



Sharing economy: the Canadian perspective

RESEARCH REPORT

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Option consommateurs

MISSION

Option consommateurs is a non-profit organization whose mission is to promote and defend the rights and interests of consumers and ensure that they are respected.

HISTORY

Option consommateurs has been in existence since 1983, when it arose from the *Associations coopératives d'économie familiale* movement, more specifically, the Montreal ACEF. In 1999 it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

PRINCIPAL ACTIVITIES

Option consommateurs helps consumers experiencing difficulties, provides budget consultation and conducts sessions on budgeting, indebtedness, consumer law and the protection of privacy. We also make free visits to low-income households in order to improve energy efficiency in their homes.

Each year we produce research reports on important consumer issues. We also work with policy makers and the media to denounce unacceptable situations. When necessary, we institute class action suits against merchants.

MEMBERSHIP

In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government authorities. You can help us do more for you by becoming a member of Option consommateurs www.option-consommateurs.org

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- Renaud Beauchemin, in charge of communications and other representatives at the Bureau du Taxi, in Montreal.

Mtre. Suzanne Guèvremont, a lawyer working in private practice, specializing in housing law.

Summary:

The sharing economy is increasing in popularity and involves an ever larger number of players. In this study, we focus on online sharing economy platforms (OSEPs), which consumers can use to borrow goods or obtain services. These platforms include product service systems that permit consumers to use a product belonging to someone else, or benefit from a service offered by a private individual.

The sharing economy is convenient, relatively inexpensive, and offers an experience tailored to individual consumer requirements. It does, however, have some shortcomings, particularly as regards the protection of consumers and the public. Many questions arise: who are consumers who conclude a contract via an OSEP actually transacting with? What rights and remedies do they have in the event of problems?

There are other issues worth considering. How safe are consumers who use the sharing economy in order to seek accommodation or a means of transport? Generally, those offering their goods or services via an OSEP are not subject to the same rules as traditional businesses. What about liability? Insurance? Dynamic pricing?

In our study, we identified the protections offered to consumers who use OSEPs. This involved studying the terms and conditions of agreements and related documents from a representative sample of OSEPs. These were platforms featuring sharing mobility, short-term private accommodation rentals and services offered by individuals.

Our analysis revealed certain problems with the terms and conditions of OSEPs, which often accept only limited civil liability. They justify this by stating that they merely connect people, whereas in fact, they do much more than that. They also limit consumers' rights and remedies, contrary to the laws of certain Canadian jurisdictions.

We also analyzed the Canadian legal framework. In so doing, we identified the major protections included in provincial consumer protection legislation that could apply to OSEPs. These rules apply to transactions between a consumer and a merchant, but may not apply to transactions between two individuals. In addition, some exclude certain sectors, such as rental accommodation, from their scope.

We also examined statutory legislation and common law that might apply to the areas in which OSEPs operate, and to situations that might arise during use. Some of these laws provide less protection than those specifically intended to protect consumers. Common law also promotes freedom of contract between parties, without exception, which enables the parties to waive certain protections.

In our quest to find appropriate solutions that would protect consumers and to identify best practices, we also studied foreign legislation, finding inspiration in certain initiatives of French and European Community law.

We also wanted to know how Canadian consumers who use these OSEPs perceive the laws designed to protect them and how much they know about them. We therefore conducted a survey of 1100 such Canadians. In addition to revealing their motivations and misgivings about OSEPs, our survey showed that when it comes to the sharing economy, many consumers find it difficult to describe their contractual relationship and have little knowledge of their rights.

Section 1. Introduction

Just pay a fee, and you can now live in a New Yorker's apartment a few days, get someone to drive you home, or do odd jobs. It used to be that rentals of goods and services were provided by companies. Today, they are also provided by individuals, by way of what is known as the sharing economy¹.

The sharing economy is defined as "An economic model based on the sharing, exchange, trade or rental of products and services favoring usage rather than ownership"^{2,3}. It is not the practices themselves that are new, but the fact that they are now backed up by technology and are so widely adopted. Thanks to their huge network, online sharing economy platforms (OSEPs), make it possible to connect people looking to rent property or obtain services with people who are willing to rent their property or to offer their services.

The sharing economy is steadily gaining in popularity. In 2015, according to PricewaterhouseCoopers (PwC), it was valued at \$15 billion worldwide, and is predicted to be worth \$335 billion by 2025⁴. It is also popular in this country; as Statistics Canada reports: "From November 2015 to October 2016, an estimated 9.5% of persons (or 2.7 million people) aged 18 and older living in Canada participated in the sharing economy by using peer-to-peer ride services or private accommodation services⁵."

The sharing economy has definite advantages. It is convenient, it is relatively inexpensive, and provides an experience geared to the tastes of some consumers. According to several studies, "millennials," who have the reputation of enjoying the experience rather than acquiring

¹ We chose to use the term sharing economy in line with the term used by Canadian public agencies such as Statistics Canada, the Competition Bureau, and the media. This is not to say that we recognize the legitimacy of every business practice and business model that advertises itself as a sharing economy company.

² Rachel Botsman and Roo Rogers. *What's Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010.

³ Conseil national de la consommation, *Avis du Conseil national de la consommation sur les plateformes numériques collaboratives*, January 28, 2016, page 1

⁴ PwC "The Sharing Economy," Consumer Intelligence Series <http://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf>

⁵ <http://www.statcan.gc.ca/daily-quotidien/170228/dq170228b-fra.htm>

possessions, are particularly fond of this option⁶. Some others prefer it for social or environmental reasons⁷.

The sharing economy also presents challenges, particularly with regard to protecting consumers and the general public, and it is upon these that this research is focused.

1.1 Our methodology

In this study, we examine the protections available to consumers who use an online sharing economy platform (OSEP) to procure goods or services⁸. We will study the services that permit the use of goods belonging to someone else (product services systems) - as well as services provided by individuals.⁹ We will present the protections they offer as well as their legal framework¹⁰. This study analyzes the most important issues raised by OSEPs of this type; it does not include an examination of issues affecting other types of services (including other types of OSEPs) operating in other areas of the sharing economy. We will identify best practices and finally, we will report on Canadians' perceptions of OSEPs and how much they know about them.

We performed a literature search and conducted interviews with experts. We began our study of the protections offered by OSEPs by selecting a representative sample of contracts and related documents and submitting them to analysis. In selecting this sample, we performed a preliminary selection by choosing the largest OSEPs, both in terms of their users and their presence nationally. This was justified by the fact that these are the OSEPs that control the market and may dictate the rules of the game. They are also the OSEPs used by the greatest number of consumers. Consequently, we felt it was important to identify any problems related to consumer protection that arose. We also made a secondary selection of certain OSEPs; this was justified in order to obtain a complete sample of the sectors analyzed in the study.

⁶ <http://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf>

⁷ Rachel Botsman and Roo Rogers. *What's Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010, Reiner Schulze and Dirk Staudenmayer, "Digital Revolution: Challenges for Contract Law in Practice" *Nomos*, 2015, chapter by Caroline Meller-Hannich, "Share Economy and Consumer Protection" page 128.

⁸ We understand that, according to case law, service providers may be consumers in their relationship with OSEPs. Nevertheless, in this study, we shall not study the protection granted to them.

⁹ See the different types of economy shared in Section 2.1.

¹⁰ OSEP-related issues are constantly changing. There are many issues in this field that have not been resolved by the courts. Accordingly, in this study, we have used interpretations already recognized in areas having some similarities, e.g. more traditional online platforms such as eBay and taxis. We have also found inspiration in foreign law. We did this everywhere, but most notably in Section 5.

In order to inform ourselves on the legal framework in Canada protecting consumers who use OSEPs, we studied the provincial legislation governing the spheres of activity of these platforms.

To identify best practices, we conducted a literature review and performed a comparative analysis of the applicable provincial legislation and the laws of other jurisdictions: Australia, the United States, the European Union, France and the UK.

In order to determine the perceptions and knowledge of OSEP users regarding the laws that protect them, we conducted a survey of 1,100 Canadian OSEP users. These users lived in Québec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, the provinces that are home to 90% of the Canadian population. Our analysis of the survey also includes a simple descriptive analysis, a difference in means tests, including the Student t-test, a variance analysis and non-parametric (Chi-Square) tests. The statistical differences observed were evaluated primarily to determine regional and social differences¹¹.

¹¹ Summary analysis of the results of a survey of collaborative economy services users, see Appendix 1.

The difference between the almost right word and the right word is really a large matter — it's the difference between the lightning bug and the lightning

The Wit and Wisdom of Mark Twain
Mark Twain

Section 2. The sharing economy

2.1 Definitions and clarifications

In *What's Mine is Yours: The Rise of Collaborative Consumption*, expert and theoretician of the new economy, Rachel Botsman, defines “collaborative consumption”¹² as “An economic model based on the sharing, exchange, trade or rental of products and services favoring usage rather than ownership”¹³. This definition is broad and includes a number of business models: exchange, barter, sharing, couchsurfing, carpooling, house-sharing and peer-to-peer rentals¹⁴.

In her book, Ms. Botsman identifies three systems. The first, based on the fact that increasing numbers of consumers prefer to use a product rather than to own it, leads to their using products belonging to someone else – what is known as a product service system (PSS). The second is a redistribution market in which individuals exchange goods or buy or sell used goods. The third is a collaborative lifestyle in which individuals with similar interests or needs share intangibles such as time, space and tasks¹⁵.

Statistics Canada defines the sharing economy as “an activity facilitated by online platforms where people rent their skills (such as driving or computer skills) and make their resources (such as properties or cars) available for money”¹⁶.

¹² This is the term used by the author.

¹³ Rachel Botsman and Roo Rogers, *What's Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010, National Consumer Council, “Avis du Conseil national de la consommation sur les plateformes numériques collaboratives,” January 28, 2016, page 1.

¹⁴ Rachel Botsman and Roo Rogers, *What's Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010, pages 71-72.

¹⁵ Rachel Botsman and Roo Rogers, *What's Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010, pages 74-75, and Heather Schelwe Kulp and Amanda L. Kool, *You Help Me, He Helps You: Dispute System Designs in the Sharing Economy* 48 Wash. UJL and Pol'y 129 2015, page 189.

¹⁶ Statistics Canada, “The Sharing economy in Canada” February 28, 2017.

For some authors, the sharing economy represents a new consumer movement centred around the values of empathy, communication, openness, fairness and equality. Others¹⁷ consider that such sharing could often not take place without the intervention of big business. Online sharing economy platforms (OSEPs) generate an astronomical number of transactions and make enormous profits by utilizing the concept of sharing as a marketing strategy¹⁸.

For many, the sharing economy little more than a trick to get around the legislative framework. Others say the sharing economy is disruptive because of its scale and because it requires specially adapted regulation¹⁹. Some OSEPs are multinationals, whose values are very far removed from those that inspired the sharing economy²⁰.

2.2 Sharing economy principles

Rachel Botsman identifies four principles of the sharing economy. The first is critical mass - there must be sufficient momentum for a system to become autonomous. Thus, in order for the sharing economy to be an alternative to the traditional economy, it must offer the consumer sufficient choice.²¹

The second principle relates to the “idling capacity” of goods. Many goods, particularly tools and cars, are unused for most of their lives. For example, a drill is used for an average of 12 minutes throughout its active life²² while a car is idle 95% of the time²³.

The third principle is related to our use of common property, including water, air and public space²⁴. Although it is desirable for everyone to use these common goods, problems can arise when such use is excessive or inadequate.

¹⁷ Nicolas A. John, “The Age of Sharing,” *Polity*, 2016.

¹⁸ Benjamin G. Edelman and Damian Geradin, “Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Uber and Airbnb?” 19 *Stan. Tech. L. Rev.* 293, 2015-2016, page 295.

¹⁹ Vanessa Katz “Regulating the Sharing Economy,” 30 *Berkeley Tech. LJ* 1067 2015, page 1070.

²⁰ Nicolas A. John, “The Age of Sharing,” *Polity*, 2016, and Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 14.

²¹ Rachel Botsman and Roo Rogers, *What’s Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010, pages 81-82.

²² <http://www.cniid.org/Partager-l-usage-des-objets-et-produire,329>

²³ Interview with Uber (answers to our questions were provided to us in writing).

²⁴ Rachel Botsman and Roo Rogers, *What’s Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010, pages 88-89.

The fourth principle is trusting strangers, since the sharing economy requires us to trust someone we do not know. Trust between individuals can eliminate intermediaries²⁵.

2.3 Factors leading to widespread adoption of the sharing economy

There were several factors at the source of the sharing economy. The economic crisis of 2008 not only weakened consumer confidence in the financial system, but also in traditional companies. It resulted in the loss of thousands of jobs and a tremendous amount of assets. This was the context in which today's sharing economy was born: at the time, it appeared to be a solution. Although the economy has largely recovered, experts agree that the sharing economy is here to stay²⁶.

The earnings of the majority of consumers today cannot keep pace with the cost of living, which has resulted in a drop in purchasing power²⁷. The sharing economy gives consumers access to less expensive goods or services that they otherwise may not have been able to afford (see Section 7)²⁸. These goods or services are proposed via an OSEP (see Section 7)²⁹ – by other individuals who are already well-off financially or do so to supplement their income³⁰.

It would be a mistake to think that the sharing economy is purely the creation of the new technologies; the idea has been around for a long time. The first community garden was born in Germany in 1864. During World War II, some form of carpooling emerged in the US aimed at conserving valuable resources³¹. Nevertheless, the new technologies that make the wide

²⁵ Rachel Botsman and Roo Rogers, *What's Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010, pages 91-92.

²⁶ European Commission Business Innovation Observatory "The Sharing Economy: Accessibility Based Business Models for Peer-to-Peer Markets" Case Study 12, 2013, page 2.

²⁷ Rachel Botsman and Roo Rogers, *What's Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010, pages 88-89.

²⁸ Airbnb, "Impact of share accommodation in Montreal," 2014.

²⁹ Chiara Farronato and Jonathan Levin, "The Sharing Economy: New Opportunities, New Questions," *Global Investors 2.15*, Credit Suisse November 2015, page 53.

³⁰ Airbnb, "Impact of share accommodation in Montreal," 2014.

³¹ Chiara Farronato and Jonathan Levin. "The Sharing Economy: New Opportunities, New Questions," *Global Investors 2.15*, Credit Suisse November 2015, pages 9-11.

network of OSEPs available have played an undeniable role in the growing popularity of the sharing economy³².

Several OSEPs function as online markets³³. This is a two-sided concept whereby an intermediary (the platform), connects two categories of people (consumers and service providers). Uber and Airbnb are good examples of online two-sided markets for using goods, while AskforTask or TaskRabbit are examples of two-sided markets for obtaining services³⁴.

These markets can be demand-driven, supply-driven or both. For example, one consumer might compare a series of deals on OSEPs – if, for example, he is looking for a room on Airbnb. Another may be looking for a specific service³⁵ and use the OSEP to get the names of providers who offer this service - this is how Uber works.

2.4 Main features of the sharing economy

In the traditional economy, transactions are carried out between businesses and individuals³⁶; in the sharing economy, they are carried out between individuals via an online sharing economy platform (OSEP). The arrival of the OSEP was a major factor in the growth of the sharing economy. Another feature of the sharing economy is the reduced transaction costs made possible by linking the parties through the intervention of a single intermediary³⁷. The OSEP gives the service provider the opportunity to bid on online markets, without which, he could not offer his services³⁸.

³² Mowat Centre, Noah Zon, “The Sharing Economy and Why it Matters for Policy Makers,” December 2015, and Chiara Farronato and Jonathan Levin, “The Sharing Economy: New Opportunities, New Questions,” *Global Investors* 2.15, Credit Suisse November 2015, page 9.

³³ French uses the expressions “une place du marché” or “marketplace,” while English speakers use the term “online marketplace.”

³⁴ Heather Kulp Schelwe and Amanda L. Kool “You Help me, He Helps you: Dispute Systems Design in the Sharing Economy,” 48 Wash. U.L.J and Pol’y 179, 2015, and European Commission Business Innovation Observatory “The Sharing Economy: Accessibility Based Business Models for Peer-to-Peer Markets” Case Study 12, 2013.

³⁵ European Commission, Business Innovation Observatory “The Sharing Economy: Accessibility Based Business Models for Peer-to-Peer Markets” Case Study 12, 2013.

³⁶ Vanessa Katz “Regulating the Sharing Economy,” 30 Berkeley Tech LJ 1067 2015 1070 page 1070.

³⁷ Benjamin G. Edelman and Damian Geradin, “Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Uber and Airbnb?” 19 Stan. Tech. L. Rev. 293, 2015-2016, page 294, and Vanessa Katz “Regulating the Sharing Economy,” 30 Berkeley Tech LJ 1067, 2015, page 1071.

³⁸ Benjamin G. Edelman and Damian Geradin, “Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Uber and Airbnb?” Stan. Tech. L. Rev. 293, 2015-2016, page 298, and Vanessa Katz “Regulating the Sharing Economy,” 30 Berkeley Tech LJ 1067, 2015, page 1071.

The digital economy, and the sharing economy in particular, can give rise to uncertainty: users can neither rely on the reputation of an established business nor see the product they intend to purchase. Nevertheless, OSEPs make it easier to get optimized information on the goods and services the providers offer. For example, it is quite easy for a consumer to look at the accommodation available on Airbnb or get information on a kayak offered by ShareShed³⁹. Furthermore, OSEPs provide access to online reputation mechanisms (ORMs) than can help potential users make an informed choice (see Section 4)⁴⁰.

The OSEPs use algorithms to optimize transactions⁴¹. These are sometimes only available on mobile support – this is the case with Uber, which, thanks to real-time geolocation can offer rapid service tailored to the consumer's location⁴². Some OSEPs offer dynamic pricing, which has some benefits for consumers but can also be problematic⁴³.

In the sharing economy, the product does not belong to the company, but to whoever chooses to lend it. Generally, the sharing economy does not involve the transfer of property; the product can be used many times by many people⁴⁴.

2.5 Benefits

By competing with traditional businesses, the sharing economy gives consumers more choice, which in principle enhances competition. Also, in a market where there is healthy competition, prices are generally lower⁴⁵. While some platforms are very popular, others struggle to build up enough consumers and service providers to achieve critical mass⁴⁶. The result is the creation of quasi-monopolies⁴⁷ which, like any monopoly, involve dangers.

³⁹ Benjamin G. Edelman and Damian Geradin, "Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Uber and Airbnb?" 19 Stan. Tech. L. Rev. 293, 2015-2016, page 299 and <https://shareshed.ca/>.

⁴⁰ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016.

⁴¹ Mowat Centre, Sunil Johal and Noah Zon, *Policy Making in the Sharing Economy: Beyond Whack-A-Mole*, February 2015, pages 12-13.

⁴² Mowat Centre, Sunil Johal and Noah Zon, *Policy Making in the Sharing Economy: Beyond Whack-A-Mole*, February 2015, pages 12-13.

⁴³ This point was identified by several of the experts interviewed.

⁴⁴ Rachel Botsman and Roo Rogers, *What's Mine is Yours: The Rise of Collaborative Consumption*, HarperCollins Publishers, 2010.

⁴⁵ Competition Bureau of Canada Summary Report, "Workshop Highlights on the new challenges of competition held by the Competition Bureau," March 2016.

⁴⁶ European Commission, Business Innovation Observatory "The Sharing Economy: Accessibility-Based Business Models for Peer-to-Peer Markets Case Study 12," 2013, page 11.

⁴⁷ European Commission, Business Innovation Observatory "The Sharing Economy: Accessibility-Based Business Models for Peer-to-Peer Markets Case Study 12," 2013, page 11.

According to our survey results, 73% of respondents who have already rented a room or other accommodation through an OSEP made this choice because it was inexpensive. Respondents who have used transportation services via an OSEP say they did so for the same reason. Cost was the main reason for using the sharing economy for 60% of our respondents⁴⁸. However, prices are not always lower. As a result of dynamic pricing⁴⁹, prices rise during peak periods. Despite this, a US study in the City of San Francisco revealed that in 95% of cases, Uber still costs less than a taxi⁵⁰.

2.6 Summary and interviews with experts

There is no consensus on the definition of the sharing economy and the actors involved. There are, however, certain common principles: the need for a critical mass, the need for goods that are not being used and the need for user confidence. The phenomenon is not new, but its widespread adoption has been propelled by advanced technology.

In this study, we adopted the research strategy of interviewing several experts in various fields in order to collect a variety of opinions with the aim of obtaining as comprehensive a picture as possible of the situation. We talked to representatives of provincial consumer protection agencies and consumer rights associations as well as to academics in the fields of consumer affairs, law, e-commerce and economics.

The vast majority of these experts pointed out the same benefits of the sharing economy as those expressed in the doctrine; namely, that it is convenient, offers relatively low prices and provides an experience tailored to the tastes of consumers.

The experts also identified significant challenges for consumer protection in the context of the sharing economy. These challenges are due in large part to the asymmetry of information

⁴⁸ Summary analysis of the results of a survey of users of collaborative economy services, see Appendix 1.

⁴⁹ Dynamic pricing means that prices vary dynamically and automatically (sometimes up to several times per day) depending on several internal factors or contexts. One example is increases in Uber prices.

⁵⁰ Lauren Geisser, "Risk, Reward and Responsibility: A Call to Hold UberX, Lyft and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers," 89 S. Cal. L. Rev. 317 2015-2016, page 336.

between the parties, the difficulty of gaining a clear idea of the parties and the contract, and the safety of the consumer. Another challenge lies in enforcing the consumer protection laws in various situations related to the sharing economy (see Section 3).

We also spoke to the Montreal taxi bureau and Uber Canada. The positions of the parties are presented in Section 6.

Section 3. Canada's consumer protection laws

3.1 Applicability

In Canada, jurisdiction over civil law⁵¹, including consumer protection, falls to the provinces. As a result, protection may vary from one province to another. The consumer protection laws are more protective than those provided by common right – which originally, were created to protect consumers from merchants because of the informational and financial imbalance involved⁵². These are laws of public order and cannot be waived.

Are consumer protection laws applicable to the sharing economy? Some authors doubt it. They argue that in this case the asymmetry between traditional merchants and consumers is missing or minimized⁵³. We believe, on the contrary, that these factors may be the same as in the traditional economy, or may even be amplified, when the platform belongs to a multinational who knows the rules and practices in the industry and has access to many resources.

3.1.1 Scope

The sharing economy also poses particular challenges for consumers. For example, they do not always manage to find out who they are actually dealing with and what remedies are available to them in the event of problems.⁵⁴ In addition, they cannot even be clear about the status of the service provider - is it an individual or a merchant? All these factors have an impact on their rights and the likelihood that they will be respected.

Indeed, as we said, consumer protection laws are designed to regulate contracts with consumers. However, although the scope varies from one law to another, they all have one feature in common: they define the consumer contract as a contract between a consumer and a merchant. If the entity with whom the consumer does business is not a merchant, consumer protection laws (CPAs) may not apply.

⁵¹ S. 92 (13), the *Constitution Act*, 1867, 30 and 31 Vict, c 3.

⁵² Pierre-Claude Lafond, *Droit de la protection du consommateur: théorie et pratique*, Carswell, 2015, pages 9 and following

⁵³ Mowat Centre, *Policy Making for the Sharing Economy: Beyond Whack-a-Mole*, 2015 Reiner Schulze and Dirk Staudenmayer, *Digital Revolution: Challenges for Contract Law in Practice*, Nomos, 2015, chapter by Larry A. DiMatteo, "Regulating of Shared Economy: A Consistently Changing Environment."

⁵⁴ This issue was identified by several experts in our interviews.

In order to determine the applicability of a CPA, one must first decide whether the context one is in is that of a commercial activity. In order to do this, it must be determined whether the activity is carried out in order to make a profit or if it is speculative⁵⁵. Note here that the definition of a commercial activity is quite similar from one law to another.

It must also be determined with whom the consumer is doing business. Our analysis of OSEPs and the terms of their contracts, the doctrine and jurisprudence⁵⁶ reveals a tripartite agreement. The consumer enters into two contracts: one with the platform and the second with the service provider. The platform, for its part, also concludes two contracts, one with the consumer and the other with the service provider.

We must also look at the status of the person with whom the consumer enters into a contract. The concept of consumer is defined in laws devised for their protection, but the concept of merchant is not always defined. Some laws contain an explicit definition of the merchant, others say only that the merchant performs certain activities⁵⁷, and yet others are silent⁵⁸.

Case law and doctrine do shed light, however. They state that in order to qualify as a merchant, three criteria need to be satisfied. First, there must be an act of commerce, an activity aimed at making a profit. Next, this activity has to be performed on a regular, rather than an occasional basis. The merchant may be a natural or legal person or an NPO⁵⁹. He must operate on his own behalf and bear risks (speculative acts)⁶⁰. Nicole L'Heureux and Marc Lacoursière write: [TRANSLATION] "Acts that are not of a speculative nature are not considered to be commercial acts according to marketability theory. Under the CPA [Québec's *Consumer Protection Act*], non-merchants are seen as consumers."⁶¹

According to doctrine and case law, certain categories of persons are excluded from the definition of merchant. This is particularly the case with the professional farmer and artisan. Case law has recognized that a taxi driver, provided that he does not form a company with other people or a corporation and does not have several vehicles driven by his employees, is

⁵⁵ Pierre-Claude Lafond, *Droit de la protection du consommateur: théorie et pratique*, Carswell, 2015, page 64.

⁵⁶ *eBay Canada Ltd. v. Mofo Moko* 2013 CCQ, 1912.

⁵⁷ This is the case with the Ontario act.

⁵⁸ Pierre-Claude Lafond, *Droit de la protection du consommateur: théorie et pratique*, Carswell, 2015, page 64.

⁵⁹ Nicole and Marc L'Heureux Lacoursière, *Consumer Law*, 6th Edition, Carswell, page 49 and 50

⁶⁰ Pierre-Claude Lafond, *Droit de la protection du consommateur: théorie et pratique*, Carswell, 2015, page 64, and Nicole L'Heureux and Marc Lacoursière, *Consumer Law*, 6th Edition, Carswell, page 49.

⁶¹ Nicole and Marc L'Heureux Lacoursière, *Consumer Law*, 6th Edition, Carswell, page 50.

considered to be self-employed⁶². Note, however, that “this exception does not apply to a transportation company”⁶³.

Some authors assert that the same person cannot be both a merchant and a consumer. It is true that one person cannot wear both hats at the same time. We believe that when the craftsman obtains a good or service, he is a consumer, but when he sells services to consumers, he is acting more like as a merchant, especially if he does this habitually and repeatedly. We came to this conclusion through our analysis of the above-mentioned case law and *a contrario* interpretation⁶⁴.

Since technology evolves faster than the law, we may well wonder whether the above analysis is applicable to Uber drivers and whether they might be considered as merchants.

Since a merchant is not explicitly defined in the CPA, we turn to the *Civil Code* for supplementary assistance. Its definition of an enterprise is broader than the concept of merchant or business and it may offer some useful insight⁶⁵. Art. 1525a13 CCQ states as follows:

The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service, constitutes the operation of an enterprise.

Finally, we must consider what the contract actually says. Our analysis reveals that the contract between the consumer and the online sharing economy platform (OSEP) is at the same time an adhesion contract, a consumer contract and a distance contract. Moreover, depending on the OSEP in question, it could also be a service or a lease agreement. We could find no case law on contracts with OSEPs, but in one decision, the Court of Appeal concluded that the contract between eBay and a user who was looking to make a profit was a consumer contract and that the user was a consumer⁶⁶. eBay is an online marketplace that exerts far less control than the majority of the platforms we analyzed.

In consumer law, the jurisprudential and doctrinal tendency is to espouse a broad, liberal conception of the role of consumer protection legislation in order to ensure the protection of

⁶² Pierre-Claude Lafond, *Droit de la protection du consommateur: théorie et pratique*, Carswell, 2015, page 67, *Rancourt v. Martin*, [1990] RJQ 595 (CQ) and *Milien v. Cansalvage Com.*, JE 2008-296 (CQ).

⁶³ Pierre-Claude Lafond, *Droit de la protection du consommateur: théorie et pratique*, Carswell, 2015, page 67.

⁶⁴ *Rancourt v. Martin*, [1990] RJQ 595 (CQ), *Milien v. Cansalvage Com.*, JE 2008-296 (CQ), *Faraj v. 1666606 Canada Inc.*, 2007 QCCQ 348 (CanLII) and *L'Italien v. MCN Auto Tech* 2004 CanLII 31271 (QC CQ)

⁶⁵ Nicole and Marc L'Heureux Lacoursière, *Consumer Law*, 6th Edition, Carswell, page 49.

⁶⁶ *eBay Canada Ltd. v. Mofo Moko*, 2013 CAQC 1912.

consumers and the public⁶⁷. Accordingly, we believe that the consumer protection laws must be interpreted broadly and liberally, as in the context of the sharing economy. The contract between the consumer and the service provider may be seen as a consumer contract. It depends whether the service provider is acting like a merchant and if the situation is covered by the consumer contract.

There are nevertheless some distinctions made in the different provincial legislations. Some laws have exclusions that deserve attention, particularly in the context of OSEPs for short-term accommodation rentals (for houses, apartments or rooms, for example). Some CPAs do not specifically mention that buildings are excluded from their scope. This is the case with Newfoundland and Labrador, Nova Scotia and Saskatchewan⁶⁸. The CPAs of Alberta and Manitoba, on the other hand, do mention that they regulate leases, yet the definition section of the laws states that dwelling leases are not included.

While other CPAs exclude accommodation from their scope or severely limit the protection offered to accommodation, Section 6 (b) of Québec's *Consumer Protection Act* excludes the sale, rental or construction of a building. However, Section 6.1 states that certain provisions of the CPA nevertheless apply, particularly those relating to prohibited business practices⁶⁹. Section 6.1 also says that the law does not apply to the lease of a building governed by Arts. 1892 to 2000 of the *Civil Code of Québec* (CCQ)⁷⁰.

These articles refer to leases for dwellings. Art. 1892a13 (1) CCQ states that the lease of a dwelling rented for vacation purposes is not considered a dwelling lease⁷¹. The definition of the term "dwelling" is not determined by law, but by habitual use. According to case law, whether or not a dwelling is considered to be rented for vacation purposes depends on the purpose of the premises and the designation provided by the parties⁷². The intention of the parties is an important criterion⁷³.

⁶⁷ *Nichols v. Toyota Drummondville*, [1995] RJQ 746 (CA) *Richard v. Times Inc.*, 2012 SCC 8, para 103 and Pierre-Claude Lafond, *Droit de la protection du consommateur: théorie et pratique*, Carswell, 2015, page 30

⁶⁸ *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, *Consumer Protection Act*, RSNS 1989, c 92, and *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2.

⁶⁹ Ss. 6 (b) and 6.1, *Consumer Protection Act*, CQLR c P-40.1.

⁷⁰ S. 6.1, *Consumer Protection Act*, CQLR v. P-40.1, and the *Québec Civil Code*, c CQLR 1991.

⁷¹ S. 1892a13 (1) CCQ CQLR c 1991.

⁷² *Thomason v. Lépine* 2006 CCQ 13452, para 14, and Beaudoin Renaud, *The Annotated Québec Civil Code*. Vol. 2, 2014, 17th Edition, pages 2881- 2882.

⁷³ *Camping Normand Inc. v. Croteau*, 2013 QCCQ 1723, para 78, and Beaudoin Renaud, *Ibid.*

The question of the applicability of Section 6.1 CPA to the Airbnb situation has not been decided by the courts. Most judgments about Airbnb concern the legality of the practice and the change in vocation of the dwelling. Indeed, it is forbidden to change the vocation of a dwelling lease. We found judgments against tenants who did not comply with the building's regulations or had caused prejudice to the landlord (a dwelling rented via an OSEP may not be covered by the insurance policy), and judgments against owners who had not respected the condominium rules. We also found criminal decisions against people who had contravened the *Act mainly to improve the regulation of tourist accommodation and to define a new system of governance as regards international promotion*.

Given the above, we believe it is possible that a judge could determine that Section 6.1 CPA applies to renting a house through Airbnb. The fact that this has yet to happen, however, gives rise to uncertainty, which could undermine protection for consumers, particularly if they are excluded from both protection regimes: the CPA and the section respecting dwellings in the *Civil Code of Québec*.

In British Columbia, building rentals are not regulated by the CPA, except in cases of prohibited practices and disclosure of cost of credit. In New Brunswick, building rentals are excluded from the *Consumer Product Warranty and Liability Act*⁷⁴. Finally, in Ontario, consumer contracts related to the purchase, sale and leasing of certain buildings (except those for timeshare vacations), are excluded from the scope of the *2002 Consumer Protection Act (CPA-2002)*. The latter also does not apply to transactions governed by housing laws⁷⁵.

3.2 Additional protections

3.2.1 Protections offered to consumers who transact online

From the outset, defining what constitutes an electronic contract can pose a sizeable challenge. Professor Nicolas Vermeys states that the scope of the contract should be limited to contracts formed by means of electronic networks. For instance, when a consumer makes purchases online, he enters into an electronic contract⁷⁶.

⁷⁴ *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

⁷⁵ Ss. 2 (f) and 2 (g), *2002 Consumer Protection Act*, LO-2002, c 30, Sch. AT.

⁷⁶ Nicolas W. Vermeys, *Droit codifié et nouvelles technologies : Le Code civil* Editions Yvons Blais, 2015, pages 103 to 106.

The rules for online contracts have been harmonized. Indeed, in 1999, the Uniform Law Conference of Canada (ULCC) adopted the *Uniform Law on Electronic Commerce*⁷⁷, which is similar to the model established by the United Nations. This law governs how contracts are signed, the obligation to provide a written version, and the contractual rules. All the provinces except Québec have incorporated it within their provincial legislation. Québec's rules are similar, however⁷⁸.

In 2001, the Consumer Measures Committee adopted the Internet Sales Contract Harmonization Template⁷⁹, which specifies obligations regarding disclosure of information, training and cancellation of contracts and refunds. One particular stipulation is that in the event of non-compliance with the law, the credit card issuer has similar obligations as those that apply to chargeback⁸⁰. All the provinces except for Prince Edward Island and New Brunswick have incorporated this into their legislation.

There are other distinctions in the provincial laws⁸¹. For instance, some provinces have chosen to protect consumers who contract with a merchant in another province or another country. This is the case in Québec, Ontario, Saskatchewan and Alberta.⁸²

Another distinction concerns the means of signifying one's consent online to contracts of the click-wrap type. In the common law provinces, unless the terms of the contract are "aberrant," clicking on "I agree" could be enough to indicate consent⁸³. Note that after this report was drafted, but prior to submission, the Supreme Court of Canada rendered its decision on *Douez v. Facebook* in a choice of forum clause; the majority of the Court held that such clauses cannot be binding on consumers and also laid down certain criteria. Justice Abella also added that the unequal power relationship between the parties, i.e. a consumer and a multinational company,

⁷⁷ <http://www.ulcc.ca/fr/lois-uniformes-fr-fr-1/299-commerce-electronique-loi-sur-le/75-loi-uniforme-sur-le-commerce-electronique>

⁷⁸ Option consommateurs, Annik Bélanger-Krams, *The Views of Canadians on the Harmonization of Consumer Protection Standards*, June 2015.

⁷⁹ http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h_fe00157.html

⁸⁰ http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h_fe00157.html and Teresa and Michael Scassa Deturbide, *Electronic Commerce and Internet Law in Canada* 2nd ed. Toronto, CCH, 2012 page 3.

⁸¹ Ibid.

⁸² Ibid.

⁸³ *Spencer1 v. Payscale Corp.*, 2005 CanLII 6484, Nicolas W. Vermeys, *Droit codifié et nouvelles technologies : Le Code civil* Editions Yvons Blais, 2015, page 111, and Éloïse Gratton and Éliisa Henry, *Practical Guide to E-Commerce and Internet Law*, LexisNexis, 2015, page 3.

is in many countries an important factor to be considered in matters of online consent⁸⁴. Moreover, in Québec, there are other restrictions on online consent; such consent is not always sufficient, especially due to obligations relating to contracts of adhesion and pre-contractual information⁸⁵.

We note that there is a tendency to impose excessive consequences for non-compliance with the terms and conditions of agreements. According to Martin Kratz, a court might find that unfair and declare the clause unenforceable against consumers. In the decision *Tilden Rent-A-Car Co. v. Clendenning*, the question arose as to whether a clause invalidating damage insurance might be inconsistent with the purpose of the contract. If this were the case, signing a contract would not amount to consent⁸⁶.

3.2.2 Warranties

In Québec, there are three types of warranty: the conventional warranty, the additional warranty and the legal warranty. The latter is defined under the *Civil Code of Québec* and the *Consumer Protection Act* (CPA) and applies to consumer contracts. According to the CPA, the good must be used for the purpose for which it was intended; in addition, it must be durable in normal use for a reasonable of length of time, with regard to its price, its conditions of use and the terms of the contract⁸⁷. The durability warranty only applies to moveable property. The duration of the warranty is determined by jurisprudence. A merchant or manufacturer cannot refuse to apply this warranty on the pretext that he did not know about the defect. The CPA also provides for the imposition of punitive damages⁸⁸. There are also safety warranties.

The common law provinces also have a warranty regime. In 1893, the British Parliament passed the *Sale of Goods Act*, which was subsequently incorporated within the laws of each province. The Act applies to all contracts in the context of sales and provides statutory warranties and

⁸⁴ *Douez v. Facebook, Inc.*, 2017 SCC 33, and Michael Geist, Globe and Mail, "Why clicking 'I agree' may no longer mean you agree to everything," June 27, 2017. https://www.theglobeandmail.com/report-on-business/rob-commentary/why-clicking-i-agree-may-no-longer-mean-you-agree-to-everything/article35476932/?=cmpid=RSS1&click=sf_globeftb

⁸⁵ *Rudder v. Microsoft Corp.*, 1999 CanLII 14932 and Martin P.J. Kratz, *Canada's Internet Law in a Nutshell*, Carswell, 2013, page 320, and Éloïse Gratton and Éliisa Henry, *Practical Guide to E-Commerce and Internet Law*, LexisNexis, 2015, page 3.

⁸⁶ Martin PJ Kratz, *Canada's Internet Law in a Nutshell*, Carswell, 2013, page 330.

⁸⁷ Ss. 37 and 38, *Consumer Protection Act*, CQLR c P-40.1, and Union des consommateurs, *L'adéquation des régimes de garantie légale au Canada*, June 2012, pages 40-42.

⁸⁸ *Ibid.*

warranties of quality and fitness. Moreover, the parties may derogate from them, except in a few very specific exceptions⁸⁹.

Some provinces have also introduced notions of warranty into their consumer protection legislation; this is the case with Nova Scotia and Ontario. Section 9 (1) of CPA-2002 states that suppliers are presumed to warrant that services are of a reasonable quality. Section 9 (2) of CPA-2002 states that in a consumer contract, the principles of the *Sale of Goods Act* apply to goods supplied that are leased or traded. Section 9 (3) states that any waiver of an implied warranty is void, and Section 9 (4) states that no waiver is evidence of an intent to exclude the warranty⁹⁰.

Other provinces have also adopted comprehensive warranty regimes. New Brunswick introduced a legal warranty and liability system for defects in consumer products. The *Consumer Product Warranty and Liability Act* is of public order, which means it is not possible to derogate from it and, in case of conflict, has precedence over other laws⁹¹. It is particularly applicable to sales contracts, contracts of barter or exchange of consumer products, leases, and service contracts. It provides express⁹² and tacit warranties (including quality and fitness warranties)⁹³. It also provides remedies for infringements of these warranties⁹⁴. With regard to accountability, it states that any person, including third parties not parties to the contract who suffer damage may bring an action against the seller, if the harm was foreseeable⁹⁵. Nevertheless, the parties may limit this recourse⁹⁶. Section 24 states that no one may restrict or exclude the warranties provided by the law, unless so provided by the same law, as in the case of express warranty. Even when exclusions are required by law, the grounds must be reasonable. Note that the Act also contains “product liability” provisions for defects in consumer products⁹⁷.

⁸⁹ Union des consommateurs, Marcel Boucher, “L’adéquation des régimes de garantie légale au Canada,” June 2012, pages 46 and following, and Option consommateurs, Annik Bélanger-Krams, *The View of Canadians on the Harmonization of Consumer Protection Standards*, June 2015, pages 41 and following

⁹⁰Ss. 9 (1) 9 (5), 2002 *Consumer Protection Act*, LO-2002, c 30, Sch. AT.

⁹¹ Ss. 2 (3) and 2 (4) *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

⁹² Ss. 4 to 6 *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

⁹³ Ss. 8 to 12, *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

⁹⁴ Ss. 13 to 92 *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

⁹⁵ S. 23 *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

⁹⁶ S. 24 (6) *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

⁹⁷ S. 27 and following, *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

Manitoba has incorporated notions of legal warranty with regard to the retail sale or lease of goods and services within its own *Consumer Protection Act*⁹⁸, which is also a law of public order. The Act provides important protections such as implicit and explicit warranties and remedies. However, its applicability is far from certain in the context of the sharing economy. The law makes reference to retail sales, but with online sharing economy platforms (OSEP), goods are not sold, they are rented or are used to provide services⁹⁹.

Saskatchewan also built safeguards into its *Consumer Protection Act*, which is also of public order. These warranties protect buyers or purchasers of goods and contains express and implied warranties and remedies¹⁰⁰. However, as is the case with the Manitoba legislation, since the sharing economy generally requires no transfer of ownership, it is questionable whether this law can protect consumers.

3.2.3 Unilateral modification of contract by the merchant

With regard to consumer contracts, the legislator in some provinces has intervened to prohibit clauses that allow merchants to unilaterally change the terms of the contract. This is the case of Newfoundland and Labrador, Québec and Manitoba.

3.2.4 Terms of the contract and disclosure obligations

According to the consumer protection laws, the terms of a contract must be clear, legible and unambiguous. When these points are not respected, or in case of doubt, the contract is interpreted in the consumer's favour. This is the case in Québec¹⁰¹, Ontario¹⁰² and Alberta¹⁰³. Note that common right states that in a consumer or adhesion contract, an illegible clause will be unenforceable if it causes harm to the adhering party¹⁰⁴.

⁹⁸ "Retail hire-purchase" of goods, according to s. 1 of the *Consumer Protection Act*, CCSM, c C200 "means any hiring of goods from a person in the course of his business in which
(a) the hirer is given an option to purchase the goods; or
(b) it is agreed that upon compliance with the terms of the contract the hirer will either become the owner of the goods or will be entitled to keep them indefinitely without any further payment;"

⁹⁹ Ss. 58 and following, *Consumer Protection Act*, CCSM c C200.

¹⁰⁰ Ss. 10 and following, *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2.

¹⁰¹ S. 17, *Consumer Protection Act*, CQLR c P-40.1.

¹⁰² Ss. 5 and 11, 2002 *Consumer Protection Act*, LO-2002, c 30, Sch. AT.

¹⁰³ S. 4 *Fair Trading Act*, RSA 2000, c F-2.

¹⁰⁴ S. 1437, *Civil Code of Québec*, CQLR, c CCQ-1991.

3.2.5 Prohibited business practices

Provincial consumer protection laws contain sections on prohibited business practices, for example, false representations and deceptive marketing practices.

Some provinces have adopted specific provisions, which may provide important protections against certain practices such as exorbitant pricing.

In Québec, it is possible to cancel a contract on the grounds of lesion since it vitiates the consent of the parties. Under the *Civil Code of Québec*, cases of lesion are applicable only to minors and adults under protective supervision. However, the *Consumer Protection Act* protects adults against lesion.

There are two types of lesion: objective and subjective. The first is caused by an economic mistake that can affect both the value of the good and the value of services delivered; it can occur when the contract is concluded or when it is in force. Professor Pierre-Claude Lafond writes: [TRANSLATION] "Without resorting to fraud, the party that exploits the weakest contractor places the latter in a position in which he inevitably commits an error of judgment about the value of the payments or the risk that he assumes, either due to his lack of experience, lack of information (technical or legal) or simply his state of need"¹⁰⁵.

Subjective lesion raises the question of fairness. For there to be lesion in this case, there does not necessarily need to be a disproportion of benefit between the parties, only that, due to the circumstances surrounding the contract, the consumer suffers economic harm that causes him serious short- or long-term problems¹⁰⁶.

Legislators in certain provinces have intervened to restrict price increases. In Ontario, Section 10 of the *Consumer Protection Act, 2002* states that no merchant may require a price that is more than 10% over the "estimated" price. If this happens, the consumer may request to obtain the good or service at the estimated price¹⁰⁷. Similarly, no merchant may require more than 10% of

¹⁰⁵ Pierre-Claude Lafond, *Droit de la protection du consommateur: théorie et pratique*, Carswell, 2015, page 149, and Claude MASSE, "Historical Foundations of the evolution of Québec consumer law" in Pierre-Claude Lafond (dir.) *Mixtures Claude Masse-seeking justice and fairness*, Cowansville, Yvon Blais, 2003, page 39, and Ss. 8 and 9, Law on consumer protection, CQLR, c P-40.1.

¹⁰⁶ Pierre-Claude Lafond, *Droit de la protection du consommateur: théorie et pratique*, Carswell, 2015, page 149, and Claude MASSE, "Historical Foundations of the evolution of Québec consumer law" in Pierre-Claude Lafond (dir.) *Mixtures Claude Masse-seeking justice and fairness*, Cowansville, Yvon Blais, 2003, page 39, and Ss. 8 and 9, Law on consumer protection, CQLR, c P-40.1.

¹⁰⁷Ss. 10 (1) and 10 (2), 2002 *Consumer Protection Act*, LO-2002, c 30, Sch. AT.

the estimated price up to \$100, unless the consumer consented in writing before receiving the good or service or benefitted from an additional service¹⁰⁸.

The legislators of British Columbia and Newfoundland and Labrador state that it is forbidden to ask a price which, at the time it is agreed upon, grossly exceeds the price indicated for similar transactions¹⁰⁹.

Moreover, the legislators of certain provinces, including Québec, have intervened to protect the consumer in cases of external clauses; such a clause is null if, at the time of formation of the contract, it was not specifically brought to the attention of the consumer, unless the merchant can prove that the consumer was aware of it¹¹⁰.

3.2.6 Unenforceable clauses with regard to renunciation of rights and remedies

Access to the courts, through individual or class action, is essential to permitting access to justice. The Supreme Court of Canada has already pointed out the essential role played by class actions in achieving access to justice. This is done through the pursuit of three objectives: judicial economy - grouping similar individual actions together saves money and avoids unnecessary duplication of appeals - access to justice - the costs can be divided among a large number of applicants - and improving the efficiency of the justice system – “potential wrongdoers”¹¹¹ are prevented from ignoring their obligations to the public¹¹².

In 2007, the Supreme Court recognized that clauses imposing compulsory arbitration were binding on consumers. The legislators in Québec¹¹³, Ontario¹¹⁴ and Saskatchewan¹¹⁵ later intervened to ban this requirement for consumer contracts. The Alberta legislator¹¹⁶ greatly

¹⁰⁸ S. 6 (e) *Fair Trading Act*, RSA 2000, c F-2.

¹⁰⁹ S. 8 (1) (c), *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1.

¹¹⁰ S. 1435a12 CCQ CQLR c CCQ-1991.

¹¹¹ This term comes from the judgment *Western Canadian Shopping Centres v. Dutton* from the pen of the Hon. Justice Beverley McLachlin.

¹¹² *Western Canadian Shopping Centres v. Dutton*, Janet Walker, “Class Actions in Canada: Cases Note and Materials” Walker and Watson, Toronto, Edmon Montgomery Publications, Toronto, 2014, Chapter 1, Craig Jones and Janet Walker, “Introduction: Class Proceedings,”

¹¹³ S. 11.1, *Consumer Protection Act*, CQLR c P-40.1.

¹¹⁴ S. 7 (2), 2002 *Consumer Protection Act*, LO-2002 C 30, Sch. A.

¹¹⁵ Ss. 101 (1) (2), *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2.

¹¹⁶ Ss. 13 to 16, *Fair Trading Act*, RSA 2000, c F-2.

limited such clauses; for example, the compulsory arbitration clause requires ministerial approval and the consumer has to give written consent.

The situation is not as clear in other provinces. Following certain court decisions, is it no longer certain that clauses requiring arbitration are always binding on consumers. Indeed, in *Seidel v. Telus Communications Inc.*¹¹⁷, the Supreme Court of Canada held that one of the provisions of *Business Practices and Consumer Protection Act*¹¹⁸ gave the Supreme Court of British Columbia jurisdiction to hear disputes for a specific class action, while another section of the Act explicitly stated that a consumer could not beforehand waive the court's jurisdiction in a consumer contract¹¹⁹.

In *Briones v. National Money Mart Company* in Manitoba, in the context of a motion for dismissal, the court had to rule on the fact that the plaintiff had signed a contract that imposed compulsory arbitration. The Court of Queen's Bench¹²⁰, interpreting sections of the *Consumer Protection Act*¹²¹, the *Unconscionable Transactions Relief Act*¹²² and the judgment *Seidel*¹²³, rejected the application on the grounds that the court had jurisdiction to hear the dispute. Thereafter, the Manitoba Court of Appeal refused to dismiss the action because of a provision of the *Unconscionable Transactions Relief Act*¹²⁴.

In the other provinces, the clauses requiring arbitration or restricting access to judicial remedies have been generally recognized as valid and enforceable against consumers¹²⁵. So there is a real risk that these clauses could limit consumers' access to legal remedies.

In addition, some provinces protect consumers who make purchases online from a merchant located in another province. In Québec, all contracts are deemed to have been concluded at the consumer's address¹²⁶. In Ontario, the CPA-2002 will apply if the consumer or merchant is in Ontario during the transaction¹²⁷. In addition, some provinces, including Québec and Alberta,

¹¹⁷ *Seidel v. Telus Communications Inc.*, [2011] 1 SCR 531.

¹¹⁸ *Business Practices and Consumer Protection Act*, SBC 2004, c 2.

¹¹⁹ *Seidel v. Telus Communications Inc.*, [2011] 1 SCR 531.

¹²⁰ *Briones v. National Money Mart Co.*, 2013 MBQB 168 (CanLII).

¹²¹ *Consumer Protection Act*, CCSM c C200.

¹²² *Unconscionable Transactions Relief Act*, CCSM c U20.

¹²³ *Seidel v. Telus Communications Inc.*, [2011] 1 SCR 531.

¹²⁴ *Briones v. National Money Mart Co. et al.*, 2014 MBCA 57 (CanLII), *National Money Mart Co. et al. v. Briones*, 2014 CanLII 68711 (CSC) authorization request rejected and <https://www.harpergrey.com/administrative/2014/07/article773/>

¹²⁵ *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 RCS34, and *Frey v. Bell Mobility* 2010 SKCA 30 (CanLII); the court said it was bound by the Supreme Court decision in *Dell Computer*.

¹²⁶ S. 54.2, *Consumer Protection Act*, CQLR P-40.1.

¹²⁷ S. 2, 2002 *Consumer Protection Act*, LO-2002, c 30, Sch. AT.

give consumers who transact online more protection in terms of choice of forum than other provinces when they trade online¹²⁸.

3.2.7 Rules of evidence

The consumer protection laws of some provinces help consumers assert their rights by facilitating the rules of evidence in court. They may, for example, allow testimonial evidence of a written contract or a lessening of the burden of proof. This is the case in Québec¹²⁹ and New Brunswick with regard to warranties and liability¹³⁰.

Moreover, in Québec, a merchant who offers an additional warranty without disclosing information concerning the legal warranty is deemed to have omitted an important fact and to be engaging in a prohibited practice¹³¹. When the merchant engages in certain prohibited practices, there is a presumption that the consumer would not have contracted or paid such a high price if these practices had not occurred¹³².

When it comes to prohibited practices, there is reversal of the burden of proof. It is up to the merchant to prove that there was no prohibited practice. This is notably the case in British Columbia¹³³ and Ontario¹³⁴. The latter provinces also provide that, in such a context, the consumer may cancel the contract or provide testimonial evidence. They also assign joint and several liability to all persons having contracted with the consumer¹³⁵. Alberta also assigns joint liability in this context¹³⁶.

3.2.8 Summing up

In short, the sharing economy raises new issues of consumer protection, particularly in the context of consumer protection acts (CPAs). These laws contain more obligations than common right, especially with regard to online contracts, disclosure of information, rules of contract formation and prohibited practices. There are also differences between the various provincial

¹²⁸ Teresa and Scassa and Michael Deturbide, *Electronic Commerce and Internet Law in Canada* CCH, 2012 pages 613-614.

¹²⁹ S. 263 *Consumer Protection Act*, CQLR P-40.1.

¹³⁰ S. 5 *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

¹³¹ S. 228 *Consumer Protection Act*, CQLR P-40.1.

¹³² S. 254 *Consumer Protection Act*, CQLR P-40.1.

¹³³ S. 5 *Business Practices and Consumer Protection Act*, SBC 2004, c 2.

¹³⁴ S. 17 (2), 2002 *Consumer Protection Act*, LO-2002, c 30, Sch. AT.

¹³⁵ S.s 18 (1) (10) (12), 2002 *Consumer Protection Act*, LO-2002, c 30, Sch. AT.

¹³⁶ 7 (3), *Fair Trading Act*, RSA 2000, c F-2.

CPAs. For example, some provinces include additional protections in their CPAs, including making clauses limiting consumer redress and unilateral changes to contracts unenforceable. Some also contain an additional warranty regime. Nevertheless, CPAs generally apply to commercial transactions carried out between a consumer and a merchant. In addition, certain activity sectors are excluded from the scope of some CPAs.

3.3 Foreign law

3.3.1 The European Union

European law is supranational, meaning that the directives and decisions of the courts of Community law apply to Member States. They must incorporate these principles within their national law. The European Union has adopted several Directives for consumer protection and online contracts, many of which could potentially protect consumers who use an online sharing economy platform (OSEP).

For instance, Directive 2011/83/ EU on Consumer Rights applies to contracts concluded between a trader and a consumer¹³⁷. It defines a consumer as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”. A trader is defined as “any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive”¹³⁸.

This Directive governs several types of contracts, including distance contracts¹³⁹. It does not apply to the rental of residential buildings¹⁴⁰ or “vacation packages” (covered by Directive 90/314 / EEC¹⁴¹), timeshare, resale and exchange contracts¹⁴² (covered by Directive 2008/122 / EC¹⁴³).

¹³⁷ Art. 3 *Consumer Rights Directive*.

¹³⁸ Art. 1 *Consumer Rights Directive*.

¹³⁹ Art. 1 *Consumer Rights Directive*.

¹⁴⁰ Art. 3 (3) (f), *Consumer Rights Directive*.

¹⁴¹ Art. 3 (3) (g) *Consumer Rights Directive*.

¹⁴² This is a contract by which a consumer, in return for payment, subscribes to a plan allowing him access to overnight accommodation or other services and, in exchange, allows others to temporarily benefit from the rights under his timeshare contract.

¹⁴³ Art. 3 (3) (h) *Consumer Rights Directive*.

This Directive confers many rights and remedies upon consumers. These include informational and disclosure obligations (which are more formal and comprehensive when contracts are concluded at a distance), rights of withdrawal, application, and recourse to remedies.

Directive 2000/31 /EC on electronic commerce is also relevant. It aims at establishing a unified legal framework for electronic commerce in order to ensure legal certainty and provide protection to consumers. For example, it gives consumers the right to be governed by the law of their own country. It also establishes harmonized rules on transparency and disclosure of information, commercial communications, online contracts and limitations of liability that online service providers have to respect.

The Directive also includes a regime of reduced liability for information societies or companies that only transmit information on a communications network, provided that the provider is not responsible for automatic storage and that this is done to improve the transmission of information. It also specifies the conditions that must be met to qualify for the exemptions¹⁴⁴.

The reduced liability regime does not apply in cases when the intermediary participates in illegal activities¹⁴⁵. However, intermediaries are subject to decisions of the court¹⁴⁶. In addition, to benefit from reduced liability, they must, as soon as they become aware of any unlawful interference, act promptly to remove it from the site. Member States may add additional requirements¹⁴⁷. The intermediary may qualify for exemption if he only transmits information¹⁴⁸.

According to the Conseil national de la consommation, the platform can act both as a technical intermediary (a host of online content) and as a service provider. When acting as a host, it is subject to a reduced regime. In this case, it is not obliged to verify whether the references to goods and services posted online constitute published advertisements or representations made about them, unless it is proven that it was aware of illicit activities. On the other hand, when the platform is acting like a professional and is linked to users through a service contract, it has

¹⁴⁴ Arts. 12 and 13, *E-Commerce Directive*.

¹⁴⁵ Art. 44, *E-Commerce Directive*

¹⁴⁶ Art. 45, *E-Commerce Directive*

¹⁴⁷ Art. 46, *E-Commerce Directive*

¹⁴⁸ Art. 42, *E-Commerce Directive*

informational obligations toward consumers. It is also responsible for the execution of the contract within the meaning of the Directive on Electronic Commerce¹⁴⁹.

Another applicable directive is Directive 2005/29 /EC on Unfair Practices. This Directive requires the professional to act with due diligence and caution and not mislead the consumer. According to the European Commission, OSEPs could be considered professionals due to their commercial activities such as intermediation, payment and listing. They should also enable providers who wish to do so, to identify themselves as professionals, which would require them to comply with the Directive¹⁵⁰.

In November 2015, the Directive on Payment Services was replaced by Directive 2015/64 /EC on Payment Services in the Internal Market. According to the Commission, as soon as the OSEP has professional status and engages in business activities, it must act with due diligence and transparency. When its service providers are professionals, they must inform consumers. Finally, when it carries out checks on its service providers, it must also inform consumers¹⁵¹.

Much has been said in Europe on the question of the applicability of Community law to the sharing economy. There is a risk that transactions between individuals might not be regulated by the Directive on Consumer Rights¹⁵². However, when the situation is analyzed taking into consideration the role played by the OSEP, it is quite possible that it should be considered a professional within the meaning of the Directive. Furthermore, Article 2 b) of the Directive could apply to an online market¹⁵³.

Another author observes that, in order to determine how the directives should be applied, the contracts need to be analyzed. She adds that whenever an individual seeks to make a profit or acts in a similar manner to a professional, consumers should be entitled to protection and

¹⁴⁹ Conseil national de la consommation, *Avis du conseil national de la consommation sur les plateformes numériques collaboratives*, January 28, 2016.

¹⁵⁰ European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic Committee and the Board of Regions. A European agenda for collaborative economy*, June 2, 2016, pages 10-12.

¹⁵¹ European Commission, Working Document "A comprehensive approach to stimulate cross-border e-commerce for citizens and businesses of Europe," May 2016.

¹⁵² Reiner Schulze and Dirk Staudenmayer, "Digital Revolution: Challenges for Contract Law in Practice" Nomos, 2015, chapter by Rafael Illescas Ortiz, "Share Economy and the Consumer Concept," pages 115-116.

¹⁵³ Reiner Schulze and Dirk Staudenmayer, "Digital Revolution: Challenges for Contract Law in Practice" Nomos, 2015, chapter by Rafael Illescas Ortiz, "Share Economy and the Consumer Concept" page 117, and Art. 2 (b) of *E-commerce Directive*.

information; they must also have the right of withdrawal. She further adds that even innocent collaborative consumption can lead to a consumer-merchant relationship¹⁵⁴.

The European Commission offers an important insight in this regard. It says that Community Law consumer protection legislation applies to all collaborative platforms that act in a similar way to professionals and employ business practices. Service providers will also be considered to be professionals if they conduct their activities for commercial, industrial, craft or liberal purposes. However, EC laws dedicated to the protection of consumers in Community Law do not apply to transactions between individuals¹⁵⁵.

The European Commission provides pointers for determining whether a service provider is acting like a professional, such as frequency of services. Those who provide services on an occasional basis are unlikely to be considered professionals. Another important factor is the profit motive. People who exchange goods could be considered as individuals, while those who seek only to receive financial compensation could be considered as professionals. Finally, there is the question of the profits themselves. The higher these are, the greater the likelihood of the provider being considered a professional.

3.3.2 France

France, like all European countries, is obliged to integrate EC law (including directives) within its national law. However, French Civil Law applies to all contracts, whereas the *Code de la consommation* applies to consumer contracts concluded between a business and a consumer¹⁵⁶.

In 2015, the French legislator added an article to the *Code de la consommation* aimed at protecting consumers in the context of the digital economy. Art. L. 121-17 sets forth the obligations for disclosure of information in the context of an online platform. The first paragraph of Art. L. 111-5-1 reads:

[TRANSLATION] Without prejudice to the disclosure requirements set forth in Article 19 of Law No 2004-575 of 21 June 2004 respecting confidence in the digital economy, any person whose business is to electronically link several parties for the sale of property,

¹⁵⁴ Reiner Schulze and Dirk Staudenmayer, "Digital Revolution: Challenges for Contract Law in Practice" Nomos, 2015, chapter by Caroline Meller-Hannich, "Share Economy and Consumer Protection" page 127.

¹⁵⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic Committee and the Board of Regions, A European agenda for collaborative economy*, June 2, 2016, page 10.

¹⁵⁶ Conseil national de la consommation, *Avis du conseil national de la consommation sur les plateformes numériques collaboratives*, January 28, 2016.

the provision of a service or the exchange or sharing of a good or service shall be required to provide fair, clear and transparent information about the terms and conditions of use of the intermediary services and the terms of referencing, listing and delisting online offers.

The second paragraph of Art. L. 111-5-1 provides that in cases when only consumers or non-professionals are put into contact, the platform must also provide accurate, clear and transparent information about the quality of the “advertiser.” It must also provide information about the civil and tax rights and obligations of the parties.

The third paragraph states that when professionals are linked with consumers, the online sharing economy platform (OSEP) is required to make a space available for communicating the information specified in Art. L.121-17¹⁵⁷. This article sets forth the information and disclosure obligations, as well as a right of withdrawal. More specifically, if the OSEP permits access to professionals, it shall disclose and clearly identify who these professionals are. If the OSEP allows professional service providers to post offers, it shall be considered an online marketplace, subject to the third paragraph of Art. L111-5-1. The Committee also recommends that OSEPs educate service providers on the rules regarding their status¹⁵⁸.

Art. L. 121-17 sets forth the disclosure obligations regarding in particular the characteristics of the good or service, the fees, withdrawal rights and the professional’s contact information. Any violation of the law may result in to fines of up to €75,000 for an individual and to €375 000 for a legal person¹⁵⁹.

3.3.3 The United Kingdom

The above-mentioned directives were incorporated into UK law before the process to leave the European Union (BREXIT) was set in motion. From the outset, the United Kingdom has been very active in the sharing economy – one need only think of the sharing cities to be convinced of this. It was this that led British industry to create associations, voluntary codes¹⁶⁰ and accreditation

¹⁵⁷ Art. L11-5-1, *Code de la Consommation* and Conseil national de la consommation, *Avis du conseil national de la consommation sur les plateformes numériques collaboratives*, January 28, 2016 January 28, 2016,

¹⁵⁸ Conseil national de la consommation, *Avis du conseil national de la consommation sur les plateformes numériques collaboratives*, January 28, 2016 January 28, 2016.

¹⁵⁹ Arts. L111-1, L111-2 and L-111-6-1, *Code de la Consommation* and Conseil national de la consommation, *Avis du conseil national de la consommation sur les plateformes numériques collaboratives*, January 28, 2016 January 28, 2016.

¹⁶⁰ <http://www.sharingeconomyuk.com/>

bodies¹⁶¹. In the HM government report, which aims at establishing minimum rules of consumer safety in the event of evacuation, it states that online sharing economy platforms (OSEPs) must notify providers of the rules to be followed. Note that in the case of shared mobility¹⁶², certain activities are not considered permissible, such as taking passengers when this is not the main reason for the trip¹⁶³.

3.3.4 Australia

In Australia, there have been numerous interventions at both the state and municipal level; these differ from one jurisdiction to another¹⁶⁴. A report published by the Australian Competition and Consumer Protection Commission contains some interesting proposals. In particular, it recommends standardizing online reputation mechanisms and online contracts. It also identifies a number of shortcomings, particularly in the application of the law in the context of information companies, which could be addressed through amendments to the law or the introduction of voluntary codes¹⁶⁵.

3.3.5 United States

Our neighbours to the South have launched some inspiring initiatives in certain states and municipalities. Since these initiatives are often implemented by sector, we will deal with them separately, mainly in Section 6. A study of US federal legislation, however, would be less pertinent in the context of this research, although there are some lessons to be learnt from the document on the collaborative economy issued by the Federal Trade Commission. These will be addressed by sector of activity. Moreover, we will also comment on many American doctrines focusing on general concepts of the collaborative economy, online reputation, civil liability and the regulation of the Uber and Airbnb OSEPs. These will be addressed by theme.

¹⁶¹ <http://www.sharingeconomyuk.com/members>

¹⁶² The term “shared mobility” refers to OSEPs active in the field of transportation.

¹⁶³ HM Government, “Independent Review of the Sharing Economy: Government Response,” March 2015.

¹⁶⁴ New South Wales Business Chamber, “The Sharing Economy: Issues, Impacts and Regulatory Responses in the Context of the NSW Visitor Economy,” September 2015.

¹⁶⁵ Deloitte Access Economics, Australian Competition and Consumer Commission “The Sharing Economy and the Competition and Consumer Act,” 2015.

Section 4. Consumer protection mechanisms in the digital economy

The sharing economy poses particular challenges for consumers, who cannot rely on a company's public reputation. Nor, since they usually do not know the service providers, can they rely on their reputation as a fair dealer¹⁶⁶. For their part, the providers do not know whether consumers will respect the property made available to them or if they will behave reasonably¹⁶⁷.

Some service providers are merchants and, consequently, there is some informational asymmetry between them and consumers, particularly as regards the nature of the services offered, the practices promoted and the obligations of the parties.

From every standpoint, several authors assert, being better informed about the online sharing economy platform (OSEP) used can help consumers feel more confident about dealing with service providers¹⁶⁸. However, according to some studies, consumers rely both on online reputation platforms and service providers, without always differentiating between them¹⁶⁹.

Trust between the parties is an important prerequisite for participating in the sharing economy and its widespread adoption¹⁷⁰. However, when the parties do not know each other, trust can be a challenge. In fact, lack of trust can be a barrier for anyone thinking about participating in the sharing economy¹⁷¹. Our survey of consumers using OSEPs revealed that 48% of them had concerns at first, while 52% did not¹⁷². The fear of getting ripped off was the most common fear among respondents (61%). Other fears included having fewer remedies in the event of problems (41%), obtaining services that were less safe (39%), being subjected to different rules from those

¹⁶⁶ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 31.

¹⁶⁷ Benjamin G. Adelman and Damien Geradin, "Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?" 19 Stan. Tech. L. Rev. 293 2015-2016, page 313.

¹⁶⁸ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, and Benjamin G. Adelman and Damien Geradin, "Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?" 19 Stan. Tech. L. Rev. 293 2015-2016.

¹⁶⁹ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 33.

¹⁷⁰ Mowat Centre, *Policymaking for the Sharing Economy: Beyond Whack-A-Mole*, page 11, 2015 Mowat Centre; Noah Zon, "The Sharing Economy and Why it Matters for Policy Makers," December 2015 March Solutions Lab *Shifting Perspectives: Redesigning Regulation For Sharing Economy*, March 2016, page 19 European Commission, Business Innovation Observatory, "The Sharing Economy: Accessibility Based Business Models for Peer-to-Peer Markets," Case Study 12, 2013, page 2, and Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016.

¹⁷¹ *ibid.*

¹⁷² For a summary analysis of the results of a survey of users of collaborative economy services, see Appendix 1.

that apply to a traditional business (32%) and subscribing to an illegal service (25%). OSEPs have implemented various mechanisms aimed at allaying consumers' fears and earning their trust¹⁷³. Following is a short description of each.

4.1 Online reputation mechanisms

OSEPs are generally equipped with online reputation mechanisms (ORMs). There are several differences among these, particularly as regards their format, content and impact on the service provider. ORM systems can use systems with positive, negative or neutral feedback on scales of 1 to 5 or 1 to 10. Some ORM systems allow parties to post comments, others not¹⁷⁴.

The Uber ORM offers the user the option of selecting a rating on a scale of 1 to 5 (the scores are indicated by stars). Both the driver and the passenger are evaluated. There are notes on the app that drivers and passengers can consult before pairing; they can both easily refuse to be paired with someone who has a poor rating. Once the service has been provided, the parties are invited to evaluate each other. The driver's average rating is based on his most recent trips (fewer than 500). The drivers cannot see what score a specific passenger has given them, while consumers can access a driver's average rating¹⁷⁵.

According to Uber, the ratings are intended to ensure good quality of service - they allow consumers to obtain competent, courteous drivers, and the drivers get the chance to transportation reasonable consumers. According to many, the ORM systems increase the likelihood of consumers getting the same or better quality service than that offered by traditional operators¹⁷⁶.

Airbnb uses a different online reputation mechanism. It determines the parties' ratings through a combination of written comments. These comments, which must be less than 500 words long, are posted online, and the other party has the opportunity to respond. This ORM assessment

¹⁷³ Mowat Centre, *Policymaking for the Sharing Economy: Beyond Whack-A-Mole*, page 11, 2015. Mowat Centre, Noah Zon, "The Sharing Economy and Why it Matters for Policy Makers," December 2015. March Solutions Lab "Shifting Perspectives: Redesigning Regulation for Sharing Economy," March 2016, page 19; European Commission, Business Innovation Observatory. "The Sharing Economy: Accessibility Based Business Models for Peer-to-Peer Markets," Case Study 12, 2013, page 2, and Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016.

¹⁷⁴ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 35.

¹⁷⁵ <https://help.uber.com/h/7b64dda6-78f5-4575-b7da-3c9e40d2c816>

¹⁷⁶ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 36, and interview with Uber.

is based on the general experience of the parties. There are subcategories, including accuracy of reporting on the cleanliness of the accommodation, its location and communication between the parties. Users may only evaluate service providers if they actually book¹⁷⁷.

4.1.1 Benefits of ORMs for consumers...

The Federal Trade Commission states that there are several benefits to using online reputation mechanisms (ORMs). They foster delivery of quality services, ensure the parties are responsible, encourage courteous behaviour and reduce discriminatory behaviour¹⁷⁸. Getting a good score is especially important for both parties, particularly the provider, as it can lead to many more opportunities. In contrast, a poor score could reduce their earnings or even lead to their being expelled from the platform.

Online reputation mechanisms are used to obtain information on the quality of the goods and services provided. They therefore play an essential role in deciding whether to deal with one provider rather than another. Furthermore, because they are instantaneous, they allow OSEPs to react quickly in the event of major problems¹⁷⁹.

4.1.2 ... and shortcomings

The Federal Trade Commission has identified certain shortcomings with regard to ORMs. The first is that, whatever the quality of service, one is likely to find more favourable ratings than unfavourable ones¹⁸⁰, since the majority of users only give high marks or positive feedback. One study questions the effectiveness of ORMs for this very reason. It refers to another study in San Francisco that found that one or two stars were given in only 1% of assessments¹⁸¹. Also, we should point out that Uber explicitly encourages high ratings, saying, “Most passengers give drivers 5 stars, unless there was a particular problem that came up during the ride.”¹⁸²

¹⁷⁷ <https://www.airbnb.ca/help/article/13/how-do-reviews-work> and Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 37.

¹⁷⁸ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 36.

¹⁷⁹ Benjamin G. Adelman and Damien Geradin, “Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?” 19 *Stan. Tech. L. Rev.* 293 2015-2016, page 317, and interview with Uber.

¹⁸⁰ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 36.

¹⁸¹ Benjamin G. Adelman and Damien Geradin, “Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?” 19 *Stan. Tech. L. Rev.* 293 2015-2016, page 316.

¹⁸² <https://help.uber.com/fr/h/7b64dda6-78f5-4575-b7da-3c9e40d2c816>

There is also the possibility of scores being deliberately distorted for strategic reasons, even though this is less likely in the context of OSEPs than in other online environments¹⁸³. The suggestion is that consumers may be reluctant to give a negative assessment for fear of reprisals on the platform (e.g. they could receive a bad evaluation)¹⁸⁴. Although several OSEPs such as Airbnb have reduced the likelihood of this occurring, consumers may still fear reprisals outside the OSEPs (e.g. they could be threatened). After all, when they book, consumers disclose their personal information, including their addresses.

At first it is difficult to build up a good reputation online¹⁸⁵, especially for providers. However, many studies show that consumers are reluctant to do business with a supplier who has had few evaluations, and they are willing to pay more for the use of a good or service from a provider who has a good reputation¹⁸⁶.

ORMs and evaluations also have their limitations. Although they can let potential users know about problems that have been noted, such as a driver's lack of courtesy or the uncleanliness of a home, there are others that will escape notice, such as a faulty heating system in the summer¹⁸⁷.

Those who consult online reviews are not always able to understand the risks they face¹⁸⁸. Some authors even state that they have a "cognitive bias." This could be caused by a lack of information, by irrelevant information or a misperception of the importance to be given to certain items. One consumer might worry about the very unlikely but catastrophic possibility that the provider is a serial killer, for example, but fail to give importance to a less serious, but

¹⁸³ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 43.

¹⁸⁴ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 43.

¹⁸⁵ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 43.

¹⁸⁶ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 43 and Benjamin G. Adelman and Damien Geradin "Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?" 19 Stan. Tech. L. Rev. 293 2015-2016.

¹⁸⁷ Benjamin G. Adelman and Damien Geradin "Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?" 19 Stan. Tech. L. Rev. 293 2015-2016, page 316.

¹⁸⁸ Benjamin G. Adelman and Damien Geradin "Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?" 19 Stan. Tech. L. Rev. 293 2015-2016, page 316, and interview with Howard Dean of the Consumer Council of Canada.

more likely risk (such as being a victim of a car accident or getting kicked out of an accommodation)¹⁸⁹.

Finally, the ORMs may adversely affect certain groups, including people with reduced mobility and visible minorities, even if mechanisms were set up to avoid discrimination¹⁹⁰. One study reveals that 16% of people from visible minorities face discrimination on Airbnb¹⁹¹.

4.1.3 Some improvements

In light of the preceding, the FTC has made recommendations for improving the reputation of online mechanisms (ORMs). In addition to the score, it proposes posting what percentile gave that particular score, in order to allow for comparison. The platform should also display the number of silent assessments or services that did not end with an evaluation. It is thought that silent assessments are most likely the result of a negative experience¹⁹².

Another improvement would be to allow consumers to write a comment rather than just give a score¹⁹³. Howard Dean, of the Consumer Council of Canada¹⁹⁴, says this might avoid unjustified negative evaluations, especially for people with reduced mobility, who as customers, are more likely than others to receive a poor evaluation¹⁹⁵. Many studies bear this out. To avoid false evaluations, only users should have the right to submit an evaluation. Moreover, recent scores should be given more weight than old ones. This would permit having an up-to-date assessment and identify parties who might have exhibited bad behaviour shortly before leaving the platform¹⁹⁶.

4.2 Survey results on online reputation mechanisms

Our survey reveals that reputation is important for users. To the question: “On a scale of 1 to 8, 1, being not at all important and 8 being very important, is the reputation of the person

¹⁸⁹ Benjamin G. Adelman and Damien Geradin, “Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?” 19 *Stan. Tech. L. Rev.* 293 (2015-2016), page 318.

¹⁹⁰ Benjamin G. Adelman and Damien Geradin, “Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?” 19 *Stan. Tech. L. Rev.* 293 (2015-2016), page 319.

¹⁹¹ Benjamin Adelman, Michael Luca and Dan Svirsky, “Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment” *American Economic Journal: Applied Economics* (Forthcoming), page 2.

¹⁹² Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 43.

¹⁹³ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 45.

¹⁹⁴ Interview with Howard Dean, Consumer Council of Canada.

¹⁹⁵ Mowat Centre, Sarah Ditta and Michael Crawford-Urban, “Sharing the Road: The Promise and Perils of Shared Mobility in the GTHA,” August 2016, page 24.

¹⁹⁶ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 45.

providing the good or service important?” 83% of our survey respondents gave a score of between 6 and 8, it is therefore not surprising that 81% of respondents look at the users’ comments on a platform before using an app or a website to contact people. Women place more importance on peer assessment (85%) than men (81%), as 46% responded that reputation was very important (score of 8)¹⁹⁷. Women are also more likely to attach great importance to the reputation of the platform, since 49% said they accorded it great importance (note 8). Finally, women attach more importance to the recommendation of relatives (59%) and recommendations on social networks (25%)¹⁹⁸.

4.3 Intervention platforms

OSEPs can monitor service providers’ access to the platform¹⁹⁹. They can study feedback from consumers and react quickly when a problem arises²⁰⁰. They can offer consumers warranties and insurance (see Sections 6 and 7)²⁰¹. They can propose compensation or refunds to dissatisfied users (Airbnb does this, especially when the accommodation is not consistent with the description, even if it says it is providing the service “as is” or “not guaranteed”)^{202 203}.

4.4 Online dispute resolution mechanisms

Many platforms also offer an online dispute resolution mechanism (ODRM)²⁰⁴. Studies were carried out on these mechanisms when they were employed by traditional online platforms such as eBay. Their results may still be helpful to us in our analysis of OSEPs.

One of the ODRMs is automated online negotiation. This involves the parties making a settlement offer and agreeing in advance to be bound by it. There is also computer-assisted online negotiation, which attempts to conclude an agreement through online communication

¹⁹⁷ For a summary analysis of the results of a survey of users of collaborative economy services,” see Appendix 1.

¹⁹⁸ In our survey, we used the term “social media” to define public online communications, including social media and online evaluation; this was done in order to make it easier for the respondents to understand.

¹⁹⁹ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 48.

²⁰⁰ Chiara Ferronato and Jonathan Levin, “The Sharing Economy: New Opportunities, New Questions” Credit Suisse *Global Investors* 2.15, November 2015, page 2, and interview with Uber.

²⁰¹ Daniel K. McDonald “Reputation Will Teach the Sharing Economy to Share” 27 U. Fla. J.L. and Pub. Pol’y 219 2016, page 233, Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, page 48.

²⁰² For shared mobility OSEPs see section 6; for short term private accommodation rental OSEPs, see Section 7, and for service OSEPs, see section 8.

²⁰³ <https://help.uber.com/h/595d429d-21e4-4c75-b422-72affa33c5c8>

²⁰⁴ Clea Lavarone-Turcotte, “Et s’il était possible d’obtenir justice en ligne ?” *Lex Electronica*, Vol. 17: 2, fall 2012.

between the parties. Finally, there is online mediation, which is similar to traditional mediation, except that it is done online, and online arbitration, which is similar to traditional arbitration, but is also done online²⁰⁵.

Consumers may find ODRMs useful. They are inexpensive, fast, and more flexible and user-friendly than the courts. Some authors believe they are the only means consumers have to enforce their rights in situations such as a low-value individual action when the merchant is in another country²⁰⁶.

Public authorities have recognized the importance of online dispute resolution mechanisms for certain types of claims. In 2016, Québec's Bureau de la Protection du consommateur even set up a platform to allow consumers experiencing problems with merchants to resolve their differences online²⁰⁷.

The United Nations also recognizes the importance of ODRMs²⁰⁸. The European Union has created a one-stop online platform to allow consumers to use ODRMs when they have a problem stemming from a purchase made online with a merchant located in another member State. According to the *Directive on Alternative Dispute Resolution for Consumer Disputes*, merchants have certain obligations, including participating in the process and posting their contact information and a link to the resolution platform on their websites.

Nevertheless, ODRMs have certain shortcomings. Consumers do not all have the same abilities, either in terms of reading or of technology; this could prevent them from using the ODRMs or achieving a satisfactory result²⁰⁹. In addition, many consumers do not know their rights and are unaware of how the courts might help them, which can affect their ability to make an informed decision. Most importantly, some OSEP contracts contain illegal clauses. In addition, some disputes cannot be submitted to an ODRM because the particular characteristics of the situation might require the parties to be present²¹⁰.

²⁰⁵ Clea Lavarone-Turcotte, "Et s'il était possible d'obtenir justice en ligne ?" *Lex Electronica*, Vol. 17: 2, fall 2012.

²⁰⁶ Clea Lavarone-Turcotte, "Et s'il était possible d'obtenir justice en ligne ?" *Lex Electronica*, Vol. 17: 2, fall 2012.

²⁰⁷ <http://www.opc.gouv.qc.ca/a-propos/parole/>

²⁰⁸ Clea Lavarone-Turcotte, "Et s'il était possible d'obtenir justice en ligne ?" *Lex Electronica*, Vol. 17: 2, fall 2012, and <http://www.uncitral.org/uncitral/fr/>

²⁰⁹ Clea Lavarone-Turcotte, "Et s'il était possible d'obtenir justice en ligne ?" *Lex Electronica*, Vol. 17: 2, fall 2012.

²¹⁰ Clea Lavarone-Turcotte, "Et s'il était possible d'obtenir justice en ligne ?" *Lex Electronica*, Vol. 17: 2, fall 2012.

Another issue is related to the fact that for an ODRM to be effective, it needs to include mechanisms that attract and others that deter (carrots and sticks). An ODRM that contains no sanction is likely to be less effective²¹¹. Another problem is that ODRMs are not financially independent, meaning that they are tied to the platform. Finally, there is the question of actual cost²¹².

We see that platforms can serve in a variety of ways to obtain compensation for dissatisfied consumers. Unfortunately, because they operate retrospectively, they cannot protect them from everything that might occur²¹³. Moreover, according to several experts interviewed, the platforms' interventions are not standardized, which complicates the task for consumers attempting to obtain compensation.

The tools offered by OSEPs are admittedly useful and can help consumers settle disputes. But they are no substitute for the protections and remedies afforded by law. It is crucial that consumers who opt to use these tools also continue to benefit from legal and other remedies provided by legislation created to protect them.

²¹¹ Interview with Nicolas Vermeys.

²¹² Clea Lavarone-Turcotte, "Et s'il était possible d'obtenir justice en ligne ?" *Lex Electronica*, Vol. 17: 2, all 2012.

²¹³ Comments by some experts in telephone interviews, including a representative of the Ministry of Government and Consumer Services Ontario.

Section 5. The liability of the platform

Several experts have identified the liability of the online sharing economy platform (OSEP) as an important issue. It is quite obvious that any service provider that commits a fault can be held liable for it. But what happens when it is the OSEP that commits the fault? Can this be ascribed to the actions of the service provider? What happens if the service provider cannot pay for the damage suffered? What happens if a consumer causes prejudice when using a product? What if the prejudice is sustained by people unrelated to the contract (a neighbour or another passenger, for example)? These questions raise important issues that the courts have yet to pronounce on.

According to Vanessa Katz, the traditional extra-contractual liability regime does not apply perfectly to OSEPs, especially owing to the tripartite nature of the relationship²¹⁴. In addition, the degree of liability will depend on the type of OSEP in question and the contract associated with it.

5.1 The platform: more than a phone directory?

In this section, we will use Uber as an example to explain civil liability, as this company appears to exert a relatively high degree of control. However, we believe that the challenges raised here are not restricted to the automobile sector, but are experienced in other sectors that are less subject to regulatory control in terms of insurance and liability — and this could increase risks for consumers. We also understand that because of the no-fault or compulsory automobile insurance plans offered in certain jurisdictions, this analysis may not apply.

The OSEPs say they offer a service that enables people to contact each other. But they do much more than that. For example, when the Uber app - which emphasizes that it is not a transportation service – opens, the messages we actually get can be summarized as: “Here's an Uber driver. Here's the Uber driver ID. Here's this person being tracked on your phone, and you're going to pay them through us,” Clearly, consumers contract with the platform, not the driver. Yet Uber claims not to be responsible for the behaviour of drivers. It also asks the

²¹⁴Vanessa Katz “Regulating the Sharing Economy,” 30 Berkeley Tech. LJ 1067, 2015.

passengers to give their evaluation using the app²¹⁵. Uber also provides advice to drivers so that they improve the quality of their service. Note that after this report was completed, but before it was submitted on May 11, 2017, the Advocate General of the European Court of Justice concluded that Uber is not an information company, but one that offers an urban transportation service upon request. It therefore cannot claim enjoy the status of an information company, which would have allowed it to invoke the freedom to provide services principle guaranteed under European law.

5.2 Jurisprudence and doctrine on traditional online platforms: some helpful similarities?

Since there is no case law relating directly to civil liability with regard to online sharing economy platforms (OSEPs), we shall perhaps find inspiration in the case law on traditional online platforms such as eBay.

The eBay platform operates an online market. The site posts advertisements for products offered for sale by persons (natural or legal) who have registered and have an account with eBay. Case law recognizes that eBay allows sellers and buyers to meet and therefore has little control over their actions. In Québec, [TRANSLATION] “its liability is limited to its obligation to monitor; eBay must take reasonable measures to prevent fraud and the sale of counterfeit goods on its site”²¹⁶.

The European courts have also had to rule on eBay’s liability in a context of counterfeit. The factors they considered were the use of promotional and sales development tools on its sites, the creation of online stores, and the opportunity to become “power sellers”. The eBay platform plays an active role in increasing the number of transactions, offers an ad storage service aimed at ensuring a role of intermediary, and acts as an intermediary between sellers and buyers,

²¹⁵Lauren Geisser, “Risk, Reward and Responsibility: A Call to Hold UberX, Lyft and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers,” 89 S. Cal. L. Rev. 317 2015-2016, page 320.

²¹⁶*Mofo Moko v. eBay Canada Ltd.*, 2016 QCCS 4669 (CanLII) paras. 48 and 49; Shana Chaffai-Parent, “Commentaire sur la décision *Mofo Moko c. eBay Canada Ltd* - Les effets du retrait intempestif d’une annonce par la plateforme eBay sur sa responsabilité contractuelle”.

which gives it a commission. eBay's liability is engaged because it is more than just an intermediary²¹⁷.

In a judgment of the European Court of Justice, a distinction was made between a referral system such as Google and an online market such as eBay. We should point out that eBay is not a neutral platform²¹⁸ since it provides users with instructions, for example, how to write ads. The eBay platform may be able to seek certain derogations but, conversely, in the event of derogation, it could still be held liable²¹⁹.

Furthermore, foreign doctrine and jurisprudence state that control over pricing is a determining factor in deciding whether an OSEP is an intermediary²²⁰. One article of the European doctrine states that OSEPs cannot have limited liability because they do not act merely as intermediaries.

In Québec, to determine a platform's level of liability, one needs to take into account the type of control it exerts. The degree of control is usually determined by situating it on a continuum of responsibilities²²¹. The following criteria, which apply to the context of privacy, are nevertheless relevant to establishing that liability.

The first criterion is related to the user's activity²²². Section 22 of the *Act to Establish a Legal Framework for Information Technology* (AELFIT) states that no person who acts as an intermediary, "that provides document storage services on a communication network" is responsible for the activities engaged in by the service user²²³. Note that this law came into force in 2001 and that no decision has yet been rendered on the application of Section 22.

²¹⁷ *SA Louis Vuitton Malletier v. eBay Inc.*, Tribunal de commerce de Paris, 30 June 2008, page 11.

²¹⁸ Here the word is used in the sense of this directive.

²¹⁹ *L'Oreal SA et al. v. eBay International AG et al*, ECLI. EU: C: 2010: 757.

²²⁰ European Commission, "Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of Regions," A European agenda for collaborative economy, June 2, 2016, page 7.

²²¹ Vincent Gautrais and Pierre Trudel, "Circulation des renseignements personnels et web 2.0," 2010, pages 69-70.

²²² Vincent Gautrais and Pierre Trudel, "Circulation des renseignements personnels et web 2.0 " 2010, pages 74 and following.

²²³ S. 22, *Act to Establish a Legal Framework for Information Technology*, CQLR v. C-1.1, and Patrick Gingras and Nicolas Vermeys, "Acte illicite sur Internet : qui et comment poursuivre" Edition Yvon Blais, 2011.

However, the service provider may incur liability if he is aware that the documents are being used for an illicit activity, or if he knows of circumstances that make such a use apparent, and does not act promptly to prevent the activity from being pursued.^{224, 225}

The second criterion is that of the activity of the platform²²⁶. Those who act in order to provide services on a communication network, or who store or transmit technological documents are not required to verify the information contained in them, nor to search for circumstances that would indicate that the documents permit the conduct of unlawful activities²²⁷.

The third criterion is the power to control the content of the document. At one end of the continuum, there is a situation of complete control over the document, e.g. drafting or negotiating the content of the contract; at the other, there is a situation of no control whatsoever²²⁸. The fourth criterion is that of knowledge²²⁹. The exception made in the case of intermediaries or hosts disappears if they act as publishers of the content²³⁰.

In light of the above and of the interpretation of eBay's status as intermediary, we believe that OSEPs should at the very least be considered as intermediaries, regardless of what the contract states, since it is the law, not the titles that OSEPs choose to give themselves, that defines the contractual relationship between the parties. In addition, some OSEPs are far more interventionist than mere intermediaries.

There are similarities between eBay and the OSEPs. Like eBay, OSEPs publish offers, offer tools that facilitate the transaction, and provide dispute resolution mechanisms. Similarly, both set up online reputation mechanisms (ORMs) and can remove ads or ban users.

They also have some significant differences. The OSEPs are more interventionist than eBay, especially those that provide services. Uber, for example, provides the initial and ongoing

²²⁴ S. 22 (2) *Act to Establish a Legal Framework for Information Technology*, CQLR v. C-1.1.

²²⁵ Patrick Gingras and Nicolas Vermeys, "Acte illicite sur Internet : qui et comment poursuivre" Edition Yvon Blais, 2011, Pages 34-35.

²²⁶ Vincent Gautrais and Pierre Trudel "Circulation des renseignements personnels et web 2.0," 2010, pages 77 and following

²²⁷ S. 27, respecting the context of information technology, CQLR v. C-1.1.

²²⁸ Vincent Gautrais and Pierre Trudel, "Circulation des renseignements personnels et web 2.0," 2010, pages 81 and following

²²⁹ Vincent Gautrais and Pierre Trudel, "Circulation des renseignements personnels et web 2.0," 2010, pages 81 and following

²³⁰ Patrick Gingras and Nicolas Vermeys, "Acte illicite sur Internet : qui et comment poursuivre" Edition Yvon Blais, 2011. Page 36.

training of its drivers in order to improve the quality of service - including sending them messages. It also offers them protection (which may include insurance), whether prescribed by law or not.

Uber is a recognized trademark. In many jurisdictions, including Québec, drivers who use this platform display the Uber logo on their car. We can assume that consumers choose to do business with Uber due to the company's reputation.

5.3 Status of OSEPs in the European context

The European Commission states that in order to determine whether an online sharing economy platform (OSEP) is to be considered a provider of the underlying services²³¹ a verification must be made to determine if it sets the price of the services and the conditions of the contract. If, in addition, it owns the major assets used to supply the service²³², there is good reason to believe that it exercises significant control, and can therefore be considered an underlying supplier. Also to be considered is the relationship between the OSEPs and the service provider - is this relationship similar to a work contract? Also to be considered is the fact that it is the OSEP that chooses the providers²³³.

Moreover, if it is the service provider who sets the prices and conditions, the OSEP will only be considered an information company, even if it provides services - for example, it may receive payments and propose insurance²³⁴. This will have an impact on the rules it must respect as well as its degree of liability.

5.4 Civil liability in the Québec context

In Québec, despite the principle of contractual freedom, the legislator has acted to protect the parties in certain circumstances. Article 1474 of the *Civil Code of Québec* (CCQ), states "A person

²³¹An OSEP can be considered an information company, but it is also possible for it to be considered a service supplier underlying a transportation service or a short-term rental service, for example. The European Commission establishes criteria that can help determine the status of OSEPs.

²³² European Commission, *Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of Regions*, A European agenda for collaborative economy, June 2, 2016, page 7.

²³³ European Commission, *Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of Regions*, A European agenda for collaborative economy, June 2, 2016, pages 7-8.

²³⁴ European Commission, *Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of Regions*, A European agenda for collaborative economy, June 2, 2016, page 8.

may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence. He may not in any way exclude or limit his liability for bodily or moral injury caused to another”²³⁵.

Moreover, even if the OSEP posts a notice limiting or excluding its obligation to compensate the damage suffered as a result of breach of contract, it will have no effect if the other party asserts that the OSEP was aware of it at the time of contract formation²³⁶. The OSEP cannot, even with a notice to this effect, exclude or limit its liability towards third parties. However, such a notice may permit it to disclose a danger²³⁷. Article 1477 CCQ reads: “The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the author of the injury”²³⁸.

5.5 Québec decisions on online sharing economy platforms

The Québec courts have ruled against Uber. Although the allegations date from before the entry into force of the pilot project regulating Uber’s activities, the conclusions may shed some light on the question of an OSEP’s liability.

In *Uber Canada Inc. v. Agence du revenu du Québec*, Justice Curnoyer wrote: [TRANSLATION] “The fact that the transportation service is made accessible though the Uber app means that Uber cannot be considered the third party and neutral intermediary it claims to be, because it assures the management and control of the service. Without the intervention of Uber and its app, drivers would be unable to offer the UberX service”²³⁹. In this case, the judge described the Uber app as “the modern version of a technologically advanced call distribution service”. He also stated: [TRANSLATION] “Uber does not act as a neutral and passive intermediary. Its interventions entail potential criminal responsibility”²⁴⁰.

²³⁵ S. 1474 CCQ CQLR c CCQ, 1991.

²³⁶ S. 1475 CCQ CQLR c CCQ, 1991.

²³⁷ S. 1476 CCQ CQLR c CCQ, 1991.

²³⁸ S. 1477 CCQ CQLR c CCQ, 1991.

²³⁹ *Uber Canada Inc. v. Agence du Revenu du Québec*, 2016 QCCS 2158 (CanLII), para 209.

²⁴⁰ *Uber Canada Inc. v. Agence du Revenu du Québec*, 2016 QCCS 2158 (CanLII), para 212.

The judge added: [TRANSLATION] “Uber uses circular reasoning, when it claims, that since UberX drivers use an automobile to transport people without having a taxi license, they are not operating a taxi business. However, the activity that requires one to hold a license is the paid transportation of persons using an automobile. One cannot claim that the activities in which one engages are outside the scope of the law simply because they do not satisfy the clear and unambiguous terms of the law”²⁴¹.

In the decision *John Paul v. Uber*, Justice Peacock wrote that the court is not bound since the decision does not relate to the matter under consideration in this case (an authorization request for class action, whereas Justice Cournoyer’s decision bears upon administrative considerations). Justice Peacock nevertheless states that [TRANSLATION] “the Cournoyer decision is a thoughtful analysis by a Superior Court Justice on an important issue”²⁴².

In that case, Uber asserted in its defense that the simple fact of being able to virtually access, from Québec, an online store for downloading software does not constitute a connecting factor. It also said that no cause of action was alleged against Uber Technologies Inc.; the mere fact of having developed an app is not in itself an offense. Justice Peacock rejected these arguments since the case law cited by Uber is of common law and comes from the Federal Court. The competence of the Québec Superior Court is established by Article 3148 CCQ, which states that the connecting factor is that the fault was committed in Québec, or that an injury was suffered in Québec, or that one of the obligations arising from the contract was to be performed in Québec²⁴³.

As of the completion of this report, no court in Québec or Canada had settled the question of the employment status of Uber drivers. However, two judgments, one in California²⁴⁴ and one in the UK²⁴⁵, have ruled that the drivers are Uber employees. Although such decisions are often based on laws related to the regulation of labour law, which are interpreted broadly and liberally in order to protect employees, the definitions of the term “employee” in the British and

²⁴¹ *Uber Canada Inc. v. Agence du Revenu du Québec*, 2016 QCCS 2158 (CanLII), para 203 to 206.

²⁴² *Jean-Paul v. Uber Technologies Inc.*, 2017 QCCQ 164 (CanLII), para 32.

²⁴³ *Jean-Paul v. Uber Technologies Inc.*, 2017 QCCQ 164 (CanLII), para 59-60.

²⁴⁴ This case was subsequently settled out of court.

²⁴⁵ <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>

Californian laws appear to be similar to the concept of “employee” in Québec; this notion is defined in Section 1 (10) of the *Act Respecting Labour Standards*²⁴⁶.

Art. 1463 CCQ states that “The principal is bound to make reparation for injury caused by the fault of his subordinates in the performance of their duties; nevertheless he retains his remedies against them”²⁴⁷. To receive compensation, the applicant must demonstrate the fault, the existence of a relationship of subordination between the employer and the employee and that the offense occurred during the execution of the employee’s functions. If the fault committed was to the employer's benefit or in his interest, the situation falls within the scope of his official functions, otherwise, the acts will be considered as having been committed during the employee’s functions²⁴⁸.

5.6 Liability under *common law*

The principle of contractual freedom also prevails in the common law provinces. Except in special circumstances, exclusion of liability shall be enforceable against the parties, even if they have not read the contract. However, case law recognizes the importance of exclusions of liability. These should be written in plain language, must be highly visible; the size of the characters, the colours used and where they are placed are also important²⁴⁹.

However, the courts can intervene and render clauses unenforceable if they are found to be unconscionable. There have been several cases in Canadian law, but most of the time, these were extreme situations such as concluding a contract with an incapacitated person or proposing a contract contrary to the public order²⁵⁰.

In *Tercon Contractors Ltd. v. British Columbia*²⁵¹, the Supreme Court provided a test to determine the applicability of exclusions of liability. It also stated that contractual freedom could be limited if the clauses were contrary to public order. This decision also settles the

²⁴⁶ *Act Respecting Labour Standards*, CQLR v. N-1.1.

²⁴⁷ S. 2463, *Civil Code of Québec*, CQLR c CCQ-19.

²⁴⁸ Patrick Gingras and Nicolas Vermeys, “Acte illicite sur Internet : qui et comment poursuivre” Edition Yvon Blais, 2011, page 42 and following

²⁴⁹ *Karroll v. Silver Star Mountain*, 1988 CanLII 3094 (BC SC) and *McQary v. Big White Ski Resort*, [1993] BCJ No. 1956 (SC).

²⁵⁰ *Halsbury's Law of Canada*, Angela Swan and Jakub Adamski, 2013.

²⁵¹ *Tercon Contractors Ltd. v. British Columbia* (Transportations and Highways) 2010 SCC 4 (CanLII).

question of the applicability of the doctrine of fundamental breach in Canadian law²⁵². In addition, in 2012, in its judgment *Bhasin v. Hrynew*²⁵³, the Supreme Court imposed the obligations of honesty and good faith. Although these depend on the context, they do not impede contractual stability, because they depend on the clarity of the terms and obligations under the contract. The true interpretation of this doctrine will be refined as the court renders subsequent decisions²⁵⁴.

5.7 The liability of taxi companies under common law

Common law imposes obligations on taxi companies, which it subsumes under the general classification of common carrier²⁵⁵. Generally, a common carrier offers transportation services for goods and people to those who request them. There are also private carriers, which provide transportation services only in special circumstances, and guest carriers, which provide transportation to people free of charge and for social purposes – for example, giving a friend or colleague a lift. Determining whether a transportation service belongs to one category or another often requires an analysis of the context.

The common carrier offers its transportation services for goods and people to the general public, while the private carrier does not offer services to the public; it only deals with the people with whom it wants to do business^{256 257}. To determine the status of a carrier, one has to know whether it gives itself the right to refuse “customers” based on their characteristics and its own interest.

Common law imposes different obligations depending on the characteristics of the carrier. A common carrier has to take the utmost care while carrying out transportation services, while a private carrier has the obligation to take reasonable care to ensure that everything runs

²⁵² *Tercon Contractors Ltd. v. British Columbia* (Transportations and Highways) 2010 SCC 4 (CanLII).

²⁵³ *Bhasin v. Hrynew*, [2014] 3 SCR 494.

²⁵⁴ Tamara Buckwold, “The enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v. Hrynew* and the Organizing Principle of Good Faith in Common Law Canada” and Halsbury’s Law of Canada, Angela Swan and Jakub Adamski, 2013.

²⁵⁵ *Goffin v. Abbey Life Insurance Co. of Canada*, 1996 CarswellSask 456.

²⁵⁶ *Engel Canada Inc. v. Bingo’s Transportation Drivers*, 1990 CanLII 6617 (ON SC).

²⁵⁷ *Chief Construction Company v. McDonald*, 1987 CanLII 3337 (AB QB).

smoothly. The guest carrier, on the other hand, only has the obligation not to commit a fault or to be negligent.

In the case of taxis, the principle of vicarious liability has also been recognized by the courts. This principle states that an employer may be liable for the acts of his employee even in the absence of fault or negligence, which includes unintentional acts committed as part of his duties²⁵⁸. For unauthorized intentional or criminal acts such as sexual assault²⁵⁹, the Courts are reluctant to determine that the employer is not liable²⁶⁰. Note: generally, barring exceptional circumstances, no company will be liable for acts committed by self-employed workers²⁶¹. After this report was completed, but before it was submitted in June 2017, the Ontario Court of Appeal upheld a judgment of the Superior Court, which concluded that the taxi company was not responsible for the sexual assault committed by a taxi driver because the assault did not fit the five criteria set forth in the *Bazley* judgment²⁶².

5.8 Common law and online sharing economy platforms

What type of carrier is Uber? Even among American authors who argue that Uber could be held liable, opinions differ. According to one author, it is a common carrier, and would therefore have to exercise utmost care²⁶³. According to another, it would be at least a private carrier; consequently, it could have lower obligations²⁶⁴. In the opinion of others, since Uber and its drivers have similar business activities²⁶⁵, Uber would have vicarious liability. Finally, according to one author, if the driver is an employee, vicarious liability is the most likely²⁶⁶. That said, it should be added that one author thinks one simply needs to interpret common law doctrines

²⁵⁸ *Ivic v. Lakovic*, 2017 ONCA 446 (CanLII).

²⁵⁹ This example is one of the most extreme; we mention it here since the Ontario Court of Appeal had to rule on this issue in the context of taxis, see note 264

²⁶⁰ *Ibid.* and *Jacobi v. Griffiths*, 2 SCR 534.

²⁶¹ 671122 Ontario LTD. v. Sagaz Industries Canada Inc., 2001 SCC 59.

²⁶² *Ivic v. Lakovic*, 2017 ONCA 446 (CanLII)

²⁶³ Lauren Geisser, "Risk, Reward, and Responsibility: A Call to Hold UberX, Lyft and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers," 89 S. Cal. L. Rev. 317 2015-2016, page 325.

²⁶⁴ Agnieszka A. McPeak, "Sharing Tort Liability in the New Sharing Economy," *Connecticut Law Review*, Volume 49, November 2016, Issue 1.

²⁶⁵ Lauren Geisser, "Risk, Reward, and responsibility: A Call to Hold UberX, Lyft and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers" 89 S. Cal. L. Rev. 317 2015-2016, page 325, and Agnieszka A. McPeak, "Sharing Tort Liability in the New Sharing Economy" *Connecticut Law Review*, Volume 49, November 2016, Issue 1.

²⁶⁶ Vanessa Katz, "Regulating the Sharing Economy," 30 Berkeley Tech. LJ 1067 2015 Geisser and Lauren, "Risk, Reward, and Responsibility: A Call to Hold UberX, Lyft and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers," 89 S. Cal. L. Rev. 317 2015-2016, page 325.

broadly and liberally to invoke Uber's liability in the event of fault committed by the driver, both for passengers and third parties²⁶⁷. We await future developments.

In Canada, at the time of writing this report, no decision had been made on the subject. However, there have been some common law judgments on the legal status of Uber. In *City of Toronto v. Uber Canada Inc. et al*²⁶⁸, the City of Toronto, through injunction proceedings, wanted to oblige Uber to obtain a taxi cab brokerage licence and a limousine service company licence. The judge concluded that Uber was not comparable to a taxi or limousine company intermediary according to the meaning of the law in Toronto because of the definition of "accepts." He justified his decision by saying that the law defines such a company as a person or entity who accepts "calls" and that the word "accepts" is not comparable to the simple fact of receiving or transmitting messages, and is not broad enough to include the automatic transmission of messages through an app without human intervention. The word "accepts" would therefore require a conscious decision²⁶⁹. Nevertheless, the judge limited this interpretation to the wording of the current law in Toronto and stated that this did not restrict any legislative intervention.

The City of Ottawa reacted to this decision, saying that the wording of its own regulation as regards the word "accept" was different²⁷⁰ and proceeded to regulate Uber (see Section 6).

²⁶⁷ Agnieszka A. McPeak, "Sharing Tort Liability in the New Sharing Economy," *Connecticut Law Review*, Volume 49, November 2016, Issue 1.

²⁶⁸ *City of Toronto v. Uber Canada Inc. et al.* 2015 ONSC 3572.

²⁶⁹ *City of Toronto v. Uber Canada Inc. et al.* 2015 ONSC 3572.

²⁷⁰ *City of Ottawa, Taxi and Limousine Regulations and Service Review, Current Regulatory Regime*, October 2015.

Section 6. Shared mobility

6.1 Definition

As already stated, the term “shared mobility” refers to the online sharing economy platforms (OSEPs) operating in the field of transport. According to the Mowat Center, these platforms, which are generally available through mobile apps²⁷¹, include various types of services: bicycle rentals, car sharing, access to vehicles belonging to a company, or a car belonging to a private individual, transportation via a transportation network company (TNC)²⁷², carpooling, microtransit etc.²⁷³

In this section, we will be concentrating on the Netlift and Turo car sharing platforms and the Uber and Ripe TNC platforms (the latter operates in British Columbia). We will therefore be focussing on OSEPs that bring people together. Excluded from this study are businesses that permit sharing via a fleet of vehicles belonging to a company such as car2go²⁷⁴ as well as those that offer shared parking²⁷⁵.

We should note that Uber offers other services, particularly in Toronto: for example, UberPOOL, which offers carpooling services and UberEATS²⁷⁶, which delivers food. Our study will focus on TNCs.

6.2 The pros of sharing mobility...

Sharing mobility plays an important role in an efficient public transportation network. In the Mowat Center study, which focuses on the cities of Toronto and Hamilton, it forms part of the

²⁷¹ Mowat Centre, Sarah Ditta and Michael Crawford Urban “Sharing the Road: The Promise and the Perils of Shared Mobility in the GTHA,” August 2016, pages 6-7.

²⁷²We have opted for the term Transportation Network Companies (TNCs) since this is the term used in the rest of Canada, the United States and abroad. We find this term more specific than that employed by the Québec legislature, “*entreprise de transportation par personnes*.” This term includes both companies that provide a traditional transportation service and those that offer a transportation service through the use of new technologies.

²⁷³ Mowat Centre, Sarah Ditta and Michael Crawford Urban, “Sharing the Road: The Promise and the Perils of Shared Mobility in the GTHA” August 2016, pages 6-10 and Mars Solution Labs “Shifting Perspective: Redesigning Regulation for the Sharing Economy” March 2016, page 60.

²⁷⁴As defined by Rachel Botsman, product service systems (PSS) may include property owned by businesses – one example is Car2Go. In this study, we have paid particular attention to property belonging to individuals. We made this choice because the presence of particular providers raises questions about the applicability of consumer protection laws and related consumer contracts.

²⁷⁵ Since parking is legally considered an immovable under the *Civil Code of Québec*, we shall discuss this in the section on short-term accommodation rentals. This includes WhereiPark and Rover.

²⁷⁶ Following the drafting of this report, UberEATS was launched in Montreal on April 19, 2017.

strategy to improve public transport. According to this organization, an efficient transportation system is safe, focuses on the needs of citizens, and is accessible to all. It promotes an active community and encourages the use of new technologies. It is sustainable and does not exploit its workers²⁷⁷.

Sharing mobility provides many benefits to consumers. Some are similar to those of other OSEPs (see Section 2). For example, sharing mobility offers more choice and is less expensive than traditional transportation (this is true 95% of the time, even when including dynamic pricing and price increases²⁷⁸). It also helps some people avoid buying a car (or a second car).

Transportation is the most common service used by the respondents to our survey, 61% of whom have used it. It is especially popular among relatively young adults. The respondents who liked this service most were 18 to 34 years old, and 75% of them used it. This was also the case with 64% of 35 to 44 year olds, 67% of 45 to 55 year olds, 48% of 55 to 64 year olds, and 33% of those 65 and over²⁷⁹.

Our survey brought to light two motives. One is financial (66% of respondents), while the other is related to convenience (50%)²⁸⁰. Those 34 and under said their choice was more motivated by convenience (58%). Respondents also replied that they chose shared mobility (SM) because the service is better (44%) or because the collaborative economy is one of their values (31%). The majority of respondents using shared mobility have had positive experiences: 76% reported having excellent or very good experiences, while 20% said they had been good.²⁸¹

²⁷⁷ Mowat Centre Sarah Ditta and Michael Crawford Urban "Sharing the Road: The Promise and Perils of Shared Mobility in the GTHA," August 2016, page 4.

²⁷⁸ Lauren Geisser, "Risk, Reward, and Responsibility: A Call to Hold UberX, Lyft and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers," 89 S. Cal. L. Rev. 317 2015-2016, page 336.

²⁷⁹ See summary analysis of the results of a survey of collaborative economy services users, Appendix 1.

²⁸⁰ To this question, consumers could indicate more than one choice, which explains the results of over 100%.

²⁸¹ Ibid.

6.3 ... and the cons

6.3.1 Safety of consumers and the public

Despite its benefits, there are risks involved in shared mobility. Indeed, because it is a transportation service, there could be very serious consequences for the consumer if a problem occurs. This is especially true of network transportation companies (NTCs), which offer similar services to taxis but do not have the same obligations, particularly as regards training and background checks for drivers.

Indeed, while the taxi industry is highly regulated in terms of licenses, vehicles and drivers, this is not necessarily the case with NTCs²⁸². Uber, however, says that it does criminal background checks on its drivers. In addition, some jurisdictions require NTCs offering services on their territory to undergo mandatory training with background checks for drivers²⁸³.

6.3.2 Insurance

Another issue raised by sharing mobility is insurance. What happens if an accident happens? If someone (a passenger or a third party) is injured? If their property is damaged? Does the driver's insurance cover the damage? If not, what will happen?

Previously, OSEPs claimed that the driver's personal insurance provided blanket coverage in the event of an accident. However, such insurance generally excludes commercial activities, including the transportation of people. Uber then started to offer commercial-type insurance. The insurance coverage began when the driver agreed to carry a passenger, but the driver was not covered when waiting for a fare²⁸⁴.

²⁸² Mowat Centre *Policymaking for the Sharing Economy: Beyond Whack-A-Mole*, 2015, page 7, Mars Solutions Lab, *Perspectives Shifting: Redesigning Regulation for the Sharing Economy*, 2016, page 5, and Michael Motala, "The 'Taxi Cab Problem' Revisited: Law and Ubernomics in the Sharing Economy" 31 BFLR 467.

²⁸³ Interview with the Bureau du taxi (the answers to our questions were provided to us in writing), interview with Uber and agreement between the Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9 2016.

²⁸⁴ Vanessa Katz "Regulating the Sharing Economy" 30 Berkeley Tech. LJ 1067 2015, pages 1092-1093, Lauren Geisser, "Risk, Reward, and Responsibility: A Call to Hold UberX, Lyft and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers," 89 S. Cal. L. Rev. 317 2015-2016, page 352.

In 2013, a Uber driver in California collided with a family and killed a little girl when he was looking for a fare. The family sued Uber²⁸⁵. In its defense, the company stated that it only brought people into contact and that, consequently, it was not responsible²⁸⁶. The case was settled out of court and the terms of the agreement are confidential. In 2015, a similar accident occurred in Miami. A driver hit a motorcycle, killing one person.

Such events highlight issues related to liability and insurance for network transportation companies (NTCs). California, Oregon and Washington have passed legislation that state that shared mobility is not a commercial activity and thus prohibits insurers from using it as a pretext to reject a claim²⁸⁷. In addition, the State of California imposes insurance obligations on NTCs, especially with regard to civil liability²⁸⁸.

In Canada, the provinces have acted differently from each other and several municipalities have adopted regulations governing NTCs.

There are significant differences between provinces when it comes to car insurance. Most provinces permit private insurers to sell motor insurance products to consumers. In Manitoba, Saskatchewan and British Columbia, however, consumers contract their insurance directly from the government. Québec, for its part, has a completely different regime.

Even though the vast majority of provinces have adopted some form of no-fault automobile insurance, there are significant differences regarding the right to sue for damages. Québec has a pure no-fault system; it is the province that pays compensation when there is physical injury. The Manitoba government is similar. Ontario has a hybrid plan. The Saskatchewan plan is mid-way between the hybrid model and no-fault model. The Maritime provinces, Alberta and British Columbia have a tort-based (civil liability) regime²⁸⁹. Nevertheless, in cases of bodily injury, the

²⁸⁵ Vanessa Katz, "Regulating the Sharing Economy" 30 Berkeley Tech. LJ 1067 2015, 1103 page and Agnieszka A. McPeak, "Sharing Tort Liability in the New Sharing Economy," *Connecticut Law Review*, Volume 49, November 2016, issue 1, page 174.

²⁸⁶ Vanessa Katz "Regulating the Sharing Economy" 30 Berkeley Tech. LJ 1067 2015, 1103 page and Agnieszka A. McPeak, "Sharing Tort Liability in the New Sharing Economy," *Connecticut Law Review*, Volume 49, November 2016, issue 1, page 174.

²⁸⁷ Craig Harris, "A Changing Relationship with the Car" *Advantage Monthly: Emerging Trends and Issues*, the CIP Society, 2014.

²⁸⁸ Lauren Geisser, "Risk, Reward, and Responsibility: A Call to Hold UberX, Lyft and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers," 89 S. Cal. L. Rev. 317 2015-2016, pages 319-320, and Agnieszka A. McPeak, "Sharing Tort Liability in the New Sharing Economy" *Connecticut Law Review*, Volume 49, November 2016, issue 1, page 223.

²⁸⁹ <http://getintheknow.abc.ca/Blog/2012/October-2012/Fault-or-No-Fault-What-s-the-Difference.aspx>.

Alberta and British Columbia plans provide certain benefits, such as medical expenses and rehabilitation. There are variations between these two provinces regarding the payment of disability benefits for a personal injury described as “catastrophic” (this can be paid throughout the working life of a person in British Columbia, but only for 104 weeks in Alberta)²⁹⁰.

6.3.2.1 Québec

The Société de l'assurance automobile du Québec (SAAQ) compensates any victim of an accident for personal injury suffered; this is a provision of the Automobile Insurance Act²⁹¹. The Act is “remedial” legislation and must be interpreted broadly and liberally²⁹². Victims are not only covered in case of collisions, but also if a tree branch falls on their vehicle or if they fall as they are getting out. The decisions are made on a case-by-case basis²⁹³. Québec also requires drivers to have insurance to cover damage to other vehicles. There is a certain level of state control for this type of insurance product²⁹⁴.

Moreover, in the pilot project to regulate Uber²⁹⁵ (See section 6.4.1), the Québec legislator addresses the issue of insurance and requires that from now on, Uber ensures that its drivers comply with the requirements of the Autorité des marchés financiers (AMF) concerning this type of business activity²⁹⁶. Section 8 of the pilot project requires the holder to have a liability insurance contract under section 84 of the *Automobile Insurance Act*²⁹⁷, which guarantees compensation for property damage caused by Uber drivers during the paid transportation of people.

The insurance conditions are set forth in an endorsement form for the pilot project and form an integral part of the agreement with Uber Canada Inc. The form states that Uber is the designated insured party and that each partner-driver is insured from the moment they connect

²⁹⁰ B.C.'s *Insurance (Motor Vehicle) Act*, “The Autoplan” administered by ICBC <https://www.cwilson.com/no-fault-benefits-in-british-columbia-must-out-of-province-auto-insurers-pay-the-same-as-icbc/>.

²⁹¹ *Automobile Insurance Act* CQLR c A-25.

²⁹² S. 41 *Interpretation Act*, CQLR c I-16.

²⁹³ *Westmount (City) v. Rossy*, [2012] 2 SCR 136 and *Production Pham v. Lemay*, 1992 CanLII 3306 (QC CA).

²⁹⁴ Ss. 422 and 422.01, *the Insurance Act*, CQLR v. A-32, and *Option consommateurs*, Annik Bélanger-Krams, “Protection des consommateurs et distribution de produits d’assurance en ligne : Des enjeux inconciliables ?” December 2016.

²⁹⁵ The pilot project is set up by the Under the agreement between the Québec Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9, 2016.

²⁹⁶ 2. S. 9 Agreement between the Québec Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9, 2016.

²⁹⁷ *Automobile Insurance Act* CQLR c A-25.

to the Uber Canada Inc. mobile app until the time they disconnect. Drivers therefore have no extra steps to perform in order to be insured during periods when they are transporting people. On the other hand, they must take out personal insurance to ensure they are insured outside of these periods²⁹⁸.

Note that several US doctrines refer to three periods with regard to insurance. The first covers the period when the driver, after opening the app, waits for a fare. The second covers the period during which the driver, after accepting a fare, goes to pick up the passenger. The third covers the period during which the driver carries the passenger. The pilot project protects consumers and third parties during these three periods.

Online sharing economy platforms (OSEPs) of the Carsharing type (such as Turo), which allow consumers to borrow the car of a private individual, also raise important questions regarding insurance and consumer protection. Turo offers property and casualty insurance, but this seems to raise concerns about disclosure of information. We will address this in section 6.5.6.

6.3.2.2 Ontario

In July 2016, the Ontario government intervened to make amendments to the *Insurance Act*²⁹⁹. The goal was to allow a fleet of vehicles used by the network transportation companies (NTCs) to obtain commercial insurance. This regulatory change allows insurers to develop new insurance products appropriate to the context of shared mobility (SM) and NTCs in addition to filling gaps in coverage³⁰⁰. We note that the platforms in the SM sector have access to insurance products tailored to their business model. These products take certain factors into account, such as the fact that many drivers work part time³⁰¹.

Sharing mobility platforms, especially those of NTCs, must also comply with the laws of the municipalities where they operate. The City of Toronto has adopted the *Vehicle For Hire By-*

²⁹⁸ https://lautorite.qc.ca/fileadmin/lautorite/reglementation/assurances-inst-depot/avis-web-projet-pilote-uber_2016.pdf and https://lautorite.qc.ca/fileadmin/lautorite/reglementation/assurances-inst-depot/projet-avenant-uber_an.pdf

²⁹⁹ *Insurance Act*, RSO 1990, c.1.8.

³⁰⁰ <https://news.ontario.ca/mof/en/2016/07/ontario-modernizing-auto-insurance-system-to-protect-ride-sharing-consumers.html>

³⁰¹ Craig Harris, "A Changing Relationship with the Car" *Advantage Monthly*: Emerging Trends and Issues, the CIP Society, 2014, and March Solutions Lab, "Shifting Perspectives: Redesigning Regulation for Sharing Economy" March 2016.

Law³⁰². Section 546-114 (1) (a) of this regulation includes the obligation to take out at least \$2 million in insurance for each vehicle. This insurance covers bodily injury and death, property damage and liability. It also states that the municipal authority should have a copy of the insurance policy and be informed of any changes to this insurance³⁰³.

This insurance must cover all risks from when the driver accepts the fare to when the passenger leaves the vehicle³⁰⁴(periods 2 and 3). The insurance on the vehicle must be in the name of the driver or, if this is not the case, the driver's personal insurance coverage must be equivalent³⁰⁵. If the driver has personal insurance, a copy must be submitted to the municipal authority³⁰⁶. In addition, NTCs must have commercial insurance providing at least \$5 million in coverage³⁰⁷. NTCs must notify the municipal authority of any changes to their insurance³⁰⁸. In the event of any breach of the above with regard to insurance, the NTC and the offending driver can be immediately suspended, without a hearing³⁰⁹.

6.3.2.3 Alberta

In this province, the sale of insurance products is government-regulated. Alberta also has a public compensation plan for certain types of personal injury.

In July 2016, Alberta passed the *Transportation Network Companies Regulation*³¹⁰. According to Section 1 (2) (h) of this Act, the transportation of passengers includes periods one to three, i.e. when the driver turns on the app and is waiting for a fare, when the driver agrees to pick someone up, and when the passenger is in the vehicle. Section 4 (6) states that Network Transportation Companies (NTC) must ensure that they have insurance coverage. They can get this under the *Insurance Act*, which provides liability insurance with minimum compensation of \$1 million for bodily and material injury in the event of death during transportation within the meaning of Section 4 (2) (h), or by providing liability insurance with minimum compensation of

³⁰² Ch. 546-114 (c) Licensing of Vehicles-For-Hire. Bill no. 571 <http://www.toronto.ca/legdocs/bills/2016/bill0571.pdf>.

³⁰³ Ch. 546-114 (c) Licensing of Vehicles-For-Hire, City Of Toronto Bill No. 571 By-Law No.-2016

³⁰⁴ Ch. 546-114 (c) Licensing of Vehicles-For-Hire.

³⁰⁵ Ch. 546-114 (c) Licensing of Vehicles-For-Hire.

³⁰⁶ Ch. 546-114 (d) Licensing of Vehicles-For-Hire.

³⁰⁷ Ch. 546-114 (f) Licensing of Vehicles-For-Hire

³⁰⁸ Ch. 546-114 (f) Licensing of Vehicles-For-Hire

³⁰⁹ Ch. 546-114 (g) (h) Licensing of Vehicles-For-Hire

³¹⁰ *Transportation Network Companies Regulation*, Alberta Regulation 100 | 2016.

\$1 million for personal injury or death when the service is provided within the meaning of Section 4 (2) (h) (iii) (period 3). Furthermore, NTCs that work in municipalities where they are regulated have to comply with these obligations³¹¹. Note that insurance companies have offered products for NTCs since July 1, 2016³¹².

6.3.2.4 British Columbia

In this province, any company that transports passengers must purchase insurance products from the Insurance Corporation of British Columbia (ICBC). In addition to supplying automobile insurance, British Columbia also has a compensation scheme for personal injury. All people carriers must have insurance that meets the minimum ICBC requirements. These carriers do not currently offer insurance products adapted to NTCs, in particular because many drivers work with NTCs part-time and the commercial insurance products assume that drivers work full time. NTCs must procure insurance products for taxi or limousine drivers. At a public consultation, the Government of British Columbia asserted that public safety is a critical issue, as is NTC insurance and stressed the importance for NTCs to have sufficient insurance coverage³¹³. Note that the NTC Ripe, which offers services in the province, provides liability insurance of up to \$10 million in compensation³¹⁴.

6.3.3 Dynamic pricing

Another issue brought up by many experts is that of dynamic pricing. This term means that prices may not always be the same: they vary depending in accordance with several criteria, the major one being volume of demand (the higher this is, the higher the prices will be). Dynamic pricing is said to reduce waiting times and improve service³¹⁵.

In the taxi industry, the legislator intervened to impose a fixed price. This was done because of the unequal power relationship that exists between drivers and passengers - the latter are in a

³¹¹ *Transportation Network Companies Regulation*, Alberta Regulation 100 | 2016

³¹² Alberta Standard Automobile Form – Transportation Network S.P.F. No. 9

³¹³ The Hon. Peter Fassbender, “Ride Sourcing in BC: Stakeholder Engagement Summary,” October 2016.

³¹⁴ <https://www.riperides.ca/legal.html>

³¹⁵ Interview with Uber.

position of vulnerability and are not always able to negotiate. Some experts say that price increases due to dynamic pricing put consumers in a vulnerable position – they have no choice but to pay. On New Year's 2016, a situation occurred that was widely reported in the media. A consumer who chose Uber had to pay a very hefty price: \$300 for a 30-minute trip in Montreal³¹⁶; another paid \$1100 for a 60 km trip in Edmonton³¹⁷.

The majority of public authorities and authors stress the importance of transparency with regard to price disclosure³¹⁸. Some jurisdictions require Uber to provide an estimate of the fare before the passenger accepts it.

6.3.4 Accessibility for all

Another challenge of the sharing mobility platform is ensuring accessibility for all, including low-income consumer. But this is easier said than done. To access the services offered by an NTC, you need a smart phone and a credit card, which not everyone has - in Canada, 73% of consumers have smart phones³¹⁹ and 89% have credit cards.

The service also needs to be accessible to people with reduced mobility. According to several authors, not all NTC drivers are able to accept disabled customers (see Section 2), because it would mean they would all have to have adapted vehicles, which involves considerable expense. Nevertheless, the legislator may impose obligations on NTC accessibility or offer incentives to drivers who wish to offer adapted transport. An exemption could be created, for example, to allow these drivers to get their permit free of charge. This was the choice made by the City of Portland, Oregon. The City of Toronto has indicated its intention to do the same³²⁰.

³¹⁶ <http://www.tvanouvelles.ca/2016/01/02/facture-de-300-pour-un-voyage-de-35-minutes-avec-uber>.

³¹⁷ <http://globalnews.ca/news/2430713/alberta-man-furious-over-1000-uber-charge-on-new-years-eve/>

³¹⁸ <http://ici.radio-canada.ca/nouvelle/757764/facture-elevee-uber-edmonton-jour-an>

³¹⁹ <https://www.cwta.ca/facts-figures/>

³²⁰ Ch. 546-114 (c) Licensing of Vehicles-For-Hire, City Of Toronto Bill No. 571 By-Law No.-2016, <http://www.toronto.ca/legdocs/bills/2016/bill0571.pdf>

6.3.5 Different rules

Online sharing mobility platforms represent another way of offering a relatively low price (at least most of the time), thereby increasing competition. But even considering that competition is good for consumers - it generally results in lower prices - many are concerned that the companies do not all follow same rules.

The NTCs say they are not transportation companies and, consequently, do not have to submit to the rules that apply to that type of business. The taxi companies have to respect them, and it costs them dearly. Taxis pay \$220,000 for a license in Montreal, \$114,000 in Toronto and \$500,000 in Vancouver. They cannot compete with the NTCs³²¹. In such a context, does it make sense to talk of healthy competition? Not to mention that Uber is the only company offering sharing mobility services across Canada.

6.4 The legal framework in Canada

6.4.1 Québec

In Québec, the taxi industry is regulated by the provincial government, through the *Act Respecting Transportation Services by Taxi*³²² and its *Regulations*. This authority may be delegated to municipalities. Only the City of Montreal has chosen to exercise it. The taxi industry is regulated by the *By-law Concerning Taxi Transportation*³²³.

In Québec, Uber is regulated only by the pilot project authorized by *Ministerial Order 2016-16*, which came into force on October 15, 2016. It is valid for a period of one year, and may be renewed by the parties. Under this pilot project, Uber will get the equivalent of 300 taxi owners' permits, issued in number of hours per week for a total of 50,000 hours weekly³²⁴.

³²¹Michael Motala, "The 'Taxi Cab Problem' Revisited: Law and Uberonomics in the Sharing Economy" 31 BFLR 467.

³²² *Act Respecting Transportation Services by Taxi*, CQLR v. S-6.01.

³²³ *By-law Concerning Taxi Transportation*, RCG 10-009.

³²⁴ S2. S. 9 Agreement between the Québec Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9, 2016, <https://www.transports.gouv.qc.ca/fr/salle-de-press/news/Documents/2016-09-09/agreement-uber.pdf>.

There are many differences between the rules governing Uber and those governing the taxi industry³²⁵. In this report, we will focus only on differences that affect consumer rights.

Uber drivers can only use vehicles less than 10 years old that have less than 350,000 km on the odometer. In Québec, taxis cannot use vehicles older than 5 years upon entry into service and over 10 years old in total. In Montreal, the rule is stricter: vehicles cannot be more than three years old when they enter into service, nor be more than 8 years old in total³²⁶.

Uber drivers must hold a class 4C license. Those who were already drivers on August 17, 2017 had three months to comply with this obligation³²⁷. For their part, taxi drivers must have two licenses, a class 4C license and a taxi driver's permit³²⁸. The permit costs about \$ 220,000³²⁹.

There are also differences in terms of training. While taxi drivers must complete 150 hours of training given by institutions accredited by the *ministère des Transports, de la Mobilité durable et de l'Électrification des transports*, Uber offers its own training. According to the Bureau du taxi de Montréal, this training is not verified. Uber must, however, post the content on its website. The Bureau du taxi also claims that there is no minimum training period on the operation of the app, service quality, legal obligations, mechanical checks, transportation for people with reduced mobility, and fiscal responsibility³³⁰. Uber must also respect the minimum content requirements in these areas³³¹. However, Uber says its training focuses on the regulations in place and tells drivers how to provide five-star service. It also provides an ongoing assessment through the use of online reputation mechanisms (ORMs)³³² (See Section 4).

³²⁵ As part of this study, the Taxi Bureau of the City of Montreal agreed to answer our questions in writing and to provide us with comparative documents. We also obtained an interview with Uber Canada.

³²⁶ Appended document provided by the City of Montreal's Taxi Bureau.

³²⁷ S. 2.3, Agreement between the Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9, 2016.

³²⁸ <https://saaq.gouv.qc.ca/transport-personnes/taxi-limousine/chauffeur/>

³²⁹ Ibid.

³³⁰ Appended document provided by the Taxi Bureau of the Ville de Montréal.

³³¹ S. 2.5, Agreement between the Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9, 2016.

³³² Written interview with Uber Canada.

Uber relies on geolocation, which is not the case with taxis.^{333, 334} Uber only offers services through its mobile app, while taxis can be hailed in the street, wait in line for fares, or be requested by phone³³⁵.

Uber offers dynamic pricing. This is determined by algorithms that typically depend on the volume of traffic. The pilot project limits the increase to 1.5 times the price “in case of force majeure.” Uber is also committed to transparency in displaying its prices and to ensuring consumer protection³³⁶. Moreover, payments to Uber are made automatically via the company’s app, while taxis are obliged to accept electronic payments and cash³³⁷.

Uber carries out a criminal record background check on its drivers with the help of private firms³³⁸. For taxis, this check is performed by the police; a tripartite committee composed of the Bureau du taxi de Montréal, the SAAQ and the *ministère des Transports, de la Mobilité durable et de l'Électrification des transports* also studies the files³³⁹.

Uber’s vehicles are identified by a sticker affixed to the rear. When a consumer uses the app, he can see the driver's name, photo and his score. Taxi drivers’ vehicles have a license plate beginning with T, a sticker number, a lantern (dome light), and a permit (pocket number) with a card bearing the name and the photo of the driver.

The Uber driver is obliged to have the mechanical inspection of his vehicle carried out by - any - mechanic and must provide an inspection report³⁴⁰. The taxi driver has to have the mechanical inspection of his vehicle carried out by an SAAQ agent once a year.

³³³ There are some exceptions, however. For example, in Québec, Teo Taxi offers taxi service using global positioning.

³³⁴ Appended document provided by the City of Montreal’s Taxi Bureau.

³³⁵ S. 2.12, Agreement between the Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9, 2016.

³³⁶ Agreement between the Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9, 2016.

³³⁷ Appended document provided by the City of Montreal’s Taxi Bureau.

³³⁸ S. 2.4, Agreement between the Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9, 2016.

³³⁹ Appended document provided by the City of Montreal’s Taxi Bureau.

³⁴⁰ S. 2.7, Agreement between the Minister of Transport, Sustainable Mobility and Transportation Electrification and Uber Canada Inc., September 9, 2016.

6.4.2 Ontario

In Ontario, the three levels of government are involved in sharing mobility. The government also made it an issue in its budget for 2015 and 2016³⁴¹. On May 3, 2016, Toronto City Council rendered a series of decisions concerning the regulation of taxis, limousines and NTCs. It went on to adopt the Vehicle-For-Hire By-Law³⁴², a regulation that came into force on July 15, 2016. The regulation included the creation of a license category for network transportation companies (NTCs) and a permit for drivers. The City's objective was to ensure that consumers who wish to use the services of the NTCs can do so safely. This regulation requires both NTCs and taxi companies to carry out mandatory criminal background checks on drivers³⁴³- those who have been convicted of certain criminal offenses cannot get permits - and includes the obligation to take out insurance - NTCs must purchase commercial liability insurance; \$5 million for the fleet and \$2 million for each vehicle.

The regulation also requires the mechanical inspection of vehicles (both taxis and those used by NTCs)³⁴⁴. It also regulates transportation costs - the price of fares solicited on the street is prescribed by the regulation. If the fare is planned via a taxi intermediary, the price may be lower than that prescribed. The regulation permits dynamic pricing for NTCs. Nevertheless, the consumer must accept the price increase before committing, and the NTCs must provide a detailed receipt. The City of Toronto is attempting to attain its objectives with regard to accessibility, including the transportation of persons with limited mobility. The city wants 12% of taxis and NTCs to be able to transportation such customers, which means that 500 NTCs will be required to do so³⁴⁵.

The City of Ottawa has also adopted a by-law³⁴⁶ for regulating NTCs. The content of this regulation is based on the recommendations of a report by KPMG³⁴⁷. The City states that although users of NTCs need to be vigilant (buyer-beware), it chose to follow the recommendations of the Competition Bureau and modernized its laws to include NTCs.

³⁴¹ Mowat Centre Sara and Michael Altid Crawford Urban "Sharing the Road: The Promise and Perils of Shared Mobility in the GTHA," August 2016, page 4.

³⁴² Vehicle-For-Hire By-Law Chapter 546, <http://www.toronto.ca/legdocs/bills/2016/bill0571.pdf>

³⁴³ Vehicle-For-Hire By-Law Chapter 546, <http://www.toronto.ca/legdocs/bills/2016/bill0571.pdf>

³⁴⁴ Vehicle-For-Hire By-Law Chapter 546, <http://www.toronto.ca/legdocs/bills/2016/bill0571.pdf>

³⁴⁵ Vehicle-For-Hire By-Law Chapter 546, <http://www.toronto.ca/legdocs/bills/2016/bill0571.pdf>

³⁴⁶ <http://ottawa.ca/en/city-hall/public-engagement/law#report>

³⁴⁷ City of Ottawa, *Taxi and Limousine Service Regulations and Review*, October 1, 2015.

6.4.3 Alberta

In January 2016, the City of Edmonton was the first city in Canada to regulate network transportation companies (NTCs). As part of a settlement, Uber has to pay \$70,000 per year; of this amount, \$20,000 will be used to finance taxis that can accommodate disabled clients. The number of NTC vehicles is not limited and fares must be \$3.25 or more. The number of vehicle inspections and driver background checks has been increased³⁴⁸.

One month later, the City of Calgary also legislated to regulate Uber. The company first announced it was withdrawing from the city. It then agreed to offer its service once more following an amendment to the fees³⁴⁹.

In June 2016, the Government of Alberta passed the *Transportation Network Companies Regulation*³⁵⁰ which governs NTCs. These companies now have several obligations: they must obtain a permit from the Registrar and require background checks for drivers (on both their criminal and driving records, as well their experience of working with vulnerable people)³⁵¹. It also states that individuals who have been convicted of certain criminal offenses may not become drivers for NTCs³⁵². In addition, NTCs are required to have insurance and keep files on their drivers³⁵³.

6.4.4 British Columbia

At the time of writing this report, network transportation companies (NTCs) were not specifically regulated in British Columbia.

However, taxi transportation in the province is governed by six laws. The first is the *Passenger Transportation Act* (2004), which outlines the permits required in order to offer transportation

³⁴⁸ <http://www.macleans.ca/economy/economicanalysis/the-right-way-and-wrong-way-for-cities-to-regulate-uber/>

³⁴⁹ Ibid.

³⁵⁰ *Transportation Network Companies Regulation*, Alberta Regulation 100 | 2016.

³⁵¹ In addition to criminal background, this check includes pardons for certain offenses, such as sexual offenses. Generally, this type of check is for people working in positions of authority with vulnerable individuals, such as children *Vehicle-For-Hire By-Law* Chapter 546, <http://www.toronto.ca/legdocs/bills/2016/bill0571.pdf>.

³⁵² S. 4 (4) *Transportation Network Companies Regulation*.

³⁵³ S. 5 *Transportation Network Companies Regulation*.

to people for compensation³⁵⁴, the *Commercial Transportation Act* (1959), which regulates the vehicles used for this form of transportation (the Transportation Minister is responsible for its implementation)³⁵⁵ and the *Insurance (Motor Vehicle) Act* (2007), which states that taxis must comply with the law and buy insurance products in accordance with the insurable risk³⁵⁶.

There is also the *Motor Vehicle Act* (1974), which defines what constitutes a Type 4 license (it includes taxi and limousine licenses), the criteria for obtaining it and the safety standards to be respected³⁵⁷. Under the *Local Government Act-2000* and the *Community Charter-2003* certain provincial powers may be delegated to a municipality. At the provincial level, it is the Passenger Transportation Board that determines the number of taxis in each municipality and establishes policies to ensure that users are protected.

In the spring of 2016, the provincial government undertook consultation with various stakeholders. This process revealed that the current framework does not seem suited to NTCs. There appears to be an opening for legislation, but the province would require that certain principles be respected. The principal ones are public safety – which will require checking the background and skills of drivers and vehicle safety³⁵⁸ - and accessibility for disabled persons³⁵⁹, equitable rules between the parties³⁶⁰, laws adapted to modern transportation³⁶¹, and finally, consumer satisfaction. In British Columbia, it can be difficult to find a taxi in the city center during peak hours. The government believes it must increase the number of taxis and gradually allow the entry of NTCs³⁶².

6.5 Contract analysis

In our study, we carried out an analysis of the contracts of numerous online sharing economy platforms (OSEPs). For example, we investigated the contracts of Netlift (carpooling), Turo (car

³⁵⁴ The Hon. Peter Fassbender, *Ride Sourcing in BC: Stakeholder Engagement Summary*, October 2016, page 2.

³⁵⁵ The Hon. Peter Fassbender, *Ride Sourcing in BC: Stakeholder Engagement Summary*, October 2016, page 2.

³⁵⁶ The Hon. Peter Fassbender, *Ride Sourcing in BC: Stakeholder Engagement Summary*, October 2016, page 2.

³⁵⁷ The Hon. Peter Fassbender, *Ride Sourcing in BC: Stakeholder Engagement Summary*, October 2016, page 2.

³⁵⁸ The Hon. Peter Fassbender, *Ride Sourcing in BC: Stakeholder Engagement Summary*, October 2016, page 5.

³⁵⁹ The Hon. Peter Fassbender, *Ride Sourcing in BC: Stakeholder Engagement Summary*, October 2016, page 5.

³⁶⁰ The Hon. Peter Fassbender, *Ride Sourcing in BC: Stakeholder Engagement Summary*, October 2016, Page 6.

³⁶¹ The Hon. Peter Fassbender, *Ride Sourcing in BC: Stakeholder Engagement Summary*, October 2016, Page 7.

³⁶² The Hon. Peter Fassbender, *Ride Sourcing in BC: Stakeholder Engagement Summary*, October 2016, Page 5.

sharing), Ripe³⁶³ and Uber³⁶⁴(transportation). We paid special attention to Uber because of its major place in Canadian and world markets. Uber currently operates in 81 countries and 581 cities worldwide, and has an estimated worth of \$66 billion³⁶⁵.

6.5.1 Defining online sharing economy platforms

OSEPs put people into contact with each other. In its contract, Uber states that it provides the services of a technology platform. It specifies that this platform allows users, via a mobile app, to access services or to organize travel or logistics services with independent third party providers (drivers). Further, Uber states that it does not provide transportation or logistics services and that it does not act as a carrier. It asserts that its services are provided by the drivers, who are independent contractors and not employees or persons related to the company³⁶⁶. We believe this clause could be problematic, because it is not legally correct³⁶⁷.

Netlift says that it offers a service via its online platform that allows drivers to offer carpooling to one or more passengers (Section. 1 c). It states that it permits access to a user account and facilitates payments between the parties. Turo defines itself as a platform that connects people wanting to rent their vehicles to individuals³⁶⁸. It says it performs checks on potential drivers, including verifying their credit, their driving record, their insurance record and their personal and professional background³⁶⁹.

6.5.2 Service provided without a warranty

OSEPs state that they provide their services “as is” or “as available.” For example, Uber says that its services are provided without any warranty, express or implied, including warranties of quality, merchantability and reliability. It says that it offers no warranties of punctuality, service quality or safety. It states that the consumer is responsible for all risks, to the extent permitted under the applicable laws³⁷⁰.

³⁶³ This company offers its services in British Columbia.

³⁶⁴ This company offers its services in Québec, Ontario and Alberta.

³⁶⁵ <http://uberestimator.com/cities>

³⁶⁶ <https://www.uber.com/legal/terms/ca/>

³⁶⁷ <https://www.uber.com/legal/terms/ca/>

³⁶⁸ <https://www.netlift.me/terms/>

³⁶⁹ <https://turo.com/policies/terms>

³⁷⁰ <https://www.uber.com/legal/terms/ca/>

It appears that this provision is contrary to the protection provided in the *Civil Code* and consumer protection laws. Common law favours contractual freedom, but also specifies limitations in certain circumstances (see Section 5). It imposes strict obligations on common carriers and private carriers.

6.5.3 Limitation of liability

The contracts of the network transportation companies (NTCs) also limit these companies' civil liability. Uber maintains that it may not be held liable for any potential damage, or almost all possible risks, arguing that the consumer has solicited the services of a third party provider. The company also limits the amount of damages that can be awarded to \$500. However, Uber says that the limitation of liability do not apply where the law states that the rights of consumers cannot be excluded or reduced³⁷¹.

Other NTC platforms have similar practices. For example, Ripe also has a clause limiting its liability³⁷². Turo states that the user and all related persons waive any and all their rights and remedies for any damages suffered... "whereas permitted by law³⁷³".

Netlift, for its part, especially limits its liability for any damage caused by the vehicle's passengers. In addition, on its website, Netlift provides information on civil liability with regard to physical or verbal abuse, as well as public compensation systems, such as the *Compensation for Victims of Crime Act (CVCA)*³⁷⁴.

6.5.4 ... and consumer remedies

OSEPs also limit consumer redress. In clause 6 of the Uber contract, it states that consumers are governed by the laws of the Netherlands, except for that country's rules regarding conflicts of laws. Consumers are required to submit their dispute to mediation and, if the situation is not resolved within 60 days, must submit their dispute to arbitration. This must take place in Amsterdam, without prejudice to certain rights under the relevant European directives and

³⁷¹ <https://www.uber.com/legal/terms/ca/>

³⁷² <https://www.riperides.ca/legal.html>

³⁷³ <https://turo.com/policies/terms>

³⁷⁴ <https://www.netlift.me/terms/>

certain provisions of the *Dutch Civil Code*. Arbitration will take place in English or in the language of the consumer and English. All procedures (including results) shall remain confidential³⁷⁵.

Like Uber, Turo limits the rights and remedies of consumers. It requires them to submit their disputes to arbitration, unless it is subject to injunctive relief for intellectual property reasons. It prohibits class actions, but allows consumers to institute proceedings in small claims court in the district of Phoenix, Arizona. It prohibits class arbitration unless Turo accepts. Nevertheless, it allows consumers to exercise a right of withdrawal, which must be in writing. It specifies that the applicable law is that of the State of Arizona, regardless of principles of conflicts of law³⁷⁶.

Ripe also contains a clause concerning the choice of applicable law, but says that this clause may be unenforceable against consumers in certain jurisdictions³⁷⁷.

6.5.5 Changing terms of agreement and notices to consumers

In some contracts, the companies reserve the right to change the terms of the agreement without informing consumers. This is particularly the case with Uber³⁷⁸ and Turo³⁷⁹. This type of change has been deemed unenforceable in certain jurisdictions (see Section 3).

6.5.6 Insurance

Uber provides insurance coverage in line with the regulatory requirements for NTCs in the various jurisdictions. In cases when the province has adopted a no-fault regime, Ripe offers no liability insurance. A consumer who violates the terms of the contract would lose his insurance coverage in the event of an accident. On its website, Netlift says there is no need to purchase additional insurance and notes that a private insurance provider is sufficient because carpooling is non-profit; the compensation paid to the service provider being intended only to reduce fuel

³⁷⁵ <https://www.uber.com/legal/terms/ca/>

³⁷⁶ <https://turo.com/policies/terms>

³⁷⁷ <https://www.riperides.ca/legal.html>

³⁷⁸ <https://www.uber.com/legal/terms/ca/>

³⁷⁹ <https://turo.com/policies/terms>

costs, vehicle wear and parking costs. Netlift says carpooling should be seen as complementing the journey that would have been made with or without passengers³⁸⁰.

Turo says it provides liability insurance to consumers residing in Québec, Ontario and Alberta, but this information seemed hard to understand. In the general section of the terms, there is a hyperlink allowing the consumer to access information on the law in their province of residence. This link brings up a web page of Intact Insurance that offers general information on car sharing and insurance³⁸¹. One can click on another link to get more information on car sharing, the insurance product and the role of the insurer³⁸².

Moreover, Turo specifies that it is neither an insurer nor a broker, but adds that it contracts group insurance (liability and damages) for users. When the owner of a vehicle does business, through the platform, with an individual who rents his vehicle, Turo is the insured party and the consumer who has a complaint has to deal with a third party. Turo seems here to be contradicting itself: at one moment it claims to provide insurance, and at another it claims to have renounced it or subscribes to the minimum required by law³⁸³.

When the time comes for consumers to buy insurance, they have a choice between two products with different deductibles. We were informed that the information related to insurance information was difficult to understand and that the information on the deductibles was hard to find on the website. We checked this and saw it first hand. This leads us to ask questions about the usability of the site. Do consumers have easy access to the information they need to make an informed decision³⁸⁴ ?

³⁸⁰ <https://netlift.zendesk.com/hc/fr/articles/213384998-Le-fait-d-%C3%Aatre-chauffeur-n%C3%A9cessite-t-il-un-r%C3%A9gime-d-extra-insurance-%C3%A9mentaire->

³⁸¹ <https://www.intact.ca/turo-car-sharing>

³⁸² <https://www.intact.ca/resources/intact-insurance/assets/Turo-FAQ-Québec.pdf>

³⁸³ <https://turo.com/policies/terms>

³⁸⁴ <https://turo.com/policies/terms>

Section 7. Short-term housing rentals

7.1 Definition and Scope

Online sharing economy platforms (OSEPs) that bring people who want to rent their homes (or a part thereof) together with people seeking short time accommodation are becoming increasingly popular. Platforms are also beginning to emerge that match drivers looking for a parking space with people who have one vacant.

In the context of our research, we studied short-term private accommodation rental (STPAR) platforms including Airbnb, HomeAway, VRBO, VacationRentals³⁸⁵ and Flipkey³⁸⁶ as well as parking space rental (PSR) platforms – such as Rover and WhereiPark. On the other hand, we did not study sites posting small ads online such as Craigslist and Kijiji³⁸⁷.

We will focus on STPAR platforms because of the challenges they pose in terms of monitoring and consumer protection. In addition, we will pay particular attention to Airbnb because of its importance on the Canadian market.

STPAR platforms function like an online marketplace where consumers can choose an accommodation based on its location, type, size, price, or their personal taste. The host provides a description of the accommodation, with supporting photographs.

Unlike Uber, Airbnb does not set prices; it provides tools for consumers so that they can refine their searches. It also provides tools for the hosts, so that they can publish enticing ads and make good deals. Payment is by means of an escrow service. It also provides online dispute resolution mechanisms. It also provides insurance products for hosts and warranties to consumers³⁸⁸. It has the power to remove accounts from its OSEP.

³⁸⁵ OSEPs of the HomeAway, VRBO and Vacation Rentals type are governed by the same terms of the agreement.

³⁸⁶ These are offered to consumers in City of Toronto: Policy, Research, Public Consultation and Events, “Short-term Rentals,” October 2016, and represent 97% of the market to those offered to consumers in Vancouver and Host Company LLC, “City of Vancouver Short-Rental Market Overview,” August 2016.

³⁸⁷ We excluded these platforms because they are less popular with consumers, and because short-term accommodation rentals do not represent a major share of their turnover.

³⁸⁸ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, pages 23 and 49.

7.2 Some numbers

Short-term private accommodation rental (STPAR) platforms are popular with Canadian consumers, who from November 2015 to October 2016, reportedly spent close to \$ 1.1 billion, in Canada and abroad, for an average of \$890 each. Of this total, \$367 million was spent in Canada³⁸⁹.

Our survey shows that STPAR platforms are popular among respondents who were OSEP users. In fact, 56% reported having used them. The highest percentage of our respondents who have used the platforms were from Ontario (41%) but proportionately, it is the residents of British Columbia who use them the most (69%). Note that these results are different from those in the Statistics Canada survey, since the populations studied are different. In fact, Statistics Canada surveyed the general population, while we restricted our survey to OSEP users³⁹⁰.

Although STPAR platforms are quite popular among respondents 18 to 34 years old, proportionally, they are most used by people over 65 (69%)³⁹¹ According to a Statistics Canada survey released in 2017, however, it is the 25 to 34 age group that uses the service most³⁹². Respondents to our survey reported using STPAR platforms because the prices are relatively low (73%), because the sharing economy is one of their values (33%) because they are easy to use (32%) and because the service is good (28%)³⁹³. Note that it was the younger respondents who most often referred to ease of use. In addition, respondents were generally satisfied with the STPAR, since 74% of them said they had an excellent or very good experience. However, British Columbia residents were slightly less satisfied than respondents in other provinces³⁹⁴.

Among the STPAR platforms, Airbnb is by far the most important. It is present in 191 countries and in more than 65,000 cities; over 3 million accommodations are posted on the company's website³⁹⁵. Ninety-seven percent of the ads propose accommodation for a period of less than 30

³⁸⁹ <http://www.statcan.gc.ca/daily-quotidien/170228/dq170228b-eng.htm>

³⁹⁰ <http://www.statcan.gc.ca/daily-quotidien/170228/dq170228b-eng.htm> Summary analysis of the results of a survey of collaborative economy services users, Appendix 1.

³⁹¹ Summary analysis of the results of a survey of collaborative economy services users, Appendix 1.

³⁹² <http://www.statcan.gc.ca/daily-quotidien/170228/dq170228b-eng.htm>

³⁹³ Summary analysis of the results of a survey of collaborative economy services users, Appendix 1.

³⁹⁴ Summary analysis of the results of a survey of collaborative economy services users, Appendix 1.

³⁹⁵ <https://www.airbnb.ca/about/about-us?locale=en>

days. Of these ads, 24% offer houses and 69% condos or apartments³⁹⁶. A 2014 Airbnb study revealed that 2900 Montrealers were registered as hosts³⁹⁷. In 2016, 12,260 homes in Toronto were listed on Airbnb, compared with 700 homes on Flipkey, 640 on VRBO, 480 on HomeAway and 200 on Roomorama³⁹⁸. In this study, we focus on STPAR platforms in the context of the sharing economy.

7.3 Benefits

The benefits of short-term private accommodation rental (STPAR) platforms may be similar to those described in Section 2. They allow consumers to travel differently, i.e. to interact more closely with citizens of the place they are visiting. STPAR platforms are also a plus for the neighbourhoods where the accommodation is located, as they can benefit from tourist spending³⁹⁹. Also, some STPAR platforms have developed initiatives to help consumers and aid workers to locate accommodation in times of crisis; one particular example is Airbnb's Disaster Response Program⁴⁰⁰.

7.4 The challenges

7.4.1 For consumers

Issues related to short-term private accommodation rental (STPAR) platforms were brought up by the majority of our experts. Many pointed to the challenges these platforms pose in the area of consumer protection⁴⁰¹. As we stated in Section 3, the scope of consumer protection laws varies from one province to another with regard to STPAR platforms.

³⁹⁶ City of Toronto: Policy, Research, Public Consultation and Events, "Short-term Rentals," October 2016.

³⁹⁷ Airbnb, "Impact du partage de son logement à Montréal," 2014.

³⁹⁸ City of Toronto: Policy, Research, Public Consultation and Events, "Short-term Rentals," October 2016.

³⁹⁹ Airbnb, "Impact du partage de son logement à Montréal," 2014

⁴⁰⁰ <https://www.airbnb.ca/disaster-response> and Privy Council "Back to the Future: Sharing Economy report for CSMIP, February 2015.

⁴⁰¹ The following experts raised issues in the context of an STPAR OSEP: Pierre-Claude Lafond, Professor in the Faculty of Law at the University of Montreal, Nicolas Vermeys, Associate Professor in the Faculty of Law at the University of Montreal, Marc Lacoursière, Professor in the Faculty of Law at Université Laval, Pierre-Yves Yanni, Professor in the Economics Department at Université du Québec à Montréal, Dr. Jacques St Amant, an expert in consumer law and lecturer at the Université du Québec à Montreal, representatives of Business and Consumer Services Nova Scotia, an official working for the Ministry of Government and Consumer Services Ontario (he wanted to remain anonymous), Eric Greene, Director, Consumer Protection Division, Financial and Consumer Affairs Authority, Saskatchewan, John Lawford, Executive Director of Legal Affairs and Defense of the Public Interest, and Yannick Labelle, attorney for Union des consommateurs.

Hosts do not form a homogeneous category. Some rent a main section of their residence and are present during the stay of their visitors. Others rent their entire residence or a second home and are absent. Others have several residences that they rent on platforms.

STPAR platforms claim that the hosts are individuals. They exploit their rental business on an occasional basis. They have no special training, and they work part time⁴⁰². They could, however, be considered to be merchants under some consumer protection laws. According to several studies, such a framework should not be imposed on the hosts, because they do not perform the same activities as merchants⁴⁰³.

We are not of that opinion. A US study reported that some hosts lease many properties (sometimes more than 20 units) simultaneously and repeatedly^{404, 405}. Another state study in New York found that 6% of hosts rent more than three units⁴⁰⁶. Such hosts reportedly generate 40% of Airbnb revenues⁴⁰⁷. The company does claim, however, that it has acted against illegal hotels. One would have little difficulty calling hosts with so many properties merchants. Since provincial consumer protection legislation includes the rental of short-term accommodation, it should be applied to such cases.

There are also hosts who rent their dwelling or part of it very occasionally, perhaps just once a year. It's pretty clear that these people are not merchants.

Not surprisingly, many hosts fall between those two extremes. Determining the status of a host can be a daunting task, especially if one does not know the full extent of their activities.

⁴⁰² Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, pages 75-76.

⁴⁰³ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, pages 75-76, and Mars Solution Labs "Shifting Perspectives: Redesigning Regulation for Sharing Economy," March 2016.

⁴⁰⁴ CBRE Hotels' Americas Research, "Hosts with Multiple Units – A Key Driver of Airbnb Growth: A Comprehensive National Review Including a Spotlight on 13 U.S. Markets," March 2017.

⁴⁰⁵ Although this study comes from the industry, which traditionally takes a dim view of shared digital platforms such as Airbnb, Option consommateurs has decided to include this data because the methodology seems sound and the results relevant. Indeed, in order to arrive at its results, CBRE analyzed data compiled by AirDNA on offers published on Airbnb as well as the revenue generated. AirDNA is a company that specializes in data collection for entrepreneurs in the hospitality sector.

⁴⁰⁶ CBRE Hotels' Americas Research, "Hosts with Multiple Units – A Key Driver of Airbnb Growth: A Comprehensive National Review Including a Spotlight on 13 U.S. Markets," March 2017.

⁴⁰⁷ Federal Trade Commission, *The Sharing Economy: Issues Facing Platforms, Participants and Regulators*, November 2016, pages 75-76.

Some experts are concerned about the safety of consumers. They do not really know whom they are dealing with, and whose home they are staying in. They may find themselves in a very vulnerable situation, especially in a foreign country. The fact that accommodation rented via a platform are less well-regulated than regular tourist accommodation does not help. Are they located in safe buildings that are easy to get out of in case of fire (although, if the accommodation is safe enough for the host who resides there, shouldn't it be good enough for the traveler...)? Could the host become violent? When the host is absent, other questions arise. Will the user know what to do if problems come up⁴⁰⁸? Some studies report that due to cognitive biases, consumers are not always able to assess all the safety factors (see Section 4)⁴⁰⁹.

The experts also pointed out the risks posed to the occupants of an accommodation that is rented illegally (as defined in the Act or the building regulations)⁴¹⁰. They could find themselves being expelled, a situation that would make them very vulnerable. Some authors claim that condominium associations should play an active role in overseeing the renting of short-term private accommodation (STPAR) rather than banning them. In their view, banning them will not bring about a change in behaviour, but will force the transactions into hiding, thereby increasing the vulnerability of consumers and the residents of the building⁴¹¹.

7.4.2 ... and for others?

Renting short-term private accommodation (STPAR) can also result in disadvantages or challenges for third parties. Neighbours do not necessarily look forward to seeing tourists arrive, especially when it's an apartment that is being rented. In addition, some visitors may be loud or disrespectful⁴¹². What is more, excessive numbers of short-term private accommodation rentals

⁴⁰⁸ Mars Solution Labs *Shifting Perspectives: Redesigning Regulation For Sharing Economy*, March 2016, page 38, and Reiner Schulze and Dirk Staudenmayer (eds.), "Digital Revolution: The Challenges for Contract Law in Practice" Nomos, 2016, Chapter 1 written by Gerd Billen, "The Challenges of Digitalization for Consumers" Page 101, and Benjamin G. Edelman and Damien Geradin "Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?" 19 Stan. Tech. L. Rev. 293 2015-2016, page 310.

⁴⁰⁹ Benjamin G. Edelman and Damien Geradin "Efficiencies and Regulatory Shortcuts: How Should we Regulate Companies Like Airbnb and Uber?" 19 Stan. Tech. L. Rev. 293 2015-2016, page 318.

⁴¹⁰ Condo associations may oppose the rental of private housing in the short term (LLPCT) for reasons of cost, insurance and responsibility.

⁴¹¹ Mars Solution Labs, "Shifting Perspectives: Redesigning Regulation for Sharing Economy," March 2016, page 38 ff.

⁴¹² Mars Solution Labs *Shifting Perspectives: Redesigning Regulation For Sharing Economy*, March 2016, page 38, and Reiner Schulze and Dirk Staudenmayer (eds.), "Digital Revolution: The Challenges for Contract Law in Practice" Nomos, 2016, Chapter 1 written by Gerd Billen, "The Challenges of Digitalization for Consumers" Page 101, and Benjamin G. Edelman and Damien Geradin "Efficiencies

can reduce the number of homes available for residents, which can also have an impact on prices⁴¹³.

7.5 The legal framework and short-term rental accommodation

Some provinces have found different solutions to the problems raised by renting short-term private accommodation via a platform. One adopted a strict regulatory framework, another adopted a pilot project, while two others are studying the issue. Some municipalities decided to intervene, as was the case in Toronto and Vancouver.

7.5.1 Québec

In Québec, businesses that offer short-term rental accommodation, such as hotels and B&Bs, must first obtain authorization for tourist accommodation. They are also governed by the *Tourist Establishments Act* (TEA) and its Regulations⁴¹⁴. This law sets forth certain obligations including that of obtaining a classification certificate⁴¹⁵. In the Act, a tourist accommodation establishment is defined as “Any establishment in which at least one accommodation unit is offered for rent to tourists, in return for payment, for a period not exceeding 31 days, on a regular basis in the same calendar year and the availability of which is made public.” Section 2 states that an accommodation unit consists of “a room, a bed, a suite, an apartment, a house, a cottage, a ready-to-camp unit or a camp site”⁴¹⁶.

In the fall of 2015, the legislator intervened to ensure that Airbnb-type short-term private accommodation rentals (STPAR) are regulated by the TEA. In doing so, he said that the definition of a tourist now reads as follows: “a person who takes a leisure or business trip, or a trip to carry out remunerated work, of not less than one night nor more than one year outside the municipality where the person’s place of residence is located and who uses private or commercial accommodation services”⁴¹⁷. The consequence of adding the definition of “tourist”

and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?” 19 *Stan. Tech. L. Rev.* 293 2015-2016, page 310.

⁴¹³ *ibid.*

⁴¹⁴ James Woods and Antonietta Melchiorre, “Aspect juridique de la location en ligne à l’ère d’Airbnb,” Lapointe Rosenstein Marchand Melançon, February 2016.

⁴¹⁵ *Act Respecting Tourist Accommodation Establishments*, CQLR c E-14.2.

⁴¹⁶ Ss. 1 and 2, *Regulation Respecting Tourist Accommodation Establishments*, CQLR c E-14.2, r 1.

⁴¹⁷ S. 1 para2 *Act Respecting Tourist Accommodation Establishments*, CQLR c E-14.2.

is that both individuals and businesses that rent their accommodation to a person who is a resident in another municipality will be considered as having a tourist establishment, even if it does not appear as such. They must obtain a classification certificate and collect tax on the accommodation⁴¹⁸.

Another change relates to the process of applying for certification⁴¹⁹. Yet another is the increase in fines for non-compliance. Previously, fines could be between \$750 and \$2,500; these have since gone up to \$2,500 to \$25,000 for an individual and \$5,000 to \$50,000 for a corporation⁴²⁰.

For its part, the City of Montreal, stated that it was important to regulate STPAR and requested that the provincial government intervene⁴²¹. It was reported in the media that the TCA is difficult to apply and that, there are many individuals offering rentals on Airbnb who have not obtained certification. Some hosts were given warnings or fines. According to a CBC investigation⁴²² of 10,000 ads, only 0.4% had applied for a permit⁴²³.

Note that judgments regarding Airbnb are usually about the rights of the “tenant” or “owner” to rent their house, to a change in the vocation of the building and to issues of co-ownership (see Section 3). We found one judgment related to the impact of STPAR on insurance; in this case, the fact that the insured was hosting an STPAR led to a reduction in the damages awarded⁴²⁴. On the other hand, we found no judgment relating to the rights of consumers who rented via an OSEP.

There is no difference between short-term rentals and very short-term rentals. Condominium associations may limit the duration of the lease by, for example, prohibiting leases shorter than

⁴¹⁸ James Woods and Antonietta Melchiorre, “Aspect juridique de la location en ligne à l’ère d’Airbnb,” Lapointe Rosenstein Marchand Melançon, February 2016 and Cloe Fauchon “L’encadrement d’Airbnb par le gouvernement provincial” Lavery, The Right to Know, November 2015.

⁴¹⁹ S. 37, Law on tourist accommodation establishments, CQLR c E-14.2 and Cloe Fauchon “L’encadrement d’Airbnb par le gouvernement provincial” Lavery, The Right to Know, November 2015.

⁴²⁰ Ibid.

⁴²¹ http://ville.montreal.qc.ca/documents/Adi_Public/CM/CM_ODJ_ORDI_2015-06-15_13h00_FR.pdf

⁴²² This survey was made public after this report was drafted, but before publication.

⁴²³ <http://ici.radio-canada.ca/nouvelle/1030589/la-loi-anti-airbnb-a-peu-effet-logements-location-Quebec-montreal>. This study was made public after the writing of this report, but before publication. We have added this, since the survey brought to light certain omissions.

⁴²⁴ *Leblanc v. Axa Assurance inc.*, 2014 QCCS 4393 (CanLII).

six months. They may also limit certain activities⁴²⁵. Renting by a corporation is not necessarily a commercial activity; one needs to look at the facts⁴²⁶. However, in the case of rentals of less than 31 days, even in the absence of a regulation prohibiting it, it seems probable that this is a commercial activity.

7.5.2 Ontario

In this province, businesses such as hotels that offer short-term rentals have to comply with numerous laws, including the *Inkeepers Act*⁴²⁷, the *Fire Code*⁴²⁸, the *Hotel Guest Registration Act*⁴²⁹, the *Accessibility for Ontarians with Disabilities Act*⁴³⁰, the *Taxation Act*⁴³¹, the *Smoke Free Ontario Act*⁴³² and the *Workplace Safety and Insurance Act*⁴³³. They must also comply with 29 other pieces of provincial legislation⁴³⁴. As in Québec, travel agencies have special obligations to their customers (performance requirements)⁴³⁵.

In February 2016, Ontario announced the adoption of a pilot project with Airbnb. The goal was to raise the awareness of hosts in several sectors of their obligations and their responsibilities in the areas of taxation and consumer protection, particularly with regards to disclosure of information, contractual obligations and reimbursement. In particular, this pilot project takes consumers' safety into account by adding the obligation to have smoke and carbon monoxide detectors. It also adds accessibility requirements, e.g. allowing guide dogs. The hosts will be informed of their obligations by Airbnb; they can also consult a government website⁴³⁶.

Municipalities play an important leadership role, particularly through zoning – short-term rentals are allowed in some areas and banned in others. In Toronto, Zoning By-law 569-2013

⁴²⁵ S. 1096 CCQ CQLR c CCQ-1991 and Bruno BOURDELIN, "Chronique - La location à court terme en copropriété divisée" Carswell, Mark, November 2015.

⁴²⁶ Kilzi c. *Syndicat de co-propriétaire du 10 400 boul. l'Acadie*, REJB 2001-26512.

⁴²⁷ *Inkeepers Act*, RSO 1990, c I-7.

⁴²⁸ *Fire Code*, O Reg 213/07.

⁴²⁹ *Hotel Registration of Guests Act*, R.S.O. 1990, c. H.17.

⁴³⁰ *Accessibility for Ontarians With Disabilities Act*, 2005, SO 2005, c 11.

⁴³¹ *Taxation Act*, 2007, SO 2007, c 11, Sch A.

⁴³² *Smoke-Free Ontario Act*, SO 1994, c 10.

⁴³³ *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Sch A

⁴³⁴ Mowat Centre, Sunil Johal and Noah Zon, "Policymaking for the Sharing Economy: Beyond Whack-A-Mole," February 2015, page 15 and Mars Lab Solution, "Shifting Perspectives: Redesigning Regulation for Sharing Economy" March 2016, pages 35 and following, and City of Toronto: Policy, Research, Public Consultation and Events, "Short-Term Rentals."

⁴³⁵ *Travel Industry Act*, 2002, SO 2002, c 30, Sch D, and City of Toronto: Policy, Research, Public Consultation and Events, "Short-term Rentals" October 2016.

⁴³⁶ <https://news.ontario.ca/mof/en/2016/02/ontario-partners-with-airbnb-on-new-pilot-project.html>

governs short-term rental accommodation, but does not cover the entire territory of the city. Under this regulation, short-term private accommodation rental (STPAR) may be compared to an establishment welcoming tourists. It may be permitted in some cases, especially if done in a part of the host's main residence and offered in the short-term for travellers; it may or may not include meals. However, if the host does not live in the rental accommodation, it can be considered a hotel according to Zoning By-Law 569-2013. Hotels have to pay commercial-type municipal taxes, while B&Bs pay residential municipal taxes. Furthermore, the City of Toronto does not collect additional taxes for hotels⁴³⁷.

Although the right to ownership includes the right to sell, lease or transfer property, the *Condominium Act*⁴³⁸ allows the condominium association to adopt regulations and rules prohibiting short-term rentals⁴³⁹. One author states that the wording of the condominium regulations and the Act may complicate the situation in the case of STPAR via an OSEP. Whereas condos are often rented, the *Residential Tenancy Act* allows the tenant to sub-lease with the owner's permission. Also, some condominium regulations state that the unit can only be used for residential purposes. The notion of commercial activity within the meaning of this law relates to the nature of the activity, not the relationship between landlord and tenant. Also, the mere fact of an owner attempting to make a profit does not make it a business activity, since many owners are looking to make a profit when they buy a building⁴⁴⁰.

Moreover, MaRS Solution Labs recommends that STPAR be permitted. It recommends that home sharing be limited to only permitting the host's principal residence to be rented, for a maximum period of 180 days. This would ensure that the host lives in the residence at least 50% of the time during the year⁴⁴¹. Note: After this report was completed but before it was submitted in June 2017, the City of Toronto introduced a regulation to regulate STPAR⁴⁴².

⁴³⁷ City of Toronto: Policy, Research, "Public Consultation and Events, Short Term Rentals" October 2016.

⁴³⁸ *Condominium Act*, 1998, SO 1998, c 19, City of Toronto: Policy, Research, "Public Consultation and Events, Short Term Rentals" October 2016, and Monica Peters "A long look at short term rentals: lawmakers, condo boards and landlords struggle to control online accommodation sites," vol. 34, No. 21, October 2014.

⁴³⁹ Mars Solution Labs, *Shifting Perspectives: Redesigning Regulation For Sharing Economy* March 2016, page 4.

⁴⁴⁰ Monica Peters, "A long look at short term rentals: lawmakers, condo boards and landlords struggle to control online accommodation sites" flight. 34, No. 21, October 2014.

⁴⁴¹ Mars Solution Labs, *Shifting Perspectives: Redesigning Regulation For Sharing Economy* March 2016, pages 43-44.

⁴⁴² <http://www.toronto.ca/legdocs/mmis/2017/ex/bgrd/backgroundfile-104802.pdf>

7.5.3 British Columbia

The government of British Columbia has said that it is studying the issue of regulating short-term private accommodation rentals (STPAR). Until recently, the City of Vancouver's by-laws prohibited STPAR, unless it was offered by a hotel or B & B. Nevertheless, there were many homes on OSEPs offering STPAR. Since Vancouver was experiencing a serious housing crisis at that time, this was an important issue. In September 2016, the City Council passed a motion to allow STPAR for less than 30 days, but only for primary residences and after obtaining a permit⁴⁴³. As in other jurisdictions, it is difficult to apply the law since a complaint needs to be filed in order for an investigation to be carried out.

7.5.4 Nova Scotia

In March 2016, the provincial government began an impact study to assess Airbnb and Uber type OSEPs⁴⁴⁴.

7.5.5 Other provinces

Short-term private accommodation rental (STPAR) is present in every province. Nevertheless, at the time of writing this report, several provinces had not adapted legislation to regulate STPAR via OSEPs. These provinces have laws that govern accommodation, short-term rental, lodging, zoning and certain business practices. Thanks to the legislation already in place, they are able to take action against illegal hotels and regulate accommodation.

The Alberta legislature has not intervened to regulate STPAR via OSEPs. The cities of Calgary and Edmonton have not done so, either. Alberta's *Condominium Property Act*⁴⁴⁵ prevents condominium regulations from prohibiting or restricting the rental of a unit. Nevertheless, building regulations may restrict commercial activities in the units and in public areas. One

⁴⁴³ <http://council.vancouver.ca/20161005/documents/pspc1c.pdf>

⁴⁴⁴ <http://www.cbc.ca/news/canada/nova-scotia/uber-airbnb-tourism-bookings-rooms-taxi-1.3472845>

⁴⁴⁵ *Condominium Property Act*, RSA 2000, c C-22 and Alan Rankine "Condo By-Laws v. Airbnb," *The Lawyers Weekly*, Vol. 35, No. 21, October 2015.

wonders if advertising accommodation on a site such as Airbnb can be considered a commercial activity, especially as the courts have recognized that keeping a hotel or resort, as well as offering vacation timeshare, constitutes a commercial activity⁴⁴⁶.

The provinces that have not enacted a specific law to govern STPAR OSEPs or have studied the possibility of adopting one, are Saskatchewan (Saskatoon, however, is considering regulating Airbnb), Manitoba, New Brunswick, Prince Edward Island and Newfoundland and Labrador. Some provinces, such as Newfoundland and Labrador, view OSEPs like Airbnb favourably, as they do not have a sufficient number of hotels to accommodate all their tourists⁴⁴⁷.

7.6 Analysing the contracts

7.6.1 Definition of the platform

STPAR and parking space rental (PSR) platforms also deny that they are one of the parties involved in the transaction. Several, such as Flipkey⁴⁴⁸ and HomeAway⁴⁴⁹, say that they are only online marketplaces where people can post ads that consumers are allowed to access. For its part, Airbnb says it offers access to an online platform that connects hosts with accommodation for rent and consumers looking for such accommodation⁴⁵⁰. It adds that it does not have to check the content of the ads as it is not responsible for them⁴⁵¹.

The OSEP Rover, for its part, described the agreement as a licensing agreement between the driver, who has a reserved parking space, and the owner of the parking lot. Rover acts like the owner's agent with regard to the agreement, which is binding on both the driver and owner. He has the right to force execution of the agreement but has no obligation to the parties⁴⁵².

When we consider the terms of the contract, however, it becomes clear that OSEPs do not just connect people. For example, Airbnb offers advice, tools⁴⁵³ and an escrow service. It also offers

⁴⁴⁶ Alan Rankine, "Condo By-Laws v. Airbnb" *The Lawyers Weekly*, Vol. 35, No. 21, October 2015.

⁴⁴⁷ Interview with Kevin King, Divisional Director, Service NL, Consumer Affairs and Leonard Penton, Consumer Affairs Officer

⁴⁴⁸ https://www.tripadvisor.com/pages/ftl_fk_terms_and_conditions.html

⁴⁴⁹ <https://www.homeaway.ca/info/about-us/legal/terms-conditions>

⁴⁵⁰ <https://www.airbnb.ca/terms?locale=en>

⁴⁵¹ <https://www.airbnb.ca/terms?locale=en>

⁴⁵² <http://roverparking.com/termsAndConditions/>

⁴⁵³ <https://www.airbnb.ca/terms?locale=en>

insurance products and dispute resolution mechanisms. In some jurisdictions, it even goes as far as to facilitate the collection of passenger occupancy taxes⁴⁵⁴.

7.6.2 Identity of parties and consumer safety

To ensure the safety of the parties, Airbnb can verify their identity to the extent permitted by law; it also gives itself the right to investigate⁴⁵⁵ or to expel them. In doing so, it especially verifies whether they have a criminal record. In the US, it can also check their prior sexual conduct. Note that the version of the contract dated March 2016 referred only to checking history relating to sexual offences. This specification was excluded from its October 2016 contract.

7.6.3 “As is” service

Short-term private accommodation rental (STPAR) OSEPs say they also offer an “as is” service and limit all forms of guarantees⁴⁵⁶. Airbnb states that it limits warranties to the extent permitted by applicable laws⁴⁵⁷.

7.6.4 Limitation of liability

Online sharing economy platforms (OSEPs) also limit their liability for damages on the grounds that they are not part of the transaction⁴⁵⁸ or that the hosts are self-employed. In addition, some OSEPs limit the liability of third parties such as service providers. Airbnb says it does not form part of the transaction, but only contacts the parties, and has no control over hosts and consumers and, as such, it excludes itself from all liability. However, Airbnb limits its exclusion from liability to the extent permitted by the applicable laws⁴⁵⁹.

As we pointed out in section 6.5.3, some of these provisions are not enforceable in civil law and may also not be enforceable in certain common law contexts. Similarly, parking spaces rental

⁴⁵⁴ <https://www.airbnb.ca/terms?locale=en>

⁴⁵⁵ <https://www.airbnb.ca/terms?locale=en>

⁴⁵⁶ <https://www.airbnb.fr/terms> <https://www.honkmobile.com/terms/> <https://www.whereipark.com/en/terms>

⁴⁵⁷ <https://www.airbnb.ca/terms?locale=en>

⁴⁵⁸ <https://www.airbnb.ca/terms?locale=en>

⁴⁵⁹ <https://www.airbnb.ca/terms?locale=en>

(PSR) OSEPs also limit their liability, but due to the nature of the service offered, consumers are less at risk than with STPAR platforms.

7.6.5 Clauses limiting remedies

OSEPs also limit consumers' redress by forcing them to bring proceedings in a jurisdiction other than the one where they reside. The OSEP WhereiPark says its site is exclusively Ontario and has made no effort to publicize it outside the province. It states that the parties agree that it is the laws of Ontario and Canada that apply. All litigation or arbitration must be introduced in Toronto⁴⁶⁰.

Another way to limit the rights and remedies of consumers is to impose a foreign law. Since consumers are more likely to know the laws of their home country than foreign laws, such a requirement may represent an additional stumbling block for consumers who have a dispute. This is also contrary to some provincial consumer protection legislation. For its part, Airbnb indicates that the choice of law does not affect the rights of consumers with regard to applicable laws. The consumer may bring an action in Ireland or in another country of the EU. European laws is harmonized due to its being integrated with Community law as set forth in the Directives and in national laws. Although this clause of the contract appears to have been written for European consumers, Canadian consumers are also subject to it, since they do not deal with Airbnb Inc., but rather with Airbnb Ireland. This raises questions as to the enforceability of the clause for consumers residing in provinces that have not specifically excluded this type of clause. While the clause imposing arbitration is enforceable against US residents, it does not seem to be so against Canadian consumers.⁴⁶¹

7.6.6 Insurance

In this section we address short-term private accommodation rentals (STPAR) OSEPs. In a context of consumer protection, parking space rentals (PSR) OSEPs raise fewer insurance-related issues.

⁴⁶⁰ <https://www.whereipark.com/en/terms>

⁴⁶¹ <https://www.airbnb.ca/terms?locale=en>

Airbnb provides an insurance program for civil liability that it calls Host Protection Insurance, which provides coverage of up to \$1 million for damage or injury⁴⁶². This can be applied to consumers who are injured in a dwelling. Last year, only 1% of bookings led to an insurance claim⁴⁶³.

When the accident is not covered by Host Protection Insurance, Airbnb limits total damages at \$100. Moreover, it appears that acts committed knowingly by the host, such as violence (physical or sexual) and assault and battery, are excluded from coverage. This clause contravenes Quebec civil law and possibly also common law⁴⁶⁴.

The insurance offered is not the same everywhere. For example, HomeAway and VRBO say they provide damage insurance, but upon reading the contract and related documents, one realizes that the insurance is more like travel insurance. These platforms say they do not provide insurance and claim that consumers have the obligation to inform themselves of their own insurance coverage⁴⁶⁵. Several Canadian regulators recommend that hosts disclose their STPAR activities to their insurer about to make sure that this risk is covered by their insurance policy.

If the host does not disclose its activities, insurers may refuse to pay compensation in the event of an incident, arguing that providing accommodation to consumers does not qualify as a commercial activity. They could also say that this activity modifies the insurable risk. However, a host who offers STPAR on an occasional basis may not think to report this activity to his insurer. This raises important issues with regard to consumer protection.

⁴⁶² <https://www.airbnb.ca/terms?locale=en> and <https://www.airbnb.fr/host-protection-insurance>

⁴⁶³ Michael Henry, "Know your liability coverage before renting online," *The Lawyers Weekly*, Vol. 36, No. 32, December 2016.

⁴⁶⁴ <https://www.airbnb.ca/terms?locale=en> and <https://www.airbnb.ca/host-protection-insurance>

⁴⁶⁵ <https://www.homeaway.ca/info/about-us/legal/terms-conditions>

Section 8. Other types of Online sharing economy platforms

In this study, we selected other types of online sharing economy platforms (OSEP) that raise important issues for consumers. These are those that offer convenience services, such as walking or looking after a dog, obtaining help for household jobs (maintenance, repair, etc.). We also studied the contract of an OSEP offering to rent out tools.

Consumer do use convenience service OSEPs, but significantly less than sharing mobility or short-term accommodation rental OPSEPs. Our survey revealed that 15% of respondents have used a convenience service OSEP and 9% a tool rental OSEP.⁴⁶⁶

8.1 Analysis of online convenience sharing platforms

8.1.1 Description of Services

These OSEPs offer services aimed at contacting people looking for someone to perform a task with someone capable of doing it. For example, AskforTask connects consumers (askers) with people offering cleaning or repair services (taskers). DogVacay Inc. and Part Time Pooch help consumers find someone to walk their dog or to look after it.

8.1.2 Limited liability and nonexistent guarantees

OSEPs offering services also limit their liability, invoking the same reasons as other platforms. AskforTask says taskers are independent contractors and did not have to verify their identity, their qualifications or the quality of their work. In the same vein, it limits liability and provides no warranty. DogVacay, Part Time Pooch and ShareShed have similar views.

8.1.3 Some control

The OSEPs offering services exclude their liability under the pretext that their services are limited. But are they really? AskforTask says it facilitates the transaction, imposes a code of conduct on taskers and expel those who do not comply from the platform. It requires taskers to

⁴⁶⁶ See summary analysis of the results of a survey of collaborative economy services users in Appendix 1.

have a minimum number of years of experience. In addition, it offers insurance coverage up to a million dollars in the event of loss or damage. DogVacay says it is neither the agent nor the employer of the service providers. However, it exercises control similar to that exercised by AskforTask. DogVacay also derives considerable income from its business, charging a fee of 15% for each booking and charges of 3 to 20% for each transaction⁴⁶⁷.

8.1.4 Limitation of Remedies

Some of these OSEPs also limit consumers' remedies; this is particularly the case with DogVacay and ShareShed, which impose compulsory arbitration in the majority of disputes, unless otherwise prohibited by law. DogVacay requires that the application be filed in Los Angeles - the applicable law therefore being that of California; ShareShed requires that it be filed before the Supreme Court of British Columbia – in which case the law is that of British Columbia. In addition, some OSEPs say they can unilaterally change the terms of the contract.

⁴⁶⁷ Vanessa Katz "Regulating the Sharing Economy," 30 Berkeley Tech. LJ 1067 2015, page 1070.

Section 9. Conclusion and Recommendations

There are several issues to consider with regard to sharing economy. As we have seen, providers that offer goods or services through an online sharing economy platform (OSEP) are often subject to less oversight than conventional businesses. Legislators therefore need to intervene to impose rules to protect consumers. This has been done in some Canadian jurisdictions, but things could be improved. It might also be interesting to standardize the rules, at least within the same province⁴⁶⁸.

There is one fundamental issue related to the applicability of provincial consumer protection laws (PCPA). As already stated, determining whether PCPAs apply requires contextual analysis. First, we believe that the contract between the platform and the consumer involves a tripartite relationship. The consumer enters into two contracts, one with the platform and the other with the service provider.

As regards the contract between the consumer and the platform, we believe this to be a consumer contract and that, consequently, the PCPA applies. As regards the contract between the service provider and the consumer, we believe that this depends on the status of the provider. If the latter is a merchant, the PCPA applies, unless specifically excluded. If the latter is an individual, the PCPA might not apply. Note that it is not always easy to determine the status of the service provider. To do this, we have to rely on the law, the criteria established by case law, doctrine and the context. We must also consider the nature of the activity, whether or not it is usual and profit-driven.

Another difficulty is that there are exceptions that might make PCPAs inapplicable to certain transactions carried out via an OSEP, such as rental accommodation. There are also many differences between the various PCPAs, with the result that consumer protection can vary from province to province.

⁴⁶⁸ March Solutions Lab, *Shifting Perspectives: Redesigning Regulation For Sharing Economy*, March 2016, and Mowat Centre, Sara and Michael Crawford Urban "Sharing the Road: The Promise and Perils of Shared Mobility in the GTHA," August 2016.

The identity of the parties is not always clear, either. Users do not necessarily know who they are dealing with. For example, a third of the respondents to our survey believed the platform was an intermediary, while another third believed it was a merchant. Similarly, 40% of respondents said that the service provider was a merchant while 28% said it was sometimes a merchant and sometimes an individual.

Another issue is that users believe they are protected while this is not always the case. In our survey, we asked the participants if they thought they had the same protection when dealing with a service provider via a platform as when doing business with a merchant⁴⁶⁹. The results were that 73% of 18 to 34 year-olds believed they did; 52% of 55 to 64 year-olds and 39% of 65 year-olds and over were of the same opinion⁴⁷⁰. Among the participants who believed they had the same protection, 55% replied, [TRANSLATION] “This service is legal, so I'm protected by the law the same as with a traditional business.” 33% responded: “The laws are the same for everyone” and 21% responded, “All companies protect me in the same way.” The main reason given by those who believed they did not have as much protection was that they would have access to less recourse in the event of problems⁴⁷¹. It will be recalled that, according to Statistics Canada, 18 to 34 year-olds are the biggest users of OSEPs.

Furthermore, there is an informational asymmetry between the parties. Although this does not exist with regard to the use of OSEPs, we believe it is amplified here. Online reputation mechanisms can certainly help consumers choose which service provider they want to do business with, but this is not enough to protect them. The combined legal uncertainty related to the lack of consumer knowledge makes them particularly vulnerable. However, informational asymmetry and consumer vulnerability have prompted the legislature to intervene on numerous occasions.

Another issue relates to the fact that OSEPs say their service is provided without warranty and with limited liability. They justify this by saying that their role is limited to contacting people.

⁴⁶⁹ The question was: “When a good or a service is provided by a peer contacted through an application or website, do you have the same protections as when dealing with a merchant?” 63% of respondents answered in the affirmative. “The younger they were, the more they felt they had the same protections, while the opposite was observed among older respondents.”

⁴⁷⁰ Summary analysis of the results of a survey of collaborative economy services users, see Appendix 1.

⁴⁷¹ Summary analysis of the results of a survey of collaborative economy services users, see Appendix 1.

However, despite their claims, they exert significant control over access to the platform, the mechanisms set in place (online reputation, dispute resolution, etc.), provider training and the advice it lavishes upon them. They impose a consumer adhesion contract. They play an active role in facilitating the transaction and receive income. Some provide assurances and warranties and even set prices. For these reasons, we believe that the clauses regarding limited liability, remedies and safeguards should not be binding on consumers.

We remarked numerous clauses in the contracts that are harmful to consumers, especially those relating to information, contract modification, limited warranties and liability as well as limiting the rights and remedies of consumers. We believe that, in some jurisdictions, a court would consider such clauses unenforceable against consumers.

Technological innovations are changing faster than the law. A significant number of consumers already use OSEPs, and their popularity is growing⁴⁷². We must maintain the benefits afforded by that technology, while ensuring that consumers are properly protected. This can be done through the inclusion of the concept of enterprise within the meaning of the *Civil Code of Québec* - a concept that is wider than that of merchant. Another way of ensuring protection is to follow the example of European Community laws on digital platforms, disclosure of information and definition of the parties. The recent addition to France's *Consumer Code*, which imposes disclosure obligations, is also interesting in this context.

⁴⁷² PWC "The Sharing Economy" Consumer Intelligence Series <http://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf>, <http://www.statcan.gc.ca/daily-quotidien/170228/dq170228b-eng.htm>, Mowat Centre, Noah Zon, "The Sharing Economy and Why it Matters for Policy Makers," December 2015, and Chiara Farronato and Jonathan Levin, "The Sharing Economy: New Opportunities, New Questions," *Global Investors 2.15*, Credit Suisse, November 2015,, page 9.

Option consommateurs recommends:

that federal and provincial governments and municipalities:

- study the possibility of adopting new rules specific to online sharing economy platforms (OSEPs) aimed at adequately protecting consumers and the public, taking into account the unique nature of this new business model;
- implement information strategies designed to properly inform consumers and the public on OSEP-related issues and make them aware that when dealing with OSEPs, they might not have the rights they imagine;
- inform consumers when the activities of OSEPs are prohibited or severely restricted in a given territory, and make them aware of the impact that using an OSEP can have on their rights and remedies.

that federal and provincial authorities:

- closely consider online sharing economy platforms (OSEPs) and related consumer protection issues, particularly those that fall within their respective jurisdictions;
- adopt a strategy to improve consumer protection with regard to OSEPs, within their respective jurisdictions.

that provincial governments:

- intervene to regulate online sharing economy platforms (OSEPs) and service providers in order to adequately protect consumers. This can be done by including certain amendments concerning, for example, the definition of a merchant, disclosure of information and compulsory insurance. The government could learn from European Law and France's *Consumer Code*;
- study, where relevant, the possibility of harmonizing the rules governing OSEPs within the same province, so as to avoid a mosaic of different rules from one municipality to the next.

that online sharing economy platforms (OSEPs):

- **revise and modify their contracts that include clauses that appear to be unenforceable against consumers because they are contrary to certain laws;**
- **take the necessary steps to provide consumers, before the conclusion of the contract, with all the information they need to make an informed decision. This can be done using technology available to them, such as pop-up notifications and multi-layered disclosure;**
- **better inform consumers regarding the identity and characteristics of service providers and on the impact that their status may have on their rights.**

that consumers:

- **before doing business with a service provider, inform themselves about the identity and reputation of these providers, using all the tools at their disposal, including online reputation mechanisms;**
- **before doing business with an online sharing economy platform (OSEP), inquire about the insurance offered as well as about their own insurance;**
- **complain to the authorities if they consider that their rights have been violated in while using of an OSEP.**