The new realities of working in Canada: The right to disconnect and gig work

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Submission in response to ESDC – Labour Program Consultation

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The Public Service Alliance of Canada represents more than 225,000 workers in every province and territory in Canada and in a few locations outside Canada. Our members work for federal government departments and agencies, Crown Corporations, universities, casinos, community services agencies, Indigenous communities, airports, and the security sector among others. PSAC is headquartered in Ottawa with 23 regional offices across Canada. More than 11,000 of our members are in workplaces governed by the Canada Labour Code; 166,000 members fall under the jurisdiction of the Federal Public Service Labour Relations Act and the Parliamentary Employees Staff Relations Act. The remainder of the membership falls under provincial labour statutes.

PSAC participated in the consultations of the Expert Panel on Modernizing Federal Labour Standards (Expert Panel), held in 2019. Our submission to this current consultation on Gig Workers and on the Right to Disconnect will elaborate on those discussions, with additional information that has been brought to the forefront in the intervening unprecedented times.

On gig and precarious work

We will discuss gig work in the context of precarious work that includes temporary help agency workers, misidentification of dependent and independent contractors and others in non-standard employment situations. The pandemic has clearly shown us that the gig economy and the entire shift to increasingly precarious work puts many workers in Canada in harm's way. Without clear, worker-centered labour standards, without universal protections including paid sick leave, childcare, pharmacare, robust employment insurance provisions and wide employment insurance qualifications, we will continue to live in a country that leaves behind those who we call most essential – those who are predominantly women, Indigenous, Black, racialized and workers with disabilities and are therefore already marginalized in our society.

We recognize that marginalized workers, and especially those in precarious work, face more workplace injuries, including increased hazards of a psychological nature as well as harassment, discrimination, and violence and/or emotional trauma. . Any efforts taken by the ESDC Labour Program aimed at improving the new realities of workers in Canada must consider the specific ways that members of equity seeking groups experience psychosocial hazards and how their particular needs might be addressed. Furthermore, it should be acknowledged that workers' experiences both inside and outside of the workplace have impacts and women carry a disproportionate burden to care for families.

Foremost, it is incumbent upon the government to act on the evidence that already exists, and indeed on the recommendations of the House of Commons Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA) Committee in its June 2019 Report on Precarious Work. While it appears that this all-party report and its recommendations were discarded in the aftermath of the election that followed its release, the research and the proposals are all pertinent to this current consultation.

Our first recommendation, therefore, is to implement of all the recommendations of the HUMA Report on Precarious Work (Appendix 1). Leaving this good work to languish is counterproductive to the House of Commons committee process and to this current consultation itself. The federal government is currently the country's biggest user of temporary help agency workers. It currently contracts out federal

public sector work to companies that have a vested interest in ensuring that provisions to protect precarious workers are not enacted – companies such as Maximus, which has newly been awarded a contract to provide call centre work for the Canada Revenue Agency – and has a history of pursing an anti-worker agenda in the United States. The federal government is required to comply with the Employment Equity Act (EEA) and yet its ongoing use of temporary and other precarious workers is inconsistent with those commitment. Each federal organization is required to have an employment equity plan and collect data on representation of the designated equity groups in their workplaces. If temporary and other precarious workers are not counted in that data, then it is difficult to know whether those federal organizations are meeting their obligations. In addition, while the Federal Contractors Program (FCP) seeks to convey accountability for employment equity measures on private companies that contract to the federal government, the reporting requirements under the FCP are so opaque as to make the exercise of accountability and comparison impossible. By implementing the recommendations of the HUMA report, the government will significantly reduce the use of temporary and precarious workers in the public service, ensuring that employment equity measures are more accessible and applicable to all.

On gig workers

A lack of regulation in existing laws has meant that employers or foreign businesses often classify gig workers as self-employed independent contractors and not employees.

Worse yet, gig companies, Uber in particular, are eager to enshrine insecurity and inferior work conditions into Canadian legislation while undermining the right of workers to organize. The Canadian labour movement stands united with the growing global movement demanding full rights and protections for gig economy workers. These employers do not pay into provincial/territorial workers' compensation boards, do not pay Employment Insurance (EI) or Canadian Pension Plan (CPP) premiums. The CPP, the Quebec Pension Plan and EI rely on the participation of workers and employers as a commitment to our economic security while at work and in retirement. The rights of gig workers are entwined with all of us.

Gig economy workers do not have the protections afforded to employees under Canadian labour statutes, including the right to unionize and to collectively bargain, basic occupational health and safety protections as well as basic labour standards protections, like minimum wage, overtime pay, hours of work, and sick leave, which are afforded to every other worker in Canada. In addition, gig workers also lack access to important social security programs such as employment insurance. If they lose their job, are injured, have a baby, fall ill, or are otherwise unable to work, they have limited support.

In addition to these challenges faced by Canadian workers denied basic labour protections, gig workers are left at the mercy of variations in consumer demands and changes to algorithms determining both when they should work and how much they will earn. These workers have no recourse or protection from arbitrary deactivation or simple changes in the terms and conditions of their work. According to anecdotal information gathered by the Canadian Labour Congress, many Canadian gig workers are reporting their pay has steadily declined, and during the pandemic, they experience working conditions that endanger their safety. Yet, they are afraid to complain because they fear retaliation from employers.

Gig workers should have the same full protections and employment rights as other workers in Canada including the fundamental right to organize and bargain collectively.

It is PSAC's position that all employees in federally regulated sectors and the federal public service should be protected by the same minimum labour standards. Further, no employer, including the federal government, should be able to opt out of these labour standards by declaring certain groups of workers, such as students or casuals or certain contractors, not to be employees.

As the background paper produced by the Expert Panel states, currently there is a continuum of protections available to workers in different categories. For example, a part-time permanent worker has greater protection than a full-time temporary agency worker who in turn may have greater protection than a dependent contractor and so on. As a result, workers doing the same duties in the same workplace can be compensated differently. This is unacceptable.

The solution should center on strengthening and supporting the ability of workers in non-standard jobs to unionize by providing the resources to organize, and then by increasing the effectiveness and efficiency of collective bargaining, particularly with respect to bargaining a first collective agreement.

PSAC recommends the following in order to create greater equity and fairness between employees, and to address the generally poorer and worsening working conditions of workers in non-standard jobs.

1. Part III of the Canada Labour Code should include a definition of employee that includes dependent contractors.

2. All non-standard workers, regardless of sector, should have social protections on par with those in standard work, including access to benefits, EI, CPP, other social programs, and the right to unionize. This should include gig workers, dependent contractors, and any employees of independent contractors. This means that both the contract employer & the worker should deduct EI on the same 2/1 ration that exists now. The government should also once again participate on a tri-partite basis in funding EI.

3. The Employment Equity Act must apply to all workers in the federal public service, regardless of employment status and disaggregated equity data should be collected on these workers. This Act applies to all federally regulated workplaces and organizations under the Federal Contract Program.
4. Term limits for temporary or contract employees should be imposed. Given that the precedent already exists within the federally regulated private sector, we suggest that 18 months may be a reasonable term. Any worker who works for an employer for longer than 18 months should be made permanent and given all the related entitlements.

5. All workers in federally regulated work roles should be covered by a federal workers' compensation scheme that provides for compensation at a rate equivalent to full-time work, and, where higher, the minimum wage payable in the province of work. If the worker was making, or could make more in a similar job, that should be the assumed wage.

6. Workers in precarious positions with unclear employer relationships (e.g. Temporary Help Agency workers) should be afforded increased protection by making both the firms and

contracting employers in the relationship jointly and severally liable for labour standards violations.

7. To make it possible for workers to exercise their constitutional right to organize into unions, employers should be required to provide complete employee lists and contact information to the organizing union provided it is able to demonstrate that it is engaged in a bona fide organizing drive.

8. Legislative changes to provide for sector-based and/or broader-based bargaining should also be explored to allow workers in non-standard and precarious employment situations to join forces with workers in more standard jobs to obtain greater bargaining power, and to negotiate working conditions on a more equal footing.

9. ESDC should recommend improvements and expansion of public and universal services and programs, including the introduction of a comprehensive and universal Pharmacare program, and ensure that the proposed system of universally accessible affordable child care moves forward without delay

10. PSAC encourages the Labour Program to consider changes to the *Canada Labour Code (Part I – Industrial Relations)* and/or the Canada Industrial Relations Board's *Regulations* to give non-union workers better access to unionization. Our specific recommendations on this issue can be found in our original submission to the Expert Panel

On the right to disconnect

One of the most drastic changes to work that has occurred as a result of the pandemic, has been the movement of millions of workers from office-based work to home-based work. As with precarious work, this sudden and enormous change has highlighted the problems with our over-connected lives and work-life balance. For many, owning professional digital tools had already become commonplace. Laptops, smartphones, and tablets entered the office and now have followed workers to their homes. At least one tool, often a smartphone, accompanying them on nearly every outing. Over the past 18 months, office workers, knowledge workers, teachers and others have been forced into work-from-home situations. Employers scrambled to provide tools for those who didn't already have them. Even before the pandemic, these work tools were increasingly invading the space of the workplace, family and personal life. Several reasons can be put forward: the fear of being looked down upon, the desire for performance, the desire to remain a good soldier and quite simply being unable to turn off your smartphone outside of work hours. Add to this the lack of other activities outside of the home, while entire communities isolate or lockdown, and workers are left feeling that they are always at work.

Unfortunately, not only has constant connection crept into the personal lives of many workers in the federal public service and other workplaces, but it is making workers sick. Several occupational health and safety studies show the link between the excessive use of digital tools and the deterioration of the state of health which comes at both a high financial and social cost. Some studies have recognized that cognitive and emotional overload which can lead to a sense of fatigue is a psychosocial risk of being constantly connected.

While PSAC strongly supports the generalization of the right to disconnect being beneficial to workers, it is our view that we can and should go beyond the symbolic notion of work-life balance and instead achieve something more ambitious by ensuring work-free time. The right to disconnect would make work more humane not only by making it possible to know one's actual working time schedule, but also knowing the parameters of one's guaranteed personal time.

PSAC believes the right to disconnect is an extension of the right to rest and leisure including a reasonable limitation of working hours and periodic holidays with pay.

We reiterate that government policy and law should encourage and facilitate the disconnection of workers from work outside of scheduled work hours. If it is essential that an employee keep working beyond their work hours, the employee must be adequately compensated. It is with this is mind that PSAC believes disconnection should not be a matter of voluntary compliance or isolated decisions, but of collective decision and action. The supervision of the use of digital tools must ensure respect for rest and leave times, as well as personal and family life. PSAC believes that a regulation, developed in tri-partite consultation, is the only effective solution.

Along with the right to disconnect, workers must be protected from unacceptable use of surveillance methods by their employers. Keystroke counters, requirements for open web cameras, GPS surveillance and other electronic methods of surveillance have serious privacy implications for workers, and for others in their households. It is imperative that restrictions on what methods of work oversight can be used by employers be put in place along with right to disconnect provisions.

Voluntary compliance with the right to disconnect will not work. In the absence of federal regulation, the ultimate choice lies with the employer, who will alone decide on the terms of application of the right to disconnect in an internal policy, drafted by the employer without compulsory discussion, or any actual requirement to work with worker representatives. There should be an obligation that employers consult with workplace and/or policy committees, as well as bargaining agents where appropriate, to negotiate the right to disconnect.

Guidelines should be given to negotiators and/or policy communities to define the modalities of non-abusive use of digital tools and to make it possible to distinguish between working time and rest time. Similar to the enforcement of the requirement for applicable partners to be consulted on the creation of a harassment and violence prevention policy, the ESDC Labour Program should ensure provisions are made for enforcement including directions and administrative monetary penalties in the event of a violation of either the requirement to consult, or the agreed-to disconnection policy.

PSAC recommends

1. Enactment of legislative provisions to enshrine the right of employees to disconnect and an employer obligation to facilitate disconnection.

2. Employers be required to distinguish between working time and rest time by specifically defining the healthy use of digital tools.

3. Treating the time spent reading and/or responding to email, or text messages etc. as work for all purposes of the *Canada Labour Code*, including weekly hours of work maximums, with accompanying adequate compensation entitlements. Compensation for on-call or stand-by periods should be introduced.

4. Enactment of legislative provisions to protect employees from reprisal if they exercise their right to disconnect.

5. Recognizing the ''right to disconnect'' as an extension of article 24 of the Universal Declaration of Human Rights which states that ''everyone has the right to rest and leisure including reasonable limitation of working hours and periodic holidays with pay''.

6. Enactment of legislative provisions to provide for financial penalties and remedial orders in cases where an employer breaches employees' right to disconnect or engages in reprisal for its exercise.

7. Enactment of legislative provisions that could provide for approaches tailored to specific workplaces, industries or occupations via an obligation on employers to introduce policies crafted in meaningful consultation with workers or their bargaining agents where workers are organized into unions. Such approaches could also require the issuance of appropriate exemption permits similar to the current overtime averaging system.

8. Enactment of legislative measures to protect and advance an employee's right to privacy, and to place restraints upon employer intrusion into and interference with the private lives of employees by technological means, including limiting or prohibiting the use of monitoring software and open camera requirements.

9. Make public education efforts in support of a governmental policy approach that advances both the employer's responsibility around the legal right to disconnect and an individual's rights in this regard.

Apply federal standards to the federal public service

Our final recommendation is one that we have made before. Federal standards enshrined in the Canada Labour Code must also apply to workers in the federal public service. It is not tenable for the federal government to impose standards on federally-regulated private sector employers that it is not prepared to accept for its own workforce—the largest in Canada. This is especially important given that precarious work, with all the problems associated with it, is becoming increasingly prevalent in the federal public service because of increased reliance on temporary help agency workers, contracting out, term and casual positions and increasing connectedness through technology.

One key manner in which the federal government is presently not held to the same standard as private sector employers is with respect to the consequences of exercising "fundamental control" over the employment of temporary help agency workers. Where a private sector employer exercises

fundamental control over temporary help agency workers, it is treated as the “true employer” of those agency workers and held accountable as such. At present, jurisprudence insulates the federal government from the operation of these legal principles. Legislation should be enacted to counter the harmful effects of this jurisprudence and make the federal government accountable as the true employer of those agency workers over whom it exercises fundamental control.

Appendix 1: HUMA Report on Precarious Work 2019 - Recommendations

LIST OF RECOMMENDATIONS

As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.

Recommendation 1

That Employment and Social Development Canada work with relevant government departments and agencies in consultation with industry, labour, academia, workers with lived experience of precarious employment, and other stakeholders, in order to come to a common understanding of precarious employment, and in so doing, consider the following dimensions and elements: compensation (including wages, benefits, and income volatility), job security (including work arrangements and sectoral changes), working conditions, opportunities for career development, and an individual's circumstances..... 44

Recommendation 2

Employment and Social Development Canada work together with Statistics Canada to

- **develop a data strategy for measuring these elements that includes quantitative, qualitative and longitudinal components; and**
- **ensure the data strategy incorporates the labour market participation, income security outcomes and skills of vulnerable groups (including women, Indigenous people, visible minorities, youth, recent immigrants, temporary foreign workers, interns, seniors, and people with disabilities)..... 45**

Recommendation 3

That Employment and Social Development Canada review and reform Employment Insurance to better support workers in precarious employment including those in self-employment. To this end, reforms must consider:

- **reducing the number of hours worked required to qualify;**

- increasing the amount of the benefit for workers with low earnings;
- the rules that apply to and benefits available to self-employed workers;
- the accessibility of skills training and vocational programs delivered through Employment Insurance; and
- international best practices. 46

Recommendation 4

That Employment and Social Development Canada study forms of income support, such as a guaranteed annual income or other transfer programs, that are not tied to employment..... 46

Recommendation 5

That Employment and Social Development Canada work with other federal government departments and agencies to review human resources practices with a view to:

- reducing reliance on temporary agency workers and solo self-employed;
- improving protections of temporary agency workers and solo-self employed to ensure that they enjoy the same level of occupational health and safety protections and access to workers compensation; and
- reviewing human resources policies and budgeting practices to ensure that they incentivize hiring employees on indeterminate contracts..... 47

Recommendation 6

That Employment and Social Development Canada and the expert panel:

- Refine the scope of the review, recognizing that low-wage workers and vulnerable workers (women, youth, seniors, Indigenous workers, recent immigrants, people with disabilities, visible minorities, interns and temporary foreign workers) need to be considered; and

Recommendation 10

That Employment and Social Development Canada, in the design, roll-out and evaluations of the Canada Training Benefit:

Recommendation 11