Deliveroo riders.[44] The broader point is that decisions like *Foodora* and *Aslam* may be narrowed, ignored, or overruled by future decisions. Moreover, even on their own terms, they do not necessarily translate into practical relief. In Ontario, for example, the OLRB's decision in *Foodora* likely contributed to, or perhaps even precipitated, Foodora's departure from Ontario.[45] And following *Aslam*, the agreement between Uber and the GMB on behalf of Uber drivers, lauded as "groundbreaking" by some at the time, was criticized by others for excluding central platform worker concerns from collective bargaining, including compensation.[46]

Underlying these practical problems is a conceptual one. Whether platform workers *need* the protection of rights to organize and bargain collectively is not the same thing as whether, as a formal legal matter, they are conceived as "employees," "workers," or "dependent contractors." Platform workers may fall short of even the broadest definitions of these concepts, yet still require legislative protection of their collective voice in the workplace. To take examples from outside the platform context, most fishers and artists are not "employees" under prevailing legal definitions of the term.[47] Fishers do not take a wage, but rather share proceeds from particular voyages; they do not work for employers, but rather engage in joint ventures with other fishers, including with captains

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44 *Independent Workers Union of Great Britain v Central Arbitration Committee and another*, [2023] UKSC 43 at paras 40, 69–73.

45 Josh O'Kane, "Foodora to Exit Canada Just Months After Workers Won the Right to Unionize", *The Globe and Mail* (27 April 2020), online: <theglobeandmail.com> [perma.cc/M3FS-H8EB].

46 A number of unions have criticized Uber for recognizing unions but not engaging in true collective bargaining. Critics include the International Secretary of the Dutch union FNV (Pieter Haeck, "Uber and Unions Face Off Over EU Gig Work Law", *Politico* (8 November 2023), online: <politico.eu> [perma.cc/UQ2P-WYVM]), the General Secretary of the App Drivers & Couriers Union (Pieter Haeck, "Uber Fights to Win Over its Enemies, One at a Time", *Politico* (30 May 2023), online: <politico.eu> [perma.cc/W9ZS-D35T]), and the Independent Workers' Union of Great Britain (Agence France-Presse, "Uber's British Union Deal Gets Mixed Reception", *Barron's* (27 May 2021), online: <barrons.com> [perma.cc/4RFF-RNA3]).

47 For fishers, see e.g. Unifor, "BC Fish Harvesters Join Unifor with Historic Vote" (20 June 2019), online: <unifor.org> [perma.cc/ZS2D-AKTG] ("[t]raditional labour laws do not apply to seiners because they are not paid wages, but are paid by the weight and price of their catch"). For artists, see Slinn, *supra* note 17, at 99–102.

and vessel owners; their incomes depend on prices paid by processors to which they collectively (with other joint venturers) sell their catch; and they do not work consistently with any one captain, vessel owner, or crew. Artists, as Sara J. Slinn observes, are analogous in many ways to platform workers—their work is often intermittent, of short duration, conducted for several different engagers at once, isolated, and on a gig basis rather than under employment contracts.[48] In short, the work relationships of fishers and artists lie some distance from an SER. Yet, for each group, governments in Canada have recognized the need for statutory collective bargaining and created sector-specific regimes, such as British Columbia's *Fishing Collective Bargaining Act*[49] and the federal *Status of the Artist Act*.[50] These acts demonstrate that workers' *need* for collective bargaining is a different issue than whether they can be classified in terms of prevailing legislative concepts. They also show how regulatory reform can bypass barriers created by traditional legal categories of work, and thus extend collective bargaining rights to workers who need them.[51]

B. Regulatory Reform

Numerous jurisdictions have initiated regulatory and legislative reforms to protect platform workers.[52] These often, though not always,

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48 *Supra* note 17 at 107–08.

49 RSBC 1996, c 150. In 2019, the first organization under this act took place as seine boat fishers voted to join the United Fishermen and Workers Union – Unifor (see Jenna Cocullo, "Historic Win for B.C. Fishermen Now Bargaining Under Labour Code", *Terrace Standard* (28 June 2019), online: <terracestandard.com> [perma.cc/4BFZ-VUH9]).

50 SC 1992, c 33.

51 In this regard, we examine in Part III(D), *below*, whether, and what kinds of, sector-specific collective bargaining regimes for platform workers might be appropriate remedies for infringements of section 2(d) resulting from their exclusion.

52 For example, Italy expanded the scope of employment protections for platform workers (see *Decreto-Legge 3 Settembre 2019, n 101*, GU, 4 September 2019, 1, Preamble (Italy)). Chile added a new chapter into its labour code, providing for the classification of platform workers as either dependent or independent, and outlining employment standards for both types of work (see *Ley n° 21.431*, DO, 11 March 2022, no CVE-2099107, art 2 (Chile)). Additional examples include Portugal's "Uber Law," which classifies platform workers as employees (see *Lei n° 45/2018 de 10 de Agosto*, DR, 10 August 2018, 3972, art 1 (Portugal)), Spain's "Riders' Law" that classifies platform workers as employees (see *Real Decreto-ley 9/2021 de 11 de mayo*, BOE, 12 May 2021, 56733

operate by legislatively classifying workers in terms designed to ensure protection. In British Columbia, for example, Bill 48 amended the *Employment Standards Act* and the *Workers Compensation Act* to include online platform workers by classifying them as "workers" for the purpose of each act, and by deeming the platforms to be "employers."[53] As a result, certain legislative standards now "apply to all workers in the industry regardless of whether they are employees or independent contractors under any law."[54] No doubt, this extension of legislative protection to platform workers is significant. There is, however, a glaring omission: Bill 48 provides no protection for workers' rights to bargain collectively. Outside of British Columbia, the only other Canadian jurisdiction with specific regulations for platform workers is Ontario.[55] That legislation has been criticized for prioritizing the interests of app-based companies over workers and thereby falling short of adequate protection.[56] Another notable example comes from California. In 2020, the California legislature enacted Bill A5, which redefined "employee" in sufficiently broad terms to include many platform workers.[57] In that same year, however, and in direct response, California voters passed Proposition 22 (by a vote of 59 percent to 41 percent), which exempts ridesharing and delivery platforms from the scope of Bill A5, and therefore from the employment and collective bargaining obligations the latter would have imposed upon

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(Spain)), and a Brazilian law that removed the differentiation between work conducted in the workplace and work conducted through an app for the purpose of determining employment, and has been used to establish an employment relationship for platform workers (see *Ley n° 12.551/2011*, DOU, 16 December 2011, 3, art 1 (Brazil)). For discussion of some of these laws, see De Stefano et al, *supra* note 34 at 21–23, 29. See also Stewart & Sanford, "Regulating Work", *supra* note 14 at 225–27.

53 Bill 48, *Labour Statutes Amendment Act*, 4th Sess, 42nd Leg, British Columbia, 2023, cls 2, 9 (assented to 30 November 2023), SBC 2023, c 44.

54 BC Ministry of Labour, News Release, 29877, "Fairness Coming to Gig Workers" (16 November 2023), online: <news.gov.bc.ca> [perma.cc/S9BE-ABJG].

55 See *Digital Platform Workers' Rights Act, 2022*, SO 2022, c 7, Schedule 1.

56 Vanmala Subramaniam, "How Uber Got Almost Everything It Wanted in Ontario's Working for Workers Act", *The Globe and Mail* (24 May 2022), online: <theglobeandmail.com> [perma.cc/27B2-KRCK].

57 See US, AB 5, *An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefore*, 2019, Reg Sess, Cal, 2019, s 2(a)(1) (enacted).

them.[58] As compensation, Proposition 22 imposed some obligations on platforms, including minimum hourly earnings, and contributions towards healthcare and occupational accident protection.[59]

There are other examples of legislative and regulatory reforms, some robust, others less so, some relying on classification, others not.[60] Overall, however, such reform strategies like litigation are uncertain at best for a variety of reasons. To begin with, political environments must be conducive to prioritizing platform workers' rights for such strategies to succeed, and that can be a problem due to large platforms' political clout.[61] In California, for example, Uber and Lyft waged highly visible campaigns to support Proposition 22, spending a record-breaking US$200 million

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58 Michael Andre et al, "California Proposition 22 Election Results: Define App-Based Drivers as Contractors", *The New York Times* (last modified 12 December 2020), online: <nytimes.com> [perma.cc/X6VB-2MFL]; *Protect App-Based Drivers and Services Act*, 3 Cal BPC §§ 7448–67 (2020) [*Protect App-Based Drivers Act*].

59 Attorney General (California), "Proposition 22: Official Title and Summary" (3 November 2020), online (pdf): <vigarchive.sos.ca.gov> [perma.cc/3GN4-MVPA]. For the new law created by Proposition 22, see generally *Protect App-Based Drivers Act*, *supra* note 58. The law created minimum compensation (*ibid*, § 7453), healthcare subsidies (*ibid*, § 7454), and minimum loss and liability protection (*ibid*, § 7455). Proposition 22 was challenged for being unconstitutional, but it was ultimately upheld by the California supreme court (see Grace Gedye, "Court Upholds California Prop. 22 in Big Win for Gig Firms like Lyft and Uber", *CalMatters* (13 March 2023), online: <calmatters.org> [perma.cc/AT4R-V9BH]; Suhauna Hussain, "California Supreme Court Upholds Prop. 22, Ending Legal Saga over Status of Gig Drivers", *Los Angeles Times* (25 July 2024), online: <latimes.com> [perma.cc/R3KV-92EA]).

60 Importantly, some of these may facilitate and protect a collective voice for platform workers, though not through collective bargaining, such as codes of conduct agreements negotiated between unions and platforms, such as, as Slinn discusses, the "Crowdsourcing Code of Conduct" agreed to by the German union IG Metall and eight cloud work platforms (see *supra* note 17 at 96–97). As Slinn points out, however:

> It is important to recognize ... that this regime does not involve collective bargaining and does not produce an enforceable collective agreement. It is based on individual complaints, with the hope that the Ombuds Office's identification of structural problems from these complaints, decisions, and recommendations may contribute to reform (see *ibid* at 97).

61 Rachel Tansey & Kenneth Haar, *Über-influential?: How The Gig Economy's Lobbyists Undermine Social and Workers Rights* (Brussels: Corporate Europe Observatory & AK EUROPA, 2019) at 9, online (pdf): <corporateeurope.org> [perma.cc/NUQ6-MC4X]; Joy Borkholder et al, "Uber State Interference: How Transportation Network Companies Buy, Bully, and Bamboozle Their Way To Deregulation" (18 January 2018) at 4–7, online (pdf): <nelp.org> [perma.cc/S9RH-44PX].

in political donations for a proposition.[62] The two platforms also threatened to leave California if the proposition failed.[63] They similarly threatened to leave Minneapolis if an ordinance passed by its city council requiring minimum wages and other protections went into effect, and the mayor vetoed that ordinance in response to the threat.[64] These are just some illustrations (there are many others) of platforms' intense, well-funded, organized, and usually successful efforts to avoid the imposition of regulatory obligations.[65] And sometimes platforms cross the line. A document leak in 2022, for example, showed that Uber "broke laws, duped police and secretly lobbied governments," as *The Guardian* described it, to pave the way for its aggressive global expansion and avoidance of taxi regulations between 2013 and 2017.[66]

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62 Kate Cogner, "It's a Ballot Fight for Survival for Gig Companies Like Uber", *The New York Times* (23 October 2023), online: <nytimes.com> [perma.cc/UJ9Y-DKDV].

63 For an outline of the amount of money spent on campaigning and efforts made to increase visibility, such as through notifications within the Uber app, see Suhauna Hussain, "Uber, Lyft Push Prop. 22 Message Where You Can't Escape It: Your Phone", *Los Angeles Times* (8 October 2020), online: <latimes.com> [perma.cc/F6H4-N8HG]; Graham Rapier, "Uber Drivers Are Suing the Company over 'Threatening' Messages Urging Them to Vote for California's Prop. 22", *Business Insider* (22 October 2020), online: <businessinsider.com> [perma.cc/NNM6-2W97].

64 Max Nesterak, "Minneapolis Mayor Vetoes Minimum Wage Ordinance for Uber and Lyft Drivers", *Minnesota Reformer* (22 August 2023), online: <minnesotareformer.com> [perma.cc/9R36-5NXW]; Mary Walrath-Holdridge, "Uber, Lyft Say They'll Leave Minneapolis if Rideshare Minimum Wage Ordinance Passes. Here's Why.", *USA Today* (18 August 2023), online: <usatoday.com> [perma.cc/2QLD-DZDW].

65 See Jimena Valdez, "The Politics of Uber: Infrastructural Power in the United States and Europe" (2023) 17:1 Regulation & Governance 177 at 181–82; Cristiano Lima-Strong & Aaron Schaffer, "How Uber Sought to Influence Governments and Dodge Authorities", *The Washington Post* (11 July 2022), online: <washingtonpost.com> [perma.cc/G4JP-LHM3]. For criticism from the Confederal Secretary of the European Trade Union Confederation, see Vincenzo Genovese, "Trade Unions Accuse Uber of Unfair Influence on Platform Workers' Rights", *EuroNews* (25 October 2023), online: <euronews.com> [perma.cc/N3YR-AQVB].

66 Harry Davies et al, "Uber Broke Laws, Duped Police and Secretly Lobbied Governments, Leak Reveals", *The Guardian* (11 July 2022), online: <theguardian.com> [perma.cc/6UHT-HXUN]; Frédéric Zalac, Zach Dubinsky & Paul Émile d'Entremont, "Uber Deliberately Dodged Authorities, Ignored Rules in Early Years, Leaked Documents Show", *CBC News* (10 July 2022), online: <cbc.ca> [perma.cc/XF6D-E7F6].

Finally, even if legislatures and governments promulgate laws and regulations favourable to platform workers, these are vulnerable to future diminishment and repeal. For example, while the recent reforms in British Columbia provide some protection for platform workers (despite excluding collective bargaining rights), they are vulnerable to repeal or diminishment by future governments. Historically, in Canada (and elsewhere), employment and labour rights have been political footballs, as governments swing among political parties with varying levels of commitment to workers' concerns. In British Columbia, for example, successive Social Credit, New Democratic Party (NDP), and Liberal governments have rewritten key parts of the province's labour code each time they assume power.[67] In Ontario, just one year after Premier Bob Rae's NDP government extended collective bargaining rights to agricultural workers, a newly elected, and less-labour-friendly, Conservative government reversed that extension.[68] The point is that reforms protecting platform workers are always vulnerable to subsequent governments reversing those reforms.

C. Informal Organizing

Informal organizing and collective action is another important, though again limited, strategy for protecting platform workers' collective interests. As Bethany Hastie notes, there are growing instances of "innovative approaches workers are using to collectively organize and advance their labour interests outside of formal unionization."[69] Without denying the importance and even necessity of informal organizing, of which Hastie elaborates numerous examples, it cannot, on its own, create legally enforceable rights for platform workers. Moreover, in some instances, it may pre-empt creation of such legal rights. In Ontario, for example, Uber succeeded in cajoling cooperation from the United Food and Commercial Workers (UFCW), a US-based union with Canadian members, to

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67 See Noah Meltz & Anil Verma, "Developments in Industrial Relations and Human Resource Practices in Canada: An Update from the 1980's" (1993) Queen's University Industrial Relations Centre, Working Paper No QPIR 1993-8 at 3, online (pdf): <irc.queensu.ca> [perma.cc/J7YA-C5ZW].

68 For an account of these events, see *Fraser*, *supra* note 3 at paras 5–6. For more background on the political back-and-forth, see Felice Martinello, "Mr. Harris, Mr. Rae and Union Activity in Ontario" (2000) 26:1 Can Pub Pol'y 17 at 17–21.

69 "Platform Workers", *supra* note 13 at 46–47.

join it in lobbying the provincial government to deny app-based drivers and delivery couriers employment status, thus barring them from protection under Ontario's *Employment Standards Act, 2000* (*ESA*).[70] The union-corporation cooperation arrangement was formalized in an agreement which, in exchange for the UFCW's support, gave the union the right to represent Ontario drivers and delivery couriers in disputes with the company. Following that, the government enacted the *Digital Platform Workers' Rights Act, 2022*, which explicitly excluded platform workers from more robust protection under the *ESA*. The deal and its consequences have been criticized from within the Canadian labour movement.[71] It demonstrates, as Stanford and Andrew Stewarts have noted, "risk of platform firms favouring non-binding or relatively compliant forms of worker representation, in order to forestall more genuine and independent union organization."[72]

III. A *CHARTER* RIGHT FOR PLATFORM WORKERS TO BARGAIN COLLECTIVELY

A. *Introduction*

The shortcomings of the strategies examined above raise the question: Is there a way to obligate governments *legally* to extend meaningful

70 SO 2000, c 41, s 3(1) [*ESA*]. Coverage by the *ESA* requires that workers be "employees." The new *Digital Platform Workers' Rights Act, 2022*, defines an individual who performs digital platform work as a "worker," not an "employee," thus excluding online digital platform workers from *ESA* protection (see SO 2022, c 7, Schedule 1, s 1(1)).

71 The CUPW initially referred to the announcement of the agreement as a "shock" (see Canadian Union of Postal Workers, Press Release, "CUPW Statement on the Uber and UFCW National Agreement" (28 January 2022), online (pdf): <cupw.ca> [perma.cc/22HR-MTQ4]). In late 2022, CUPW brought an unfair labour practice application to the Ontario Labour Relations Board, with the initial hearing taking place in January of 2023 (see *Canadian Union of Postal Workers v Uber Canada Inc*, 2023 CanLII 5397 (ONLRB)). In October 2023, the board—having heard preliminary objections based on delay and whether a prima facie case had been made—declined to dismiss the application (see *Canadian Union of Postal Workers v Uber Canada Inc*, 2023 CanLII 98479 (ONLRB)).

72 Andrew Stewart & Jim Stanford, "Giving Platform Workers a Say: Regulating for Voice in the Gig Economy" in Adrian Wilkinson et al, eds, *Missing Voice?: Worker Voice and Social Dialogue in the Platform Economy*, The Future of Work and Employment (Cheltenham: Edward Elgar, 2022) 48 at 53.

collective bargaining rights to platform workers, and, in this way, avoid some of the aforementioned uncertainties attendant to classification litigation and reform strategies? We argue in this section that a constitutional right to collective bargaining for platform workers could do this, and that the Supreme Court's section 2(d) jurisprudence supports such a right. The advantage of such a right is that it would *bind* governments and legislatures. Not easily diminished or taken away, it would provide platform workers concrete protection, and also symbolic and mobilizing power.[73] Still, like the aforementioned strategies, such a right would not transcend political contingency and volatility. Governments might invoke section 33's notwithstanding clause to override it (governments have in the past sought to avoid constitutional labour rights by invoking section 33 or threatening to);[74] courts might rely on section 1 to defer to legislation restricting it; and the Supreme Court might reverse recent decisions and return to more restrictive interpretations of section 2(d). Moreover, as discussed more fully below, even if precarious platform workers gain constitutional rights to bargain collectively, the capacity to exercise those rights effectively might be denied by the very reasons underlying their precarity. Realistically, then, section 2(d) rights for platform workers would, like other strategies, be subject to sometimes-hostile political economic forces. These forces do not deny the importance of pursuing bargaining rights, but caution that they are not a panacea.

There is today strong jurisprudential foundation for extending section 2(d) protection to platform workers. Though the Supreme Court initially refused to recognize a section 2(d) right to bargain collectively in the 1980s and 1990s, by the early 2000s[75] it had reversed course,

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73 For discussions of the mobilising power of rights litigation strategies, see e.g. Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, Chicago Series in Law and Society (Chicago: University of Chicago Press, 1994); Michael W McCann & George I Lovell, *Union by Law: Filipino American Labor Activists, Rights Radicalism, and Racial Capitalism*, Chicago Series in Law and Society (Chicago: University of Chicago Press, 2020); Pnina Werbner, "Legal Mobilisation, Legal Scepticism and the Limits of 'Lawfare': Between Law and Politics in Union Activism in Botswana" (2021) 53:3 J Leg Pluralism & Unofficial L 593 at 593–608.

74 See e.g. Vanmala Subramaniam, "Doug Ford's Use of the Notwithstanding Clause Had the Unintended Effect of Bringing Canada's Largest Unions Together", *The Globe and Mail* (7 November 2022), online: <theglobeandmail.com> [perma.cc/3NLW-W3D4].

75 See *Alberta Reference*, *supra* note 2 at para 185; *PSAC*, *supra* note 2 at para 54; *RWDSU*, *supra* note 2 at para 47.

holding that a right of workers to bargain collectively flowed from the section's purpose.[76] As the Court more recently described this earlier jurisprudential evolution, "after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee."[77] This evolution was a "fundamental shift," yielding a "revitalized interpretation of section 2(d)," according to Justice Abella, writing for the majority in *Saskatchewan Federation of Labour v Saskatchewan* (*Saskatchewan Federation*), where the Court recognized a section 2(d)-based right to strike.[78] The new approach, she said, demonstrated that "the arc [of section 2(d) jurisprudence] bends increasingly towards workplace justice."[79] At the core of the Court's extant section 2(d) jurisprudence lies three questions relevant to the labour rights of platform workers: (1) who is protected by *Charter* labour rights, (2) what constitutes a breach of that right, and (3) what is the remedy for such a breach?

B. Who is Protected by a Charter *Right to Bargain Collectively?*

The Supreme Court's post-*Reference Re Public Service Employee Relations Act (Alta.)* (*Alberta Reference*) jurisprudence on constitutional labour rights attracted considerable criticism. As Alan Bogg and Keith Ewing observe in relation to one of the initial cases, *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia* (*BC Health Services*)—the first to recognize a constitutional right to bargain collectively—"the remarkable interventions of law professors critical of [the case] ... was perhaps one of the most extraordinary attacks on one of the most positive decisions on workers' rights in any common law jurisdiction for at least a generation."[80] Scholars criticized the Court not

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76 *Dunmore*, *supra* note 3 at para 37; *BC Health Services*, *supra* note 3; *Fraser*, *supra* note 3 at para 2; *MPAO*, *supra* note 2 at paras 66–67; *Saskatchewan Federation*, *supra* note 3 at para 1.

77 *MPAO*, *supra* note 2 at para 46.

78 *Supra* note 3 at para 32.

79 *Ibid* at para 1.

80 Alan Bogg & Keith Ewing, "A (Muted) Voice at Work?: Collective Bargaining in the Supreme Court of Canada" (2012) 33:3 Comp Lab L & Pol'y J 379 at 379.

only for its decision, but for retrenching on that decision,[81] being imprecise about the content of constitutional labour rights,[82] being too (and wrongly) precise about that content,[83] being conceptually confused and confusing,[84] relying on international legal norms, and for how it so relied.[85] Yet, *BC Health Services*, and *Dunmore v. Ontario (Attorney General)* (*Dunmore*) before it, would end up providing the foundations for subsequent broadening of constitutional labour rights by the Court, and for clarification of why, and for whom, constitutional protection is needed. Key cases on these questions—and therefore for assessing whether platform worker rights are protected by section 2(d)—are *Dunmore*, *Mounted Police Association of Ontario v. Canada (Attorney General)* (*MPAO*), and *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec* (*Société des casinos*).

1. Dunmore *and* MPAO

In *Dunmore* and *MPAO*, the Supreme Court held that section 2(d) was breached by the exclusion of groups of employees—agricultural workers (*Dunmore*) and Royal Canadian Mounted Police (RCMP) officers (*MPAO*)—from legislative rights to organize and bargain collectively.[86] The question of *who* is protected by section 2(d) was determined

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81 Judy Fudge, "Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case" (2012) 41:1 Indus LJ 1 at 16 [Fudge, "Constitutional Rights"]; Paul JJ Cavalluzzo, "The Fog of Judicial Deference" (2012) 16:2 CLELJ 369 at 372.

82 Brian Langille, "The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It" (2009) 54:1 McGill LJ 177.

83 Brian Langille, "Why are Canadian Judges Drafting Labour Codes—And Constitutionalizing the Wagner Act Model?", Case Comment on *Fraser v Ontario (Attorney General)*, (2009) 15:1 CLELJ 101 at 106 [Langille, "Canadian Judges Drafting"]; Oliphant, *supra* note 4 at 351.

84 Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association" (2014) 40:1 Queen's LJ 249 at 267–68; Brian Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians" (2011) 34:1 Dal LJ 143 at 147.

85 Brian Langille & Benjamin Oliphant, "From the Frying Pan into the Fire: *Fraser* and the Shift from International Law to International 'Thought' in *Charter* Cases" (2012) 16:2 CLELJ 181 at 197 [Langille & Oliphant, "Frying Pan"].

86 *Dunmore* was a *Charter* challenge to the *OLRA*, which grants labour rights to "employees" (see *Dunmore*, *supra* note 3). The *OLRA* excludes certain categories of

in favour of excluded groups, and the remedy, as discussed further below, was to require such rights be extended to them. The Supreme Court's approach in these cases is *purposive* and *principled*, rather than *formal* and *categorical*.[87] It aims to protect workers by enabling their collective voice in the face of unequal workplace power and resulting vulnerabilities. To that end, the Court eschews questions about whether workers are properly classified as "employees" or otherwise. In *MPAO*, for example, it explicitly rejects a legislative definition of "employee," not in favour of a different one, but because relying upon it would exclude workers in ways that belie section 2(d)'s protective purpose.[88] The overarching message of *Dunmore* and *MPAO* is that workers fall within section 2(d)'s scope if they *need* legislative protection of collective action to overcome workplace vulnerabilities.

In *MPAO*, the Court identified the purpose of section 2(d) as "protect[ing] individuals against more powerful entities" by enabling them to band together to act collectively.[89] As it explains in its decision, relying upon Chief Justice Dickson's dissenting opinion in the *Alberta Reference*:

> By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society. ... [S]. 2(*d*) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also

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employees (see *supra* note 35, s 3) and, at the time, it provided: "This Act does not apply ... to a person employed in agriculture, hunting or trapping" (see *ibid*, s 3(b) as it appeared on 20 December 2001). *MPAO* was a *Charter* challenge to the *Federal Public Sector Labour Relations Act*, which also grants labour rights to "employees" (see *MPAO*, *supra* note 2 at paras 1–5; *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [*FPSLRA*]). At the time, section 2(1) of the act defined "employee" to exclude RCMP officers (*FPSLRA*, *supra* note 86, s 2(1) as it appeared on 18 June 2017).

87 In his articles noted *above*, Brian Langille has elegantly critiqued the court's approach in *MPAO* and *Saskatchewan Federation*, and preceding cases, like *Dunmore* and *BC Health Services*.

88 *Supra* note 2 at paras 130, 136.

89 *Ibid* at para 58.

> enhancing their strength through the exercise of collective power.[90]

In the workplace, the Court reasons, the goal of empowering otherwise powerless individuals to band together to redress vulnerability has particular resonance, especially because of workplace inequalities:

> Without the right to pursue workplace goals collectively, workers may be left essentially *powerless* in dealing with their employer or influencing their employment conditions. ... Nowhere are these ... functions of s. 2(*d*) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can [workers] meaningfully pursue their workplace goals.[91]

Therefore, when individual workers are powerless on their own in relation to more powerful employers, section 2(d) protects their rights to pursue workplace goals collectively, and therefore effectively. This is a broadly encompassing standard for extending collective labour rights to workers, based on assessing workplace conditions in relation to worker vulnerability and unequal power, rather than classifying workers into formal categories.

In *Dunmore*, for example, the Court held that agricultural workers need the protection of labour rights, in part, because of their powerlessness. "Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers," the Court wrote.[92] "[A]gricultural workers are 'poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility.' ... [T]here is no possibility for association as such without minimum statutory protection."[93] The Court struck down the explicit exclusion of agricultural workers from the *OLRA*, bringing

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90 *Ibid* at paras 58, 70.

91 *Ibid* at paras 68, 70 [emphasis added].

92 *Dunmore*, *supra* note 3 at para 41.

93 *Ibid* at paras 41–42 [references omitted].

agricultural workers within that regime's coverage.[94] The Court suspended its declaration of invalidity, and Ontario, rather than extending the *OLRA* to agricultural workers, created a special collective bargaining regime for them, the *Agricultural Employees Protection Act, 2002* (*AEPA*).[95]

In *Ontario (Attorney General) v. Fraser* (*Fraser*), agricultural workers challenged the *AEPA* for violating section 2(d) because it excluded them from the province's general labour legislation. *Fraser* reaffirmed *Dunmore*'s holding that section 2(d) provides workers robust protection of collective action:

> After *Dunmore*, there could be no doubt that the right to associate to achieve workplace goals in a meaningful and substantive sense is protected by the guarantee of freedom of association, and that this right extends to realization of collective, as distinct from individual, goals. Nor could there be any doubt that legislation (or the absence of a legislative framework) that makes achievement of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association. Finally, there could be no doubt that the guarantee must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments.[96]

Fraser upheld the new *AEPA*, however, noting that the Ontario government was obliged only to provide a meaningful collective bargaining regime, not a "particular model of bargaining, nor a particular outcome."[97] To comport with section 2(d), the regime simply had to include a "process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion"—that is, *meaningful collective bargaining*.[98] Though different than the province's general labour relations legislation in key respects, the *AEPA* nonetheless met the requirements of section 2(d), the majority held, because it offered agricultural workers

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94 *Ibid* at para 70.

95 SO 2002, c 16, s 1.

96 *Fraser*, *supra* note 3 at para 32.

97 *Ibid* at para 42.

98 *Ibid* at para 54.

meaningful collective bargaining.[99] That decision was widely criticized as a retrenchment from *Dunmore* and *BC Health Services*,[100] including by Justice Abella, who, in dissent, held that the *AEPA* did not meet the criteria of a meaningful collective bargaining regime.[101] Nonetheless, the core point remains after *Fraser* that workers vulnerable to unequal power relations have rights to meaningful collective bargaining under section 2(d), though not necessarily to any particular kind of collective bargaining regime.

MPAO confirms that latter point and indeed takes it further by protecting another group of workers excluded from collective bargaining: RCMP officers. The *Federal Public Sector Labour Relations Act* (*FPSLRA*) provides a general collective bargaining regime for persons employed in Canada's public service.[102] But section 2(1), which defined "employee" for the purpose of the act, explicitly excluded RCMP officers from that definition, thereby placing them outside the scope of collective bargaining.[103] Instead, officers were offered a structure and process for presenting concerns that, as the Court described it, was "part of the management organisation of the RCMP,"[104] and did not "[provide] employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them."[105] Accordingly, the Court held, the process "fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable

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99 *Ibid* at para 118.

100 Bogg & Ewing, *supra* note 80; Cavalluzzo, *supra* note 80; Fudge, "Constitutional Rights", *supra* note 81; Alison Braley, "'I Will Not Give You a Penny More Than You Deserve': *Ontario v. Fraser* and the (Uncertain) Right to Collectively Bargain in Canada" (2011) 57:2 McGill LJ 351 at 364–65, 368–69. However, as Bethany Hastie argues, *Fraser* can also usefully be seen as creating a constitutional framework for "labour pluralism" (see "(Re)Discovering the Promise of *Fraser*? Labour Pluralism and Freedom of Association" (2021) 66:3 McGill LJ 427 at 440–43 [Hastie, "(Re)Discovering *Fraser*?"]).

101 *Fraser*, *supra* note 3 at paras 325–51, Abella J, dissenting.

102 *Supra* note 86, s 54.

103 *Ibid*, s 2(1) as it appeared on 20 December 2001.

104 *MPAO*, *supra* note 2 at para 106.

105 *Ibid* at para 81.

position,"[106] and was in breach of section 2(d). However, because "s. 2(d) of the *Charter* does not mandate a particular model of labour relations," the Court held that RCMP officers were not entitled to be included in the *FPSLRA*, but only a collective bargaining process that met the section 2(d) standard of being *meaningful*.[107] Therefore, the Court held, "it remains open to the federal government to explore other collective bargaining processes that could better address the *specific* context in which members of the RCMP discharge their duties."[108]

2. Société des casinos

In *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec* (*Société des casinos*), the Supreme Court confirmed from its previous decisions that the purpose of section 2(d) in labour relations is to redress power imbalances between workers and those they work for. The majority held:

> It is well recognized that freedom of association "specifically addresses power imbalances in society." Moreover, as the majority observed in [*MPAO*], "[t]he guarantee entrenched in s. 2(*d*) of the *Charter* cannot be indifferent to power imbalances in the labour relations context. To sanction such indifference would be to ignore 'the historical origins of the concepts enshrined' in s. 2(*d*)."[109]

The legislation challenged in *Société des casinos* explicitly excluded managers from a collective bargaining regime for employees.[110] The employers claimed the exclusion breached section 2(d). The Court held, following *Dunmore*, that a breach of section 2(d) is established if, first, the activities for which protection is sought fall within the scope of section 2(d); and, second, government action has substantially interfered with

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106 *Ibid* at paras 106, 136.

107 *Ibid* at para 137.

108 *Ibid* [emphasis added].

109 *Société des casinos*, *supra* note 3 at para 57 [references omitted].

110 Quebec's *Labour Code* defines an "employee" as "a person who works for an employer and for remuneration" (see CQLR c C-27, s 1(l) [*QC Labour Code*]), but expressly excludes persons employed as a "manager, superintendent, foreman or representative of the employer in his relations with his employees" (*ibid*, s 1(l)(1)).

those activities, in purpose or effect.[111] The majority held the first part of the *Dunmore* test was met, but the second was not as neither the legislation's purpose or effect substantially interfered with collective bargaining.[112] The purpose of the exclusion was legitimately aimed at distinguishing between management and operations, avoiding conflicts of interest, ensuring employers could be confident that managers would represent their (managers') interests, and protecting the distinctive common interests of employees.[113] In terms of effect, the Court found the legislative exclusion did not preclude the managers from creating a meaningful, albeit informal, collective bargaining framework with their employer.

3. *Do Platform Workers Have a* Charter *Right to Bargain Collectively?*

None of the Supreme Court's 2(d) decisions concern workers, such as platform workers, who lie outside SERs. Extending this line of jurisprudence to platform workers is therefore doctrinally novel, though, we argue, justified—indeed required—by principle. As the above discussion of section 2(d)'s purpose demonstrates, the Court has avoided formalistic and classification-based reasoning in its decisions, focusing instead on workers' *need* for collective labour rights due to vulnerabilities inherent to workplace power imbalances. The Court has never identified the SER as a condition of section 2(d) protection. *Société des casinos* rejected the managers' claim on other grounds, including recognition of "the distinctive common interests of employees," which presumably includes vulnerabilities to workplace power imbalances that managers do not share. Following the Court's purposive approach, it is arguable section 2(d) encompasses and protects collective bargaining rights for platform workers vulnerable to workplace power imbalances. A close match exists between the purpose of the section and these workers' need for collective action to help overcome powerlessness, isolation, asymmetrical dependency, and resulting vulnerability. In short, such platform workers may *need* a legally protected collective voice to protect workplace interests. Determining whether that is so in any given case requires evidence of workplace conditions in relation to the criteria constitutive of section 2(d)'s purpose.

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111 *Société des casinos*, *supra* note 3 at paras 17, 33.

112 *Ibid* at paras 46–57.

113 *Ibid* at para 51.

After *Société des casinos* (and arguably before it),[114] the most likely doctrinal mechanism for that determination would be the "substantial interference" test for infringement, which is discussed more fully below.

4. International Law Support

Further fuel for the argument that the Supreme Court should extend section 2(d) protection to platform workers, or at least to some of them, can be found in Canada's international legal obligations, which loom large in the Court's section 2(d) jurisprudence. For present purposes, the most relevant treaty is *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise* (*Convention No. 87*).[115] Canada ratified *Convention No. 87* on March 23, 1972.[116] *Dunmore*, *Fraser*, *BC Health Services*, *MPAO*, and *Saskatchewan Federation* rely extensively on *Convention No. 87*, as did Chief Justice Dickson in his seminal (albeit dissenting) opinion in the *Alberta Reference*.[117] This treaty is highly relevant to the question of *who* is entitled to collective bargaining rights, particularly in respect to non-SER work arrangements.

Though the Supreme Court's reliance on *Convention No. 87* to interpret section 2(d) has been criticized,[118] its reliance aligns with the Court's more recent decision in *Quebec (Attorney General) v. 9147-0732 Québec inc.* (*Québec inc.*), which held that *Charter* rights and freedoms must be interpreted to provide protection *at least as great as* that provided by international human rights treaties ratified by Canada.[119] Commentators have termed this interpretation principle the "presumption of

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114 *Ibid* at para 34.

115 9 July 1948, 68 UNTS 17, art 11 (entered into force 4 July 1950, ratified by Canada 23 March 1972).

116 For a list of international labour conventions ratified by Canada, see ILO, "Ratifications for Canada" (last visited 23 February 2025), online: <ilo.org> [perma.cc/KT3Y-SLGV].

117 See *Alberta Reference*, *supra* note 2 at paras 65–72; *Dunmore*, *supra* note 3 at para 27; *BC Health Services*, *supra* note 3 at paras 71–72, 76–78; *MPAO*, *supra* note 2 at para 267; *Saskatchewan Federation*, *supra* note 3 at paras 68–70.

118 Langille & Oliphant, "Frying Pan", *supra* note 85 at 190–92.

119 *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 31.

minimum protection,"[120] a presumption that flows from the long-standing "presumption of conformity," a rule of statutory construction requiring Canadian courts to interpret legislation to conform with Canada's international legal obligations. Prior to *Québec inc.*, the Court had held for many years, including in *BC Health Services*, that the presumption of conformity applies to *Charter* interpretation.[121] *Quebec inc.*'s presumption of minimum protection refines and clarifies the presumption of conformity. Applied to labour rights, it means that section 2(d) must be interpreted to provide workers protection at least as great as that provided by international labour law.

Though not always naming it as such, the Court has effectively relied on the presumption of minimum protection throughout its *Charter* labour decisions. *Dunmore* is perhaps the most relevant precedent in this regard for platform workers' *Charter* labour rights. In that case, the Court invoked two provisions of *Convention No. 87* to support its inclusion of agricultural workers within the scope of section 2(d)'s protection: article 2, which provides that "[w]orkers ... *without distinction whatsoever*, shall have the right to establish and to join organisations of their own choosing;" and article 10, which defines an "organisation" as "*any* organisation of workers ... for furthering and defending the interests of workers."[122] The Court reasoned that these provisions prohibited denying workers, including agricultural workers, access to a collective bargaining regime.

Article 2 has long been central to debates about labour rights in non-SER work contexts. Relevant to platform work, the article has consistently been held by the ILO's Committee on Freedom of Association (CFA) to confer rights on workers *irrespective* of the nature of their contractual relationship with their employer,[123] "appl[ying] to all workers, whether they are employed on a permanent basis, for a fixed term, or as

120 Payam Akhavan et al, *Kindred's International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed by Phillip M Saunders & Robert J Currie (Toronto: Emond Montgomery, 2019) at 242.

121 *Ibid*; *Saskatchewan Federation*, *supra* note 3 at para 64; *BC Health Services*, *supra* note 3 at para 70.

122 *Dunmore*, *supra* note 3 at para 27 [emphasis in original].

123 International Labour Organization, *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association*, 6th ed (Geneva: International Labour Office, 2018) at paras 326–31, online (pdf): <ilo.org > [perma.cc/G6LG-2QLM].

contract employees."[124] Given that the CFA's decisions have played a key role in the Court's section 2(d) jurisprudence—in *Saskatchewan Federation*, for example, the Court held that "[t]hough not strictly binding, the decisions of the [CFA] have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including our Court"[125]—it bears asking: What does the CFA have to say about collective bargaining rights in the context of platform work, and contexts analogous to it?[126]

Over the last three decades, the CFA has routinely held that excluding workers from the right to unionize on the ground they lack permanent employment contracts constitutes a violation of article 2. In 1990, the CFA addressed a complaint brought by the Turkish Railway Workers' Union, a public sector union, in *Case No. 1521 (Turkey)*. The union alleged that workers on short-term contracts were excluded from collective bargaining. While the CFA was unable to sustain the complaint on the record before it, it stated in obiter that "all workers, without distinction whatsoever and irrespective of their legal status, including public servants and contract workers, are entitled to set up and join organizations of their own choosing."[127] In the early 1990s, the CFA extended this principle, again in obiter, to the private sector in *Case No. 1615 (Philippines)*,[128]

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124 Beatriz Vacotto, "Precarious Work and the Exercise of Freedom of Association and Collective Bargaining: Current ILO Jurisprudence" (2013) 5:1 Intl J Lab Research 117 at 119.

125 *Supra* note 3 at para 69 [references omitted].

126 For a critique of the court's reliance on the CFA's jurisprudence, see Brian A Langille, "Can We Rely on the ILO?" (2007) 13 CLELJ 363 at 376–80. Justice Côté's dissent in *Société des casinos* appears to have accepted Langille's criticism of the nature of the CFA as a political, not a judicial, body (see *supra* note 3 at para 195). However, Justice Côté also accepts that if it is a judicial body, its decisions are persuasive, which means they do not trigger the presumption of conformity themselves (see *ibid* at para 196). But even if the CFA's decisions are only persuasive, they nonetheless interpret Canada's binding international legal obligations under *Convention No. 87* and therefore are relevant to the determination by Canadian courts of whether Canada has complied with its international treaty obligations.

127 *Case No 1521 (Turkey)*, "Definitive Report", [1990] 73:1 ILO (Ser B) 177 at para 33.

128 "Report in Which the Committee Requests to Be Kept Informed of Developments", [1994] 77:1 ILO (Ser B) 97 at para 327.

and, in a case from Peru, it held that excluding *subcontractors* in the private sector from collective bargaining was a violation of article 2.[129]

Over the following decade, the CFA continued to expand the scope of article 2 to include an ever-broadening range of non-SER workers. Two important decisions arose from Canada. *Case No. 2083 (Canada)* alleged that New Brunswick's *Public Sector Labour Relations Act* violated article 2 because it defined eligible employees to exclude *casual workers* employed for less than six months. The CFA determined in 2001 that casual workers had a right to establish and join public sector unions under article 2, notwithstanding that they were not permanent employees.[130] *Case No. 2430 (Canada)* concerned a complaint against Ontario's *Colleges Collective Bargaining Act*, which governed collective bargaining in community colleges, for excluding several categories of *part-time employees.*[131] The CFA held the act violated article 2, because "all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed-term or as contract employees, should have the right to establish and join organizations of their own choosing."[132]

The CFA confirmed in two cases from South Korea that this interpretation of article 2—namely, its inclusion of part-time employees—applied *mutatis mutandis* in the private sector. *Case No. 2602 (Republic of Korea)* concerned an employer's designation of a group of workers as *subcontractors* when, in all respects, they worked on the same terms as regular employees. This designation was, it said,

> a form of false subcontracting under which irregular workers work inside the principal employer's facilities alongside the regular employees of the principal employer, using the expendable materials, tools and machinery belonging to the principal

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129 *Case No 1796 (Peru)*, "Interim Report", [1996] 79:2 ILO (Ser B) 121 at paras 464, 466.

130 *Case No 2083 (Canada)*, "Report in Which the Committee Requests to Be Kept Informed of Developments", [2001] 84:1 ILO (Ser B) 70 at paras 253–54. See also *Case No 2013 (Mexico)*, "Definitive Report", [2001] 84:3 ILO (Ser B) 117 at para 416.

131 *Case No 2430 (Canada)*, "Report in Which the Committee Requests to Be Kept Informed of Developments", [2006] 89:3 ILO (Ser B) 92 [*Case No 2430*]; *Colleges Collective Bargaining Act*, RSO 1990, c C.15, ss 1, 67, Schedules 1–2 as it appeared on 21 June 2006.

132 *Case No 2430*, *supra* note 131 at para 360.

> employer, under the instructions of, and subordination to the principal employer, to produce products sold by the principal employer ... [133]

These workers were paid 50 to 60 percent of the wages of regular employees. The CFA held article 2 protected their right to form a union at the principal employer.[134] It also held that "owner-drivers of cargo trucks, dump trucks and ready-mixed concrete trucks"—i.e., *independent contractors* (as platform workers are often classified)—could also form unions at these companies even though they were not employees.[135] The CFA reached similar conclusions in cases from the Dominican Republic, Panama, Peru, and Poland.[136] *Case No. 2620 (Republic of Korea)* determined that article 2 rights were also held by *migrant workers*, regardless of their legal status—and therefore those who could not legally enter into SERs.[137]

The CFA has applied article 2 in relation to other kinds of nonstandard employment relationships. In *Case No. 2498 (Colombia)*, security guards, previously employed directly by a university, were reclassified as *subcontractors* when their employment contracts were shifted to a private firm with which the university contracted. Despite the shift, the workers did the same kind of work on essentially the same conditions. The CFA held that Colombia had violated article 2 by failing to let the security guards form a union to negotiate directly with the university.[138]

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133 *Case No 2602 (Republic of Korea)*, "Interim Report", [2008] 91:2 ILO (Ser B) 160 at para 631.

134 *Ibid* at para 671; *Case No 2602 (Republic of Korea)*, "Interim Report", [2009] 92:3 ILO (Ser B) 158 at para 654.

135 *Case No 2602 (Republic of Korea)*, "Interim Report", [2011] 94:1 ILO (Ser B) 93 at paras 346, 367; *Case No 2602 (Republic of Korea)*, "Report in Which the Committee Requests to Be Kept Informed of Developments", [2012] 95:1 ILO (Ser B) 131 at para 461.

136 *Case No 2786 (Dominican Republic)*, "Interim Report", [2011] 94:1 ILO (Ser B) 116 at para 453 [*Case No 2786*]; *Case No 2868 (Panama)*, "Report in Which the Committee Requests to Be Kept Informed of Developments", [2012] 95:1 ILO (Ser B) 279 at para 1005; *Case No 2687 (Peru)*, "Report in Which the Committee Requests to Be Kept Informed of Developments", [2010] 93:2 ILO (Ser B) 215 at para 891; *Case No 2888 (Poland)*, "Definitive Report", [2012] 95:1 ILO (Ser B) 302 at para 1084.

137 "Interim Report", [2009] 92:3 ILO (Ser B) 176 at para 705; *Case No 2620 (Republic of Korea)*, "Interim Report", [2011] 94:3 ILO (Ser B) 148 at para 595.

138 *Case No 2498 (Colombia)*, "Interim Report", [2008] 91:1 ILO (Ser B) 176 at para 735.

It affirmed that article 2 does *not* require the existence of an employment relationship,[139] a holding it confirmed in a case from the Dominican Republic concerning subcontractors,[140] and other cases as well. In *Case No. 2556 (Colombia)*, for example, the CFA applied article 2 to find that workers employed by a *temporary employment agency* serving pharmaceutical companies had a right to form a union at those workplaces, notwithstanding the lack of an employment contract.[141] In another decision, *Case No. 2600 (Colombia)*, the CFA took a similar approach to *temporary workers*, many of whom had been working at the same companies for over eight years.[142] The CFA later reached the same conclusion in a case on *contract workers* (i.e., with a finite term of employment) from Guatemala.[143]

Taken together, the CFA's decisions under *Convention No. 87* hold that workers in non-standard work relationships have rights under international law to unionize. Workers are entitled to those labour rights regardless of their formal contractual relationships and classifications. Though the CFA has yet to decide a case concerning platform workers' international law rights to unionize, the principles articulated in its decisions suggest it would likely hold in their favour. That conclusion finds further support in recent ILO reports about gig work, and platform work more particularly, as forms of "non-standard employment" covered by *Convention No. 87* and *Convention (No. 98) Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively*.[144] In those discussions, the ILO describes "non-standard employment" as

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139 *Case No 2498 (Colombia)*, "Report in Which the Committee Requests to Be Kept Informed of Developments", [2009] 92:1 ILO (Ser B) 196 at para 557. See also *Case No 2560 (Colombia)*, "Report in Which the Committee Requests to Be Kept Informed of Developments", [2009] 92:2 ILO (Ser B) 108 at para 439.

140 *Case No 2786*, *supra* note 136 at para 453.

141 "Report in Which the Committee Requests to Be Kept Informed of Developments", [2008] 91:1 ILO (Ser B) 185 at para 754.

142 "Interim Report", [2008] 91:3 ILO (Ser B) 132 at para 572; *Case No 2600 (Colombia)*, "Report in Which the Committee Requests to Be Kept Informed of Developments", [2009] 93:3 ILO (Ser B) 123 at para 477.

143 *Case No 3042 (Guatemala)*, "Interim Report", [2009] 98:3 ILO (Ser B) 120 at para 560.

144 *Convention (No. 98) Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively*, 96 UNTS 257 (entered into force 18 July 1951, ratified by Canada 14 June 2017).

work that falls outside the scope of the "standard employment relationship," the latter being "work that is full time, indefinite, as well as part of a subordinate and bilateral employment relationship."[145] Non-standard employment relationships can take the form of: "(1) temporary employment; (2) part-time work; (3) temporary agency work and other forms of employment involving multiple parties; and (4) disguised employment relationships and dependent self-employment."[146] Part-time work includes "on-call work" which includes periods of "zero hours," i.e., no work at all.[147] "[W]ork-on-demand via app"—i.e., platform-based gig work—combines different elements of non-standard employment; according to the ILO, it is part-time and on-call, including "zero hour" periods, and, is arguably "disguised employment" and "dependent self-employment," due to its elements of control and dependence.[148] For these reasons, the ILO states,

> in many cases [gig workers] risk being excluded from fundamental principles and rights at work such as freedom of association and collective bargaining or protection against discrimination, since many jurisdictions restrict these fundamental rights to employees.[149]

In summary, the CFA's jurisprudence under *Convention No. 87* supports an international law right for platform workers to form and join unions. In light of *Dunmore*, *BC Health Services*, and *Saskatchewan Federation*, and the presumptions of minimum protection and conformity governing the relationship between international labour rights and the *Charter*, the CFA's jurisprudence is persuasive authority in support of interpreting section 2(d) to include labour rights for platform workers. When combined with the Court's broad articulation of a section 2(d) right to collective bargaining in *MPAO*—which itself builds upon earlier reliance on international law sources in *Dunmore*, *BC Health Services*, and *Saskatchewan Federation*—international law and the CFA's jurisprudence provide

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145 International Labour Organization, *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects* (Geneva: International Labour Office, 2016) at 7, online (pdf): <ilo.org> [perma.cc/JMS7-Z7JP].

146 *Ibid*.

147 *Ibid* at 8.

148 *Ibid* at 39.

149 *Ibid*.

further support for interpreting section 2(d) to include rights for platform workers to organize and bargain collectively.

C. *Does Legislative Exclusion of Platform Workers Breach Section 2(d)?*

As noted earlier, *Société des casinos* follows *Dunmore* to articulate two distinct criteria for establishing a breach of section 2(d): First, whether the activities for which section 2(d) protection is sought fall within the scope of that section; and second, if they do, whether government action substantially interfered with those activities, in purpose or effect? Platform workers claiming protection of collective bargaining rights would clearly meet the first test, as did the claimants in *Société des casinos*. The second test would require platform workers to prove *government action* has interfered with collective bargaining, and that such interference is *substantial*. Importantly, as concerns the first of these—government action—platform workers' claim would be different than claims in previous cases where legislative exclusion is *explicit*: "a person employed in agriculture, hunting or trapping";[150] "a person who is [an RCMP officer]";[151] a "manager, superintendent, foreman or representative of the employer in his relations with his employees."[152] By contrast, no legislation *explicitly* excludes platform workers from statutory collective bargaining. Rather, they are—or may be—*implicitly* excluded by statutory definitions of "employee" that are drafted and interpreted too narrowly to include them.

However, whether legislative exclusion is explicit or implicit should, in principle, make no difference in relation to whether it constitutes government action. As the Court stated in *Vriend v. Alberta* (*Vriend*):

> If an omission were not subject to the *Charter*, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from *Charter* challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine

150 *Dunmore*, *supra* note 3 at para 4, citing *OLRA*, *supra* note 35, s 3(b) as it appeared on 20 December 2001.

151 *MPAO*, *supra* note 2 at para 243, Rothstein J, dissenting, citing *FPSLRA*, *supra* note 86, s 2(1)(d).

152 *Société des casinos*, *supra* note 3, citing *QC Labour Code*, *supra* note 110, s 1(l)(1).

> whether it was open to challenge. This result would be illogical and more importantly unfair.[153]

Though *Vriend* arose in a different context—a section 15(1) challenge to human rights legislation that omitted protection against discrimination on the basis of sexual orientation—the broader point of principle remains: Exclusion from legislative protection is government action, regardless of whether it is explicit or implicit.

Restricting eligibility for statutory collective bargaining to "employees"—as most labour law regimes do—risks implicit exclusion of platform workers. Through years of common law and statutory interpretation, the meaning of "employee" has crystallized to exclude non-SER workers who, like platform workers, fall between the category of independent contractor and SER worker.[154] Underlining the risk that such workers are excluded by the category "employee" is the fact that some legislatures in Canada have found it necessary to add "dependent contractor" as a sub-category of "employee," in order to include non-SER workers in "position[s] of economic dependence upon, and under ... obligation[s] to perform duties for" employers, and thereby in relationships "more closely resembling the relationship of an employee than that of an independent contractor."[155] Inclusion of the "dependent contractor" category presumes that, without it, such workers would not be included as "employees." In *Foodora*, the OLRB explicitly draws this connection, noting that "it is clear from this definition [of 'dependent contractor'] that individuals *may* be entitled to collective bargaining even if they are not employed under a contract of employment—*that is, even if they would not be considered employees at common law*."[156] By corollary, the *OLRA*'s "dependent contractor" category was crucial to the OLRB's decision in favour of including platform workers in *Foodora*. Absence of the category

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153 1998 CanLII 816 at para 61 (SCC).

154 Ogunde, *supra* note 28 at 50.

155 *OLRA*, *supra* note 35, s 1(1). Federal labour relations legislation, and provincial legislation in British Columbia, Alberta, and Newfoundland and Labrador also rely on similar definitions of dependent contractors (see *BC Labour Relations Code*, *supra* note 35, s 1(1); *AB Labour Relations Code*, *supra* note 35, s 1(1); *NFLD Labour Relations Act*, *supra* note 35, s 2(1)(k)).

156 *Foodora*, *supra* note 26 at para 78 [emphasis added].

in other labour codes—such as in Saskatchewan,[157] Manitoba,[158] Quebec,[159] Nova Scotia,[160] New Brunswick,[161] and Prince Edward Island[162]—risks exclusion of platform workers from statutory collective bargaining.

At the moment, platform worker classification has not been fully tested and determined by any board or court in Canada, other than the

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157 *The Saskatchewan Employment Act*, SS 2013, c S-15.1, s 6-1(h):

> '[E]mployee' means: (i) a person employed by an employer [and] (iii) any person designated by the board as an employee for the purposes of this Part notwithstanding that, for the purpose of determining whether or not the person to whom he or she provides services is vicariously liable for his or her acts or omissions, he or she may be held to be an independent contractor.

158 *The Labour Relations Act*, CCSM 2024, c L10, s 1:

> '[E]mployee' means a person employed to do work and includes any person designated by the board as an employee for the purposes of this Act, notwithstanding that the person to whom the employee provides services is not vicariously liable for the employee's acts or omissions.

159 *QC Labour Code*, *supra* note 110, s 1(k):

> '[E]mployer': anyone, including the State, who has work done by an employee; (*l*) 'employee': a person who works for an employer and for remuneration but the word does not include ... [exceptions are listed, including select public servants, police officers, prosecutors, managers, superintendents, foremen, and other representatives of employers].

160 *Labour Standards Code*, RSNS 1989, c 246, s 2(d)–(e):

> '[E]mployee' means a person employed to do work ... (e) 'employer' means a person, firm, corporation, agent, manager, representative, contractor or subcontractor having control or direction of or being responsible, directly or indirectly, for the employment of any employee.

161 *Industrial Relations Act*, RSNB 1973, c I-4, s 1(1):

> '[E]mployee' means a person employed to do skilled or unskilled manual, clerical, technical or professional work, but does not include (a) a manager or superintendent, or any other person who, in the opinion of the Board, is employed in a confidential capacity in matters relating to labour relations or who exercises management functions, or (b) a person employed in domestic service in a private home.

162 *Labour Act*, RSPEI 1988, c L-1, s 7(h):

> '[E]mployee' means a person employed to do skilled or unskilled manual, clerical or technical work, and includes a member of a police department, a person employed as a security police officer by the University of Prince Edward Island and an instructing officer employed by the Atlantic Police Academy.

OLRB. As the issue is adjudicated across the country, as it likely will be, we can expect conflicting decisions, both between jurisdictions with and without "dependent contractor" categories, and also within both kinds of jurisdictions. With the prospect of at least some of those decisions concluding that platform workers are not "employees," and are thereby excluded from statutory collective bargaining, the proposed section 2(d) argument could be crucial. The most likely route for raising it in practice (other than a government initiating a reference on the matter) is, as in *Foodora*, through a labour organization pursuing certification to represent platform workers in collective bargaining. Whether at first instance, or on appeal, reconsideration, or judicial review, the argument would be essentially the same—namely, that, first, the definition of "employee" (with or without a "dependent contractor" category) includes platform workers on its own terms; and, second, in the alternative, if that definition is held to exclude platform workers, then it is potentially in breach of section 2(d). The need for the alternative argument may be obviated by, as in *Foodora*, a board or court deciding in favour of the first argument. But if it is not, and section 2(d) must be relied upon, the argument is that the *legislation*, as interpreted by the board or court, breaches section 2(d), albeit implicitly, and that the breach is therefore—as it must be, *per* the *Dunmore/Société des casinos* test—a result of *government action*.

Having established the foregoing, the argument would then turn to the second leg of the *Dunmore/Société des casinos* test, claiming that legislative exclusion of platform workers—or at least some of them—from a collective bargaining regime constitutes *substantial interference*. As noted earlier, previous rulings of the Court emphasize that, in labour relations, section 2(d)'s purpose is to enable workers to "meaningfully pursue their workplace goals," when "without the right to pursue [those] goals collectively ... [they are] left essentially powerless in dealing with their employer or influencing their employment conditions."[163] In *Dunmore* and *MPAO*, the denial of legislative collective bargaining rights to workers who fell within the scope of that purpose—agricultural workers and RCMP officers, respectively—was sufficient to constitute a breach of section 2(d), and therefore a "substantial interference." In *Société des casinos*, in contrast, while the Court affirmed section 2(d) aims to remedy "imbalances of power" in the workplace, it held that exclusion of

163 *MPAO, supra* note 2 at paras 68, 70.

managers from legislated collective bargaining rights was not *substantial* interference.

Based on earlier-noted differences among diverse kinds of platform work, with some of it including, for example, managerial and professional work,[164] some platform workers may fall outside the Court's concerns about workplace power imbalances. Many, however, and especially those in Alasoini et al's first group, and possibly their second group as well, will fall within those concerns due to their precarity, and resulting powerlessness, isolation, asymmetrical dependency, and overall vulnerability. On the basis of *Dunmore*, *MPAO*, and *Société des casinos*, their exclusion from collective bargaining legislation will arguably constitute substantial interference—an argument that will, in any given case, depend on evidence pertaining to workplace realities power relations, and whether, in light of those, workers need legislative protection of a collective voice to protect their interests. Such evidence would include contractual terms, degrees of control and dependence, and other workplace realities like those canvassed in *Foodora* and *Aslam*, and in a plethora of expert, NGO, and government reports and studies.[165] At least for some platform workers in some jurisdictions, it is likely that their complete exclusion from collective bargaining regimes, coupled with the vulnerability and disempowerment they experience in relation to the powerful platforms they work for, will constitute substantial interference, and therefore breaches of section 2(d).

D. Assuming There Is a Breach of Section 2(d), What is the Remedy?

The proper remedy for a section 2(d) breach caused by exclusion of platform workers from a legislated collective bargaining regime would be, following *Dunmore*, *Fraser*, and *MPAO*, their *inclusion* in a meaningful collective bargaining regime. This remedy would involve the kind of "positive" rights approach canvassed and applied in *Dunmore*. Section 2(d) labour rights constitute a "unique swatch in Canada's constitutional

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164 Exclusion of professionals is typical of labour laws across Canada. The *OLRA,* for example, excludes from the definition of "employee," and therefore its collective bargaining regime, anyone "who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity" (see *supra* note 35, s 1(3)(a)).

165 See the text accompanying note 26.

fabric" because workers are "substantially incapable of exercising their fundamental freedom to organize without the protective [legislative] regime,"[166] as the Court held; their "ability ... to associate is only as great as their access to legal protection."[167] Labour legislation, therefore, "does not simply enhance, but instantiates, the freedom to organize."[168] The remedy for breaches of section 2(d) resulting from exclusion of particular groups of workers' statutory collective bargaining regimes is therefore to command governments to include them. As such, the result of the Court's *Dunmore* and *MPAO* decisions was to obligate governments to include excluded workers. In each case, however, the Court emphasized that workers' corresponding entitlement was to be included in a meaningful collective bargaining regime, not necessarily in the regime from which they were excluded, and nor to any particular model of collective bargaining. Accordingly, the Court suspended its ruling in each case to allow governments time to craft collective bargaining regimes for the excluded groups.

In Ontario, as noted earlier, a new law was created specifically for agricultural workers in response to *Dunmore*. It was later upheld by the Court in *Fraser*. In *MPAO*, the Court invited the federal government to take similar steps for RCMP officers.[169] In both cases, the Court insisted it was for the government to determine whether to create an alternative regime, and what its nature should be. The only requirement was that it provide *meaningful* collective bargaining. In each of *Fraser* and *MPAO*, the Court stated in broad terms some key elements of what that would require. In the event a government introduced a sector-specific collective bargaining regime for platform workers—whether of its own volition, or as part of a remedy ordered by a court in a section 2(d) ruling—it will need to consider the unique working conditions and relationships of platform workers, and especially their temporal and spatial dispersion.[170]

166 *Dunmore*, *supra* note 3 at para 35.

167 *Ibid* at para 45.

168 *Ibid* at para 36.

169 *Supra* note 2 at paras 154–56.

170 Relevant is the fact that sector-specific collective bargaining is common in Canada and could be a remedy for precarious platform workers. It is a core element of Hastie's idea of labour pluralism (Hastie, "(Re)Discovering *Fraser*?", *supra* note 100 at 430–41) and examples (in addition to agricultural workers) can be found across the country for public

Such regimes could, as the cases make clear, take a variety of forms, so long as they offer *meaningful* collective bargaining.[171] Though prescribing the precise parameters of such regimes is beyond the scope of this paper, what can be said is that they would have to avoid *Wagner Act* model (WAM) characteristics that notoriously impede access to statutory collective bargaining for non-SER workers.

Benjamin Oliphant argues forcefully that judicial adherence to the WAM limits section 2(d) jurisprudence to the disadvantage of precarious workers, including platform workers.[172] On the one hand, *Dunmore* and *MPAO*, for example, concern SER workers who are able to organize in ways that permit inclusion under prevailing WAM labour laws, he claims.[173] On the other hand, precarious and vulnerable workers, who need protection of labour rights the most, are least able to mobilize to achieve and exercise those rights. Because such workers work in contexts generally hostile to organizing, and in which they are vulnerable, their certification attempts are readily defeated within existing WAM frameworks.[174] For such workers to be able to organize effectively, and thereby to be included in statutory collective bargaining, courts would have to challenge, among other things, the strictures of WAM, Oliphant correctly argues. As Slinn observes, the WAM's certification requirements are hostile to platform worker organizing because those workers are geographically dispersed, and their status as "employees" uncertain.[175] Bethany Hastie and Alex Farrant demonstrate the pitfalls of rigid devotion to the WAM for interpreting section 2(d) jurisprudence,[176] while Doorey illuminates how extant section 2(d) jurisprudence can be read to support a

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sector employees, teachers, police, firefighters, fishers (as discussed *above*), construction workers, and artists (see Slinn, *supra* note 17 at 107–08).

171 *BC Health Services*, *supra* note 3 at paras 90–92; *MPAO*, *supra* note 2 at paras 67, 137. See generally Hastie, "(Re)Discovering *Fraser*?", *supra* note 100 at 453–54.

172 Oliphant, *supra* note 4 at 350–51.

173 *Ibid*. See also Langille, "Canadian Judges Drafting", *supra* note 83 at 108.

174 Oliphant, *supra* note 4 at 350–51.

175 *Supra* note 17 at 98–99.

176 Bethany Hastie & Alex Farrant, "What Meaning in a Right to Strike? *MedReleaf* and the Future of the *Agricultural Employees Protection Act*" (2021) 53:1 Ottawa L Rev 5 at 6–9, 18.

"graduated" non-WAM approach to freedom of association, which could be helpful for platform workers.[177]

Importantly, the Court itself has acknowledged that solutions to the extension of collective bargaining under section 2(d) are not necessarily found in the WAM. According to Justice Abella in *MPAO*:

> The Wagner Act model ... is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining ... Labour schemes are responsive to the interests of the parties involved and the particular workplace context. Different models have emerged to meet the specific needs of diverse industries and workplaces. The result has been ongoing debate on the desirability of various forms of workplace representation and cooperation and on their coexistence ... The search is not for an "ideal" model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue.[178]

In that spirit, as in *Dunmore*, the *MPAO* Court, having found a violation of section 2(d), suspended its declaration of invalidity for twelve months to give the federal government time, if it wished, "to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s. 2(d) and s. 1 of the *Charter*."[179]

CONCLUSION

Collective bargaining rights for platform workers are potentially significant for protecting their workplace interests. Section 2(d) protection of such rights, combined with nuanced thinking about what kinds of collective bargaining regimes best fit the varied needs of different groups of platform workers, could therefore be an important advance. To that end, we have argued that platform workers fall within the scope of *Charter*-

177 *Supra* note 4 at 525.

178 *Supra* note 2 at paras 95–97.

179 *Ibid* at paras 156, 158.

protected rights to bargain collectively under section 2(d) if their work relationships and conditions align with the section's purpose of protecting workers from vulnerabilities rooted in workplace power imbalances. To the extent such workers are excluded from statutory collective bargaining regimes, their section 2(d) rights are infringed, and the appropriate remedy is to provide them access to meaningful statutory collective bargaining. The Court has left it to governments to determine, within the broad parameters of section 2(d), what kinds of regimes are appropriate for different sectors of work, and it has insisted they need not assume a WAM form. In developing a section 2(d) right for platform workers, courts will need to answer questions about *which* platform workers are protected by section 2(d) by comparing evidence of particular workplace realities to the principles and purposes the Court has articulated for the section. And, eventually, if and when governments promulgate collective bargaining regimes for platform workers—either on their own initiative or in response to section 2(d) decisions against them—courts will have to grapple with whether those regimes are *meaningful* in the sense required by section 2(d).

Our argument asks for a novel application of section 2(d) jurisprudence. All previous decisions of the Supreme Court concern workers who unambiguously meet traditional criteria of "employee," and they involve challenges to legislative provisions that *explicitly* exclude those workers from collective bargaining rights. These factual differences do not, however, provide *principled* bases for refusing to extend section 2(d) protection to platform workers, as we have argued. Still, it might be claimed that we are overly optimistic in assuming courts will make that leap. Many scholars—including one of us—have argued that the common law judiciary has long been at the leading edge of hostility and resistance to collective labour rights.[180] The Court's approach in the Labour Trilogy, along with various picketing decisions in the late-1980s, cogently illustrated how echoes of that history could impact *Charter* interpretation.[181]

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180 Judy Fudge, "'Labour is Not a Commodity': The Supreme Court of Canada and the Freedom of Association" (2004) 67:2 Sask L Rev 425 at 426, 430–35, 445; HJ Glasbeek, "Contempt for Workers" (1990) 28:1 Osgoode Hall LJ 1 at 43–48, 51–52; Bakan, *Just Words*, *supra* note 11 at ch 7.

181 *RWDSU v Dolphin Delivery Ltd*, 1986 CanLII 5 (SCC); *BCGEU v British Columbia (Attorney General)*, 1988 CanLII 3 (SCC); *UFCW, Local 1518 v KMart Canada Ltd*, 1999 CanLII 650 (SCC). In contrast, the court reached the opposite result in *RWDSU,*

Today, it is fair to claim the judiciary is not an ideal institution for workers to advance their collective interests. Taking that position too far, however, risks exaggerating the past's influence over the present. The fact is that, despite the limitations of recent *Charter* labour jurisprudence, its "arc bends increasingly towards workplace justice," as Justice Abella observed, and now recognizes a constitutional right to bargain collectively, whereas only a short time ago it explicitly rejected that right.[182] The extension of the right that we argue for can be understood as a natural extension of that arc's bend towards justice.

Nevertheless, we acknowledge there will be significant practical challenges for platform workers to exercise constitutional rights to bargain collectively, even if courts and boards are willing to recognize them. As noted above, these can likely be mitigated, at least to some extent, by governments constructing collective bargaining regimes that take account of those workers' unique working conditions and relationships and the challenges they create. A more general point is that such practical difficulties should not be seen as arguments against *Charter* protection of platform workers' labour rights. The fact those workers—like *all* workers in today's political and economic climate—face challenges to effective collective action should be an argument *for* such rights, not against them, especially in light of the symbolic and mobilizing impacts they might have, in addition to their tangible protections.[183] Such rights could—in synergy with the strategies canvassed in Part III above—help catalyze governments and legislatures to extend protections to platform workers, which have, to this point, largely been lacking. "As conventional voluntary and political modes of action have been battered by a sustained neoliberal assault on workers' interests," Bogg and Ewing observe, "constitutional litigation has emerged as another possible strategy for the vindication of workers' fundamental labor rights."[184] We agree. The fight for constitutional protection of platform workers' labour rights is needed and worthwhile.

Local 558 v Pepsi-Cola Canada Beverages (West) Ltd, despite similar facts to *Dolphin Delivery* (see 2002 SCC 8).

182 *Saskatchewan Federation*, *supra* note 3 at para 1.

183 See the text accompanying note 71.

184 Bogg & Ewing, *supra* note 80 at 413.