Dependent Contractors and the Ontario Labour Relations Board: Understanding the Board's Role in a Capitalist Economy

Brad Walchuk

Political Science, York University, Toronto, Ontario

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Abstract

This dissertation explores the evolution and politics behind the concept of the 'dependent contractor' in Ontario, from its earliest incarnations in the late 1970s to its current usage in the gig economy, as interpreted and applied by the Ontario Labour Relations Board (OLRB). It examines how the Board's interpretation and application of dependent contractor provisions has impacted workers whose employment status falls somewhere between traditional notions of independent contractor and employee, i.e. the 'grey area' as the Board has referred to it, over a period of changing employment relationships and of increasingly precarious work. The research tracks these changes over time, examining how previous OLRB jurisprudence on dependent contractors can be seen to impact its decisions in more contemporary contexts (e.g *Foodora, 2020)* and what this might tell us about the Board's understanding of employment relations in a changing capitalist economy. The analysis seeks to place the actions of the OLRB into a broader social context to assess what factors have influenced the Board's decisions and gauge how it understands both its potential to address employment inequities and the limits it faces in doing so within a capitalist economy. This dissertation argues that the OLRB operated with an implicit industrial pluralist understanding of labour-capital relations and made decisions informed by that approach and, in doing so, lacked an appreciation of how capitalist workplaces were changing over time in a way that evaded control via that understanding. It further argues that while bodies such as the OLRB have some autonomy from capitalists and the capitalist state, they are unable to, nor are they designed to, overcome or dramatically alter the power imbalances that exist in capitalist civil society.

Dedication

For Andrew, Claire, Autumn, and Grace

I don’t expect you to ever read this dissertation, aside from the following three words:

Never Give Up

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These words do not fully do justice to the many people who have provided their patience, support, and expertise to this dissertation. There was a period, perhaps one darker than I had fully realized, when completing a dissertation seemed like an impossibility. Being able to write these words is not something I take lightly, and it would not have been possible to do alone.

It seems conventional to thank your significant other at the end of the acknowledgements section. There was nothing conventional about my journey through a doctoral program and completing this dissertation, so unconventionally I will begin by thanking and acknowledging my best friend and wife Laura Harris. Without Laura strongly urging me to return to graduate school and wrap up some unfinished business, I would not be writing this. She believed in me when I didn't believe in myself and she put up with my many late nights of researching and writing (and often the grumpy mornings that followed), my occasional sneaking away during the day to work on this dissertation, and my general stress and anxiety. I am forever grateful for your encouragement, love, and support.

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I'm also thankful for the support and encouragement that my parents provided to me throughout my learning journey, from pre-school right through to graduate school.

Finally, and perhaps conventionally, I'll thank Laura again. This weight wouldn't have gotten off my shoulders without her.

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Chapter 1- Introduction

In February 2020, the Ontario Labour Relations Board (OLRB) delivered a "forceful decision challenging the underpinnings of the gig economy" that one union leader described as "a big precedent for anyone in the gig economy who worries about their health, safety, and security" (Mojtehedzadeh, 2020; Manzocco, 2020). The case, *Canadian Union of Postal Workers v Foodora Inc. d.b.a. Foodora, 2020 CanLII 16750 (ON LRB)* (referred to hereinafter as *Foodora, 2020*), focused on whether food delivery couriers for the app-based company Foodora were dependent contractors (and thus employees of the company) and therefore legally able to unionize. The union and workers asserted that they were dependent contractors. In contrast, Foodora claimed that the couriers were independent contractors, which would exclude them from legislative protection under Ontario's *Labour Relations Act* (*LRA*) and prevent them from unionizing. The OLRB concluded that Foodora couriers were dependent contractors and able to unionize. According to CUPW, the Board's decision "vindicated the union, which has known all along that Foodora controls the way that couriers work too much for them to be classified independent contractors" (Wilson, 2020).

The decision in *Foodora, 2020* is important not only to these workers, but also to the development of broader legal precedent surrounding dependent contractors. It also represents the first time that the Board issued a decision on employment relations in the growing platform economy, though this decision was grounded in decades of precedent from a variety of other, more traditional industries. Kaardal and Bjornson define the digital platform economy as one that "connects workers with clients or employers on flexible, autonomous, and short-term basis," through online applications, while Statistics Canada notes that "the broadest definition of digital platform employment includes platforms that pay workers directly, those that exercise another form of control, and those that simply connect workers with clients and let them arrange the payment by themselves." Based on this definition from Statistics Canada, "927 000 people (3.3% of the population aged 15 to 69 years) reported that they had engaged in digital platform employment in the 12 months preceding December 2023" (Statistics Canada, 2024). Commonly referred to as "gig workers," these workers often lack any legal protections because labour and employment laws do not recognize them as employees or dependent contractors (Lim, 2019). In this sense, the Board's decision in *Foodora* provided a small number of these workers with dependent contractor (or employee) status under the *LRA*, recognized their legal ability to join trade unions and engage in collective bargaining, and has the potential to open the door for further organizing. This important determination was not done by the legislature or the courts but rather by the OLRB, a government agency with a quasi-judicial function.

Although the first involving work in the platform economy and setting an important precedent, this case built upon roughly forty-five years of precedents involving dependent contractors that has been established by the Board. The development of this precedent is the focus of this dissertation. Except for drivers using a smart phone app, the fact scenario in *Foodora, 2020* shared much in common with previous cases before the Board involving workers alleging to be dependent contractors, particularly those involving other delivery drivers dating back to 1978. For dependent contractors – or those alleging to be – the Board has played an influential yet overlooked role in determining whether they can join a union and exercise bargaining rights.

This dissertation focuses on labour law, dependent contractors, and the OLRB's evolving role in determining protections for these workers. It traces the development of the earliest cases in the late 1970s – which outlined the Board's view of the scope of dependent contractors – and follows the growing body of jurisprudence through the neoliberal era, culminating in recent cases involving gig workers. There is a specific focus on the growing importance of the dependent contractor provisions in the *LRA* – and the Board's role in interpreting them – as work becomes increasingly 'non-standard,' or arranged in a way that differs from the post-war norm of a full-time, full year, permanent paid job with a single employer (Krahn, 1995).

This standard employment relationship was the very model upon which Ontario's post-war labour relations legislation was built, and this arrangement originally excluded dependent contractors from protections afforded to employees (Cranford et. al, 2005: 3-4 and 16-17). As work became increasingly precarious throughout the neoliberal period, as governments with aggressive anti-union agendas came to power, and as the labour movement experienced a waning influence, the Board's interpretation of dependent contractor provisions – and general extension of dependent contractor status to workers – became especially relevant.

This dissertation also explores the evolution and politics behind the concept of the 'dependent contractor' in Ontario, from its earliest incarnations to its current usage in the gig economy. It also examines how the Board's interpretation and application of dependent contractor provisions has impacted workers whose employment status falls somewhere between traditional notions of independent contractor and employee, or the 'grey area' as the Board has referred to it (*Retail, Wholesale and Department Store Union (AFL:CIO:CLC) v.*

Metroland Printing, Publishing and Distributing Limited (Ajax/Pickering News) Advertiser, 1993 CanLII 7838 (ON LRB)). To the extent that the Board can provide protections to dependent contractors – in contrast to independent contractors – are especially important in an era of changing employment relationships and of increasingly precarious work. Finally, this dissertation considers how the Board's previous jurisprudence on dependent contractors impacted its decisions in contemporary labour relations issues, such as in *Foodora, 2020*, and examines what this tells us about the Board's understanding of employment relations in the gig economy.

This dissertation answers three important questions: what were the Board's underlying concerns in their dependent contractor rulings? In particular, it seeks to understand the main concerns reflected in the Board's early dependent contactor rulings and the Board's broader understanding of the employment relationship. Secondly, it asks what were the limits of this understanding? In other words, what were the boundaries of 'dependency' that the Board was defining in their decisions and what kind of understanding did this convey of capitalist employment and labour relationships? Third, it asks what the Board was most concerned about and did these concerns evolve with the rise of neoliberalism and the spread of precarious employment?

By answering these questions, this dissertation develops an understanding of the role the OLRB in the context of a capitalist economy and, using a case study of dependent contractors, explores what functions it serves in the broader social order. This entails considering what influences the Board's decisions, why it makes these decisions, and understanding both the Board's potential to facilitate economic change and its limitations in doing so in a capitalist economy. This is important in helping to understand the wider implications of the shift in the OLRB's approach for gig economy workers.

This dissertation asserts that the OLRB operated with an implicit industrial pluralist understanding of labour-capital relations and made decisions in light of that approach. In so doing the Board was slow to perceive that capitalist workplaces were changing over time, and thus lagged behind in applying those industrial pluralist ideas effectively, particularly with the rise of precarious work. It further argues that while bodies such as the OLRB have some autonomy from capitalists and the capitalist state, they are unable to – nor are they designed to – overcome or dramatically alter the power imbalances that exist in capitalist civil society.

The Time Period – 1975 to the Present

The time period examined begins in 1975 for a variety of reasons. The mid-1970s ushered in the decline of the so-called golden age of capitalism and the corresponding emergence of neoliberalism (McNally, 2011). Beginning in 1975 is also logical given the changing dynamics of partisan politics that marked the final decades of the twentieth century. The period from 1975 to 2011 was characterized by frequent changes to Ontario's government after a period of relative stability consisting of seven consecutive Progressive Conservative governments between 1945 and 1975 (Manthorpe, 1974; Spiers, 1986; MacDermid and Albo, 2001).[1] In 1975, the governing PCs lost a majority government for the first time since 1945, and the ensuring political uncertainly was reflected in labour law reform. As a result of growing

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[1] The Progressive Conservatives won a minority government in 1943, majority governments in 1945, 1948, 1951, 1955, 1959, 1963, 1967, 1971 before winning a minority government in 1975 and 1977, a majority government in 1981, and a short-lived minority government in 1985 before losing the 1987 election.

labour unrest and shifting partisan sands following the election of a Conservative minority government and an NDP opposition in 1975, major amendments were made to the *LRA* that year that extended the Board's powers. The 1975 amendments represented the first major legislative changes to the *Act* since the 1960-61 amendments and were the final set of major changes made to the *LRA* and the Board's powers until the late 1990s.

Specifically, the 1975 *LRA* amendments expanded the Board's discretionary powers to determine bargaining units without conducting an investigation, granted it the remedial power to certify unions in the event of employer unfair labour practice, gave it remedial powers to grant cease and desist orders in all instances of unlawful strikes and lockouts, and provided it with greater power to regulate internal union affairs (Smith, 2009: 405-06). Most importantly for the purposes of this dissertation, the *LRA* was amended to include the classification of dependent contractors, who were explicitly defined as employees. As a result, the Board was tasked with making specific determinations in the event of disagreements between companies and workers as to whether someone was a dependent contractor.

There is a considerable amount of scholarship on the rise dependent contractors in the 1990s and 2000s (Langille and Davidov, 1999; Davidov, 2002; Fudge, Tucker, and Vosko, 2003), but this scholarship is not directly focused on the broader historical development of the Board's legal precedent on dependent contractors. A renewed interest in dependent contractors has become especially noteworthy with the growth of the gig economy, though these scholars do not necessarily make linkages between work performed in the gig economy and similar work performed in earlier periods (see, for example, Cherry and Aloisi, 2017; Kaardal and Bjornson, 2018). As a result, the historical evolution of the concept of dependent contractors and the

Board's role in both expanding protection to these workers and delineating the boundaries of this status, has not been fully examined. There is also limited literature on the push for legislative recognition of the term dependent contractor and the development of legal precedents by the Board in the years following 1975.

The OLRB and Dependent Contractors

Ontario's *Labour Relations Act* defines a dependent contractor as:

> a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor (Government of Ontario, 1995: art. 1(1)).

The *Act* also explicitly notes that the definition of "employee includes a dependent contractor." This text has not changed since 1975. Even prior to the 1975 amendments that specifically included dependent contractors as employees, the Board had the power to extend employee status to those that it believed fell in a grey area between employee and entrepreneur, though the Board limited its usage and was more subjective in making these determinations as there was not a legislative definition or concept to point to and rely upon. As Michael Bendel has noted, "Boards have been entrusted with administering labour relations statues precisely because they are supposed to have some appreciation of labour relations in addition to labour law," highlighting the Board's role in interpreting and applying the law in ambiguous situations

(1982: 393).[2] Bendel added that the Board "[has] it within their power, through the application of the organization test, to extend employee status to persons who are economically dependent on the putative employer … and they can so decide in the absence of a dependent contractor provision in governing legislation" (1982: 382).[3]

Bendel thus highlights the OLRB's potential influence over the livelihoods of workers and the operations of employers, even – or perhaps especially – in situations where the law is unclear and requires interpretation. This decision-making role is especially important in a changing political and economic context, and especially under neoliberalism, given the increasing role of contractual employees and the rise of non-standard employment relationships (see, for example, Vosko, 2000; Fudge and Owens, 2006; Kalleberg, 2009). The rise of non-standard employment relationships, while problematic itself, is made worse for workers when companies deliberately misclassify workers as contractors to prevent them from accessing legislative protections. Problematically, however, the issue of detection and reporting employee misclassification presents a challenge as "the issue [of being properly classified] is only raised if a worker makes a complaint alleging that [they are] an employee who is being deprived of the protection of the ESA, or if an ESO conducts an inspection in which [they make] an assessment that one or more workers is an employee whose ESA entitlements are being

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[2] In *Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Superior Sand, Gravel & Supplies Ltd. [1978] OLRB Rep. February 119119* the Board stated the 1975 legislative amendment provided "a more useful and less confusing reference point than those adopted by the Board prior to the enactment of the dependent contractor provisions" and continued that the legislative definition "provides a more direct and understandable route to the ultimate result" (at para. 125).

[3] Though critical of the legislative change to extend coverage to dependent contractors – an unnecessary and flowed development in his words – Bendel asserted that while the Board was always "able to extend employee status to all or almost all the near-employees who were previously thought to be beyond its reach. They have not always been explicit in explaining how they have been able to arrive at such a result" (1982: 379). If nothing else, Bendel appears to concede that the 1975 legislative amendment aided with allowing the Board to be more explicit in explaining its decisions and outcomes than what was often possible prior to the amendment.

violated" (Vosko et. al, 2017: 10). While the Board has potential influence on the livelihoods of contract workers, given the issues of reporting, detection, and enforcement, that power is not as influential as the power held by employers.

In certain instances, however, particularly those in which workers have made a complaint about the way in which they are classified, the Board has some level of power. For example, the OLRB's decision in *Foodora, 2020* illustrates the important role played by the Board as the ultimate arbiter of whether one is an employee and whether one can access the associated benefits and entitlements that come with an employee designation. Of course, this decision – while important and notable for being the first decision of this nature pertaining to the platform economy – is nothing new in the sense that there have long been job classifications that straddle between 'employee' and 'independent contractor' which the OLRB has determined whether they are employees and eligible for unionization.

While *United Food and Commercial Workers International Union (UFCW Canada) v Uber Canada Inc., 2020 CanLII 54980 (ON LRB)* (referred to hereinafter as Uber, 2020) and the Board's ruling in *Foodora*, *2020* serve as important and contemporary examples of the relevance and impact of dependent contractor language and highlight the importance of examining the Board's role in determining who is a dependent contractor, this dissertation is concerned with the historical development of this term, and traces its evolution through to the current juncture. Although app-based companies in the platform economy – such as Uber and Foodora – are often seen as unique or innovative, more critical analysis suggests that this supposed 'innovation' is nothing more than "a cutthroat war on workers' rights" (cited in

Hunsberger, 2022. For an analysis of Uber's innovation, see Bharti, 2014; for a critical analysis this innovation, see Hunsberger, 2022).

This dissertation illustrates the many similarities between how companies – and not simply global app-based ones – have, since 1975, attempted to deny workers bargaining rights under the *LRA* by classifying them as independent contractors. This is true of the construction aggregate delivery industry, milk and bread distributors, newspaper companies, and traditional taxicab and limousine companies, as well as contemporary app-based companies, that are explored throughout this dissertation. Workers are often only classified properly as dependent contractors when the Board makes a ruling on the matter, and this occurs only after workers themselves have organized collectively.

As with any dissertation, it can address certain aspects relevant to the topic but does not have the scope to address others. Specifically, this dissertation will not address or explore in any depth the broader economic and political influences shaping the political struggles going on in Ontario or the socio-cultural factors that both were and have undoubtedly remained at work (e.g. gender, race) over the period covered here. Instead, the analysis focuses primarily on performing a legal case study analysis of what the OLRB said and did in the period after legislation and an examination of how the Board made distinctions on the basis on whether workers were dependent or independent contractors. The purpose, therefore, is to identify and analyze patterns of decision-making at the Board and bring them into dialogue with concerns about the role of state institutions under capitalism and the degree they perform legitimating functions or operate with a degree of 'relative autonomy'

Chapter Outline

Chapter 1 introduces the topic of the OLRB and dependent contractors and outlines the structure of the dissertation. Chapter 2 reviews the academic literature relevant to the Labour Relations Board, dependent contractors, and precarious work. In so doing, it highlights a historical and ongoing trend of workers falling outside of legislative protection, culminating with a discussion of workers in the contemporary gig economy. Chapter 3 describes the theoretical approaches that inform this dissertation and outlines the methodology utilized herein. The chapter begins with an overview of industrial pluralism – the predominant theoretical approach informing labour law in Canada – and proceeds to outline the neo-Marxist state theory, neo-Marxist theories of corporatism, and critical labour studies approaches that challenge the industrial pluralist tradition. Chapter 3 concludes with a detailed overview of the methodology used to select and analysis the case analyzed in four proceeding empirical chapters.

These four empirical chapters trace the development of the Board's jurisprudence on dependent contractors. Chapter 4 examines owner-operators in the construction aggregate industry, Chapter 5 explores delivery drivers in various other industries (such as milk, bread, and newspapers), Chapter 6 considers the experiences of taxi and limousine drivers, and Chapter 7 looks at dependent contractors in the digital platform economy in the 21st century. Together, they provide a fine-grained analysis of the Board's pattern of decision making.

In some chapters – such as with construction aggregate delivery – cases appeared only in a limited period (1977 to 1981), while in others – including perishable delivery and taxicabs – the cases are spread over a longer period consisting of multiple decades. To the extent possible, the chapters are chronologically ordered, though cases in certain industries – namely non-perishable delivery and taxicabs – spill over the same period as other chapters.

These industries are consistent with the areas in which work is precarious and where employment relationships are not traditional or clear-cut. In his seminal piece on dependent contractors, Harry Arthurs viewed workers in many of these industries as “personify[ing] the dependent contractor” due to their being “economically vulnerable” and lacking employee status that is required to bargain collectively (1965: 89). Perhaps not surprisingly, some of these workers – notably self-employed truck drivers and taxicab drivers – began to organize into unions, helping to establish legal precedent in the field of dependent contractors.

Chapter 4 focuses on the first wave of cases involving workers, generally the owner-operators of dump trucks, seeking classification as dependent contractors in the immediate aftermath of the 1975 amendments to the *LRA*. During this time, the Board established and refined the criteria used to determine whether a worker was a dependent contractor. Generally, it did so in a way that provided the owner-operators of dump trucks with access to the rights enjoyed by traditional employees, at least for those workers whose employment relationship was consistent with the Board’s prevailing understanding of industrial relations.

Chapter 4 finds that in determining who was a dependent contractor, the Board relied upon the post-war standard employment relationship – even though this employment relationship was becoming less prevalent due to the rise of precarious work. This increasingly dated understanding of the standard employment relationship was reflective of the Board’s industrial pluralist mindset. Although the outcomes of many cases explored in this chapter provided dependent contractor status for the owner-operators appearing before the Board, it foreshadowed a significant shortcoming of the Board's ability to play a leading role in advancing the rights and protections afforded to precarious workers.

Chapter 5 examines cases involving the delivery of perishable goods, such as milk and dairy products, bread, and several cases involving the delivery of newspapers. Unlike the preceding chapter – in which cases were clustered in a limited period – Chapter 4 explores a much longer period ranging from 1978 to 2017. This chapter illustrates the Board's inconsistent approach in determining who is a dependent contractor and its struggle with understanding the evolving realities of precarious work and extending access to bargaining rights to precariously employed workers. The chapter concludes with a discussion of the Board's first meaningful analysis of precarious work in 2001.[4] The outcomes in the cases examined in this chapter had a more disparate outcome and failed to provide the same degree of expanded access for those seeking status as a dependent contractor that was provided to workers in situations that were closer to the standard employment relationship that were discussed in Chapter 4.

Chapter 5 highlights the Board's inability to understand and address the growth of non-standard work and further reflects the shortcomings of its post-war industrial pluralist mindset. Most problematic, especially with the growth of non-standard work, was the Board's conclusion *in Ottawa Newspaper Guild, Local 205 v. The Citizen (Southam, Inc.), 1985 CanLII 990 (ON LRB)* (referred to hereinafter as *The Citizen, 1985)* that workers in a 'casual' or 'part-time' relationship could not be dependent contractors under the *Act*. This logic prevailed until the

[4] *Communications, Energy and Paperworkers Union of Canada Local 87-M, Southern Ontario Newspaper Guild v. Toronto Star Newspapers Ltd., 2001 CanLII 6537 (ON LRB)* (referred to hereinafter as *Toronto Star, 2001*).

Board's decision in *Toronto Star, 2001*, in which it appeared to have a better grasp of the realities of precarious workers.

Chapter 6 considers the complexity of the "matrix of economic relationships" in the taxicab and limousine industry (*Ontario Taxi Workers' Union v. Hamilton Cab, 2011 CanLII 7282 (ON LRB)* and referred to hereinafter as *Hamilton Cab, 2011* at para. 14). Beginning with their decision in *Blue Line, 1979*, the Board consistently determined that taxicab drivers – with few exceptions – were dependent contractors and was certainly more consistent in determining that taxicab drivers were dependent contractors than it was with making a similar determination on the employment status of newspaper delivery drivers explored in Chapter 5.

The economic realities of the taxicab industry meant that owner-operators of a single vehicle needed to drive at least 'full-time' themselves (and often needed a second driver to drive the car when they were not). This chapter finds that the necessity for 'full-time' employment was consistent with the Board's prevailing understanding of the standard employment relationship and industrial pluralist mindset. As a result, the growing realties of precarious work – and the need to reposition its analysis of the changing nature of employment relationships – were moot in an industry in which workers were economically dependent upon a single employer, working the equivalent of full-time hours (if not more) for a single company, and working for another company was not an option or necessity.

The rise of the so-called gig economy is examined in Chapter 7. It draws upon two cases involving digital platform companies: *Foodora, 2020* and *Uber Canada, 2020*. In so doing, this chapter draws important linkages with industries explored in earlier chapters: taxicabs (with *Uber Canada, 2020*) and delivery of perishable goods (with *Foodora, 2020*). Although neither group of workers secured a collective agreement, the Board appears to have opened the door to an expanded notion of employee status for contractors in the gig economy.[5]

Despite this opening, Chapter 7 also highlights the limitations of the Board, irrespective of its decision in *Foodora, 2020*. Although the Board determined that Foodora couriers were dependent contractors, the workers were unable to secure their goal – a negotiated collective bargaining agreement – and the Board was not able to facilitate this outcome. The Board's precedent in *Foodora, 2020* might, however, play an important role in future cases involving workers in the gig economy. This chapter finds that the Board's analysis in both *Foodora, 2020* and *Uber Canada, 2020* illustrated an improved understanding of the realities of precarity within the growing gig economy, especially relative to its understanding of precarity in earlier cases explored in previous chapters.

Overall, my findings point to the Board as an important legal gatekeeper in providing expanded access to workers who are seeking to unionize and who believe they are dependent contractors. While some the cases explored in the following chapter show the potential of the Board to provide this expanded access, the outcomes are unequal and vary from industry-to-industry. Other cases – particularly those involving non-standard and precarious workers – illustrate the shortcomings of the Board and have presented a significant hurdle for these workers.

Far from being a mere tool for the advancement of the state's economic goals, the Board has a degree of autonomy from the capitalist state and the governing party. It is,

[5] Foodora ceased its Canadian operations after the Board's ruling, and Uber and the UFCW came to a voluntary arrangement before the case was decided.

however, deeply rooted in its industrial pluralist leanings and operates within the relatively narrow confines of the capitalist system. As such, it is ill-suited to challenge the accumulation of capital or the subservient nature of the employment relationship more generally. Despite advancing the rights of some workers seeking dependent contractor status, the Board has been slow to react to the decline of the post-war standard employment relationship and the resulting growth in precarious and non-standard work.

Instead, the conclusions stemming from the cases explored in the chapters that follow find that the Board has historically been willing to advance those employees whose work most closely fits the mold of the traditional standard employment relationship, that is, those workers who are not only economically dependent and have an obligation to perform duties, but who also work (nearly) full-time hours and work for a single company. More recently, this dissertation finds that the Board has increasingly been more open to extending dependent contractor status to those in a non-standard employment relationship (part-time hours, multiple employers), but lacks the enforcement power to ensure that these workers remain employed and are able to exercise their bargaining rights.

This dissertation concludes with a discussion of the implications of these findings, and most importantly, what they mean for non-standard workers to secure the status of a dependent contractor in the future and the Board's possibilities and limitations in facilitating this.

Chapter 2: The Labour Relations Board, Dependent Contractors, and Precarious Work: An Overview

There are approximately 630 government agencies in Ontario, each with varying functions, budgets, and importance.[6] John Eichmanis and Graham White define agencies (including boards and commissions) as "governmental bodies created at 'arm's length' from government, having a measure of independence from the ministry and policy-making process" (1985: 83). The role of these governmental agencies has long been vague and outside the public's awareness. While the public may recognize leading agencies like the OLRB as being somehow "governmental," Eichmanis and White note that most Ontarians "would certainly not have a clear understanding of their relationship to government, to the cabinet and to the legislature" (1985: 83). Like the OLRB, some of these agencies are quasi-judicial in that they exercise 'court-like' functions, such as the impartial adjudication of cases that come before them, though often without the rigidities and procedures of the formal legal system.

One agency that Eichmanis and White identified as being at least nominally familiar to some Ontarians is the OLRB, "an independent adjudicative tribunal which plays a fundamental role in the labour relations regime within Ontario [with] a mandate to provide excellence in administrative justice through the effective resolution of a wide range of labour relations and employment disputes."[7] In a legal sense, it is "an independent, adjudicative tribunal issuing decisions based upon the evidence presented and submissions made to it by the parties, and upon its interpretation and determination of the relevant legislation and jurisprudence,"

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[6] The term "agency" is the broad term utilized by the Ontario government to encompass Agencies, Boards, Commissions, Councils, Authorities and Foundations. See Government of Ontario, *Agencies and Current Appointees*, Available online at: https://www.pas.gov.on.ca/Home/Agencies-list (accessed December 10, 2023).
[7] Government of Ontario. n.d., a. Ontario Labour Relations Board, available online at: https://www.pas.gov.on.ca/Home/Agency/357

including – among others – the *Labour Relations Act*.[8] While the public is generally unaware of the specific nature of the thousands of cases that the Board is tasked with, certain decisions – such as *Foodora, 2020* – generate some media interest and receive considerable public attention.

The OLRB has authority over many significant aspects of labour relations, including the certification of trade unions as collective bargaining agents, appointing officers to mediate complaints regarding contraventions of the *Act*, conducting hearings into complaints that have not been settled, and issuing termination of bargaining rights (OLRB Annual Report, 2021-22).[9] In addition to its more traditional roles in unionized workplaces, the Board also has jurisdiction over more than 25 employment-related statues, including the *Employment Standards Act*. In short, this agency is an important regulator of the relationship between employers and workers for virtually all employment classifications falling under provincial jurisdiction.

Studying the OLRB is important because it is one of the province's largest and most-established agencies, is "widely regarded as the premier administrative tribunal in Ontario," and "is regarded nationally as the leading jurisdiction in the continuing development of labour law and the processes used in mediation and adjudication" (OLRB Annual Report, 2009-10: ii). In the 2023-24 fiscal year, the Board had an operating budget of over $12 million, received 3026 new applications, and had a total caseload of 4656 before it (OLRB Annual Report, 2023-24: 3-4 and 41). Despite the important role it plays in regulating workplaces in Ontario and

[8] Government of Ontario. n.d.,b. Ontario Labour Relations Board, available online at: https://www.olrb.gov.on.ca/
[9] Other important roles include the handling of unfair labour practices…successor bargaining rights, essential services, strikes, lock-outs, first contract directions and declarations where unlawful strikes and lockouts have occurred, jurisdictional disputes…and a range of issues arising in the construction industry, including the arbitration of grievances" (OLRB Annual Report, 2021-22).

governing the relationship between employee and employer, there is a noteworthy gap in the literature on the Board's post-1960s development and operation.

To the degree that the OLRB during the neoliberal era has been studied directly, it has been done primarily by industrial pluralists and often former Board practitioners. These studies have focused largely on the partisan politicking of the mid-1990s and the OLRB's supposed shift away from the concepts of 'fairness and balance' (See Smith, 2009 for an analysis of 'fairness and balance' in the Board. For example, when the social democratic New Democratic Party (NDP) formed government in 1990, the Board's powers were expanded considerably, prompting one observer to remark that the Board was invited "to revisit 20 years of jurisprudence" (Burkett, 1998: 171). In 1995, however, with the NDP's defeat and the election of the decidedly right-wing Progressive Conservatives, the political climate in Ontario changed, which "meant a sudden U-turn in both the labour law climate and the philosophy of administrative justice appointments" (McCormack, 1999: 351). Burkett refers to the effects of this climate of rapid change and instability, in which a newly elected government overwrites the existing administration of labour law only to have it rewritten once again following their defeat, as the pendulum effect (Burkett, 1998: 168). This desire for the Board to "fit the mold" of the government of the day (McCormack, 1999: 350) has in many respects represented an Americanization of labour law (see Gross; 1996; Bodah, 1999; Flynn 2000). The implication of such work is that changes in government should or did affect the Board, but the research stops short of showing that this was so.

Similarly, there has been limited analysis of the Board after the 1990s. While McCormack (1998; 1999), Burkett (1998), Ellis (1998) and Flood (1998) have analyzed the relationship between the executive and the Board, they have focused only on a limited period (1993 to 1996). In so doing, they have focused their scholarship on areas other than a critical political economy analysis of the Board in the overall operation of the neoliberal state. Similarly, while Martinello (2000), Slinn (2004) and Bartkiw (2008) have chronicled the effects of changes to the *LRA*, these scholars have focused on the impacts of the legislative amendments in 1993 and 1995, particularly as they relate to the union certification process. While their scholarship has been effective in analyzing the impact of legislative change in a specific function of the Board, there remain many important areas of the Board's role – such as their role surrounding dependent contractors – that have not yet been studied.

A detailed analysis of the OLRB's development and role has thus far been the subject of two doctoral dissertations produced at York University. F. David Millar's (1980) dissertation chronicles the decline of the former Ontario Labour Court and the establishment and early years of the OLRB, beginning in 1944 and ending in 1950. Building upon this work, Charles Smith's (2009) dissertation begins with an examination of the Board in 1949 and ends in 1961. These two dissertations connect with one another in that a series of major amendments to labour law in Ontario occurred in 1950. Adam Bromke (1961) also covers the early decades of the *LRA* and OLRB, though his theoretical approach and understanding of the Board's role is drastically different from the more critical insights of Millar and Smith.

Toward the conclusion of his dissertation, Smith discusses the 1960 overhaul of the *LRA* and the Board's powers, though his rich critical analysis of the Board's political role ends in 1961. Our understanding of many facets of labour law in Ontario, and more specifically the Board's role in shaping labour law and its impact upon the implementation of various *LRA* provisions is limited, especially in the post-1960 era. This dissertation, therefore, extends the periods studied by Millar and Smith, thus contributing to a broader linear analysis of the Board's trajectory and its implementation on labour relations policy in Ontario, especially in context of the rise of precarious employment and the gig economy.

Literature Review- Dependent Contractors

Writing in 1965, legal scholar Harry Arthurs asserted that "unequal power between private persons, no less than between citizen and state, is an unhappy fact of modern society" (Arthurs, 1965: 89). One area of unequal power in the employment context involved "the paradoxical plight of groups of competitors who may find survival difficult without collective action. They are often economically vulnerable as individuals … [but] lack the legal status which is prerequisite of the right to bargain collectively under labour relations legislation" (Arthurs, 1965: 89). What these workers lacked was the legal classification of being an employee, which was the prerequisite required for coverage under the *LRA* to access to collective bargaining rights. While not legally employees within the meaning of *Act*, Arthurs posited that these workers were also not "businessmen [sic]" in the traditional sense of the word, but their economic vulnerability – often on a single purchaser of their labour power – meant that they were also not independent contractors. Though lacking the ability to bargain collectively due to their exclusion from the *LRA*, they were unable to "legally employ collective tactics to buy or sell or otherwise stabilize conditions, because of the combines legislation" (Arthurs, 1965: 89).

To solve this situation of relative powerlessness and the absence of any leverage over the conditions they faced in the market, Arthurs proposed the creation of a new term in the

LRA – dependent contractor. By this, he meant workers that "are 'dependent' economically, although legally 'contractors'" (1965: 89). By way of example, he identified "self-employed truck drivers (commonly referred to as owner-operators), peddlers, and taxicab operators, farmers, fishermen [sic], and service station lessees" as those who "personify the dependent contractor" (Arthurs, 1965: 89). A decade later, the first appearance of 'dependent contractor' as a legal term in Ontario came about with the 1975 amendments to the *LRA*. These amendments expanded the classification of whom the law considered an employee by including dependent contractors as employees, thus making them eligible for certain protections afforded to employees, notably the ability to unionize and bargain collectively. Michael Bendel has rightly suggested that "it seems safe to assume that all these amendments were inspired, in part at least, by the recommendations of Professor Arthurs and the [Woods] task force" (1982: 378).[10] Since 1975, the OLRB has played, and continues to play, a central role in the interpretation, evolution, and scope of the *Act's* dependent contractor provisions.

Arthurs' intervention to suggest the creation of the category of dependent contractors was rooted in his industrial pluralist leanings. Prior to 1975, a subset of individual workers – dependent contractors – suffered from a power imbalance relative to the companies for whom they worked but were legally prohibited from collective action to attempt to remedy the imbalance. Arthurs correctly noted that "in many instances, dependent contractors have sought to employ 'countervailing power' in the form of unions … for concerted economic action" and

[10] The Woods Task Force on Labour Relations was established by the federal government in 1966. Chaired by H.D. Woods, the Dean of the Faculty of Arts and Science at McGill University was "concerned with the problems of labour-management relations" in Canada and examined several areas, including dependent contractors (largely at the federal level) (Woods, 1967: 130; see also Woods, 1968).

supported this approach to collective action, asserting "there is a case to be made for the encouragement of countervailing power even at the sacrifice of some competition" (Arthurs, 1965: 89, 117). The belief that these workers not only needed, but also deserved, the ability to have a collective voice in the determination of their working conditions to balance the pre-existing power imbalance in their employment relationship is consistent with industrial pluralist orthodoxy. Even the term used to describe this process, the creation of a 'countervailing power,' draws from the industrial pluralist tradition. For example, John Kenneth Galbraith noted that "private economic power is held in check by the *countervailing power* of those who are subject to it" (Galbraith, 1963: 125, emphasis added; see also Kaufman, 2000: 22).[11]

Arthurs' article helped to popularize the plight of these vulnerable workers, which in turn facilitated a growing discussion on their role in the prevailing scheme of labour relations. Though focused on the federal level, the Woods Task Force on Labour Relations echoed many of Arthurs' concerns and, in 1968, asserted that "we are concerned about accessibility to collective action by groups of self-employed persons who are economically dependent for the sale of their product or services on a very limited market or who for other reasons may have economic characteristics of employees … We recommend that the Canada Labour Relations Board be given discretion to recognize these groups as bargaining agents within a specified market" (1969: 30). In particular, the Woods Task Force referenced "such groups as fishermen [sic], owner-drivers of taxis, and independent owner-drivers of trucks and delivery vans" as examples of workers to whom bargaining rights as employees should be extended. Two groups of workers – owner-drivers of taxis and owner-drivers of trucks and delivery vans – have played

[11] Galbraith's book was originally published in 1952.

precedent-setting roles in the OLRB's eventual jurisprudence on dependent contractors and are explored in detail throughout this dissertation.

The initial recognition of the dependent contractors as employees – first somewhat mildly by the Board itself, then more formally by legislative change, and finally by the Board directly through the application of an amended *LRA* – occurred within a model of industrial pluralism. Writing in 1967, Arthurs asserted that "today the Canadian worker lives increasingly in a world of rights and duties created not by his [sic] individual contractual act, but by a process of public and private legislation" (Arthurs, 1967: 786). Of course, many workers, who met the definition of dependent contractors – or thought they did – had already organized prior to 1975, "whether under the aegis of such legislation, or without regard to it" (Arthurs, 1965: 115). When the state was finally ready to acquiesce to the most basic right – the ability to be an employee within a capitalist system – and pass legislation to that effect, it was done so within an industrial pluralist framework. This countervailing power – dependent contractor status – helped to redress the imbalance of power between individual workers and companies by facilitating their collective action and organization but was never designed to disrupt the existing power relationship between employee and employer.

The work of Arthurs and the Woods Task Force certainly played an important role in securing legislative change. As Michael Bendel has noted, "although the notion of the dependent contractor did not surface in Canada until 1965, concern for his [sic] status had become part of the conventional wisdom on labour relations by the early 1970s" (1982: 376). Indeed, seven jurisdictions (British Columbia, Newfoundland & Labrador, Saskatchewan, Manitoba, Nova Scotia, Ontario, and federal) amended their labour relations statutes to grant employee status to dependent contractors around this time, though not without "significant deviation from the models proposed by Professor Arthurs and the Woods Task force," as well as variation across jurisdictions (Bendel, 1982: 376).[12] As Fudge, Tucker, and Vosko note:

> while most provinces amended their collective bargaining legislation to include dependent contractors in response to industrial strife in a number of industries where the use of contract workers was undermining stable collective bargaining relationships, they did not also give these workers the benefit of minimum standards legislation, notwithstanding that they were in an economically dependent position that made them more like employees than independent contractors. Presumably, a major reason for this inaction was the absence of the kind of political pressure that was being brought to reduce industrial conflict (2003: 226).

For his part, however, Bendel (1982) was critical of the advent of dependent contractor provisions, viewing them as flawed and unnecessary. Similarly, Langille and Davidov have characterized the various dependent contactor provisions in Canada as "partial, inadequate, [and] interesting" (1999: 29; see also Fudge, Tucker, and Vosko, 2003). Bendel was not critical of the expanded protection that dependent contractor provisions provided to groups of vulnerable employees, but rather that the amendments "had little or no impact on the coverage of labour relations statutes … [because] labour relations boards, without having to rely on dependent contractor provisions, have been able to extend employee status to all or almost all of the near-employees who were previously thought to be beyond its reach" (1982: 379). For Bendel, labour boards were sufficiently empowered and aware enough to provide employee protections to workers whose employment status was in question prior to legislative amendments. He asserted that specific dependent contractor provisions "might give rise to the

[12] In Ontario, the definition of dependent contractor was "essentially the same" as in British Columbia and Newfoundland & Labrador, though it was unique in that it "guarantee[d] dependent contractors bargaining units of their own unless, by a majority, they expressed a preference for being assigned to a bargaining unit with other employees" (Bendel, 1982: 378).

inference … [that] a narrow approach is to be taken" and maintained that repealing the dependent contractor provisions and amending the definition of employee to "enable labour relations boards to recognize as employees [those] persons whose contracts … could appropriately be the subject of collective bargaining" (Bendel, 1982: 411). Despite these worries, the legislature amended the dependent contractor language in the *LRA* just once, and that was to include the usage of gender-neutral language.

Dependent Contractors and Precarious Work

The absence of legislative amendments to the *LRA's* dependent contractor provisions limited the academic literature in the area, as it seemed a settled issue. However, the rise of precarious work beginning in the mid-1990s led to a resurgence of analysis of the dependent contractor provisions (Langille and Davidov, 1999; Davidov, 2002; Fudge, Tucker, and Vosko, 2003). The precedents established by the Board in the late 1970s and early 1980s proved important not only to the workers whose cases were being heard at that time, but also to facilitate further expansion of *LRA* coverage beginning in the 1990s. An expanded conception of dependent contractors as employees increased in importance as neoliberal employment relations became further entrenched and was expressed in app-based platform work in the early 2020s.

Even before the rise of platform work, workers found themselves in increasingly precarious or non-standard employment relationships and in situations where their status as an employee (or dependent contractor) was unclear. As Vosko et al. note, "in the 1990s the legal definition of employment began to attract a great deal of attention internally and in Canada.

The changing nature of employment relationships has put the legal tests under considerable stress" (2003: 195). This stress comes from both the rise of precarious employment relations that fall into a grey area and the deliberate misclassification of workers in which the employer wrongly alleges that a worker is an independent contractor.

The growth of precarious employment happened for a variety of reasons, but broadly speaking it can be attributed to the breakdown of the post-World War II Fordist compromise and has occurred over many decades. While precarious work has always existed, neoliberal choices made by successive governments at both the federal and provincial levels have exacerbated workers' precarity and slowly undermined the standard employment relationship. Jason Foster (2023a) has attributed the rise of precarious work to various factors, noting that "governments, responding to demands from an increasingly aggressive corporate lobby, rolled back workers' protections, cut social programs and privatized many public services. Employers happily rushed into lower wages, outsource, bust unions, shift to part-time and temporary jobs and generally degrade the quality of work" and concludes that "these actions constructed the monster that is precarious work today."

Langille and Davidov rightly note that "the last two decades of the 20th century have seen dramatic changes in the organization of work … there is now a proliferation of part-time, casual and temporary (or otherwise short-term) arrangements, more multiple job holders, and more people who work at home" (1999: 31). This rise in 'non-standard' work has heightened the relevance of dependent contractor provisions in Ontario and across Canada as the employer-employee relationship is less clear (Cranford et. al, 2005). Another important feature of the 'new economy' has been a rise in self-employment and in contracting out, which further compounds confusion (Langille and Davidov, 1999: 31; see also Fudge, Tucker, and Vosko, 2003: 195). As this dissertation highlights, however, the employer-employee relationship has never been perfectly clear and employee status has long been contested.

For many businesses, a goal has been to avoid employment relationships altogether and to structure their enterprise in such a way that they have fewer employees. By not having employees, businesses are no longer subject to occupational health and safety regulations, minimum employment standards, or the prospect of their employees forming a union and having to engage in collective bargaining. With increased profit and flexibility on the line, there is considerable incentive to avoid the traditional employer-employee relationship. One way to do this is to rely more heavily on independent contractors, whether properly classified or not. As Davidov points out, eroding the traditional employer-employee relationship "is becoming more and more common as a result of an increased emphasis on flexibility and the new pressures of globalization" (2002: 363).

Employers' desire to be free from the constraints and costs of an employment relationship while simultaneously relying on the labour of others heightens their reliance on contractual and outsourced labour that may be legal, illegal, or in the grey area in between. Businesses can engage legally in the use of contractors and subcontractors by outsourcing some function to a company that employs people to perform the outsourced work, or by entering a contractual business relationship directly with an independent contractor. Businesses can also engage in misclassification – whether deliberately or inadvertently – and claim that they have entered into a contractual business relationship with an independent contractor. In some instances, however, these workers push back and claim they are being misclassified and are instead dependent contractors (or employees), and occasionally they will attempt to certify into a trade union. It is this third approach – misclassification – that is important for the purposes of this dissertation, regardless of whether it was done deliberately or inadvertently, and especially so in those instances in which the workers attempt to unionize.

The Platform-Based Gig Economy

The rise of platform work in the early twentieth century has forced further analysis of the legal status of those whose employment classification may fall somewhere between traditional employee and independent contractor.[13] Tech-based platforms include those economic activities that are "facilitated by digital platforms like websites or mobile applications" and the transactions made through them generally "involve three or more separate parties, including: sellers of goods or services; consumers buying these goods or services; and platform operators that use technology to facilitate transactions between sellers and consumers" (Government of Canada – Canada Revenue Agency, 2024). These tech-based platforms operators assert aggressively that they are not employers and that the workers are not employees (Bay Area Council et al., 2019; Marshall, 2019).

Alex Wood of the University of Oxford defines the gig economy as "the way in which people are now finding work in non-standard ways. So, instead of working for a traditional employer, they access paid work through online platforms which enable workers to be hired to

[13] Canada has seen a notable rise in precarious work since the 1980s. Mitchell Thompson (2023) notes that "nonpermanent employment has nearly doubled from 7 percent in the 1980s to 10.4 percent in the early 2000s to 12 percent today." Jason Foster (2023) found that in 2020, 15.4 percent of workers reported being self-employed compared to the 12 percent in 1976.

do a specific task, or gig." He adds that "It's important to understand that the system of work comes with no frills. Zero-hour contracts and no benefits like holiday pay, sick pay or even a minimum wage" (Wood, cited in Butterfield, 2018). These workers, often referred to as 'own-account self-employed,' are contractors who may not be able to secure a living through a single economic relationship with a single company and may need to have multiple 'gigs' to make ends meet (Vosko, Zukewich, and Cranford, 2003; Doucette and Bradford, 2019; Glavin, 2023).

One notable site of gig work is found in the platform economy. Platform owners classify workers who sell their labour through the digital platform as 'independent contractors' and not as employees, thereby avoiding the responsibilities and costs of more traditional employment relationships. Iglika Ivanova and Mark Thompson (2018) note that "owners of these platforms derive much of their profit (and gain a competitive advantage over traditional service providers) by exploiting gaps in the current employment standards regulation and enforcement." They add that "gig economy workers … are rarely true entrepreneurs who set their own hours and rates" (2018).

More accurately, their atypical employment arrangement features a limited and highly variable income, ownership of some of the 'tools' of their trade (such as a vehicle or bicycle), and – in theory – flexibility as to when they work. However, because they are subject to forms of discipline and control, and because they are reliant on access to the platform to conduct their work, platform workers are in the grey area between employee and independent contractor. This grey area provides space to make the legal argument that platform workers are either employees or dependent contractors in jurisdictions like Ontario, where the term has legal meaning and is akin to 'employee'. Despite platform owners' argument that workers are independent contractors, they are more accurately in "a form of disguised employment" (Kaardal and Bjorson, 2018: 6).

As Cherry and Aloisi note in their comparative study of dependent contractors in the gig economy in Spain, Italy, and Canada, platform operators have an incentive to deliberately misclassify platform workers and force litigation in the hope that "no one will notice or want to invest the time, patience, and effort in starting an administrative action or lawsuit to challenge the firm's initial misclassification" (2017: 37). Since gig work is often low-paid and casual, for many workers the cost of litigation may not be worth the effort if they can even afford to pursue it to begin with. Even if an administrative board such as the OLRB rules that gig workers are dependent contractors, the incentive of a ruling in the alternative that they are not (or no ruling at all if the decision is not challenged) may be worth the risk for many companies. Cherry and Aloisi add that while platform operators may face consequences, such as fines, for misclassification, "many companies are willing to take the risk in the hopes that it will not get to that point [of litigation]. In other words, they feel it is better to risk asking for forgiveness, rather than first getting permission" (2016: 38).

Disputes that arise when workers assert that they are dependent contractors and legally permitted to unionize are resolved by the OLRB. Though not speaking directly about dependent contractors, Smith importantly recognizes that "while neo-liberalism continues to force trade unions to adopt…new organizing strategies, there can be little doubt that questions of workplace democracy and the expansion of unions into new sectors will depend on how the *OLRA* and the OLRB work to regulate unionization across the province" (2009: 14). The Canadian Union of Postal Workers (CUPW)'s 2019 drive to unionize workers at Foodora serves as a telling example of the Board's role in regulating unionization in new sectors, such as platform work.

Although Arthurs did not use the term 'precarious' and was not referring to the gig economy, he nevertheless identified the situation of those he viewed as dependent contractors as exhibiting many elements of contemporary precariousness, notably that they "are often economically vulnerable" and that "they may find survival difficult without collective action" (1965: 89). In this sense, while the tech-savvy nature of Foodora couriers is a unique 21st century situation, they too experience economic vulnerability. Despite technological advances, the problems facing workers who are at risk of not being defined as employees have remained an important constant in the field of labour relations.

Chapter 3: Theoretical Approaches and Methodology

This chapter sets out the theoretical traditions informing this study and maps out how the research was carried out. The dissertation draws from a variety of critical approaches to analyze the decision-making of the OLRB. Most notably, it draws from neo-Marxist state theory, neo-Marxist theories of corporatism, and critical labour studies, particularly as it pertains to labour law and systems of industrial pluralism. The chapter begins by exploring the dominant understandings of labour law and industrial pluralism before shifting to critical approaches to capital/labour relations with a focus on the state and state institutions. It then sets out the methodological strategies deployed to analyse the decision-making of the Board over time and to assure that the sources consulted are representative of their views and decisions on matters relating to dependent and independent contractors.

Industrial Pluralism

Every attempt to grapple with state decisions about the regulation of labour is in dialogue with a broad, sometimes implicit, tradition that can be understood as industrial pluralism. This approach tends to be "adhered to by economists and industrial relations scholars adopting a traditional institutionalist approach and reflects the traditional philosophy underlying labour law in North America" (Godard, 2017, p. 14).[14] Industrial pluralism attempts to strike a balance between the competing interests of business/capital, who seek profit, an efficient economy, and control at the workplace, and workers, who seek fairness and some

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[14] Liberal theories of industrial pluralism have dominated much of the scholarship on the OLRB and Canadian labour law more generally. See, for example, Woods, 1958; Arthurs, 1967; Woods and Ostrey, 1973: 15; Arthurs, 1985; Burkett, 1998; Carter, 2002; Sack et. al, 2004; Adams, 2019.

degree of voice in the employment relationship. To this end, champions of the industrial pluralist approach place emphasis on state institutions, such as labour law and the Board who adjudicates much of that law, to mediate these competing claims (Godard, 2017).

Implicit in industrial pluralism is a traditional power imbalance between capital and labour, with the former having far more power and influence than workers – especially unorganized workers – in a purely laissez-faire capitalist system. The introduction of a system of labour laws and the resulting state-regulated process facilitating collective bargaining (for a selected group of workers at least) was designed with the intention of providing a collective voice to workers and correcting the previous power imbalance between capital and labour. As Bruce E. Kaufman notes, throughout the late 19th and early 20th centuries, "employers were given nearly unrestrained rights to run their business as they saw fit for the purpose of making as much money as possible" (Kaufman, 2000: 196). A system of state-instituted labour law would help to correct an inequality of bargaining power between capital and labour, but – by design – fell short of tilting the balance of power in labour's favour. The goal of industrial pluralism was to facilitate "greater equality in bargaining power…, improve both the efficiency and equity of the market system and lead to a win-win outcome for employers, workers, and the public at large" (Kaufman, 2000: 189).

This public interest was protected by the state, which plays an important – albeit supposedly neutral – role in the minds of many industrial pluralists. In his analysis of orthodox (or pluralist) industrial relations, Richard Hyman highlights the belief that "there exists a public interest common to all groups and classes in the society, and that the state is the natural defender" (Hyman, 1978: 21). Compromise between the parties, as opposed to conflict, is the hallmark of the industrial pluralist approach. To the extent that capital and labour cannot reach a consensus and arrive at a compromise, the supposedly neutral state helps to facilitate a compromise. H.A. Clegg, a prominent British industrial pluralist, asserted that "there must be some mechanism at work which binds the competing groups together and holds them back from rending the societies to pieces. For the pluralist this mechanism is the continuous process of concession and compromise" (Clegg, 1975: 309; see also Hyman, 1978: 29).

The conflict between capital and labour – in the minds of industrial pluralists – are relatively limited to economic and workplace-specific issues, as opposed to an underlying disagreement about the efficacy of the capitalist system as a whole or the supposed neutrality of the state within it. For example, Kochan and Katz assert that conflict between capital and labour is limited to a "subset of issues" and that they nevertheless share "a common overarching interest in successfully resolving issues arising from their conflicting interests" (1988: 7, see also Godard, 2017: 14-15).

In Canada, the founding moment of the industrial pluralist tradition can arguably be traced to the important arbitration decision in *Ford Motor Co. of Canada v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America (U.A.W.-C.I.O.) [1946] O.L.A.A. No. 1* (hereinafter *Ford Motor Co v. U.A.W, 1946* or *'the Rand decision')*. This arbitration decision addressed the UAW's demand for union security – in the form of a union shop – in which Ford would be free to hire whomever it pleased but would require, within a certain time, all employees to join the U.A.W. or face dismissal and helped shape the trajectory of post-war labour relations in Canada.

The arbitration ruling was issued by Supreme Court Justice Ivan Rand and was influenced heavily by an industrial pluralist approach (though Rand himself does not use that phrase in his decision).[15] Nevertheless, Rand attempts to facilitate a compromise between capital, labour, and the public. He noted in his decision that, by 1946, most provinces had already established a rudimentary labour relations framework recognizing the "social desirability of the organization of workers and of collective bargaining" (*Ford Motor Co v. U.A.W, 1946*: para. 4). Rand elaborated that this developing labour relations framework was designed

> toward an increasing harmony, the interests of capital, labour and the public in the production of goods and services which our philosophy accepts as a part of the good life; it is to secure industrial civilization within a framework of a labour-employer constitutional law based on a rational economic and social doctrine (*Ford Motor Co v. U.A.W, 1946*: para. 4).

For Rand, this framework entailed an expansion of workers' rights to increase their bargaining power to improve their economic lot while respecting the pre-eminence of capital and without undue disruption to the broader public interest.

Before addressing what he referred to as 'the particular problem' (the specifics of the case itself), Rand provided a broad overview of the competing interests of capital and labour and the need for compromise between them. Consistent with the industrial pluralist tradition, Rand asserted that "capital must in the long run be looked upon as occupying a dominant position," but elaborated that labour – "the necessary co-partner of capital" – has an important role to fulfil in "redress[ing] the balance of what is called social justice" (*Ford Motor Co v.*

[15] In explaining his rationale for the specific terms of his arbitration award, Rand began with "the mechanism from the *orthodox standpoint* preserves the basic liberties of the Company and employee" (*Ford Motor Co v. U.A.W, 1946*: para. 31, emphasis added).

U.A.W, 1946: para. 8). In this role, labour itself develops some degree of power and influence, though less than capital, and this newfound power "in turn must be met in balancing controls in relation to the individual members or workers over whom [that power] may be exercised, as well as to industry and the public" (*Ford Motor Co v. U.A.W, 1946*: para. 8).

Ultimately Rand rejected the union's request for a union shop because such a requirement "would subject the Company's interest in individual employees and their tenure of service to strife within the union and between them and the union … and it would deny the individual Canadian the right to seek work and work independently of personal association with any organized group" (*Ford Motor Co v. U.A.W, 1946*: para. 22). He did, however, mandate all employees to "be required to shoulder their portion of the burden of expense for administering the law of their employment, the union contract, that they must take the burden along with the benefit" (*Ford Motor Co v. U.A.W, 1946*: para. 27). Rand also required the company to deduct these dues from individual paycheques and remit them to the union.[16] In the years following Rand's decision, his approach to union security became commonplace in collective agreements – and legislation – across Canada and, as Debra Parkes has noted, became "an integral part of the post-war model of Canadian labour relations," largely because of its pluralist underpinnings and ability to facilitate "an individual/collective rights compromise in the liberal democratic tradition" (Parkes, 2010: 227).

Ultimately, industrial pluralists see labour and capital as two major – and relatively equally powerful – actors and view the state as a neutral body mediating any disputes that

[16] This approach to union security has since become known as the Rand Formula and exists in all jurisdictions in Canada. See Unifor, *The Rand Formula and the Struggle for Union Security* (2013), available online at: https://www.unifor.org/sites/default/files/legacy/documents/document/part_3_-_rand_formula.pdf

might arise between them, protecting the public interest from any residual impacts of labour-management disputes (Woods and Ostrey, 1973: 15; see also Woods, 1958; Arthurs, 1967; Arthurs, 1985). Harry Arthurs, one of Canada's foremost labour law scholars – whose seminal 1965 piece brought the place of dependent contractors within the industrial relations framework to the forefront – went so far as to suggest that the post-war industrial relations framework represented a state within a state. He maintained that "the industrial community does not exist in a vacuum: it is a state within a state … there are areas where the attributes of industrial citizenship overlap with or parallel those of national citizenship" (Arthurs, 1967: 787). For industrial pluralists, the state plays a neutral role in industrial relations and its institutions, such as the OLRB, are not inherently an arm of the capitalist state.

The Neo-Marxist Challenge to Industrial Pluralism

Utilizing a neo-Marxist perspective to analyze the OLRB provides a meaningful challenge to liberal theories of industrial pluralism. Charles Smith contends that, for industrial pluralists, "there is no natural connection between the capitalist state and employers," despite the existence of measures such as restrictions on who can legally unionize and restrictions on the right to strike, which are clearly to the benefit of capital (2008: 113). Elsewhere, Smith notes that "[Labour] Boards were especially important for legal scholars because they purportedly represent a third-party institution, neither political nor judicial, that negotiates the contentious environment of management-employee relations" (2009: 60). In this perspective, industrial pluralists see the state, through labour relations tribunals, playing the role of referee between two competing parties.

According to Fudge and Tucker (2001), industrial pluralism became ideologically hegemonic in the post-war era. Like other critical legal theorists, they contest the characterization of labour boards and the broader state as benevolent institutions devoid of a class-based hegemony (Tucker, 1994; Tucker and Fudge, 2001; Fudge and Glasbeek, 1995; Panitch and Swartz, 2003). Neo-Marxist state theory can also be employed to deconstruct the supposed ideological neutrality of industrial pluralism that its adherents have ascribed to the Board. As Nicos Poulantzas asserts, "ideology is always class ideology, never socially neutral. In particular, the ruling ideology constitutes an essential power of the ruling class. The dominant ideology, then, is embodied in the state apparatuses. One of their functions is to elaborate, inculcate and reproduce that ideology" (Poulantzas, 2014: 28). It is perhaps not surprising, then, that industrial pluralism was both hegemonic at its face and ideologically driven – by class – at its core. Rather than viewing legal institutions such as the Board as a neutral body and an apolitical entity, neo-Marxists see them as inherently political. This approach is consistent with the work of economist H.C. Pentland, who argued that it is necessary to go beneath the "letter of the law" and examine how the law's "interpretation and enforcement by public authorities and judicial actors shapes the system of industrial relations" (1979: 9).

Neo-Marxism and the State

Neo-Marxist inspired approaches take issue with the way that industrial pluralists have outlined the role of the state in at least two major ways. First, they view social relations as being shaped by the balance of competing class forces and through dynamics of class struggle. Social struggle helps define the line between capital and labour. At the present juncture, this entails that labour and capital are not equally powerful and instead labour occupies a subordinate position to capital. This dominant-subordinate relationship is, at least in part, due to the role of the capitalist state and especially present under neoliberalism. Second, neo-Marxist approaches do not see the state as a benevolent or neutral body, nor do they see it as mere agent for the ruling class and unrelenting in its advancement of capitalist interests at all costs. Instead, there is a more nuanced understanding of the state's role whereby the state functions to facilitate conflict resolution and as an instrument for achieving cross-class equilibrium all while operating in the context of protecting and advancing ruling class interests, though possessing a significant degree of freedom and autonomy from the capitalist class itself (Solo, 1978: 841). These neo-Marxist approaches allow a conventional topic – labour law – to be explored in a more critical and nuanced light.

The neo-Marxist lens utilized in this dissertation draws upon the work of various critical scholars, including Nicos Poulantzas and Leo Panitch. Marx did not produce a fully formed theory of the contemporary capitalist state. In the *Communist Manifesto*, he referred to the state as merely "a committee for managing the common affairs of the whole bourgeoisie" (Marx and Engels, 1888:1). However, this theoretical critique of the capitalist state (in the 1880s) did not account for the development of capitalism (and the capitalist state) in the 20th century, which did not "follow the prophecies and expectations of classical Marxism" (Solo, 1978: 831). As Robert Solo has observed, "in some societies, the party of organized labor has gained and maintained political control of the state yet has not displaced private property or replaced the capitalist mode of production," adding that "after the Great Depression and World War II, in all technologically advanced capitalist societies the state ceased to be dominated by the precepts of laissez-faire liberalism. There emerged, instead, the welfare state, which curbed the capitalists, guaranteed the development of industrial trade unionism, and transformed the status of the 'dominated' classes" (Solo, 1978: 831).

As a result, other thinkers have further developed Marx's insights to better understand the nuances and constituent parts of the contemporary capitalist state, such as the OLRB. Aaron McCrorie, for example, criticized Marx's view as being "crude" and "empirically weak" (1995: 18). By characterizing the state and its institutions as simply a tool of the bourgeoisie, Marx underestimated the complexities of the contemporary state. While capitalist in its nature, the contemporary state – of which labour boards are a part – requires a more nuanced analysis to be situated properly.

That said, merely approaching the OLRB as historical institutionalists or industrial pluralists might do – as an institution within the broader state without situating its place as a part of a capitalist state and analyzing its impact on capitalist social relations – misses a vital aspect of the Board's role. An approach such as historical institutionalism lacks the critical lens needed to understand the Board's role as an institution charged with mitigating class-based conflict within a capitalist system. As Dennis Pilon notes, historical institutionalism "simply describes what is going on rather than offering an explanation of what is causing such processes to happen" (Pilon, 2021: 4).

Instead of relying upon a merely descriptive analysis of the role played by state institutions, Pilon asserts instead that institutions need to be viewed in a more critical light and "understood as historical products of human agency created within conditions shaped by capitalism. Such institutions are both influenced, but not wholly determined, by capitalist social relations and help reproduce said social relations in historically distinct and varied ways" (Pilon, 2021: 9). Similarly, using what they refer to as institutional Marxism, Maher and Aquanno assert that institutions "cannot be defined in abstraction from their specific embeddedness in capitalist society," adding that "history evolves in relation to the open-ended operation of distinctly capitalist pressures exerted upon conscious, socially embedded human beings organized into specific institutional formations" (Maher and Aquanno, 2018: 40 and 34; see also Panitch and Gindin, 2012). Consistent with this approach, this dissertation sees the OLRB as an institution that is a product of and embedded (though not fully) within Ontario's capitalist state. By examining its actions concretely (i.e. decisions it makes over time), we can glean insight into why they might be making the decisions they make and what factors or ideas or contextual factors might influence them.

Understanding the dynamic and class-based role played by institutions within the capitalist state helps to situate more accurately the Board's role as it pertains to dependent contractors. It is here where a neo-Marxist approach proves especially valuable. Broadly speaking, for Poulantzas, the state is "the condensation of a relationship" and "a strategic field" (2014: 129, 140). More specifically, he notes that "the state apparatuses consecrate and reproduce hegemony by bringing the power bloc and certain dominated classes into a (variable) game of provisional compromises" (2014: 140; see also Panitch, 1981: 166). In this sense, he draws from Marx and recognizes that society is divided on class-based lines and that the state mediates this, but does so in such a way that "represents and organizes the dominant class or classes; or, more precisely, it represents and organizes the long-term political interest of a *power bloc*" (Poulantzas, 2014: 127, emphasis in original; see also Maher and Aquanno, 2018: 37).

The relationship between classes is fractious and one of competing interests; but to ensure the long-term viability of the capitalism, the capitalist state enacts policy that recognizes the needs and relative strength of the working-class without jeopardizing capital accumulation or the primacy of private property. The state, then, is not a thing or a subject, but rather, a relatively autonomous agent, albeit one firmly committed to the dominant capitalist ideology. Poulantzas notes that if "regarded as a *thing* … the State is a passive, or even neutral, tool which is so completely manipulated by one class or fraction that it is divested of autonomy whatsoever" (Poulantzas, 2014: 129). If, however, the State is "conceived as a subject, the State enjoys an absolute autonomy that refers to its will as the supposedly rationalizing instance of civil society" (Poulantzas, 2014: 129). For Poulantzas, neither is fully accurate.

A neo-Marxist approach to the state recognizes that the state has a degree of autonomy – a relative autonomy – from the dominant capitalist class but is firmly committed to its long-term survival and growth. Leo Panitch's approach to the state is useful in this regard. He maintains that if we are to employ a theory of the state "that sees the state as relatively autonomous from this [capitalist] class, acting on its behalf but not necessarily at its behest, we can discern how the state responds directly to various class pressures" (Panitch, 1977: 78). Such an approach is particularly useful when considering the introduction of a labour relations regime in the mid-1940s, which provided a clear method to organize unions, extended a legislative right to bargain collectively, recognized a right to strike (in certain instances), and established a quasi-judicial body to enforce these rights. Viewing the state simply as an exclusive manager for the affairs of the capitalist class would suggest a prohibition on the advancement of these union rights, and certainly not the establishment of a legal framework for their recognition and growth.

The long-term growth of the capitalist system, however, requires strategic organizing on the part of the state. The strength of the working-class during World War II necessitated an approach that brought the labour movement into the capitalist fold and secured their buy-in to the capitalist system instead of engaging in an all-out assault against it. In the short term, a more confrontational approach may have staved off the establishment of a collective bargaining regime, at least temporarily; in the long-term, it would have antagonized and disrupted the class hegemony that allowed for the continued operation of the capitalist system.

For this reason, the concept of the relative autonomy of the state proposed by neo-Marxist theories proves useful. As Poulantzas notes, “relative autonomy made the long-term hegemony of the power bloc vis-à-vis the dominated classes possible. It was achieved, for example, by imposing material compromises on the power bloc” (2014: 140). The passage of the *LRA* and the establishment of the OLRB were two such material compromises. Similarly, on the relative autonomy of capitalist states, Panitch and Gindin note that the institutions of capitalist states are “not … unconnected to the capitalist classes, but rather [have] autonomous capacities to act on behalf of the system as a whole” (2012: 4). They add, however, that “what these state institutions can autonomously do, or do in response to societal pressures, is ultimately limited by their dependence on the success of capitalist accumulation” (Panitch and Gindin, 2012: 4).

As it pertains to workers alleging to be dependent contractors, the Board can extend a material compromise and determine that they are covered by the *Act*; but it stops well short of challenging the accumulation of capital or challenging the subservient nature of the employment relationship more generally. Even in instances such as *Foodora, 2020* that represent a legal victory for workers, the Board was not in position to do anything to protect these workers when the company announced it was ceasing to operate in Ontario (as Foodora did). The property rights of capital are left unchallenged.[17]

According to Bob Jessop, the state can effectively organize and promote a dominant capitalist bloc while simultaneously disorganizing the working class and other subaltern forces. In accomplishing this, the state can disguise its promotion of capital domination and make it "relatively opaque due to the complex mediations involved in the exercise of state power" (Jessop, 2007: 418). In his analysis of the state's role in enacting Privy Council Order 1003 (PC 1003), which established the legality of the post-war industrial relations system and provided unions with formal recognition, mandatory collective bargaining, and protection against unfair labour practices, Aaron McCrorie draws upon a neo-Marxist understanding of the state. PC 1003 was implemented "following four years of ever-increasing labour unrest … that represented a major challenge to capital accumulation, especially in the highly profitable

[17] Even when applied to a more standard employment relationship, there are often problems with enforcing various aspects of the labour regime under an industrial pluralist model within a capitalist economy. See, for example, Thomas et. al (2019). A similar outcome to Foodora also occurred when a Wal-Mart store in Jonquière, Quebec ceased its operations suddenly months after its employees unionized. Nearly nine years after unionizing (and the store's closure), the Supreme Court of Canada eventually concluded that Wal-Mart's actions contravened Section 59 of the Quebec Labour Code, which states working conditions must not be altered in any way, shape, or form during a unionization process and ordered that the workers be compensated. That said, the decision did not – and could not – undo the closure and mandate Wal-Mart to re-open the store and negotiate a collective agreement with its employees. See Marin, 2014 and *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp., 2014 SCC 45, [2014] 2 S.C.R. 323*.

wartime industries" (1995: 16). While operating "within a context determined by capitalism and the clash of class forces … the Canadian state in 1944 had an autonomous space within which it was 'free' to respond to working-class demands while ultimately respecting capital's pre-eminent position" (McCrorie, 1995: 16). McCrorie concluded that "the timing and content of PC 1003 were therefore the product of a complex interaction of class forces" (McCrorie, 1995: 16-17).

The development of labour law in 1940s and the resulting industrial pluralism it fostered was a concession to organized labour and reflective of their growing strength, militancy, and willingness to engage in work stoppages, thus having the potential to halt capital accumulation. The state mediated this system of law, however, and it fell firmly within the boundaries of the capitalist system. This is also true of the OLRB. Eric Tucker notes that the dominant (albeit flawed) logic of labour history sees the early 1940s as marking the transition from an era of toleration of unions to one of promotion (1994: 277). Elsewhere, Tucker and Judy Fudge (2001) posit that 1944 represented what has generally been viewed as a shift from industrial voluntarism (emphasis on market conditions and an absence of legal obligations) to industrial pluralism in the sense that basic legal rights for unions were established, human rights standards implemented, and employment standards introduced by legislation.

Informed by their critical legal scholarship, Tucker and Fudge (2001) asserted that despite this era of 'promotion' and the resulting industrial pluralism that it fostered, the state was hardly a neutral or benevolent actor (see also Tucker 1994 and Fudge and Glasbeek, 1995). This post-war system of industrial pluralism was not concerned with ensuring better outcomes for workers and stronger collective agreements, let alone a more radical paradigm shift, but rather upheld capitalist imperatives of "property, competition, and contracts" (Panitch and Gindin, 2012: 4). Tucker and Fudge (2001) add that bargaining disputes nevertheless were "settled by reference to the economic power of the parties themselves" and that unions "were tightly wrapped up in a web of industrial legality that constrained militancy, recognized management rights, and favoured fragmented bargaining" (Fudge and Tucker, 2001: 276-77).

This system was never intended to challenge private property or management's right to control the workplace. As Charles Smith notes, "post-war industrial pluralism thrust forms of 'business unionism' upon many trade unions as they became organizations whose sole focus was to get better agreements rather than to challenge the injustice and class inequity associated with capitalism" (Smith, 2008: 75; see also Fudge and Tucker, 2001: 305-306).[18] This trajectory of labour law and the state is consistent with Poulantzas' recognition of the state's imposition of short-term material sacrifices on the dominant class to ensure the long-term viability of capitalist accumulation. Taking on this insight, some might see the Board determining that certain workers are dependent contractors and able to bargain with their employer – but failing to consider the broader class inequities of capitalism let alone being concerned about the creation of a strong collective agreement – as one clear example of this

[18] The ability for workers in the post-war era to secure a collective agreement and union representation was far from universal and contained many gendered and racialized dimensions. The 'postwar compromise' was built in relation to the male dominated industries of capitalist mass production, such as steel and automative, and excluded feminized jobs – such as office and retail work – from the scope of union coverage. Racialized divisions of labour ensured that many non-white workers were left outside of union protection as well, save for those racialized men who worked in the white-dominated mass production industries (and even they experienced racial discrimination). As a result, for many workers, jobs were precarious even during the height of the period of labour compromise. See, for example, Fudge, Judy and Eric Tucker. Pluralism or Fragmentation?: The Twentieth Century Employment Law Regime in Canada," *Labour/Le Travail* 46 (2000), p. 281-82, Carmela Patrias, "Race, Employment Discrimination, and State Complicity in Wartime Canada, 1939-1945," *Labour/Le Travail* 59 (2007), pp. 9-41; Nicole S. Bernhardt, "Racialized Precarious Employment and the Inadequacies of the Canadian Welfare State," *Journal of Workplace Rights* (Apr-Jun 2015), pp. 1-13, and Jennifer Kelley and Dan Cui, "Racialization and Work," in *Working People in Alberta: A History*, ed. Alvin Finkel, Athabasca, Alta: Athabasca University Press, 2012.

approach. While true, this still doesn't help us understand why the OLRB takes certain specific decisions at various times. For that we must look more closely at the Board's decisions themselves.

Neo-Marxism and Corporatism

How does the OLRB fit into the state apparatus, and how does a neo-Marxist analysis help us to analyze it? Poulantzas recognizes the broad and overarching nature of the state, asserting that, "the State spreads out into the tiniest vein" (Poulantzas, 2014: 37). Although not speaking directly about labour boards, his analysis can be applied easily to them. He notes that "the economic role of the State is terrifyingly real," and, as a result, "the dominant place of economic functions within the State has given rise to new forms of specialization in certain state bodies charged with carrying out these functions" (Poulantzas, 2014: 163, 170). The OLRB represents one of these specialized state bodies. Of course, as noted, Marxist state theory makes clear that these institutions have a degree of 'relative autonomy,' which is precisely why we must study them to really grasp their decision-making processes and what is influencing them.

While originally responsible for simply certifying trade unions, OLRB's role has grown considerably since its foundation. The Board was developed as "a tripartite, non-judicial structure" and was "given the authority to broadly certify and protect collective bargaining in the province. The tripartite nature of the Board allowed worker representatives and state officials to certify unions independently of judicial review and government interference" (Smith, 2008: 4). This tripartite nature, which provides labour with a seat at the table alongside business and the state, offers labour a voice in the administration of labour law that they previously lacked, albeit one within the capitalist industrial relations system and not in opposition to it. This structure, according to McCrorie, was able to “respond to working-class demands while ultimately respecting capital’s pre-eminent position” (1995: 16).

The notion of corporatism attempts to describe how tripartite structures involving capital, labour, and government representatives are embedded in the functioning of the state. Neo-Marxist state theory can help us understand corporatism and the role of labour boards as an example of it. According to Leo Panitch, corporatism is a “political structure within advanced capitalism which integrates organized socio-economic producer groups through a system of representation and cooperative mutual interaction at the leadership level and mobilization and social control at the mass level” (Panitch, 1981: 23). This integration, however, is not one of equals – though it is often posited that labour is an equal partner in the relationship. Employer/business groups represent the interests of capital, but so too does the state.

Although the state may, at times, advance the short-term material interests of labour, corporatism attempts to mitigate class conflict by emphasizing mutual or shared interests and seeks to ensure the continued growth of capital in the long-term. “With private property left undisturbed,” as J.T. McLeod notes, “the objective [of corporatism] is to obviate strife or schism between business, labour, and the state. Instead of conformation between classes or aggressive competitions between groups, corporatism seeks to substitute principles of social harmony and unity through negotiation between capital, labour and the state” (McLeod, 1978 cited in Panitch, 1979: 48). Therefore, through its corporatist or tripartite structure, the OLRB provides a voice for labour within the confines of capitalism, albeit one that is limited in what it can advance. One thing that it can advance in terms of workers' rights within a capitalist framework, to some extent at least, is the extension of dependent contractor status to certain groups of workers in instances where that designated is challenged by business.

In his analysis of the development of the *LRA* and OLRB between 1949 and 1961, Charles Smith reflects upon the rollout of protections for certain union freedoms, albeit within the confines that would quell class conflict while maintaining the pre-eminence of capitalist hegemony. He notes that while the post-war establishment of the *LRA* and OLRB were "celebrated by supporters as the arrival of industrial pluralism in Ontario, the freedoms outlined in the *Act* were undermined by the provincial government's association with private business" (Smith, 2008: 140). Despite introducing protections for organizing, collective bargaining, and certain strike activity, the *Act* still excluded thousands of workers – including many of those who Arthurs saw as personifying the dependent contractor. Amendments to the *LRA* in 1961 restricted union security, limited the right to strike, and limited rank-and-file participation in the process of collective bargaining. Smith concluded that "the concessions in the [1961] *Act* reflected the fact that government policy was still very much motivated by the demands of private enterprise" (Smith, 2008: 141).

In Canada (and North America more generally), examples of corporatism at the level of economic and social policy making have always been far less frequent than in much of Western Europe. In his analysis of corporatism in Canada, Panitch observed that "labour representation on public bodies, insofar as they involved more than purely honorific roles on the boards of hospitals, universities and philanthropic organizations, were narrowly confined to federal or provincial labour boards, workmen's [sic] compensation boards, and the Unemployment

Insurance Commission" (1979: 66). By embedding a voice for labour, however limited, in branches of the state such as the OLRB, the state was able to offer certain benefits to workers, such as the right to unionize, mandatory collective bargaining when certain thresholds of support were met, protections against unfair labour practices, and a right to strike in certain instances. In so doing, however, the state insulated itself – and capital – against a more militant form of trade unionism that would present an open challenge to capital. As Panitch notes, "corporatism is *above all else* a political form designed to integrate the organized working class in the capitalist state" and "a powerful vehicle for reinforcing class dominance" (Panitch, 1977: 81, emphasis in original).

Neo-Marxist insights on the state and corporatism, then, are a useful lens for understanding the Board and its place within the capitalist state. The state, through is various appendages – such as the OLRB – organizes and manages the relationship between classes in such a way as to secure the long-term interests of the dominant capitalist class. This is not to suggest that the Board is an anti-worker institution; in fact, its mere existence represents a material concession to the dominated working class (Poulantzas, 2014: 87). Its creation, however, mitigated the development of more radical forms of worker organizing and secured the consent of the official labour movement within the capitalist state. Through its existence, the Board structured labour policy – in certain instances – to the benefit of the working class so as to create a stake in the existing socio-economic system. The Board's increased recognition of dependent contractors being employees, especially following the *LRA* amendments in 1975, is one such example. This recognition, however, exists within the confines of capitalism, the primacy of private property, and the employer's right to manage the workplace.

The long-term outcome of certain cases involving dependent contractors – such as *Foodora, 2020* – despite the Board's otherwise positive ruling, reflect the Board's industrial pluralist leanings and highlights the confines within which the Board operates and the limitations of its transformative impacts. But what is important to underline here is that there is nothing automatic about these tendencies. They are worked out over time by people making decisions in these institutions of the state and informed by pressures and unequal social relations that decision-makers may or not be aware of. That is why studying the pattern of the Board's decision-making over time and the rationales they offer is so important to understanding their role in the broader state apparatus.

The Methodological Approach

The point of this study is to develop a theoretically informed analysis of the decision-making taking place at the OLRB as it relates to whether workers should be considered dependent or independent contractors. To inform this analysis, we will review all cases where the Board has made a significant decision relating to this subject area. The methodological approach deployed here will be interpretive across the full range of cases relevant to the topic. Via a deep reading of the cases, we can interpret the decisions and look for patterns within those decisions. We can also interpret the nuances in the rationales offered for them that we can bring into dialogue with the critical theory outlined above to support arguments and explanations about why the Board may be acting as it has.

Obviously, to understand and assess the OLRB's decisions we need to understand confidently what it thinks about the issue of dependent contractors. To that end, I have accessed all substantive decisions made by the Board touching on the question of dependent contractors over a period of nearly 50 years. Specifically, I accessed the primary source OLRB decisions posted to the Canadian Legal Information Institute site, more commonly known as CanLii, a non-profit organization managed by the Federation of Law Societies of Canada.[19] For Ontario, CanLii provides access to both statutes and regulations, and the decisions of five levels of courts and 56 boards and tribunals, including the OLRB.

To access the relevant cases informing the OLRB's approach to dependent contractors and then tracing the development of precedent coming from those cases, it was necessary to identify a clear timeframe. The amendments to the *LRA* that introduced protections for dependent contractors were given Royal Assent on July 18, 1975, which represents a logical starting date for the CanLii search (Government of Ontario, 1975). No cases prior to this date heard by the Board could have dealt with the dependent contractor language in the *LRA* – as it did not yet exist – and it therefore represents a logical and objective starting point. The end date – April 11, 2022 – represents the date on which Royal Assent was given to a series of amendments to labour relations legislation in Ontario, including the passage of the *Digital Platform Workers' Rights Act, 2022*, something explored in more detail in Chapter 7 (Legislative Assembly of Ontario, 2022). The passage of this legislation may have impacts on the employment status of platform workers in ways that depart from the logic of dependent contractor jurisprudence and therefore represents a defensible ending to the timeframe chosen here.

[19] Canadian Legal Information Institute, available online at: http://www.canlii.org

After identifying the timeframe, I then performed an exhaustive search on CanLii of all cases in which the Board used the term ‘dependent contractor’ in a decision issued between July 18, 1975 and April 11, 2022. This broad search criterion ensured that all potentially relevant cases were included in the resulting population of cases and the subsequent analysis.

The distribution or thoroughness of reported cases varied before and after January 1, 2000, at which point the reporting of cases became “continuous,” meaning that a copy of each Board decision was posted. Prior to this date, not all OLRB cases were posted to CanLii, and only 4,713 total OLRB cases are recorded prior to January 1, 2000 (CanLii). These cases are generally the most significant or ‘leading’ cases, though CanLii’s method for selecting these cases is not publicly disclosed.

As of April 11, 2022, CanLii provided access to 134,615 OLRB decisions, a number considerably higher than any other Ontario-based board, tribunal, or court. This figure represents the total universe of OLRB cases contained in CanLii from which information can be drawn. Within CanLii, cases can be searched for in three ways: by “document text,” by “case name, citation, or docket,” or by “Noteup/Discussion: cited case names, legislation titles, citations of dockets.” Using the “document text” search bar, the search term “dependent contractor” was used to locate cases, which were then reviewed and analyzed. This search identified a population of 756 cases between July 18, 1975, and April 11, 2022 in which the Board used the term “dependent contractor” in some way.[20]

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[20] The term 'precarious' produced only 90 hits on CanLii (OLRB decisions) between July 18, 1975, and April 11, 2022. What is so interesting is that it was not until 2016 (the 68th case decision issued by the Board using this term) that the Board used precarious as an adjective for a worker. Previously the term was used exclusively to define an employer, mainly an employer's precarious financial situation. Curiously, this term was not used at all in *Foodora*, 2020. While at first glance it seems surprising, given the inherently precarious nature of work in gig

Once a search term is inputted, the cases can be sorted in six different ways: document relevance, date: newest, date: oldest, most cited, court level, and most pages. Though it would have been easy to rely on CanLii's sorting based on document relevance, it is unclear how they construct relevance or to what these cases were relevant and, as such, this category of "relevance" was not relied upon. These cases were not necessarily relevant to the question at hand of whether someone was found to be a dependent contractor and on what basis. To ensure that the cases considered were relevant to the research question, this number was reduced to include only those cases in which the Board determined whether someone was a dependent contractor.

CanLii's sorting for the cases with the most pages and most cited would have been similarly easy, yet flawed, ways to analyze the cases. The cases with the most pages, while important to *something*, may not have been important to the research question at hand. These were lengthy, but perhaps not relevant, cases. The most cited cases also presented a similarly easy, yet flawed, way to analyze cases. Although frequently cited cases are also important to *something*, there was similarly no guarantee that they were relevant to the research question.

Each individual case from the population of 756 cases was read with careful detail and recorded into an Excel document with the following factual or objective information in the following categories: 'Date', 'File Number', and 'Citation Summary (or case name)'. A fourth category 'Relevant' was used and recorded as either "yes" or "no." This category was also

economy, this makes sense, given that precarious is more of an academic and now popular term- it has no specific *legal* meaning, though its usage is becoming more commonplace. In *Foodora, 2020*, the term "gig economy" was used for the first time (the only hit thus far) and the decision itself recognized this and explicitly stated that this was the Board's first decision on work in the gig economy. The lag between the rise of the gig economy and a case on a dispute within it is notable. The term 'precarity' had 0 hits. The term 'non-standard work' had 1 hit, but it was not used as a synonym for precarious.

objective – a case was deemed to be relevant if it involved the Board making some sort of determination on whether someone was a dependent contractor. A fifth category, 'Other Notes,' was used to record information that was helpful, interesting, or worthy of further analysis.

The fourth category – 'Relevant?' – was especially important and determined whether a case was considered for subsequent detailed analysis. This entailed using purposive sampling guided by the question: "Does this case render a decision in which the Board makes a determination about whether someone is a dependent contractor?" This involved, to be sure, some judgement in answering that question, but the question was designed in a broad manner with only two options (yes or no). In cases that were not entirely clear, I erred on the side of caution and answered "yes," which allowed the case to be studied in more detail.

Although containing the phrase "dependent contractor," many of the 756 original cases proved to be irrelevant for the purposes of this study as there was no determination by the Board as to whether someone was a dependent contractor. These cases consisted generally of procedural or administrative matters, scheduling issues, were repetitive without any outcome, or did not make a substantial determination on someone's status as a dependent contractor.

Purposive sampling represents a form of non-probability sampling. Although the entire population of 756 cases was reviewed and analyzed, each case did not have an equal chance of being selected for further analysis – only those meeting the relevant criteria were marked selected as being relevant to this dissertation and marked as "yes." A total of 208 cases were found to have yielded a judgement in which the Board decided whether someone was a dependent contractor and selected for further analysis.

Purposive sampling can be criticized as judgemental sampling and, by extension, biased. Several measures were taken to eliminate any possible bias in the identification of relevant cases. First, focusing on relevant cases began with analysis of the entire population of possible cases; it did not begin from a sample of cases. Any case in which the Board's decision contained the words "dependent contractor" was read and analyzed. As a result, no potentially relevant cases were missed or overlooked.

A second measure to eliminate bias was by having only two options (yes or no) as to whether a case was relevant. While the analysis in making this determination was objective as possible and decided only after a through read of the case, a clear question with two options for an answer helped to limit any possible subjectivity. There were not, for example, degrees or levels of relevance or importance – the case either decided whether someone was a dependent contractor or not; its relevance was not weighed at this stage.

Sorting cases chronologically and treating each case as equal, instead of relying on one of CanLii's more subjective sorting options (by relevance, by number of pages, or by most cited) represented a third measure to eliminate bias. As noted earlier, chronological order put cases on equal footing with one another and refrained from a more biased approach that treats cases as important based on their length, how frequently they were cited, or how relevant CanLii deemed them to be.

Finally, a fourth measure to eliminate potential bias is reflected in the fact that the specific outcome of the case – in other words, if the Board decided that someone was a dependent contractor – did not matter to whether the case was included for further analysis. Because this study is qualitative and seeks to understand the Board's reasoning when defining the boundaries of the category ‘dependent contractor,’ there is no advantage to excluding certain outcomes. Both outcomes – those in which there is a finding of dependent contractor and those in which there is not a finding – are needed for a detailed analysis of the Board’s jurisprudence on dependent contractors.

There is, however, an inherent recency bias in the overall universe of cases. This is something that could not be controlled for by using CanLii. CanLii's database has a total of 134,585 OLRB cases (as of April 11, 2022), of which only 4,713 were decided prior to January 1, 2000. This is unsurprising given that “continuous access” to OLRB decisions (i.e. a posted copy of every single decision) only began on January 1, 2000. However, as a result, considerably more cases in the population used also occurred after January 1, 2000. Of the 756 cases that include ‘dependent contractor’, only 132 (or 17.5%) occurred prior to January 1, 2000, while the remaining 624 cases (82.5%) occurred after January 1, 2000. The pre-2000 cases available on CanLii tend to be leading or significant cases to begin with, and so some sorting as to importance has happened already (by CanLii). To increase the amount of pre-2000 cases would require reading the OLRB’s published hard-copy records to find each time that the phrase “dependent contractor” was used and would have been a practical impossibility and unlikely to turn up any additional relevant cases to the evolution of the dependent contractors as those were most likely in the ones on CanLii.

The sample of 208 relevant cases was analyzed further. These cases were re-read, and those in which a precedent was developed and/or which the Board relied heavily upon in future decisions were flagged as cases of particular importance. This process was slightly more subjective in nature as there was not a numeric threshold of how frequently cases needed to be cited, and developing such a qualitative threshold of importance would be even more subjective. After reading 756 cases and re-reading 208 of them a second time, the most important cases became apparent. This was due to the important precedent created in them and, by extension, being cited frequently in subsequent cases. While such an undertaking has some degree of subjectivity, I relied upon the entire population – as opposed to a mere sample – of relevant cases and have analyzed cases with varying outcomes.

Given the newness of dependent contractor legislation (post-1975), I have been able to identify and analyze in detail the seminal (or landmark) cases as well as the relevant bolstering cases. Douglas K. Norman has defined a seminal case as "generally the first case from the highest court to have decided the issue and stated the proposition of law in question," adding that "as the first case to have stated the proposition in question, the seminal case has generally gone into some depth in analyzing the issue and the court's rationale in a manner that might not be repeated in later cases" (Norman, 2000: 340).[21]

A landmark case is, however, about more than simply establishing a leading precedent (though, to be sure, that is a major aspect of landmark cases). Ernest Lim elaborates that "we need to look at how the canonicity of a case is constructed by subsequent courts," maintaining that a landmark case "is not only a product of intrinsic merits (how well-reasoned or significant a case is on the grounds of precedent, principle, and rule) and contextual significance, but also subsequent and contingent judicial reception" (Lim, 2014: 525). Certain cases that the Board decided upon in the immediate aftermath of the 1975 have become the landmark cases on the

[21] Ernest Lim notes that common understanding of a seminal or landmark cases involve two components: an "analysis of the intrinsic merits of a case such as how well-reasoned or significant a case is on the grounds of precedent, principle, and rule" and "the historical contexts in which the cases were decided" (2014: 524).

jurisprudence of dependent contractors.[22] Additionally, as new cases were heard in different industries, additional seminal and bolstering cases came into existence.

Bolstering cases are those which, “in addition to parroting seminal authority … [add] new reasoning and analysis to support the underlying proposition of law” (Norman, 2000: 340). After decisions in the seminal cases were delivered, a series of bolstering cases that have provided new reasoning, such as those involving different industries or that have analyzed a new factor that was not present in earlier cases, were identified. While ultimately subjective as most qualitative, textual analysis is, I am confident that those identified as important represent an exhaustive list of the key cases.

As noted above, the analysis found a total of 208 cases that yielded a judgement in which the Board decided whether someone was a dependent contractor. However, after reading these cases, I determined that it was logical to exclude those cases involving construction and trades (including roofing). After excluding cases involving the trades and construction, the remaining sample size was 59. The rationale for the exclusion of construction and trades cases is explained below. This sample of 59 cases represents those upon the qualitative analysis for this dissertation is based, with a focus on the seminal and bolstering cases. Of these 59 cases, 48 occurred prior to 2000 (81.4%) while the remaining 11 cases occurred on or after January 1, 2000 (18.6%).

As noted above, cases involving the building trades, including roofing, were excluded from analysis in this dissertation. In his original piece on dependent contractors, Harry Arthurs

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[22] Landmark cases include *Corrado Di Sabitino et al., v. International Brotherhood of Teamsters Local 879, et al., and Adbo Contracting Company Ltd.* [*1977] OLRB Rep. April 1977* and *Algonquin Tavern, 1981 CanLII 812 (ON LRB)*, both of which are discussed in Chapter 3.

identified various workers who "personify the dependent contractor," including self-employed truck drivers, peddlers, taxicab operators, farmers, fishers, and service station lessees (1965, p. 89). He makes no mention of construction or building trades workers. Of course, Arthurs' list is neither definitive nor exhaustive, but it highlights an important starting point for subsequent analysis. In the field of construction and building trades, most workers are contractors in the sense that they move from one jobsite to the next on a regular basis and lack the stable employment relationship that many workers became accustomed to in the post-war era.

Construction labour relations are different from labour relations in most other industries both at the time of Arthurs' writing (1965) and when the dependent contractor provisions were brought into the *LRA* (1975), much as they are today. As Cavalluzzo – one of Canada's leading union-side labour law firms – notes, "construction labour law is a unique and complex field. Construction unions and their members have specialized legal needs" (Cavalluzzo, 2023). In many respects, construction labour law is a unique sub-field of labour law. For example, the *LRA* contains 190 clauses, 42 of which specifically and exclusively address construction labour relations. The construction industry is also unique (especially in the private sector) as it is one of the few industries covered by the Ontario *Labour Relations Act* that has special legislative provisions and legal processes that apply solely to it.[23]

As a result, the construction industry is an outlier and often seen as distinct from labour relations more broadly. Goldblatt Partners, another leading union-side labour law firm, states

[23] Among other unique legislative provisions involving the construction and building trades industry, province-wide bargaining is mandated in many parts of the construction/building trades industry but is a rarity to secure in other industries. Construction unions are the only ones which can certify through card-check certification (as opposed to the standard two-step process involving signing cards followed by a secret-ballot election), and grievances in the industry are heard directly by the Board (instead of a private arbitrator hired by the parties).

that "in the traditional labour relations field, we represent both provincially and federally regulated trade unions in all types of labour relations board proceedings, including certifications, unfair labour practices, related employer applications *and construction labour relations matters*" (Goldblatt Partners, 2023, emphasis added). Owing to this distinctiveness, cases involving the construction and building trades (including roofing) have been excluded from the scope of this dissertation.

To be sure, the Board has heard many cases involving construction and building trades workers alleging to be dependent contractors. In fact, due to the ease of organizing trades workers with card-check certification, the presence of 'crew leaders' on small crews of contractors, and the frequency with which workers in the building trades move from jobsite to jobsite, there are more cases involving dependent contractors within the trades than in other industries. This is especially true in the roofing industry, where a significant number of cases involve displacement applications stemming from the triannual open period.[24] While these cases involve questions as to whether certain workers are dependent contractors, the nuance involved in them is unique to the trades and not easily applicable to other industries. The unique and distinct nature of construction, roofing, and building trades has led to their exclusion from analysis in this dissertation, though it represents and important area for future research.

[24] The *LRA* regulates mandates that construction industry collective agreements expire every three years on April 30th. "The last two months of the three-year cycle, often referred to as the '[triennial] open period,' is when these collective agreements are renegotiated, and when decertification and displacement (or raid) applications are permitted to be filed" (Koldorf, 2025).

The chapters that follow explores the Board's landmark cases pertaining to dependant contactors in a variety of industries and examines how their interpretation and application of dependent contractor provisions has impacted workers seeking legislative protection as employees under the *Labour Relations Act*.

Chapter 4: The 'Outer Limits' of the *Labour Relations Act*: Construction Aggregate Delivery and Owner-Operator Drivers[25]

Following the amendments to the *Labour Relations Act* in 1975, workers were no longer either an 'employee' or an 'independent contractor.'[26] Instead, the Board could classify them as a 'dependent contractor.' The newly amended legislation was explicit that the definition of employee included a 'dependent contractor' and empowered the Board to determine the employment status of a worker in the event of a dispute (Government of Ontario, 1975: Article 1(gb)). This new classification of worker provided legislative protection, including the ability to certify into a trade union, for those who were not quite employees but not quite contractors, and sought to rectify a problem made widely known by Professor Harry Arthurs in his seminal 1965 article 'The Dependent Contractor: A Study of the Legal Problems of Countervailing Power.'

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[25] In *Corado DiSabitino et. al, v. International Brotherhood of Teamsters Local 879, et. al, and Adbo Contracting Company Ltd. [1977] OLRB Rep. April 1977*, (referred to hereinafter as *Adbo, 1977*) the first major case decided with the new dependent contractor amendments, the Board noted that the new language would force them to "explore the outer limits of the Labour Relations Act" (at para. 17).

[26] Following the 1975 provincial election, the Progressive Conservatives were left with a minority government and relied upon the support of the NDP, who held the balance of power in the legislature. This provided an opening for certain pro-labour reforms championed by organized labour and the NDP, including language on dependent contractors. In the legislature during debate on Bill 111, *An Act to amend the Labour Relations Act* (which brought dependent contractor provisions into the LRA), Minister of Labour John MacBeath stated "this section on dependent contractors is to my mind one of the important sections of the bill. It was not aimed at truckers as such. It was aimed mainly at people in what we call the jug milk business and that type of operation, but it is all-inclusive. We do want to cover these people who, by technicalities of the law, have been ruled as independent but in view of today's arrangements are what anyone else would consider as dependent. We do want to give them the provisions of collective bargaining" (Legislative Assembly of Ontario, Session: 29:5, Friday, July 18, 1975, available online at: http://hansardindex.ontla.on.ca/hansardeissue/29-5/l108.htm). Similarly, Ted Bounsall, a NDP MPP from Windsor, stated "there are certainly some positive positions and improvements in the Act itself. They included dependent contractors as employees … the inclusion of dependent contractors is a step forward" (Legislative Assembly of Ontario, Session: 29:5, Wednesday, July 02, 1975, available online at: http://hansardindex.ontla.on.ca/hansardeissue/29-5/l090.htm).

This chapter explores the first few years of cases (decided between 1977 and 1981) involving dependent contractors following the 1975 legislative amendments. The bulk of these cases were from the construction aggregate industry.[27] During this era, the Board generally – with some exceptions – determined that these workers were dependent contractors and thus employees under the *Act*. Perhaps even more important than the outcome of specific cases was the criteria that the Board developed for application in future cases and the precedent created in individual cases. This was especially true in *Abdo, 1977* in which the Board established two main criteria: 1) economic dependence and 2) obligation to perform duties, and the landmark eleven-factor test developed in *Algonquin, 1981*.

To the extent that the Board found workers not to be dependent contractors, this occurred primarily in instances in which someone owned more than one truck (and therefore had the ability to profit from the labour power of someone else, which made them an employer in their own right). However, this chapter also illustrates that, problematically for precarious workers in a non-standard employment relationship. In such relationships, the Board determined that workers were not dependent contractors when a limited percentage of a worker's total income was derived from work at the respondent company and, relatedly, that workers could not be dependent upon an entire industry (see *Craftwood, 1980*).

This chapter also explores how the Board determined criteria for determining who was – and by extension who was not – a dependent contractor. In so doing, the Board illustrated its potential for advancing dependent contractor status, at least for those who met its criteria. In

[27] Virtually all of these cases occurred in the construction aggregate industry (sand, gravel, crushed stone, etc.) and involved the employment status of the owner-operator truck drivers contracted to deliver construction aggregates.

determining who was a dependent contractor, the Board, however, illustrated its reliance upon the post-war standard employment relationship – even though this employment relationship was becoming less prevalent due to the rise of precarious work. This increasingly dated understanding of the standard employment relationship was reflective of the Board's industrial pluralist mindset and demonstrated a significant shortcoming of the Board's ability to play a leading role in advancing the rights and protections afforded to precarious workers.

Following the 1975 amendments to the *LRA*, the Board was tasked with providing meaning and clarity to an otherwise vague legislative definition. As is often the case, the law itself was written in generalities, leaving the Board to articulate specifics of exactly who was a dependent contractor when the parties could not agree. This chapter explores the Board's early history with determining the specific scope of who was – and was not – a dependent contractor and examines the body of legal precedents it created. This chapter also challenges Bendel's (1982: 379) assertion that "dependent contractor amendments have had little to no impact on the coverage of labour relations statues" and considers the important expansion of coverage for dependent contractors in the post-1975 era.

In analyzing the Board's decision-making in the earliest set of dependent contractor cases, this chapter examines the Board's role, as a quasi-legal body, in shaping public policy on the nature of the (changing) employment relationship in Ontario. The 1975 amendments were broad and opaque. The Board needed to interpret and operationalize the new law so that it might apply it. Hence, its earliest decisions are of particular importance in establishing how the law would evolve in subsequent decades.

While the legislation classified dependent contractors as employees, the Board grappled with determining who exactly was a dependent contractor and what it entailed to be one. This forced the Board to "explore the outer limits of the Labour Relations Act" (*Adbo, 1977* at para. 17). In *United Cement, Lime and Gypsum Workers International Union v. Craftwood Construction Co. Ltd., 1980 CanLII 940 (ON LRB)* and referred to hereinafter as *Craftwood Construction, 1980)*, and speaking for a unanimous board, Board Chair George Adams stressed the two main criteria used to determine if one is a dependent contractor: economic dependence and an obligation to perform duties (at para. 18). The Board continued to apply these criteria into the 2020s in cases involving precarious workers and those platform work.

While most cases heard in this era involved the delivery of construction aggregate by owner-operator drivers, there was one noteworthy exception. In 1981, the Board rendered a single decision in four separate cases involving the employment status of burlesque entertainers (see *Algonquin Tavern, 1981*). This case has become one of the seminal authorities on the employment status of dependent contractors as it established a list of eleven criteria to apply in such determinations. The Board noted that such a list "must necessarily be somewhat artificial" and added, "no one factor in itself, will be significant" in determining whether someone is a dependent contractor *(Algonquin Tavern, 1981*, at para. 64).

The Immediate Post-Amendment Landscape

Romina Campanella (n.d.) has noted that "1970s Ontario was a time of bellbottoms, disco, and turbulent labour strikes. The rise of various social movements throughout the previous decades echoed through the province's workforce, sparking a series of passionate and often violent strikes." Workers faced challenging economic times throughout the 1970s as "work was changing with the early stages of globalization and automation. Workers were losing their jobs as employers adopted new technologies at home and shifted production to lower-paid workers overseas" (Canadian Labour Congress, n.d.). At the same time, both inflation and unemployment were increasing. Making matters worse, increases in the price of oil were substantial: over the 1970s, the price for a barrel of oil jumped from $3 to $40, an increase of over 1300% (Canadian Labour Congress, n.d.).

In 1976, over 200 hours per 1,000 employees were not worked as a result of labour disputes, such as strikes or lockouts. In response to the federal government's implementation of wage and price controls (something the governing federal Liberals indicated they would not implement prior to the election), a National Day of Protest occurred in October 1976 which saw over one million Canadians walking off the job and marching in the streets, accounting for many of the days not worked due to a work stoppage in that year. Despite a drop in work stoppages in 1977, this number then increased from 1978 until 1981, when it reached 160 hours per 1,000 employees (Statistics Canada, 2022).[28] If nothing else, Canadian workers were mobilized toward collective action in the mid-1970s and welcomed legislative amendments that offered more workers the opportunity to negotiate better wages and working conditions.

Following the 1975 amendments to the *Labour Relations Act*, the legislation defined a dependent contractor as:

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[28] By comparison, from the early 1980s to the mid-2000s, the number of hours not worked due to strikes and lockouts has generally followed a long-term downward trend. By 1991, the number of hours not worked because of a labour dispute has remained fewer than 50 hours per 1,000 employees. Statistics Canada (2022) notes that "The long-term trend in hours not worked due to labour disputes in Canada since 1981 has been of one of relatively rapid decline from 1982 to 1993 and a very slow downward trend until 2006. With the notable exception of 2014, there has been only minor variability since."

> a person, whether or not employed under a contract of employment, and whether or not furnishing his [sic] own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he [sic] is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor (Government of Ontario, 1975: Article 1(ga)).

The *LRA* clarified that "employee includes a dependent contractor," but did not otherwise define the term 'employee' (Government of Ontario, 1975: Article 1(gb)). Of the new definition for dependent contractor, there are a few points worth noting. One is that the absence of an employment contract is not evidence of complete independence from the employer, nor is whether someone provides their own 'tools of the trade.' To be a dependent contractor, the legislation indicated that there must be, first, a requirement for compensation to a degree that it puts the worker in a position of economic dependence, and second, an obligation to perform duties. If these two criteria were met, the dependent contractor then would "more closely resembl[e] the relationship of an employee than that of an independent contractor" (Government of Ontario, 1975: Article 1(gb)). This suggests the existence of a spectrum between employees on one end and independent contractors on the other, with dependent contractors somewhere in between, but ultimately having more in common with those identified as employees. As the Board would later note in *Algonquin Tavern, 1981*, "there is no shorthand formula or magic phrase that can be applied to find the answer. What is important is that the total factual context be considered in light of the general principles" (at para. 35).

Although it was only after 1975 that the Board was asked to determine whether someone was a dependent contractor, they had long been determining whether someone was an employee. By 1975, four major legal tests were already in place to determine someone's employment status. The first test – the control test – “assumes that the employer is both the manager and technical expert … superior in skill and knowledge” (*Algonquin Tavern, 1981*, at para. 36). While “useful in dealing with simple relationships,” the Board noted that this understanding of direction and control was limited in usefulness when classifying more technical and complex employment relationships, citing the example of an airplane pilot (*Algonquin Tavern, 1981*, at para. 37).

The second test – the ‘fourfold test’ from *Montréal v Montréal Locomotive Works Ltd [1944] UKPC 44 [1947] 1 DLR 161* – was “somewhat more sophisticated” than the control test in that it built on the single criterion of control and added ownership of tools, chance of profit, and risk of loss to determine someone’s employment status (*Algonquin Tavern, 1981* at para. 37). Although the test had been used previously (most notably in *Livingston Transportation Limited, 1972)*, the Board maintained that all four criteria must be met to be an independent contractor, adding that the test “is not without its faults” (*Algonquin Tavern, 1981* at para. 37). This was especially true if an analysis of one criterion strongly suggested an independent contractor while the analysis of another criterion suggested an employee.

The third test was an organizational test in which “the question becomes: ‘does the alleged servant form part of the alleged master’s organization?’” (*Algonquin Tavern, 1981* at para. 38). The fourth test was the ‘statutory purpose test’ and relied on “the (fairly obvious) proposition that in applying the *Act*, and in selecting and weighting the factors which towards one interpretation over the other, the Board should take into account the concerns underlying the legislation" (*Algonquin Tavern, 1981* at para. 39).[29]

The Board concluded that "each of these 'tests' is merely a guideline," adding, "no approach will be controlling in a particular case, nor will the various formulations necessarily give an unequivocal answer" (*Algonquin Tavern, 1981*, at para. 41). Determining someone's employment status is inherently subjective, though the various tests attempted to apply objective criteria. This reinforces the Board's general approach to each case being situational and context-dependent, but these tests provide some criteria upon which to base an analysis.

The Mount Nemo Truckers' Association v. Nelson Crushed Stone, 1977

The Board first applied the amended *LRA* to determine if workers were dependent contractors in the case *Nelson Crushed Stone,* 1977. The Truckers' Association asserted that these workers were dependent contractors while the company maintained that the drivers were "independent businessmen [sic] who are disentitled to the benefits of representational rights" (*Nelson Crushed Stone, 1977* at para. 2). In determining the outcome of this case, the Board characterized the legislative amendment as an attempt to properly identify and provide

[29] In *Nelson Crushed Stone, 1977*, counsel for the quarry argued that "the Legislature's intent was premised upon the *status quo* position assumed by the Board in distinguishing an employee from an independent contractor" applied in both *Livingston Transportation Limited [1972] OLRB Rep. May 1972* and *General Concrete of Canada [1975] OLRB Rep. March 234* (*Nelson Crushed Stone, 1977* at para. 12). By amending the *LRA*, counsel for the quarry asserted that the Legislature recognized "the inadequacies of the existing approaches in dealing with the employee-entrepreneur distinction to codify, and thereby limit, the pronouncements of the Board in [its] most recent cases" (*Nelson Crushed Stone (1977),* at para. 11). By this logic, the counsel for the quarry asserted that the effect of the statute's purpose would be to find that the owner-operator truckers functioned more like independent contractors than as employees. This line of argument was "dismissed … as overly circumscribed" by the Association's counsel, who suggested that the Legislature's intent "was clearly expansionary with the objective of extending bargaining rights to persons who would otherwise be deprived of trade union representation" (*Nelson Crushed Stone, 1977* at para. 11).

protection to workers whose employment status fell somewhere between that of an employee and an independent contractor (*Nelson Crushed Stone, 1977* at para. 12). Problematically, as Arthurs (1965) pointed out twelve years prior, the previous legislation prohibited these workers from accessing the benefits of collective representation despite being in a position of economic vulnerability and subservience. This group of 'employee-like' workers were vulnerable and subservient to a company that was not formally their employer but who possessed much the same power that an employer has over a traditional employee.

The truckers were responsible for delivering a product – construction aggregate – from the quarry to various customers. To do this, the drivers signed a contractual agreement that the company presented them with, which involved no negotiation or consultation. The drivers were responsible for providing their own truck (either a tandem or single-axle) but were prohibited from using a larger tri-axle truck. The drivers were also required to provide their own public commercial vehicle (PVC) license and insurance, and report to work at 7 a.m. (or another time prescribed by the quarry). They were loaded on a first-come, first-served basis, and subject to potential discipline if a load was refused or not delivered in a timely matter. A report by a Labour Relations Officer assigned to the file determined that "the lion's share of [the drivers'] income [came] from the haulage services required by the respondent," and that their "principal source of revenue is through the delivery opportunities made available by the respondent" (*Nelson Crushed Stone, 1977 at para 10).*

In its decision, the Board recognized the inadequacies of the existing tests to determine someone's employment status and opted instead to make decisions "upon the facts and circumstances of each case" (*Nelson Crushed Stone, 1977* at para. 13).[30] As the first case involving the Board's interpretation of the amended *LRA*, this seminal decision contained broad pronouncements about the purpose of the statute and the Board's position on it.

To this end, the Board asserted that the purpose of the amendment was to:

> address the mischief created by persons who may very well outwardly manifest the trappings to independent entrepreneurs but who in an intrinsic sense are clearly in such a subservient economic position vis-à-vis the beneficiary of his [sic] services that he [sic] ought to extend the protection intended by the collective bargaining process (*Nelson Crushed Stone, 1977* at para. 12).

For the Board, this purpose was "more than apparent" in the legislative change (*Nelson Crushed Stone, 1977 at para. 12*). In defending this interpretation, the Board further suggested that the "Legislature recognized the economic vulnerability of depriving the 'so called' small businessman [sic] of rights under the *Act* and thereby exposing him [sic] to the arbitrary whims of the person upon whom he [sic] is dependent for his [sic] livelihood" (*Nelson Crushed Stone, 1977* at para. 12).

The legislative change did not simply define a dependent contractor and provide them access to representation under the *LRA*, it explicitly defined 'employee' to "include a dependent contractor." Given this, the Board's logic was that dependent contractors should be treated as employees. The Board's statement on this is worth quoting at length. It asserted that

> the watch word of the definition is 'dependent' and dependent is to be interpreted in a manner consistent with the economic reality of the relationship with the beneficiary of the service having regard to the industry of undertaking under review. It therefore follows that the status of the 'dependent contractor' must be matched and plotted in relation to the terms and conditions of 'employees' in like industries to determine

[30] Despite both this assertion and remarking on the "shortcomings" of the statutory purpose test, the purpose of the statute and the Board's interpretive role was a central part of the arguments put forward by counsel for both the Association and the quarry. This prompted the Board to apply the statutory purpose test in a more sustained manner than they may have otherwise preferred.

> whether he [sic], in a *de facto* sense, more resembles them (*Nelson Crushed Stone, 1977* at para. 12).

The Board concluded its undertaking of a statutory purpose test by making a clear assertion of both what the legislature intended the amendment to do and not to do. As for what it felt was intended, the Board "perceive[d] that the Legislature has instructed [us] … to sacrifice form for substance, to dispel superficial distortion that disguises industrial reality and to supplant individual want by supporting, in appropriate circumstances, collective equality" (*Nelson Crushed Stone, 1977* at para. 12). On what was not intended, the Board asserted it was "certainly fallacious to suggest that the Legislature has thereby created an artificial limitation to the interpretation of the amendment's purpose by restricting its scope to some pre-existing status quo" (*Nelson Crushed Stone, 1977* at para. 13). The Board applied the statutory purpose test more so in this case than in subsequent cases, setting the stage to expand access to collective representation for many dependent contractors (so long as they fit into the Board's understandings of typical post-War standard employment model), such as the drivers working at Nelson Crushed Stone.

Despite its clear pronouncement about the expansive purpose of the statute, the Board indicated that its decisions would be context-dependent and reflective of "the facts and circumstances of each case" (*Nelson Crushed Stone*, 1977 at para. 13).[31] Here, we see the Board take on an active role in determining the outcome of cases involving alleged dependent contractors. By focusing on the facts and circumstances of each case – as opposed to relying

[31] While it is possible that additional external factors and circumstances which might have influenced the Board at any point in time, this falls outside the scope of the study.

solely on an overarching test – the Board employed an ongoing autonomous decision-making role in determining which workers the legislation covered.

The Board's decision in *Nelson Crushed Stone, 1977* focused on the broader question of statutory purpose and was remarkably brief in its discussion of the facts in the case before it. The Board simply concluded that "the sheer uniformity of the terms and conditions imposed by the respondent without negotiation or, indeed, often without consultation in satisfying the truckers' financial needs, contradicts any suggestion of an entrepreneurial relationship" and that the owner-operator drivers were "very much the captive of the respondent's enterprise" *(Nelson Crushed Stone, 1977* at para. 15-16).

However, unlike in future cases (see, for example, *Craftwood Construction, 1980* and *Algonquin Tavern, 1981*), the Board did not establish a list of criteria or factors to be met, but instead focused their decision almost exclusively on the lack of entrepreneurship possessed and exercised by the truckers. The only real factor discussed by the Board was "the opportunity for economic mobility" possessed by someone whose employment status was in question (*Nelson Crushed Stone, 1977* at para. 15).

In responding to one of the arguments asserted by the quarry, the Board indicated that the presence of a continuing obligation was not required for one to be classified as a dependent contractor. Counsel for the quarry suggested that the drivers (or anyone claiming to be a dependent contractor) needed to have a continuing obligation to a company to be dependent upon them. Again, relying upon the *Act*'s statutory purpose, the Board determined that "no such condition need be read into the Legislature's intent" and that the existence of such a continuing obligation represented “an unnecessary restriction upon the Legislature’s purpose” *(Nelson Crushed Stone, 1977* at para. 17).

In this case, the drivers’ lack of entrepreneurship led to a finding of them being dependent contractors and thus forming a unit appropriate for collective bargaining. Given that more than fifty-five percent of the drivers had signed union cards, the Board granted a certificate to the Association. The approach developed in *Nelson Crushed Stone, 1977* would form the basis of the Board’s future determinations of dependent contractor status. This case represented the beginning of a shift in which dependent contractors secured coverage under the *LRA*, with the Board’s decisions representing the rise of new policy.

Corrado Di Sabitino et al., v. International Brotherhood of Teamsters Local 879, et al., and Adbo Contracting Company Ltd. [*1977] OLRB Rep. April 1977* (referred to hereinafter as *Adbo, 1977*).

The Board’s second major case involving dependent contractors was *Adbo, 1977*. In many respects, this was a procedural case as five owner-operator drivers sought relief under Article 79 of the *Labour Relations Act* for an alleged unfair labour practice by Adbo Contracting. Since then, however, the case has become a seminal or landmark case in jurisprudence surrounding dependent contractors due to its detailed and nuance decision. However, the *Act* applied only to employees (including dependent contractors), so it was incumbent upon the five owner-operators to demonstrate first that they were employees that fell under the purview of the *LRA*.[32]

[32] While the five drivers asserted that they were dependent contractors, a construction company, two labour ‘brokers,’ and a Teamsters Local union asserted that the drivers were instead independent contractors, and outside the purview of the Board’s jurisdiction and the LRA.

The facts at hand for this case were quite similar to those in *Nelson Crushed Stone, 1977*, although the Board did not cite the case in their decision. The five drivers were all owner-operator drivers of their own single truck, which they supplied, drove, and used to haul various loads. Most did not own their truck outright, but rather, self-financed the vehicle. Further, they also bore "all of the other expenses associated with the operation of the vehicle [such as] license fees, insurance premiums, maintenance bills, and fuel bills" (*Adbo, 1977* at para. 10). For tax purposes, the drivers treated all these costs as business expenses.

Unlike in *Nelson Crushed Stone, 1977*, where the drivers contracted directly with the quarry upon whom they were found to be dependent, the drivers in *Adbo, 1977* "obtained almost all of their work through persons who styled themselves as 'brokers'" (*Adbo, 1977* at para. 11). The primary 'broker' in the case was Luigi Pasinato, whom the drivers relied upon "almost exclusively" (*Adbo, 1977* at para. 11).[33] Pasinato obtained work through his contacts in the construction industry and then allocated those jobs to a pool of drivers that worked with him. Pasinato would instruct the driver where to report and when, supply the driver with time sheets, and pay the drivers bi-weekly, "regardless of whether he could collect from the person for whom the work was performed" (*Adbo, 1977* at para. 12-13). Once Pasinato assigned the work, his supervisory role was non-existent because, on the job site, it was the contractor (such as Adbo) who required the work and instructed the drivers how to perform it, where to receive the load, and where to deliver it.

[33] This triangular relationship involving the drivers, a broker, and construction contractors did not exist in Nelson Crushed Stone, 1977 and added another layer of complexity to this case.

Pasinato profited from the drivers' work, as he would negotiate a price or contract with a contractor, and then negotiate a lower rate with the drivers and profit from the difference. There were no taxes, holiday or vacation pay, pension payments, employment insurance, or workers' compensation deducted from or provided to the drivers, and the drivers were free to work with brokers other than Pasinato or to obtain work directly from contractors.

The respondent company argued that the drivers "functioned as independent businessmen [sic]" (*Adbo, 1977* at para. 5). Given their ability to work for multiple brokers, or directly for contractors and not use the services of a broker at all, there was more flexibility than what a traditional employee possessed. The drivers owned their own equipment – a key factor in the 'four-fold test' – and saw no at-source deductions and claimed any costs as business expenses on their taxes.

There was, however, also a strong argument that the drivers were dependent contractors (whether on brokers like Pasinato or on contractors such as Adbo). Although they were legally free to work with another broker or negotiate and contract with companies directly, four of the five respondents relied upon Pasinato almost exclusively for their work. For this, Pasinato paid them a set hourly rate that they did not negotiate while Pasinato profited from their labour by paying them less than what the contractors paid him and keeping the difference. They were instructed where and when to report and took directions while at the job site (albeit not from Pasinato). The existence of this complex triangular relationship and the need to determine the employment status of the drivers caused the Board to explore what it referred to as "the outer limits of the *Labour Relations Act*" (*Adbo, 1977* at para. 17).

These so-called outer limits, however, were rather mild. The drivers wanted only employee status – a logical outcome sought by all workers going to the Board in such an instance – and they did not challenge that a supervisor for whom they generated profit also controlled them at the workplace. The drivers simply wanted a voice and a fair slice of pie and, as was the case with dependent contractors, did not seek any broader structural economic changes. Here, as they did in *Nelson Crushed Stone, 1977*, the Board was able to respond to working-class demands from within the system "while ultimately respecting capital's pre-eminent position" (McCrorie, 1995: 16). While providing additional rights to a group of workers who historically had been excluded from legislative protection and access to collective bargaining, the Board's decision was very much consistent with the prevailing post-war system of pluralist industrial relations.

The Board noted that the term 'employee' now included a 'dependent contractor,' which facilitated an easier "point of departure for distinguishing between the individual worker and the true entrepreneur" than was possible prior to 1975 amendment (*Adbo, 1977* at para. 20).[34] With the 1975 amendment, the Board could now determine whether someone was 'employee-like'. Employing the statutory purpose test, the Board maintained:

> This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship (*Adbo, 1977* at para. 24).

[34] Consistent with *Nelson Crushed Stone, 1977*, the Board considered the Legislature's purpose in amending the statue, asserting that "we do not construe the inclusion of these provisions in the Act as merely amounting to a legislative attempt to codify the Board's existing jurisprudence, such as *Livingston Transportation*" (*Adbo, 1977* at para. 22). In those cases, decided upon prior to the amendment, the Board could determine only if the worker in question was an employee or an independent contractor – a worker was either one or the other.

Drawing on the purposes of the statute, the Board asserted again – as it did in *Nelson Crushed Stone, 1977* – that the legislation would not simply codify the status quo but would instead expand access to bargaining rights for those contractors who were closely analogous to traditional employees. For the Board, these workers with a more traditional employment relationship were able to secure legislative protection.

In coming to its decision, the Board moved beyond simply examining "the facts and circumstances of each case" (*Nelson Crushed Stone, 1977* at para. 13) and began to establish some broader, universal criteria in addressing these types of cases. They identified two factors in particular: 1) economic dependence and 2) obligation. The Board's explanation of each, and their interrelatedness, is worth citing at length:

> This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" roughly analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee (*Adbo* (1977) at para. 27).

For both factors, the level of dependence and obligation needed to be analogous to that of an employee. Furthermore, the Board drew a distinction between economic dependence – something that an employee experiences vis-à-vis their employer – and economic vulnerability, a condition that may be experienced by an independent contractor or business owner and placed greater emphasis on economic dependence as criteria for a finding of someone being classified as a dependent contractor (*Adbo, 1977* at para. 26).

Informed by the broader business relationship between the drivers and Pasinato, as well as the factors of economic dependence and an obligation to perform duties, the Board determined that the drivers were "dependent economically upon the respondent Pasinato" because he was "the almost exclusive source of work for the complainants" (*Adbo, 1977* at para. 29). The Board also noted that Pasinato controlled the source of work through their network of contractors and the remuneration paid to the drivers. The organizational test was also employed by the Board, which noted, "the complainants were very much integrated into Pasinato's business," leading to "an organizational dependence on the part of the complainants that extended well beyond what might exist between businessmen [sic]" (*Adbo, 1977* at para. 30).[35]

In both *Adbo, 1977* and *Nelson Crushed Stone, 1977*, the Board found the owner-operator drivers to be dependent contractors, whether dependent upon a quarry (*Nelson Crushed Stone*) or a broker (*Adbo*). Because these were both early cases in the jurisprudence on dependent contractors, they relied heavily upon the statutory purpose test to extend access to collective bargaining. While the Board in *Nelson Crushed Stone (1977)* focused on "the facts and circumstances of each case" (at para. 13), it began to establish some broader, universal criteria in addressing these types of cases.[36] These criteria were further elaborated in *Adbo, 1977*, which set the stage for a further expansion of access to bargaining rights to other owner-operator drivers.

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[35] This finding was also informed by Pasinato's level of control, his supplying the hours of work forms, his ability to assign the work (or to not assign the work), leading to a situation in which the drivers became "an integral part of Pasinato's business organization" (*Adbo, 1977* at para. 30).

[36] Even favourable decisions do not assure the substantive goals of the decisions are respected or that what workers are ultimately seeking – a reasonable and fair collective agreement – are secured. These specifics ultimately are outside the Board's ability to bring about and fall outside of the scope of this project.

<u>*Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Indusmin Limited [1977] OLRB Rep. September 552* (referred to hereinafter as *Indusmin, 1977*)</u>

In *Indusmin, 1977*, a group of owner-operator drivers were seeking to unionize, but to do so required a finding that they were employees within the meaning of the *Act*. The facts were similar to both previous cases in that the respondent company was involved in the production and sale of construction aggregate and utilized drivers who owned their own vehicles, paid their own insurance, held their own P.C.V. license, and were paid bi-weekly with no deductions taken from the paycheque. In this case, drivers could take their breaks at will, did not wear an Indusmin uniform, and although some carried an Indusmin sign, they were not obliged to. Like the situation at the other quarries, there was "no dispute that the lion's share of the trucker's income generally is derived from revenue paid him [sic] for services extended [to] the respondent" (*Indusmin, 1977* at para. 7).

This case was unique, relative to *Nelson Crushed Stone, 1977* and *Adbo, 1977*, in two ways. Despite the absence of a written contract, Indusmin recognized a formal but uncertified drivers' committee and would negotiate rates with that committee. As a result, the drivers were "paid on a ton-mileage basis based on a formula determined by the respondent and a committee appointed by the drivers" (*Indusmin, 1977)* at para. 6).[37] Another differentiating feature was that there were two groups of workers in *Indusmin, 1977*, both of whom the respondent company asserted were independent contractors. Like in *Nelson Crushed Stone, 1977*, there were drivers who contracted directly with Indusmin and did not utilize the service

[37] There was no disagreement from the parties that the committee "meets with the drivers and obtains instructions from them. The representatives thereupon negotiate the rates with the respondent" and that "premiums for trips that require the driver to travel beyond a pre-arranged zone and mutually established" (*Indusmin, 1977* at para. 6).

of a broker. These were the drivers represented by the committee and for whom the union sought bargaining rights. However, Indusmin also relied upon brokers, whose drivers were "assigned from time to time" to the Indusmin quarry, but not on an exclusive or long-term basis. These drivers were paid by their broker, assigned to Indusmin by their broker, and only received instruction from Indusmin when they were given a load.

The Board relied upon both *Nelson Crushed Stone, 1977* and *Adbo, 1977* as seminal authorities in coming to their decision and determining that, while the broker drivers had a contractual relationship with the broker and were not employees or dependent contractors of Indusmin, the owner-operator drivers not associated with a broker *were* dependent contractors of Indusmin. In finding that the broker drivers were employees of the broker (and not Indusmin), the Board noted:

> the amount of his [sic] remuneration with the broker, the nature and frequency of assignments are determined by the broker, the quality of his [sic] work performance is measured by the broker and the source of his [sic] income is controlled by the broker. His [sic] only contact with Indusmin is a functional one (*Indusmin, 1977* at para. 14).

As for the central issue at hand – the employment status of the drivers without a broker who contacted with Indusmin – the Board referenced two major factors identified in *Adbo, 1977*: 1) economic dependence and 2) obligation (at para. 27). It also reiterated the two-fold test of the dependent contractor:

> Should the Board be satisfied that the driver, having regard to the nature and quality of his [sic] trucking operations be found to be inextricably tied to the enterprise of the entrepreneur, alleged to be his [sic] employer, to the extent that he [sic] more resembles an employee that an independent contract, then he [sic] will be treated as "dependent" upon that entrepreneur and thereby will be concluded to be "an employee" for purposes of the Act (*Indusmin (1977)* at para. 16).

The drivers' economic dependence was illustrated by them being "patently without business initiative" and thus much closer to an employee than an independent contractor (*Indusmin, 1977* at para. 16). As for the obligation, the Board identified the drivers' "efforts" in securing a P.C.V. licence, purchasing third-party insurance, satisfying creditors as establishing their "inclination to report for work," obligations which, the Board added, were "shown to relieve the respondent from the serious expenditures" that the driver absorbed (*Indusmin, 1977* at para. 17).

While counsel for Indusmin noted the existence of many differences from the drivers in *Nelson Crushed Stone (1977)* – including the lack of a required size or design of the truck, the minimal discipline, and the drivers negotiating their pay through a committee – they failed to convince the Board that a different outcome was warranted. Despite these differences, the Board concluded, "their similarities are more meaningful and thereby reduce their differences" (*Indusmin, 1977* at para. 17). This represented a clear move away from the four-fold test, a relatively simplistic checklist for the presence of or absence of four criteria, and toward a holistic analysis of the overall relationship between the parties.[38]

Also unique in this case was the first (but not last) dissent from employer-side Board member F.W. Murray. Murray asserted that the distinctions between the drivers at Indusmin and those *in Nelson Crushed Stone, 1977* represented "very important distinguishing features in the employment relationship" of the Indusmin drivers (*Indusmin, 1977* at para. 2, dissent).

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[38] Although not relied upon as much, the Board applied the statutory purpose test toward the end of the decision. "In the context of the Legislature's purpose of introducing the 'dependent contractor' on the employer-employee spectrum," the Board concluded, "is intrinsically more analogous to the employee in his [sic] relationship with the respondent. The obligations he [sic] assumes and the rewards he [sic] receives for his [sic] services entitled the driver to the benefits of collective bargaining" (*Indusmin, 1977* at para. 19).

Murray also relied on the dated ‘control test’ when asserting that “probably the most important element in making a decision as to the degree of dependency or independency should be the matter of control exercised by the user of the services over those tendering the services” (*Indusmin, 1977* at para. 18, dissent). He also drew on the ‘four-fold test’ when identifying the ownership of the ‘tools’ as an important factor for the Board to consider.

The Board’s majority in *Indusmin, 1977* built upon the precedent set by *Nelson Crushed Stone, 1977* and *Adbo, 1977* and further solidified the evolving approach of analyzing the facts and circumstances of each case, but paying specific attention to factors of economic dependence and obligation articulated in *Adbo, 1977* (at para. 27). The Legislature’s stated purpose in seeking to extend the benefits of collective bargaining to those resembling employees continued to play an important role in the Board’s decision-making, though Bendel has asserted that “it would be little more than an exercise speculation to inquire into the intentions of the various legislatures,” and that “as for the provisions in Ontario for separate bargaining units for dependent contractors, it would appear that there was either a genuine feeling that the interests of dependent contractors were not at one with those of other employees or successful lobbying by unions hopeful of organizing dependent contractors” (1982: 378).[39]

Mount Nemo Truckers Association v. Canada Crushed Stone, A Division of Steetley Industries Limited; A. Cupido Haulage, Peter Bawtinheimer Limited; K.F. Marshall Limited, Benny Haulage Limited [1977] OLRB Rep. December 806 (referred to hereinafter as *Canada Crushed Stone, 1977)*

[39] See footnote 25 for a brief discussion of the Legislature’s intent and approach to the 1975 amendments on dependent contractors.

In each of *Nelson Crushed Stone, 1977, Adbo, 1977*, and *Indusmin 1977*, the Board used its discretion to further expand coverage for owner-operator drivers and based their decision, at least in part, on their interpretation of the Legislature's purpose in passing the amendments to the LRA. In these cases, there was a considerable degree of economic dependence and obligation, which made the drivers more akin to employees than independent contractors.

A new layer of complexity, which had not been previously considered by the Board, was added to the analysis in *Canada Crushed Stone, 1977*. While in the previous cases the owner-operators owned a single truck that they also drove, in this case there were owner-operators of multiple trucks – one that they would drive and at least one other that was operated by another driver. While these owner-operators of multiple trucks (or 'dependent contractor employers' as the Board referred to them) may have been dependent upon companies such as Canada Crushed Stone, they were also employers in their own right. The Board, then, needed to determine if these dependent contractor employers were included in the meaning of 'dependent contractor' within Section 1(ga) of the *Act* and eligible for bargaining rights as a member of the applicant union while simultaneously being an employer.

Complicating the Board's analysis even further was that these so-called dependent contractor employers were not simply potential members of a possible union but were in fact "the moving force behind the application for certification" (*Canada Crushed Stone, 1977* at para. 25). Counsel for the respondent companies asserted that Section 12 of the *Act*, which established a bar against certification "if any employer or any employers' organization has participated in its formation," should apply in the case and prohibit the Board from certifying the union (*Canada Crushed Stone, 1977* at para. 11).

The specific questions – were some truckers also employers and did their support for the organizing drive trigger the application of the bar on certification under Section 12 of the LRA – were both answered in the affirmative. The Board concluded that the three owner-operators of multiple trucks were employers "both in form and substance" (*Canada Crushed Stone, 1977* at para. 7) and therefore not dependent contractors, and concluded further that, as employers, their support for the union drive triggered a bar on certification.[40] The finding of bar on certification is of little consequence to the analysis of this case for the purpose of the dissertation, but the Board's reasons for finding that the owner-operators of multiple trucks were not dependent contractors (or employees) under Section 1(gb) of the *Act* forms an important part of the broader jurisprudence on dependent contractors. This is important because those who owned more than one truck were not truly dependent upon a company in the same way that an owner-operator of a single truck was. The owner-operator of more than one truck had, in addition to their income from their driving themselves, an ability to profit from the labour power of another driver. In coming to this decision, the Board found a "qualitative distinction, or the difference in kind … between the owner-operator who uses his [sic] own labour and employs no one and the owner-operator, who, in addition to his [sic] own labour, used and attempts to profit from the labour of others" (*Canada Crushed Stone, 1977* at para. 19).

[40] The Board found that the three owner-operators of multiple trucks were employers "whose interests stand to be affected by the collective representation of those whom the union seeks to represent" thus triggering a Section 12 bar on certification (*Canada Crushed Stone, 1977* at para. 28).

The fact that someone was an employer did not automatically mean that they were prohibited from being a dependent contractor, as later cases would illustrate.[41] The Board maintained "in the abstract there is nothing illogical about finding that an individual can be both an employee and an employer at one and the same time," continuing that "many employees, especially those with special skills or with shift arrangements which permit, carry on business distinct and apart from their employment in which they may employ others" (*Canada Crushed Stone, 1977* at para. 19). In deciding on whether someone who may be economically dependent upon another business but who also employs others, the "total character of the business" became an important part of the consideration (*Canada Crushed Stone, 1977* at para. 17).

In the case at hand, "the dependent contractor-employer and his employees supply their services to a common employer (i.e., in this case Canada Crushed Stone) who is the employer party to an application for certification" (*Canada Crushed Stone, 1977* at para. 19). The question, then, was if a so-called dependent-contractor employer – or an owner-operator of multiple trucks – more closely resembled an employee or an independent contractor. For the Board, owner-operators of multiple trucks more closely resembled independent contractors as they were able to profit from the labour power of others (despite also working the same job). Their source of income was not simply their own labour power – like an employee's or a dependent contractor's – but also the profit they derived from the labour power of those

[41] For example, in *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees (International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 647) v. Dominion Dairies Limited, 1978 CanLII 443 (ON LRB)* (referred to hereinafter as *Dominion Dairies, 1978*), the Board noted that the "use of a young helper to lighten the load during the summer season, to shorten the hours worked on a Saturday or to eliminate the burden of stairs on a daily basis does not thrust the contractor-driver into an entrepreneurial undertaking" (*Dominion Dairies, 1978* at para. 36).

whom they employed. Despite it's industrial pluralist leanings, the Board understood Marx's theory of labour power and the concept of surplus labour in distinguishing between a labourer and someone who buys and profits from the labour power of another.

It is here that the Board sought to 'draw the line' between dependent contractors who more closely resembled employees and those who more closely resembled independent contractors or employers. Given the precedent-setting nature of this case on both later cases in the delivery of construction aggregate, it is worth citing the Board's rationale at length:

> The Board takes the view that the line must be drawn so as to exclude from the operation of the *Act* those contractors who, although economically dependent, are themselves employers deriving income from the labour of others. It must be found that the nature of their business is such that within the meaning of the *Act* they more closely resemble independent contractors than employees in their relationship with the employer. The exclusion of these persons accords with the statutory definition and also maintains the clear division between employers and employees created by the overall scheme of *The Labour Relations Act* (*Canada Crushed Stone, 1977* at para. 20).

The Board also grappled with the question of degree – or the number of persons in the employ of a dependent contractor – and determined that any contractor with the ability to hire, fire, discipline, and otherwise set the terms and conditions of employment, even if only for one person, could not be a dependent contractor within the meaning of the *Act*.[42]

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[42] This hardline exclusion was contrary to the existing precedent in British Columbia, where the BC Labour Board did not "believe that an individual who owns perhaps two trucks, and thus employee a driver to operate one of them, is necessarily removed from the category of 'dependent contractor'" (*Teamsters Local Union 213 and Fownes Construction Co. Ltd [1974] 1 CLRB Rep. 510*). The OLRB, "concerned with the uncertainty...if it were to attempt to draw an artificial distinction between the contractor who employs two or three persons and the contractor who employs several persons," opted instead to establish a clear and objective rule of excluding any contractor with any employee from collective representation under the Act (*Canada Crushed Stone, 1977* at para. 21). In Ontario, the extension of collective rights for dependent contractors was more exclusionary than in BC, as any contractor who profited off the labour power of an employee would cease to be an employee themselves, at least in those instances when they both supplied their services to the same buyer. This precedent would be applied in future cases in the construction aggregate delivery industry and would become especially important – and challenged – in the skilled construction trades the decade(s).

In some respects, this case reappeared in front of the Board in 1980.[43] The certification drive in 1977 was unsuccessful because of employer interference by those drivers owning multiple trucks. As a result, the question of whether drivers for Canada Crushed Stone and a number of affiliated brokers were dependent contractors went unanswered in 1977. In 1980, however, many of the drivers owning only a single truck sought bargaining rights without employer interference and the Board needed to determine their employment status.

Teamsters Local 879 v. A. Cupido Haulage Limited, 1980 CanLII 748 (ON LRB) (referred to hereinafter as *Cupido, 1980*)

In September 1977, Canada Crushed Stone informed the drivers that it would no longer deal directly with owner-operators. Drivers would instead need to operate through one of several brokers that Canada Crushed Stone agreed to deal with. The drivers selected A. Cupido Haulage Ltd. as their broker, though there existed no formal written agreement between Cupido and the drivers. Drivers were, however, expected to pay Cupido a 5 percent broker's fee, but were provided with a 5 percent pay increase by Canada Crushed Stone to cover the new broker's fee (*Cupido, 1980* at para. 8).

Prior to September 1977, the owner-operators hauled almost exclusively for Canada Crushed Stone (approx. 95 percent of their total workload). While they could work elsewhere, there was an understanding they would give Canada Crushed Stone priority and inform the Canada Crushed Stone dispatcher if they were working elsewhere. They were also expected to

[43] See *Teamsters Local 879 v. A. Cupido Haulage Limited, 1980 CanLII 748 (ON LRB).* Discussed below in chapter 4.

notify the dispatcher if they were sick, on vacation, had an accident, or otherwise unable to appear for work (*Cupido, 1980* at para. 6).[44]

Following the mandated use of a broker in 1977, very little had changed in the drivers' day-to-day routine. They continued to report to and take direction from the Canada Crushed Stone dispatcher, notified the dispatcher in the event of an inability to work (often before informing Cupido), and delivered to Canada Crushed Stone's customers (*Cupido, 1980* at para. 9). The Board noted that the changes involving the broker "relate to the method of payment and the handling of complaints" (*Cupido, 1980* at para. 9). While the drivers' pay cheque was from 'A. Cupido Haulage, Broker's Account, Canada Crushed Stone,' the Canada Crushed Stone dispatcher handed it to the drivers, and the drivers had "little day to day contact with Cupido" (*Cupido, 1980* at para. 9).

With three parties involved – the owner-operators of a single truck and their union, Cupido, and Canada Crushed Stone – the arguments had more nuance than in other cases. The union asserted that Cupido Haulage was merely a "payroll agent" and that the drivers were dependent upon Canada Crushed Stone, as they had always been. For its part, Cupido similarly denied that a new employment relationship was created in 1977 and asserted that the drivers remained under the "direction and control" of Canada Crushed Stone and were therefore employees of the quarry. Canada Crushed Stone, on the other hand, asserted that Cupido hired the drivers in 1977 and claimed the argument that "little else in the day-to-day work routine

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[44] Like most drivers discussed in this chapter, they also owned their vehicle, covered the insurance, maintenance, and PCV license. A number assigned by Canada Crushed Stone identified their truck, and they were paid a rate determined by Canada Crushed Stone from which no deductions were taken. Unlike in other cases, such as *Indusmin, 1977* and *Superior Sand, 1978*, there was not a group of drivers with which Canada Crushed Stone would negotiate.

changed must be seen as a red herring in the context of the company's operation where very little else could change" (*Cupido, 1980* at para. 14).

Given these complexities, the Board outlined its process in more detail than in previous cases, while drawing upon the precedent set in them. While the relationship between the three parties may have been complex, the Board outlined a very clear process, asserting that it "does not determine dependency and then undertake a separate inquiry to determine the identity of the employer. If the persons who are the subject of this application are found to be dependent, the person upon whom they are dependent is the employer for purposes of the Act" (*Cupido, 1980* at para. 16). There would not be a two-part test, then, to determine if the drivers were dependent contractors and then a determination upon whom they were dependent.

Previous cases involving owner-operator drivers hauling construction aggregate highlighted a series of "visible benchmarks" which the Board could use in determining the broader nature of the business relationship between owner-operators and companies. The source of the work is one such benchmark. As the Board noted, "If the owner/operator looks to the quarry for the bulk of his [sic] work and does advertise or otherwise solicit customers on his [sic] own, and is generally available during the working hours of the quarry, he [sic] is acting more like an employee truck driver than an independent contractor" (*Cupido, 1980* at para. 16). Along with the source of work, methods used to control the work and overall work processes were also relevant variables, as was the percentage of income derived from the relationship and the way those rates were determined.

Using these factors, the Board determined that the drivers were dependent contractors and dependent upon Canada Crushed Stone, not upon Cupido. The drivers did not act like independent contractors or business owners, nor did they have a relationship with Canada Crushed Stone in which they operated as such. As a result, the Board determined they were not independent contractors. The drivers did not advertise their services to other contractors, were generally available (and prioritized) Canada Crushed Stone through the day and derived a substantial portion of their income (anywhere between 80 to 100 percent) from the work done for Canada Crushed Stone, despite the paycheque coming from the broker. Although the drivers were "attached to" a broker, they were in a position of dependence upon Canada Crushed Stone.

What is also interesting about this decision is the Board's lengthy discussion on a "three-sided relationship" between an owner-operator, a broker, and a business (*Cupido, 1980* at paras. 22-26). In the previous cases involving brokers, the Board determined that the owner-operator drivers were employees of the broker, not the company. This finding helps illustrate the degree to which the Board effectively relied "upon the facts and circumstances of each case" (*Nelson Crushed Stone, 1977,* at para. 13). Instead of simply applying the precedent that the owner-operator drivers were employees of a broker and not the company, the Board considered the circumstances and came to a different conclusion than they had previously.

In *Indusmin, 1977* (at para. 14*)*, the Board found the owner-operators to be dependent contractors of the broker because it was the broker that set their wage, determined their assignments, and measured the work performance. The owner-operators only contact with Indusmin was "a functional one." Similarly, in *Adbo, 1977* (para. 29), the brokers controlled the source of work, the remuneration, and regular interactions with the owner-operators.

Interestingly, the implementation of a broker system – at the insistence of Canada Crushed Stone – did not alter the pre-existing relationship or lead to any significant changes in the drivers' working conditions or relationship. Prior to the broker system, the owner-operators "carried the essential hallmarks of a dependent contractor relationship as found by the Board in the construction aggregate cases" (*Cupido, 1980* at para. 24).[45] The very implementation of the broker system itself was "evidence of the control which Canada Crushed Stone enjoyed over the owner/operators and the acceptances of this arrangement as evidence of their economic dependence" (*Cupido, 1980* at para. 25). With or without a broker system, the owner-operators' livelihood was dependent upon Canada Crushed Stone, a company to which there was an obligation to perform duties.[46]

Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Superior Sand, Gravel & Supplies Ltd. [1978] OLRB Rep. February 119119 (referred to hereinafter as *Superior Sand, 1978*)

By 1978, the Board had begun to establish a precedent regarding dependent contractors, at least in the construction aggregate delivery industry. The facts in *Superior Sand, 1978* were similar to many previous cases. The owner-operators were responsible for the purchase of their own vehicle, insurance, and licensing, were required to sign a 'Haulage Agreement' as a

[45] Despite the implementation of a broker system – a clear change in form, though not in substance – the Board employed its approach of examining the "substance of the economic relationship" and not relying upon "the form which merely obscures it reality" (*Superior Sand, 1978* at para. 19). The substance of the relationship had not changed with the existence of a broker.

[46] Although the drivers' cheques came from one of the brokers, the drivers continued to work (almost) exclusively out of the Canada Crushed Stone quarry and were present there on a near daily basis. As such, Canada Crushed Stone remained the primary source of income for the drivers. Quite simply, because the drivers in *Adbo, 1977* and *Indusmin, 1977* were dependent upon the brokers, the drivers in *Cupido, 1980* were dependent upon the company and not the broker inserted into the pre-existing relationship. The facts of dependency remained consistent, but by looking at the facts of each case and examining the nature of the economic relationship, the decision in *Cupido, 1980* differed.

condition of securing work, submitted a daily summary of deliveries and invoices, were required to notify the quarry of their absence, and were required to deliver to all locations assigned to them by the dispatcher (*Superior Sand, 1978* at paras. 6-13). Despite the similarities, there were other factors in this case making it different than previous ones. For example, the drivers paid a service charge from their wages back to the company and some drivers earned only a fraction of their income from Superior Sand and were not exclusively financially dependent on the company.

Like in *Indusmin, 1977*, the respondent company negotiated a per-ton rate with a committee of owner-operators. The evidence also showed that of the nine drivers seeking certification, all but one "obtained a very substantial portion of their remuneration from the respondent," generally between eighty and ninety-five percent of their annual income (*Superior Sand, 1978* at para. 4). A new feature in this case was that the drivers paid a four percent service charge from their wages back to the company to "cover the costs of credit, handling, billing and dispatching" (*Superior Sand, 1978* at para. 11).[47]

The Board recognized that there existed "no clear line of demarcation" between independent contractor and dependent contractor, and that it would analyze each case based on the "substance of the economic relationship" and "away from the form which merely obscures it reality" (*Superior Sand, 1978* at para. 19). The concept of substance over form became a central part of the Board's approach, with an emphasis on the overarching business

[47] In addition to the nine drivers, the parties agreed that there were also independent contractors utilized by Superior Sand who owned at least two trucks. Based on existing precedent, the parties agreed that these workers were dependent contractors and fell outside of the scope of the proposed bargaining unit (*Superior Sand, 1978* at para. 14).

relationship between the parties. This approach ensured that the relationship at hand between the applicant and respondent was the focus, rather than a reliance upon benchmarks from previous cases involving other companies and contractors.[48]

In coming to its decision, the Board reiterated the need to “examine the types of economic dependence and the kind of business relationship” rather than placing “undue emphasis” on whether the person furnished their own “tools, vehicles, equipment or machinery” (*Superior Sand, 1978* at para. 24). Given that approach, the large percentage of income coming from work done for Superior Sand, the drivers not needing to create their own work opportunities but instead relying upon Superior Sand, and the source and method of remuneration meant these drivers had far more in common with an employee than an independent contractor. This type of economic dependence, in conjunction with an obligation to perform duties (including, but not limited to what was contained in the ‘Haulage Agreement’), led to a finding that the nine drivers seeking certification were dependent contractors and eligible for collective representation under the *Act*.

While a small point, it is worth noting that due to the nature of the economic dependence, the Board found that “even the one owner-operator who derived only twenty-five percent of his income from the respondent does not appear to be unlike a casual employee” (*Superior Sand, 1978* at para. 8). This was an important development because in previous cases

[48] This is not to suggest that precedent was irrelevant to the Board, but rather illustrates that the parties could not rely simply on a convenient benchmark to convince the Board. A case in point occurred in this case, in which counsel for the applicant union relied on *Indusmin, 1977*, where the owner-drivers were found to be dependent contractors, and suggested the same should be found in this case. Counsel for the respondent company used one of the independent contractors agreed to by the parties and suggested that the other owner-operators should be treated the same as they possessed the same ability to exercise their entrepreneurialism. Both arguments were dismissed by the Board as “obscur[ing] the considerations” that must be assessed when determining whether someone was a dependent contractor (*Superior Sand, 1978* at para. 23).

a higher threshold of income appeared to have been required to be considered "dependent". For example, the Board's decision in *Nelson Crushed Stone (1977* at para. 10) referenced "the lion's share of [the drivers'] income [coming] from the haulage services required by the respondent," while *Indusmin (1977* at para. 7) noted the "principal source of revenue is through the delivery opportunities made available by the respondent." The lowering of this perceived threshold of income required to be economically dependent upon a company from "a lion's share" or the "principal source" was important in expanding access to collective representation as a dependent contractor and is more in line with recognizing that dependent contractors may be more like casual or part-time employees.[49]

The decision in *Superior Sand, 1978* also reinforced the Board's framing of owner-operators with more than one vehicle and who profited off the labour power of another driver as employers with more in common with independent contractors than with dependent contractors. Building on the "qualitative distinction" between an owner-operator driver of a single truck and one with more than one truck who "attempts to profit from the labour of others" (*Canada Crushed Stone, 1977* at para. 19), the exclusion of owner-operators who employ others was given further context.

As he did in *Indusmin, 1977*, employer-side member F.W. Murray issued another dissenting opinion and argued that all the drivers in question – not just those who owned more than one truck and employed a driver – were independent contractors. Citing his own dissent in

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[49] The Board determining that dependent contractors may be more like casual or part-time employees was short-lived as they would move away from this approach in subsequent cases explored in this chapter, such as *United Cement, Lime and Gypsum Workers International Union v. Craftwood Construction Co. Ltd., 1980 CanLII 940 (ON LRB).*

Indusmin, 1977, Murray referenced the existence of “a lesser degree of control” by the company over the drivers, a logic consistent with the much older ‘control test.’[50] Although his dissent asserted that all the drivers should have been classified as independent contractors, he made specific reference to the driver who earned only 25 percent of his income from Canada Crushed Stone, suggesting that while his “employment may be casual, his relationship with the respondent is clearly entrepreneurial” (*Canada Crushed Stone, 1977* at para. 8, dissent).

Despite Murray’s dissent, *Superior Sand, 1978* further reinforced that those with an economic dependence on a company (even if it accounted for a minority of their total income) and a business relationship closer to that of a traditional employee rather than a true entrepreneur were dependent contractors.

United Cement, Lime and Gypsum Workers International Union v. Craftwood Construction Co. Ltd., 1980 CanLII 940 (ON LRB) (referred to hereinafter as *Craftwood, 1980*)

The Board’s decision in *Craftwood, 1980* marked the first instance in which they determined that owner-operators of a single truck were not dependent contractors. The nature of the economic relationship between two groups of drivers seeking union certification (one group working out of Craftwood Construction Co. Ltd, and the other working of Coreydale Contracting Co.) differed from that of previous groups of drivers, leading to their exclusion from coverage under the *LRA*.

In coming to this conclusion, the Board examined six aspects of the relationship between the drivers and the company, establishing a more detailed set of criteria for use in

[50] See *Ready Mixed Concrete (South East) Limited v. Minister of Pensions and National Insurance,* [1968] 2 Q.B. 497.

future cases. These six factors were: the percentage of income or business derived from the respondent company (supported by a detailed statement of income); the presence or absence of business initiative or entrepreneurial activity; the manner of remuneration; ownership of tools; contract of employment; and supervision and control (*Craftwood*, 1980 at para. 4). This line of analysis was certainly more prescriptive and systematic than it had been in previous post-1975 cases and represented an expansion of the 'fourfold test' from *Montréal Locomotive Works*, *1947*. Despite the amendments to the *LRA* in 1975, the Board undertook the novel approach of "determin[ing] first whether the owner/operators qualify as employees without regard to the dependent contractor provisions of the statute," an approach not explicitly taken in previous cases heard by the Board (*Craftwood*, *1980* at para. 8).[51] Relying upon the fourfold test, the statutory purpose test, the question as to whether the owner-operators were carrying on business for themselves, and the Board's decision in *Livingston Transportation (1972)*, the Board concluded that the owner-operators in *Craftwood*, *1980* were not dependent contractors.

In making their determination, the Board looked at the testimony of six drivers and applied the six factors described above to their circumstances. The percentage of wages the drivers earned from the companies was minimal, ranging between 5 to 15 percent at Craftwood and 1.4 to 3.1 percent at Coreydale. Regarding the drivers' business initiative, none of the drivers advertised their services in the Yellow Pages and only those at Coreydale handed out

[51] The rationale for this exercise was not made clear. The case was heard by the newly appointed OLRB Chair George Adams, who had not sat on a panel of the Board in any of the previous leading dependent contractor cases. Had the Board found that the owner-operators were employees, it would have afforded them rights under the *Act* and negated a determination as to whether they were dependent contractors.

business cards, though most of the drivers had their own bookkeeper. The drivers were remunerated with a regular cheque after submitting periodic statements and daily bills to the company.[52] The prevailing gross wage was between $22 and $25 per hour with no deductions and little to no negotiating as “everyone pays more or less the [same] price” (*Craftwood*, 1980 at para. 5).

Both sets of drivers owned and maintained their own trucks and paid all associated costs (insurance, fuel, licenses etc.), and neither set of drivers had any contract or formal agreement with the companies. As far as supervision and control, both sets of drivers needed to check in with the person in charge and had no real control over their hours of work. While neither Craftwood nor Coreydale had any formal set of rules around leaving early or sick days, both sets of drivers suggested that leaving early risked damaging the relationship, not being hired back, or “hurt his reputation” (*Craftwood*, 1980 at para. 4).

In some respects, such as owning and driving a single truck, being subjected to control and supervision, limited advertisement of their services, and little to no negotiating power as individuals, the owner-operators here had a work relationship similar to dependent contractors from previous cases (see, for example, *Nelson Crushed Stone, 1977; Adbo, 1977; Indusmin, 1977; Cupido, 1980)*. For the Board, however, there was one notable difference that altered their entire substance of the economic relationship: the percentage of total income derived from work at the respondent company. In previous cases, the drivers earned “the Lion’s share” of their income from a single company (see *Nelson Crushed Stone, 1977 at para. 10* and

[52] Twice a month at Craftwood and an average of every 1 ¼ months at Coreydale.

Indusmin, 1977), a figure that the Board suggested represented anywhere between 80 and 100 percent of the drivers' income (see especially *Canada Crushed Stone, 1978)*.

Counsel for the drivers and their union were aware of this, asserting that the low percentage of income flowing to the drivers from the respondent companies "should not be allowed to obscure the subservient relationship between the companies and the owner/operators" (*Craftwood*, 1980 at para. 6). This low percentage of income, they continued, "simply reflected the highly mobile nature of employment in the construction industry and that when all the evidence was considered the owner/operators more closely resembled employees than independent contractor" (*Craftwood*, 1980 at para. 6). For the Board, the question then became how dependent upon a single business does someone need to be to be found a dependent contractor? According to the drivers' counsel, the nature of the industry was such that many drivers would need to contract to multiple companies to make ends meet and it was not always possible to earn the lion's share of one's income from a single company. Although this work was clearly 'precarious' in the sense commonly understood today, in that the drivers could not rely on the stability of any particular source of income, the term was not yet in the popular lexicon and was not utilized in this case.

Owing to the drivers' 'precarity,' *Craftwood, 1980* was unique in that it confronted the question of the degree to which one could be dependent upon multiple employers or upon an entire industry (*Craftwood*, 1980 at para. 6). The Board had yet to entertain this question, as previous applications focused on dependency upon a single employer – a point central to the Board's findings of their dependency. Could owner-operators have economic dependence upon an entire industry (as opposed to a single company) and an obligation to perform duties for multiple companies – sometime simultaneously – and still be dependent contractors?

Despite meeting almost all the criteria of a dependent contractor, the Board determined that the owner-operators in *Craftwood, 1980* were not dependent contractors within the meaning of the *Act*. Relying on the statutory purpose test, the Board concluded, "it is not readily apparent that the Legislature has in mind an 'economic dependence' on a vast number of purchasers or an entire industry" (*Craftwood*, 1980 at para. 16). This deference to legislative intent reflects the OLRB's position within the broader state apparatus as a quasi-judicial body with some – but not full – autonomy from the state. The Board's position vis-à-vis the governing party, combined with its overarching industrial pluralist mindset, entailed that it would not deviate from the legislature's belief that someone could not be dependent upon an entire industry, even if that was a growing reality for some contractors. Although they recognized the unequal bargaining power between the owner-operators and the companies because they provided their services to several different purchasers, the drivers were not dependent upon anyone in particular. The Board explicitly rejected dependence upon the industry as a whole as a relevant criterion, concluding, "it is impossible to be economically dependent on more than one person" and resemble an employee in a multitude of economic relationships (*Craftwood*, 1980 at para. 16). Finally, because they provided their services to many companies, there was no obligation to perform work for any one of them in the same way that an employee would have.[53]

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[53] At the time of the hearing, an additional twenty-five cases were "with labour relations officers awaiting the outcome of these two cases" (*Craftwood*, 1980 at para. 2). The precedent coming out of *Craftwood, 1980* was then

For owner-operators unable to secure steady work with any single company, this decision undermined their ability to secure collective representation under the *Act*. While some owner-operators in this position may have preferred this flexibility and sense of entrepreneurship, the ruling did nothing for those who may have been unwillingly reliant upon several companies to secure enough work. The Board's ruling in *Canada Crushed Stone, 1977* provided dependent contractor status to an owner-operator who derived only 25 percent of their income from a single company as they were deemed to be a casual worker. The owner-operators in *Craftwood, 1980*, however – including one who made as much as 15 percent of his income from Coreydale – were not afforded access to collective representation under the *Act*.

Perhaps not wrongly, the Board surmised that "a ruling in favour of the applicants in these two cases would be tantamount to a declaration that an owner/driver of a single truck can never be an independent contractor for the purposes of *The Labour Relations Act*" (*Craftwood*, 1980 at para. 16). While that may have been the case, the Board's decision also indicated a clear limitation of the amended *LRA* in providing collective representation to a group of workers experiencing an imbalance in bargaining power and seeking bargaining rights to correct that. In understanding the trajectory of the Board's precedent for dependent contractors, their ruling illustrated the clearest delineation between dependent contractors and independent contractors in the series of cases in the construction aggregate delivery industry in the late 1970s and early 1980s.

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applied to these other cases, highlighting the importance of this case and the Board's role in the broader trajectory of precedent surrounding dependent contractors.

Through its analysis of the substance of the economic relationship between parties, the decision in *Craftwood, 1980* drew a clear distinction between those who were economically dependent upon a single company for which they had an obligation to perform a duty, and those who had an economic relationship with multiple companies and no obligation to perform duties for any single one of them. Quite simply, the Board was so rooted in its industrial pluralist leanings that it was slow to respond to the growth of non-standard or precarious work.

Canadian Labour Congress (Canadian Association of Burlesque Entertainers, Local Union No. 1689) v. Algonquin Tavern, 1981 CanLII 812 (ON LRB) (referred to hereinafter as *Algonquin, 1981*)

The final case concerning dependent contractors in this era involved a series of certification applications for burlesque dancers working at four establishments (Algonquin Tavern, Waverly Hotel, Carousel Inn, and Colonial Tavern). Several dancers, including those working 'on the circuit' (moving from one establishment to the next, often one week at a time) and 'house dancers' (working at a single establishment), signed union cards and sought bargaining rights. The four establishments maintained that all the dancers were self-employed or independent contractors.

Algonquin, 1981 was one of the first cases involving alleged dependent contractors who were not owner-operator drivers in the construction aggregate delivery industry and, like many of those cases, was a precedent-setting decision by the Board and has since become the seminal case involving dependent contractors. Despite being delivered six years after the 1975 amendments and coming after a series of earlier decisions, *Algonquin, 1981* represented the lengthiest and most detailed decision on dependent contractors delivered by the Board up until that point and has since become the leading authority in subsequent cases. The decision also articulated the clearest overview of previous tests utilized by the Board and the most detailed overview of precedent-setting cases on employee status.

The facts of the case were straightforward and uncontested by either of the parties. Several hotels hired dancers to hold or attract customers, but dancing was ultimately “an ancillary concern” to the hotels, as food and beverage was their primary focus (*Algonquin, 1981,* at para. 4). For those dancers working ‘on the circuit’ (i.e. those who danced at multiple establishments) the hotel would set the number, time, and length of shows and would operate under “a generally understood set of ‘house rules’ but otherwise exercised little to no direct control” (*Algonquin, 1981,* at para. 29). The relationship between dancers and any given hotel was “entirely transitory” and re-employment at the same establishment was “highly unlikely” (*Algonquin, 1981,* at para. 6). Similar to *Craftwood, 1980*, each of the dancers was “totally dependent on [their] trade for earning a living, but [none of the dancers] can be considered economically dependent upon the Algonquin, Carousel, or Waverly respectively” (*Algonquin, 1981,* at para. 7). Again, much like *Craftwood, 1980*, “the proportion of their income attributable to the respondents was no more than five per cent” (*Algonquin, 1981,* at para. 7).

Dancers ‘on the circuit’ also secured their bookings through agents, whom a dancer would call and then “pick and choose” from the agent’s available bookings (*Algonquin, 1981,* at para. 13). The agent’s role was “that of a broker or middleman whose function is to match supply and demand,” and although they provided opportunity to the dancers, the agents’ connections to the hotel was “much stronger” than the dancers’ connection (*Algonquin, 1981,* at paras. 13 and 17). Unlike with construction aggregate, however, there was no assertion that the broker was the employer of the dancers, and the dancers were “free to accept or reject any of the bookings offered” (*Algonquin, 1981,* at para. 22).

The situation was different for the ‘house dancers’ at the Colonial Tavern. Instead of ‘working the circuit,’ these dancers’ relationship with the hotel “was much more stable” (*Algonquin, 1981,* at para. 31). Of this relationship, the Board wasted no time in asserting “there is no doubt where real economic power resides” as the Colonial Tavern made unilateral decisions regarding compensation “on a take it or leave it basis” (*Algonquin, 1981,* at para. 31).

After reviewing the landscape of the entertainment industry, the Board “attempt[ed] to distill some of the features which, individually or in combination, have been relied on to support a finding of independent contractor status” (*Algonquin, 1981,* at para. 64). While recognizing that “a list such as this must be somewhat artificial” and that “no one factor, in itself, will be significant,” the Board proceeded to list eleven criteria to deduce one’s employment status as either a dependent contractor or independent contractor (*Algonquin, 1981,* at para. 64). Given its precedent-setting nature and frequent application in future cases, the criteria are worth citing in full:

> 1. *The use of, or right to use substitutes.* It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else’s labour rather than one’s own work and skill. This is significant however, only to the extent that it is the alleged employee who makes that decision.
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> 2. *Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials.* These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual’s own labour. On the other hand, reliance upon another’s financial loss on capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.

3. *Evidence of entrepreneurial activity.* This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop “clients”, the use of agents, and organizing one’s “business” (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a “chance of profit” or “risk of loss”; that is whether business acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.

4. *The selling of one’s services to the market generally.* If the purchasers of individual’s services are numerous and of diverse character, the individual looks more like an independent self-employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a “dependent” contractor or employee especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his “prime customer” is given priority.

5. *Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.* Of course, few independent contractors are entirely free in this regard, but the question is one of degree. A “self-employed” person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has “tied his fortunes”.

6. *Evidence of some variation in the fees charged for the services rendered.* This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as “independent contractors”, and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser’s ability to pay, may indicate independent contractor or self-employed status.

7. Whether the individual can be said to be carrying on an “independent business” on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit. Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and “place” of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer’s organization. In the case of entertainers, the cases suggest that it may

also be useful to determine the extent to which the artist's material or co-workers are influenced by the employer; that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered "integrated" into the employer's operation in the manner of an employee, if he is required to devote the whole of his working time during the period to the service of the employer, promote its organization, or fill in his "non-performing" time with unrelated ancillary duties.

8. *The degree of specialization, skill, expertise or creativity involved.* If these are dominant element in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of "integration" into the respondent's organization, the disputed individual is "self-employed" professional.

9. *Control of the manner and means of performing the work —especially if there is active interference with the activity.* However, it is the *right* to interfere rather than the *ability* to do so which is significant. The fact that a particular occupation involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship *at will and without cause* may indicate an employment relationship whether or not the employer exercises this power.

10. *The magnitude of the contract amount, terms, and manner of payment.* If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be "employees"; and independent professionals may charge an hourly rate rather than a block fee).

11. *Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.* The employer's established employee complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. If the so-called independent contractor substitutes for a firm's employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee (*Algonquin, 1981*, at para. 64).

This list of criteria has had long-lasting implications on the trajectory of labour law in Ontario and was applied subsequently as the seminal authority in many cases to help determine if someone is a dependent contractor.[54] The Algonquin criteria provide a systematic and more objective baseline for the Board to consider in determining someone's employment relationship, but has the flexibility to permit a broader examination of the overall economic relationship between the parties.

When applied to the dancers seeking certification in this case, the Board determined that the dancers 'on the circuit' were self-employed independent contractors and thus not employees within the meaning of the *Act*. The Board juxtaposed the situation of the self-employed dancers against that of the two 'house dancers' and "serve[d] to reinforce our general conclusion" of the differences between dependent and independent contractors (*Algonquin, 1981,* at para. 64). The house dancers were "economically dependent upon the Colonial in a manner analogous to that of an employee" given their full-time and longer-term employment, control by management, and limited mobility in the marketplace (*Algonquin, 1981,* at para. 75).

The establishment of the eleven criteria, rather than the specific outcome in this case, represents the long-term importance of this case. Although there were some 250 establishments in the Toronto area alone that the dancers could have, in theory, worked at, the burlesque dancing industry was a rather niche market, and the Board has not seen subsequent cases in this field. While the application of the newly established criteria was a one-off in the

[54] The criteria expanded upon both the four-fold test from *Montréal Locomotive Works*, *1947* and the six criteria applied in *Craftwood, 1980*.

burlesque dancing industry, *Algonquin, 1981* has become one of the most important precedent-setting cases for determining whom the Board considers a dependent contractor.

Conclusion

The first six years following the passage of amendments to the *Labour Relations Act* in 1975 represented a pivotal time in the development of jurisprudence surrounding dependent contractors. While the legislature extended employee status to dependent contractors, it was the Board who gave meaning to these changes.

Prior to 1975, the Board and other bodies – including the Supreme Court of Canada – had established some legal (and competing) frameworks to determine who was and who was not an employee.[55] After 1975, this role fell almost exclusively to Board, who articulated that it would determine whether someone was a dependent contractor based "upon the facts and circumstances of each case" (*Nelson Crushed Stone, 1977* at para. 13). A year later, the Board added that they would be guided by "substance of the economic relationship" rather than relying upon "the form which merely obscures its reality" (*Superior Sand, 1978* at para. 19). Two major factors identified in *Adbo, 1977* (at para. 27) informed the substance of this relationship: 1) economic dependence and 2) obligation. The substance of the relationship was rooted heavily in the Board's post-war understanding of employment. Ultimately, the Board's approach to determining who was – and who was not – a dependent contractor was rooted in

[55] These included the control test, the fourfold test, the organizational test, and the statutory purpose test. In three of the earliest major cases – *Nelson Crushed Stone, 1977*, *Adbo, 1977*, and *Indusmin, 1977* – the Board employed the statutory purpose test in such a way as to expand coverage under the *Act* for dependent contractors. These cases illustrated a broad and more liberal approach to the amended *Act* than counsel for the respondent companies preferred.

their industrial pluralist mindset. While this approach expanded rights under the *LRA* for some workers, it also established real limitations for other workers and effectively placed them outside of the coverage under the *LRA*, highlighting a key shortcoming of the Board in its ability to advance rights for the most precarious workers.

The legislation established – and the Board enforced – two primary conditions that needed to be met to be a dependent contractor: 1) a requirement for compensation (and the degree that it puts the worker in a position of economic dependence), and 2) an obligation to perform duties. However, by focusing on the "substance of the economic relationship," the Board established additional criteria that excluded some workers from dependent contractor status, despite them receiving compensation (and being economically dependent) and having an obligation to perform duties. The establishment of this additional criteria was reflective of the standard post-war employment relationship and reflected the Board's industrial pluralist approach.

As much as the Board helped to shape the precedent for determining who was a dependent contractor, it also began to articulate who was not a dependent contractor and thus extended LRA protections to a certain subset of workers. For example, the Board determined that owner-operators of multiple trucks, in other words, those who "in addition to his [sic] own labour, used and attempts to profit from the labour of others" were not dependent contractors (*Canada Crushed Stone (1977)* at para. 19).

More problematically, however, the Board also began to establish the degree to which someone was dependent upon a single company and in so doing drew a further distinction between being a dependent contractor or an independent contractor, thereby denying rights under the *LRA* to precariously employed workers who needed to obtain work from multiple companies to make ends meet. Generally, “the Lion’s share” of someone’s income needed to be from a single company, and those with multiple sources of income ceased to be dependent contractors (see *Nelson Crushed Stone, 1977 at para. 10*; see also *Indusmin, 1977*; and *Craftwood, 1980*). This proved problematic for a growing number of workers who lacked more traditional or stable employment with a single company and were required to seek work multiple ‘part-time’ jobs with multiple companies – often within the same industry.

While virtually all the cases during this era focused on the delivery of construction aggregate by owner-operator truck drivers, the Board examined a series of economic relationships from which broader, more universal criteria were established. In many instances, these criteria allowed the Board to interpret the legislation in such a way as to expand access to collective representation under the *Act*, though important limitations were established, especially for part-time workers or those working full-time hours but for multiple companies. While Cherry and Aloisi noted, “the practical result of the ‘dependent contractor’ category was to expand the definition of employee and bring more workers under the ambit of labour law protection,” it is more accurate to say that the result of the dependent contractor category was to bring a certain type of worker under the ambit of labour law protection (Cherry and Aloisi, 2017: 32). The Board was, at this time, unwilling to provide protection to other types of workers.

The cases explored in this chapter provide a benchmark for the Board’s interpretation of the new legislation. Moving forward, in subsequent chapters, it then becomes possible to trace the Board’s decision-making and determine if there was a change or evolution to their approach to those seeking protections as dependent contractors and, if so, to what degree. The Board continued to employ the criteria and precedent developed during this era, and the approach taken by the Board in these cases has shaped subsequent decisions. Decisions regarding dependent contractors in a wide-range of industries explored in upcoming chapters – perishable delivery, taxi and limousine drivers, and the gig economy – were informed by the decisions made in these first pivotal years following the 1975 amendment.

Chapter 5: A Neatly Illustrated Imaginary Line: The Dependency of Delivery Drivers[56]

Chapter 4 explored the first set of cases heard by the OLRB following the inclusion of dependent contractor provisions in the 1975 *Act*. These cases were clustered within a compressed period (1977 to 1981) and generally fell within a single industry (construction aggregate delivery). These construction aggregate cases – along with *Algonquin, 1981* – established the Board's general approach to determining the extent to which workers who straddled between traditional employee and entrepreneur were dependent contractors and thus covered as employees under the *Act*.

Outside of owner-operator drivers in the construction aggregate industry, the Board did not decide upon any notable cases from different industries, except for burlesque dancers in *Algonquin, 1981*. This limitation to a single industry would not last for long. As workers from other industries sought to unionize, the question of their employment status was pushed to the forefront and cases from other industries began to make their way to the Board.

This chapter covers a longer period (1978 to 2017) than the previous chapter and focuses on workers involved in the delivery of (primarily) perishable goods. While the facts of these cases share some similarities with construction aggregate delivery (for example, ownership of the 'tools' of the trade, questions about the use of substitute drivers, and the process of delivering some sort of consumer product, etc.), the outcomes were, in some cases,

[56] When analyzing two similar cases heard three months apart in 1985 – *Ottawa Newspaper Guild, Local 205 v. The Citizen (Southam, Inc.), 1985 CanLII 990 (ON LRB)* (referred to hereinafter as *The Citizen, 1985*) and *Syndicat Québécois de l'imprimerie et des communications, Local 145 v. Journal Le Droit (UniMedia Inc.), 1985 CanLII 1047 (ON LRB)* (referred to hereinafter as *Journal Le Droit, 1985*) – the Board noted their contrasts "neatly illustrated the 'imaginary line' between dependent and independent contractors" (*Journal Le Droit, 1985* at para. 25).

drastically different. As the Board noted in one of its first major cases involving dependent contractors, it would make its decisions based "upon the facts and circumstances of each case" (*Nelson Crushed Stone, 1977* at para. 13). The perishable nature of some of the products delivered by workers examined in this chapter – milk and bread for example – influenced the circumstances factored into the Board's decision-making.

The Board's reliance upon the facts and circumstances of each case is also evident in two "companion cases" involving newspaper delivery drivers (*Journal Le Droit, 1985* at para. 25).[57] Both cases involved contracted newspaper delivery drivers, but based on the specific circumstances and overall economic relationship of the parties, the Board found drivers working for *The Ottawa Citizen* to be independent contractors, while three months later it found drivers working for *Journal Le Droit* to be dependent contractors.

With the rationale behind the 1975 legislative amendments well established from the earlier construction aggregate cases, the statutory purpose test was not employed and the Board instead relied on its earlier analysis from *Adbo, 1977* in explaining its interpretation of the legislation.[58] During this era, the Board finetuned its approach by focusing upon an economic dependency and an obligation to perform duties as its guideline in determining the nature of the relationship between the parties before it. The Board also continued to employ the 11-point criteria articulated in the seminal *Algonquin, 1981*, eventually making it the leading authority in dependent contractor cases.

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[57] The two companion cases are *The Citizen, 1985* and *Journal Le Droit, 1985*. See footnote 37.

[58] See, for example, *International WoodWorkers of America v. Atway Transport Inc., 1989 CanLII 3245* at para. 69

While the cases in the late 1970s helped to interpret the purpose of the legislation, established a baseline for decision-making, and provided criteria and precedent for future decision-making, those explored in this chapter helped to refine the Board's rationale. The ongoing evolution of decision-making explored in this chapter is important to comprehend more fully the Board's impact. While the Board developed criteria for determining whether one was a dependent contractor in a relatively short time (1978 to 1981) in construction aggregate cases and *Algonquin, 1981*, other groups of workers sought similar protections. In this sense, the Board played an ongoing role in determining which groups of workers were entitled to legislative protections as employees.

Many of the cases examined in this chapter were decided between the late 1970s and early 1990s. During this time, job insecurity became a reality for a growing number of workers as the post-war standard employment relationship unraveled further. As Cranford et. al (2003: 7) note, "the term 'non-standard work' came into widespread usage when the Economic Council of Canada pronounced in its study *Good Jobs, Bad Jobs*."[59] The study found that one-half of all new jobs created in Canada from 1980 to 1988 were different from the traditional post-war model of permanent, full-time work. At the same time as work was becoming more precarious, the post-war employment regime "was stretched to its breaking point" as governments were shifting away from a consensual era of industrial pluralism and beginning "a broad-based assault on trade union freedoms," particularly against public-sector workers

[59] Economic Council of Canada. 1990. *Good Jobs, Bad Jobs: Employment in the Service Economy*. Ottawa: Ministry of Supply and Services.

(Fudge and Tucker, 2000: 289; Panitch and Swartz, 2003: 30). This era was characterized by deregulation, privatization, and a sharp decline in the manufacturing sector.

Finally, toward the end of this era, the Board began to examine the evolving realities of precarious work or "atypical work" as they referred to it at the time (*Toronto Star*, 2001 at para. 13). According to Leah Vosko, precarious work "normally involves those forms of work involving atypical employment contracts, limited social benefits and statutory entitlements, job insecurity, low job tenure, low wages and high risks of ill health" (Vosko, 2003: 1). Importantly, as it pertains to contractors, Vosko adds that precarious work "is shaped by tendencies in late capitalism whereby employers use subcontracting and other strategies to minimize labour costs and thereby lower the bottom of the labour market" (Vosko, 2003: 1).

By classifying workers as independent contractors – whether inadvertently or deliberately – employers effectively minimized labour costs and lowered the bottom of the labour market. Tucker notes that "integral to [employers'] calculations is the reduction of labour costs, which, in turn, is closely related to the legal consequences of having employees, including liability to pay minimum wages, payroll taxes, and workers' compensation premiums, and the possibility of unionization" (2005: 35). This type of atypical and insecure work is in stark contrast to the standard, post-war model of full-time and permanent employment with a single employer.

That said, the extension of the standard, post-war employment relationship was never universal, and many workers – especially women and new immigrants – were excluded from its benefits (see, for example, Forrest 1995; Fudge 1993; Cranford et al., 2003). As Eric Tucker notes, "from their inception, Canadian statutory collective bargaining schemes have only benefitted a limited segment of Canadian workers, principally male workers who possessed key skills or who were employed in mass production industries that prospered in the post-World War II period" (Tucker, 2005: 34, see also Drache and Glasbeek, 1992). This exclusion also applied to workers who were classified as independent contractors and other precarious workers, even if their employment relationship was more 'employee-like' in nature. Tucker elaborates that "precarious workers found it difficult to gain access to collective bargaining, and when they did, they often achieved only limited improvements" (Tucker, 2005: 34).

For those workers who sought status as dependent contractors, the Board possessed the power to regulate their access to collective bargaining. The Board did not simply possess influential decision-making power in singular cases, but instead it established and defined what constituted normalized or standard employment and conferred rights on those workers. By extension, it also established what was not 'employment' (and in the Board's mindset an independent contractor relationship) and excluded non-standard workers. This illustrated the Board's limited or at least temporal understanding of a certain type of idealized employment relationship in the post-war era, an understanding that would not begin to waver until the beginning of the 21st century.

Securing some form of labour protection – ideally as an employee under *the Labour Relations Act* – was a key goal for precariously employed workers. Sometimes seen as self-employed workers, contractors have historically faced an uphill battle in being deemed employees and have been excluded from basic labour law protections (Cranford et al., 2003: 3). Cases involving newspaper delivery drivers – notably *The Citizen, 1985* and *Ajax/Pickering News Advertiser, 1993* – illustrate the Board's struggles with understanding precarious work and their shortcomings in addressing the changing nature of work and employment relationship. By 2001, however, in *Toronto Star, 2001*, the Board appeared to have a better understanding of how the employment relationship had begun to move away from the post-war standard of full-time, secure work with a single company and recognized some of the challenges and realities of precarious work.[60]

Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees (International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 647) v. Dominion Dairies Limited, 1978 CanLII 443 (ON LRB) (referred to hereinafter as *Dominion Dairies, 1978*)

While cases involving workers claimed to be dependent contractors in the late 1970s and early 1980s tended to stem from disputes over employee status in the construction aggregate sector, those disputes were not limited to that industry. Workers in other areas claimed to be dependent contractors were also organizing and bringing their cases to the Board for a decision. The first such case was *Dominion Dairies, 1978*. In addition to being in a different industry, which itself presented a different set of circumstances for the Board to consider, this case had many unique circumstances and brought up new arguments that the Board had not previously considered.

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[60] Notably, in *Toronto Star, 2001* (at para. 100), the Board displayed an openness to a dependent contractor being dependent upon more than one employer – something they rejected in earlier cases such as *Craftwood, 1980* and *The Citizen, 1985*. The Board noted that it "heard the evidence of several carriers. Many of them are only carriers for *The Star*. That is their only job, and only source of income. Most, though, have other jobs and their Star income is a portion of their overall income. Abstracting the employer's argument from the specifics of The Star and its carriers, it applies also to part-time employees generally. Economic necessity or entrepreneurial energy drives many workers to work more than one job. Many of the carriers have other jobs. Those jobs do not interfere with the hours they are required to spend on The Star's business, collecting and distributing its papers" (*Toronto Star, 2001* at para. 100). This recognition represented an important development for precarious or atypical workers as those working multiple jobs – a necessary reality for many – had generally not be found to be dependent contractors due to their broad economic dependence upon more than one employer.

As in the construction aggregate cases, these workers were responsible for delivering a company's goods to its customers in their own truck. However, unlike those in the previous chapter, the drivers in *Dominion Dairies, 1978* were franchised contract-drivers who purchased their product from the dairy prior to delivery – as opposed to just delivering a product. This represented a clear difference in the forms of relationships previously considered by the Board. *Dominion Dairies, 1978* was the first instance in which the company made an explicit shift from employee status to contractor status, which might symbolize the beginning of the trend of active employer reclassification discussed by Fudge et. al (2003) and Vosko et. al (2017, p. 9-11) and in which a company wrongly (and often deliberately) changes someone's status from employee to contractor. As a result, the question of the substance of that relationship became central for the Board to consider in determining whether the franchised drivers more closely resembled employees (as they previously were) or a traditional independent contractor (as Dominion Diaries claimed they were).

In 1970, Dominion Dairies altered the relationship it previously had with its drivers. Prior to that point,

> the delivery work now performed by the contractor-drivers was performed by drivers who were employees of the dairy (many of whom are the same people). In 1970, the respondent decided that a portion of its wholesale and retail sales should be made through the intermediary of franchised contractor-drivers and that its employee drivers should be reduced in number and restricted to making wholesale deliveries. The proposition, simply put, was that a portion of the employee drivers would take over their routes, their trucks and their customers as franchised contractors (*Dominion Dairies, 1978* at para. 16).

Until this change, the employee drivers were also paid a percentage of the sales from their delivery routes. Upon becoming a franchised contract-driver, the drivers began to purchase their product from the dairy at one price and sold it to the customers at a higher price, 'profiting' from the difference. They could also grow their route with new customers or contract it as they saw fit. At first glance, this appears to be evidence of entrepreneurial activity and, along with owning the truck, suggests the contract-drivers were independent contractors. Such a conclusion, however, focuses more on the form than the substance of the relationship.

This was the first instance in which the Board addressed the question of the employee status of franchisees in the post-1975 era. While some of the owner-operator drivers in the construction aggregate industry would occasionally purchase a load from the quarry, sell it to someone, and use their truck to deliver it, such transactions were rare and represented a minimal portion of the drivers' earnings. In contrast, in *Dominion Dairies, 1978* the drivers purchased all their products from the dairy and sold it to customers.

However, a deeper analysis of the relationship between the diary and the drivers illustrated that "the relationship between the contract drivers and the dairy has not changed since the days, prior to 1970, when the drivers in questions were employees" (*Dominion Dairies, 1978* at para. 24). The contract between the dairy and the drivers described the customers as being the dairy's (and not the driver's), and if a customer was unsatisfied with the driver's service, the dairy assigned them a new driver. The Board found this to be evidence of the dairy "exert[ing] control over the quality of service provided by the contract drivers" (*Dominion Dairies, 1978* at para. 26). The prices of the product also illustrated a level of control by the dairy over the drivers, as the drivers "have no input into the determination of the suggested retail price" and if they were to attempt to charge a customer more than the suggested retail price, the dairy would "adjust the amount charged to reflect its suggested retail price when it invoice[d] the credit customer for the purchase in question" (*Dominion Dairies, 1978* at para. 24).

In fact, evidence showed that the drivers "derive[d] virtually 100 percent of their income from their work on behalf of the [dairy]" (*Dominion Dairies, 1978* at para. 30). As further evidence of their integration into the company – and unlike most of the owner-operator drivers discussed in the previous chapter – the drivers painted their vehicles in the 'Sealtest' colours and logo with money provided to them by the dairy, wore 'Sealtest' uniforms, and had the cost of their municipal peddlers' license paid for by the dairy (*Dominion Dairies, 1978* at para. 27).[61]

The Board concluded that all but one of the contractor-drivers were dependent contractors under the *Act*, and that their employment relationship had not changed – at least not in substance – from when they were previously employee drivers. Although the ownership of the trucks and the method of payment had changed, "the nature of the work, the customers, supervision and co-ordination on the part of the dairy and the product handled are in all material respects the same" and the drivers operate "under the constant control" of the dairy (*Dominion Dairies, 1978* at para. 31). The one contractor-driver who the Board found not to be a dependent contractor owned two delivery trucks, both of which were driven by people employed by the contractor-driver, rendering him an employer in his own right and thus not covered by the *Act.*

The Board also addressed the issue of paid 'helpers' that worked with some of the drivers and aided them on their delivery route, usually "on Saturdays and … [sometimes] during

[61] Sealtest was the product/brand name of the milk produced by Dominion Dairies and delivered by the drivers in question.

the summer vacation period" (*Dominion Dairies, 1978* at para. 27). The usage of helpers was commonplace, as it was while the drivers were employees prior to 1970. Nine of the twelve drivers used "an occasional helper" and three used "a helper on a steady, day-to-day basis" (*Dominion Dairies, 1978* at para. 27). Previously, in *Canada Crushed Stone, 1977*, the Board found a "qualitative distinction" between the owner-operator driver "who uses his [sic] own labour and employs no one and the owner-operator, who, in addition to his [sic] own labour, used and attempts to profit from the labour of others" (*Canada Crushed Stone, 1977* at para. 19). The Board thus needed to determine if using a helper was akin to employing a second driver (which would then make the drivers employers in their own right and disqualify them from being employees under the *Act*), or if it was something altogether different.

In making this determination, the Board considered whether the helper "merely assist[ed] the contractor in the performance of his work or in fact perform[ed] work that is separate and beyond the work done by the contractor, so that the contractor may fairly be characterized as master of a business that profits in a substantial way from the labour of others" (*Dominion Dairies, 1978* at para. 35). The Board concluded that the contractor-drivers using a paid helper (whether occasionally or regularly) remained dependent contractors under the *Act* as the "use of a young helper to lighten the load during the summer season, to shorten the hours worked on a Saturday or to eliminate the burden of stairs on a daily basis does not thrust the contractor-driver into an entrepreneurial undertaking" (*Dominion Dairies, 1978* at para. 36).[62] The Board found a qualitative difference between someone who assisted the driver

[62] The Board also cited a pre-1975 case – *Automatic Fuels Limited [1966] OLRB Rep. Apr. 22* – which found that the use of a helper did not deprive someone of their status as an employee under the Act. Similarly, in a then

with their own tasks on their own route and someone who was employed to take on a second route. Paying a helper to aid on a single route effectively cost the contractor-driver money (though it may have made their day shorter or easier), while employing someone to drive a second truck/route and paying them a wage (less than the additional revenue they brought in from route) was profiting off the labour-power of someone else.

Dominion Dairies, 1978 was important in addressing questions around so-called franchisees whose employment relationship was closer to that of a traditional employee than it was an independent contractor and business owner, despite their title. In so doing, the Board illustrated a clear example of prioritizing substance over form. The written contract between the drivers and the dairy suggested that the drivers were not dependent contractors, whereas their day-to-day functions and the overall economic relationship demonstrated both an economic dependency and an obligation to perform duties. This case also distinguished itself from *Canada Crushed Stone, 1977* in delineating between drivers with a single truck who utilized helpers and drivers who owned multiple trucks. With it's decision, the Board also appeared to have recognized some sort of misclassification on the part of the employer and used its power to correct it in favour of workers.

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unreported case – *Comfort Guard Services Ltd. (Board File No. 2007-77, unreported, Oct. 6 1978)* – the Board determined that a heating contractor did not cease to be a dependent contractor because he occasionally utilized the services of a helper. The case was later reported as *Fuel Oil & Natural Gas Service Technicians Association v. Canadian Fuel Marketers Group, Inc., 1978 CanLII 593 (ON LRB).*

Ottawa Newspaper Guild, Local 205 v. The Citizen (Southam, Inc.), 1985 CanLII 990 (ON LRB) and *Syndicat Québécois de l'imprimerie et des communications, Local 145 v. Journal Le Droit (UniMedia Inc.), 1985 CanLII 1047 (ON LRB)* (referred to hereinafter as *The Citizen, 1985*, and *Journal Le Droit, 1985)*

In 1985, the Board issued decisions in two cases surrounding the employment status of adult newspaper delivery drivers.[63] In *The Citizen, 1985*, the Board determined that the drivers in question were independent contractors. Three months later, in *Journal Le Droit, 1985*, the Board determined that the drivers were dependent contractors. This was not a case of the Board failing to apply precedent or backtracking from its earlier precedent but rather was rooted in the Board's specific understanding of a normalized or typical employment relationship. A comparison of *The Citizen, 1985*, and *Journal Le Droit, 1985* reaffirms not only the Board's evolving approach to dependent contractors and their further refinement of their demarcations, but more importantly illustrated the Board's limited understanding of precarious employment in this era and their ongoing assumption of the norm of full-time employment with a single company, a standard against which all other relationships were to be judged.

As the Board noted, "despite a number of similarities, some superficial and some more substantial," when viewed together, *The Citizen, 1985*, and *Journal Le Droit, 1985* "neatly illustrate the 'imaginary line' between dependent and independent contractors" (*Journal Le Droit, 1985* at para. 25). Both cases relied heavily on the 11-factor guideline from *Algonquin, 1981*, with the presence, absence, and relative strength of varying factors – most notably evidence of entrepreneurial activity, the selling of one's services to the market, and economic

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[63] These two cases are also noteworthy as they represented the first certification applications on behalf of newspaper distribution workers in Ontario (Tucker, 2005: 43).

mobility or independence – explaining the differing outcomes in the two newspaper delivery cases. Despite their being from the same industry, heard by the same Vice Chair, and decided a mere three months apart, their outcomes diverged and were very much reflective of the Board's limited understanding of the changing nature of work and their reluctance to extend protections to those whose relationship deviated from a more traditional understanding. Here, the Board delineated the limits of the employment relationship and began to establish who is (and who is not) an employee.

Counsel for *The Citizen* asserted that the drivers were independent contractors at common law (owned tools, chance of profit/risk of loss, etc.). They also suggested not only that there must be an economic dependence on the alleged employer, but that the economic dependence "must flow from the 'terms and conditions' regarding the performance of the 'work'" (*The Citizen, 1985* at para. 8). In other words, "counsel asserted that individuals in a casual or part-time relationship could not be 'dependent contractors' and cited the employer-side member F.W. Murray's dissenting opinion in *Superior Sand, 1978*. In that dissent, because the drivers had access to other sources of income and because the company "imposed no restrictions of a legal or practical nature on obtaining such income," any dependence was not the results of the "terms and conditions" of the arrangement between the parties (*The Citizen, 1985* at para. 8; see also *Superior Sand, 1978* at para. 8, dissent).

In short, counsel for *The Citizen* claimed that economic dependence was not simply a reflection of the percentage of income earned from an employer and a contractor being dependent upon that source of income, but that the "terms and conditions" of the relationship needed to mandate any such dependence. In this case, because the drivers worked between 2 and 4 hours per day, they had time to perform work for other companies and *The Citizen* placed no legal restrictions on their ability to do so, counsel maintained that there was no dependence flowing from the "terms and conditions" of their relationship with *The Citizen*. For its part, the union asserted that "the appropriate measure for assessing dependency is the actual source of income, not the potential for other earnings" (*The Citizen, 1985* at para. 9).

For precariously employed and part-time workers, *The Citizen's* argument was especially problematic. Their argument was not just that dependency had to flow from the terms and conditions of the relationship but that only those working full-time hours could be in a relationship of economic dependency. In other words, according to the counsel for *The Citizen*, part-time workers were not dependent because they could find employment elsewhere, unless the terms and conditions of their relationship explicitly prohibited them from doing so (see *The Citizen, 1985* at para. 8). Given the decline of the typical post-war job and the increasingly non-standard nature of employment in the 1980s, a *de facto* prohibition on classifying casual and part-time workers as dependent contractors was particularly troubling.

If accepted by the Board, this prohibition would go further than their ruling in *Craftwood, 1980*, where they determined that the *Act* did was not designed for workers to have "an 'economic dependence' on a vast number of purchasers or an entire industry" (at para. 16). There, they concluded, "it is impossible to be economically dependent on more than one person" and resemble an employee in a multitude of economic relationships (*Craftwood*, 1980 at para. 16). Such an approach had the potential to be problematic for workers seeking employee status if their work was precarious to the point of needing to work multiple jobs. By virtue of having a second source of income – perhaps out of necessity – someone could potentially be rendered an independent contractor, even if they fit most of the criteria for being a dependent contractor in each of those individual relationships. In an era of rising precarity that saw a growth in the number of workers holding multiple jobs (see, for example Economic Council of Canada 1990; Schellenberg and Clarke, 1996, cited in Cranford et al., 2003: 7), the Board's understanding of, and approach to, changing employment relationships became increasingly important.

In *Craftwood, 1980*, the owner-operators behaved like entrepreneurs, had economic relationships with multiple companies, and worked full-time hours. Counsel for *The Citizen* asserted that part-time and casual workers should not be considered dependent contractors because they *could* have behaved like entrepreneurs, *could* have pursued economic relationships with multiple companies, and *could* have worked full-time hours if they wanted to as there was nothing legally (such as non-complete clause) or practically (no additional time due to full-time work with a single company) restricting them from doing so.

In coming to their decision in *The Citizen, 1985*, the Board considered the position of the contract drivers seeking dependent contractor status relative to both actual employee drivers of *The Citizen* (who distributed the evening edition of the paper) and certain independent contractors who also delivered *The Citizen*. They determined that the circumstances of the drivers in question were in "sharp contrast" to actual employee drivers of *The Citizen* and found that a comparison with independent contractors "did not assist" the applicant union (*The Citizen, 1985* at para. 12-13). The Board also determined that there was not a strong identification with the company (i.e. no use of logo on trucks), that the company was not involved in the selection of the trucks – suggesting independent contractor status – and found that the financial arrangements between the parties "do not unequivocally point in one direction" (*The Citizen, 1985* at para. 16).

The Board drew also heavily on *Algonquin, 1981*, and found that that two factors were "of particular interest in this case": 1) economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes, and 2) whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer (*The Citizen, 1985* at para. 19). In the Board's view, the drivers were not integrated into the company's operation and their economic mobility was "unusually high" (*The Citizen, 1985* at para. 19). The lack of restrictions on working for other companies, including competitors, combined with the time to do so, was particularly convincing for the Board.

Problematically, at least for advancing protections for non-standard workers, the Board was convinced by the company's argument that "individuals in a 'casual' or 'part-time' relationship could not be 'dependent contractors' with the meaning of section 1(1)(h)" of the *Act* (*The Citizen, 1985* at para. 8). They drew a distinction between being in a position of economic dependence more generally and being in a position of dependence as a direct result of the conditions of a particular economic relationship. This interpretation was a departure from both the legislation and precedent in previous cases, put those in a non-standard 'employment' relationship in a more vulnerable position, and negated of the benefits of the *Act's* dependent contractor position because it placed them outside of a legally recognized employment relationship. The *Act* covered a traditional employee who was casual or who worked part-time but was interpreted as not covering a contractor who was casual or who worked part-time. In short, the labour market was changing due to the rise of non-standard work, but this case illustrated that the Board was not keeping up with this reality and reflecting this shift in its decisions.

While the Board recognized that someone could be dependent upon multiple employers (*Craftwood, 1980*) but not on an industry as a whole (*Algonquin, 1981*), they were "of the view, though, that the economic dependence necessary under the definition in section 1(1)(h) of the Act must flow from the terms and conditions of the relationship between parties" (*The Citizen, 1985* at para. 20). In the case of a driver for *The Citizen*, that Board maintained that "in a sense, he [sic] is in a position of economic dependence [but] [t]hat dependence, however, does not flow from the terms and conditions of the relationship" (*The Citizen, 1985* at para. 20). Here, while the drivers depended upon *The Citizen* for a bi-weekly pay cheque to make at least some level of income, they were not legally or practically dependent upon *The Citizen* for their economic well-being because there was nothing preventing them from taking on additional work elsewhere.

Since the terms and conditions of their work for *The Citizen* did not preclude them from working elsewhere, and the practicalities of their work allowed them to work elsewhere if they chose (i.e. they worked approx. 2 hours/day, 6 days/week), the Board reasoned that they lacked the economic dependence upon *The Citizen* required to establish the threshold of being a dependent contractor under the *Act*. To be sure, however, the *Act* itself did not refer to a threshold – it simply required economic dependence and an obligation to perform duties. This case introduced a question of the degree of dependence, and for an increasingly precarious workforce, the Board's approach to placing limitations on part-time and casual workers being covered by the *Act* as dependent contractors represented a problematic interpretation.

This approach represented a disconnect between the Board's traditional understanding of employment and the changing economic relationships between companies and workers in the neoliberal era and represented a noteworthy limitation of the Board. The growth of precarious work presented the Board with more cases involving dependent contractors and made their approach to these workers more important. If, however, the Board continued to focus on the threshold of hours for precarious workers to become employees, fewer contractors would be deemed employees under the *Act*. Conversely, if the Board were to continue to expand employee status to contractors, they would need to gain a more fulsome understanding of precarious and casual work, including multiple job holders, as was becoming more commonplace in this period.

In fact, the Board's interpretation that the *Act* did not cover a casual or part-time contractor represented a marked departure from their earlier position in *Adbo, 1977*. There, the Board simply asserted that "in order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be 'under an obligation to perform duties for that person' roughly analogous to that of an employee" (*Adbo, 1977* at para. 27). Although they drew a distinction between economic dependence and economic vulnerability, their decision did not preclude part-time or casual workers from securing dependent contractor status. If someone was in a position of economic dependence upon and under an obligation to perform duties for a person or company, they were a dependent contractor. The fact some had no restrictions on them working for another company and having the time to do so did not preclude their coverage under the *Act*. Granted, the owner-operator drivers in *Adbo, 1977* worked full-time and their broker accounted for virtually all their work opportunities, but they were not restricted from working for another broker or for a competitor of Adbo. Much like it did in *Nelson Crushed Stone, 1977*, the Board spoke of the amended legislation expanding access to bargaining rights to those contractors who were closely analogous to traditional employees. With their decision in *The Citizen, 1985*, the Board made it clear that this expanded access was reserved largely for those who resembled traditional *full-time* employees. This highlighted the Board's dated understanding of the changing nature of work, but also represented a clear limitation of the Board as an agent of progressive change for precarious workers.

The Board's use of the norm of full-time employment to judge other employment relationships presented a significant problem for part-time and casual workers, whether working part-time by choice or due to an absence of full-time work. The Board's logic in *The Citizen, 1985* had the potential to limit further expansion of employee status and its accompanying protections at a time when full-time, permanent work for a single employer was declining (see, for example, *Craftwood, 1980*; *Algonquin, 1981*; and *Journal Le Droit, 1985* at para. 20). At this juncture, the Board's understanding of the employment relationship was still fixated on a more traditional understanding of post-war work.

This understanding of the traditional post-war employment relationship was also reflected in the Board's decision in *Journal Le Droit, 1985*, though the outcome was different from that in *The Citizen, 1985*. Not surprisingly, both sides' arguments were informed heavily by the decision in *The Citizen, 1985*. The union argued that there were some differences between the cases that, "while not 'earth-shattering' in themselves, had a cumulative effect of 'nudging' the findings to the dependent contractor end of the dependent-independent contractor continuum" (*Journal Le Droit, 1985* at para. 7). Not surprisingly, the company maintained that the distinctions were insufficient to justify a different conclusion than *The Citizen, 1985* and that the *Journal Le Droit* drivers in question were similarly independent contractors.

The Board assessed this case by its facts and circumstances against the backdrop of *The Citizen, 1985*. Rather than applying precedent from earlier cases, the Board "regard[ed] the *Citizen* and *Le Droit* as 'companion' cases" that "neatly illustrate the 'imaginary line' between dependent and independent contractors" (*Journal Le Droit, 1985* at para. 25). While recognizing that the "factual determination is more difficult than in the *Citizen*," the Board determined the drivers for *Journal Le Droit* were dependent contractors (*Journal Le Droit, 1985* at para. 12).

The Board examined three 'clusters' of facts in *Journal Le Droit, 1985*, and the differences between the cases were illuminated in one such cluster. The first cluster – the identification of the company with the contractors – revealed some differences, mainly that *Le Droit* made stickers and decals available to the drivers for their vehicles and many drivers purchased jackets and other logo-bearing clothing, though neither was required. The second cluster – ownership and financing – revealed little difference as neither newspaper was involved with purchasing, financing, or licensing vehicles. The third and most important cluster – the financial arrangements between the parties – revealed "real differences" between the cases (*Journal Le Droit, 1985* at para. 15). While a formula with some room for individual negotiation was used in *The Citizen, 1985*, the basis for *Le Droit's* payments was "not as clear" (at para. 15). The price of gasoline impacted the prevailing rate, all drivers were paid for waiting time, and the driver's immediate supervisor would seek increases on behalf of the drivers.

The eleven factors from *Algonquin, 1981* also informed the outcome of the case. The use of substitute drivers revealed "significant differences" as *Le Droit* was "far more involved" in their usage (*Journal Le Droit, 1985* at para. 18). Additionally, the drivers' lack of economic mobility, their integration into the company, and their lack of control over work "strongly support[ed] a finding of dependent contractor status" (*Journal Le Droit, 1985* at para. 20).

The drivers were more integrated into the company as they were required to do more than just deliver the paper (for example, they were required to manually count papers, return unsold papers, deliver both promotional material and the *Globe and Mail* under separate remuneration) and at least two long-service drivers enjoyed retirement ceremonies upon their retirement. They were also subject to more monitoring as a *Le Droit* delivery manager provided them with training. The manager also insisted upon specific sequences of drop-offs, and drivers were not always permitted to alter their manifest (*Journal Le Droit, 1985* at para. 23).

Finally, and perhaps most persuasively, the economic mobility of the drivers was "seriously restricted" and a major difference from *The Citizen, 1985*. Although there were no legal prohibitions against working elsewhere, the Board determined that the circumstances under which the drivers worked presented a "practical impediment" to doing so (*Journal Le Droit, 1985* at para. 20). Here, the part-time/casual versus full-time distinction played a prominent role. Unlike in *The Citizen, 1985*, where drivers worked approximately 2-4 hours per day, the drivers in *Le Droit, 1985* worked 5 or 6 hours per day, which "approaches that of a normal work day" and was often extended due to printing and production delays (*Journal Le Droit, 1985* at para. 20).

While other factors informed the Board's decision – the use of substitutes, integration into company, and control over work – the workers' economic mobility and selling of services to the market were especially important. Because they were more similar to standard or full-time workers, drivers for *Journal Le Droit* were dependent contractors under the *Act*, while non-standard or casual drivers for *The Citizen* were not. While other factors also explained the Board's decision and no single factor was determinative, the lack of impediments to additional work and the lack of hours worked jeopardized any expanded coverage of bargaining rights that the Board spoke of in earlier cases (see, for example *Nelson Crushed Stone, 1977* at para. 12 and *Adbo, 1977* at para. 24).

In the conclusion of their decision in *Journal Le Droit, 1985*, the Board juxtaposed the two cases and explained how one group of newspaper delivery drivers were independent contractors and excluded from bargaining rights under *the Act*, while another group of newspaper delivery drivers were dependent contactors and afforded bargaining rights under the *Act*. Of these divergent outcomes, they noted:

> while some factors merely 'nudge' the assessment toward the dependent contractor side of the imaginary line and some may be described as neutral, none strongly point to a status of independent contractor. In contrast to the *Citizen* case, a number of factors in the instant case, in the Board's view, do favour a finding of dependency relationship including the financial arrangements, the selection and use of substitutes, entrepreneurial activity/marketing and economic mobility/integration/ control (*Journal Le Droit, 1985* at para. 24).

Together, *The Citizen, 1985* and *Le Droit, 1985*, serve as an important case study into the Board's approach and decision-making process in the same industry. The Board analyzed the facts and circumstances in *Journal Le Droit, 1985* in and of themselves, but also in relation to *The Citizen, 1985*. In coming to their conclusion in *Journal Le Droit, 1985*, the Board noted that it:

> regards the *Citizen* and *Le Droit* as "companion" cases, in a sense. The assessment of dependent or independent contractor status is a factual determination in the context of the circumstances of each case, an assessment which is often not a straightforward matter. These two cases, despite a number of similarities, some superficial and some more substantial, neatly illustrate the "imaginary line" between dependent and independent contractors. In the *Citizen,* the Board concluded that, on balance, the drivers fell on the independent contractor side of the fictional line. In the instant case, the Board, again on balance and for the reasons set out above, finds that the *Le Droit* drivers fall on the other side of that line (*Journal Le Droit, 1985* at para. 25).

The decision was informed largely by the eleven factors established in *Algonquin, 1981* and compared in Table 5.1. As noted, these cases illuminated the 'imaginary line' between dependent and independent contractors. For non-standard workers, the 'dependent contractor side of the line' was a mirage as their part-time or casual status prevented them from securing bargaining rights alongside their full-time contemporaries.

Despite the different outcome for the drivers in *Journal Le Droit, 1985*, the Board's decision-making remained grounded in the post-war mindset of full-time employment with a single employer and, by extension, reinforced an increasingly dated model of employment and exacerbated the challenges faced by those whose work did not meet conditions that were increasingly less common. Had it not been for the practical impediments to *Journal Le Droit* drivers working for another employer, the Board would likely have found them to also be independent contractors and unable to unionize. The Board had yet to catch up with the realities of a shifting employment relationship and risked denying part-time workers benefits under the new legislation, leaving them in a position of further precarity.

Table 5.1: The application of the eleven factor criteria from *Algonquin, 1981* to *The Citizen, 1985* and *Journal Le Droit, 1985*

Factor from *Algonquin, 1981*	**Impact in *The Citizen, 1985***	**Impact in *Journal Le Droit, 1985***
The use of, or right to use substitutes	Permitted. *Points to independent contractor*	"Le Droit, by contrast, is far more involved with substitutes" (at para. 18). *Points to dependent contractor*
Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials	Drivers owned their truck, paid for relevant fees, upkeep, etc. *Points to independent contractor*	"…the respondent is not significantly involved with the drivers in this area" (at para. 15). Owned their truck. *Points to independent contractor*
Evidence of entrepreneurial activity	"…no restrictions whatsoever in earning other income, including working for competitors of the company" (at para. 19). *Points to independent contractor*	"…virtually no evidence" (at para. 19). *Points to dependent contractor*
The selling of one's services to the market generally	No prohibitions against. *Points to independent contractor*	"…virtually no evidence" (at para. 19). *Points to dependent contractor*
Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes	"…unusually high" (at para. 19). *Points to independent contractor*	"…in contrast to the Citizen drivers, is seriously restricted" (at para. 20). *Points to dependent contractor*
Evidence of some variation in the fees charged for the services rendered	"…do not point unequivocally in one direction." *Neutral*	"…the Board regards the financial arrangements as pointing toward the dependent contract end of the continuum" (at para. 16). *Points to dependent contractor*
Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer	"…the Board does not consider the drivers have been integrated into the company's operation" (at para. 19). *Points to independent contractor*	"…may be reasonably described as integrated into, not merely coordinated with, the respondent's operations" (at para. 21). Owned their truck. *Points to dependent contractor*

The degree of specialization, skill, expertise, or creativity involved	None. "...in the absence of "integration" into the respondent's organization, the disputed individual is "self-employed" professional" (*Algonquin Tavern, 1981* at para. 64). *Points to independent contractor*	"…is not relevant as this is unskilled work" (at para. 16). *n/a*
Control of the manner and means of performing the work — especially if there is active interference with the activity	Present, but "flowing from the nature of the respondent's business" (at para. 13). *Points to independent contractor*	"…more 'monitoring' of the drivers at Le Droit…[and] also evident by the arrangements made for one driver, Whissel" (at para. 23). *Points to dependent contractor*
The magnitude of the contract amount, terms, and manner of payment	No deductions. *Points to independent contractor*	No deductions. *Points to independent contractor*
Whether the individual renders services or works under conditions which are similar to persons who are clearly employees	"…the circumstances of the drivers in questions stand in sharp contrast [to employees]" (at para. 12). *Points to independent contractor*	"…not available here" (at para. 12). *n/a*

Retail, Wholesale and Department Store Union (AFL:CIO:CLC) v. Metroland Printing, Publishing and Distributing Limited (Ajax/Pickering News) Advertiser, 1993 CanLII 7838 (ON LRB) (referred to hereinafter as *Ajax/Pickering News Advertiser, 1993*)

Within five years of the Board's decisions in *The Citizen, 1985* and *Le Droit, 1985*, the Retail, Wholesale and Department Store Union (RWDSU) brought certification applications forward on behalf of delivery drivers for two much smaller community newspapers, *Ajax/Pickering News Advertiser* and *Oshawa/Whitby This Week*. Both were owned by the same corporate entity, Metroland Printing, Publishing, and Distributing. The competing precedents from *The Citizen, 1985* and *Journal Le Droit, 1985* resulted in questions as to whether drivers for other newspapers were dependent contractors (as they were in *Journal Le Droit, 1985*) or independent contractors (as they were *in The Citizen, 1985*). This lack of clarity was not without reason. As the Board rightly noted, "the Board's jurisprudence demonstrates that it can be quite difficult to distinguish between 'dependent' and 'independent' contractors" (*Ajax/Pickering News Advertiser, 1993*, at para. 5).

While cognizant of their own approach of determining employment status based "upon the facts and circumstances of each case" (*Nelson Crushed Stone, 1977* at para. 13), the Board noted there were many "grey areas" in the case before them (*Ajax/Pickering News Advertiser, 1993*, at para. 6). They added, however, that it was not simply a matter of analyzing the facts of each case, but rather any decision needed to be made with "regard to the context of the industry in which the individual is engaged" (*Ajax/Pickering News Advertiser, 1993*, at para. 6). In this sense, the realities of the newspaper delivery industry were different from other industries – construction aggregate, for example – and those realities had the potential to influence the outcome of the case. For this reason, both *The Citizen, 1985* and *Journal Le Droit, 1985* were "of particular assistance in [the Board's] determination" (*Ajax/Pickering News Advertiser, 1993*, at para. 5).

At face value, the facts of this case – which were undisputed by the parties – suggested that the drivers were dependent contractors. For example, they were responsible for picking up a specified product at a specified location at a specified time, they were required to count the papers to confirm they received the accurate number, and then ultimately delivered the product at specified locations by a specified drop-off time. The Board noted, however, "these factors are less significant than they might first appear when examined in the context of the newspaper industry" (*Ajax/Pickering News Advertiser, 1993*, at para. 13).

While delivery of an item – construction aggregates for example – at a specific pickup time and dropped off by a specific delivery time entailed a lack of control over the manner and means of performing the work, this same logic was not an automatic equivalent when applied to the realities of the newspaper industry. As the Board asserted in both *The Citizen, 1985* and *Journal Le Droit, 1985,* a newspaper may be likened to a perishable good that needs to be picked up at the right time and delivered by the correct time to the correct customer. In this sense, these facts may be less of evidence of control by an employer over an employee, but instead a functional reality of the industry and having no bearing on someone's employee status.

The Board found more parallels between *Ajax/Pickering News Advertiser, 1993* and *The Citizen, 1985* than with *Journal Le Droit, 1985* and determined that the drivers in question were not dependent contractors. No one factor was determinate, and the Board maintained that the degree of economic dependence – if it existed at all – did not flow from the terms and conditions between the drivers and Metroland and was certainly "far less than that noted by the facts in Journal Le Droit [1985]" (*Ajax/Pickering News Advertiser, 1993*, at para. 29). The Board made special note of the fact that "some of the contractors have other full-time jobs or businesses [and that] many use others to fulfill all or part of their agreement" (*Ajax/Pickering News Advertiser, 1993*, at para. 29).

<u>Table 5.2: The application of the eleven factor criteria from *Algonquin, 1981* to *Ajax/Pickering News Advertiser, 1993*</u>

Factor from *Algonquin, 1981*	**Findings in *Ajax/Pickering News Advertiser, 1993***
The use of, or right to use substitutes	"The evidence clearly discloses that the contractors are responsible for paying substitutes or helps. On the other hand there is evidence that the practice is to pay substitutes the same rates as the drivers themselves receive from Metroland" (at para. 24-25)
Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials	"The fact that some of the drovers regular use others to perform all or significant portions of their obligations under the agreement…is a factor which points strongly towards independent contractor status" (at para. 26)
Evidence of entrepreneurial activity	"…the majority of drivers (and certainly the greater majority of those who filed tax returns) treated themselves as independent or self-employed business persons for tax purposes. They were able to take advantage of tax laws by claiming various deductions which are not available to employees" (at para. 20)
The selling of one's services to the market generally	"As noted some of the drivers have established businesses and it is these independent proprietorships which have entered into the agreement with Metroland" (at para. 23)
Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes	"…one driver estimate[d] he works more than 55 hours per week for another employer and that 60% of that time is spent in the USA and away from the Ajax/Pickering area"
Evidence of some variation in the fees charged for the services rendered	"With respect to these financial arrangements we find that although there is evidence of a limited amount of negotiation of the rates paid under the agreement (with Metroland first and unilaterally setting a standard rate) on balance the financial arrangement set out in the agreement does not unequivocally point to either the dependent or independent contractor question" (at para. 15)
Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer	"In our view this treatment for tax purposes is some evidence of entrepreneurial activity, affects the ability of the drivers to increase profit and reduce loss, and also distinguishes them from other employees at Metroland"(at para. 20).
The degree of specialization, skill, expertise or creativity involved	n/a

Control of the manner and means of performing the work — especially if there is active interference with the activity	"On balance therefore we find the factor of control to be mostly a neutral factor with perhaps only a slight shading toward the independent contractor end of the spectrum" (at para. 13)
The magnitude of the contract amount, terms, and manner of payment	"…the financial arrangement set out in the agreement does not unequivocally point to either the dependent or the independent contractor direction" (at para. 15)
Whether the individual renders services or works under conditions which are similar to persons who are clearly employees	"unlike Metroland employees, the drivers do not fill out employment application forms, do not receive annual performance appraisals, are not subject to Metroland's discipline polices (although there are certain rules relating to their delivery of the product), receive no training from Metroland, receive no benefits, have no deductions made on their behalf and have no vacation entitlement. Unlike Metroland employees, drivers are not required to notify Metroland if they are sick or will be absent" (at paras. 21-22)

The Board again relied heavily upon the criteria from *Algonquin, 1981*, as described in Table 5.2 above. An analysis of the various factors led the Board to conclude that the Metroland drivers "fall more closely to the Citizen's independent contractor end of the bookshelf" (*Ajax/Pickering News Advertiser, 1993*, at para. 6). In so doing, the Board further built upon their existing precedent on cases involving delivery – especially of 'perishable' goods such as a newspaper – by maintaining that it needed to have "regard to the context of the industry in which the individual is engaged" (*Ajax/Pickering News Advertiser, 1993*, at para. 6).

The Board's assertions were especially problematic from the perspective of part-time or precarious workers. In *The Citizen,* 1985, the Board determined that "individuals in a 'casual' or 'part-time' relationship could not be 'dependent contractors' with the meaning of section 1(1)(h)" of the *Act* (at para. 8). Because there were no legal impediments from accepting employment elsewhere (regardless of whether other work practical or even available), the workers were not dependent contractors. For those who were underemployed or involuntary working part-time, the inability to secure bargaining rights as an employee under the *Act* due to their part-time or casual status not only penalized them for being precarious but also eliminated a potential avenue to become less precarious through bargaining more secure employment. The Board's reasoning thus created something of a self-fulfilling prophecy. In an industry in which full-time work is difficult – if not impossible – to secure, workers are likely to remain in a highly precarious state and are either forced to work multiple, precarious jobs or leave their job to another industry offering full-time work to have the opportunity to become an employee.

The Board applied this logic again in *Ajax/Pickering News Advertiser, 1993*. In concluding that Metroland drivers were not dependent contractors, it determined

> that the number of hours required to fulfill the agreement does not practically impede the economic mobility and independence of the drivers. Neither in there any legal impediment which restricts the contractors' scope of activity. Although the contractors are restricted from delivering other products *while* they are delivering Metroland products – there is no impediment which restricts the contractor from delivering other products at other times – or which prevents contractors from doing other jobs. Exclusivity of labor is not a part of the relationship between Metroland and these drivers (*Ajax/Pickering News Advertiser, 1993* at para. 28).

While the above statement is true in that there was not a legal prohibition on the drivers working for other companies, it is nevertheless problematic that it informed the Board's decision-making. Although the substance of the Metroland drivers' relationship was more consistent with that of a contractor than of an employee – especially considering the factors from *Algonquin, 1981* and the precedent from *The Citizen, 1985* – the Board's approach to the question of exclusivity and the absence of legal impediments to other work was misplaced.

This trend towards exclusion from coverage under the *LRA* for part-time workers (who may or may not have also been multiple jobholders) represented a significant movement away from the Board's application of the statutory purpose test in early cases such as *Nelson Crushed Stone, 1977.* In that case, the Board saw the additional of dependent contractor language as an opportunity for those "requiring the assistance of collective bargaining" to secure some semblance of a voice at work, a purpose that it suggested was "more than apparent" (*Nelson Crushed Stone, 1977* at para. 12). For precarious workers, however, it would take more time before it became 'more than apparent' that they, too, required legislative protection and bargaining rights. The Board's decision work represented a clear limitation in addressing the realities of precarious work.

Whereas the first wave of dependent contractor cases heard in the late 1970s involving the delivery of construction aggregates generally found the drivers to be dependent contractors, the same was not true of cases involving newspaper delivery drivers in the 1980s. The Board's new logic – that one was an independent contractor absent a legal impediment prohibiting them from working for another employer – meant that part-time workers who worked a limited number of hours were excluded from rights afforded to dependent contractors under the *LRA*. Despite contractors securing some early victories from the Board that expanded bargaining rights, decisions in *The Citizen, 1985* and *Ajax/Pickering News Advertiser, 1993* further delineated the terms of precariousness through the Board's narrow and dated approach to defining dependent contractors. These limitations reinforce the reality that the Board was not an institution that could be relied upon to ensure an ongoing expansion of rights for contractors, notably those who effectively worked part-time hours and had no contractual prohibition against taking on additional work.[64] The Board's approach to work, which failed to appreciate the growing precarity faced by workers and the rise of part-time employment, was dated and reflected an understanding of employment relations increasingly out of reach for a growing share of the working class. The lack of response from the Board to address and attempt to rectify these shifting conditions meant that instead the Board was actively reinforcing precarity. This approach regulated the status quo, provided no benefit to the growing number of precarious workers, and gave legal legitimacy to those companies who were actively constructing a more precarious workforce. The Board, however, revisited its approach to newspaper delivery drivers (and precarious workers more generally) in the early 2000s.

Communications, Energy and Paperworkers Union of Canada Local 87-M, Southern Ontario Newspaper Guild v. Toronto Star Newspapers Ltd., 2001 CanLII 6537 (ON LRB) (referred to hereinafter as *Toronto Star, 2001*)

It took until the early 2000s for the Board to grapple fully with the issue of precarious work, in the now seminal precedent-setting case *Toronto Star, 2001*. The case was significant in its own right, given the large, proposed scope of the bargaining unit, potentially 2800 members (*Toronto Star, 2001* at para. 4). The case was also notable because it was the first OLRB decision on dependent contractors that engaged with the notion of precarious work in any meaningful

[64] Despite finding that the delivery drivers were not dependent contractors, the Board's decisions in *The Citizen, 1985* and *Ajax/Pickering News Advertiser, 1993* did not necessarily put a chill on attempts at organizing newspaper delivery drivers. See, for example, *Kitchener-Waterloo Record, 1997, OLRD No. 432* and *Teamsters Local Union 938 v Toronto Sun (Sun Media Corporation), 1999 CanLII 19950*, though the Board relied upon its precedent from *The Citizen, 1985* and *Ajax/Pickering News Advertiser, 1993* in determining that the Kitchener-Waterloo Record drivers were independent contractors. In, *Teamsters Local Union 938 v Toronto Sun*, the Board dismissed the application without making a finding on the employment status of the drivers. See Tucker, 2005: 44.

way and recognized these workers' growing vulnerability. *Toronto Star, 2001* spoke forcefully to the issues faced by part-time workers and multiple jobholders in a way that challenged the Board's prevailing logic in *The Citizen, 1985* and *Ajax/Pickering News Advertiser, 1993.* In making its decision, the Board was cognizant of the realities faced by precarious workers in a way that it was not in previous cases in the mid-1980s and early 1990s. This newfound understanding of precarious work resulted in a decision that afforded *Toronto Star* delivery workers rights as employees (dependent contractors) under the *Act* that the Board had denied similarly situated workers in earlier cases.

Indeed, the Board drew from some academic literature in providing its reassessment of employment relationships given the growth of non-standard work. Broadly speaking, it noted that

> in the past 20 years there has been a significant shift in the nature of employment generally, from typical full-time regular work to atypical forms of work…The hallmark of these 'atypical' relationships is that employers shift the risks associated with employment to the worker. The model of work relations becomes 'task' based, rather than 'time' based. In this atypical scenario no long-term job tenure is offered, as the worker is only called upon when the employer needs extra help; compensation is based on some variant of payments by result; and the employer can terminate the contract at will if it deems the calibre of service provided by the worker to be unacceptable. This 'task' model is best personified by 'consultants' who expressly profess themselves to be 'self-employed', but it also applies to many casual workers, homeworkers and agency-supplied 'temporaries' who do not hold themselves out to be business operators (*Toronto Star, 2001* at para. 13).[65]

Focusing on the changing nature of work in Canada, the Board continued:

> Self-employment has grown steadily in Canada over the last 20 years. The gap in income between the self-employed and employees has steadily diminished over that period. Non-standard forms of employment and engagement are increasingly prevalent. Atypical forms of engagement need therefore to be scrutinized carefully for their substantive content. They need to be considered less by their formal contractual

[65] The Board cited H. Collins, 1990 and England et. al, 1998.

characteristics, and more by how they actually operate (*Toronto Star, 2001* at para. 14).[66]

Like most other newspaper delivery cases before it, the facts in *Toronto Star, 2001* were relatively straightforward and uncontested by the parties. The difference, however, was the Board's newfound understanding of the changing nature of work and its impact on contactors such as *Toronto Star* carriers. These carriers worked seven days per week, every week of the year, with Christmas Day as their only holiday. Each day, they arrived at pre-determined drop-off locations between 2:00 and 4:00 a.m. to collect and count the papers they were to distribute and insert any flyers or other inserts, following which carriers spent between one-and-a-half to three hours delivering the paper each weekday (and longer on weekends). Once per week, the carriers were given a route list with names, addresses and phone numbers of customers, days of delivery, type of payment method (office paid vs. carrier collect) and any "specific instructions for delivery [that] the carrier is expected to comply with" (*Toronto Star, 2001* at para. 32). There was a target delivery time of 5:30 a.m. in the suburbs, and 6:00 a.m. in the city, and the "perishable nature of the news and the product [made] that limitation necessary" (*Toronto Star, 2001* at para. 32).

The expectations, however, were "more complicated and concentrated" as the weekend approached (*Toronto Star, 2001* at para. 35). The weekend delivery included the 'TMC' (a free version of the 'Best of the Star') and various advertisements and inserts for subscribers, some of which were available for pickup on Fridays. While the regular newspaper delivery and the TMC delivery used to be done by separate distributors, a carrier was "obliged

[66] The Board cited S. Crompton, 1993.

to assume responsibility" for newly available TMC routes "as a condition for maintaining [their] 7-day contract" as newspaper delivery drivers (*Toronto Star, 2001* at para. 35). Overall, the parties agreed that "carriers have no choice as to what they will distribute. They must distribute the paper each day with any inserts, advertising supplements, coupon books and the like. They must also deliver the TMC…. [and] may not add any items of their own for distribution" (*Toronto Star, 2001* at para. 38).

Unlike with the other newspapers discussed in this chapter, regular collection duties for cash-on-delivery (COD) customers were a major feature of the carriers' tasks, accounting for between four to six hours a week of responsibilities (*Toronto Star, 2001* at para. 46). That said, "the Star's policy (and generally the carriers' interest) [was] to reduce the number of C.O.D. customers and to increase the number of office-pay subscribers" (*Toronto Star, 2001* at para. 40). The form of relationship was that all subscribers were effectively customers of the carrier, who purchased the papers from *The Star* and sold them (at a higher price) to those customers. Despite this, "a carrier ha[d] no right him or herself to cut off delivery of The Star to a defaulting customer" (*Toronto Star, 2001* at para. 44). The impact of office-paid subscriptions, however, meant that those subscribers were effectively clients of the newspaper and not the carrier. By 2001, approximately 70 percent of subscribers were office-pay subscribers, though the specific number varied from route to route (*Toronto Star, 2001* at para. 47).

As in most cases, the Board turned to the factors it established in *Algonquin, 1981* as the leading precedent. Since 1981, however, those factors had been refined in some ways. For example, in *The Citizen, 1985*, the Board noted that the factors "must be utilized with caution as the relevant indicia may vary by industry" (at para. 15). In *Journal Le Droit, 1985*, they divided the eleven factors from *Algonquin, 1981* into three major categories: identification with the employer, ownership of materials, and the financial arrangements between the parties (at paras. 13-16). Cognizant of the industry-specific factors of the newspaper delivery industry, the Board drew upon the existing jurisprudence and focused on six indicators in coming its decision: integration within *The Star's* business, engagement/terms of engagement of the carriers, the nature of the work, limitations upon entrepreneurial activity, monitoring the carriers, and terminating the services of a carrier.

1) *Integration within The Star's business*

The integration, or lack thereof, with the company's overall business is an important factor in determining whether one is a dependent contractor. Traditional employees are fully integrated within the company (their employer) while independent contractors are much less so, if at all. *The Star* integrated the delivery drivers into its business in both substantial and minor ways.

For *The Star*, an integrated delivery process was central to their overall financial well-being as it derived 60 percent of its revenue from home delivery. As the Board asserted, *The Star's* "economic success depends measurably upon the effectiveness and reliability of its home delivery operation [and that] the carriers must perform their work properly and punctually for the profitable success of the paper" (*Toronto Star, 2001* at para. 49). Despite this, *The Star* maintained a distinction between the carriers and its regular employees in the method of hire, pension and benefit access, and bonuses/profit sharing. While their purpose and role were integrated into the company's business model, the drivers themselves were not integrated into the company in the same way as traditional employees. On a less significant note, the *Star* provided the carriers with *Toronto Star* branded winter coats, a cardboard 'On Delivery – *Toronto Star*' sign, and branded Christmas calendar cards for customers, facts that the Board posited as "similarities with the facts in *Journal Le Droit*" (*Toronto Star, 2001* at para. 55).

2) Engagement and terms of engagement of the carriers

Carriers were hired by a district representative (DR) who "ensure[s] that the individual's other job(s) do not interfere with his or her anticipated obligations as a carrier" (*Toronto Star, 2001* at para. 58). *The Star* may also have tried that applicant as a substitute for another carrier as part of an evaluation before they were awarded a route of their own. Once approved as a carrier, the assignment of specific routes was within the DR's discretion and the new carrier was given a manual by *The Star*, "making clear exactly how *The Star* expects the papers to be collected, sorted and delivered and how it expected notices to customers and payments to be made" (*Toronto Star, 2001* at para. 62). The contract, which was for an indefinite period, was paid "whatever *The Star* determines is the rate applicable," which varied from carrier to carrier (*Toronto Star, 2001* at para. 64).

Carriers tended to treat the cost of maintaining their vehicle (and the cost of the vehicle itself) as a business expense, and they deducted such expenses against their income for taxation purposes. *The Star* took no deductions, except for an optional distributor accident insurance policy (of which roughly 80 percent of carriers elected to take), the offering of which the Board viewed as "indicative of an on-going relationship" (*Toronto Star, 2001* at para. 70).

3) The nature of the work

This factor was of little use and the Board largely glossed over it. They noted, "the work of a carrier does not require much specialization, skill, expertise or creativity" and that "the carrier decides how [they] will deliver the paper," subject to certain restrictions (i.e., the paper was not allowed to blow in the wind) (*Toronto Star, 2001* at para. 74-77).

4) Limitations upon entrepreneurial activity

At the time of the hearing, there were approximately 2000 separate seven-day routes, virtually all of which were held by a carrier with a single route. *The Star* had a clear preference that that each carrier have only a single route, unilaterally determined the size, extent and location of the route, and could adjust the route's size or composition at any point (*Toronto Star, 2001* at para. 81). This level of unilateral control over the routes suggested that the routes were the business interests of a single corporation, as opposed to roughly 2000 separate business interests of roughly 2000 carriers. As the Board noted, *The Star's* control over the (re)assignment and composition of routes meant that the carriers "cannot make newspaper delivery for *The Star* into a growing business" and that "the entrepreneurial possibilities are foreclosed" (*Toronto Star, 2001* at para. 83).

An interesting case study to assess *The Star's* assertion that the carriers were entrepreneurs developed in the newspaper's south-west delivery zone, where four individuals "had acquired effective control over several routes" (*Toronto Star, 2001* at para. 78). These four 'brokers' were "engaging distributors to act as their surrogates," or effectively contracting out portions of their routes to sub-contractors (or perhaps hiring employees to work on their behalf) (*Toronto Star, 2001* at para. 78). While the parties agreed that these four were "exceptions," particularly with *The Star's* reorganization of the south-west zone in response to the potential influence of the four entrepreneurs, the reality is the carriers did not possess an ability to profit from the control of their route (*Toronto Star, 2001* at para. 83).

According to the Board's majority, this example "raises an interesting contradiction in *The Star's* position – at one level it claims the distributors are entrepreneurs free to pursue their entrepreneurial instincts, yet in practice it has stopped any accumulation or monopolization of routes by the most enterprising of its carriers" (*Toronto Star, 2001* at para. 79). Why bother, counsel for the union asked, "to regularize the situation in the south-west zone if it [*The Star*] genuinely regards the carriers as entrepreneurs" (*Toronto Star, 2001* at para. 79). Regularizing the role of the carriers and preventing them from conducting basic entrepreneurial activity, while maintaining that the carriers are absolutely entrepreneurs, raised some inconsistencies in *The Star's* argument. *The Star* alleged the carriers were entrepreneurs but, given that their behaviour was highly regulated and their business opportunities highly controlled or outright prohibited, there was a strong indication of an employer-employee relationship.

There appeared to be little room for entrepreneurial activity by the carriers, despite T*he Star's* claim to the contrary. One such example involved the carrier's inability to terminate the subscription of a subscriber, including any customer who had defaulted on their payment. Recall that the original contract defined the subscribers as customers of the carrier (not of *The Star*) and that the carrier bought and re-sold papers, even if the subscriber was an office-paid customer. For the termination of a customer's subscription, the carrier needed to contact the district representative, inform them of the reason, and request a cancellation (which may or may not have been granted). The Union's counsel inquired how the subscriber could be viewed as a customer of the carriers if that carrier cannot terminate that client. For the Board, this was a "telling question" (*Toronto Star, 2001* at para. 95).

For these and other reasons, the Board asserted "there are considerable limitations upon the entrepreneurial activities of the carrier in relation to *The Star,*" concluding that while the carriers "may do the work more or less expeditiously … there is no real prospect of making a profit from what they do for *The Star*" (*Toronto Star, 2001* at para. 95). Perhaps not surprisingly, this factor carried considerable weight when the Board issued its decision.

5) Monitoring the carriers

"The real monitoring of the carriers," the Board asserted, "occurs through complaints by subscribers" (*Toronto Star, 2001* at para. 111). Recall that the subscribers were allegedly customers of the carrier and not *The Star*, and that the carrier and *The Star* were both allegedly two businesses engaging in a business relationship. *The Star*, however, would receive complaints from subscribers and would then inform the carrier of the nature of the concern and what should be done about it, rather than referring the subscriber directly to the carrier to address their concern.

The union's counsel aptly noted that "if the customers were really the customers of the carrier, and not of *The Star* (as the formal structure of their relationship contemplates), *The Star* would not monitor performance, but would leave delivery matters, including complaints, to the carrier to deal with [them]self" (*Toronto Star, 2001* at para. 104). In some instances, a *Star* representative would trace a route to ensure that drivers delivered papers on time, to the correct homes, and that the driver adhered to any special delivery instructions.

6) Terminating the services of a carrier

Though rare – and the subject of minimal analysis by the Board – it was possible for a *Star* DR to terminate a carrier.

Drawing from the six main indicators examined above, a summary of the Board's rationale and explanation for each factor is found in Table 5.3 below.

Table 5.3: The Application of Six Indicators to *Toronto Star, 2001*

Indicator	**Impact in *Toronto Star, 2001***
Integration within *The Star's* business	While *The Star* maintained a distinction between its own employees and the contracted delivery drivers, an integrated delivery process was central to their overall financial well-being as it derived 60 percent of its revenue from home delivery (at para. 49)
Engagement and terms of engagement of the carriers	"Viewing the procedures followed by The Star when appointing a new carrier from the perspective of contrast between what would occur if an independent contractor were being engaged, as compared to an employee, it appears that the procedure is more akin to that of engaging an employee than an independent contractor" (at para. 72)
The nature of the work	The "variations are relatively insignificant. The word as a whole has little scope for imagination. The employer's counsel submits that the carriers are able to manage their routes entirely within their own discretion. That is certainly the case, but the substance of that management is minimal" (at para. 77)
Limitations upon entrepreneurial activity	"In our opinion…there are considerable limitations upon the entrepreneurial activities of the carriers in relation to The Star itself" (at para. 98)
Monitoring the carriers	"The real monitoring of the carriers occurs through complaints by subscribers. Carriers are rewarded for good performance. The Star calculates the frequency of complaints against each carrier..." (at para. 111) "The meetings, although informal, relatively infrequent and voluntary, are suggestive more of an employment, than an entrepreneurial, association between The Star and its carriers" (at para. 112)
Terminating the services of a carrier	"A DR has the authority, in practice after conferring with the Zone Manager, to terminate the services of any carrier" (at para. 113) "The reason for the disciplinary actions against these carriers was that the manner in which they were promoting their private interests suggested some association with The Star" (at para. 114)

After walking through the six factors, the Board concluded, “the carrier position more closely resembles that of an employee as opposed to that of independent contractor” (*Toronto Star, 2001* at para. 122). Recognizing that these carriers did not work full-time hours, the Board’s majority elaborated, “a carrier is more akin to a part-time employee than to an independent contractor” (*Toronto Star, 2001* at para. 122).

While previous decisions may have suggested that a determination of being a part-time employee negated one’s ability to secure dependent contractor status under the *Act*, the Board appears to have turned a corner in this case and reconsidered their approach to non-standard work. By the early 2000s, even a relatively conservative institution could no longer deny the significant growth of precarious work that had occurred in the preceding decades.[67] Despite “the substantial increase in the percentage of people who had part-time or temporary jobs, were own-account self-employed in their main job, or held multiple jobs,” Vosko et. al (2003) correctly noted that “the standard employment relationship, nevertheless, remained the model upon which labour laws and policies were based.” It was no longer unreasonable that the Board’s industrial pluralist leanings could consider and seek to address precarity in some basic way. Though slow to respond to the changing nature of work, the Board was nevertheless able to respond, albeit in a more reactive than proactive manner. In reconsidering their view of non-standard work arrangements, the Board drew from socio-legal academic research to analyze the changing nature of work and the rise of “atypical” employment, as opposed to relying simply on case law and its own precedent.

[67] Mitchell Thompson (2023) notes that “by all counts, precarious work has increased across Canada’s economy since the 1980s. Officially, non permanent employment has [increased] from 7 percent in the 1980s to 10.4 percent in the early 2000s.” See also Vosko, Zukewich, and Cranford, 2003 and Foster, 2023.

The Board's framing of the growing precarity of work (a term not formally used by the Board) is worth citing at length given the newfound understanding of the prevalence and impact of non-standard work and the related move away from its own precedent. The Board's majority opinion stated:

> In the past 20 years there has been a significant shift in the nature of employment generally, from typical full-time regular work to atypical forms of work. The hallmark of these "atypical" relations is that employers shift the risks associated with employment to the worker. The model of work relations becomes "task" based, rather than "time" based. In this atypical scenario no long-term job tenure is offered, as the worker is only called upon when the employer needs extra help; compensation is based on some variant of payments by result; and the employer can terminate the contract at will if it deems the calibre of service provided by the workers to be unacceptable. This "task" model is best personified by "consultants" who expressly profess themselves to be "self-employed", but it also applies to many casual workers, homeworkers and agency-supplied "temporaries" who do not hold themselves out to be business operators (*Toronto Star, 2001* at para. 13; see also Collins, 1990 and England and Christie, 2005: ch. 2).

Here, the Board recognized a two-decade long shift away from the normative form of full-time, single-employer, year-round, permanent employment toward an "atypical" employment relationship. This period corresponds, roughly, to the passage of dependent contractor provisions in the *Act*.

The Board not only provided an apt definition of 'atypical' work, but it also cited its growing prevalence as problematic and articulated a criticism of its ill effects. They correctly noted that:

> Self-employment has grown steadily in Canada over the last 20 years. The gap in income between the self-employed and employee has steadily diminished over that period. Non-standard forms of employment and engagement are increasingly prevalent. Atypical forms of engagement need therefore to be scrutinized carefully for their substantive content. They need to be considered less by their formal contractual characteristic and more how they actually operate (*Toronto Star, 2001* at para. 14; see also Crompton, 1993: p. 22).

This statement both recognized the empirical reality of the growth of atypical (or precarious) work and made a normative claim about its potential adverse impact on wages. The Board also recognized the need to evaluate the substance rather than the form of the work when determining whether that work is more consistent with the work of an employee. Such an approach is consistent with some of the Board's earliest jurisprudence on dependent contractor relationships (see, for example, *Nelson Crushed Stone, 1977* at para. 12; *Adbo, 1977* at para. 24-27).

In contrast to earlier decisions, in *Toronto Star, 2001* the Board seemed to have appreciated the economic realities faced by working-class people who often require more hours – or, more accurately, more income – than their employer provides them. This is especially true if the employer provides them only with access to part-time work, as did the *Toronto Star*, which effectively limited the size of a route and permitted carriers to deliver only a single route. The Board reasoned, "economic necessity or entrepreneurial activity drives many workers to work more than one job. Many of the carriers have other jobs. Those jobs do not interfere with the hours they are required to spend on *The Star's* business, collecting and distributing its papers" (*Toronto Star, 2001* at para. 100).

There was no debate that *The Star* did not control the carriers' time when they were not delivering. In fact, that was a central argument for *The Star* – the carriers were free to undertake other economic (or entrepreneurial) pursuits when not delivering papers. However, for these carriers, a second job outside of *The Star* – either because of desire or because of economic necessity – did not affect the nature relationship with *The Star*. It did not make them an entrepreneur whose services were generally available in the market. In making this assertion, the Board's majority challenged its own precedent on part-time contractors and contractors with multiple jobs. "In our view," the Board wrote,

> a person working a second or third job does not necessarily imply that they are entrepreneurial or, more exactly for the purposes of a proper analysis of this issue, that they are running their own business. They may just be employees of two or three separate employers, or they may be entrepreneurs in respect of some activities and employees in respect of others. While the provision of services to more than one employer may suggest entrepreneurial activity, it may equally suggest economic dependence upon different employers (*Toronto Star, 2001* at para. 100).

The Board's openness to a dependent contractor being dependent upon more than one employer represented an important development for precarious or atypical workers and marked a departure from their previous ruling in *Craftwood, 1980* and *The Citizen, 1985*. In *Craftwood, 1980*, the Board had explicitly rejected dependence upon a single industry or multiple employers, asserting "it is impossible to be economically dependent on more than one person" (*Craftwood, 1980* at para. 16). The Board also rejected the idea that someone could resemble an employee in a multitude of different economic relationships.

In their decision in *Craftwood, 1980*, the Board determined that because the drivers provided their services to many companies and because there was not an obligation to perform work for any single one of them in the same way that an employee would have, that they were not dependent contractors. The fact that the drivers performed work for many companies and did not have any specific obligation to any single one of them made the drivers more like entrepreneurs than employees, thus establishing a poor precedent for other workers claiming dependent contractor status.

However, the facts and circumstances in *Toronto Star, 2001* were different from those in *Craftwood, 1980*. The carriers had an obligation to perform work (364 days per year) for T*he*

Star and did not possess the same ability to accept and decline work, as was the case with the drivers in *Craftwood, 1980*. That some carriers "were more enterprising" than others in terms of pursuing other opportunities "does not alter the relationship of the carrier to the Star. It says merely that carriers are capable of pursuing other ventures, particularly outside of the time they spend delivering papers, and to some limited extent while doing that" (*Toronto Star, 2001* at para. 102). Working an additional job outside of their work for *The Star* did not change the nature of a carrier's employment with *The Star*. This reasoning marked a significant shift from the Board's decision *The Citizen, 1985*. The lack of prohibition against carriers performing other work had no impact on whether the carriers were dependent contractors, regardless of whether they pursued other opportunities. If this were not the case, businesses could easily just permit people performing work for them to also perform work for others in order to not be found to be an employer.

More so than in previous cases involving workers with multiple jobs – *Craftwood, 1980*, *The Citizen, 1985*, and *Ajax/Pickering News Advertiser, 1993* – the Board recognized the growing reality that many people needed to work at multiple jobs and lacked enough hours at one job, and that this did not negate them from being an employee and dependent upon one (or more) companies. This is particularly true of those who are employed part-time but would rather work full-time hours – a situation that scholars have referred to as 'underemployed' (McKee-Ryan and Harvey, 2011).

Underemployed workers may have to take on multiple part-time jobs to secure the 'full-time' hours that they require. As Leah Vosko (2000) has pointed out, precarious (part-time) work is also highly gendered, with many women working part-time while also balancing familial responsibilities (see also Vosko, MacDonald, and Campbell, 2009). Recall that in earlier cases, the Board determined that if contractors had (access to) other sources of income and if the company "imposed no restrictions of a legal or practical nature on obtaining such income," they were unlikely to be found to be dependent contractors (see *The Citizen, 1985* at para. 8; see also *Superior Sand, 1978* at para. 8, dissent). In such a case, any dependence was not the result of the "terms and conditions" of the arrangement between the parties. This approach was problematic as it effectively excluded part-time or casual workers from protection as dependent contractors under the *Act*. The Board's majority in *Toronto Star, 2001* moved away from that precedent.

The Board's decision in *Toronto Star, 2001* was not unanimous, however, with employer-side member Judith Rundle putting forward a lengthy 29-paragraph dissenting opinion and asserting that, in finding the carriers to be dependent contractors, "the majority has misinterpreted and misapplied the Board's jurisprudence resulting in a decision totally inconsistent with that jurisprudence" (*Toronto Star, 2001* at para. 28, dissent). Referring to the majority's decision as one that undermines previous jurisprudence "in a cavalier manner," Rundle argued that the answer as to the employment status of the carriers was "straightforward and indisputable" (*Toronto Star, 2001* at para. 4, dissent).

The dissenting opinion, however, was based more on the narrow form of the carriers' relationship than on the substance of their actual working relationship, an approach at odds with previous jurisprudence. Rundle maintained that, among other things, carriers had flexibility in organizing their route, could take advantage of some tax provisions not available to employees, could utilize a helper, were not precluded from delivering other products, and could organize their route more/less efficiently to increase profits. All these points, however, were contested and not necessarily indicative of one being an independent contractor.

On the topic of precarious work, Rundle's dissenting opinion was problematic, at least from the approach of viewing the dependent contractor amendment as an opportunity to extend bargaining rights. According to the Board in *Nelson Crushed Stone, 1977*, the 1975 amendments were designed to extend dependent contractor/employee status to those in a "subservient economic position vis-à-vis the beneficiary of his [sic] services" so that that person can be "extended the protection intended by the collective bargaining process" (*Nelson Crushed Stone, 1977* at para. 12). Rundle's dissent sought to do the opposite. She was alone, however, in her dissenting opinion and the Board's majority ruling that determined that *The Star* carriers were dependent contractors stood as precedent and remains an influential ruling over 20 years later.

Rundle's dissent highlights the nuance of the Board's role within capitalist system, showing that it is more than simply a tool for advancing the direct interests of the bourgeoisie in all situations. Here, the neo-Marxist approach is useful to highlight how the Board (and the state more broadly) is capable of providing certain material compromises to the working-class but firmly within a capitalist framework and falls well short or challenging the subservient nature of the employment relationship more generally, as the ultimate outcome – outside of the legal arena – in this case illustrated.

Despite the Board's newfound understanding of precarious work and an otherwise progressive decision for carriers seeking unionization – especially in comparison with decisions in *The Citizen, 1985* and *Ajax/Pickering News Advertiser, 1993* – the ultimate outcome illustrated the supremacy of capitalist property rights. This represented the Board's inability to prevent a determined employer from reducing its costs and eliminating the potential consequences of having employees. In February 2001 – twenty-six months after the November 1998 certification vote took place – the Board found that the carriers were dependent contractors and thus certified the bargaining unit. As Eric Tucker notes, "for a moment it seemed as if the statutory collective bargaining scheme was capable of adapting to the needs of this group of precarious workers" (Tucker, 2005: 30).[68]

That moment, however, was short-lived. The *Star* responded by fully contracting out the entirety of its home delivery operation, thus negating any employment relationship with the drivers (who it effectively ceased to employ after contracting out the work). In other words, while the Board can decide if a group of workers are employees, they cannot mandate an employer to ultimately employ those people and cannot prohibit contracting out to undermine any employment relationship. Labour rights can be expanded by the Board, but not at the expense of property rights. As Tucker notes, "the *Star's* exercise of property rights to contract out the delivery operation, [is] a power that is particularly potent in relations with contractors, such as newspaper carriers, whose work is already marginal to the core of the business of the employer" (Tucker, 2005: 51). Despite the Board's important recognition of the challenges of precarious work, the realities of the economic system and the limitations of labour law meant

[68] The Board coming to this decision during a time in which the Progressive Conservative Party of Mike Harris, who "launched wave after wave of radical reforms" and was the "most transformative government in Ontario's history" formed government illustrates that the Board a reasonable degree of autonomy from the governing party, even if such a decision appeared to run contrary to that government's ideology (Ibbitson, 2023).

that they were unable to make those workers less precarious.[69] In this case, while the Board responded to the growing demands of precarious workers to be recognized as employees, they could not constrain capital's ability to organize its affairs and "redeploy their property rights as they see fit" (Tucker, 2005: 51).

International WoodWorkers of America v. Atway Transport Inc., 1989 CanLII 3245 (ON LRB) (referred to hereinafter as *Atway, 1989*)

Though not involving the delivery of newspapers, *Atway, 1989* is an important case in this period establishing the threshold between those workers more closely resembling independent contractors than employees. In this case, the union grieved the termination of Edward Kidd, who it claimed was a dependent contractor and whose termination was in violation of the *Labour Relations Act*. The company maintained that the grievor was not an employee but was an independent contractor and fell outside the *Act*.

Atway was a company involved in the haulage of raw forest products in Northwestern Ontario and its work was completed by a fleet of approximately one hundred trucks provided by contractors (whether independent or dependent) and a fleet of about fifty company trucks driven by traditional employees. Through its analysis of the evidence, as well as a reliance on the factors established in *Algonquin, 1981*, the Board was "clear … that Mr. Kidd is a contractor" but that they would need to determine "whether or not he is a dependent contractor within the meaning of [the *Act]*" (*Atway, 1989* at para. 46). The Board concluded that "although Mr.

[69] While the union was not able to alter the *Star's* decision to contract out the work of the newly formed bargaining unit (as well as the work of an existing bargaining unit), they were able to secure additional severance and a job offer from the new contractor. As Acharya (2001a and 2001b) notes, the Star spent a total of $47 million ensuring that it would not become the employer of the contractor drivers.

Kidd performed work or services for the respondent for compensation, he was not in a position of economic dependence upon, and under obligation to perform duties for, the respondent" and more closely resembled an independent contractor rather than an employee (*Atway, 1989* at para. 58). In coming to this determination, the Board dismissed the union's grievance.[70]

The Board made their decision almost exclusively through a factor-by-factor analysis of the eleven criteria established in *Algonquin, 1981*. While some of the factors were "somewhat equivocal" and others were "of little assistance," several of the more significant factors "point[ed] towards independence rather than dependence" (*Atway, 1989* at para. 58). Mr. Kidd was under no obligation to drive himself and could choose whether to accept or reject a load. In relation to those drivers who were employees, there was a "dramatic contrast between the[ir] highly controlled relationship" with management and the "very loose relationship" between Mr. Kidd and management (*Atway, 1989* at para. 58). A more detailed overview of the eleven factors from *Algonquin, 1981* is found in Table 5.4 below.

<u>Table 5.4: The Application of the eleven-factor criteria from *Algonquin, 1981* to *Atway, 1989*</u>

Factor from *Algonquin, 1981*	**Findings in *Atway, 1989***
The use of, or right to use substitutes	"Mr. Kidd was under no obligation to drive the vehicle himself; he was at liberty to fulfil the contract by arranging for someone else to drive his truck" (at para. 47) *Suggestive of independent contractor*

[70] The Board issued a split opinion. Vice-Chair Robert Howe and employer-side member Robert Sloan issued the decision for the majority cited above. Union-side member Janis Sarra issued her own decision whereby she "concur[red] only with the specific issue before this panel, that on balance the evidence does not establish Mr. Kidd was a dependent contractor during the period in question" (*Atway, 1989* at para. 10, dissent). Sarra was "concern[ed] that the majority has made findings of fact beyond the scope of the issue before the panel" and that by so doing their decision "may foreclose any future effort by a group of these contractors who may seek status to enjoy the benefits and protections afforded by the *Act*" (*Atway, 1989* at para. 1 and 10, dissent).

Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials	"Mr. Kidd purchased his truck at a cost of $64,000.00 without any financial assistance from the Company. He received no direction or input from the Company regarding the selection of that vehicle…" (at para. 48) *Suggestive of independent contractor*
Evidence of entrepreneurial activity	"This factor does not point unequivocally toward either dependence or independence in the circumstances of this case" (at para. 49)
The selling of one's services to the market generally	"although the fact that Mr. Kidd hauled almost exclusively for the respondent during the material period of time lends weight to the complainant's contention that Mr. Kidd was economically dependent upon the respondent, the fact that this was a matter of choice rather than a matter of necessity dictated by the circumstances of the industry or the terms of his contractual relationship with the respondent substantially reduces the determinative value of that fact in the instant case" (at para. 50)
Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes	"We are satisfied on the totality of the evidence that Mr. Kidd was free to refuse a load and to wait for another load on the basis of his personal preference concerning the type of wood to be carried or the mill to which he wished to haul. He was also at liberty to haul for other firms whenever he so desired without notice to the Company or risk of any sanction" (at para. 51) *Suggestive of independent contractor*
Evidence of some variation in the fees charged for the services rendered	"On the whole, we do not find the evidence concern-ing rates to be of much assistance in deciding the issue that is before us" (at para. 52)
Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer	"Thus, although the seventh factor does provide some support for the complainant's position, it does not point unequivocally toward dependence" (at para. 53)
The degree of specialization, skill, expertise or creativity involved	"This factor is not very helpful in the instant case" (at para. 54)
Control of the manner and means of performing the work — especially if there is active interference with the activity	"In contrast with the extensive control which the respondent exercises over Company drivers through Company rules, tachometer card monitoring, driver's licence abstracts, and disciplinary action, the Company exercises almost no control at all over the manner and means by which Mr. Kidd and other contractors perform their work" (at para. 55)

	Suggestive of independent contractor
The magnitude of the contract amount, terms, and manner of payment	"Unlike Company drivers who are paid on a per trip basis and have an hourly rate for waiting time and time spent changing tires, washing Company trucks, helping mechanics repair Company trucks, or cleaning up the Company yard, contractors are paid solely on the basis of the volume of wood which they haul" (at para. 56) *Suggestive of independent contractor*
Whether the individual renders services or works under conditions which are similar to persons who are clearly employees	"It is sufficient to note at this juncture that the various procedures described above by which the Company tests, hires, regulates, and disciplines Company drivers have no counterpart in the context of the conditions under which contractors provide hauling services to the Company" (at para. 57) *Suggestive of independent contractor*

The contrast between drivers such as Mr. Kidd and employees of Atway, and the related evidence of entrepreneurial activity, was stark. A driver who operated a double shift could "gross as much as $200,000 per year," but accidents and repairs – for which the driver was responsible for – could be so significant that there would be a yearly loss. As the Board noted, in some cases, that loss was so much that some contractors declared bankruptcy (*Atway, 1989* at para. 32). In contrast, employee-drivers "have no financial interest in the vehicles they drive," and licensing, insurance, and maintenance fall to the company" (*Atway, 1989* at para. 37). Although *Atway, 1989* largely applies the criteria from *Algonquin, 1981* to a specific case, it became a highly cited case in coming years.

Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647, affiliated with the International Brotherhood of Teamsters v Canada Bread Company Limited, 2017 CanLII 62172 (ON LRB) (referred to hereinafter as *Canada Bread, 2017*)

A relatively recent important case in the evolution of dependent contractor jurisprudence at the Board occurred in 2017. In *Canada Bread, 2017*, a Teamsters affiliate sought to represent a unit of drivers who delivered Canada Bread products to retail outlets (such as grocery stores) based out of five distribution outlets in Southern Ontario. This case is unique because the drivers seeking certification were franchise owners with an incorporated company, and many of the drivers employed 'helpers' on a limited basis to aid them in the completion of their work.

Canada Bread used a franchise system to engage its drivers and had done so for many years. According to a key witness from Canada Bread, a franchise system "is one where a business grants a license to other businesses to sell the granting business's goods or services on the condition that the franchisee adhere to the granting franchisor's standards, methods and procedures" (*Canada Bread, 2017* at para. 12). To obtain a franchise to deliver products to retail customers on behalf of Canada Bread, "a driver must incorporate a company and it is that company that is a signatory to the franchise agreement [FA]. The driver in [their] personal capacity is typically descried throughout the franchise agreement as "the Principal" of the franchisee" (*Canada Bread, 2017* at para. 11).[71] These franchisees signed union cards and sought status as contractors who were dependent upon Canada Bread.

[71] There were two separate franchise agreements relevant to the hearing: The "Previous FA" (the one signed by drivers who became franchisees prior to February 2014) and the "New FA," which was "put into place be Canada Bread in or around February of 2014" (*Canada Bread, 2017* at para. 10). While the overall substance of each franchise agreement was the same, there were differences between the two related to the initial acquisition fee, various individual fees, the royalty fee, the possibility of 'alternative distribution methods,' the term, and the application of a decal to the driver's vehicle. See *Canada Bread, 2017* at para. 20.

To obtain and maintain status as a franchisee, “the franchisees must be approved by Canada Bread, pay an initial fee to Canada Bread, continue to pay royalty fees to Canada Bread (under the New FA) and comply with all the rules and standards set out in the franchise agreement and related Canada Bread documents” (*Canada Bread, 2017* at para. 13). The FA serves as a good example of the ‘form’ of the relationship between the parties, although that may not be an accurate reflection of the substance of that relationship. The distinction between form and substance of the relationship has always been an important part of the Board’s decision-making process.

In *Adbo, 1977*, the Board spoke of a focus on ensuring employment protections for those in “arrangements that differ only in form, but not in substance, from the employment relationship” (at para. 24; see also *Nelson Crushed Stone, 1977* at para. 12). Recognizing this, the Teamsters “urged [the Board] to not be guided by the form of the relationship,” and the franchise agreement’s requirement for the drivers to form a numbered corporation, “but instead be guided by the substance of their relationship,” which the union submitted was that of a dependent contractor *(Canada Bread, 2017* at para. 91).

For its part, Canada Bread asserted that the drivers seeking to unionize were “the principals of bona fide franchises who operate small businesses” and assume the risk of loss while having the ability to profit, including profiting of the labour of ‘helpers’ who many of the drivers employed (*Canada Bread, 2017* at para. 96). Their relationship with the franchisee drivers, they maintained, had “all the hallmarks of a business dependency as opposed to an employment dependency” (*Canada Bread, 2017* at para. 99). The Board maintained, “Canada Bread has established and exercises a significant degree of control over the working lives of the drivers and that there is a high degree of economic dependence on Canada Bread on the part of the drivers" (*Canada Bread, 2017* at para. 106). As a result, the Board concluded that the drivers – except for those who employed full-time helpers – were dependent contractors of Canada Bread.

In coming to its decision, the Board drew from *Adbo, 1977* and the eleven criteria identified in *Algonquin Tavern, 1981*. Relying on the eleven criteria from *Algonquin Tavern,* 1981, the Board asserted, "while in some respects the drivers do not readily fit into the category of 'employee' they fit even less easily into the category of 'entrepreneur' or 'independent contractor,'" adding aptly that it was "precisely cases like the drivers in these applications that the 'dependent contractor' category in the *Act* was intended to address" (*Canada Bread, 2017* at para. 99).[72] Indeed, Arthurs stated that "self-employed truck drivers," among others, "personify the dependent contractor" (1965: 89).

Table 5.5: The Board's application of the eleven factor criteria from *Algonquin, 1981* in *Canada Bread, 2017*

"The criteria identified in Algonquin Tavern that most militate in favour of a finding that the drivers in the cases before me are dependent contractors" (at para. 109)	**"The criteria identified in Algonquin Tavern that most favour a finding that the drivers in [*Canada Bread, 2017*] are not dependent contractors" (at para. 110)**
• selling services to the market generally • economic freedom (i.e., the right to reject work) • freedom to set prices for the services rendered	• the use of or right to use substitutes (for those drivers who engage full time employees) • the ownership of tools and equipment • the control of the manner in which goods/services are delivered.

[72] As part of their submissions, counsel for the Teamsters pointed out that the introduction of the dependent contractor category into the *Act* (and its equivalent outside of Ontario) was, in part, reflective of "the particular conditions of those persons who distributed products on behalf of dairy and bakery industries" (*Canada Bread, 2017* at para. 106; see also *Toronto Star, 2011* at para. 16).

• whether the person is separate from or integrated into the business to whom he or she supplies services • the degree of specialization, skill or expertise involved in the work; and • does the person render services or goods or both in a manner similar to how employees do so.	

The other two criteria from *Algonquin Tavern, 1981* – evidence of entrepreneurial activity and the magnitude of the contract amount, its terms, and the manner of payment – were deemed to "be essentially neutral in placing the drivers in or out of the dependent contractor category" (*Canada Bread, 2017* at para. 111).

Here, the Board recognized that the franchisee drivers were not traditional employees, but nor were they traditional independent contractors or entrepreneurs in their own right. In determining whether they were closer to employees (and therefore dependent contractors) or independent contractors, the Board asserted that, if Canada Bread were to make all of its drivers employees, "not very much" would change regarding their work and the conditions under which it was performed (*Canada Bread, 2017* at para. 115).

Given the unique positioning of the drivers – that they were clearly business owners, some of whom employed 'helpers' on their routes – further discussion of these points is warranted. Canada Bread pointed to both these facts as proof of their independent contractor status (*Canada Bread, 2017* at para. 96-97). These facts help highlight the distinction between form and substance. In form, someone owning a numbered company and employing another is certainly an independent contractor. In this case, however, despite owning a numbered company, Canada Bread prohibited the franchisee drivers from rejecting customers, selling the products to certain new customers, or altering the selling price of the product that they had bought – all of which would be the hallmark of a true entrepreneur (*Canada Bread, 2017* at para. 112).

Finding someone to be an employee who, themselves, employed ‘helpers’ appears at first glance to depart from the Board’s precedent. Previously, the Board saw owner-operators of dump trucks with more than one vehicle and “attempts to profit from the labour of others” as independent contractors (*Canada Crushed Stone, 1977* at para. 19; see also *Superior Sand, 1978*). In *Canada Bread, 2017*, the helper did not operate a separate route or truck, but rather, provided help that was “specifically defined and [on a] limited basis” to the driver on their own single route” (*Canada Bread, 2017* at para. 128). In contrast with owning a second dump truck and employing a driver, the employment of a delivery helper did not permit the franchisee driver to “meaningfully expand business opportunities and activities” but rather “merely permit[ed] the driver in question to make ends meet (*Canada Bread, 2017* at para. 128). Here, simply finishing at a reasonable time, assisting with stairs, or working fewer hours in a week – not increasing profit and the expansion of a business – were the motivating factors for employing a helper.

Conclusion

The cases in this chapter span a nearly thirty-year period, but all involved the delivery of a perishable good. The discussion has highlighted both the potential and limitations of the Board’s willingness and ability to expand employee status to contractors. Building upon an analysis of the Board’s approach outlined in Chapter 4, this chapter has illustrated further the fact that the Board also helped to make (and maintain) the conditions of precarity through their understanding of who was an employee and by shaping the boundaries of the legislation. For much of this era, it was not simply that the Board was not keeping up with the changing nature of work, but rather that, through their decisions, they were a key actor in determining how precarity is constructed. Whether they intended to or not, the Board's decision-making – and more specifically its delayed willingness to understand precarious work and broaden its approach to dependent contractor status – amounted to helping to solidify the precarity experienced by many contractors.

This chapter has demonstrated that the Board further delineated the line between employee and independent contractor and, in so doing, revised its understanding of who is and who is not a dependent contractor. It was not until the end of this era (into the 21st century) that the Board began to recognize and discuss the concept of precarious work – or atypical work as they referred to it as – and highlighted a potential to provide some protection for those not privy to the standard post-war employment relationship. This helps to illustrate how the OLRB is an important actor in determining and delineating the nature of precarity in the labour market.

The companion cases of *The Citizen, 1985* and *Journal Le Droit, 1985* highlight the importance of specific facts in determining outcomes. In *The Citizen, 1985*, the Board determined that the drivers in question were independent contractors. Three months later, in *Journal Le Droit, 1985*, the Board determined that the drivers in question in this case were instead dependent contractors. While the situations in *The Citizen, 1985* and *Journal Le Droit, 1985* are largely similar, there were important and subtle differences between them, and this nuance accounted for the divergent outcomes. The cases also illuminated the 'imaginary line' between dependent and independent contractors and helped to establish the threshold for employee status under the *Act*. In *The Citizen, 1985*, the Board tied this threshold to a (lack of) impediment to additional work and total hours worked, the effect of which was to exclude part-time workers from dependent contractor status. They applied this logic again in *Ajax/Pickering News Advertiser, 1993* and further established a precedent excluding non-standard workers from status as dependent contractors. At a time of growing job precarity, these decisions jeopardized any expanded coverage of bargaining rights for non-standard workers. For a growing group of precarious workers, it began to appear that the 'dependent contractor side of the line' was mirage-like as their part-time or casual status excluded them from securing dependent contractor status and access to bargaining rights.

By 2001, however, the Board began to reflect upon non-standard work in a more meaningful way and seemed more aware of the realities of the new economy. In *Toronto Star, 2001*, they shifted away from a nearly twenty-year-old precedent and posited that one could be a dependent contractor who was dependent upon more than one employer. They remarked that having multiple jobs "does not necessarily imply that they are entrepreneurial or, more exactly for the purposes of a proper analysis of this issue, that they are running their own business. They may just be employees of two or three separate employers" upon whom they are economically dependent (*Toronto Star, 2001* at para. 100). The Board's decision in *Toronto Star, 2001* represented an important – and long overdue – evolution and meaningful response to the rise of precarious work from earlier cases it decided upon in the mid-1980s and early 1990s.

That this decision occurred during a significant rise in the implementation of neoliberal policy in Ontario illustrates that the Board has some autonomy from the governing party and reflects its traditional pluralist ideas over a purely neoliberal approach to decision-making. It also reinforces the reality that the Board delineates the boundaries of precarity, at least as it applies to many workers. The reality was that the Board could have determined earlier that those with multiple jobs do not necessarily imply that they are entrepreneurial and are instead entitled to rights under the *LRA*, but ultimately waited until precarious work was more widespread before seeking to tweak its precedent. Many contractors remained in a precarious position until this point, not only due to the way that companies structured these relationships but also because the Board had – until this point – established the boundaries of what counted as employment that facilitated this highly precarious relationship.

Despite the important change in precedent, the direct impact of the ruling was limited as *The Star* promptly contracted out its entire delivery operation and the drivers ceased to be employees. While the Board has the potential to facilitate progressive change on behalf of precarious workers, it is not structured in such a way, ideologically or practically, that can bring about some sort of radical change. Furthermore, the Board's own industrial pluralist worldview ensured that their decisions, even when advancing workers' rights – were enacted in such a way that capitalist hegemony was protected and the fundamental tenants of capitalism, such as strong private property rights, remained undisturbed. As Tucker aptly notes, "there are no panaceas in a social formation that value private property rights so highly" (2005: 55).

The chapter concluded with an analysis of *Canada Bread, 2017*, a case in which the Board found that franchisee drivers – many of whom employed 'helpers' on a less-than-full-time basis – were dependent contractors. Though these drivers worked full-time hours, their non-standard 'own account' self-employment left them highly precarious, especially given the degree of power and influence that Canada Bread had over them. This case further expanded the scope of coverage for non-standard workers.

Overall, this era saw the Board grapple with a change from the norm of the standard, postwar employment relationship to various forms of non-standard work. The resulting precarity was a reality that the Board was slow to recognize and respond to, but ultimately began to do with *Toronto Star, 2001*. The Board's recognition of these new economic realities and an ability to respond to them – at least to the degree that the industrial relations system permits – would prove to be an important development with the rise of the gig economy.

Chapter 6: No Shorts in the Summer: The Employment Status of Taxicab and Limo Drivers[73]

Taxicabs, in various forms, have existed in Ontario since at least the 1830s, with the earliest being horse-drawn carriages (Errett, 2016). A full history of Canada's taxicab industry is not necessary here; but suffice it to say that people have long worked in an industry in which their job is to pick up passengers and drive them from one place to another for a fee (Monteiro, 2020). Despite this lengthy history, the employment status of taxicab drivers has – at best – been unclear, though generally speaking they were not seen as employees under the law.[74] While drivers of larger streetcars and buses, often publicly run, have long been employees and have engaged in unionization and collective action to improve their working conditions, taxicab drivers had historically not met the threshold of 'employee' under provincial or federal labour law (see, for example, Tucker, 2010).

In his original piece on dependent contractors, Harry Arthurs identified taxicab operators, among others, as workers who "personify the dependent contractor" (1965, p. 89) and needed the "protection of the labour relations legislation" not afforded to independent contractors (1965, p. 96). Unsurprisingly, then, following the 1975 amendments to the *Labour Relations Act*, several cases made their way to the Board in which taxicab drivers asserted they were dependent contractors and thus employees of various taxicab companies. This chapter explores those cases and the Board's decision-making in them.

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[73] Niagara Veteran Taxi had a rule that prohibited drivers from wearing shorts in the summer. See *NVT, 1980*, p. 13.
[74] The employment status of those who pick up passengers and drive them from one place to another for a fee has continued to be a contested terrain. As Chapter 6 will explain, in the early 2010s, ride-share service Uber similarly asserted that its drivers were independent contractors. What Uber did in the industry is not new – as this chapter explains, cab companies have long sought to evade the *LRA*.

The Board has recognized the various layers of relationships in the taxicab industry. In (see, for example *Ontario Taxi Workers' Union v. Hamilton Cab, 2011 CanLII 7282 (ON LRB)*, referred to hereinafter as *Hamilton Cab, 2011*,) for example, the Board noted that “the actual matrix of economic relationships may be complex” (*Hamilton Cab, 2011* at para. 14), and continued:

> there may be an individual who owns a car, owns a plate and drives. There may be an individual who owns a case, leases a plate and drives. There may be an individual who leases a car, owns a plate and drives. There may be individuals who lease both car and plate. There may be individuals who own one or more cars or plates but do not drive at all. There may be individuals who own several cars or plates, drive one car and enter into arrangements permitting other persons to use other plates or cars. And there are simply drivers who either drive on a full-time basis or may “rent shifts” from other individuals in order to cover weekends, or off-hours, and extend the time that a particular vehicle may be kept in service. (*Hamilton Cab, 2011* at para. 14).

In short, any possible employment relationship in the taxicab industry is more complex and layered than the typical employer-employee relationship in most other industries.

A precedent began to develop that taxicab (and limousine) drivers were generally dependent contractors, but the nuances and specificities in these various relationships have allowed companies to argue that their drivers are independent contractors. These cases continued to make their way to the Board into the 2010s (*Hamilton Cab, 2011*) and served as a precursor for Uber drivers’ case in the 2020s.

While this chapter covers a period of over thirty years, the bulk of the cases occurred between 1979 and 1987. In deciding these cases, the Board focused on the specifics of the taxicab industry itself and generally the Board determined that taxicab drivers were dependent contractors in most of their decisions. Despite the taxicab companies not paying a wage directly to the drivers, the Board nevertheless recognized the drivers’ degree of economic dependence on the taxicab companies they drove for and the related obligation to perform duties for those companies.

An Overview of the Taxicab Industry

While varying from company to company, there are some general commonalities in the commercial and employment relationships in the taxicab industry. As the Board noted in *Niagara Falls Co-operative Taxi Owners Association v. Niagara Veteran Taxi, 1981 CanLII 958 (ON LRB),* referred to hereinafter as *N.V.T., 1981*), "taxi owner-operators are often in a triangular relationship with the company they work for and the passengers they service. That the major source of their income happens to be paid to them directly by passengers rather than a taxi company does not itself alter the essential nature of the business relationship between the owner-operator and the taxi company" (*N.V.T., 1981* at para. 18). In short, there is: a) a company (for example, Yellow Cab, Niagara Veteran Taxi, Hamilton Cab Co., etc.) that provides dispatch service to connect passengers with available taxi cabs; b) passengers that ride the cabs and pay a fare; and c) those who drive cabs for their income.

In a more typical (and straightforward) employment relationship, customers pay a company for the service, the company pays workers to provide that service, and the workers provide that service to the customer. The triangular relationship in the taxi industry is far more complex. Here, passengers call the taxi company for a ride, the taxi company sends a driver to the customer, and the customer pays the driver. That driver, however, might own their own car and pay dues to the taxi company, though that driver might also 'rent' a shift to drive or drive for an owner-operator during an off shift.[75] The taxi company generally does not pay any wage or money to the drivers; in fact, the opposite is true as owner-operators pay dues to the company for access to the dispatch service and taxi waiting stands. In some cases, however, passengers will have pre-paid taxi chits that the drivers accept and then receive payment from the company. In short, the relationships in the taxicab industry are vastly different than in most other industries.

The relationships are even more complex because those who drive taxicabs may own a single taxicab, multiple taxicabs, or might not own a taxicab at all. Furthermore, each taxicab requires a license or 'plate,' of which there are a finite number. The person who owns the 'plate' might be the taxicab company, or an owner-operator of a taxicab, or might not own or drive a taxicab at all. The area's municipal government (or airport authority, for taxicabs servicing airports) is also involved and is responsible for issuing a limited number of new 'plates' or licenses and regulating things such as the cost of trips. In short, relationships in the taxi industry are layered, complex, and nuanced – all of which make the employment status of taxicab drivers unclear in many instances and an ongoing source of disagreement, even after the Board established a clear and consistent legal precedent.

Given this complexity, it is not surprising that cases involving taxicab drivers began to appear in front of the Board by the late 1970s and into the early 1980s. In most of these cases, owner-operators of a single taxicab claimed dependent contractor status under the *Act*, much like the owner-operator truck drivers in the construction aggregate industry explored in

[75] For clarity, 'owner-operators' consist of people who own and drive a single taxicab, while 'drivers' do not own their own taxicab, but drive taxicabs owned by the 'owner-operators' or others.

Chapter 4. In the construction aggregate industry, however, a considerable number of cases were heard in a short period, a predictable precedent was established, and major cases involving owner-operator drivers were non-existent within a five-year period. However, despite the existing precedent from the construction aggregate industry and a related precedent established involving taxicab drivers, cases surrounding the employment status of taxicab drivers continued to emerge well into the 2010s. In these cases, both owner-operators and drivers asserted that they are dependent contractors, and thus employees within the meaning of the *Act*, while taxicab companies have consistently maintain that they do not employ the owner-operators and drivers, who they instead assert to be independent contractors.

Ontario Taxi Association (Canadian Labour Congress, Local 1688) v. Blue Line Taxi Co. Limited, 1979 CanLII 950 (ON LRB), referred to hereinafter as *Blue Line, 1979*)

The first instance of taxicab drivers claiming to be dependent contractors made its way to the Board in 1979, four years after the amendments to the *LRA* came into effect. In *Blue Line, 1979*, a group of 92 owner-operators working within the Airport service provided by Blue Line and responsible for transporting passengers from the airport to various points within Ottawa alleged they were dependent contractors – and thus employees – under the *Act*.

At this point, the Board had not developed a complex series of factors under which to assess cases such as this, since *Algonquin, 1981* was still two years away. However, the parties presented the Board with an Agreed Statement of Facts, from which the Board made its findings. This negated the Board needing to use previous tests, such as the four-factor test or the control test. The Agreed Statement of Facts focused on seven factors: the business of the respondent; licensing; airport taxi regulation; financial arrangements; regulation of working conditions; other arrangements; and drivers. An analysis of these variables is useful not only for contextualizing the complexities of the taxicab industry, but also because the Board relied on these variables in making its decision in this case.

Some of the factors were of little use in determining the employment status of the owner-operators. The business of the respondent was the taxicab industry, and they had a fleet of 350 vehicles to serve customers in Ottawa. Blue Line also provided an airport service – the subject of the union drive in this case – granting it the exclusive right to provide ground transportation for hire from the airport, as only taxis operating under a Blue Line sign were permitted to pick up a fare at the airport (*Blue Line, 1979* at para. 4). The individual owner-operators obtained their taxicab license through the Town of Gloucester and were subject to various municipal regulations. While at the airport, regulation at the taxicab line was "in most part … self-regulating" with the first car in line being required to take the first passenger, and vice versa (*Blue Line, 1979* at para. 4).

Other factors, however, proved helpful at illuminating the substance of the employment relationship. The drivers paid a monthly fee of $150.00 to Blue Line for the ability to pick up fares from the airport, and some paid an additional $20.00 per month to access Blue Line's dispatch system (*Blue Line, 1979* at para. 4). Blue Line did not pay wages directly to the owner-operators (except for pre-paid charge slips used by their riders) or take employment-related deductions, and all drivers were responsible for providing their own car, roof sign, and taximeter. The Blue Line roof sign was a requirement to pick up passengers from the airport stand and was available exclusively through Blue Line, while other equipment could be rented or purchased from Blue Line or elsewhere.

The owner-operators were subject to regulations established not only by the Town of Gloucester and the provincial Ministry of Transportation, but also by Blue Line. These included a requirement to have a car painted entirely black, an obligation to accept Blue Line charge slips from passengers, a prohibition against line jumping or refusing a short distance fare, and a requirement to return the Blue Line sign and license plate while on vacation (*Blue Line, 1979* at para. 4). The requirement to return the sign and plate was to ensure company control over any replacement driver that may cover while the regular driver was away. To enforce these regulations, Blue Line could impose a fine on the owner-operators (of up to $100), 'book-off' a driver for a period and refuse them access to the taxi stand, or suspend the driver altogether.

Other arrangements between the company and the owner-operators were considered by the Board. The Blue Line name or number were not required to be visible on the cab (but a Blue Line roof sign was required), owner-operators could rent out their vehicle to another Blue Line driver (though the company had the right to pre-approve any replacement driver), and the company could control their own hours and days of work. Drivers were also not required to check in or check out from their shift and could take holidays and vacations at will. Finally, under the last factor of 'drivers,' the personal income of the owner-operators was "derived entirely or almost entirely from their association with the Blue Line Taxi airport service" (*Blue Line, 1979* at para. 4).

In arriving at their decision, the Board cited *Superior Sand and Gravel, 1978* and noted that the "fundamental question [was] whether the person's relationship with another more closely resembles the relationship of an employee than that of an independent contractor" (*Blue Line, 1979* at para. 6). The Board also noted that any decision "must be viewed in the total context of the taxi industry," and that factors governing the relationship in the taxi industry may be different from those governing other industries (*Blue Line, 1979* at para. 8). Blue Line, for example, argued that the lack of compensation or reward flowing from it to the drivers did not resemble that of an employee. Furthermore, the risk of non-payment (loss) was borne by the drivers if a passenger did not pay, and that payment (aside from Blue Line tax slips) flowed directly from the passenger to the owner-operator. In fact, the only real exchange of funds was from the owner-operator to the company in the form of a $150.00 monthly stand rental fee.

For its part, the Board recognized this economic relationship had the form of an arrangement between a company and independent contractors; but the substance of the relationship made the owner-operators more like employees. They asserted this "single factor cannot be allowed to obscure the fact that the control of work opportunities by the respondent is…the *sine qua non* [necessary condition] of the economic dependence which here exists, and the form of compensating for the service performed is determined by the type of market being served" (*Blue Line, 1979* at para. 8). The company's ability to grant, withhold or otherwise regulate work opportunities represented an exertion of control that was more like that of an employer over employees than a company over an independent contractor. It was Blue Line's acquisition of the exclusive right to provide ground service for hire at the airport from which all work opportunities flowed, and upon which the owner-operators were dependent (*Blue Line, 1979* at para. 7).

While finding that the 92 owner-operators who operated out of the airport were dependent contractors, the Board also found that a group of 'vehicle renters' who rented shifts from the owner-operators were not dependent upon Blue Line and fell outside of the bargaining unit, as did the five owner-operators of more than one vehicle. The ten drivers who permitted other drivers to operate their vehicle “on an occasional basis” were found to be dependent contractors and included within the bargaining unit because the occasional renting out of their vehicle did not detract from their relationship to Blue Line (*Blue Line, 1979* at para. 19).

This understanding of class relations and profit builds on the Board’s earlier decisions in *Canada Crushed Stone, 1977* and *Superior Sand, 1978*. Those drivers who rented vehicles from owner-operators were neither economically dependent on nor obligated to Blue Line, but those owner-operators who occasionally rented out their vehicle were found to be dependent upon Blue Line. In *Canada Crushed Stone, 1977*, the Board found a “qualitative distinction, or the difference in kind … between the owner-operator who uses his [sic] own labour and employs no one and the owner-operator, who, in addition to his [sic] own labour, used and attempts to profit from the labour of others” (*Canada Crushed Stone, 1977* at para. 19). Here, the Board found those who occasionally rented out the vehicle were not profiting from the labour-power of those drivers to whom they rented their vehicle in a meaningful and ongoing way. Any money made from renting the vehicle out was supplemental to their main income, which was derived from their relationship with Blue Line. In contrast, the owner-operators who owned more than one vehicle were found to be employers in their own right as the second car was regularly driven and a source of ongoing profit for their owners. In this sense, the second taxicab represented the means of production, and those who owned those means were not dependent contractors.

Blue Line, 1979 was one of the earliest cases of taxicab drivers seeking dependent contractor status and became the first precedent-setting case in the taxicab industry. A series of similar cases followed, but unlike those in the construction aggregate industry however, most of which were resolved by the early 1980s, cases in the taxicab industry continued to be heard at the Board into the 2010s, despite being largely all resolved in similar fashion to *Blue Line, 1979*.

Niagara Falls Co-operative Taxi Owners Association v. Peters (Niagara Veteran Taxi), 1980 CanLII 814 (ON LRB), referred to hereinafter as *NVT, 1980*)

The next two cases involving taxicab drivers – *NVT, 1980* and *NVT, 1981* – built upon the Board's decision in *Blue Line, 1979* and helped to develop a clear precedent in the industry. Both NVT cases arose from a union drive of taxicab drivers in Niagara Falls. The first case – *NVT, 1980* – involved an unfair labour practice regarding a driver who was prohibited from continuing to drive for NVT and was specific to one individual, while the second case – *NVT, 1981* – involved the remaining NVT drivers.

William Manson worked as an owner-operator for Niagara Veteran Taxi (NVT) for thirty-two years until NVT ended its relationship with him. Both Manson and the union alleged that NVT wrongly terminated Manson and, in so doing, violated multiple sections of the *Labour Relations Act* by terminating Manson during a union organizing drive. They premised their argument on their belief that Manson and the other owner-operators were dependent contractors and entitled to relief under the *Act*. NVT maintained that Manson worked as an independent contractor and was therefore not entitled to protection under the *Act*. The Board, therefore, needed to determine if Manson was a dependent contractor before hearing the merits of the complaint itself.

In order to determine if Manson was a dependent contractor, the Board needed to consider the definition of dependent contractor under Section 1(1)(ga) of the *Act*. This analysis required the Board to determine if Manson performed work or services for NVT for compensation or a reward, whether he was in a position of economic dependence on NVT, and whether he was under an obligation to perform duties for NVT (*NVT, 1980* at para. 3). While there was no doubt that Manson performed services for NVT, "the more difficult question [was] whether he perform[ed] the work or services for compensation or a reward" within the meaning of the *Act* (*NVT, 1980* at para. 3).

The relationship between Manson and NVT was unique relative to most other industries, though it had many similarities to the relationships in *Blue Line, 1979* and was generally reflective of the nature of the taxicab industry. Manson paid an initial fee of $500 (in 1948) to NVT to affiliate with the company and paid 'dues' each week thereafter to have access to the NVT dispatch service.[76] For its part, NVT did not provide any compensation directly to Manson, except for providing owner-operators with the cost of a fare for any 'charge slips' used by customers with a NVT charge account. In all other instances, money flowed directly from the customer to the owner-operator, with NVT serving "as a conduit" for the compensation flow (*NVT, 1980* at para. 3).

In concluding that "the compensation received by Manson from third party passengers falls within the parameters of 'compensation' referred to in section 1(1)(ga)" of the *Act*, the

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[76] At the time of Manson's dismissal, the weekly dues to NVT were $51.50.

Board maintained that the *Act* "must be responsive to differences that exist from one industry to another," thus recognizing the industry-specific nature of the taxicab industry (*NVT, 1980* at para. 6). The *Act* itself does not specify that compensation must flow directly from an employer to an employee, simply that services must be performed for an employer in exchange for wages.[77] Without a clearly defined test and list of criteria (i.e. such as the criteria developed by the Board in *Algonquin,* 1981, which came a year after this decision), the Board relied heavily upon the language contained in the *Act* itself. Without a clear test to rely upon, the Board needed to make decisions without one. Having determined that Manson performed work for compensation, the Board needed to determine if Manson was in a position of economic dependence upon and under an obligation to perform duties for NVT.

Although owner-operators could pick up private fares or pick up a passenger from a public taxi stand, NVT was the source of much of Manson's work. Outside of the summer tourist season, the "bottom drops out of the taxi business" and leads to a situation of dependence in which "90 per cent of [Manson's] business would flow from the [NVT] dispatch service" (*NVT, 1980* at para. 8). NVT's importance to Manson's ability to make a living was illustrated by Manson's wages following his dismissal from NVT. During the period in which Manson did not have access to the NVT dispatch, NVT-only taxicab stands, or the NVT rooftop sign, Manson's maximum daily earning was $24.00, compared to his general earnings of

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[77] This represented an important distinction from *The Alberta Labour Act*, which mandated that wages must flow directly from the company. In *Yellow Cab Ltd. v. Board of Industrial Relations et al., [1980] 2 S.C.R. 761*, and a short time after the OLRB's decision in *NVT, 1980*, the Supreme Court overturned a previous decision from the Alberta Board of Industrial Relations, which found that taxicab drivers of Yellow Cab Ltd., were employees. Instead, the Supreme Court concluded that Board erred it its interpretation of the definition of employee in *The Alberta Labour Act*, reversed the decision, and found that the drivers were not and could not be employees under the *Act*. The Supreme Court's decision in *Yellow Cab, 1980* would factor into the Board's subsequent decision in *NVT, 1981*.

$110.00 to $120.00 per day while driving under the NVT brand (*NVT, 1980* at para. 9). The affiliation with NVT, an obvious benefit for which he paid monthly dues, was the near exclusive source for Manson's income, thus creating a situation of economic dependency.

For the Board to find that Manson was a dependent contractor, he also needed to illustrate that he was under an obligation to perform duties for NVT in a manner closer to an employee than an independent contractor. One could be economically dependent upon NVT in that it was the (near) exclusive source of their income; however, they would not be a dependent contractor if there was no corresponding obligation to perform duties. Like many taxicab owner-operators, Manson possessed some criteria typically associated with independent contractors. For example, Manson was solely responsible for the costs and upkeep of his car, and NVT made no statutory deductions (CPP, the former UI, the former Workmen's Compensation [sic.], etc.) from him. Most notably, there was no need to report an illness, absence, or vacation to NVT; Manson could simply not show up for work. This type of freedom is not typically associated with an employee, but rather with an independent contractor.

While NVT did not assert control over *whether* Manson showed up for work, they asserted considerable control over Manson *when* he showed up for work (and economic realities were such that he had every incentive to show up for work). NVT exerted a high degree of control over Manson and the other owner-operators, which led to a corresponding obligation to perform duties – much like an employee – when they were working. For example, if an owner-operator wanted to work the day shift, they need to report by 8:15 a.m. or NVT would cut them off dispatch access for the day. If they worked the day shift, NVT prohibited them from working after 9:00 p.m. (*NVT, 1980* at para. 12). While a driver themselves was free not to work, NVT could still mandate them to place a driver on their car for the delay and had approval over that driver. There were other rules imposed by NVT, including one that prevented owner-operators from wearing shorts in the summer.

NVT's control over the owner-operators was perhaps best summarized by a posted notice issued to owner-operators stating, in part, "THE PRACTICE OF CHECKING OUT ON JOBS THAT MAY NOT BE TO YOUR LIKING MUST STOP AT ONCE … YOU WILL BE DISMISSED IF THIS PRACTICE CONTINUES" (*NVT, 1980* at para. 14, caps in original). The imposition of a rule, backed by the threat of termination, is not indicative of the relationship between a business and an independent contractor. As the Board aptly stated, "a warning of this nature reflects a permanent and continuing relationship controlled by a party closely resembling the typical employer" (*NVT, 1980* at para. 14).

The Board determined that Manson performed services for compensation, even though NVT did not compensate him directly. When working for NVT, he was in a position of economic dependence and was under obligation to perform duties for NVT. As a result, the Board found Manson to be a dependent contractor who was thus entitled to relief under the *Act*, and his unfair labour practice complaint against NVT could proceed.

Niagara Falls Co-operative Taxi Owners Association v. Niagara Veteran Taxi, 1981 CanLII 958 (ON LRB), referred to hereinafter as *NVT, 1981*)

In what the Board referred to as "a parallel proceeding," a second case involving NVT and its owner-operators made its way to the Board in 1981. In this case, the Niagara Falls Co-operative Taxi Owners Association sought bargaining rights for the owner-operators, who the Board would first have to find to be dependent contractors. In *NVT, 1980*, the Board held that a single owner-operator –William Manson – was a dependent contractor but stopped short of ruling on the full complement of NVT drivers. In *NVT, 1981*, an additional four owner-operators provided evidence that "differ[ed] only slightly from the evidence the Board heard regarding the duties and responsibilities of Mr. Manson" (*NVT, 1981* at para. 7). Here, too, for similar reasons the Board found that all owner-operators driving for NVT were dependent contractors, irrespective of the slight differences between the specific details of Manson and the four additional witnesses.

The Board made note of the triangular relationship between the owner-operators, the company (for whom the owner-operators worked and to whom they paid dues for dispatch and sign privileges) and the passengers (who made direct payment to the drivers in exchange for services rendered). Counsel for NVT urged the Board to apply the Supreme Court of Canada's ruling in *Yellow Cab, 1980* to the case at hand and dismiss the union's claim that the owner-operators were employees. In *Yellow Cab, 1980*, the Supreme Court overturned a previous decision from the Alberta Board of Industrial Relations and determined that owner-operators were neither in an employment relationship nor dependent contractors (*Yellow Cab, 1980*; see also footnote 2). The Supreme Court relied on the fact that the company did not pay a wage directly to the owner-operators, a requirement for a finding of employee status in Alberta.[78] In Ontario, however, the fact that the owner-operators' major source of their income was paid to them directly by passengers rather than a taxi company did not prevent the drivers from being in a relationship that more closely resembles that of an employee (*NVT, 1981* at para. 18).

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[78] The *Alberta Labour Act, 1973 S.A. c. 33* defined employer as "a person, corporation, partnership, or group of persons who … is responsible for the payment of wages to an employee" (at section 1(3)(iv)). *The Ontario Labour Relations Act* did not (and does not) define employer in any way.

In contrast to Alberta, the Ontario *Labour Relations Act* did not suggest that wages must flow directly from the employer to the employee. Similarly, it did not suggest that an employee must receive wages directly from an employer (*NVT, 1981* at para. 15).[79] As a result, the Board could rely on the statute's purpose and determine that drivers earning wages that did not flow directly from NVT (or another employer for that matter) were still employees or dependent contactors, so long as other conditions were met. Under the *Act*, these conditions were being in a position of economic dependence and under an obligation to perform duties.

Much like in *NVT, 1980*, the Board determined that the owner-operators were in a position of economic dependence and under an obligation to perform duties for NVT, and thus dependent contractors under the *Act.* NVT's dispatch service, which owner-operators paid $51.50 per week to have access to, was central to the owner-operators' ability to earn income, and their reliance upon it placed them in a position of dependence. One owner-operator testified that it "would be financial suicide to operate without the N.V.T. dispatch service," while another testified that he "wouldn't have a chance" during the non-tourist season without the dispatch service. In addition to the initial $500 'purchase' of an economic relationship with NVT, the weekly dues "underscore[d] the Board's conclusion that the owner-operators are dependent on N.V.T. for their economic well-being" (*NVT, 1981* at para. 27).

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[79] In Alberta, the economic relationship between owner-operators and a taxicab company was essentially the same as it was in Ontario. The statutory purpose in Alberta and Ontario were different as the *Alberta Act* did not contain dependent contractor (or similar) language: one was either an employee and covered by the Act or not an employee and outside of the Act. Originally, the Alberta Board determined that owner-operators were employees, but the Supreme Court overturned their decision on appeal. The Ontario Board's logic was generally the same as the Alberta Board's, but the differing language of 'employee,' the absence of a definition of 'employer' in Ontario, and the absence of the term 'dependent contractor' in Alberta explains why one ruling (in Alberta) was overturned and another ruling (in Ontario) was not even heard by the Supreme Court.

As it pertained to an obligation to perform duties, the findings in *NVT, 1981* mirrored those from *NVT, 1980* and illustrated additional elements of control. For example, in addition to a prohibition on shorts (referenced in *NVT, 1980*), the company prohibited owner-operators from wearing sandals, blue jeans, or having beards with hair below the collar (*NVT, 1981* at para. 30). For various infractions, each of the four witnesses who testified had been subject to varying forms of discipline from NVT. Further evidence of an obligation to perform duties is that, despite being able to take time off as needed, the owner-operators were still responsible for paying $51.50 in weekly dues even while they were away. This often meant that a driver would allow someone else to drive their car (and pay the dues), but those vacation coverage drivers still required NVT's approval (*NVT, 1981* at para. 38).

With *Blue Line, 1979*, *NVT, 1980*, and *NVT, 1981*, a clear precedent was beginning to emerge in the taxicab industry. The Board's consensus in each of these three cases was that taxicab drivers were dependent contractors and entitled to protection under the *Act*. These decisions reflected the Board's understanding of the specific nature of the taxicab industry. Although wages did not flow from the company to the driver, there was still an economic dependence upon the company and its name and a corresponding obligation to the company during a shift. These facts of these cases, however, reflected the Board's preexisting industrial pluralist approach as the taxi drivers had some of a more traditional work relationship with the taxicab companies in the sense that the work was full-time, year around, and performed for a single employer. This very much fit the Board's prevailing mindset of employment and did not a precarious challenge to the typical work relationship.

Ontario Taxi Association 1688 Canadian Labour Congress v. Windsor Airline Limousine Services Limited (Veteran Cab Company) [1981] CanLii 1035 (ON LRB) (referred to hereinafter as *Windsor Airline, 1981*)

Windsor Airline, 1981 represented a slightly more complicated case than had previously been heard as it involved two separate certificate applications for employees of Veteran Cab – one for owner-operators and a second for drivers.[80] The Ontario Taxi Association asserted that both groups were dependent contractors under the *Act*.

One single car owner-operator, Mark Dempsey, was representative of all single car owner-operators and was the only witness for that group of workers. Ownership of the cab, the Board noted, was "central to the relationship between the respondent [Veteran Cab] and owner-operators" (*Windsor Airline, 1981* at para. 8). In this case, however, the company purchased and financed the car, then immediately sold it to an owner-operator, passing along costs for the vehicle, the financing, and further interest payable to the company. In order "to safeguard its loan to the owner-operator the respondent retain[ed] legal title to the vehicle" (*Windsor Airline, 1981* at para. 9). The owner-operator could later sell the vehicle at any point, but only with the approval of Veteran Cab. This arrangement was "so onerous," the union argued, that "ownership is more of a matter of form than substance" (*Windsor Airline, 1981* at para. 10).[81]

In addition to the arrangement on the vehicle and financing, the owner-operators had "other ties and obligations to the company" (*Windsor Airline, 1981* at para. 11). Among other

[80] Considering the Board's rulings in *Canada Crushed Stone, 1977* and *Dominion Dairies, 1978*, the Ontario Taxi Association sought bargaining rights only for the owner-operators of a single vehicle and excluded owner-operators of multiple vehicles from the proposed bargaining unit (*Windsor Airline, 1981* at para. 5).
[81] See also *Nelson Crushed Stone, 1977* at para. 12 for a discussion of form versus substance

things, these included the requirements for a company meter, the colours and decals of the company to be painted on the vehicle, a $68.50 weekly payment for a stand rental, and a $50.50 weekly payment for mandatory insurance, in addition to gas, car washes, and maintenance costs. Dempsey purchased the vehicle for $4100, and seven months later was still indebted $4000 to Veteran Cab. The combined impact of these costs meant that Dempsey's total financial obligations to Veteran Cab required him to have the car on the road daily, and for more than eight hours each day (*Windsor Airline, 1981* at para. 11). This is certainly indicative of a traditional, full-time employment relationship. In fact, there was so much of an obligation to perform duties for Veteran Cab that he "[found] it necessary to use the services of a driver" to keep the car on the road for more hours and "earn revenue for more hours than they can drive" (*Windsor Airline, 1981* at para. 11).

As we have seen, beginning with *Canada Crushed Stone, 1977*, the Board consistently found that a driver who employed a second driver to earn additional revenue was not dependent contractor and was therefore excluded from any potential bargaining unit.[82] Curiously, the Board made a different decision here. Although the owner-operator was entitled to some portion of the total revenue earned by the driver (generally 50 to 60 percent of the revenue), the Board determined that this was not profiting off the driver in an entrepreneurial sense. Instead, they found it reflected an owner-operator "making the best use of his

[82] As the Board noted, "the economic relationship between the owner-operator and his driver is simple. They agree between themselves on a split of the revenue generated by the driver. The reality of the industry, however, is that there is little real negotiation on this point. Almost without exception, the owner and the driver will opt for either a sixty-forty share of revenue or a fifty-fifty split. Occasionally they may agree on a flat fee" (*Windsor Airline, 1981* at para. 18). In all instances, the owner-operator was entitled to some portion of the revenue earned by the driver.

equipment to earn his living" (*Windsor Airline, 1981* at para. 27).[83] In the case at hand, the owner-operator's use of a driver "springs from financial necessity" and was "the only apparent way to make ends meet within the respondent's operations" (*Windsor Airline, 1981* at para. 27-28). As such, the owner-operators were not employers under the *Act*. Their reliance on drivers when they themselves were not driving was to get by – not to get ahead – and highlighted both their dependence upon Veteran Cab and their obligation to perform work for the company. It is likely that the Board's decision would have been different if the owner-operator owned multiple vehicles and regularly profited from the labour of a second driver while they themselves were driving). Allowing someone to use their vehicle during off-hours, however, was not the same as owning multiple vehicles.

Further evidence of the owner-operators' (and drivers') obligation to perform work was that a refusal of a posting from Veteran Cab when they were available would lead to an immediate suspension or the possibility of termination. When owner-operators and drivers began their shift, they were required to report on the air to dispatch and remain on air – while advising of their location – throughout the shift. They also needed to follow company-imposed rules, such as a dress code and a clean vehicle. Veteran Cab, who employed supervisors in unmarked cars to observe the owner-operators and drivers at work, enforced all these rules. Such practices would not apply to an independent contractor and was illustrative of the owner-operators' (and drivers') status as a dependent contractor.

Much like the owner-operators in previous cases, Veteran Cab drivers were (almost) exclusively reliant upon work obtained through the company's dispatch. Dempsey, who the

[83] See also *Dominion Dairies, 1978* and *Comfort Guard Services, 1978*.

parties agreed was representative of single car owner-operators, obtained 95 percent of his fares through the Veteran Cab dispatch, suggesting a clear economic dependence upon the company (*Windsor Airline, 1981* at para. 7). Such a high degree of reliance on the company made the owner-operators "dependent for the livelihood on the goodwill developed by the company and not by themselves. By strictly controlling their access to this goodwill through a financing arrangement in respect of which they have no real choice and working conditions that involve an extensive code of rules," the owner-operators were in a position of economic dependence and more closely resembled traditional employees than independent contractors (*Windsor Airline, 1981* at para. 23).

Having found that the owner-operators were employers in form only, it followed that the drivers were then employees of Veteran Cab. For the Board, there was "little doubt" that this was the case (*Windsor Airline, 1981* at para. 33). In coming to this conclusion, they noted:

> Drivers are recruited by Veteran Taxi. It checks their qualifications, gives them basic orientation and issues them an identification card. It subjects them to an elaborate code of rules which are enforced through its supervisory staff. It assigns them to drive the cars of owner-operators and imposes discipline upon them for breaches of the rules up to and including dismissal, without consultation with the owner-operator (*Windsor Airline, 1981* at para. 33).

The Board continued:

> The drivers earn money to the extent that the respondent's business allows them to. It hires them, fires them and controls their day-to-day work in a way that the work of employees is controlled …The driver is an integral part of an economic structure directed and controlled by the respondent. By keeping the owner-operator's car on the road, adhering to company rules and driving a cab to service the respondent's calls the driver plays an essential part in advancing the respondent's goodwill and its ultimate profits. Like the owner-operator, the driver has no real economic existence apart from the respondent's business organization (*Windsor Airline, 1981* at para. 38).

The Board's finding that the owner-operators were dependent contractors built upon its earlier decision in *NVT, 1980* and *NVT, 1981* and was consistent with the Board's initial approach to owner-operators of taxicabs in *Blue Line, 1979*.

Retail, Wholesale and Department Store Union (AFL-CIO-CLC) v. Hamilton Yellow Cab Company Limited, 1987 CanLII 3130 (ON LRB) (referred to hereinafter as *Yellow Cab, 1987*)

The taxicab industry in Hamilton shared many similarities with the broader taxicab industry throughout Ontario in terms of both municipal regulations and the relationship between the taxicab company and those who drove under its banner. Yellow Cab had just over 100 taxicabs operating under its banner and, much like in previous cases (*Blue Line, 1979*; *NVT, 1981*), provided access to a computer dispatch system and taxi waiting areas or taxi stands in exchange for monthly dues ($235 per month, per car) from those who drove. Likewise, each vehicle needed to be equipped with a roof sign, taxicab meter, two-way radio, and a mobile taxi computer, all of which could be purchased or rented from Yellow, but in any case, needed to be in each vehicle for it to drive under the 'Yellow' banner. As in other cases, in addition to the regulations imposed through municipal bylaws, "Yellow applies its own sanctions to ensure that appropriate standards of behavior and performance are met" (*Yellow Cab, 1987* at para. 9).

Yellow's dispatch system allocated customers to vehicles on shift (accounting for about 80 percent of business/income), while its charge account customers accounted for between 30 and 35 percent of total customers. These customers saw only 'Yellow' as a brand – the specific driver did not matter and did not attract customers to the brand. Yellow advertised in the phone book and elsewhere in the community as having Hamilton's "largest and finest fleet" and urged customers to call it for "prompt and efficient service" (*Yellow Cab, 1987* at para. 13). In short, customers were attracted to call Yellow because of its brand recognition and "it's goodwill in the community, or its business arrangements, rather than the business acumen of a particular driver or owner-operator" (*Yellow Cab, 1987* at para. 14). Similarly, if customers were unhappy with the service or if there was a problem, Yellow – and not the individual owner-operator – was "the entity to be notified" (*Yellow Cab, 1987* at para. 13). All of this was more suggestive of an employment relationship with Yellow, rather than the owner-operators being independent contractors, and appeared to be consistent with the precedent established in *Blue Line, 1979*, *NVT, 1980*, *NVT, 1981*, and *Windsor Airline, 1981*.

Because Yellow and its apparatuses (dispatch, charge account, taxi stand, relationships with local businesses) accounted for such a high percentage of the owner-operators' income, it was able to exert considerable control over the owner-operators. It had a brand to protect and imposed various sanctions to ensure compliance with its various rules. For their part, the owner-operators were heavily reliant – or dependent, according to the union – upon Yellow and had every incentive to keep their cab on the road as much as possible, as well as abide by Yellow's rules. This market imperative highlighted the owner-operators' dependency on Yellow. As the Board noted, "the need to make a living dictate[d] that most owner-operators will be working most of the time, and it is not likely that a car could remain for very long under the Yellow banner if it was regularly unavailable or continually refused to accept service calls from Yellow's customers" (*Yellow Cab, 1987* at para. 21). Under this logic, there existed both a dependency upon Yellow and an obligation to perform services in a manner more akin to a traditional employee than an independent contractor.

The Board's rationale in this case is best summarized in the following paragraph:

> What the owner-operators supply to Yellow is primarily their labour, in the service of Yellow's customers. The fact that they may own or lease a car which, we note, must still meet Yellow's specifications, does not alter that basic equation. Yellow exercises detailed control over the performance of their work as it must if it is to preserve its customers' goodwill, and ensure that they are served in accordance with its own standards. Yellow also maintains an elaborate system of rules and disciplinary responses which effectively penalizes any owner or driver who does not meet those standards (*Yellow Cab, 1987* at para. 43).

While operating in a manner more akin to a traditional full-time employee than an independent contractor in many ways, there remained ways in which the owner-operators resembled independent contractors, one of which – performance of services for compensation – was a defining factor of being a dependent contractor. As in previous cases in the taxicab industry, questions arose about the absence of wages paid directly from the company and the owner-operators' usage of fill-in drivers during off-hours. The Board dismissed the first point, stating that the absence of direct wages "flows from the special market context of the taxi industry" and that, in this industry-specific context, the collection of fares by owner-operators or drivers was not "a critical element in their relationship with Yellow" (*Yellow Cab, 1987* at para. 49-50).

The other way it seemed that owner-operators might be independent contractors – having the ability to lease shifts to drivers to fill in during off-hours or weekends – risked excluding them from the *Act* by virtue of being employers in their own right. The alleged employment of fill-in drivers by the owner-operators was, however, a more significant point as a finding that they employed others would make them an independent contractor and employer, and outside the protections of the *Act*. The Board focused on the exploitation of someone else's labour-power and the accumulation of profit through that person's labour in analyzing the alleged employment relationship between the owner-operators and the drivers.

Here, too, the unique context of the taxicab industry was an important point. The Board elaborated that in

> the taxi business, the owner-operator does not engage a replacement driver to 'profit from his labour' in any material sense, but rather to fill in for the times when he cannot work for Yellow, so that he can 'make ends meet', and to preserve the continuity of his commitment to the Yellow organization. The owner-operator is an 'employer' in form only (*Yellow Cab, 1987* at para. 51; see also *Windsor Airline, 1981* at para. 27-28 for a similar approach).

As an employer 'in form only,' the owner-operators were therefore not excluded from the *Act* because their usage of a fill-in driver flowed from their own ongoing obligation to perform work for Yellow than an attempt to make profit from the labour of the fill-in driver, a finding consistent with the Board's decision in *Windsor Airline, 1981*. The Board's reliance of the act of profiting off someone else's labour as one threshold between an employer (falling outside of the *Act*) and another employee using a 'helper' (falling under the *Act*) recognizes how profit is created in a capitalist system. Given that the drivers were not employees of the owner-operators, the Board found them to be employees of Yellow.

In determining the drivers' position relative to both the owner-operators and Yellow, the Board noted that "the meaningful lines of accountability still run between Yellow and the working driver, who remains, on the job, subject to Yellow's rules, direction and control" (*Yellow Cab, 1987* at para. 51). Conversely, they found "the economic relationship between the owner-operator and driver is largely confined to agreeing on the split of the revenue derived from serving Yellow's customers" (*Yellow Cab, 1987* at para. 51). Like the owner-operators, the drivers were economically dependent upon Yellow as they too derived income "from the name, goodwill, and dispatch service of Yellow" (*Yellow Cab, 1987* at para. 51). Similarly, the drivers were under an obligation to perform services for Yellow and in a much-prescribed manner.

Yellow subjected them to the same rules, behaviour, and disciplinary regime as the owner-operators, and possessed the right to discipline or terminate any driver that did not perform to expectation.

Yellow, 1987 reinforced earlier cases and furthered the consistent precedent developed over the preceding decade. Much like *Blue Line, 1979*, it situated the Board's decision-making in the specific context of the taxicab industry and recognized the nuances of the industry relative to other industries. Building on both *NVT, 1980* and *NVT, 1981*, the Board determined that the compensation received by taxicab drivers met the threshold of compensation under the *Act*. Similarly, *Yellow, 1987* recognized the high degree of control exercised by taxicab companies over both owner-operators and drivers alike. Finally, on the matter of the relationship between owner-operators and drivers, the Board built upon its precedent from *Windsor Limousine, 1981* around profiting of the labour-power of someone else and found that owner-operators were not employers, and that both owner-operators and drivers were dependent upon the company under whose banner they drove.[84] These decision were reinforced with the Board's comfort zone of traditional post-war employment.

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[84] In both *Windsor Limousine, 1981* (at para. 39) and *Yellow Cab, 1987* (at para.60), the Board determined that owner-operators and drivers represented two distinct communities of interest and placed them in separate bargaining units (one for owner-operators and one for drivers).

Ontario Taxi Workers' Union v. Hamilton Cab Co. c/o Hamilton Cab [2011] CanLII 7282 (ON LRB) (referred to hereinafter as *Hamilton Cab, 2011*)

In 2011, another group of owner-operators and drivers sought certification with the newly created Ontario Taxi Workers Union (OTWU).[85] Despite disagreeing on the employment status of the drivers, the parties recognized that the "delivery of taxi service to the public involves a number of inter-related elements: a car, a plate which permits its use as a taxi, a licensed driver and a broker/dispatch service (Hamilton Cab) which recruits or attracts customers and allocates them to the available cabs" and that this involved a "matrix of economic relationships [that] may be complex" (*Hamilton Cab, 2011* at para. 14). The parties agreed that "neither taxi drivers nor owner operators receive 'wages 'payable by Hamilton Cab" and "the only exception is Hamilton Cab charge account customers … in [which] case Hamilton Cab pays the cab operator for the charges" (*Hamilton Cab, 2011* at para. 14).[86]

As part of this matrix "the various participants (car owner, plate owner, driver) divide the available funds in accordance with their own privately struck economic arrangement. The owner operators and fill-in drivers determine between them which and how many shifts the latter will work ("rent"), as well as the revenue split. The owner operators determine whether

[85] At the hearing, the Board had yet to have found the OTWU to be a union within the meaning of the Act. The OWTU produced the necessary documentation and evidence of the five-necessary steps needed to be found to be a union under the Act (see *Hamilton Cab, 2011* at para. 9, and paras. 60-70). The drivers and plate owners had been trying to form a union since December 2009 and sought "better pay, health benefits and a fair dispatch system" and "a voice in efforts to reform the taxi industry in Hamilton, especially around questions of security and the city's refusal to approve the installation of plastic shields to protect drivers from their passengers" (n.a, *Hamilton Spectator*, 2011).

[86] This group of workers drove under the Hamilton Cab banner, a company that the OTWU claimed was a successor to the former Hamilton Yellow Cab (*Hamilton Cab, 2011* at para. 51). For its part, the Board did not rule that Hamilton Cab was a successor company, but nevertheless recognized that "this case bears many factual similarities to Hamilton Yellow Cab," adding, "it is apparent that many of the paragraphs in the Agreed Statement of Facts were in effect copied from that decision" (*Hamilton Cab, 2011* at para. 51).

to cover their off hours with one or more drivers" (*Hamilton Cab, 2011* at para. 14). The parties also agreed that the "plate owner is responsible for providing a car and all necessary equipment, including a roof sign, taxicab meter, two way radio and mobile taxi computer" and that all cabs driving under the Hamilton Cab banner needed to be painted with Hamilton Cab's colours to ensure "that a uniform image is projected to Hamilton Cab's customers" (Hamilton Cab, 2011 at para. 14).

Despite agreeing on a long list of facts (31 in total), the parties disagreed over their meaning and implications for the employment status of the owner-operators and drivers in question. The OTWU argued that this case was "factually indistinguishable" from previous taxicab cases, including *Blue Line, 1979*; *NVT, 1981*; and *Windsor Airline, 1981* (*Hamilton Cab, 2011* at para. 17). Hamilton Cab, on the other hand, relied on *Algonquin, 1981* to support its position that the owner-operators were independent contractors and outside the parameters of the *Act*, and that the drivers were employees of the owner-operators and not of Hamilton Cab.

The Board maintained that the factors from *Algonquin Tavern, 1981* "do not constitute a checklist and must be applied in a way that is sensitive to the context of the specific industry" (*Hamilton Cab, 2011* at para. 25). They analyzed the *Algonquin Tavern, 1981* criteria not in and of themselves but rather in a matter that accounted for the nuance and specifics of the taxicab industry. As a result, they also relied heavily upon *Yellow Cab, 1987* as the leading authority in the taxicab industry.

Relying on the application of the *Algonquin Tavern, 1981* criteria – which made very little distinction between the owner-operators and drivers – the Board concluded, "the relationship of the drivers to Hamilton Cab is essentially the same as that of the single plate owner/lessee operators to Hamilton Cab" in all but two minor ways (*Hamilton Cab, 2011* at para. 25). These two minor distinctions were that the owner-operators had a direct contract with Hamilton Cab whereas the drivers did not, and that owner-operators had the ability to refuse to permit an individual driver to drive their vehicle whereas the driver did not (because they did not own a vehicle).

Of the first difference, the Board noted that privity of contract was not necessary for a relationship of economic dependency. Citing the precedent established in *Adbo, 1977* – a case in which the Board had the opportunity to consider the "meaning of dependent contractor provision shortly after it was introduced" – a formal contract and resulting obligation stemming from it did not need to exist to establish a relationship of dependency (*Hamilton Cab, 2011* at para. 54). Although the owner-operators had a formalized contract with Hamilton Cab and the drivers did not, this fact did not preclude a finding that both groups were dependent upon Hamilton Cab. As the Board maintained in *Adbo, 1977*, "contractual form and the ownership of tools are no longer essential considerations" in determining whether someone is a dependent contractor (at para. 25). As such, the second difference of the owner-operators' ability to refuse to permit a driver to use their vehicle and drivers' lacking that same ability was moot because ownership of tools – in this case, a vehicle – was not a requirement of dependency.

The Board then needed to determine whether the owner-operators and/or drivers were dependent upon Hamilton Cab. The lack of difference between the two groups suggested that the Board's findings would apply the same to each group. Using the criteria from *Algonquin Tavern, 1981* – as it pertained to the taxicab industry (and outlined in Table 3.1 below) – the

Board concluded that both the owner-operators (of a single plate) and the drivers of those owner-operators' cabs were dependent contractors of Hamilton Cab, placing the OTWU in a position to be the certified bargaining agent (*Hamilton Cab, 2011* at para. 59).

Table 6.1: The Application of the eleven-factor criteria from *Algonquin, 1981* to *Hamilton Cab, 2011*

Factor from *Algonquin, 1981*[87]	**Findings in *Hamilton Cab, 2011***
Evidence of entrepreneurial activity	"There is no evidence of any other significant entrepreneurial activity on the part of either the single plate owner/lessee operators or the drivers. Neither the single plate owner/lessee operators nor the drivers advertise. Few have business cards. Some cabdrivers may develop personal relations with some customers which results in repeat business or favourably impress customers in a way which may result in tips. In this respect, however, they are similar to a waiter or waitress. This does not constitute them an entrepreneur" (at para. 36) *Points to dependent contractor/employee*
The use of, or right to use substitutes	"While single plate owner/lessee operators can use substitute drivers for their cars as argued by Hamilton Cab, the substitute driver must first be issued a PIN by Hamilton Cab in order to make use of its dispatch service. Hamilton Cab then exercises direct control over those substitutes" (at para. 37) *Points to dependent contractor* "There is no evidence with respect to whether the drivers can use substitute drivers for themselves" (at para. 38) *n/a*
Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials	"The single plate owner/lessee operators own or lease their cabs. The drivers do not own or supply any materials. Hamilton Cab, however, owns and operates the dispatch service upon which both the single plate owner/lessee operators and the drivers rely and thereby controls in large measure their supply of customers. Those customers in turn are attracted by the reputation which Hamilton

[87] In its decision, the Board found it "convenient to reorder the Algonquin Tavern factors to start with the third" in light of Hamilton Cab's reliance upon the criteria in *York Condominium Corporation [1977] OLRB Rep. 645* in determining who the employer was (*Hamilton Cab, 2011* at para. 26). The Board also combined the fourth (the selling of one's services to the market generally) and fifth (economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes) factors in its written decision (*Hamilton Cab, 2011* at para. 40-41).

	Cab cultivates and maintains in the market" (at para. 39) *Points to dependent contractor/employee*
The selling of one's services to the market generally/ Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes	"the single plate owner/lessee operators and the drivers sell their services to the market as "Hamilton Cab". As indicated in the Statement of Facts: "There are monthly rental obligations, distinctive vehicle colours, established radio links and computer tie-ins which make it impossible for an owner/driver working in the Hamilton Cab system to work for anyone else" (at para. 41) *Points to dependent contractor/employee*
Evidence of some variation in the fees charged for the services rendered	"Neither the single plate owner/lessee operators nor the drivers have any ability to alter the fees charged for services rendered: they are set by the City of Hamilton. As stated earlier, the revenue sharing arrangements between single plate owner/lessee operators and drivers are largely a way of sharing the cost of the brokerage fee payable to Hamilton Cab. Documents filed show that Hamilton Cab unilaterally changes those brokerage fees" (at para. 43) *Points to dependent contractor/employee*
Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer	"The single plate owner/lessee operators, and the drivers who act as "fill-in" workers for them in operating those cabs when they are not, are an essential element of Hamilton Cab's business" (at para. 45) *Points to dependent contractor/employee*
The degree of specialization, skill, expertise or creativity involved	"Hamilton Cab does not suggest that this is a relevant factor in this case" (at para. 46) *n/a*
Control of the manner and means of performing the work — especially if there is active interference with the activity	"Hamilton Cab "suspends" and even "terminates" drivers and single plate owner/lessee operators who refuse to take calls. Hamilton Cab also has standards and expectations which it imposes upon cabdrivers" (at para. 47) *Points to dependent contractor/employee*
The magnitude of the contract amount, terms, and manner of payment	"There is no question that Hamilton Cab does not pay hourly wages, provide benefits or make deductions from payments to the cabdrivers. As noted above, however, this does not change the economic dependency of the cabdrivers, including the single plate owner/lessee operators, upon Hamilton Cab. There is no suggestion that the owner/lessee operators do pay hourly wages, provide benefits or make deductions from payments to the drivers of their cabs" (at para. 49) *Points to dependent contractor/employee, despite lack of deductions*
Whether the individual renders services or works under conditions	"All cabdrivers work under the same conditions" (at para. 50) *Points to dependent contractor/employee, though Hamilton Cab*

which are similar to persons who are clearly employees	*alleged there were no employees in its employ for a comparison to be made*

The Board's decision in *Hamilton Cab, 2011* built upon and reinforced the thirty-year precedent that it had developed in the taxicab industry. The agreed-to facts in *Hamilton Cab, 2011* illustrated that very little had, or could, change in employment relationships in the taxicab industry. As the Board noted, *Hamilton Cab, 2011* "[bore] many factual similarities to Hamilton Yellow Cab" (at para. 51). Once again, the Board determined that owner-operators and drivers were dependent contractors of the company they drove for.

Despite developing an agreed-to statement of facts with the OTWU, in which "many of the paragraphs … were in effect copied from [*Yellow Cab, 1987*]," a case in which the Board found owner-operators and drivers to be dependent contractors, Hamilton Cab unsuccessfully resisted that the drivers and owner-operators driving under its banner were akin to its employees (*Hamilton Cab, 2011* at para. 51).

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. 531584 Ontario Ltd. [2013] CanLII 36487 (ON LRB) (referred to hereinafter as *531584 Ontario Ltd., 2013*)

531584 Ontario Ltd., 2013 made its way to the Board following a successful certification vote of a proposed bargaining unit, covering those "operating as owners and/or drivers of taxi cabs licensed by Greater Toronto Airport Authority to operate at Lester B Pearson Toronto International Airport." The union asserted that the drivers were dependent contractors of 531581 Ontario Ltd. (operating as and referred to hereinafter as Aeroport), while the company maintained instead that these owner-operators and drivers were not in a position of economic dependence upon them.

Despite the well-developed precedent explored in the chapter, which, thus far established that almost all taxicab and limousine owner-operators and drivers were dependent contractors, Aeroport maintained that this specific group of workers were not in a position akin to employees and therefore were not dependent contractors. This case is noteworthy because the Board sided with the company and found that the owner-operators and drivers were not in a position of economic dependence, and thus were not dependent contractors within the meaning of the *Act*. In so doing, the Board broke with its own precedent on the employment status of owner-operators and drivers. Because the Board did not deem the owner-operators and drivers to be in a position of economic dependence, it was unnecessary to decide whether they were under an obligation to perform duties for Aeroport. This decision represented a major loss for these workers and had the potential to be a major setback for precariously employed workers within the taxicab/limousine industry and in other industries with non-standard employment relationships.

The facts at hand were virtually identical to those across the broader taxicab/limousine industry explored throughout this chapter. Aeroport claimed that it was not the employer of any drivers, but rather – as many other taxicab companies had argued unsuccessfully – merely "a broker" connecting the drivers with customers seeking transit to the airport (*531584 Ontario Ltd.,* 2013 at para. 5). The Board noted that "the drivers pay a monthly fee to Aeroport, and it provides them with access to Aeroport's dispatch service. Aeroport connects the drivers with customers (or fares) who are travelling to Pearson International Airport" (*531584 Ontario Ltd.,* 2013 at para. 5).

However, Aeroport was only a dispatch service for passengers travelling *to* the airport and flying out, *not* for passengers who had just arrived and were seeking ground transportation to leave the airport. Many of the drivers also drove passengers from the airport, though this work was not connected to Aeroport. In the case of passengers seeking ground transportation from the airport, "the drivers are connected with fares departing from Pearson by the GTAA [Greater Toronto Airport Authority] dispatch system and not by Aeroport's dispatcher" (*531584 Ontario Ltd., 2013* at para. 5). This fact led the Board to determine that the owner-operators and drivers were not in a position of economic dependence upon Aeroport, or perhaps more accurately, not dependent enough upon Aeroport to be considered dependent contractors. As is standard across the taxicab and limousine industry, "customer fares are the source of the drivers' incomes" and the company did not pay a wage to the drivers directly (*531584 Ontario Ltd., 2013* at para. 8). The problem for the owner-operators and drivers in this case was that they had income from other sources, particularly customers obtained through the GTAA dispatch system and were therefore, according to the Board, not solely or even primarily economically dependent on Aeroport.

The Board asserted, "the determination of the extent of "economic dependence" is best assessed by having regard to the percentage of the drivers' income that is generated as a result of its affiliation with Aeroport" [or, more generally speaking, the entity upon which an applicant was alleging to be dependent upon] (*531584 Ontario Ltd., 2013* at para. 8). In this case, the fares dispatched by Aeroport represented – on average – 17 percent of a driver's income and

22 percent of their trips, while the fares dispatched by the GTAA represented – on average – 83 percent of a driver's income and 78 percent of their trips. For the Board, drivers' reliance upon Aeroport was not such that it represented a relationship of economic dependency. Quite simply, the Board deemed the percentage of income derived from working for the respondent company too low for the owner-operators and drivers to be in a relationship more in line with that of a traditional employee. Consequently, they were excluded from protection as dependent contractors under the *Act* and this decision represented a break from the precedent in most other taxicab and limousine cases.

In coming to this decision, the Board determined that an owner-operator or driver must derive a majority of their income from a single company for someone to be economically dependent upon that company (assuming also that there was a requirement to perform duties for that company). They added that a "review of that caselaw reveals not a single case in which drivers were found to be dependent contractors where the percentage of the drivers' income derived from its affiliation with the broker was less than 50%" (*531584 Ontario Ltd., 2013* at para. 9). To support their decision, the Board cited the following cases and figures:

- In *Blue Line Transportation Ltd.*, [2012] O.L.R.D. No. 2419, approximately 80-90% of the taxis' business came through Blue Line's dispatch;
- In *Hamilton Cab, 2011*, 98-99% of all business was generated and allocated through dispatch;
- In *Yellow Cab, 1987*, at least 80% of business came through dispatch;
- In *NVT, 1981*, the least economically dependent of the drivers was able, for three months of the year only, to rely on the broker to generate 50% of his income, but the percentage derived from the broker services was much higher during the balance of the year, and approximated 95% for one driver; and
- In *Diamond Taxicab Association (Toronto) Limited*, [*1992] OLRB Rep. November 1143*, the Board identified three sources of driver income attributable to the drivers' affiliation with the broker; dispatched fares; flagged fares paid for by account; and flagged fares by persons who recognized the Diamond "brand" or distinctive colouring of the cab. Although only the first two could be quantified, we

> interpret the statistics set out in paragraph 43 of that decision as indicating that they accounted for at least 65% of drivers' total fares (*531584 Ontario Ltd., 2013* at para. 9).

The Board reasoned that, in other taxicab cases, the company "was not only the source of the majority of the drivers' income, but was also [their] steadiest or most reliable source of income.… In this case, the drivers have another source of income that is more lucrative and at least as reliable as that generated through Aeroport: their ability to access the GTAA dispatch queue at Pearson and pick up fares leaving the Airport" (*531584 Ontario Ltd., 2013* at para. 10). Whereas in previous cases it was practically impossible to drive for a second taxicab company – especially when vehicles required a painted logo or roof sign and reality dictated that the car needed to be on the road for more than 40 hours per week in some cases – the same did not hold true in this case (see, for example *NVT, 1981*; *Yellow Cab, 1987*; *Blue Line Transportation, 2012*). Here, owner-operators and drivers drove a black car without a sign or logo and secured a minority of their fares driving passengers to Pearson Airport through the relationship with Aeroport, but a majority of their fares picking up passengers from Pearson Airport through their affiliation with the GTAA. For the Board, the fact that the income earned through Aeroport represented a minority of total income negated a relationship of economic dependency.

Finally, and unlike in other cases involving taxi and limousine owner-operators, the Board characterized the owner-operators affiliated with Aeroport as entrepreneurs. They noted that the cost of the plate that permitted the owner-operators access to the GTAA dispatch was approximately $800,000. This represented, in the Board's estimation, a "significant capital investment, and we would characterize it as entrepreneurial in nature" (*531584 Ontario Ltd., 2013* at para. 10). This focus on the $800,000 cost of a GTAA plate as evidence of entrepreneurial activity represented the only analysis of the eleven criteria established in *Algonquin Tavern, 1981*, though the Board did not formally cite the case in their written decision. They did not review each of the criteria in detail as they had in previous cases. Rather, the percentage of income served as the deciding factor in the decision that the owner-operators and drivers were not dependent contractors within the meaning of the *Act*.

Regardless of the cost of a GTAA plate, the Board's decision in *531584 Ontario Ltd., 2013* represented a dangerous precedent for precariously employed workers who – generally due to necessity – work for or provide services to more than one company. This is especially true in the gig economy. While the 'capital investment' for many potential dependent contractors is nowhere near as costly as it was in this case, the fact that the Board opened the door to someone not being a dependent contractor if their income from the company in question was less than 50 percent of their total income represented a potential hurdle for precarious workers working multiple jobs, as at least one of those jobs will represent less than half of their income.[88]

Recall that the *LRA* defines a dependent contractor as someone "who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor *is in a position of economic dependence upon*, and *under an obligation to perform duties for*, that person more closely resembling the relationship of an employee than that of an independent contractor" (emphasis added). The *Act* does not formally limit this dependency to a single employer, though there has long been an issue when workers earn a

[88] The number of multiple job holders in Ontario has increased considerably over the past four decades - about 5.3% of the workforce in 2014 held multiple jobs, up from 2.2% in 1976 (Shaker and Shaban, 2018: 21).

minority of their income from a company who they claim to be dependent upon (see, for example, *Craftwood, 1980*; *Algonquin, 1981*; and *Journal Le Droit, 1985*). An interpretation by the Board that excludes multiple job holders – especially within the same industry – from being dependent contractors had the potential to deny rights under the *Act* to a growing number of precarious workers, especially those working in the gig economy.

Without a traditional single employer to rely upon, these workers must secure multiple jobs to make ends meet and can find themselves in a position of economic dependence upon more than one company. A recognition of the realities of the precariousness of workers with multiple jobs would be an important development for the Board, but one not realized in *531584 Ontario Ltd., 2013*. If the Board remained unwilling to recognize the dependency upon companies that multiple job holders have – especially those in the gig economy – precarious workers would be unable to secure protection as employees under the *Act.* The case appears, however, to be an outlier. Its fact scenario is incredibly specific, and it has not been cited in more recent, subsequent cases on dependent contractors.

Conclusion

The fact that there is a large body of case law involving the employment status of taxicab (and limousine) drivers should not come as a surprise. As mentioned earlier, Harry Arthurs noted that taxicab drivers "personify the dependent contractor" (1965, p. 89). In *Hamilton Cab, 2011*, the Board noted, "the actual matrix of economic relationships may be complex," and the relationship between a taxicab owner-operator appears – at first glance – to be different from that of a relationship between a traditional employee and an employer

(*Hamilton Cab, 2011* at para. 14). This difference, in part, stems from the fact that it is generally the customers – not the taxicab company – that provide payment to the owner-operator or driver. In *N.V.T., 1981*, the Board added, “taxi owner-operators are often in a triangular relationship with the company they work for and the passengers they service” (*N.V.T., 1981* at para. 18). The difference between traditional employees and taxicab owner-operators and drivers, however, is more one of form of the relationship than of its substance.

Beginning with *Blue Line, 1979*, the Board has developed a lengthy precedent that that taxicab owner-operators (of a single vehicle) and drivers (who do not own a vehicle) more closely resemble employees than independent contractors (see, for example, *Blue Line, 1979*; *NVT, 1980*; *NVT, 1981*; *Windsor Airline, 1981*; *Yellow Cab, 1987*; *Hamilton Cab, 2011*). As the decision in *531584 Ontario Ltd., 2013* illustrated, however, the extension of dependent contractor status to all drivers in this industry has not been universal. Instead, informed by its post-war industrial pluralist mindset, the Board was more likely to make dependent contractors findings in cases in which the work was full-time and with a single-employer, as opposed to more precarious and split – often out of necessity – over multiple employers. Recognizing the nuances of the taxicab industry and the complexities of the relationships within it, the Board noted early on that any decision about one’s employment status “must be viewed in the total context of the taxi industry” (*Blue Line, 1979* at para. 8).

With a few exceptions, the Board found taxicab owner-operators and drivers to be dependent contractors and were dependent upon the taxicab company under whose banner they drove. Despite not being paid a wage by the taxicab companies (and, in fact, paying regular dues to the company for the usage of their dispatch services), a relationship of dependency routinely existed due to the power and control that taxicab companies have over drivers, particularly the power to grant, withhold, and otherwise regulate work opportunities. As the Board noted in *NVT, 1980*, the companies exerted a “high degree of control” over the owner-operators when clocked in, reflective of the owner-operators’ and drivers’ obligation to perform duties for the company (*NVT, 1980*, at para. 12). This approach is consistent with the approach that the Board has taken regarding many owner-operators in the construction aggregate industry and with drivers of perishable goods.

Over a period of more than 30 years – from *Blue Line, 1979* to *Hamilton Cab, 2011* – Arthurs’ assertion that taxicab drivers were the personification of dependent contractors was regularly shown to be correct. By 2011, however, the taxicab industry began to undergo significant changes with the launch of Uber, a ride-sharing provider, putting the employee-status of owner-operators into question.[89] Ride-sharing services such as Uber connect passengers with drivers, via websites and mobile apps, but unlike taxicabs, these drivers cannot be hailed legally from the street and generally do not have reserved taxi stands for drivers to wait for passengers. There has also been a rise in part-time and multiple employer precarity as compared with traditional taxicab cases. Much like traditional taxicab companies, however, Uber has similarly declared that it is not an employer and that its drivers are independent contractors (CBC News, 2019). Thus, the historical trajectory of taxicab owner-operators and drivers is noteworthy not simply as an industry-specific case study in and of itself, but also

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[89] Uber was launched in the United States in 2011 and came to Canada (Toronto) in 2012 (see Shore, 2012). Uber drivers also sought to unionize and a lengthy legal dispute as to whether they were dependent contractors or independent contractors was fought out in front of the Board (see *United Food and Commercial Workers International Union (UFCW Canada) v Uber Canada Inc., 2020 CanLII 54980 (ON LRB)*. This case is examined in greater detail in Chapter 7.

because of its important implications for the regulation of work in the emerging gig economy. Chapter 7 explores this phenomenon in further detail.

Much like the construction aggregate and the perishable delivery industries, the traditional taxicab and limousine industry saw an expansion of rights for those working within it, albeit for that subset of workers who fit more cleanly in the Board's industrial pluralist model of post-war employment. The Board recognized the uniqueness and nuance of the taxicab industry relative to other industries and played an active role in expanding coverage under the *LRA* by viewing owner-operators and drivers as more closely resembling employees than independent contractors.

Chapter 7: "You Never Know What the Algorithm is Going to Do": Dependent Contractors in the Digital Platform Economy[90]

Though the level of technology has changed since 1965, today's platform workers who access work opportunities delivering food on a bike or driving passengers in cars through a smartphone app have much in common with the dependent contractors that Arthurs initially discussed (1965: 89). While the form of the relationship and some of the more superficial points may vary, the substance of the relationship between truck drivers and food bike couriers, or between traditional taxicab drivers and Uber drivers, and the companies who utilize and profit from their services is fundamentally the same. As Arthurs noted, these dependent contractors "are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganized market conditions," and, as a result "are 'dependent' economically, although legally 'contractors'" (Arthurs 1965: 89).

This chapter explores the rise of the app-driven digital platform economy (a part of the broader gig economy) and its implications for the workers who perform these services. Specifically, it focuses on food delivery and the transportation of people and builds upon the analysis of workers seeking dependent contractor status undertaken in previous chapters. In many ways, this chapter picks up where Chapter 5 and 6 ended. In much the same way that delivery workers and taxicab drivers possessed some contractor-like flexibility in their work but were dependent upon the company for whom they drove, the same is true of bike couriers

[90] Subramaniam, 2002a.

delivering food and Uber drivers in the 2020s. In both instances, the companies asserted that these workers are independent contractors.

Kaardal and Bjornson (2018: 3) define the gig economy as one which “connects workers with clients or employers on flexible, autonomous, and short-term basis,” through an app-based digital platform. While technologically more advanced than traditional delivery or taxicab companies, the general purpose of these new digital platform companies – the delivery of goods/people for profit – remains the same. On the technological front, many companies operating in the platform economy are viewed as innovative and disruptive. For example, one commentator has remarked that “Uber is leveraging cutting-edge technologies for its operations and billing, as well as dynamically matching supply with demand,” while another added that “Uber’s unique innovation to create an app in which supply and demand of transportation services could be met through a digital platform embodies how a traditional industry can be disrupted from day to night” (Bharti, 2014; Sanchez-Armas, 2020). Similar comments have been made about Foodora (Miltok, 2016).

While Uber, Foodora, and other app-based companies emphasize new technology in the delivery of traditional services and disrupt the industry status quo, their model of employment relations is fundamentally the same as that of traditional companies in these industries. That model is to engage workers who are economically dependent upon them but whom they view as independent contractors, maintain expectations of control over those workers during their shift, but deny the existence of an employment relationship. In short, these companies – like their traditional predecessors – seek to enjoy the benefits of the employment relationship without any of its obligations or supposed burdens. Perhaps the only difference is these app-based companies' overt focus on worker 'flexibility' – something that traditional delivery and taxicab companies did not emphasize – but as this chapter will show, the substance of the relationship is otherwise the same.

Flexibility has become something of a buzzword in the 21st century, but it is a highly subjective term. The real question, then, is flexibility for whom? (Thomas, 2020). Mark Thomas maintains that "insofar as labour and employment law is concerned, workforce flexibility is often associated with an orientation towards …'market regulation', whereby labour and employment laws and policies increase the exposure of workers to market forces" (Thomas, 2020: 81-82; see also Standing, 1999: 42). Among other things, these market forces lead to an unpredictability of work schedules, a normalization non-standard working time, a rise in 'on-call' or as-needed employment, and a general reduction for workers capacities to have some semblance of control over their work time and schedule. This supposed flexibility is generally one-sided and provides flexibility for employers at the expense of flexibility for workers, who then have no choice but to adhere to the scheduling requirements of employers. As Joanne Coghlan notes, "flexibility is supposed to enhance workers' freedom to choose working arrangements tailored to their needs. Yet, in practice, flexibility too often enhances the power of employers to devise modes of working which are economically and commercially advantageous to them" (Conaghan, 2023).

Flexibility has become the hallmark of the gig economy (see, for example, Katnelson and Oberholtzer-Gee, 2023; Kelly, 2024) though this supposed flexibility is at the behest of market forces. Due, at least in part, to the one-sided nature of the supposed flexible work arrangement and the lack of benefit and protection for workers, gig workers – like taxi drivers before them –

have also sought to unionize their workplaces and seek collective bargaining rights. Aspects of a 'flexible' workplace like Foodora and Uber – the absence of a traditional workplace, the virtual nature of their work, and the transient nature of the gig economy – make it difficult for union organizers to identify their co-workers, meet with them, and convince them to sign a union card. Despite these challenges, there have been some successes. Two cases involving app-based gig workers made their way to the Board in early 2020: one involving Foodora food delivery couriers and another involving Uber Black and Uber Black SUV drivers. These cases are analyzed in this chapter.

These cases are important for a variety of reasons. First, and most importantly, they are indicative of the potential for future worker organizing and unionization in the gig economy. Second, they provide important continuity with previous cases on dependent contractors and reinforce the positions taken by workers, companies, and the Board in those disputes. Third, these cases illustrate the broader global dispute between platform owners and gig workers. As Vanmala Subramaniam noted, "the story of Uber versus gig workers in Ontario is a microcosm of a continuing global battle of the rights of a growing new class of workers – a class that has emerged only in the past decade, birthed by the technological prowess of Silicon Valley, and whose livelihoods are governed by algorithms" (Subramaniam, 2002a).

Most importantly, these cases have also forced the Board to reflect upon the changing nature of work with the rise of 'flexibility' and the gig economy, consider more fully the realities of precarious work, and re-evaluate their understanding of the relationship between contractors and the companies who utilize their labour-power to provide services. In a similar vein, these cases also allow for a historical comparison of the Board's decision-making in cases with more traditional economic relationships and those in the contemporary app-based gig economy.

Despite what appear to be victories for workers here, or perhaps more accurately what are indeed victories in the quasi-judicial realm that is the OLRB, the eventual outcomes for workers in both cases illustrate the limitations of the Board and serve as a reminder of the Board's function within the confines of the capitalist state apparatus. In the case of *Foodora, 2020,* the Board delivered a legal ruling that provided benefit to the couriers seeking dependent contractor status and Foodora responded by ceasing their Canadian operation. This was a clear exercise of Foodora's private property rights and within the realm of what Foodora, or any company for that matter, could do. The Board is simply not structured in such a way that it can prevent the closure or relocation of a business – both of which are fundamental rights of businesses within a capitalist state – even if the reason for doing so is in an effort to avoid the authority that the Board would otherwise have.

Canadian Union of Postal Workers v. Foodora Inc., d.b.a Foodora 2020 CanLII 16750 (ON LRB) (referred to hereinafter as *Foodora, 2020*)

The Board delivered its first major decision on the employment status of those working in the app-based gig economy in early 2020, with its decision on Foodora food delivery couriers. Foodora couriers, whom the company classified as independent contractors, unionized with the Canadian Union of Postal Workers and sought union certification. The company contested the couriers' ability to unionize, asserting that they were not employees and thus fell outside the purview of the *LRA*. The Board, then, was tasked with determining whether the couriers were dependent contractors and able to access bargaining rights.

Despite many of the specific technological facts and circumstances characteristic of working in the gig economy, the overarching framework used to determine whether the work in question is employment and whether those performing it are employees within the meaning of the Act "has withstood the test of time" and remains in place into the 2020s (*Foodora, 2020* at para. 1). While the 'form' of work and the corresponding relation with a purchaser of that work has evolved, the substance of that work and the corresponding relationship has remained the same. The Board noted correctly that Arthurs "could not have envisioned that [the status of dependent contractor] would apply to couriers using electronic software application ("App") on a smart phone to deliver a customized meal assigned by an algorithm without any direct communication or direct payment with the customer" (Foodora, 2020 at para. 1). Despite this, Arthurs certainly would have understood the power imbalance and level of dependency in the relationship between workers seeking to be employees and a company claiming otherwise.

However, the development and usage of new technology does not change the legal concept of a dependent contractor. The Board's decision-making does not rely upon an understanding of new technology, and the use of a technological medium by the worker does not change the analysis as to whether someone is in a relationship of economic dependency. As the Board noted, "foresight of technology was unnecessary because [Arthurs] contemplated a classification of worker to fill the void between an employee and an independent contractor that had sufficient elasticity to adapt to new workplaces and innovative modes of service delivery" (*Foodora, 2020* at para. 1). Technology had no impact on Arthurs' concept of the dependent contractor because it focused on the legal substance of the work and relationship instead of the surface level form of the work.

As we have already seen, the elasticity inherent in the legal concept of the dependent contractor permits its application to a variety of industries, in a variety of times, with a variety of characteristics, including the contemporary app-based economy. The facts and circumstances of the specific case before the Board are what matters to the outcome, not the technology being employed. The elasticity within this legal concept allowed the factors established in *Algonquin Tavern, 1981* to serve as the legal framework in *Foodora, 2020* nearly 40 years later. In short, a framework from a case involving burlesque dancers in the early 1980s and influenced by a legal concept developed in 1965 was used to determine the employment status of food couriers using a smart phone app in 2020. This fact suggests that app-based gig economy, aside from the use of smart-phone technology, is far less innovative and cutting edge than has been suggested, and that any innovations that have been made are not in the employment relationship (Bharti, 2014; Sanchez-Armas, 2020). In many respects, the delivery of food by a worker using a smart phone app shares many similarities with the delivery of construction aggregate material in the late 1970s, or newspapers in the 1980s and 1990s. While the technology involved in Foodora's work may be different than what was utilized by workers in previous cases, the substance of the work itself – and the relationship between Foodora and its drivers – is remarkably similar to those explored in previous chapters. This illustrates the reality that social relations of work within capitalism between employer and worker maintain a certain consistency despite changing technologies. The management strategy, more generally, seeks to undermine workers' collective power.

Foodora defines itself as "a web services company that provides an online marketplace platform connecting consumers to restaurants" (*Foodora, 2020* at para. 6). Foodora then engages with couriers to deliver food from the restaurant and to the customer. These couriers "are granted access to the platform through the App, [which is] owned by Foodora … [and] use the App to access Foodora's dispatch system, allowing them to receive delivery opportunities" (*Foodora, 2020* at para. 6). In turn, "Foodora charges restaurants and customers directly for its services, including accessing the App, marketing, and the services provided by the couriers …, determines the rates charged to restaurants and customers" and enters into written agreements with couriers "stipulating the terms and conditions of their engagement. These agreements expressly state that the couriers are independent contractors" (*Foodora, 2020* at para. 7). In its decision, the Board provided a summative overview of the couriers' relationship to Foodora to assess whether the couriers were similar to traditional employees (and thus dependent contractors) as the Union alleged, or whether they were independent contractors, as alleged by Foodora and stated on the written agreement between the couriers and Foodora.

Couriers provide their own 'tools' – such as a food delivery bag, a bike or vehicle, and all related costs – and Foodora only requires the food delivery bag to be of "sufficient size and condition to transport food" (*Foodora, 2020* at para. 14). Foodora does not conduct interviews with couriers or require reference checks and only provides new couriers with a 30-minute orientation on how to use the app (*Foodora, 2020* at para. 11 and 16). The app is used to schedule shifts, and Foodora then uses "an algorithm to create a shift schedule based on anticipated demand" from which "couriers can select shifts based on three prioritized selection tiers" (*Foodora, 2020* at para. 18-19). Foodora did not permit couriers to start working a shift without approval, nor were they allowed to swap shifts with another courier.

Foodora retained considerable control over couriers, especially while they were on route for a shift. Once a courier was on shift, “Foodora determines which courier is offered orders based on its algorithm that takes into consideration the GPS location of the courier, the restaurant and the customer,” though the couriers were ultimately able to either accept or decline orders made available on them on the app (*Foodora, 2020* at para. 25). However, once an order was accepted, “the courier takes the order to the customer’s location using the most optimal route as determined by the App” (*Foodora, 2020* at para. 25).

A courier also faced potential discipline (such as reduced scheduling priority) or deactivation from Foodora for violations while on shift, such as signing in late, failing to deliver an order, or receiving customer complaints. A Foodora dispatcher would record problems with couriers in a ‘Strike Log’ and a ‘Rider Management Team’ would follow up with couriers if needed. Infractions included “refusal to accept an order, refusal or repeated failure to indicate on the App that a delivery was complete, being late for shift, or engaging in inappropriate communications” (*Foodora, 2020* at para. 60). Infractions could lead to one of three ‘strikes’ being assigned – low, medium, and high – which “jeopardized [the courier’s] priority status and thus their access to preferred shifts” (*Foodora, 2020* at para. 67).

While couriers were permitted to take a break at any time (and for any length) during their shift, it first needed to be approved by a dispatcher to ensure that enough couriers were available to make deliveries at any given time. With similar logic, “if [a] courier wishes to start early, start late, leave early or work late on the shift, the courier must secure permission from dispatch” (*Foodora, 2020* at para. 58).

Compensation for couriers was determined solely by Foodora and was not subject to negotiation. Couriers were typically paid $4.50 per order, plus $1.00 per kilometre, and $5.00 per 20 minutes if an order was not ready for pickup at the restaurant at the proper time (*Foodora, 2020* at para. 36 and 45). Foodora did not take any deductions, such as payroll taxes or CPP/EI premiums, from couriers via their third-party 'Versa Pay' payroll system.

The Board was tasked with determining whether the Foodora couriers were dependent contractors – and thus entitled to bargaining rights under the *Act* – or if they were independent contractors falling outside of protections from the *Act*. As previous chapters have illustrated, making such a determination was not a new task for the Board, although this case is notable for being the first in which the Board needed to make this determination in the app-based gig economy. Despite this new context, the analysis and approach to determining whether the couriers were dependent contractors remained consistent with previous eras and industries. As the Board noted, "while the industries have varied (e.g. trucking, couriers, taxi drivers, construction), the essential question for the Board has always been: do these individuals more closely resemble the relationship of an employee or that of an independent contractor? This is a comparative analysis that focuses on a range of factors in the labour relations context. It has always been, and continues to be, a factual determination" (*Foodora, 2020* at para. 80).

In making their determination, the Board relied upon the seminal *Algonquin Tavern, 1981* case as the leading authority and drew upon the eleven criteria that it had developed previously in that case. Despite the vastly different nature of the work between burlesque dancers and almost all other groups of workers – including app-based food couriers – the Board "has consistently returned to these [*Algonquin Tavern, 1981*] factors when examining whether an individual or group of individuals are acting as dependent contractors or independent contractors" (*Foodora, 2020* at para. 81). Recall that the eleven factors from *Algonquin Tavern, 1981* are: the use of, or right to use substitutes; ownership of tools or the supply of materials; evidence of entrepreneurial activity; the selling of one's services to the market generally; economic mobility or independence; evidence of some variation in the fees charged; whether the individual can be said to be carrying on an "independent business" on their own behalf; the degree of specialization or skill; control of the manner and means of performing the work; the magnitude of the contract amount; and whether the individual renders services or works under conditions which are similar to persons who are clearly employees. As the Board noted, "no single factor is determinative and not all factors are applicable in every case. In this respect, it is very much a fact-based inquiry" (*Foodora, 2020* at para. 82). In this sense, despite the unique features of the app-based gig economy, the Board's approach to determining employment status remained consistent and built upon its established precedent.

Some of the criteria were non-existent in the case of the Foodora couriers (such as the degree of specialization involved), and for others (whether the services rendered are similar to persons who are employees), the parties made no direct submissions. Other criteria, however, such as evidence of entrepreneurial activity and economic mobility, received considerable in-depth analysis in the Board's decision.

Foodora couriers did not use and were not permitted to use substitutes. In fact, even if they wanted to, it would not have been possible due to the App being "personalized to the registered user" (*Foodora, 2020* at para. 87). As the Board noted, the identity of the courier was important to Foodora, and the company "needs to know who is delivering food to its customers" (*Foodora, 2020* at para. 90). The prohibition on the use of substitutes by a company is indicative of a more traditional employer-employee relationship. Whereas independent contractors can use substitutes and the contracting party generally does not care who is performing the work so long as the work is done, that was not the case at Foodora.

While independent contractors own their own tools, a person who owns their tools can also be a dependent contractor, as we have seen in previous chapters. However, as the Board noted, "the ownership of tools is not a significant factor in the analysis, though it can be considered" (*Foodora, 2020* at para. 92). While couriers provided their own bike (or automobile) and food delivery bag, Foodora developed, owned, and supplied the App, which was "the single most important part of the system" (*Foodora, 2020* at para. 99). Due to the centrality of the app in the operation of Foodora's enterprise, the Board determined that "the courier more closely resembles an employee who is permitted to use the company's software than an independent contractor" (*Foodora, 2020* at para. 99).

The Board also focused heavily on the entrepreneurial activity criterion. They noted that entrepreneurial activity is determined through "a qualitative analysis, not a quantitative measurement" and focuses on "the opportunity or chance for profit/loss by virtue of the individual's entrepreneurial acumen," not "how much revenue is made relative to other factors" (*Foodora, 2020* at para. 101). Whether or not one makes money – or how much money they make – is irrelevant to their class location. What matters is whether they could make profit through either relying on the labour-power of others and/or their entrepreneurial activity, or whether they are limited to making money through the wages earned by their individual labour-power. The board drew a distinction between labour-power – or one's "hard work" –

and entrepreneurial activity, or “acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking,” adding that “hard work must not be mistaken for entrepreneurial activity” (*Foodora, 2020* at para. 104).

While couriers could make more money through increasing the output of their labour-power by taking on more shifts, delivering at a faster pace, and accepting shifts at the busiest times, they were unable to make more money off someone else’s labour-power or through some heightened business acumen, risk-taking, or innovation. Their ability to earn more depended solely on their ability to work harder, longer, and faster. As the Board aptly noted, “the reality is that a courier cannot improve their chance to make profit through the customary entrepreneurial tools” (*Foodora, 2020* at para. 105). This lack of entrepreneurial activity was in direct contrast to that of Foodora, whose marketing team relied upon a strong business acumen and focused on cultivating relationships with new restaurants and strengthening relationships with existing restaurants while earning profit off the work of the couriers.

Furthermore, while working multiple jobs or picking shifts at premium times may also lead to earning more money, it is not the same as exercising entrepreneurial activity. Instead, it “is akin to working multiple part-time or casual jobs where the employee decides the most desirable place to work at a particular time” (*Foodora, 2020* at para. 111). The Board’s analysis of entrepreneurial activity – or the lack thereof – represented an important legal victory for precarious workers who often need to work multiple jobs to make ends meet and recognized their class location relative to those who profit from their labour-power. Here, the Board appears to have finally recognized the specific impacts of the gig economy, as well as the growing realities of precarious work more generally. In so doing, the Board exercised its agency to apply the dependent contractor provisions of the *LRA* and recognize the specific circumstances of these gig workers. This was done, of course, in such a manner consistent with the Board's industrial pluralist leanings and applied in such a way that the basic rights of the couriers were secured without infringing upon the corporate rights of Foodora. The ultimate outcome of the case, however, which occurred outside the confines of the Board (and discussed later in this chapter) illustrates the limitations of the Board.

Each of the four couriers who testified on behalf of CUPW "acknowledged that they worked for other courier delivery services and performed other services," including food delivery services for competitors of Foodora, such as Skip-the-Dishes, Door Dash, and Uber Eats (*Foodora, 2020* at para. 49, see also paras. 50-54). None of these couriers were dependent solely upon Foodora and were generally dependent upon the food delivery industry as a whole for their livelihoods. However, all four couriers also confirmed that they "worked on average more shifts for Foodora than other couriers" (*Foodora, 2020*, para. 49). For example, Ivan Ostos also delivered for DoorDash and UberEats – both of which are Foodora's competitors – while also working as a musician, though as of July 31, 2019, he had only worked one shift for DoorDash (earning $28.16). From April 2018 to August 2018, he earned $1,718.15 from UberEats and $19,290.56 from Foodora between January 1, 2018, and September 2018. From January 1, 2019, to July 31, 2019, he earned $7,063.58 from Foodora and $3,677.21 from UberEats (*Foodora, 2020*, para. 51). Similarly, Brice Sopher, another Foodora courier, also delivered for UberEats and earned some income from his work as a musician/DJ (approximately $10,000 in each of 2018 and 2019). From March 15, 2019, to August 4, 2019, he earned $4,361.11 from UberEats, and earned $5,134.19 from Foodora between January 1 to August 4,

2019. In 2018, he earned $16,499 in 2018 from Foodora (*Foodora, 2020*, para. 53).[91] While a majority of the couriers' income came from their work for Foodora, none of them worked full-time for Foodora, and each of the couriers worked for other companies both within the same industry and in other industries. In short, all the couriers worked as part-time or casual employees for Foodora and had the time to work elsewhere (and did).

Previously, this reality would likely have led to a conclusion by the Board that the couriers were not dependent contractors of Foodora. While the Board recognized previously that someone could be dependent upon multiple employers (*Craftwood, 1980*), they also determined that someone could not dependent upon an industry as a whole (*Algonquin, 1981*) and faced a likely exclusion from dependent contractor status when less than half of their income came from the company in question (*531584 Ontario Ltd., 2013)*. Such precedent had the potential to exclude the couriers from being dependent contractors as they were dependent upon the food delivery industry as a whole, rather than on just a single food delivery company.

In *The Citizen, 1985*, the Board concluded that "individuals in a 'casual' or 'part-time' relationship could not be 'dependent contractors' with the meaning of section 1(1)(h)" of the Act (at para. 8). They reasoned that because the terms and conditions of the newspaper drivers' work for *The Citizen* did not preclude them from working elsewhere, and the practicalities of

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[91] In addition to Ostos and Sopher, Houston Gonsalves generally worked five shifts per week for Foodora and earned $9,595.24 between December 31, 2018, to July 31, 2019. He also worked as a courier for Skip-the-Dishes, a competitor of Foodora, where he earned $7,405.31 in 2018 and $2,007.66 from January 1, 2019, to July 31, 2019. He also earned $640.72 between May 9, 2019, and August 12, 2019, delivering newspapers (*Foodora, 2020*, para. 50). In addition to working at a café, Samuel Tyler also delivered for both Skip-the-Dishes and UberEats. From January 1, 2019, to August 5, 2019, he earned $1,910.89 from UberEats and earned $20,190.96 from Foodora between January 1, 2019, and August 4, 2019. In 2018, he earned $8,469.47 from the café and $3,160.90 between January 1, 2019, and July 31, 2019 (*Foodora, 2020*, para. 53).

their work allowed them to work elsewhere (as they worked approximately 12 hours per week), they lacked the economic dependence upon *The Citizen* that was required to be a dependent contractor under the *Act*. In essence, part-time casual workers who were not legally precluded from working elsewhere and had the time to – regardless of whether they actually did – were not classified as dependent contractors and were therefore excluded from coverage under the *Act*.

None of the witnesses for the union in *Foodora, 2020* faced a legal prohibition on working elsewhere and all four couriers actively worked for other companies in addition to their work for Foodora. Despite this, the Board seemingly reversed its earlier precedent and concluded that “the tenure of the couriers resembles a part-time or casual workforce” (*Foodora, 2020*, para. 135). This is the same classification of worker that they previously failed to recognize as employees and instead determined were closer to independent contractors and thus outside coverage under the *Act*. In this case, however, the Board came to a different conclusion on their employment status. While they recognized the reality that “Foodora couriers are able to make more money if they work harder, either through doing more Foodora deliveries or dual apping,” they added that “this is akin to working multiple part-time or casual jobs where the employee decides the most desirable place to work at a particular time” (*Foodora, 2020*, para. 111).

Far from indicating that multiple job-holding was evidence of entrepreneurial activity, as they had done previously, the Board determined the opposite, finding instead “that working multiple jobs was not evidence of entrepreneurial activity. To the contrary, it lends itself more favourably to a conclusion that there is *economic dependence on different employers*”

(*Foodora, 2020* at para. 105, emphasis added; see also *Toronto Star, 2001* at para. 103). The realization that workers could be simultaneously economically dependent upon multiple employers – and perhaps even on an industry as a whole – marked an important departure from the Board's previous decisions regarding dependency upon multiple employers and an industry as a whole (see, for example, *Craftwood, 1980*; *Algonquin, 1981; 531584 Ontario Ltd., 2013*). For precarious workers, this shift represented an important and much-needed understanding of the realities of work in the gig economy.

Although Foodora couriers entered a contractual relationship with Foodora and provided the company with their services, this was not equivalent to them selling their services to the market more generally. In fact, this is what workers do – they sell their labour-power to an employer who purchases it in exchange for a wage. In this case, the couriers' labour-power was sold to Foodora, and not to individual customers or restaurants. The Board added, "it is also not accurate to say that couriers 'sell' their services to other purchasers. Couriers might perform deliveries for compensation, but there is not a packaged skill set or knowledge that is for sale" (*Foodora, 2020* at para. 114). This reality is more consistent with a dependent contractor than an independent contractor.

The criterion of economic mobility or independence (including the freedom to reject job opportunities or work when and where one wishes) was also the subject of considerable analysis. Like that of entrepreneurial activity, it involved an important discussion of precarious workers that underscored their economic dependence. While couriers had the independence and mobility to choose whether and when to deliver for Foodora (so long as they worked once every four to six weeks), Foodora controlled the "structure of shifts, when shifts are offered, how many people can work, the length of shifts, and the geographical zones" (*Foodora, 2020* at para. 124). Once a courier accepted a shift, they had limited mobility and independence for the duration of that shift. The couriers were expected to accept all orders and make all deliveries – widespread declines jeopardize the couriers' ability to continue to deliver for the company (*Foodora, 2020* at para. 124).

There was also no evidence of the variation of the fee charged, as a variation of fees was not permissible. The couriers were unable to charge a higher or lower rate (for any reason) – a reality that made them "more like an employee who receives a standard wage rate (or piece rate) rather than an independent contractor who has the ability to vary [their] fees to suit [their] needs or the environment" (*Foodora, 2020* at para. 142).

As far as the extent of integration, the Board concluded, "Couriers are heavily, if not entirely, integrated, into Foodora's business. Foodora's revenue depends entirely on the reliable and timely delivery service of the couriers. In turn, the couriers rely solely on Foodora's App – an instrument that facilitates relationships, as well as payment, with customers and restaurants," a reality that made them more closely resemble a traditional employee (*Foodora, 2020* at para. 144).

Finally, on the manner and means of performing the work, the Board noted, "Foodora has implemented numerous controls on the generation and flow of work," such as the usage of GPS technology (*Foodora, 2020* at para. 152). While the evidence illustrated that dispatchers did not actively monitor the GPS coordinates of couriers and that their interaction with the couriers was low, the very fact that the couriers were monitored and *could* be actively tracked via the GPS created a panoptic system of control and (potential) punishment in which couriers adjusted their behaviour in case they were being monitored (Foucault, 1977). This monitoring was deemed necessary to ensure that the couriers met service standards but reflects "what is commonly seen in an employment relationship" (*Foodora, 2020* at para. 161). The level of control over the work, potential monitoring, and punishment or discipline for failing to perform the work in a certain way was illustrative of the fact that couriers were under an obligation to perform duties for Foodora.

As neither of the parties made any submissions as to whether the couriers render services under conditions similar to those persons who are clearly employees – instead covering this factor under other headings – the final criterion to which the Board considered (however briefly) was the magnitude of the contract amount, terms, and manner of payment. Here, the Board noted that the manner of payment was "neutral to the overall analysis" as it was conceivable that an independent contractor could have the same arrangement in place (*Foodora, 2020* at para. 169)

Although their analysis of the various criteria to determine whether the couriers were dependent contractors was lengthy, the Board's conclusion was remarkably short (five paragraphs, one of which stated "I remain seized") given the magnitude of the case.[92] However, the Board's analysis of the eleven factors from *Algonquin Tavern, 1981* was systematic and thorough, as evidenced in Table 7.1 below.

[92] The term 'remain seized' "means that the Tribunal has decided to retain jurisdiction over the implementation of its decision or order" (Tribunals Ontario, 2011).

Table 7.1: The Application of the eleven-factor criteria from *Algonquin, 1981* to *Foodora, 2020*

Factor from *Algonquin, 1981*	**Findings in *Foodora, 2020***
The use of, or right to use substitutes	"Foodora's business is not structured in a way that allows a courier to subcontract the delivery services to substitutes … The restrictions on the use of substitutes strongly resembles an employment relationship rather than an independent contractor relationship … Thus, this factor favours a conclusion that Foodora couriers are working as dependent contractors (at para. 87 and 91) *Points to dependent contractor/employee*
Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials	"While the tools used to make deliveries are supplied by both the courier and Foodora, the importance of the App cannot be ignored. It is the single most important part of the delivery process and is a tool owned and controlled by Foodora … In this respect, the courier more closely resembles an employee who is permitted to use the company's software than an independent contractor" (at para. 99) *Points to dependent contractor/employee*
Evidence of entrepreneurial activity	"Foodora couriers do not have the opportunity to increase their compensation through anything other than their labour and skill. A close examination of this factor supports the conclusion that couriers are dependent contractors" (at para. 111) *Points to dependent contractor/employee*
The selling of one's services to the market generally	"Couriers might perform deliveries for compensation, but there is not a packaged skill set or knowledge that is for sale … a courier is not able to sell courier services directly to the customer or restaurant. This factor leans more in favour of an employment relationship rather than an independent contractor relationship" (at para. 114) *Points to dependent contractor/employee*
Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes	"After carefully considering the evidence with respect to mobility and independence, the Board is convinced that this factor weighs in favour of the conclusion that the couriers are dependent contractors. There is a complex system of incentives and restrictions that limit the choices of the courier. It has the hallmarks of the type of employment relationship the Board often sees in the form of an on-call employee or elect-to-work employee" (at para. 137) *Points to dependent contractor/employee*
Evidence of some variation in the fees charged for the services rendered	The inability to vary the fee charged by the courier makes the courier more like an employee who receives a standard wage rate (or piece rate) rather than an independent contractor who has the ability to vary his fees to suit his needs or the environment" (at para. 142) *Points to dependent contractor/employee*
Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer ("the extent, if any, of integration")	"Couriers are heavily, if not entirely, integrated, into Foodora's business. Foodora's revenue depends entirely on the reliable and timely delivery service of the couriers" (at para. 144) *Points to dependent contractor/employee*
The degree of specialization, skill, expertise, or creativity involved	"The parties agreed that this factor was non-existent in this matter as there was no specific degree of specialization. The factor is neutral" (at para. 151) *n/a*

Control of the manner and means of performing the work — especially if there is active interference with the activity	"When read in the context of the dispatch communications, the Rider Feedback Report, and the evidence of the couriers, these two documents are the type of policy manuals that apply in the traditional employment context. Put simply, the two documents explain how Foodora expects to operate its business" (at para. 165) *Points to dependent contractor/employee*
The magnitude of the contract amount, terms, and manner of payment	"The terms and manner of payment are more closely aligned with what one might see in an employment relationship … However, it is conceivable that such an arrangement might also exist with an independent contractor. As such, the Board finds this factor to be neutral to the overall analysis" (at para. 168-69) *n/a*
Whether the individual renders services or works under conditions which are similar to persons who are clearly employees	"The parties did not make submissions with respect to this factor. That is likely because their submissions substantially covered this factor under other headings" (at para. 170) *n/a*

In determining that Foodora couriers were dependent contractors who more closely resembled traditional employees than independent contractors, the Board relied upon eight of the criteria from *Algonquin Tavern, 1981*. In particular, they drew upon: the use of, or right to use substitutes; ownership of tools or the supply of materials; evidence of entrepreneurial activity; the selling of one's services to the market generally; economic mobility or independence; evidence of some variation in the fees charged; whether the individual can be said to be carrying on an 'independent business' on their own behalf; and control of the manner and means of performing the work. The Board noted that "the couriers are selected by Foodora and required to deliver food on the terms and conditions determined by Foodora in accordance with Foodora's standards" and ultimately concluded that, "in a very real sense, the couriers work for Foodora, and not themselves" (*Foodora, 2020* at para. 171). As such, the Board determined that couriers had an obligation to perform work for Foodora, upon whom they were economically dependent, and were therefore dependent contractors under the *Act*.

As a result, their bid to unionize was valid under the *Act*, and the votes for or against unionization could be counted.

Despite being the "first decision with respect to workers in what has been described by the parties and the media as 'the gig economy,'" the Board was not at all concerned with its magnitude and potential impact (*Foodora, 2020* at para. 172). Instead, for the Board, this case was like any other about employment status, albeit with a different group of workers and a different fact-specific case. The 'gig economy' or the presence of app-based technology had no specific bearing in the case. The Board aptly noted that this was "not [the] first case examining the relationship of couriers," adding that it "has been tasked with the same questions about dependent contractors in various sectors including transportation and construction. Such cases have always been fact-based inquiries that require a balancing of factors" (*Foodora, 2020* at para. 172). Despite the presence of new technology and a reliance upon the app, they concluded, "this case is no different in many respects" (*Foodora, 2020* at para. 172).

The Ontario Labour Relations Board issued their decision that Foodora couriers were dependent contractors in February 2020. By April 2020, the company announced that it was shutting down its Canadian operations. According to the company, they were "faced with strong competition in the Canadian market, and operate a business that requires a high volume of transactions to turn a profit [and were] … unable to get to a position which would allow us to continue to operate without having to continually absorb losses" (Evans, 2020). Of course, the company made no mention of the Board's recent ruling in their announcement. The outcome here was, in many ways, not unlike that in *Toronto Star, 2001*, in which the Board determined that drivers were dependent contractors only to have the employer outsource the entirety of its delivery operation. In both cases, despite a ruling from the Board that the workers were dependent contractors (and thus able to unionize), the employer used other legal means to undermine the drivers' ability to negotiate a collective agreement. These cases highlight the boundaries of what the Board can do to regulate employer power.

It is hard to sustain the view that the Board's finding that Foodora's couriers were dependent contractors was not the underlying rationale for the closure. As the CBC noted, the timing of Foodora's closure was curious. The closure announcement occurred not only within two months of the Board's decision, but also at the onset of the COVID-19 pandemic. As the CBC pointed out, "the decision comes as Foodora and other delivery services are experiencing a surge in demand because of COVID-19 lockdowns. And it's not just food, either — the company recently started offering deliveries of products as diverse as flowers, pet food, alcohol and coffee on its service" (Evans, 2020). CUPW maintained that Foodora's decision to close "show[s] it would rather leave hundreds of vulnerable workers without any income than make any changes to its business" (Evans, 2020).

Despite its inability to prevent Foodora's closing and to ensure that a first collective agreement was reached, the Board still played an important role in the workers' bid for unionization. At first glance this decision might appear to be an about-face shift from the Board, particularly given their previous decisions surrounding precarious workers in cases such as *The Citizen, 1985* and *Ajax/Pickering News Advertiser, 1993*. Since then, however, the Board's understanding of dependent contractors as precarious workers has been informed by a recognition of the prevalent growth of non-standard work in Canada. In coming to that recognition, the Board was informed by academic scholarship on the changing nature of the employment relationship.[93] In both *Toronto Star, 2001* and *Foodora, 2020*, the Board was relatively unconcerned about whether someone was working part-time, but rather was concerned only with their relationship to the company that they claimed to be dependent upon. In building upon "the Board's historical analysis of dependent contractor status [which] was set out in *Toronto Star,* 2001" and the precedent from *Algonquin Tavern, 1981*, the Board noted that "no single factor is determinative and not all factors are applicable in every case. In this respect, it is very much a fact-based inquiry" (Foodora, 2020 at para. 82).

Had the Board decided that couriers were independent contractors, the votes would not have been counted and there would not be a union of app-based workers to begin with (even if the Board was unable to facilitate the implementation of a collective agreement). Although it was well after Foodora's April 2020 closure, the Board announced the results of the union drive in June 2020, with nearly 90 percent of Foodora couriers voting in favour of unionization (CUPW, 2020). Despite Foodora's closure, the couriers became the first app-based workers in Canada to unionize successfully. CUPW also secured a $3.46 million settlement for the former couriers, despite the company having filed bankruptcy.

The Board's decision might also have an impact on the evolving labour relations in the gig economy and keeps the door open for future groups of gig workers to be declared dependent contractors and secure a collective agreement. That being said, the potential that the Board offers to future gig workers (and other highly precarious contract workers) is offset by the limits of the Board's power as an institution. It can force capital to play by the rules, but cannot force them to play the game. Furthermore, these rules are established by a capitalist

[93] See especially *Toronto Star, 2001* at paras 13, 14, and 100.

state and enforced by a state agency that seeks to support, not undermine, the market system more generally. The Board's industrial pluralist approach might challenge certain decisions of capital (such as not recognizing workers as dependent contractors) but is unable – and unwilling – to challenge broader decisions (such as the decision to cease operations in the case of Foodora or fully contract out in the case of the *Toronto Star*).

This example also shows some of the contradictory effects of the industrial relations regime, namely that workers can follow the rules but end up in a worse place (without a job). Foodora's decision to close its Canadian operations also underlines how theories of industrial pluralism fail to reckon effectively with the power of capital and how they will not necessarily play by any set rules. Perhaps most importantly, at least from the perspective of precarious workers holding multiple jobs, the Board updated its own precedent to recognize the economic dependency that casual employees have upon multiple employers and even upon an entire industry. Despite the Board's previous limited advancement of dependent contractors for precarious workers, this example also helps to highlight that workers' continued organizing plays some part in pushing the Board to reconsider some its previous decisions. This modernized precedent is especially important in the gig economy.

The Board possesses the unique ability to determine if a group of workers are dependent contractors (and thus employees under the *Act*). The only other institution with that power is the legislature who can formally exclude certain classifications of workers from coverage under the *Act*, though examples of this are limited.[94] This makes the Board an important institution in determining whether precariously employed workers can unionize.

Foodora, 2020 illustrates the possible role of – and limits to – the Board. This highlights an important limitation of the Board in a capitalist economy – it can recognize a group of workers as dependent contractors who are able to unionize, but it cannot mandate that an employer remain in business to ensure that those workers' desires to unionize become a reality. Furthermore, the Board also plays a role in containing the threats of worker organizing and also – at least in part through some of its decisions – sets the boundaries of precariousness by determining who gets access to unionization and who does not. Despite this, the Board's decision in *Foodora, 2020* has the potential to pave the way for other gig workers to secure status as dependent contractors.

United Food and Commercial Workers International Union (UFCW Canada) v Uber Canada Inc., 2020 CanLII 54980 (ON LRB) referred to hereinafter *as Uber Canada, 2020*

At roughly the same time that CUPW was organizing Foodora couriers, the United Food and Commercial Workers (UFCW) were organizing drivers at Uber Black and Uber Black SUV. Much like Foodora, Uber is a company typical of the platform economy and defines itself as "a

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[94] The *ESA* excludes many workers whose employment is an extension of their education (ie/ a co-op placement), incarcerated workers, various elected office holders, and most recently – if certain conditions are met – business consultant or an information technology consultant. See *Employment Standards Act, 2000, S.O. 2000, c. 41* https://www.ontario.ca/laws/statute/00e41#BK5. There are more legislated exclusions from the *LRA*, including domestic workers, workers employed in hunting and trapping, agricultural workers, police officers, firefighters, most publicly funded elementary and secondary teachers, principals and vice principals at publicly funded schools, employees of a college of applied arts and technology, though some of those groups have separate legislative schemes for collective bargaining. The *LRA* applies only to employees – and thus excludes independent contractors – though it is the Board that determines who is an independent contractor should the question arise. See *Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A* https://www.ontario.ca/laws/statute/95l01#BK3.

technology platform" in which "smartphone apps connect drivers and riders" (Uber, n.d., a). More specifically, Uber is an app-based transportation company that allows passengers to book a ride exclusively through the Uber app and secure a driver, who is also using the app. Uber Black bills itself as a more luxurious branding of Uber, in which riders – it claims – can "expect elevated service from professional drivers" and which features "premium cars with leather seats" that allow riders to "stretch out in comfort and show up in style" (Uber, n.d., b; see also *Uber Canada, 2020*, at para. 9-10).

Unlike traditional taxicabs, someone cannot hail an Uber ride through a telephone dispatch, from the street, or at a taxi stand. Uber cars are unmarked (and often the personal car of the driver) and only pick up riders using the app. Again, unlike traditional taxicab companies, whose mileage rate is fixed and regulated by the municipal government, Uber offers rides under a so-called dynamic pricing model for both drivers and passengers in which passengers are charged more and drivers are paid more during market-driven "peak" times (the cost and pay are lower at non-peak times).

Despite billing itself as a technology platform rather than a transportation company, Uber shares many things in common with traditional taxicab and limousine companies, not the least of which is their attitudes towards drivers. Among other things, both traditional taxicab companies and Uber allege that their drivers are not employees, but instead independent contractors. Much like taxicab drivers, Uber drivers have organized collectively and sought collective bargaining rights, and much like traditional taxicab companies, Uber has contested their drivers' employment status before the OLRB.

In January 2020, the OLRB supervised an electronic certification vote involving a proposed bargaining unit consisting of all Uber Black and Uber Black SUV drivers operating in and out of the City of Toronto and the City of Mississauga, Ontario (*United Food and Commercial Workers International Union (UFCW Canada) v Uber Canada Inc., 2020 CanLII 54980 (ON LRB)* referred to hereinafter *as Uber Canada, 2020*, at para. 5).[95] Uber – without agreeing that the drivers were dependent contractors – asserted that the UFCW lacked the requisite 40 percent of the proposed bargaining needed to hold a vote and sought to have the case dismissed on that ground.[96] As a result, rather than hearing submissions over the employment status of the members of the proposed bargaining unit at the outset of the case, the parties' preliminary arguments – and the Board's analysis – focused on the drivers' connection to the workplace, and in particular the length of time, if any, that a driver needed to have worked during in order to have a sufficient "stake in the workplace" to be included in a possible bargaining unit (*Uber Canada, 2020*, para. 36; see also *Uber Canada, 2020*, paras. 37-42 for a discussion of "stake in the workplace").

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[95] Officially the proposed scope of the bargaining unit was "all Uber Black and Uber Black SUV drivers registered/ licensed as limousine drivers by the City of Toronto engaged by the Responding Party d.b.a. Uber Black and Uber Black SUV as direct employees and/or dependent contractors in and out of the City of Toronto and the City of Mississauga, Ontario, including those operating in and out of Toronto Pearson International Airport," save and except various managers, office, IT, and other staff." The proposed recognition clause also contained the following clarity note: "The bargaining unit proposed by the Applicant union includes Uber Black and Uber Black SUV drivers exclusively. The bargaining unit does not include Uber drivers who are not Uber Black or Uber Black SUV" (*Uber Canada, 2020*, at para. 5)

[96] Before determining whether Uber Black and Uber Black SUV drivers were dependent contractors and covered by the *Act*, the Board first heard Uber's Article 8.1 objections (that the Union lacked the requisite 40% threshold of the proposed bargaining unit to trigger a vote). Solely "For the purpose of determining the s. 8.1 issue only, Rasier agreed that the Uber Black Car drivers are dependent contractors (and therefore employees under the *Act*) and that the Primary Unit could be appropriate for the purposes of collective bargaining as contemplated by section 8.1(5) paragraph 3 of the *Act* (*Uber Canada, 2020*, at para. 6). If the Union lacked the required threshold of proposed bargaining members to secure a vote, the employment status of the drivers was moot. If the Board determined the Union reached the threshold, Uber retained the right to challenge the employment status of those said to be employed in the proposed bargaining unit.

These preliminary arguments were important in defining the parameters of any proposed bargaining unit and, more importantly, in determining its size. By increasing the length of time in which one would have a stake in the workplace – and thus be included in any potential bargaining unit – Uber was seeking to inflate the number of drivers needed for the union to meet the required 40 percent threshold needed to trigger a union certification vote – many of whom the union would have been unlikely to have spoken with (or even know about) and who would have been less likely to sign a union card. By contrast, the UFCW sought a smaller proposed bargaining unit to reach the 40 percent threshold needed to trigger the certification election. These were less principled positions and more strategic ones by each party to secure its desired outcome, either preventing a certification vote (Uber) or triggering a certification vote (UFCW).

The way Uber drivers selected when and where to work through the app shared many similarities with how shifts were selected by Foodora couriers and taxicab drivers since at least 1979. There were no set working days or hours, and drivers could “choose when to accept a ride request without any set time constraints or mandated regularity” (*Uber Canada, 2020*, paras. 14-15). Uber drivers who met certain qualifications – holding commercial insurance, securing a 4.75-star rating, possessing the required licenses, and most importantly having a vehicle falling within an “acceptable list” – gained access to the Uber Black portion of the Uber driver app (*Uber Canada, 2020*, para. 13). Drivers with access to Uber Black could open it without receiving ride requests and would only receive requests when pressing the “Go Online” button.

Uber became aware when a driver 'went online' and where they were located, but the driver was under no obligation to access the app. There were often breaks in between when drivers 'went online' and many – though not all – would return to driving for Uber after a period of inactivity (often initiated by Uber due to "administrative reasons" (*Uber Canada, 2020*, para. 21).[97] According to data presented by Uber and not contested by the UFCW, 74.14 percent of drivers with a 30-day gap in activity of 'going online' returned, while 51.96 percent of drivers with a 60-day gap returned (*Uber Canada, 2020*, para. 19). These gaps and subsequent returns illustrate the flexible nature of the work and the transient nature of the workforce. This transient relationship reflects the precarity of the gig economy and is considerably different from the standard employment relationship of the post-war era. Although the Board did not consider whether Uber Black and Uber Black SUV drivers were dependent contractors, the drivers' flexible work arrangement and transient relationship with Uber was particularly important to determining which drivers had a sufficient connection to the workplace to be included in the proposed bargaining unit.[98] More importantly, for the purposes of this dissertation, this decision represented the Board's most detailed analysis of precarious workers in the gig economy, even more so than *Foodora, 2020*.

Although the Board did not use the words 'precarity' or 'precarious' to describe drivers' relationship to Uber in their written decision, they nevertheless seemed to recognize the

[97] Data presented to the Board by Uber indicated that 87.48 percent of Uber Black drivers temporarily lost access to the app at least once, and that 81.35 percent of these instances resulted in a reactivation (*Uber Canada, 2020,* para. 21).
[98] Uber argued that there should be no temporal period for which a driver needed to 'go online' and that anyone who drove for Uber Black or Uber Black SUV – at any point – should be included in the proposed bargaining unit. In the alternative, they suggested that any driver who had 'gone online' over the previous 12 months should be included (*Uber Canada, 2020*, at para. 26-27). The UFCW proposed a 30-day threshold for 'going online' was appropriate (*Uber Canada, 2020*, at para. 32-33).

precarious nature of the work. Instead, the Board spoke of the drivers' "tenuous relationship to the workplace" and stated that "all drivers have a casual relationship with the employer," adding that the drivers "come and go as they choose and thus may have large gaps in work continuity" (*Uber Canada, 2020*, at para. 46; see also *Uber Canada, 2020*, at para. 55 for a discussion of the drivers' similarity to casual employees).

The concept of the virtual workplace – an important characteristic of the platform economy – was also discussed in some detail. In attempting to advance a broad connection to the workplace, Uber urged the Board to account for the nature of the workplace and absence of a traditional location to which workers would report. The absence of a physical workplace meant the drivers "have no specific place to attend or be counted as present" (*Uber Canada, 2020*, at para. 28). As a result, the Board determined that "the virtual workplace – the operation of the app – must be considered as where the individuals are working" (*Uber Canada, 2020*, at para. 28).

While noting that "the technology should not be ignored," the Board recognized that the presence of a new technology does not change either the underlying nature of the relationship between the parties or the overall analysis involved in determining the nature of that relationship, much like they did in *Foodora, 2020* (*Uber Canada, 2020*, at para. 59). Despite the usage of a smart phone and a reliance upon the app to access available work, the Board determined that the drivers' relationship with Uber Black and Uber Black SUV closely mirrored that of a traditional casual employee who may elect when and how frequently to work, and as a result experience gaps in their work and have an erratic work schedule. As the Board noted, "the utilization of technology on a smart phone is not that different than submitting availability, accepting a shift offered by a manager, or adding a name to a call-in list. The analysis is not changed by new technology when the fundamental decision to work or not work (or in this case, to accept a ride request) involves similar factors" (*Uber Canada, 2020*, at para. 57).

Ultimately the Board rejected Uber's assertion that there should be no temporal parameter for inclusion in the proposed bargaining (i.e. that every driver who has ever driven for Uber Black or Uber Black SUV should be included). For many of these drivers, there was not sufficient connection to the workplace to justify their inclusion in the proposed bargaining unit. However, the Board also rejected the UFCW's petition for a thirty-day threshold for 'going online' as the appropriate temporal period. Informed heavily by Uber's statistics around the rate of return for drivers after experiencing a gap in driving, the Board concluded that a 60-day gap was "an appropriate cut off period" for inclusion in the proposed bargaining unit as it struck a balance between those drivers who regularly perform bargaining unit work without "unduly excluding" those drivers who go inactive for a period of time but who have a "high likelihood of returning to work" underlying nature of the relationship between the parties (*Uber Canada, 2020*, at para. 57).

While the decision in *Uber Canada, 2020* determined the criteria to be included in the proposed bargaining unit by establishing a temporal period in which a driver needed to perform work – or drive for Uber Black or Uber Black SUV – additional unresolved questions remained. The parties did not agree on which specific drivers met the criteria and, more importantly, on whether those in the proposed bargaining unit were even dependent contractors and eligible for coverage under the *Act* to begin with.

Despite the important questions that remained unresolved, *Uber Canada, 2020* was important as it illustrated the Board's new understanding of precarious work (despite their not using the phrase in particular) in the context of the gig economy. The tenuous and casual relationship between the drivers and Uber – independent of the app – reflected the drivers' precarity. The Board's comparison of Uber drivers with traditional casual employees foreshadowed how the Board might have ruled on the employment status of Uber Black and Uber Black SUV drivers. Their assertion that the presence of new technology, while important, did not fundamentally alter the nature of the relationship between the parties relative to traditional workers who did not rely upon an app for accepting shifts was also noteworthy.

Indeed, noted labour law scholar David Doorey also recognized these similarities between traditional workers and Uber Black/Uber Black SUV drivers and believed that the Board would eventually conclude that the drivers were dependent contractors, as they did with traditional taxicab drivers. Doorey also stated that "while the technology involved in modern platform Apps differs from the traditional taxi dispatch radios, it is doubtful that difference matters much in terms of the application of the tests applied in Canadian employee classification cases" (Doorey, 2020). He continued:

> The basic structure of the arrangement is fundamentally the same: a customer contacts an intermediary conduit which then connects that customer to a driver who provides the service. The customer's payment is then divvied up amongst the intermediary and the driver. The conduit (a dispatch company, like Yellow Cab, or a platform company, like Uber) regulates quality control features to protect its brand through enforcement of appearance and behavioural rules. The similarities between classical taxi drivers and modern gig drivers foreshadows that Canadian labor boards will apply similar reasoning when asked to decide if the latter are "employees" covered by labor standards legislation (Doorey, 2020).

Despite a new medium for connecting drivers with passengers, work opportunities were obtained through the company, its branding, and its technology, and the company exerted control over the drivers during their performance of the work.

Given the Board's decision in *Foodora, 2020*, the similarities between traditional casual employees and Uber Black/Uber Black SUV drivers identified by the Board in *Uber, 2020*, and legal analysis by scholars such as Doorey, it came as a surprise to many when Uber and UFCW Canada announced that they had entered into a "historic partnership" in January 2022 that effectively ended the legal proceedings before the Board (Darrah and Nesbitt, 2022; Doorey, 2022). Under this deal, the parties agreed that the UFCW could represent over 100,000 Uber drivers across Canada in dispute resolution matters – if requested by the drivers and at no cost – should they face account deactivation or other account-related disputes. The agreement also allowed the union to meet with Uber to discuss health and safety issues but did not change the drivers' employment status or provide them with any semblance of bargaining rights over the basic terms and conditions of their day-to-day work (Uber, 2022; UFCW Canada 2022). Additionally, the parties agreed to work together "to encourage provinces to mandate policies providing gig workers with new benefits and other rights" and to "preserve worker choice on when, where, and if to work" (Deschamps, 2022).

In commenting on the "surprise" agreement between Uber and the UFCW, Doorey asserted that "Uber drivers are most likely already 'employees' for the purposes of collective bargaining statutes such as the *LRA*," adding that "it would be surprising if Uber drivers are not similarly ruled to dependent contractors in cases currently pending before the Ontario Board"

(Doorey, 2022).[99] However, the OLRB was never given the opportunity to rule on whether the drivers were dependent contractors. The parties announced they had "settled [the] matters" related to the certification claim for Uber Black and Uber Black SUV drivers and UFCW Canada withdrew the certification application in May 2022, effectively ending the Board's jurisdiction over determining whether Uber Black and Uber Black SUV drivers were dependent contractors and thus employees within the meaning of the *Act* (*Uber, 2022* at para. 2-3).

While the agreement between Uber (the parent company of Uber Black) and the UFCW was a surprise even to astute labour law commentators such as Doorey, behind the scenes – and generally unbeknownst to anyone – they had been jointly lobbying the provincial government to enact to a series of labour law changes in the form of *Bill 88: The Working for Workers Act, 2022* in the months prior to the withdrawal of the certification application. Among other things, the proposed legislation considered those performing work for an online platform such as Uber (and Uber Black), though offered them no real benefit. Without the potential for a collective agreement – given the UFCW's withdrawal of the drivers' certification application – Uber Black drivers (and others in the gig economy for that matter) did not have the opportunity for the Board to determine if they were employees (dependent contractors) and thus had only the legislative changes made under Bill 88 to reply upon to protect and advance their rights.

[99] Doorey (2022) also added that "while there may be legitimate questions about whether Uber drivers meet the common law definition of 'employee,' there is a strong likelihood that they are 'dependent contractors.'"

Bill 88: The *Working for Workers Act, 2022*

On April 7, 2022 – roughly six weeks before the UFCW withdrew their certification application – the Ontario government passed Bill 88, the *Working for Workers Act, 2022,* into law. Four days later the bill was given royal assent. The legislation made amendments to the *Employment Standards Act, 2000*, the *Occupational Health and Safety Act, 1990*, and the *Fair Access to Regulated Professions and Compulsory Trades Act, 2006*, and – perhaps most importantly for the purposes of this dissertation – enacted the *Digital Platform Workers' Rights Act, 2022* (Legislative Assembly of Ontario, 2022).[100]

The *Digital Platform Workers' Rights Act* (or *DPWRA*) applies directly to companies such as Foodora (which had already ceased to operate in Canada), Uber, and other companies where work is performed through "an online platform that allows workers to choose to accept or decline digital platform work" (Legislative Assembly of Ontario, 2022: section 1). The legislation defined digital platform work as "the provision of for payment ride share, delivery, courier or other prescribed services by workers who are offered work assignments by an operator through the use of a digital platform" (Legislative Assembly of Ontario, 2022, section 1). The new legislation established the following rights and protections for digital platform workers: a right to information regarding pay, tips, work assignments and performance ratings; a right to a minimum wage for each work assignment performed; right to amounts earned, tips and gratuities; a right to notice of removal from accessing the platform and a written explanation as

[100] For a copy of the legislation, see https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2022/2022-04/b088ra_e.pdf

to why; rights to dispute resolution in Ontario; and rights against reprisal. Importantly, however, it did not define their employment status as dependent contractor or employee.

In many respects, the *DPWRA* simply provided heightened transparency to platform workers around the assignment of work, calculation of pay and tips, the usage and impact of rating systems, and when workers are paid for their work, though many of these things were already legislated for employees (and dependent contractors) under the *ESA*. The same is true of protections against reprisals for exercising rights. Information about the assignment of work, impact of rating systems, and transparency around removal from the platform guaranteed by the *DPWRA* provide workers with access to information, but not with an entitlement to additional wages or job security by virtue of properly classifying them as dependent contractors and failed to provide them with any sort of effective voice in determining and improving their work lives.

The *DPWRA's* minimum wage provision secured a minimum wage for platform workers, but only entitled them to a minimum wage for each work assignment performed, irrespective of the total time the worker makes themselves available to provide work. In other words, the *DPWRA* does not provide payment for waiting time, idle time, or time between rides, but rather provides a minimum wage on a piecemeal basis. As Vanmala Subramaniam aptly noted, while the law did not create a new classification of worker, "it gave the impression of enhanced rights for gig workers, while maintaining their status as independent contractors" (Subramaniam, 2002a).

Maintaining Uber drivers' legal status as independent contractors was a key outcome for Uber, who profits more from the drivers' labour-power when they are classified as independent contractors instead of employees or dependent contractors. In 2019, one senior Uber official stated that "our business would be adversely affected if Drivers were classified as employees instead of independent contractors," while another remarked that "employee status in most jurisdictions means that workers will be covered by the applicable minimum-wage laws … that will cost Uber greatly" (both cited in Subramaniam, 2002a).

Uber was successful at ensuring that drivers' legal employment classification did not change in two regards. First, the passage of the *DPWRA* maintained the status quo employment status for Uber drivers (and other digital platform workers), though it did not entrench a separate status upon them and legally exempt them from one day being found to be employees. Second, and more importantly, the UFCW's withdrawal of the certification application before the Board ensured that the institution best suited and most likely to classify Uber drivers as dependent contractors would not have the ability to do so.

Not only did the UFCW withdraw the certification application for Uber Black and Uber Black SUV drivers from consideration before the Board, documents obtained through a Freedom of Information request revealed that the union worked closely with Uber to push the provincial government to exclude gig workers from coverage under the *ESA* and to advocate for a new, quasi-employee status for gig workers in the lead-up to the eventual passage of the *DPWRA* (Subramaniam, 2022b).

<u>Ontario's Workforce Recovery Advisory Committee</u>

The contents of the *DPWRA* and other legislative changes to Ontario's labour laws in April 2022 under the so-called the *Working for Workers Act, 2022* stemmed from many – though not all –

of the recommendations made by Ontario's Workforce Recovery Advisory Committee (OWRAC). The OWRAC was created in 2021 by the provincial government to "provide recommendations to shape the future of work in [the] province," including "economic recovery through workforce development and new approaches to employment policy" (Government of Ontario, 2022). The committee heard presentations from a variety of individuals, groups, unions, and corporations, including gig workers and lobbyists for Uber.

One of OWRAC's 21 recommendations was to create a "proposed third category" of worker under the *ESA* – what they referred to as a dependent contractor – and to then provide "this category of worker basic employment rights … while retaining some of the flexibility … this type of work provides" (OWRAC, 2021: p. 68).[101] If this recommendation had been included in the final legislation, it would have created a separate, third class of worker under the *ESA* (in addition to the current 'employee' and 'independent contractor' classifications) who would possess some rights, but fewer rights than what 'employees' are entitled to. According to Vanmala Subramaniam, this third category is what Uber "really wanted" and "aggressive[ly] and relentless[ly]" lobbied the provincial government for (Subramaniam, 2022a).

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[101] For clarity, the proposed meaning of dependent contractor that the OWRAC suggested being introduced into the *ESA* meant something than how dependent contractor is defined and operationalized under the *LRA* (where dependent contractors are expressly employees). The *ESA* defines employee as "a person, including an officer of a corporation, who performs work for an employer for wages, a person who supplies services to an employer for wages, a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees, or a person who is a homeworker." The *ESA* makes no reference dependent contractors. Conversely the *LRA* defines a dependent contractor as "a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor." It defines employee only as "includ[ing] a dependent contractor."

Ultimately, the provincial government elected not to legislate the third category of worker, though it provided digital platform workers with a thin veneer of rights and entitlements while their employment status remained ambiguous. The appearance of those additional rights, the implementation of Uber and UFCW's partnership, and the UFCW's withdrawal of their certification application for Uber Black and Uber Black SUV drivers has effectively slowed down, though not fully stalled, ongoing organizing in the sector (Gig Workers United, n.d.).

However, there are still prospects for gig workers seeking bargaining rights. If added to the ESA, this third category of 'dependent contractor' would not have amended the *LRA* and its definitions of employee and dependent contractor, keeping the door open for the Board to determine whether digital platform workers were employees, at least under the *LRA*, and thus entitled to unionization if a case came before it and numbers warranted. This remains a possibility even with the implementation of the *DPWRA*.

Furthermore, despite the appearance of heightened rights for digital platform workers, the industry remains rife with problems and therefore organizing potential. As Subramaniam (2022a) notes, "for many drivers and delivery couriers, however, one of the biggest problems with independent contractor status is that the apps do not actually give them the independence they want. They can't negotiate or control their wages. Pay is determined by the platforms, based on several factors, such as time, distance, and the number of delivery couriers at any time in a particular area. And that formula changes." Given the real limitations of the *DPWRA* to substantially improve working conditions of gig workers – and its complete inability to provide them with any semblance of a voice in the workplace – it is likely that platform-based gig workers will continue to organize collectively and, where numbers permit, file union certification applications. Should that occur, it is also likely that platform-based companies will challenge certifications and argue that the workers are independent contractors and thus unable to unionize. In such a case, it will be up to the Board to determine their employment status. In this sense, the Board will remain an important and potentially influential actor in regulating work in the gig economy and defining the parameters of precarity for some of Ontario's most vulnerable workers.

While certification through dependent contractor status represents a way for precarious workers to secure protection under the *LRA* and the associated benefits and entitlements that (are likely to) come with the resulting collective bargaining, this dissertation has shown that this approach is not without its limits. Assuming of course that workers can successfully find enough of their co-workers to sign cards and trigger a union election – a task which is by no means easy – a successful union vote might not be enough to secure the improved outcomes that workers are seeking. Despite a potential finding from the Board that workers are dependent contractors and able to unionize, capital still has various options at its disposal to effectively evade the impacts of the Board's decision, as was evident in both *Foodora, 2020* and *Toronto Star, 2001*.

While some workers have been successful in securing meaningful bargaining rights through certification as dependent contractors, this dissertation has highlighted real barriers with this approach. As a result, other – and perhaps bolder – measures should be considered. Leah Vosko and Andrea Noack, for example, have asserted that

> it is high time to introduce mechanisms of broader-based bargaining for self-employed and other workers in precarious paid employment who face challenges to unionizing and/or, at a minimum, to benefiting from collectively agreed standards. Meeting the former challenge necessitates, among other things, providing for regional or

> geographical and/or occupational unionisms through legislation and policy (e.g., permitting multi-employer agreements applicable to a given sector); such measures would respond to problems created by majority unionism now in operation and inhibiting organizing among the precariously employed, especially in small workplaces. Overcoming the latter hurdle could involve juridical extension of labour relations and standards of the sort operating in Quebec's decree system, which allows for the extension of the terms of a collective agreement across a sector to cover both unionized and non-unionized workers although a quite significant limitation is that it does not regulate a system of representation for workers (Vosko and Noack, 2011: p. 41-42).

In short, Vosko and Noack endorse an approach to that seeks both expand collective agreement through majority vote certification and increase collective agreement outside of majority vote certification. To the extent that they seek to increase the number of workers covered by collective bargaining agreement, they propose to open the possibility of bargaining units that focus not on a single employer-single workplace – the predominant approach to a bargaining unit in the North American context – but focus instead on the industry more broadly. Likewise, focusing on an industry more broadly opens the possibility of workers securing coverage under collective agreement without unionization.

Elsewhere, Vosko et al. have recommended the creation of a legal presumption of employment status. The effect of this would be "to shift the burden of proving that a worker is not an employee onto employers. To strengthen the presumption, the law could also specify what the employer must demonstrate to overcome the presumption" (Vosko et al., 2017: 12). In other words, the default is that contractors would be considered dependent (i.e. employees) unless the company could prove otherwise. For the Board, this would shift their role to determining if someone is not a dependent contractor (ie/ not an employee) but would assume they were until the company could reasonably demonstrate otherwise. As a result, it would all but reduce a company's ability to fully contract out (as did the *Toronto Star*) or cease its operations (as did Foodora) in the event of a ruling by the Board that the workers were dependent contractors/employees as employee status would have been the default option as soon as the company began operating. Of course, a company could still contract out or cease operations, but doing so would no longer be the result of a Board decision that the company viewed as unfavorable in which the Board determined that workers were dependent contractors. Quite simply, workers would no longer need to struggle to organize and then win a case at the Board to become employees – that would be the case all along and companies would need to convince the Board that its workers were not employees (in the event of a dispute over employment status).

Conclusion

Thus far, the Board has had a brief but important engagement with platform-based gig workers in the process of unionizing and seeking classification as dependent contractors under the *Act*. Only two cases have made their way to the Board – *Foodora, 2020* and *Uber, 2020* – and neither has led to a certified bargaining unit with an operative collective agreement. In *Foodora, 2020*, after the Board determined that the food couriers were dependent contractors, the company ceased operating in Canada, largely as a response to the Board's decision. For platform-based gig workers, that decision represented a shift in the Board's understanding of casual workers, established an important precedent for gig workers, and had (and still has) transformative potential for precarious workers in the digital platform-based economy.

This case highlighted the Board's ability to evolve its decision-making to reflect a changing economy. The Board recognized that Foodora couriers were effectively casual workers as they had the ability to choose if they wanted to work, and, if so, when and where they would work. Previously the Board found that casual workers were not akin to traditional employees (and thus not dependent contractors) and explicitly excluded these workers from coverage under the *LRA*.

In *Foodora, 2020*, however, the Board reversed its existing precedent and determined that the couriers were dependent contractors, despite them being casual workers and having multiple jobs (within the same industry). Here, the Board shifted its course and determined that the couriers were economically dependent upon Foodora and that this dependency stemmed from the terms and conditions of their relationship with Foodora. In breaking with its earlier approach to casual workers, the Board illustrated a more nuanced understanding of the economic dependency of non-standard workers and recognition of the rise in precarious work. This pivot showed the Board's potential to provide additional protection under the *Act* to a broader group of workers.

Foodora's prompt exit from Canada following the Board's decision and the subsequent end of the couriers' employment also highlights a major limitation of the Board. The Board can make the determination that a group of workers are dependent contractors and entitled to bargain collectively, but they cannot mandate that a collective agreement is reached, or even that an employer bargains with the union representing those employees. The Board exists within the capitalist state and has the power to be disruptive and make decisions that are potentially transformative – for example, by determining that platform-based gig workers are dependent contractors – but is limited in its ability to reign in capital who is determined to use every legal means possible to prevent the Board's decision from being put into effect. Here, the power of capital over labour is evident – even if that meant that Foodora was willing to cease its operation than comply with the Board's decision. This approach is reflective of the Board's industrial pluralism and the related limitations highlight he Board's role in "represent[ing] and organiz[ing] the long-term political interest of a *power bloc*" (Poulantzas, 2014: 127).

Despite the Foodora couriers being unable to secure a collective agreement, the Board's decision that they were dependent contractors and could legally secure a collective agreement established an important precedent for gig workers, though one that has yet to be fully realized. An analysis of the relationship between Uber Black/Uber Black SUV drivers – and aided by the decision in *Foodora, 2020* – suggested that the Board may have been likely to declare that Uber Black and Uber Black SUV drivers were dependent contractors. To be sure, they shared many similarities with traditional taxicab drivers, who the Board found to be dependent contractors as early as 1979 and generally met the criteria for being a dependent contractor that the Board introduced in *Algonquin Tavern, 1981*.

Interestingly, much like with Foodora, these workers were denied the opportunity to secure a collective agreement (albeit for a different reason) and the Board was unable to decide upon their employment status. In this case, the UFCW elected to withdraw the case from the Board's purview, and nothing remained for the Board to decide upon. The Board lacked the power to hold its own inquiry and unilaterally decide upon the employment status of Uber Black and Uber Black SUV drivers, even though many factors pointed to them being dependent contractors. While the parties came to their own arrangement – providing limited representation for all Uber drivers in Canada – the Board ceased to have any roll in this and the existing precedent on the employment status of gig workers was not developed any further.

Industries in which platform workers are dominant are notoriously hard to organize, and as of 2025 another case surrounding their employment status under the *LRA* has not yet made its way to the Board. The employment status of gig workers, however, has received the attention of the Ontario government. The government was pressured by Uber and – somewhat curiously – the UFCW to create a new category of worker in the *ESA* called a dependent contractor, who would be entitled to some, but not all, of the legislation's rights and entitlements. The government elected not to create this category – which would have had a different meaning from 'dependent contractor' as it appears in the *LRA* – though the government could also have formally excluded platform-based workers (or gig workers more broadly) from the provisions of the *LRA* and purview of the Board. Ultimately the Board's reach can go as far as is permitted by the government (who, thus far, has generally been hesitant to exclude workers from the purview of the Board).

Despite the limited number of cases heard by the Board involving gig workers, those working in digital platform-based economy may be the next group of workers to seek employee status and union representation. This will mean a heightened role for the Board who, thus far, seems to recognize the dependency which gig workers have on the platform-based companies that they secure work through.

Chapter 8: Conclusion

Following the election of a Progressive Conservative minority government in 1975 (which had been reduced from its previous majority government), the *LRA* underwent significant amendment that expanded the power of the OLRB. Among other changes, the amended *LRA* classified dependent contractors as employees, thus providing them with legislatively protected access to organizing into a union and bargaining collectively. By virtue of this addition, the Board was also tasked with making specific determinations in the event of disagreements between companies and workers as to whether someone was a dependent contractor. This last change – recognizing dependent contractors as employees and by extension having the Board make those determinations in the event of a disagreement – has been the subject of this dissertation.

Writing ten years prior to the 1975 amendments, noted labour law scholar Harry Arthurs asserted that the exclusion from legislative labour law protections those who "personify the dependent contractor," such as "self-employed truck drivers, peddlers, and taxicab operators, farmers, fishermen [sic], and service station lessees" represented a significant power imbalance in labour relations and was an "unhappy fact of modern society" (Arthurs, 1965: 89). The 1975 *LRA* amendments provided an opportunity to rectify this power imbalance by providing access to bargaining rights for various groups of workers who had previously been excluded from protections under the *LRA*. This expansion of rights (and the resulting jurisprudence) has been understudied in the labour law literature, particularly as it relates to the Board's role in determining to whom those expanded rights applied.

This dissertation has traced and analyzed the development of the Board's precedent stemming from its newfound power to determine whether someone is a dependent contractor. In so doing, the Board has considered the employment status of many of the groups first noted by Arthurs in 1965, most notably self-employed truck drivers or owner-operators in chapter 4 and taxicab drivers in chapter 5. It has also explored the examples not initially mentioned by Arthurs, including delivery drivers (generally those of perishable goods) in chapter 6, and of contemporary app-based delivery drivers in chapter 7.

At the outset, this dissertation sought to answer three important questions. First, it sought to understand the main concerns reflected in the Board's early dependent contactor rulings and their broader understanding of the employment relationship. In so doing, it simply asked "What were the Board's underlying concerns in their dependent contractor rulings?" Second, it sought to identify the limits of the Board's industrial pluralist understandings, by asking "what were the boundaries of 'dependency' that the Board was defining in their decisions and what kind of understanding did this convey of capitalist employment and labour relationships?" Finally, it asked "what the Board was most concerned about and did these concerns evolve with the rise of neoliberalism and the spread of precarious employment?" In answering this third question, the dissertation sought to explore to what degree the discourse of "balance", "flexibility" or "protection of vulnerable workers" was prominent and whether this changed over time.

<u>What were the Board's underlying concerns in their dependent contractor rulings?</u>

This dissertation has clearly shown that the Board's earliest decisions on workers claiming to be dependent contractors reflected a concern with extending bargaining rights to vulnerable workers, most notably owner-operators of construction aggregate delivery trucks (explored in chapter 4) and taxicab drivers (explored in chapter 5). Here, the Board drew heavily upon the statutory purpose test and spoke of how they understood the legislation's purpose as seeking to include workers who "require[ed] the assistance of collective bargaining" (*Nelson Crushed Stone, 1977* at para. 12). Their perception of the 1975 *LRA* amendment was that it meant to

> address the mischief created by persons who may very well outwardly manifest the trappings to independent entrepreneurs but who in an intrinsic sense are clearly in such a subservient economic position vis-à-vis the beneficiary of his [sic] services that he [sic] ought to extend the protection intended by the collective bargaining process (*Nelson Crushed Stone, 1977* at para. 12).

The Board was clear in its desire to extend protections under the *LRA* to workers who were similar to traditional employees and who had previously not been covered by the legislation. The Board was thus explicit in its desire to extend rights to vulnerable workers, as opposed to frustrating the realization of those of those rights. In another case heard during this era, the Board maintained:

> This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, person in economic positions that are closely analogous should be given the same treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship (*Adbo, 1977* at para. 24).

Here, the Board outlines its approach to rejecting employer strategies to evade providing workers with basic statutory protections by failing to accurately classify them as dependent contractors, and in so doing applied the legislation as it was designed. In *Adbo, 1977*, much as they did in *Nelson Crushed Stone, 1977*, the Board made it clear that newly amended legislation would not simply codify the status quo but would instead expand access to bargaining rights for those contractors who were closely analogous to traditional employees but were previously excluded from legal protections under the *Act*.

This approach was indicative of virtually all cases involving owner-operators delivering construction aggregate. A notable exception to this approach occurred in *Canada Crushed Stone, 1977*, when the Board found a "qualitative distinction … between the owner-operator who uses his [sic] own labour and employs no one and the owner-operator, who, in addition to his [sic] own labour, used and attempts to profit from the labour of others" (*Canada Crushed Stone, 1977* at para. 19). In this instance, there were a limited number of owner-operators who owned multiple trucks and operated one while having the additional truck(s) operated by another driver whom they paid. The Board took the view

> that the line must be drawn so as to exclude from the operation of the *Act* those contractors who, although economically dependent, are themselves employers deriving income from the labour of others. It must be found that the nature of their business is such that within the meaning of the *Act* they more closely resemble independent contractors than employees in their relationship with the employer. The exclusion of these persons accords with the statutory definition and also maintains the clear division between employers and employees created by the overall scheme of *The Labour Relations Act* (*Canada Crushed Stone, 1977* at para. 20).

The Board distinguished between dependent contractors who more closely resembled employees (owner-operators of a single truck) and those who more closely resembled independent contractors or employers (owner-operators of more than one truck) based upon the latter's ability to profit from the labour-power of someone else and the former's sole reliance upon their own labour-power.

Despite a general extension of protection to vulnerable workers, the Board was very much wedded to the norm of the traditional post-war employment relationship consisting of a full-time employee and a single employer. This approach extended bargaining rights to those owner-operators driving for a single company but not owner-operators who relied upon multiple companies for work. In cases such as *Nelson Crushed Stone, 1977*, *Adbo, 1997* and *Indusmin, 1977*, the drivers earned “the Lion’s share” of their income from a single company (*Nelson Crushed Stone, 1977 at para 10*). In *Canada Crushed Stone, 1978*, the Board suggested drivers earned anywhere between 80 and 100 percent of their income from the company. This approach proved problematic for drivers who had to rely on multiple companies for enough work and a stable income. In such cases, the percentage of wages the drivers earned from a single company was minimal, ranging from 5 to 15 percent in *Craftwood, 1980* and from 1.4 to 3.1 percent in *Coreydale, 1980*. Lawyers for the workers at Craftwood seeking dependent contractor status argued that that the low percentage of income earned from a single company “simply reflected the highly mobile nature of employment in the construction industry” and asserted that reality “should not be allowed to obscure the subservient relationship between the companies and the owner/operators” (*Craftwood*, 1980 at para. 6). The Board did not agree, determining that these drivers more closely resembled independent contractors and concluding that “it is impossible to be economically dependent on more than one person” (*Craftwood*, 1980 at para. 16).

Though the term ‘precarious’ was not applied to these work relationships in the late 1970s and early 1980s, it very much reflected the ‘own account self-employed’ classification that Vosko, Zukewich, and Cranford (2003) discuss (see also Fudge, Tucker and Vosko 2002;

Vosko and Zukewich 2006). Own account self-employment consists of those who are "self-employed [and] who have no employees," a work situation that "is becoming more precarious" (Cranford and Vosko, with Laxer, n.d.). This typology of work applies to dependent contractors as they are self-employed and lack employees of their own. As early as 1977, the Board determined that those who were self-employed but with employees of their own would not be considered dependent contractors (*Canada Crushed Stone, 1977* at para. 19). Despite this, the Board still determined that many contractors without employees of their own were not dependent contractors. While there were other criteria aside from the presence of employees employed by the Board – such as the ownership of tools and equipment, evidence of entrepreneurial activity, and economic mobility or independence – the Board was slow to recognize the growing precarity of many workers who might otherwise be dependent contractors.

As a result of the Board's underdeveloped understanding of changing labour market conditions and employment practices, there were real differences between which vulnerable workers would be afforded traditional protections and those who would not. This latter group, by contemporary standards at least, might be seen as especially precarious. The Board, however, excluded these workers from both legislative protection and access to a collective agreement stemming from the denial of employee status. If nothing else, the Board was wedded to a typical post-war employment relationship and was not keen on venturing away from that conception following the 1975 amendments to the *LRA*, despite the decline of the standard post-war employment relationship.

While cases involving taxicab owners continued for a longer period than those involving owner-operators of construction aggregate delivery, the Board took a similar approach and generally determined that taxicab drivers were economically dependent on the taxicab companies that they drove for, often citing previous owner-operator cases in the process (see, for example, *Blue Line, 1979 and later Hamilton Cab, 2011).* Despite the complex matrix of economic relationships that exist in the taxicab industry, the Board consistently found over a thirty-plus year period – with few exceptions – that taxicab drivers were dependent contractors under the *LRA* (*Hamilton Cab, 2011* at para. 14).

Although wages did not flow from the company to the driver, drivers were nevertheless economically dependent upon the company they drove for as that company's name, reputation, and branding were vital for their livelihoods. There also existed a corresponding obligation to that company during their shift and a requirement to follow rules imposed by the company. Importantly, necessity generally dictated that drivers would drive for a single taxicab company, lending a degree of post-war traditionality to their work relationship that aided the Board in determining that they were dependent contractors. The Board declined to advance any sort of neoliberal interpretation of the relationship between taxicab drivers and taxicab companies and, in so doing, extended traditional protections to another group of vulnerable workers.

Unlike with owner-operators of construction aggregate delivery and taxicabs, the Board's approach to delivery drivers of (generally) perishable goods was a bit more of a mixed-bag. Although it is unreasonable to suggest that the Board advanced some form of neoliberal interpretation of the amended *LRA*, their extension of traditional protections to vulnerable workers was considerably more muted than with construction aggregate owner-operators and taxicab drivers.

The Board's first major case involving delivery drivers — *Dominion Dairies, 1978* – was similar to those involving owner-operators explored in Chapter 2. There, the company similar altered its relationship with its drivers, as a "portion of the employee drivers would take over their [own previous] routes, their trucks and their customers as franchised contractors" (*Dominion Dairies, 1978* at para. 16). No doubt informed by their decision in *Adbo, 1977*, in which the Board maintained that it would "protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship," they determined that the Dominion Dairies franchised contractors were dependent contractors and thus employees within the meaning of the *Act* (*Adbo, 1977* at para. 24). Thereafter, however, the Board's approach to delivery drivers changed and it was less likely to determine that drivers were dependent contractors, especially those who worked part-time and lacked a prohibition against working elsewhere.

<u>What were the boundaries of "dependency" that the Board was defining in their decisions?</u>

By the 1980s, the extension of rights for vulnerable workers seeking status as dependent contractors was restrained, though not necessarily rolled back. The Board did not suddenly begin to employ a neoliberal orientation in its decision-making, but it remained wedded to the traditional post-war employment relationship that no longer corresponded with the work relationships of many vulnerable workers and was unable comprehend new employment relationships that did not fit within the standard post-war model. This represented a missed opportunity to expand the traditional protections envisioned by the legislation – or at least made permissible under it – and delayed vulnerable workers from gaining dependent contractor status and accessing bargaining rights.

The Board continued to employ its dated assumptions about employment (previously utilized in *Craftwood, 1980*) in two cases involving newspaper delivery – *The Citizen, 1985* and *Journal Le Droit, 1985* – which were heard three months apart. These cases illuminated the 'imaginary line' that the Board drew between dependent and independent contractors in establishing the threshold for employee status under the *Act*. While the Board determined that the drivers in *Journal Le Droit, 1985* were dependent contractors, largely because of the drivers' lack of economic mobility, their integration into the company, and their lack of control over work, in *The Citizen, 1985*, the Board tied the threshold for dependent contractor status to both the lack of an impediment to additional work and the minimal total hours worked, the effect of which was to exclude *The Citizen's* part-time workers from dependent contractor status. The same logic was applied again in *Ajax/Pickering News Advertiser, 1993* and similarly had the effect excluding non-standard workers from status as dependent contractors. This precedent was not reversed until the early 2000s.

The late 1980s and 1990s saw a minimal number of key cases involving dependent contractors making their way to the Board. In the taxicab industry, the Board's decision in *Yellow, 1987* reinforced earlier cases and furthered the consistent precedent developed over the preceding decade (see, for example, *Blue Line, 1979*, *NVT, 1980*, and *NVT, 1981*). *Yellow, 1987* – like the preceding taxicab cases – recognized the high degree of control exercised by taxicab companies over both owner-operators and drivers alike and likewise concluded that both owner-operators and drivers were dependent upon the company under whose banner they drove.

<u>What the Board was most concerned about and did these concerns evolve with the rise of neoliberalism and the spread of precarious employment?</u>

The 1990s marked a considerable expansion in the prevalence of precarious work and non-standard employment relationships (Krahn, 1995; Vosko, 2000; Vosko, Zukewich, and Cranford, 2003). Despite this, few noteworthy cases involving dependent contractors made their way to the Board. A notable exception was *Toronto Star, 2001* (which was the Board's final ruling on the matter that began three years earlier with a successful majority ballot in a union certification election held in 1998). In making its decision in this case, the Board appeared cognizant of the realities faced by precarious workers in a way that it was not in previous cases in the mid-1980s and early 1990s. In so doing, they overturned their own precedent from *Craftwood, 1980* and *The Citizen, 1985* and determined that *The Star* carriers were dependent contractors and thus eligible to unionize, despite working part-time hours and often working for other companies/employers while simultaneously working for *The Star*.

The Board recognized that these carriers did not work full-time hours – a point agreed to by all parties involved – but stated that "a carrier is more akin to a part-time employee than to an independent contractor," which represented an important departure from the Board's approach to part-time workers in previous cases (*Toronto Star, 2001* at para. 122).

While previous decisions determined that being a part-time employee largely negated one's ability to secure dependent contractor status under the *Act*, the Board reconsidered their approach to non-standard work and determined that part-time workers could still have an economic dependence upon, and obligation to, one company while simultaneously working for others.

In fact, this case represents the first in which the Board recognized the problematic reality of precarious work (though they used the term 'atypical work' instead). They correctly noted that:

> Self-employment has grown steadily in Canada over the last 20 years. The gap in income between the self-employed and employee has steadily diminished over that period. Non-standard forms of employment and engagement are increasingly prevalent. *Atypical forms of engagement need therefore to be scrutinized carefully for their substantive content.* They need to be considered less by their formal contractual characteristic and more how they actually operate" (*Toronto Star, 2001* at para. 14, emphasis added; see also Crompton, 1993: p. 22).

In the case of the relationship between the carriers and *The Star*, it operated much more like a traditional employment relationship characterized by economic dependency and obligation, despite the lack of full-time hours and the potential for (an in many cases the necessity of) additional work for another company. This Board's decision in this case was important for a variety of reasons, but most notably for its changing perception of precarious work, which proved important with the rise of the gig economy in the 2010s.

While *Foodora, 2020* represented the first major case involving gig work heard by the Board – at least as it pertained to whether workers were dependent contractors – the outcome of the case was shaped by years of the Board's precedent. This case, and *Uber, 2020*, forced the Board to reflect upon the changing nature of work with the rise of the gig economy, consider more fully the realities of precarious work, and re-evaluate its understanding of the relationship between contractors and the companies who utilize their labour power to provide services. In this sense, the Board's decision in *Foodora, 2020* represented an extension of their previous decision in *Toronto Star, 2001* and the slow but important expansion of traditional rights to vulnerable workers that reflected the realities of the evolving capitalist evolving economy.

When considering the circumstances specific to Foodora couriers, there is little structural difference between a worker using a smart phone app to deliver food in the 2020s and the delivery of construction aggregate material in the late 1970s or newspapers in the 1980s and 1990s. The reliance on new technology – an app – does not have any determination in employment status and is otherwise the only notable difference between gig workers and more traditional workers. In many respects, the Board's decision in *Foodora, 2020* was consistent with their approach in *Nelson Crushed Stone, 1977*, where the Board stated that its interpretation of the dependent contractor provisions of the *LRA* needed to properly recognize workers who were dependent contractors, despite having some surface-level similarities to independent contractors (*Nelson Crushed Stone, 1977* at para. 12)

Foodora couriers, much like other groups of workers that the Board generally found to be dependent contractors, have outward markers of being an independent contractor but are subservient to – and economically dependent upon – a company which they are integrated into the operation of. The Board's decision in *Foodora, 2020* offers some promise to gig workers who are at the risk of being excluded from basic employment protections as they have a legal ability to bargain collectively with their employer. Whether a collective agreement comes to fruition – and it did not with Foodora workers due to the company ceasing its Canadian operations – is another story and outside the realm of what the Board can do on behalf of dependent contractors, though this underscores a clear limitation of the Board.

<u>The Role and Impact of the Board</u>

This dissertation has shown that following the amendments made to the *LRA* in 1975, which created the category of dependent contractor and classified these workers as employees, the Board extended traditional rights to vulnerable workers, most notably owner-operators of construction aggregate delivery trucks and taxicab drivers. As neoliberalism deepened through the 1980s and 1990s, the Board did not roll back its previous interpretation, but the expansion of dependent contractor status was noticeably restrained, particularly as it pertained to newspaper delivery drivers. In this sense, the Board was slow to respond to the changing realities of work in the neoliberal economy, though eventually did so in *Toronto Star, 2001*. This previous jurisprudence helped secure a legal victory – dependent contractor status – for gig workers in *Foodora, 2020*.

The Board has, over a nearly fifty-year period, extended dependent contractor status and the corresponding set of rights to workers that are “economically vulnerable” who “may find survival difficult without collective action” (Arthurs, 1965: 89). These include some of the groups of workers first articulated by Arthurs who “personify the dependent contractor,” including “self-employed truck drivers (commonly referred to as owner-operators) … and taxicab operators” (Arthurs, 1965: 89), as well as groups of workers that did not exist at the time of Arthurs’ writing or when the legislation was passed. Despite these advancements of traditional protections, the Board’s response to the rising precarity and changing of employment relationships was slow and did not occur – in any real way – until 2001. Nearly twenty years later, in *Foodora, 2020*, the Board made its first decision involving the gig economy and provided legal protection to a group of vulnerable workers.

While providing additional rights to a group of workers who historically had been excluded from legislative protection and access to collective bargaining, the Board's decisions were – until 2001 – very much consistent with what they viewed as the prevailing post-war system of industrial relations. While this model was prevalent for some time (and only for a certain subset of workers to begin with (see Forrest, 1997; Fudge and Tucker, 2000: p. 276-77), it began to wane as early as the 1970s, and was certainly not reflective of the work situations for a growing number of workers in the 1980s and 1990s. Quite simply, the Board was slow to adapt its decision-making process to include the realities of non-standard or atypical work to the detriment of many vulnerable workers who needed protection.

While the Board began to make important decisions to provide protection to groups of vulnerable workers in the 21st century, workers have been unable to rely upon the Board to ensure the realization of these rights. For example, following the decision in *Toronto Star, 2001*, the newspaper company promptly contracted out the entirety of its delivery option and the drivers ceased to be employees – at least of *The Star* – despite the ruling. While the Board has the potential to facilitate progressive change on behalf of precarious workers as it operates within a capitalist framework and acts to uphold the broader system. As such, its capacities to protect workers are inherently limited. The Board has shown that it is willing to navigate this role, albeit with strict limits. Over the past two decades, the Board has displayed more of an openness to shifting economic conditions and new types of work relationships – precarious work and gig work – but will not expand the right of these workers at the expense of private property rights. As Eric Tucker has aptly noted, "there are no panaceas in a social formation that value private property rights so highly" (2005: 55). Such was the case in the ultimate outcome of *Toronto Star, 2001*, which illustrated a significant limitation of the Board in terms of ensuring that the legal rights it facilitates access to for vulnerable workers are realized.

Similarly, the limitations of the Board were on display in the aftermath of *Foodora, 2020*. Here, within three months of the Board's decision that Foodora couriers were dependent contractors under the *Act* (and eligible to unionize), the company announced it was ceasing its operations in Canada. This closure, under the guise of "strong competition in the Canadian market" and an inability to secure the "high volume of transactions to turn a profit," occurred despite the high demand of food delivery during the COVID-19 pandemic and was made just prior to the announcement of results from the ballot box from the union election (Evans, 2020). Much like in *Toronto Star, 2001*, vulnerable workers were unable to exercise the rights that the Board's decision provided, and the Board was unable to prevent the closure. The *LRA's* dependent contractor language (and rulings by the Board which provide access to rights under it) are ultimately not enough to protect workers given the OLRB's inability to bring about the broader systemic change needed. Workers face not only an uphill battle in terms of being recognized as a dependent contractor, but also face an uphill battle – and perhaps an even bigger one – once the Board recognizes them as employees of a company.

This outcome is not the fault of the Board, but it highlights a significant shortcoming of the Board. Dependent contractors are not able to access rights just because the Board determines they have them – the company, or more accurately the employer, needs to provide some consent to enter into a bargaining relationship with them. There are opportunities for the company to avoid the type of relationship that the Board has no jurisdiction over, contracting out the work (in the case of the *Toronto Star*) or a complete exit from the jurisdiction (in the case of Foodora). Of course, many companies who the Board has found their workers to be dependent contractors have accepted the decision – perhaps begrudgingly – and entered a bargaining relationship with a union. While the Board can – and has – made important decisions to provide rights to vulnerable workers, there are limitations to the Board's ability to facilitate significant change.

Situating the Board in the Capitalist State

This dissertation has illustrated that the Board responded to working-class demands for dependent contractor (employee) status and the traditional rights that come with it for certain groups of vulnerable workers, but those improvements occurred from within the system "while ultimately respecting capital's pre-eminent position" within that system (McCrorie, 1995: 16). The Board has, to be sure, expanded the number of workers covered under the *LRA* and has provided various groups of workers with the legislative benefits that stem from being classified as a dependent contractor and the opportunity to bargain a collective agreement. The meaningful realization of these benefits, however, has been largely industry-specific and applied more so to some groups of workers – often full-time workers with one company such as construction aggregate owner-operators and taxicab drivers – than to other groups of workers, such as many delivery workers and gig workers, who are far more precarious.

By examining the role of the OLRB and its place in the broader state apparatus, this dissertation also illuminates one of the few examples of a corporatist structure in the Canadian system. At its most basic, the Board is a specialized state body charged with carrying out certain functions of the state (Poulantzas, 2014: 163, 170). Recall that Panitch has defined corporatism as “political structure within advanced capitalism which integrates organized socio-economic producer groups through a system of representation and cooperative mutual interaction at the leadership level and mobilization and social control at the mass level” (Panitch, 1981: 23). He added that, “above all else [corporatism is] a political form designed to integrate the organized working class in the capitalist state” and “a powerful vehicle for reinforcing class dominance” (Panitch, 1977, p. 81).

By understanding the Board’s function, we can see how corporatism operates in the Canadian context and come to recognize its limits in terms of being a site for contesting the essentially exploitative dynamics of capitalism. Corporatism is by no means a benevolent or value-neutral system, but rather, one rooted in capitalist ideology that ultimately works to legitimate the system through providing space for, and the buy-in of, the subordinated working-class within the confines of the capitalist state. The expansion of legislative rights under the *LRA* for dependent contractors serves as a useful case study. The Board’s slow but sure advancement of dependent contractor status for varying groups of workers provided an opportunity for workers to buy-in to their role as workers *within an existing class-based system* in which private property rights and pre-eminent and gave them the potential to secure some concessions from their employers through negotiating collective agreements. As a result, harmony and negotiation within the system substituted a potentially aggressive clash or disruption against the system. The Board, for its part, helped to facilitate this in the long-term interest of a harmonious and functioning capitalist system.

The state – and particularly the Board – operates as more than just an exclusive manager for the affairs and advancement of the capitalist class. Such an approach would preclude the advancement of union rights that come with being classified as a dependent contractor, let alone the very establishment of a legal framework for their recognition and growth. The Board does not operate at the behest of the capitalist class (Panitch, 1977: 78). Neither the capitalist class as a whole nor a specific neoliberal government directly lobbies the Board or otherwise interferes in its decision-making process. This represents the Board's relative autonomy or its independent decision-making from the state. It is not, however, complete autonomy and there are limitations to what the Board will decide upon. There are a range of potential outcomes or decisions that the Board can make, but all are within certain acceptable parameters that do not fundamentally determine private property rights.

While representatives of the capitalist class (in the form of specific companies involved in the case) litigate to exclude certain groups of workers from being classified as dependent contractors in front of the Board, they have the confidence that the foundations of the system – property, competition, and contracts – will not be jeopardized by a ruling which determines that a small subset of workers in a specific workplace are dependent contractors. That company will still have an opportunity to negotiate a contract, outsource the work, engage in hard bargaining at the table, and close and/or move locations. The exercise of its various management functions is beyond the realm of what the Board can prohibit or mandate; those remain the exclusive domain of the company, even if their exercise undermines the Board's decision to provide rights to vulnerable workers meeting the threshold of dependent contractors.

As Panitch and Ginden have noted, "what these state institutions can autonomously do, or do in response to societal pressures, is ultimately limited by their dependence on the success of capitalist accumulation" (Gindin and Panitch, 2013: 4). The Board does not exist to challenge capitalist accumulation, nor was it designed to, and it would ultimately falter should it put forward a challenge to the continued accumulation of capital. Instead, the Board represents a material compromise to quell working-class demands for a more transformative socio-economic system. There are real confines to what the Board can do and, as a result, what unions and workers can reasonably expect the Board to do.

What workers are forced to demand under the *LRA's* dependent contractor language, and what the Board can ultimately provide – a chance to be recognized as employees in capitalist employment – is not a broader challenge to the employment relationship more generally. This approach was made clear in *Adbo, 1977*, one of the first cases heard by the Board following the amendments to the *LRA* in 1975. Here, the Board concluded that "in order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be 'under an obligation to perform duties for that person' roughly analogous to that of an employee" (*Adbo,* 1977 at para. 27). If the Board determines that workers are dependent contractors and have bargaining rights, it is because of the existence of a subservient relationship in which the worker is economically dependent and under an obligation to perform work. The Board does not challenge the legitimacy of such a relationship.

What workers are forced to ask for – and what the Board grants – is an ability for workers to join the ranks of the working class within a "context determined by capitalism" (McCrorie, 1995: 16). There is no space (or willingness) for the Board to analyze the limitations and power imbalance of the broader class dynamics at play or of the dependence and subservience that is inherent within it. While recognizing and challenging a clear power imbalance between capital and workers, the Board can move the needle slightly and expand the number of workers who are classified as employees and entitled to certain rights as a result; but such a decision does not radically alter the broader power relationship inherent within capitalism. Here, we can see how the Board's operation is consistent with the vision of many industrial pluralists and consistent with its own industrial pluralist worldview. The Board is unconcerned with the outcome of a stronger collective agreement, but rather simply providing workers with a voice at the bargaining table to attempt to secure a collective agreement, regardless of if one is ultimately secured. This is a clear example of the concept of industrial citizenship proposed by industrial pluralists and represents the extent to which the Board can go.

To be sure, many groups of workers – notably taxicab drivers and many delivery drivers – were able to take advantage of their newfound voice at the bargaining table and secure a collective agreement (despite its limitations), though many others were not even afforded that and were instead limited by the Board's own constraints and worldview. This has become especially apparent in the 20th century and has adversely affected some of the province's most vulnerable and precariously employed workers. In any event, the 1975 amendments and the Board's corresponding decision-making has forced unions to focus their efforts on securing, bargaining, and ratifying collective agreements instead of focusing on systemic reform – or replacement – of the prevailing capitalist system.

The dissertation has shown that the Board can – and does – extend certain limited traditional rights to some groups of vulnerable workers, but only to the extent that doing so does not represent a challenge to the primacy of capitalist accumulation, the exercise of property and contract rights, and the free market system more generally. This is reflective of the Board's relative autonomy to operate *within* the capitalist state and make decisions that the capitalist class may disagree with the outcome of, but which do not fundamentally alter their broader position.

This outcome is not surprisingly part of a corporatist structure within an otherwise capitalist state. As Panitch has noted, corporatism is successful at "obviat[ing] strife or schism between business, labour, and the state…[and] substitute[s] principles of social harmony and unity through negotiation between capital, labour and the state" (1979, p. 48). The result of obviating this strife – as evidenced with the ultimate outcomes in *Toronto Star, 2001* and *Foodora, 2020* – is that above all else "private property [is] left undisturbed" (1979, p. 48).

While there might be positive outcomes in specific cases (primarily for the workers involved in that specific case, and potentially within the same industry), meaningful and transformative changes to the employment relationship will not come through Board rulings on dependent contractors. While certain workers may end up being deemed employees and have a voice at the bargaining table, they remain at the bottom of a hierarchical relationship with their employer. Decisions expanding access to bargaining represent important victories for workers directly impacted by them (and potentially those employed by adjacent employers in the same industry), but at best defensive. Workers will have access to a union and certain other rights as employees, but those rights will exist within the confines of capitalism. That said, a 'bad' ruling or one determining that a certain group of workers are not dependent contractors (such as the Board's ruling in *The Citizen, 1985*) may lead to broader setbacks within that industry for a lengthy period. These workers remain marginalized within capitalism but lack both the economic clout of the larger companies from whom they are working *and* the set of workplace rights enjoyed by traditional employees/dependent contractors.

Understanding the decision-making process and impact of the OLRB through their approach toward dependent contractors helps to illuminate the Board's broader role within the framework of Ontario's capitalist state, and the opportunities and limitations that it provides. Through the neo-Marxist lens employed in this dissertation, we can understand the OLRB as an institution that is both a product of, and embedded within, Ontario's capitalist state, though one that does not fully and exclusively serve its' interests and can provide access to expanded rights for some groups of workers. Although maintaining the long-term interests of capital, the Board has shown an ability to mitigate significant class conflict – such as a push by workers (and their unions) to recognize dependent contractors as employees – by expanding coverage under the *LRA* but leaving the broader premise of the capitalist state untouched. This dissertation has also illuminated the real limitations of the Board and both its unwillingness and inability to facilitate broader systemic change.

Future Directions

Despite the analysis advanced with this dissertation and the Board's general importance as a leading administrative tribunal in Canada and its role as the state's arbiter of the *LRA* and close to 25 other pieces of legislation, the OLRB remains understudied. While this dissertation has examined the Board's role in shaping the outcomes of a particular area of labour law in a particular period, additional analysis into the Board's role in shaping other areas of the *LRA* (and other legislation for that matter) would be advantageous for future research. More narrowly, this future research could also include the Board's role in cases involving dependent contractors in the field of construction labour relations – an area where it has been routinely called upon to determine disputes between unions and companies pertaining to who is an employee.

An analysis of the Board's role within the state also represents an important area for future study. While studies in the late 1990s focused on the Board's politicization and its role as an ideological tool for, and extension of, the government (see, for example, Burkett, 1998 and McCormack, 1999), this dissertation has found the Board to have some degree of relative autonomy from both the state and the government of the day (though it was nevertheless political, albeit in a non-partisan way). Future research would also be wise to continue to further situate the Board's role within the state's broader apparatus.

The Board's role in regulating precarious work, especially work in the growing platform economy, is an area of study that future researchers will need to take seriously. This is true for both an analysis of future cases involving highly precarious workers alleging to be dependent contractors, as well as other areas of the *ESA* and *LRA* that have the potential to impact the precarious gig workers who are particularly vulnerable to the companies they work with/for. This sort of analysis should also be comparative in nature to provide a better understanding of the employment status of various contractors outside Ontario, considering both other provinces in Canada and other non-Canadian jurisdictions.

Final Conclusion

This dissertation has examined the *LRA's* language on dependent contractors and the OLRB's evolving role in determining protection for these workers throughout the neoliberal era. Beginning in the 1970s, it traced the development of the earliest cases and followed the growing body of jurisprudence through the neoliberal era, culminating in recent cases involving gig workers. The period studied here is important because it witnessed the gradual decline of the so-called golden age of capitalism and the rise of neoliberalism. During this time, the traditional post-war employment relationship unraveled, and non-standard employment relationships became more commonplace, though this dissertation has highlighted that the Board was slow to respond to the changing nature of work. At the time of writing, the lessons from this dissertation are especially relevant with the growth of the gig economy and the performance of work through an app-based digital platform.

The workers examined in this dissertation, and the unions they sought to represent them, have made some advancements relying upon the dependent contractor provisions in the *LRA*. Full-time workers of a single company – such as construction aggregate delivery owner-operators and taxicab drivers – have had more success at being recognized as employees than part-time workers, particularly those working for multiple companies. The Board was slow to recognize the changing nature of work and the shift away from the traditional post-war employment relationship, though has slowly opened the door to dependent contractor status for these particularly vulnerable workers.

Problematically, however – at least for workers seeking protections under a collective agreement – a decision by the Board that they were dependent contractors does not guarantee that they will gain the protections of a collective agreement. As the company's responses to a decision that workers were dependent contractors has illustrated – *The Star* contracting-out and Foodora ceasing its operations in Canada – the Board lacks the power to ensure the realization of the rights that it grants. It operates firmly within a capitalist framework – it is not in a position to challenge the supremacy of capital and it leaves private property undisturbed.

It would be incorrect to suggest that the Board offers no hope for vulnerable workers seeking to be classified as dependent contractors. This dissertation illustrates the opposite. At the same time, however, it has highlighted the Board's limitations to bring about real change for vulnerable workers. For workers and unions seeking to fundamentally change the power imbalance between vulnerable workers and employers, they will need to look beyond the Board and the *LRA's* dependent contractor provisions.

Appendix A: Cases that yielded a judgement in which the Board decided whether someone was a dependent contractor, excluding cases involving construction, trades, and roofing

Date	File Number	Citation
1977-02-22	1662-75-R	*Mount Nemo Truckers Association v. Nelson Crushed Stone, 1977 CanLII 409*
1977-04-06	1295-76-U	*Di Sabatino v. Chauffeurs Warehousemen and Helpers of America (International Brotherhood of Teamsters, Local 879), 1977 CanLII 422*
1977-07-12	1065-76-U	*Federation of Community Agency Staffs v. Catholic Children's Aid Society of Metropolitan Toronto, 1977 CanLII 460*
1977-09-01	1374-76-R	*Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Indusmin Limited, 1977 CanLII 520*
1977-12-08	1070-77-R	*Mount Nemo Truckers Association v. Steetley Industries Limited, 1977 CanLII 447 (ON LRB)*
1978-02-08	1308-76-R	*Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Superior Sand, Gravel & Supplies Ltd., 1978 CanLII 467*
1978-03-01	0956-77-U	*Brown v. Standard Industries Ltd., 1978 CanLII 536*
1978-03-13	1880-76-R	*Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Dufferin Materials & Construction Ltd., 1978 CanLII 539*
1978-05-01	1307-76-R	*Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Sherman Sand and Gravel Ltd., 1978 CanLII 563*
1978-09-18	1061-77-R	*Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers (International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230) v. Flintkote Company of Canada Limited, 1978 CanLII 615*
1978-10-06	2007-77-R	*Fuel Oil & Natural Gas Service Technicians Association v. Canadian Fuel Marketers Group, Inc., 1978 CanLII 593*
1978-11-08	0998-77-R	*Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers (International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,Local 230) v. Giordano Sand & Gravel Limited, 1978 CanLII 577*
1978-12-06	0790-77-R	*Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees (International Brotherhood of Teamsters, Chauffeurs, Warehousemen*

		and Helpers of America, Local Union No. 647) v. Dominion Dairies Limited, 1978 CanLII 443
1979-03-26	0994-77-R	*Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousmen and Helpers Local 230 v. Indusmin Limited, 1979 CanLII 915*
1979-04-17	1396-78-R	*Teamsters Union (International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 938) v. Western Dispatch Inc., 1979 CanLII 1583*
1979-09-10	0306-79-U; 0307-79-U	*Bradette v. Purple Heart Film Corporation, 1979 CanLII 1006*
1979-10-09	0865-79-R	*Greater Northern Ontario Trucking Association v. Ethier Sand & Gravel Limited, 1979 CanLII 978*
1979-11-28	0224-79-R	*Ontario Taxi Association (Canadian Labour Congress, Local 1688) v. Blue Line Taxi Co. Limited, 1979 CanLII 950*
1980-03-17	0859-79-U	*Niagara Falls Co-operative Taxi Owners Association v. Peters (Niagara Veteran Taxi), 1980 CanLII 814*
1980-03-24	1704-78-R	*Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Crawford Sand and Gravel Co., 1980 CanLII 941*
1980-05-23	0716-78-R; 0717-78-R	*Teamsters Local 879 v. A. Cupido Haulage Limited, 1980 CanLII 748*
1980-11-13	1789-79-R; 1872-79-R	*United Cement, Lime and Gypsum Workers International Union v. Craftwood Construction Co. Ltd., 1980 CanLII 940*
1981-02-10	0688-79-R	*Niagara Falls Co-operative Taxi Owners Association v. Niagara Veteran Taxi, 1981 CanLII 958*
1981-02-12	0574-80-R	*Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Miore Distributing Co. Limited, 1981 CanLII 950*
1981-03-16	1275-79-R; 1391-79-R	*Ontario Taxi Association 1688 Canadian Labour Congress v. Windsor Airline Limousine Services Limited (Veteran Cab Company), 1981 CanLII 1035*
1981-08-06	0752-80-R; 0827-80-R; 0878-80-R; 1048-80-R	*Canadian Labour Congress (Canadian Association of Burlesque Entertainers, Local Union No. 1689) v. Algonquin Tavern, 1981 CanLII 812*
1981-11-18	0206-81-R	*United Steelworkers of America v. H. G. Francis and Sons Limited, 1981 CanLII 897*

1981-12-04	2447-80-R	*United Cement Lime & Gypsum Workers International Union v. Canadian Union of United Brewery, Flour, Cereal. Soft Drink and Distillery Workers, Local Union 304, 1981 CanLII 906*
1983-02-28	1913-82-R	*Tremways Drivers Association v. Tremways (1982) Limited, 1983 CanLII 982*
1984-12-18	2156-84-R	*Retail, Wholesale and Department Store Union v. Beacon Vanier Taxi (1984) Co. Ltd., 1984 CanLII 1019*
1985-06-06	1061-84-R	*Ottawa Newspaper Guild, Local 205 v. The Citizen (Southam, Inc.), 1985 CanLII 990*
1985-09-06	2099-84-R	*Syndicat Québécois de l'imprimerie et des communications, Local 145 v. Journal Le Droit (UniMedia Inc.), 1985 CanLII 1047*
1986-02-21	3351-84-R	*Ontario Public Service Employees Union v. Cradleship Creche of Metropolitan Toronto, 1986 CanLII 1397*
1986-06-04	3299-84-M	*Ontario Hydro Employees Union (CUPE- CLC, Local 1000) v. Ontario Hydro, 1986 CanLII 1513*
1987-01-22	0855-85-R	*Ontario Public Service Employees Union v. Ottawa Day Nursery Inc. (Andrew Fleck Child Centre), 1987 CanLII 3000*
1987-06-23	3295-84-M	*Canadian Union of Public Employees - CLC v. Ontario Hydro (Line Work - Tweed Area Office), 1987 CanLII 3294*
1987-11-18	1295-85-R	*Retail, Wholesale and Department Store Union (AFL-CIO-CLC) v. Hamilton Yellow Cab Company Limited, 1987 CanLII 3130*
1989-06-06	1634-87-U	*International WoodWorkers of America v. Atway Transport Inc., 1989 CanLII 3245*
1991-04-10	1825-90-R; 1827-90-U; 1827-90-R	*Retail, Wholesale and Department Store Union, AFL:CIO:CLC: v. Call-a-Cab Limited, 1991 CanLII 6043*
1991-05-17	1364-89-R	*International Union of Operating Engineers, Local 793 v. M. Pickard Construction Co. Ltd., 1991 CanLII 6067*
1991-07-11	0749-91-R	*Ontario Public Service Employees Union v. Avenue II Community Program Services (Thunder Bay) Incorporated, 1991 CanLII 6127*
1992-11-16	0763-91-R; 0764-91-R; 0765-91-R; 0766-91-R; 0767-91-R; 0768-91-R; 0769-	*Retail, Wholesale and Department Store Union (AFL) v Diamond Taxicab Association (Toronto) Limited, 1992 CanLII 6786*

	91-R; 0771-91-R; 1271-91-R	
1993-06-28	4144-91-R; 4174-91-R	*Retail, Wholesale and Department Store Union (AFL:CIO:CLC) v. Metroland Printing, Publishing and Distributing Limited (Ajax/Pickering News)Advertiser, 1993 CanLII 7838*
1995-12-21	1106-95-R	*International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 634 v 1085803 Ontario Limited (Grand Theatre Centre of Sudbury), 1995 CanLII 10027*
1998-04-01	0879-97-U; 1141-97-R	*I.W.A. Canada, Local 1-2995 v. Nighthawk Timber Company, 1998 CanLII 18426*
1998-09-09	0827-98-R	*Ontario Public Service Employees Union v. Huntsville District Memorial Hospital (Algonquin Health Services), 1998 CanLII 18381*
1998-12-22	2339-98-R	*Ontario Public Service Employees Union v. Huntsville District Memorial Hospital (Algonquin Health Services), 1998 CanLII 18261*
1999-02-15	0672-98-R	*Teamsters Local Union 938 v Toronto Sun (Sun Media Corporation), 1999 CanLII 19950*
2000-04-28	3953-99-M	*Amalgamated Transit Union, Local 1731 v. McIntosh Limousine Service Ltd., 2000 CanLII 10874*
2001-07-12	2918-97-M	*City Cab, ABC Taxi (Brockville) and Safedrive Inc. v. Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688, Ontario599* *Taxi Union, 2001 CanLII 80885*
2003-01-10	1487-02-R	*National Automobile, Aerospace, Transportation and General Workers Union of Canada v. Capital Environmental Resource Inc., 2003 CanLII 17365*
2004-10-12	1570-03-R	*Teamsters International Union, Local 847 v. Gateway Delivery Ltd., 2004 CanLII 33775*
2011-02-16	3184-09-R	*Ontario Taxi Workers' Union v. Hamilton Cab, 2011 CanLII 7282*
2012-01-20	1286-09-R	*Canadian Union of Public Employees v Governing Council of the University of Toronto, 2012 CanLII 1673*
2012-07-05	0778-10-R	*Ontario Taxi Workers' Union v. Blue Line Transportation Ltd., 2012 CanLII 38608*

2013-06-10	0085-12-R	*National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. 531584 Ontario Ltd., 2013 CanLII 36487*
2020-02-25	1346-19-R	*Canadian Union of Postal Workers v Foodora Inc. d.b.a. Foodora, 2020 CanLII 16750*
2020-07-31	2845-19-R	*United Food and Commercial Workers International Union (UFCW Canada) v Uber Canada Inc., 2020 CanLII 54980*
2020-10-20	1222-18-R	*Teamsters Local Union No. 230, Affiliated with the International Brotherhood of Teamsters v Lakeside Contracting Company Limited, 2020 CanLII 80824*

Appendix B: Summary of Cases Analyzed in Dissertation

Ch.	Citation, Date	Summary
4	*Nelson Crushed Stone, 1977*	Drew on statutory purpose of new legislation No overarching test developed, need to analyze facts and circumstances of each case Focused heavily on lack of entrepreneurs and limited economic mobility Found drivers to be dependent contractors
4	*Adbo, 1977*	Drivers secured their work through a broker (who had no day-to-day supervisory role in directing the work) The Board noted that legislative change made it easier to distinguish between worker and entrepreneur The board identified two factors in determining if someone was a dependent contractor: 1) economic dependence and 2) obligation to perform duty. Becomes key precedent moving forward Found drivers to be dependent contractors
4	*Indusmin, 1977*	Board moves away from four-fold test and considers overarching relationship in a more holistic way Drew heavily on economic dependence and obligation from *Adbo, 1977* Found drivers to be working with broker as independent contractors, but drivers without broker to be dependent contractors
4	*Canada Crushed Stone, 1977*	Board focused heavily on owner-operators of more than truck determined and determined their ability to profit of the labour power of someone else made them an employer in their own right (and thus not a dependent contractor) Certification drive unsuccessful as those who led the push for unionization were themselves employers
4	*Cupido, 1980*	Board focused on source of work, methods used to control the work and overall work processes were also relevant variables, as was the percentage of income derived from the relationship and the way those rates were determined Concluded that the drivers were dependent contractors and dependent upon Canada Crushed Stone (and not Cupido, the broker that the drivers were affiliated with)
4	*Superior Sand, 1978*	The drivers earned a portion of their income from Superior Sand and were not exclusively financially dependent on the company Despite that, the Board determined that the large percentage of income coming from work done for Superior Sand, the drivers not needing to create their own work opportunities but

		instead relying upon Superior Sand, and the source and method of remuneration meant these drivers were dependent contractors Excluded those who owned more than one vehicle
4	*Craftwood, 1980*	The Board examined six aspects of the relationship between the drivers and the company, establishing a more detailed set of criteria for use in future cases: the percentage of income or business derived from the respondent company (supported by a detailed statement of income); the presence or absence of business initiative or entrepreneurial activity; the manner of remuneration; ownership of tools; contract of employment; and supervision and control Determined that the drivers were not dependent contractors because the limited percentage of total income derived from work at the respondent company. The first instance in which the Board determined that owner-operators of a single truck were not dependent contractors Board also determined that the drivers could not be dependent upon an entire industry
4	*Algonquin, 1981*	The lengthiest and most detailed decision on dependent contractors delivered by the Board up until that point and has since become the leading authority in subsequent cases Developed 11 factor test: The use of or right to use substitutes, ownership of instrumentalities, tools, equipment, appliances, or the supply of materials, evidence of entrepreneurial activity, The selling of one's services to the market generally, economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes, evidence of some variation in the fees charged for the services rendered, whether the individual can be said to be carrying on an "independent business" on their own behalf rather than on behalf of an employer, the degree of specialization, skill, expertise or creativity involved, control of the manner and means of performing the work — especially if there is active interference with the activity, the magnitude of the contract amount, terms, and manner of payment, and whether the individual renders services or works under conditions which are similar to persons who are clearly employees Determined that the dancers working at multiple establishments were not dependent contractors but the dancers who worked solely at one club were dependent contractors
5	*Dominion Dairies, 1978*	The drivers in *Dominion Dairies, 1978* were franchised contract-drivers who purchased their product from the dairy prior to delivery – as opposed to just delivering a product (until 1970 they were drivers employed directly by the dairy) Drawing from the dairy's high degree of control over the drivers, the Board concluded thathe drivers were dependent contractors The Board also concluded that the contractor-drivers using a paid helper remained dependent contractors as they were used "to lighten the load during the summer season [or] to shorten the hours worked on a Saturday" did not constitute an entrepreneurial undertaking by the driver
5	*The Citizen, 1985*	In determining that the drivers were not dependent contractors, the Board drew on *Algonquin, 1981* and found that that two factors were "of particular interest in this case: the

		drivers lack of economic mobility or independence and that the drivers could be said to be carrying on an "independent business" (at para. 19). The drivers' terms and conditions of their work did not preclude them from working elsewhere and the practicalities of their work allowed them to work elsewhere. Because of this, the Board reasoned that they lacked the economic dependence to be a dependent contractor The Board also concluded that workers in a 'casual' or 'part-time' relationship could not be dependent contractors under the *Act*
5	*Journal Le Droit, 1985*	The financial arrangements between the parties revealed "real differences" between the *Journal Le Droit* and *The Citizen, 1985* (at para. 15). For example, the price of gasoline impacted the prevailing rate, all drivers were paid for waiting time, and the driver's immediate supervisor would seek increases on behalf of the drivers. The economic mobility of the drivers was "seriously restricted" and represented a major difference from *The Citizen, 1985* The drivers' lack of economic mobility, their integration into the company, and their lack of control over work also supported the finding of dependent contractor status
5	*Ajax/Pickering News Advertiser, 1993*	The Board found more parallels between *Ajax/Pickering News Advertiser, 1993* and *The Citizen, 1985* than with *Journal Le Droit, 1985* and determined that the drivers in question were not dependent contractors. No one factor was determinate The Board made special note of the fact that some of the drivers had other full-time jobs or businesses and that the number of hours required to fulfill the agreement did not impede the economic mobility and independence of the drivers
5	*Toronto Star, 2001*	In finding that the drivers were dependent contractors, Board drew upon the existing jurisprudence and focused on six indicators in coming its decision: integration within *The Star's* business, engagement/terms of engagement of the carriers, the nature of the work, limitations upon entrepreneurial activity, monitoring the carriers, and terminating the services of a carrier The Board concluded that there was little room for entrepreneurial activity by the carriers. One such example involved the carrier's inability to terminate the subscription of a subscriber, including any customer who had defaulted on their payment. While previous decisions suggested that being a part-time employee negated one's ability to secure dependent contractor status under the *Act*, the Board appears to have turned a corner in this case and reconsidered their approach to non-standard work
5	*Atway, 1989*	The Board made the decision almost exclusively through a factor-by-factor analysis of the eleven criteria established in *Algonquin, 1981*. They noted that "several of the more significant factors pointed towards independence rather than dependence" (at para. 58).
5	*Canada Bread, 2017*	This case was unique because the drivers seeking certification were franchise owners with an incorporated company, and many of the drivers employed 'helpers' on a limited basis to aid them in the completion of their work The Board drew from *Adbo, 1977* and the eleven criteria identified in *Algonquin Tavern, 1981* and determined the while the drivers did "not readily fit into the category of 'employee' they

		fit even less easily into the category of 'entrepreneur' or 'independent contractor'" (at para. 99). Although many drivers used a helper, the Board noted that their role was to help the driver finish at a reasonable time, assist with stairs, or working fewer hours in a week – and not increasing profit and the expansion of a business. As such, these drivers were considered dependent contractors
6	*Blue Line, 1979*	The Board noted that any decision "must be viewed in the total context of the taxi industry," and that factors governing the relationship in the taxi industry were different from those in other industries (at para. 8). In determining that the drivers were dependent contractors, the Board relied upon the company's ability to grant, withhold or otherwise regulate work opportunities represented an exertion of control and noted that such power was more like that of an employer over employees than a company over an independent contractor. They also noted that it was the company's exclusive right to provide ground service for hire at the airport that work opportunities flowed, and upon which the owner-operators were dependent
6	*NVT, 1980*	A driver was terminated during a union organizing drive. The company stated that the driver worked as an independent contractor and was therefore not entitled to protection under the *Act*. The union disagreed. The Board, therefore, needed to determine if the driver was a dependent contractor before hearing the merits of the complaint itself The Board concluded that when working for NVT, the driver was in a position of economic dependence and was under obligation to perform duties for NVT. As a result, the Board found the driver to be a dependent contractor
6	*NVT, 1981*	The Board referred to this case as "a parallel proceeding" to NVT, 1980 (at para 7). In this case, the union sought bargaining rights for the remainder of NVT drivers The Board noted that *LRA* did not suggest that wages must flow directly from the employer to the employee, not did it suggest that an employee must receive wages directly from an employer (in this case, the driver did not receive wages directly from NVT – only from fare paying customers – and actually paid weekly dues to NVT) Much like in *NVT, 1980*, the Board determined that the owner-operators were in a position of economic dependence and under an obligation to perform duties for NVT, and thus dependent contractors under the *Act.* In particular, they noted that NVT's dispatch service, which owner-operators paid $51.50 per week to have access to, was central to the owner-operators' ability to earn income and their reliance upon it placed them in a position of dependence
6	*Windsor Airline, 1981*	The Board noted that owner-operators had various ties and obligations to the company, including the requirements for a company meter, the colours and decals of the company to be painted on the vehicle, and mandatory payments for stand rental and insurance and determined the owner-operators were dependent contractors. Many owner-operators also employed a driver of their own. The Board noted that although the owner-operator was entitled to some portion of the total revenue earned by the driver (generally 50 to 60 percent of the revenue), this was not profiting off the driver in an

		entrepreneurial sense and was rather the owner-operator “making the best use of his equipment to earn his living” (at para. 27) Both owner-operators and drivers were found to be dependent contractors of the company
6	*Yellow Cab, 1987*	The Board determined that owner-operators of a single car, as well as their drivers, were dependent contractors of the company They noted that “What the owner-operators supply to Yellow is primarily their labour” and that “Yellow exercises detailed control over the performance of their work as it must if it is to preserve its customers' goodwill, and ensure that they are served in accordance with its own standards. Yellow also maintains an elaborate system of rules and disciplinary responses which effectively penalizes any owner or driver who does not meet those standards” (at para. 43).
6	*Hamilton Cab, 2011*	Spoke of a complex matrix of economic relationships between company, owner-operators, owners, and drivers Using the criteria from *Algonquin Tavern, 1981* – as it pertained to the taxicab industry (and outlined in Table 3.1 below) – the Board concluded that both the owner-operators (of a single plate) and the drivers of those owner-operators’ cabs were dependent contractors of Hamilton Cab
6	*531584 Ontario Ltd., 2013*	Unlike with many other taxicab cases, this case is noteworthy because the Board sided with the company and found that the owner-operators and drivers were not in a position of economic dependence, and thus were not dependent contractors (the Board characterized the owner-operators affiliated with Aeroport as entrepreneurs) The drivers secured fares through options other than the company, leading the Board to determine that the owner-operators and drivers were not in a position of economic dependence upon Aeroport, or perhaps more accurately, not dependent enough upon Aeroport to be considered dependent contractors
7	*Foodora, 2020*	First case in the app-based gig economy The Board drew from factors identified in *Algonquin, 1981*, most notably evidence of entrepreneurial activity and economic mobility, received considerable in-depth analysis in the Board’s decision The Board noted that the couriers were unable to make more money off someone else’s labour-power or through some heightened business acumen, risk-taking, or innovation, adding that “the reality is that a courier cannot improve their chance to make profit through the customary entrepreneurial tools” (at para. 105) The Board determined that the couriers were dependent contractors, despite them working multiple jobs (often within the broader delivery industry) adding “that working multiple jobs was not evidence of entrepreneurial activity. To the contrary, it lends itself more favourably to a conclusion that there is *economic dependence on different employers*” (at para. 103).
7	*Uber Canada, 2020*	The Board’s analysis focused on the parties’ preliminary arguments as to the drivers’ connection to the workplace, and in particular the length of time, if any, that a driver needed

		to have worked during in order to have a sufficient “stake in the workplace” to be included in a possible bargaining unit (at paras. 37-42) The Board recognized that the presence of a new technology did not change either the underlying nature of the relationship between the parties, nor the overall analysis involved in determining the nature of a potential employment relationship The Board concluded that a 60-day gap was “an appropriate cut off period” for inclusion in the proposed bargaining unit as it struck a balance between those drivers who regularly perform bargaining unit work without “unduly excluding” those drivers who go inactive for a period of time but who have a “high likelihood of returning to work” underlying nature of the relationship between the parties (at para. 57) The parties did not agree on which specific drivers met the criteria and, more importantly, on whether those in the proposed bargaining unit were even dependent contractors and eligible for coverage under the *Act* to begin with. The case was withdrawn before the Board had the opportunity to make those decisions

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