

# EVIDENCE BRIEF

The **Social Sciences and Humanities Research Council** in collaboration with the **Future Skills Centre**

SSHRC's Imagining Canada's Future initiative mobilizes social sciences and humanities research to address emerging economic, societal and knowledge needs for Canada, and help guide decision-making across all sectors toward a better future. This evidence brief addresses the Future Challenge Area of: **Skills and Work in the Digital Economy**

## Legal challenges of remote work across borders

### About the project

Since the outbreak of the COVID 19 pandemic, remote work has become a “normal” way of performing work, and it is expected to expand worldwide in the coming years. The newly virtual workplace defies national borders, since both employers and employees now operate in a global, digital market. Employees working online from a country other than that where the employer is located, remote workers relocating their residence to another country, and the growing number of “digital nomads” illustrate how relevant the international aspects of employment relations are in contemporary society. With this increased mobility come complex legal considerations that can affect protection for remote workers. Which law applies to their employment contract? Which authority has jurisdiction to rule on their rights? Such questions must be answered to ensure legal protection for workers, but they can be particularly difficult to address, given the diversity of regulations and lack of coordination between them.

This knowledge synthesis allowed us to identify shortcomings and contradictions in the legal response to remote work across borders, as the existing framework is fragmented and not well tailored to the realities of cross-border remote work. We reviewed the state of the law in Canada (Quebec, Ontario, British Columbia and Alberta) and the European Union regarding the following issues:

- determining the competent authority to adjudicate disputes involving cross-border remote workers
- identifying which laws apply for employer-remote worker relations across borders
- how minimum employment standards apply to remote work across borders
- how remote work across borders challenges the criterion of “habitual place of work” and proposed solutions to this issue

### Key Findings

- In general, the rules regarding jurisdiction on employment relationships across borders give the worker the choice between the authorities of their domicile/residence, their habitual place of work, and the state in which their employer is headquartered or established. However, in the Canadian system, this flexibility can benefit employers who decide to prosecute workers before a jurisdiction other than that of their domicile, under the ordinary criteria for contractual matters, which may impair the worker's right of defence.
- The “habitual place of work”—the predominant connecting factor for determining both the law applicable to an employment contract in the absence of a choice of law clause, and the mandatory provisions protecting the employee when the parties have chosen the law of another jurisdiction—does not adequately deal with cross-border remote work issues.
- This criterion is not representative of the socioeconomic context in which the employment relationship is rooted, since the physical place a computer is located does not affect the performance of work, which could be more connected to the place it will produce its effects.
- This criterion encourages employers to relocate work offshore by using remote workers in foreign jurisdictions offering lower protection. This benefits companies that want to avoid the mandatory employment standards of their country of origin, allowing them to reduce salary costs and lower protection for remote workers. The global regulatory disparities can lead to a veritable race to the bottom as companies sidestep the most restrictive regulations and choose the law that provides remote workers with fewer protections.

- Private international law and labour law follow a territorial logic ill suited to the virtualization of the workplace. The Canadian legislation on minimum employment standards we analyzed refuses to cover remote workers who work

exclusively for a local company from another country or Canadian province (with the exception of Quebec, if the worker is domiciled there).

## Policy implications

- The results of this knowledge synthesis will be made available to policy-makers so that they may be better equipped to assess the impact of the worldwide dematerialization of the workplace on the legal framework for labour relations. This information will be useful for educating decision-makers on the need to work with all relevant stakeholders to consider these issues and the opportunity for legislative changes that take into account the international and virtual realities of remote work.
- Given how complex it can be to understand and coordinate cross-border remote work rules, this synthesis aims to be informative to the stakeholders affected by this work model, in order to mitigate the legal insecurity resulting from such labour relations. There is already an imbalance between parties to a contract, and such insecurity can only tilt the scales further, to the employee's detriment.
- In the face of the current legal regime's inability to adequately address these issues, policy-makers and labour law practitioners have a critical role to play in improving contractual practices to reduce the complications that can occur when work contracts are executed or broken, or executed remotely from another country or a Canadian province other than the one where the employer is headquartered.

## CONTACT THE RESEARCHERS

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## FURTHER INFORMATION

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The Future Skills Centre (FSC) is a forward-thinking centre for research and collaboration, dedicated to preparing Canadians for employment success. As a pan-Canadian community, we are collaborating to rigorously identify, test, measure and share innovative approaches to assessing and developing the skills Canadians need to thrive in the days and years ahead.