

restaurateur in the news, if you can sit at home and get paid \$500 a week by the federal government?

Even though the CERB is keeping Manitobans safe and preventing a total collapse in consumer demand, Premier Brian Pallister doesn't like it either. "We are fighting against a federal program that is actually paying people to stay out of the workforce right now," he said, riding a popular conservative backlash to any and all government shutdown measures. "I don't like the fact that that is real, but that is real. People are being paid to stay home and not work."

There are a variety of reasons workers may not want to return. Many have lost access to child care. Some may have health concerns that put them at higher risk, or live with someone who is vulnerable. Community transmission has not been eliminated and won't be until herd immunity is established and/or a vaccine is found. Fear of contracting COVID-19 is not unreasonable.

Although employees have the right to refuse unsafe work, who gets to decide if the risk of transmission is low enough? Public health officers are still warning people to practice social distancing. This cannot be reassuring to those who work directly with the public or in close quarters with other workers. Such mixed messaging is at the crux of the tensions in Alberta. Cargill's unionized workers at least have a voice. Many low-wage workers do not.

The only control many workers currently have is the CERB. But this flash of autonomy will be over once they are called back to work. If workers refuse to go back they will have effectively quit and will find themselves in a challenging job market. Layoffs stabilized in May, but the unemployment rate increased slightly to a record high of 13.7%, driven by the re-entry of 201,000 workers into the labour market to look for work. One-third of the potential labour force remains underutilized, and returning student unemployment surged to over 40%.

These data do not bode well for anyone hoping to see improvements in employment standards, health and safety regulations or minimum wages post-pandemic. Higher unemployment means less worker power. Some wonder if higher unemployment could force Canadians into the agricultural sector.

The 60,000 foreign workers who come to Canada each year under federal temporary entry programs have to be quarantined for 14 days before they can start working. Worker advocates had a hard time determining if these workers' living conditions are being adequately monitored, or if they are being forced to work when they shouldn't, or forced to pay back the two weeks' pay in quarantine.

These concerns are legitimate considering the well documented abuses these workers face. It is their high degree of exploitability that makes these workers such an integral part of Canada's food production. But the quarantine and social distancing requirements mean far fewer foreign workers will be brought in this year.

So what about getting Canadians to do this work? Farmers are not keen on the idea. Evan Fraser of Guelph University's Arrell Food Institute told the *Financial Post* that farm work is "not unskilled work," since it takes a lot of training and experience to do properly and quickly. Bringing in unskilled locals to do this farming work would slow down harvests and eat into the market value of crops, he said. How many Canadians would be willing to do back-breaking work, 16 hours a day, six days a week, for minimum wage?

As long as we classify temporary foreign workers as low-skilled and refuse to open a pathway for them to permanent residency, and as long as we expect Canadians working in the service and food processing sectors to risk their health for low pay and precarious working conditions, we have to admit that some workers are essential because they're so exploitable, despite all the lip service to the contrary. **M**

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**Below
the Fold**
CYNTHIA KHOO

CUSMA: No one-size solution to platform liability

WHEN CANADA RATIFIED the "New NAFTA" (CUSMA) in March 2020, the agreement's digital trade chapter attracted renewed attention for how it seemed to import Section 230 of the United States' Communications Decency Act into Canadian law. Section 230 grants broad legal immunity to digital platform companies for the actions and speech of their users, including abusive or illegal behaviours and posts. Examples of shielded harms include radicalizing white supremacist videos on YouTube, hate speech campaigns on Facebook and Twitter, and social media-based targeted harassment or stalking.

For reference, the relevant text in Article 19.17 of CUSMA reads: "no Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service [e.g., a digital platform] as an information content provider [e.g., the user who posted the content] in determining liability for harms

related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.”

Given this wording, it is possible that applying direct liability to platforms for legal harms committed by users would violate CUSMA, while applying standalone regulatory obligations with the aim of preventing, mitigating or remedying such harms would not. If that is the case, Canada should implement and interpret Article 19.17 in a way that makes full use of that flexibility. Two key reasons support this strategy.

First, digital platforms ought to be held to different levels of accountability for user activity depending on the specific harms, rights or interests involved. For instance, platform liability measures considered necessary, proportionate and equitable where the aim is protecting the equality rights of marginalized groups would likely not be necessary, proportionate or equitable at all where the aim is to preserve copyright owners’ financial interests. The merits of a platform liability proposal must be assessed in direct relation to the rights or interests at stake.

Similarly, legal mechanisms meant to hold platforms accountable for political disinformation, discriminatory advertising or non-consensual distribution of intimate images, for example, cannot be conflated and reduced to one single platform liability regime. This would completely undermine our ability to pass and enforce sensible laws and policies that suit the dramatically different ways in which digital platforms can facilitate harm on both individual and systemic levels.

Second, Canadian law has already developed a measure of context specificity when it comes to addressing platform liability. This has occurred not through all-encompassing intermediary liability provisions such as in the U.S. or European Union, but through developments in specific areas of law. The courts have established, for example, that defamation law will consider an internet intermediary liable where it does not take down allegedly defamatory content upon gaining knowledge that it is hosting that specific content.

Legislatively, the federal Copyright Act has, since 2012, imposed a legal regime on intermediaries for users engaging in copyright infringement including direct liability where a platform meets the Section 27 test for “enabling” infringement. This contrasts with the laissez-faire approach that the federal government has taken with digital platforms for other, arguably more individually and democratically devastating user behaviours, including sexualized online abuse, intimate partner violence, or co-ordinated campaigns to harass and silence Black, Indigenous, LGBTQ+, and female journalists, politicians and human rights activists.

To be clear, the argument is not that because direct liability currently can apply to online platforms for

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defamation and copyright, at least as much liability should apply for sexual harassment or discriminatory abuse. The point is that defamation, copyright, technology facilitated violence and other user-generated issues tied to digital platforms each require their own separate and contextualized legal and policy analysis of the most suitable approach to liability. Each analysis can make reference to, but should be ultimately independent of, the analysis in other areas of law. This mitigates the risk that incorrect, misguided or objectionable approaches to platform liability in one area will cascade into others, resulting in further poor law and policy.

To illustrate, a human rights-based analysis of platform liability would suggest that the current Canadian responses to copyright infringement and platform facilitated abuse against marginalized individuals should be reversed. The latter should warrant stronger measures—to uphold the rights to equality, privacy and freedom of expression—and the former weaker or no measures, as platform liability for copyright infringement has routinely been shown to chill free expression online, including the free expression of historically marginalized communities. The current state of affairs, with seemingly misplaced priorities, does not reflect well on the Canadian justice system.

Discussions regarding platform liability often treat potential regulation as a one-size-fits-all proposition. It should not be and does not have to be. Without recognizing the importance of context and the specific rights, interests and equities involved, platform liability law and policy threatens to be overrun with false equivalencies of harm and distorted calibrations of proportionality and necessity. Lawmakers must proceed astutely and carefully to prevent CUSMA Article 19.17 from making this more likely—or the “New NAFTA” will have cost something that should not ever be up for trade. **M**

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