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Access to Justice for Gig Workers: Contrasting Answers from Canadian and American Courts
Accès à la justice des travailleurs de plateformes numériques: Réponses contrastées des tribunaux canadiens et américains

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Article abstract

With the introduction of digital platforms in the Canadian labour law's landscape comes an increased used of agreements imposing arbitration as a dispute resolution mechanism. To challenge their classification as independent workers and gain employment standards acts' protection, gig workers therefore need to submit their disputes to a private proceeding, often located outside Canada. It is in this context that the Ontario Court of Appeal's decision to invalidate the arbitration clause in *Hellerv Uber Technologies Inc.* must be read. Having granted leave for appeal, will the Supreme Court of Canada follow in the footsteps of American law and allow mandatory arbitration agreements to impede collective actions challenging the misclassification of gig workers? Our study of the Ontarian and American decisions regarding the validity of mandatory arbitration agreements between Uber and its drivers brings to light the determining impact of the approach chosen by courts.

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Access to Justice for Gig Workers: Contrasting Answers from Canadian and American Courts

Urwana Coiquaud and Isabelle Martin

Introduction

Must an Ontarian delivery driver, who demands that UberEATS respect Ontario's employment standards, apply, at his own expense, to a Dutch arbitration tribunal to have his rights recognized due to a contractual clause? This is the question at the heart of the *Heller*[1] case, to which the Ontario Court of Appeal answered in the negative and concluded that the said clause was invalid. Arbitration clauses (or arbitration agreement), by which the parties agree to entrust the final resolution of their dispute to a private arbitrator, who will settle the dispute according to the rules of law determined by the parties—even if they are different from those of a given legal system—are common in the commercial sphere. But their increasing inclusion in employment or consumer contracts raises important questions since these contracts most often constitute contracts of adhesion and benefit from protective public legislation. In this context, the arbitration clause could affect the progressive enthusiasm of these workers or consumers due, in particular, to the costs linked to arbitration that they will have to assume, the confidential nature of the decisions and the fact that they are unappealable.

The arrival of digital platforms in our economic landscape is accompanied by an increasing use of such clauses. They silence these workers and these consum-

1 *Heller v Uber Technologies Inc*, 2019 ONCA 1 [*Heller*], conf. by 2020 SCC 16 (see note below).

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Note de l'édition à nos lecteurs francophones: Ce texte est déjà paru en français dans un numéro antérieur de RI/*IR*, soit le 74-3, aux pages 577-588.

Note to all readers: This text is a translation of a French text published before the Supreme Court rendered its decision (2020 SCC 16). The majority of the Court held that the arbitration clause in the agreement between Uber and Mr. Heller was so unfair it was unenforceable. This will now allow this class-action against Uber in Ontario to proceed.

ers, or impose a semblance of justice upon them, the essential parameters of which have been determined by the employer or the commerce who is often placed in a position of strength. But how did the arrival of digital platforms in our economic landscape come to highlight these clauses?

The emergence of Uber and other digital platforms in the Canadian landscape, as in many other countries around the world, has raised serious questions regarding labour and employment law. One of these questions is to determine whether these workers are employees and can benefit from the rights and benefits that accompany this status, such as the right to a minimum wage, to vacation pay, to health and safety protection or to unionize. However, before even getting an answer from the courts, these workers face a major obstacle; the presence of an arbitration clause in their contracts. These clauses, to which they have subscribed, authorize these companies to require workers to submit their dispute not to a court, but to a private arbitrator, in a place and according to a procedure that they have unilaterally determined. These clauses will quickly have the effect of discouraging these vulnerable, self-employed and non-unionized workers, by locking them into a private justice process where they will not be able to fight on equal terms with these companies that have significantly greater means than them and thus put in jeopardy their access to justice.

The study of the facts and reasons in the *Heller* case highlights how the validity of arbitration clauses can be questioned, both in relation to the circumvention of the procedural mechanisms provided for in the employment standards laws and their inequity. This study is important, especially as the answer provided by the judges is not final since the Supreme Court of Canada accepted to hear the *Heller* case on appeal and since the wide dissemination of such clauses in the United States (Stone and Colvin, 2015) reveals the importance of the issues attached to it. In particular, American decisions on similar facts in the *O'Connor*[2] and *Mohamed*[3] cases illustrate the ability of companies to adjust the content of arbitration clauses to developments in case law so as to impose arbitration.

We will therefore deal first with diametrically opposed decisions rendered by the Ontario Superior Court and by the Court of Appeal in the *Heller* case. Secondly, we will compare these decisions with those rendered on the same subject in the United States, where these clauses could be validly imposed, thus leading to conflicts related to the qualification of workers on digital platforms in the confines of a private resolution. Given the importance assumed in the United States of arbitration clauses, commenting on *Heller* from an American law perspective illustrates the potential abuses of arbitration clauses. By confining the resolution

2 *O'Connor v Uber Technologies Inc*, No. 14-16078 (9th Cir. 2018) [*O'Connor*].

3 *Mohamed v Uber Technologies Inc*, 848 F. 3d 1201, 1206 (9th Cir. 2016) [*Mohamed*].

of litigation solely to the parties, without any trace in the public domain (Gaillard, 2017)—the process and the outcome of the arbitration remaining confidential—no support is provided in the future for the construction of case law and there is no basis for developing public policy.

Heller v Uber Technologies Inc: Opposing Visions of the Ontario Superior Court and the Court of Appeal

Heller v UberEATS deals with a class action led by Mr Heller, a delivery driver. He had been working for UberEATS since February 2016, ensuring the delivery of meals via a digital platform. He earned between $400 and $600 per week for around 40 to 50 hours of work and used his own vehicle for this purpose. He alleged that he and his colleagues are employees and that as such, they should benefit from the protections of the *Employment Standards Act 2000*[4], which grants specific rights and recourse to employees. To do this, he filed a class action[5] certification request on behalf of any person who, since 2012, had worked or continued to work from one of Uber`s applications as a delivery driver or driver (transporting people by taxi or food delivery) using Uber applications.

However, Uber Technologies Inc filed a motion to stay the proceeding on the grounds that Heller was bound by an arbitration clause obliging him to submit his dispute to arbitration in the Netherlands. Indeed, like every other delivery driver connected to Uber, Mr Heller had to adhere to the 'terms and conditions' of the contract submitted through the platform to be able to access the application and therefore work. The contract, accessible from a cellphone, is fourteen pages long. To access the workings of the platform, it is necessary first to click on "Yes, I accept", then a second time where the person confirms having read and accepted the terms of the contract and those to come. Note that Uber periodically reviews the agreement and the driver must therefore accept the terms of the new agreement to gain access to the platform again. At the end of clause 15 of the said contract, it is provided that:

> Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of the Netherlands (…) Any dispute, conflict or controversy, howsoever arising out of or broadly in connection with or relating to this Agreement (…), shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules (ICC Mediation Rules). If such a dispute has not been settled within sixty (60) days (…) such dispute can be referred to and shall be exclusively and finally resolved by arbitration under

4 LO 2000, c 41 [*Act*].

5 *Class Proceedings Act*, SO 1992, c 6, art 2 (2).

> the Rules of Arbitration of the International Chamber of Commerce (ICC Arbitration Rules) …. The Place of the arbitration shall be Amsterdam, The Netherlands.

This contract is therefore governed by the laws of the Netherlands and contains a clause providing that any widely heard conflict or misunderstanding connected with this agreement must be resolved by arbitration in that country. The dispute over the certification of a class action claiming benefits related to the employment status of Uber drivers is therefore to focus instead on the validity of the arbitration clause and the access to justice for these workers.

Between a Platform Delivery Driver and Uber: An International Business Relationship?

At the initial hearing, Justice Perrell of the Ontario Supreme Court allowed Uber's motion for suspension, stating that the contract between Mr Heller and Uber is an international business contract with an arbitration clause. It is governed by the *International Commercial Arbitration Act 2017*, Uber having international headquarters in the Netherlands and Heller working in Ontario. In the opinion of Justice Perrell, the purpose of this contract was "the sale for the use of intellectual property, a software program, for a fee" (para 46). He considered that arbitration, under the competence-competence principle[6], can determine if there is a working relationship between UberEATS and the delivery drivers, a relationship forming the basis of Heller's class action. The judge also pointed out that the *Employment Standards Act 2000* was not hostile to arbitration; as proof, its content does not expressly exclude recourse to arbitration. Finally, he rejected Heller's argument that the contract should be cancelled because it was unconscionable (unfair). According to the judge, despite the unequal bargaining power between the parties, there was no evidence to establish that the inclusion of the arbitration clause constituted negotiation that was substantially unfair or took advantage of the vulnerable party, the drivers having dispute resolution mechanisms at their disposition (para 70). Furthermore, since Heller's class action was substantial ($400 million), it was not unreasonable for arbitration to take place in the Netherlands (para 71), especially since a strong trend in case law is to favour arbitration agreements. The Court therefore stayed the proceedings in favour of arbitration. Heller appealed this judgment and, in a unanimous decision, the Ontario Court of Appeal reversed the decision, the reasons for which are set out in the following section.

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6 The 'competence-competence' principle, reiterated by the Supreme Court of Canada in the case of *Seidel v TELUS Communications Inc*, [2011] 1 SCR 531, 2011 SCC 15 (CanLII), affirms that it is up to the arbitrator to decide as a priority on his own competence and, consequently, to determine if the nature of the relationship relating to the litigation and the conflict are arbitrable.

Green Light for a Class Action: A Springboard for Recognition of the Rights of Workers on Digital Platforms

The Court of Appeal judges struck down the arbitration clause and stayed the recourse because they considered that it was unlawfully seeking to circumvent labour standards (next section) and was found to be unfair (section after).

Arbitration Clauses and Labour Standards

The Court of Appeal first considered the question of the validity of the arbitration clause in labour standards matters. Justice Nordheimer, speaking for the Court, found that at this preliminary stage, it was necessary to assume that Heller's allegations relating to employee status could be proven. The question was therefore as follows: if the appellant qualifies as an employee, does the arbitration clause constitute a way of circumventing, of evading the imperative standards of the *Act*? Justice Nordheimer answered this question in the affirmative. The arbitration clause prevented Heller from availing himself of the benefits of the *Act*, namely the possibility of filing a complaint with the Minister (para 32) and thus, of initiating an investigation process in which the employer has an obligation to participate (para 36). He also pointed out that a decision rendered under the class action had the advantage of determining, publicly, the qualification of all members of the class action. He therefore concluded that the arbitration clause was invalid since it led to the contracting-out of employment standards, in violation of article 5 of the *Act* (para 49).

Justice Nordheimer added that, regarding the benefits of this *Act*, determination of worker status had to be decided by an Ontario court due to the importance of the issue and public policy considerations (para 50). He drew a parallel with the *Douez*[7] case, regarding privacy rights, where the Supreme Court of Canada held a clause imposing the litigation of disputes in California unenforceable. The majority of the Court wrote that only a local court can give a clear and certain interpretation of the scope of a quasi-constitutional right such as the right to privacy and take into account the cultural and social context of the province[8].

Arbitration Clauses and Unfairness

The Court of Appeal then examined the question of the unconscionability of the arbitration clause. According to the Court, the conclusion that there was an absence of unfairness had to be revised because it was based on errors of fact (para 53).

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7 *Douez* v *Facebook Inc*, 2017 SCC 33, [2017] 1 SCR 751 [*Douez*].

8 *Ibid*, paras 59, 60 (Justices Karakatsanis, Wagner and Gascon).

The first error related to the place of arbitration. Contrary to what Justice Perrell had inferred (ONSC, para 70), no dispute resolution mechanism was located in Ontario, although some were accessible from Ontario. One dispute resolution mechanism controlled by Uber was located in the Philippines, a second in Chicago[9]. If these internal mechanisms do not resolve the disagreement, the arbitration has to take place in the Netherlands (ONCA, para 56). While Justice Perrell considered these costs not prohibitive in a litigation worth $400 million, Justice Nordheimer pointed out that all litigation, even those involving only a few hundred dollars, like Heller's individual claim, should be dealt with in the Netherlands (ONCA, para 58).

The second error, according to the Court of Appeal, related to the costs incurred in presenting a claim to arbitration. The Court of Appeal noted that US$14,500 would have to be spent just to initiate the arbitration process in the Netherlands, not including travel expenses and lawyers' fees (ONCA, para 59). These fees were exorbitant for an individual like Mr Heller, whose weekly income did not exceed $600.

In light of these facts, the Court of Appeal therefore considered that the arbitration clause was invalid due to its unconscionable nature. To do this, it applied the four criteria established by case law in this area:

1. a grossly unfair and improvident transaction;
2. a victim's lack of independent legal advice or other suitable advice;
3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. the other party's knowingly taking advantage of this vulnerability. (ONCA, para 60).

Justice Nordheimer concluded that the facts revealed not only a major imbalance in the bargaining power between the two parties but also that the arbitration clause was the result of a strategy devised by the multinational in order to disadvantage vulnerable drivers by imposing on them a forum located abroad and whose applicable law was unknown to them (para 68). Considering the importance attributed to the concrete conditions of access to arbitration in *Heller*, the possible impact of a change in Uber's policy relating to arbitration costs on the validity of the clause must be examined. This examination is all the more important given that American case law illustrates the capacity of this platform to adapt its practices so that its arbitration clauses may be deemed legal.

9 *Heller v Uber Technologies Inc,* 2018 ONSC 718 paras 22, 23.

Triumph of Arbitration Clauses in the United States: Foundations and Issues

The issue of the validity of arbitration clauses in a class action concerning the misclassification of an Uber worker as an independent contractor has also arisen recently in the United States. In the *Mohamed* case, the Court of Appeal for the Ninth Circuit allowed Uber's appeal against a California class action. The Court confirmed the validity of the clause imposing arbitration for any litigation and requiring that Uber drivers renounce their right to bring any action, including class action, before the courts[10]. This decision was extended to three other class actions on the same subject, also brought against Uber[11].

These cases deal with the two grounds invoked in the *Heller* case by the Court of Appeal: the question of the validity of the arbitration clause in relation to employment standards and its unconscionability. The answers given by the American courts were, however, completely different. This can be explained both by the state of American law, where arbitration clauses are widely accepted, and by Uber's ability to adapt the specific terms of its clauses, or even its response, to the American legal requirements.

Thus, in the *Mohamed* decision, the validity of the arbitration clause was disputed, notably due to the fact that drivers had to pay half of the costs related to the arbitration (estimated at $7,000 per day), which made the possibility of claiming their rights illusory. But since Uber made a commitment before the Court of Appeal for the Ninth Circuit to pay the costs of the arbitration, the Court refused to decide this question[12]. The question of the validity of the costs remains open.

Legality of Arbitration Clauses

The validity of an arbitration clause relating to employment standards has been questioned both in *Mohamed* and in *O'Connor*. In *Mohamed*, Uber drivers argued that the arbitration clause was invalid because it prevented the claimants from bringing a civil action under California's *Private Attorney General Act of 2004* (PAGA)[13] under which employees can take legal action against their employers for Labour Code violations (Garden, 2017: 218). While in the first instance the judge had concluded that the entire arbitration clause was invalid

10 See *Mohamed*, *supra* note 3.

11 See *O'Connor, supra* note 2; *Yucesoy v Uber Technologies Inc*, No 15-17422, 3: 15-cv-00262 -EMC; *Del Rio v Uber Technologies Inc,* No 15-17475, 3: 15-cv-03667-EMC.

12 See Mohamed, *supra* note 3.

13 *Ibid.*

due to the prohibition of recourse under the PAGA, the Court of Appeal for the Ninth Circuit invalidated only the part of the clause where employee waived their right to bring a PAGA claim. The rest of the arbitration clause remained enforceable and appeals other than those filed under the PAGA were dismissed[14]. In this regard, Garden (2017: 213-214) highlights the pernicious effect of allowing the invalidity of a term to not affect the entire legality of the clause: companies have no incentive to remove the illegal contract clauses or to remove the elements that do not comply with the law. This can mislead a worker who does not receive the advice of a lawyer and will bring him or her to comply with the terms of the contract.

In the *O'Connor* case, Uber drivers presented another argument based on the invalidity of the clauses prohibiting class action relating to employment standards. They claimed that these clauses would violate the *National Labor Relations Act of 1935*[15] protecting the employees' rights to take concerted actions, which included class action. Indeed, by initiating such an action, the drivers divide the costs relating to this action between them, which allows them to file a lawsuit that, would have been too costly to be brought individually. However, this argument was rejected by the Court of Appeal for the Ninth Circuit applying a recent decision of the United States Supreme Court *Epic Systems v Lewis*[16] that refused to include, in the concerted actions protected by the NLRA, the pursuit of class actions (Gelernter, 2019: 115).

Unfairness and Contractual Autonomy: A Merciless Struggle

The argument concerning the unconscionability of the arbitration clause has also been raised in the American courts. However, contrary to the *Heller* case, this argument was rejected on the grounds that the contract in question did not constitute an adhesion contract and therefore could not be characterized as unconscionable. In fact, under American case law, as soon as an arbitration clause offers the contracting party the right to withdraw from the arbitration regime, the contract is not considered as an adhesion contract and cannot be invalidated

14 The one filed under PAGA — by a driver named Gillette — had not yet been heard as at 1 June 2019.

15 29 USC § 151-169, sec. 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

16 138 S. Ct. 1612 (2018).

for reasons of unconscionability[17]. The clause contained in the Californian version of the Uber contract was therefore pronounced valid because it allowed drivers to withdraw from the arbitration regime, either by hand-delivering it to Uber's office in San Francisco or by using priority mail within 30 days of signing the agreement.

Note that, in the first instance, the California District Court judge had qualified as onerous and even illusory the withdrawal clause and invalidated the arbitration clause[18]. In fact, the judge noted that the withdrawal clause was contained in the penultimate paragraph of a fourteen-page contract accessible only on the drivers' cellphones, most of whom did not have English as their mother tongue[19], and that its withdrawal procedures were cumbersome.

The Court for the Ninth Circuit therefore concluded that only drivers who had validly excluded themselves from arbitration could continue the class action. For these, the *O'Connor* case ended in March 2019 with a $20 million out-of-court settlement that, however, maintains the classification of drivers as independent contractors[20].

Conclusion

What can we learn from this brief analysis of the different Canadian and American decisions concerning the validity of clauses imposing individual arbitration on Uber drivers? Three observations will be made.

The first relates to the importance of the approach taken by the court to determine whether or not such a clause is invalid. The realistic and protective approach taken by the Ontario Court of Appeal in the *Heller* case is radically different from the formalistic approach adopted by both the Ontario Superior Court in the *Heller* case and the Court of Appeal for the Ninth Circuit in the *Mohamed* case. In *Heller*, Justice Nordheimer of the Court of Appeal offered a realistic examination of the context, which, in every respect, revealed the weak bargaining power of Uber drivers. As he pointed out, these workers did not belong to a large union capable of having bargaining power equivalent to the multinational.

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17 See *Mohamed*, *supra* note 2.

18 *Mohamed v Uber,* 109 F. Supp. 3d 1185 (N.D. Cal. 2015) and *O'Connor v Uber Tech Inc.,* No C-13-3826 EMC (N.D. Cal. Dec. 6, 2013).

19 *O'Connor* U.S. Dist. Ct. Dec 6 2013, No C-13-3826 EMC (N.D. Cal. Dec. 6, 2013).

20 Top Class Actions, 'Calif., Mass. Uber Driver Misclassification Class Action Settlement', May 2nd 2019. Taken from <https://topclassactions.com/lawsuit-settlements/employment-labor/894443-calif-mass-uber-driver-misclassification-class-action-settlement/> (Retrieved June 13th, 2019). This regulation also applied to Uber drivers in Massachusetts who had previously withdrawn from a compulsory arbitration clause.

The second highlights the value of the class action, which proves to be an essential vehicle for the regrouping and representation of a group claiming the status of salaried workers and their access to the courts. In the hands of the most vulnerable, it promotes access to justice since it has the virtue of applying to the whole group targeted by the action. Class actions thus counteract the isolation of the most vulnerable workers as well as their lack of resources and leads to social change by the application of the judgment to all the workers concerned and not just to the claimant. According to Pierre-Claude Lafond, it grants "unorganized groups the legal means to oppose collective illegalities" (1998-99: 34, free translation).

Finally, we may observe that the imposition of individual arbitration cannot claim to provide access to equivalent justice because of the terms under which commercial arbitration is carried out between a company and a worker. The private and confidential nature of private commercial arbitration mitigates the deterrent effect of public policy standards such as employment standards or the prohibition of discrimination and harassment (Garden, 2017: 209; Sternlight, 2019, 2004). It reduces access to precedents, which, in the case of platform workers, has the effect of obliging each of them to individually claim employee status within the meaning of labour standards laws. Above all, the widespread use of arbitration clauses in employment contracts has a marked effect on workers' recourse to arbitration in the event of litigation. Hence, in the United States, only 5,126 cases went to arbitration in 2016, while approximately 60 million employees were covered by a compulsory arbitration clause. In comparison, employees not covered by such a clause (44% of the American workforce) brought 31,000 claims in the same year (Estlund, 2018: 691). These figures clearly illustrate the importance of the question that the Supreme Court of Canada is about to answer and that will shape access to justice for vulnerable people for a long time to come.

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SUMMARY

Access to Justice for Gig Workers: Contrasting Answers from Canadian and American Courts

With the introduction of digital platforms in the Canadian labour law's landscape comes an increased used of agreements imposing arbitration as a dispute resolution mechanism. To challenge their classification as independent workers and gain employment standards acts' protection, gig workers therefore need to submit their disputes to a private proceeding, often located outside Canada. It is in this context that the Ontario Court of Appeal's decision to invalidate the arbitration clause in *Heller* v *Uber Technologies Inc.* must be read. Having granted leave for appeal, will the Supreme Court of Canada follow in the footsteps of American law and allow mandatory arbitration agreements to impede collective actions challenging the misclassification of gig workers? Our study of the Ontarian and American decisions regarding the validity of mandatory arbitration agreements between Uber and its drivers brings to light the determining impact of the approach chosen by courts.

KEYWORDS: arbitration clause, access to justice, status of platform workers, dispute resolution mechanism, Ontario, United States.

RÉSUMÉ

Accès à la justice des travailleurs de plateformes numériques: Réponses contrastées des tribunaux canadiens et américains

L'arrivée des plateformes numériques dans le paysage du travail canadien s'accompagne d'un recours croissant aux conventions imposant l'arbitrage (ou clauses compromissoires) comme mode de résolution des conflits. Les travailleurs de plateformes souhaitant faire reconnaître leur statut de salarié au sens des lois sur les normes d'emploi doivent donc s'adresser à un forum privé, parfois situé à l'extérieur du Canada. C'est dans ce contexte que l'invalidation d'une telle clause dans l'affaire *Heller* c *Uber Technologies Inc.* par la Cour d'appel d'Ontario prend toute son importance. La Cour suprême ayant accepté d'entendre l'appel, empruntera-t-elle la voie du droit américain et permettra-t-elle que ces clauses fassent obstacle aux recours collectifs revendiquant la reconnaissance du statut de salarié ?

Notre étude des jugements tant ontariens qu'américains sur la validité des clauses compromissoires liant Uber à ses chauffeurs révèle à cet égard le caractère déterminant de l'approche choisie par les tribunaux.

MOTS-CLÉS: arbitrage ou clause compromissoire, accès à la justice, statut des travailleurs, plateformes numériques, mode de résolution des conflits, Ontario, États-Unis.