Making or Administering Law and Policy? Discretion and Judgment in Employment Standards Enforcement in Ontario

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Abstract

The purpose of this paper is to advance an approach to analyzing decision-making by front line public officials. The notion of discretion in front line decision-making has been examined widely in the law and society literature. However, it has often failed to capture the different kinds and levels of decisions that enforcement officials make. Taking an interdisciplinary approach that draws on political, sociological, and legal analysis, we propose a new conceptual framework, one that draws a sharper distinction between discretion and judgment and teases out distinct levels in the scope and depth of decision-making. We then use this framework to create a conceptual map of the decision-making process of front-line officials charged with enforcing the *Employment Standards Act* (ESA) of Ontario, demonstrating that a deeper, more precise analysis of discretion and judgment can contribute to a richer understanding of front line decision-making and its social, political, and legal implications.

Keywords: employment standards, front-line enforcement, discretion, precarious employment, front-line decision-making

Résumé

Cette recherche a pour but de proposer une méthode d'analyse du processus décisionnel des fonctionnaires de première ligne. La notion de la discrétion dans la prise de décision de première ligne a été largement étudiée dans les domaines judiciaire et social. Toutefois, l'on n'a pas bien cerné les différents types et niveaux de décisions que prennent les responsables de l'application des lois. À l'aide d'une démarche interdisciplinaire s'inspirant d'analyses politiques, sociologiques et légales, nous proposons un nouveau cadre conceptuel qui fait la distinction entre la discrétion et le jugement et qui ventile les processus de prise de décision en fonction de leur envergure et profondeur. Nous employons ensuite ce cadre pour créer une carte conceptuelle des processus de prise de décision des fonctionnaires de première ligne chargés de l'application de la *Loi sur les normes d'emploi* de l'Ontario, démontrant qu'une analyse plus profonde et précise des notions de discrétion et de jugement peut

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contribuer à une meilleure compréhension du processus de prise de décision de première ligne et de ses répercussions sociales, politiques et légales.

Mots clés : normes d'emploi, agents d'application de première ligne, discrétion, emploi précaire, décisions de première ligne

Introduction

The decline in unionization and the increase in precarious employment have sparked growing interest in employment legislation enforcement (Vosko 2006, 2010; Thomas 2009; Howe, Hardy and Cooney 2013). While recognizing the limitations of the laws themselves, many critiques have also emphasized weaknesses in the *enforcement* of the law, noting that even when laws themselves are 'toughened,' the basic pattern of weak enforcement remains the same (Snider and Bittle 2011; Tombs and Whyte 2013). The arguments underlying these criticisms have tended to take the position that governments promote weak enforcement through a combination of scant staff resources, compliance-based enforcement policies, and tight administrative controls, which limit the capacity of front-line officers to fully employ their investigation and enforcement powers (Tombs and Whyte 2013). This view is reinforced by the literature on the neoliberal state, which identifies a host of emerging pressures confronting front-line public workers, including staff reductions, declining professionalization, privatization, new public management controls, and a growing obsession with risk assessment (Vinzant and Crothers 1996; Black and Baldwin 2010), all of which constrain the exercise of enforcement powers.

However, top-down control and structural constraints are complicated by an ongoing understanding that front line workers maintain a considerable level of decision-making power (Durose 2011), thereby shaping the enactment of policy and law on the ground. As this understanding implies, the processes and outcomes of decisions made by front-line public officials are essential to legal and policy analysis. In this article we seek to show that the analysis of laws and policies and their effects requires more than simply acknowledging decision-making power. Rather, we suggest that decision-making should be measured in its quality, its depth, and its reach. Thus, to contribute to research exploring the powers and constraints in front-line enforcement—and their social and legal implications—we build on the discretion literature to develop a conceptual framework for mapping the different kinds and levels of enforcement decisions made by front-line officials. We use the front-line enforcement of Ontario's *Employment Standards Act* (ESA) as a case study for building this framework. While various discrete processes make up Ontario's employment standards (ES) enforcement regime, our focus is on individual claims-making made by workers, specifically, what Ontario's Ministry of Labour (MOL) does when an individual worker files an ES claim against his or her employer. We take the investigation and resolution of individualized claims-making as our starting point for two reasons: first, ES enforcement in Ontario has been grounded historically in individual claims investigation, and, accordingly, the bulk of resources for ES enforcement goes to this process; second,

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because our research is guided by a concern with workers in precarious employment,[1] for whom ES represent the primary source of labour protection, a critical question is the impact of officer decision-making on the ability these workers have to exercise and benefit from their ES rights.[2]

Based on a detailed analysis of the legislation and policy manuals, we draw on both legal and policy discourse analysis to develop our analytical framework. We identify key moments of Ministry of Labour (MOL) officer decision-making in ES claims processing and characterize them in terms of their scope and complexity as high, medium, or low. For each level, we also differentiate between two distinct types of decisions, which we characterize as discretion and judgment. By discretion, we mean the power to choose between legally available alternatives, whereas by judgment, we mean the power to decide questions of fact and law. The notions of scope and complexity and discretion and judgment are used throughout the paper and their meanings are elaborated upon below. In mapping out key decision points, we focus on identifying the formal constraints placed on front-line discretionary powers and judgment. We concentrate here on the constraints as specified in the legislation and regulations, judicially articulated principles of administrative law, and government and organizational policy.

This intervention does not aim to be the end of the inquiry but rather its beginning. We show that while, in principle, the law provides the MOL with the capacity to significantly limit officer decision-making, under current policies and procedures, the enforcement officers have considerable scope for exercising discretion and making judgments at a number of key points in the enforcement process. Further, this scope has particular implications for claims involving the precariously employed. However, how officers actually exercise their decision-making power, whether it involves discretion or judgment, and how MOL policies and procedures shape that decision-making, particularly in cases involving workers in precarious jobs, require further research, which is being undertaken as part of our ongoing project.

We begin by reviewing the literature on regulatory discretion, pointing in particular to the lack of detailed analysis of the different kinds and levels of officer decision-making within the enforcement process. The second part of the paper develops the framework utilized in the analysis by examining the legal and policy language that shapes front-line decision-making. Against this backdrop, the final part of the paper applies the framework to map out front-line decision-making by identifying and analyzing key moments in the ES claims process, assessing degrees of discretion and judgment within these moments, and considering their significance for the precariously employed. While we apply our framework to the ES

[1] Precarious employment refers to "forms of work for remuneration involving limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill-health. It is shaped by employment status (i.e., self-employment or wage work), form of employment (i.e., temporary or permanent, part-time or full-time), and dimensions of labour market insecurity as well as social context (such as occupation, industry, and geography), and social location (the interaction between social relations, such as gender and "race," and political economic conditions)" (Vosko 2006, 3–4).

[2] Our focus on individual complaints is not meant to convey that reactive measures are the most effective means of enforcement for workers in precarious jobs.

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claims process, our analytical framework provides a model for an interdisciplinary approach for investigating front-line decision-making in general, one that combines close legal and policy analysis with socio-legal investigation and can reveal the diverse and uneven ways that legislation and policy are enacted on the front lines as well as the implications for those people who rely upon or engage with front-line public service officials.

Theorizing Front-Line Enforcement

The broader literature in public administration and law and society tends to adopt Lipsky's (1980) original argument that front-line public decision-makers have considerable power to shape the application of policy and the law; in other words, more than merely administering fixed laws and policies, front-line workers, in effect, *make* policy and law through their decision-making.[3] This insight has informed a variety of investigations and analyses of front-line decision-making. Some researchers have identified the diversity in discretionary styles adopted by front-line decision-makers (Kelly 1994; May and Wood 2003), while others have dug deeper and tried to understand why different enforcement models are adopted and what that means for decision-making. From the enforcement model perspective, the question is, 'how is discretion shaped and constrained by the organizational rules, cultures and structures in which the officers are operating?' Enforcement model trends have been drawn along national lines (Piore and Schrank 2008; Howe, Hardy and Cooney 2013); but investigators more often seek to identify the ways in which agencies' values, resources, and administrative rules and procedures within a given national or regional context constrain and shape discretionary decisions (Frank 1984; Gormley 1998; Snider and Bittle 2011).

However, while the literature identifies a wide range of potential organizational and political influences on front-line enforcement decisions (Pottie and Sossin 2005), relatively little attention has been directed towards developing a conceptual framework for differentiating types and levels of decision-making within a given enforcement process and around particular enforcement priorities (Bovens and Zouridis 2002). One central challenge revolves around the definition and understanding of the concept of discretion, which is widely used to capture what analysts mean by front-line decision-making power. The difficulty is that many analysts provide little discussion of what they mean by discretion; moreover, there is significant variability in the ways in which the concept of discretion is understood. For some analysts, discretion encompasses virtually every decision or action that front-line officials make, whereas for others it is more narrowly defined, entailing powers granted specifically in the applicable statutes (Carroll and Siegel 1999; Bovens and Zouridis 2002). Definitions are also very different conceptually in the sense that while some focus on the decision-making powers granted in law and policy, others focus on the extent to which the laws and policies are

[3] In this context, we clearly recognize that officers to not make law in a formal sense, but rather that they make law at the street level, which is the level at which most people experience it.

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rigidly or loosely followed by front-line officials (Levesque 2011; Portillo and Rudes 2014). Indeed, the question for many analysts adopting a more bottom-up model of discretion is not how policy or law constrains discretion but rather how discretionary *processes*, in effect, *make* policy and law (Lipsky 1980). Thus, scholars are left with a shared acknowledgment of the importance of front-line decision making without adequate precision in terminology or analytical tools to explore the powers and constraints that shape these decisions, and, consequently, on-the-ground law and policy.

Given the variety of definitions, existing attempts to categorize types of discretion have also yielded some very different meanings. For example, focusing on social welfare administration, Carroll and Siegel (1999) distinguish policy discretion from administrative discretion, arguing that the former refers to the capacity of the administrator to change or alter programs to address client or administrator needs and circumstances, while the latter speaks to the ability of front-line administrators to control the ways in which they do their work. Using the concept of policy discretion, this time in regards to the processing and approval of immigration applications, Bouchard and Carroll (2002) identify three levels of policy discretion—procedural, which addresses the discretion used to gather information about the applicant; selection grid, which addresses the use of prescribed selection criteria to assess newcomers; and final decision discretion, which addresses the overall final judgments made by officers. While the distinctions made by Bouchard and Carroll focus on the capacities of officers to make decisions at different points in the process within the statutory and policy frameworks, Pottie and Sossin (2005) categorize discretion in terms of the source of constraints placed on decisions. They identify substantive discretion as the decisions made within the context of statute and policy prescriptions and associate procedural discretion with the ways in which administrative structures and procedures, such as staffing, office design, communications, and information, constrain and shape decisions.

These variations, and the accordant lack of conceptual clarity, make it difficult to identify, compare and link the different patterns of enforcement decision-making to the different types of legal or social issues and contexts being studied. At the same time, while many analysts recognize that rule interpretation and rule adherence are both key to many conceptions of discretion, what is often missing in the literature is a detailed examination of the formal constraints on decision-making imposed by the legislation, legal decisions, and formal agency or government policies. As this omission implies, analysts have failed to map out systematically the starting points of discretion and judgment as defined in enabling legislation. In particular, as we argue below, a clearer understanding of front line decision-making requires that we attend to the concepts of 'powers' and 'duties' and the distinction between them. While we emphasize the importance of looking at how front-line staff may make law and policy through their decisions on the ground (Lipsky 1980), one of our contentions is that a top-down map of decision options, rules, and guidelines as defined in law and administrative policy is an essential starting point for any comprehensive analysis of the overall context in which decisions take place (Bovens and Zouridis 2002).

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Such a precise analytical framework is particularly important for understanding the impact of front-line decision-making on disempowered populations who are heavily dependent on statutory rights and their enforcement. For that reason, a study of decision-making by front line employment standards officers is particularly timely. In Ontario, and Canada more broadly, as well as in Australia, the United States, and other common law contexts, there has been a growing public discourse, supported by a considerable body of empirical evidence (Vosko 2006, 2007, 2010; Lewchuk, Clarke, and de Wolff 2011; Gleeson 2013) concerning the growth of insecure, low-wage employment and the resulting increase in economic inequality (for a media commentary, see for example, Monsebraaten 2013). A growing body of scholarship examining these developments has documented the great reluctance of workers confronting high levels of insecurity to raise employment problems (Vosko et al. 2012, 2014; on the United States, see Weil 2010). The political impact of the public recognition of precarious employment has arguably been reflected in recent changes to Ontario government policies, specifically ES reforms (e.g., on temporary employment agencies), and MOL policies including the expansion of proactive enforcement that targets industries with high ratios of precarious employment (Vosko et al. 2012).

To be attentive to the different points where discretion and judgment are applied in the employment standards enforcement process, and the different levels of officer discretion and judgment exercised, there are two necessary preliminary steps to this investigation. First, we need to establish clear definitions of our concepts; second, we need to identify more precisely the quality and the scope of discretion and judgment at specified decision-points.

A Framework for Mapping Discretionary Decisions and Judgments

The Ontario *ESA* contains fifteen main parts or sections that define the different standards, such as wage payment and public holidays, and five sections that deal with enforcement. Reflecting an increased attention to precarious employment, a new section was added on Temporary Help Agencies (Part XVIII.1) in 2009, which includes both standards and enforcement provisions. Under the legislation, the Minister of Labour, who is the Minister responsible for the *Act*, must appoint a Director to manage its administration. Employment Standards Officers (ESOs) are explicitly identified as the persons appointed to enforce the *Act* and, as such, constitute the Ministry's enforcement arm (*Employment Standards Act*, SO 2000, c 41, s 86(1)); as discussed above, it is their decision-making that is the subject of our analysis.

ESOs are divided into claims-processors, ESO1s, and ESO2s (those workers who conduct investigations and those who conduct investigations and proactive inspections, the latter of which we bracket in this article). Claims processors and ESO1s are stationed in Ontario's claims-processing office, while ESO2s work in regional offices across the province. All claims processors and ESOs are trained in the ESA and through the *Administration Manual for Employment Standards* (MOL 2013), discussed below. According to the AMES, "the role of the employment standards officer is to obtain compliance with employment standards legislation" (MOL 2013 1.8.1).

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In drawing on the Ontario *ESA* to develop a framework for analyzing decision-making, we begin by outlining the legal concepts that shape decision-making: these are, first, powers and duties and, second, discretion and judgment. The purpose of this mapping exercise is to alert readers to the legal framework constructed to guide the work of enforcement officers. Without a proper understanding of this framework, bottom-up empirical investigations of how front-line officers work are liable to misinterpret or oversimplify the interaction between law on the books and law in action.

As is the case with most regulative law, the legislation designates the roles of the Ministry and its ESOs in two distinct ways that speak directly to discretion and judgment: "duties" specify what the Ministry and officers *must do* in certain circumstances, and "powers" give officers and the Director of the Ministry the capacity or power to choose between different courses of action. Section 89(1) makes this distinction very clearly under the title "Powers and Duties of Officers": "An employment standards officer may exercise powers conferred upon employment standards officers under this Act and shall perform the duties imposed upon employment standards officers under this Act." As evident in this section, duties are broadly identified by the use of the word "shall" while powers are identified by the use of the conditional word "may." The word "may" connotes the existence of discretion, while the word "shall" imposes a duty to take a particular action if specified conditions are present.

It is also important to be attentive to hierarchical arrangements of powers and duties since, quite often, more senior officials will be given the power to make decisions that limit the discretion and judgment of those subordinate to them. Significantly, for our purposes, the power to make policy is usually located at higher levels of the bureaucracy, such as the Director. Section 88(2) gives the Director a discretionary power to "establish policies respecting the interpretation, administration and enforcement of this Act." Once in place these policies are binding on ESOs and other front-line staff. Section 89(2) of the *Act* specifically imposes a duty on ESOs to "follow any policies established by the Director." In addition to the Director's power to issue binding policies, binding regulations may also be promulgated by Cabinet; these, too, may restrict the scope of ESO discretion and judgment.[4]

As noted above, by discretion we mean the power to choose between legally available alternatives and by judgment we mean the power to decide questions of fact and law. While the legal distinction between duties and powers and discretion and judgment is reasonably clear at a conceptual level, it does not capture fully the complexity of front-line officers' decision-making and the ways in which discretion and judgment are intermingled. It is for this reason that the Supreme Court of Canada warned that it is "inaccurate to speak of a rigid dichotomy of 'discretionary' or 'non-discretionary' decisions" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999]

[4] It should also be noted that inspectors' orders or failure to issue an order can be appealed to the Ontario Labour Relations Board (OLRB). Section 119(6) of the *Act* gives the OLRB the same powers as an officer and authorizes the Board to substitute its findings for those of the officer. As a result, the Board is not required to show deference to the officer's determination nor, for that matter, is it bound to obey the ministry's policies and interpretations of the *Act*.

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2 SCR 817, para 54)[5]. This complexity is illustrated by the example of enforcement decisions having to do with the minimum wage.

The general minimum wage in Ontario is not set by statute, but by regulation. At the time of writing, the general minimum wage is $11.00 per hour. There is no room for debate over what the standard is. The regulation deprives the ESO of any discretion or judgment in the matter. However, the implementation of this standard may require the interpretation of other sections of the *ESA* or its regulations, which are less straightforward. For example, by statute, the *ESA* only applies to employees; as such, a person who is not an employee is not entitled to the minimum wage. The question of who is an employee is a question of law or mixed fact and law, and so, in principle, the ESO has no discretion in determining who is or is not an employee. However, clearly there is considerable scope for judgment since the legal category of employee is a fuzzy one and, at the margins—such as construction and building maintenance contractors who frequently subcontract to individual immigrant workers—there is often room for disagreement about whether a particular individual or group of individuals fall within the category (Fudge, Tucker, and Vosko 2003). Moreover, the judgment is a complex one since not only is the legal test somewhat open-ended, but it also requires the decision-maker to consider a large number of facts in reaching a conclusion. Although in some marginal cases there may not be a uniquely correct answer to the question of who is an employee, it would be incorrect to classify the decision as an exercise of discretion. The ESO has a duty to make a legal and factual judgment about the worker's status, a judgment that has profound implications for a worker's access to ES enforcement.

As this example demonstrates, the scope of discretionary power and judgment varies considerably, from the very narrow to the very broad, although neither will ever be absolute since the notion of absolute discretion or unlimited judgment is inconsistent with the notion of the rule of law in a liberal democracy. The complexity of decision-making involving discretion or judgments is also variable. Sometimes the complexity is built in by the legislation. For example, determining whether there are "reasonable grounds to believe that an employer has contravened this Act" (*Employment Standards Act*, SO 2000, c 41, s 102(1)1) involves complex judgments about the facts and whether they meet an imprecise legal standard. In other instances, the complexity derives more from the context. For example, in determining when it is appropriate to investigate an employer who has an employee living on the premises, as in the case of live-in domestics (*Employment Standards Act*, SO 2000, c 41, s 102(1)4), the officer presumably must consider resource limitations and possible backlash if too many law-abiding citizens are

[5] Although we are not principally concerned with the administrative law consequences of classifying a decision as an exercise of discretion or a judgment about law and fact, despite the Supreme Court of Canada's rejection of a rigid dichotomy between these two dimensions of decision-making, it still recognized that its use of a functional pragmatic approach to judicial review should not reduce the level of deference given to decision-makers in this circumstance: "[t]he pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options" (*Baker,* para. 56).

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summoned to meetings with government officials without reasonable and probable cause. In claims involving precarious employment contexts, judgment is also complicated by the frequent difficulty in determining the facts, since employment records and other evidence are often incomplete or missing. Discretion is also called for in this context, as the officers must decide whether any additional investigative steps or efforts are required but, in the final analysis, they must make judgments on the basis of best evidence available.

Thus, working through the distinctions between the concepts outlined above and the simultaneous acknowledgment of their complexity, both on the books and in practice, we identify and categorize moments of discretion and judgment in three core stages of the Ontario ES complaints process (see Table 1). We categorize the "moments" surveyed using a scale of low, medium, or high discretion or judgment (see Table 2). Low discretion or judgment is identified as those moments in which officials have a limited range of options between different actions or interpretations and where the decision is a relatively simple one. Medium discretion or judgment, in contrast, involves moments where officials are accorded a limited, but more significant range of choice between actions and where the complexity of the decision is greater. Finally, in high discretion or judgment moments, officials have a wide and significant scope for action to be taken or possible conclusions that can be reached, with very little direction and/or considerable complexity to making the choice or judgment.

In addition, we are also attentive to the significance of a decision in terms of its impact on claimants generally and on workers in precarious employment in particular. For example, complex judgments about employment status are extremely significant to workers in precarious employment, but even a relatively simple decision about whether a worker is employed growing mushrooms, for example, and so whether she or he is exempt from hours of work protections, can have profound consequences. As this example also suggests, there is no necessary correlation between the complexity of a decision and its significance. Thus, our scale is based on a two-pronged assessment: first, the range of options available to an officer; and second, the significance of the decision based on available options. We suggest that a focus on significance is important for work that aims to link in-depth policy and legal analyses with their broader social implications.

Mapping the Enforcement Process

In the remainder of this investigation, we utilize textual and content analysis (Krippendorff 2004) to identify and differentiate points in the claims process where three different categories of front-line staff, claims processors, and employment standards officers (ESO1 and ESO2) exercise discretion or make legal and factual judgments. Since our focus is to better understand and map the degree and complexity of discretion and judgment available to MOL front line staff and how such decision-making may impact workers in precarious jobs, we are particularly interested in whether staff actions are described using either 'permissive' or 'mandatory' language; that is, whether front line staff are granted powers or duties.

The primary documents we analyze are the *Employment Standards Act* itself and key policy and procedural materials used by the MOL Employment Standards Branch.

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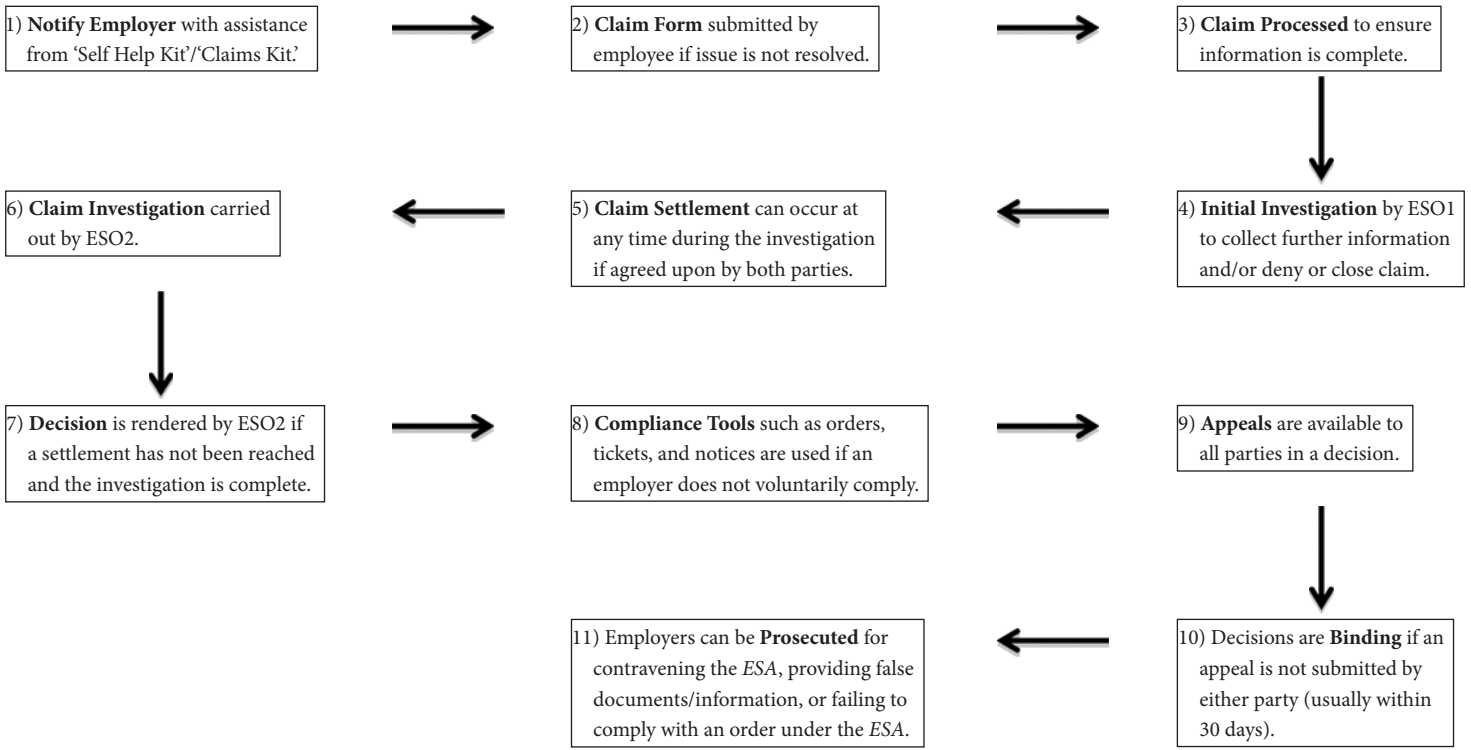
Table 1

The ES Enforcement Process



#1–3 = claims processors; #4–5 = ESO1s; #5–8 = ESO2s.

Table 2
Levels of Discretion and Judgment

Levels of scope and complexity	Discretion	Judgment
Low	Limited range of choices and evidence, legal restrictions and law clearly specified	Decisions based on simple question of fact
Medium	Presence of a range of choices that can be taken with some specific restrictions	Decisions based on mixed questions of law and fact, where the legal standard may not be clear
High	Wide and significant scope of choices that can be taken with limited specifications or restrictions, ambiguous law, and evidence	Decisions based on imprecise legal standards and a context of lacking information or documentation

These latter documents include the *Employment Standards Act Policy and Interpretation Manual* (PIM) (MOL 2009) and the AMES. The manuals reflect the priorities of the Director of Employment Standards, who is charged with setting out branch policy according to section 88(2) of the *ESA*, 2000.

The PIM is a publicly available reference guide that details how the *ESA* 2000 is interpreted, administered and enforced. As a public document, the PIM provides the Ministry's official interpretation and application of the act. The AMES is an internal Ministry document that offers procedural guidance to staff regarding how to carry out ES activities. The PIM and the AMES represent two related resources that often refer back to each other. Both are guides designed to ensure that the *ESA* is applied and administered consistently across the province of Ontario.

As noted in the introduction, we recognize that actual practices may deviate from the way they are described in the manuals, but a key objective behind the mapping is to prepare the critical ground work for field research and analysis of actual front-line decisions made by ESOs.

In what follows, we identify moments of discretion and judgment in three core stages of the complaints process (see Table 1): first, 'claims processing' in which claims processors determine whether a claimant has taken the specified steps prior to submitting a claim (Step #3); second, the 'initial investigation' carried out by ESO1s who collect and analyse evidence to prepare the claim for further investigation or close the claim (Step #4); and third, the pursuance of visits, meetings, and facilitated settlements as a means of further investigation and/or achieving voluntary compliance undertaken exclusively by ESO2s (Step #6).

As demonstrated, moments of discretion and judgment are not evenly distributed across the stages of the complaint process but rather cluster in certain key stages. Yet, in general, there is evidence that officers have considerable decision-making powers, which are directly relevant to precarious employment situations,

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at several points in the process. The significance of each step with regards to the nature and scope of the discretionary decisions and judgments is also mapped using our analytical framework.

Claims Processing

The first key decision step in the ES claims process entails the assignment of a complaint by a claims processor to an ESO1 (Table 1, Step #3). The powers afforded to claims processors emanate from Part XXII of the *ESA,* and their roles are outlined in the AMES. Broadly, claims processors determine whether a claim clearly contains a valid allegation of an *ESA* violation, ascertain whether the claimant has taken the steps required to make a claim such that an investigation can be conducted, and, where necessary, collect missing information required to forward a claim to an ESO1. In other words, they are afforded the power to decide whether to reject a claim at the first step or to assign the complaint for investigation where "a person alleging that…[the *ESA*] has been or is being contravened …[and] file[s] a complaint with the Ministry in a written or electronic form approved by the Director" (*Employment Standards Act*, SO 2000, c 41, s 96.1).

A decision on the validity of an ESA allegation involves limited judgment and discretion, and any decision to reject a claim on those grounds must be approved by a manager or coordinator (MOL 2013, 3.8.2). However, as outlined very clearly in the AMES, one responsibility that falls to the claims processor that is of direct relevance to precarious employment situations is the decision of whether or not to deny a claim on the grounds that the worker failed to contact their employer with their complaint prior to filing a claim.[6] Since the passage of the *Open For Business Act* (OBA) (SO 2010, c 16), the Ministry can require employees alleging valid *ESA* violations to first contact their employers to attempt to resolve the issue. Section 96.1 (1) of the *Act* imposes a duty on the Director not to "assign a complaint to an employment standards officer for investigation unless the complainant has taken the steps specified by the Director to facilitate the investigation of the complaint." However, the *ESA* allows for certain exceptions, noting that, "the Director may assign a complaint to an employment standards officer for investigation even though the complainant has not taken the specified steps" (Section 96.1 (1)). Notably, a number of these exceptions reflect the government's explicit acknowledgement of the difficulties that workers in precarious employment may have in coming forward when it announced the reforms that special allowances would be made for "vulnerable employees" (MOL 2010). Determining these exceptional cases lies at the crux of claims processors' decision-making power, as Section 96(4) authorizes the Director to delegate the power conferred by Section 96(2) to an individual employed by the Ministry—in this instance, claims processors.

The statute provides no further direction about when an exception may be made, but the Director has developed a policy that is binding on claims processors (MOL 2013). The first part of that policy specifies that claimants are to be exempted from

[6] The question of whether and how claims processors exercise this power is a question for field investigation.

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contacting their employers where their employer is formally insolvent, a single complaint is against both a temporary help agency and a client, or the complainant is employed by a temporary help agency and alleges a reprisal by the client (MOL 2013, 3.8.3). To apply the policy, the processor has to determine whether one of these circumstances is present, and that involves a fairly narrow and simple judgment. However, the second part of the policy is more open-ended. It provides that a complainant may be excused from contacting her or his employer where he or she has "good reasons" for not doing so. Here the language of the AMES is discretionary. Where there are "good reasons," the claims processor "may" assign the complaint. If this were all the guidance given, claims processors would be left with a significant degree of scope for making judgments about "good reasons," but the policy continues by listing a number of examples of good reasons that the claims process "must" consider:

> The employee already tried to contact his or her employer,
> The money owed became due five months ago or more,
> The workplace has closed down,
> The employer has gone bankrupt,
> The employee is afraid to do so,
> The issue does not involve money,
> The employee is or was working as a live-in caregiver,
> The employee has difficulty communicating in the language spoken by his or her employer,
> The employee is a young worker,
> The employee has a disability that prevents or makes it difficult to contact his or her employer, and
> The reason is related to the Ontario *Human Rights Code* (MOL 2013 3.8.4).

These reasons also appear on the claims form, which provides an additional space for the claimant to provide any other reason for not contacting the employer. The AMES directs the ESO to consider these other reasons and determine whether they qualify as "good reasons." Many of the stated exceptions and reasons appear related to the Ministry's expressed concerns about workers' vulnerability and precarious employment.

As a result of this structure, the judgment of the claims processor is narrowed, but not narrow; and, certainly, the significance of this judgment is great, as it determines whether or not, or how, the claimant will have access to ES enforcement. She is directed to consider specific excuses for not contacting the employer but also left with space to make a judgment about other reasons the claimant may offer that have not been anticipated by the Director. The complexity of the judgment will vary, depending on the reason offered for not contacting the employer. For example, whether the employee was working as a live-in caregiver, whether the workplace has closed down, or whether the worker is a younger worker are fairly simple judgments, but determining whether the employee was "afraid" to contact his employer is more complex. Claims processors are instructed via the policy manual to make these determinations by reviewing the claims form and, where

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necessary, by contacting the claimant. In ascertaining whether an employee is indeed afraid, claims processors appear to be offered considerable scope for judgment; in such instances, according to the AMES, they are left to determine whether a statement to this effect is required on the claims form or whether a less direct means of conveying fear (orally or in writing) is acceptable. Thus, based on our framework, we suggest that at this stage of the claims process, the overall level of discretion and judgment is low to medium (at particular points), but with a high significance for workers in precarious employment.

Initial Investigation: Collecting Information (ESO1s)

Once a claims processor has determined that a claim is a valid allegation under the *ESA* and the claimant has fulfilled the necessary steps, the claim is passed on to an ESO1 (Table 1, Step 4). The powers afforded to ESOs generally come from Part XXI and Part XXII of the *ESA* and Sections 20–40 of the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)* (SO 2009, c 32). The MOL has divided these responsibilities between two levels of ESOs: ESO1s and ESO2s. The role of the ESO1 is to conduct the "initial investigation," defined by the AMES as comprising two components: "1) to collect information in order to properly prepare a claim for further investigation by an ESO2 if needed, and 2) to close claims, by processing withdrawals and settlements or by conducting investigations and achieving voluntary compliance or issuing a denial" (MOL 2013, 5.2). Cases involving reprisals, retail business establishments, temporary agency provisions, and equal pay for equal work are all sent directly to the second level of Employment Standards Officers (ESO2s), which seems to suggest that the MOL views claims involving the precariously employed as priorities and/or as more challenging in terms of investigations.

The initial investigation undertaken by an ESO1 requires an examination of the documents forwarded by the claims processor along with direct communication with the claimant and the employer to gather additional information. As noted, some standards are passed directly to ESO2s and others are only partially investigated at the ESO1 stage, but ESO1s may issue denials for all other standards based on several criteria, including the finding that the alleged standard violation is not a violation under the *Act*. Unlike the claim denial-decision power of claims processors, ESO1s have full discretionary power to make these denials without management approval. Their discretionary power also involves more complex judgments than those made by claims processors, in as much as they are not simply determining whether an ESA standard was involved but also whether that standard was violated. As well, in the process of collecting information and contacting the parties, ESO1s may attempt to achieve voluntary compliance by sending the employer a 'Seeking Voluntary Compliance' letter (MOL 2013, 5.2.2.1, 6.13). ESO1s may also be indirectly involved in Section 101.1 voluntary settlements by finding violations which result in agreements by the employer to settle. Unlike ESO2s, ESO1s are not permitted to undertake facilitated settlements, which require more direct officer involvement (MOL 2013, 5.6.14).

However, in light of our earlier discussion of determinations involved in the definition of employee, it is important to recognize that one of the more complex

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determinations left to the ESO1's initial investigation is whether the claimant is "in law and fact" an independent contractor. The AMES directs the officer investigating a claim in which employment status is an issue to consult the PIM, which contains detailed guidance on this issue (MOL 2013, 5.6.6.4). However, previous research (Fudge, Tucker, and Vosko 2003) suggests that the distinction is often difficult to draw and requires a complex weighing of multiple factors. This decision warrants special note with respect to the precariously self-employed, given evidence that employers, especially in sectors such as building construction and cleaning, often seek to evade ES by characterizing their workers, who are often new immigrants and younger workers, as independent contractors (Cranford et al. 2005). Therefore, while there are moments that range from low to high judgment and discretion, we argue that the levels of discretion and judgment increase significantly from the claim-processing step.

Investigations, Meetings, and Facilitated Settlements (ESO2s)

As pointed out above, ESO2s are charged with investigating the more difficult cases along with selected standards, which are seen by the Ministry as high priority or more complex. While many of the ESO2 investigation and decision processes parallel those of the ESO1s, the investigations tend to require greater depth and activity, in part because they are responsible for making a final decision. As such, the ESO2s have the highest level of discretion and judgment. However, a closer examination of their work demonstrates why it is important to consider different forms of decision-making and not just levels of decision-making power. The duties and powers of officers not only shape the decision-making process; they are often intermingled in ways that create limited or constrained forms of procedural discretion. An interesting example of this arises around whether officers decide to deal with claims entirely through the phone or email or through meetings and settlements, as defined in Section 102. 1 of the *ESA* shown below:

> 102.1 (1). An employment standards officer may, after giving at least 15 days' written notice, require any of the persons referred to in subsection (2) to attend a meeting with the officer in the following circumstances:
>
> 1. The officer is investigating a complaint against an employer.
> 2. The officer, while inspecting a place under section 91 or 92, comes to have reasonable grounds to believe that an employer has contravened this Act or the regulations with respect to an employee.
> 3. The officer acquires information that suggests to him or her the possibility that an employer may have contravened this Act or the regulations with respect to an employee.
> 4. The officer wishes to determine whether the employer of an employee who resides in the employer's residence is complying with this Act.

The section begins by granting the ESO a discretionary power: the ESO "may" require a person to attend a meeting.[7] However, the discretion is limited in various ways.

[7] As a supplement to Section 102, Section 74.13 in Part XVIII.I (Temporary Agencies) authorizes officers to require clients and employees of temporary agencies to attend meetings.

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First, there is a procedural limitation on its exercise: a fifteen-day notice must be given before a person can be required to attend a meeting. This imposes a duty on the ESO to give notice if she wishes to have a meeting. The notice must also contain specific information including a list of the alleged contraventions, a list of issues to be addressed, a list of documents required, and an invitation to bring any evidence to support their position.

But that is only the beginning. The circumstances in which a meeting may be required are phrased in very different ways. Paragraph 1 involves a simple question of fact: is the officer investigating a complaint or not? The other circumstances involve more complex judgments. Paragraph 2 requires the ESO to determine, in the course of an inspection, whether there are reasonable grounds to believe the employer has contravened the *Act* or regulations. This more complex judgment involves a mixed question of fact and law, where the legal standard for "reasonable grounds to believe" is fuzzy. Paragraphs 3 and 4 require open-ended judgments. Has the ESO acquired information that suggests the possibility of a contravention or does the officer wish to determine whether the employer of an employee who resides in the employer's residence is complying with the Act?[8]

Parties who fail to attend a meeting to which they are summoned or to provide evidence not only contravene the act and, in principle, at least, face the possibility of being prosecuted, but also lose an opportunity to tell their side of the story. The officer is then empowered to make a decision on other evidence, including factors that the officer considers relevant (*Employment Standards Act*, SO 2000, c 41, s 102(10) and 102.1(3)). The AMES stipulates that "it is within the officer's discretion whether to reschedule the meeting or to proceed with the investigation using whichever method the officer deems appropriate." However, officers *must* reschedule meetings and meeting locations to accommodate persons on certain grounds, including the need for a translator and conditions involving the human rights code (e.g. accessibility). While there are no policy references to other circumstances such as transportation problems or work conflicts, both issues that could be more common among lower wage workers involved in part-time or temporary employment (MOL 2013, 5.6.10.5), such conditions are open to officer discretion. All these decisions are key moments where officer discretion and judgment are intertwined in ways that can have significant implications for precarious employment claims and claimants.

Although the Ontario government signalled its interest in enabling more officer-facilitated settlements of claims when it provided new powers to ESOs in its 2010 reform of the ESA, the question of whether the officer decides to facilitate a settlement within a meeting is left officially to their discretion. The AMES simply says, "if the officer wishes," the parties can be advised that, "the officer may attempt to facilitate a s.101.1 settlement (MOL 2013, 5.6.10.5). While there are procedural guidelines on how to facilitate settlements, there are no decision rules provided on when facilitated settlement should be attempted, and no parameters are provided

[8] Paragraphs 3 and 4 were added in 2009 for the protection of live-in caregivers, but their application is not specifically limited to this particularly vulnerable group. See SO 2009, c 32, s 51(3). How ESOs exercise this power is an empirical question to be investigated.

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in terms of desired outcomes, leaving wide scope for discretion. To the extent that such settlements may lead to early resolutions and also, significantly, to reduced payouts of claims, this scope is again potentially significant for precarious workers who are low wage or more likely to agree to a settlement for other reasons related to socio-economic location and precarious employment.

Thus, the meetings and settlements components of the ESO2 investigation appear to be an area of relatively high discretion in that neither the legislation nor the AMES directs ESOs to necessarily facilitate a settlement in these meetings, nor is the officer directed in how to facilitate such an agreement. In sum, as can be seen in Table 3, which summarizes key features of the three moments surveyed above, there are varying levels of discretion and judgment granted to different officers during the employment standards enforcement process. However, despite these differences, our research has shown that all officers are responsible for making important discretionary decisions or judgments. Indeed, even in instances where officers have a relatively low degree of discretion and judgment, the decisions that they do make can have an outsized impact on workers in precarious jobs.

Implications for Collecting and Analyzing Data on Front Line Decisions

Our map of the employment standards claims and investigation process was instrumental in shaping our current research activities in the field. Although broadly framed to capture the full range of front line decisions in ES enforcement, our recently completed interviews were guided by our detailed understanding of the legislated and policy-structured decision-making points in the claims assessment and investigation processes. The results of this research will be reported in subsequent publications, but, by using the framework described here, we were able to attend to officer descriptions and explanations of their decisions with a greater understanding of the scope and complexity of those decisions, while also allowing us to hone in on decisions which were especially consequential for precarious employment claims. The conceptual distinctions between powers, duties, judgment, and discretion and their mapping onto the steps of the claims process were key to the way we conducted the interviews, as they allowed us to identify and understand when officers were describing their dutiful application of rules and when they were talking about what they understood as the range of the decisions they could make in different situations and contexts. This anticipation cued us to when and where we needed to probe for additional insights into the rationales underlying their discretionary choices and their judgments and interpretations and when to move the interview forward to different stages in the decision process.

The conceptual distinction between discretion and judgment was also important, as we came to understand that the foundations of these two types of decisions were often different, and we therefore knew to look for different kinds or levels of explanations. For discretion, it was often a question of understanding what the officers saw as the finite choices available to them. For judgment-based decisions, there was a different level of complexity and nuance tied to the need to interpret

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Table 3
Key Moments by Levels of Discretion/Judgment

Moment in the ES Enforcement Process	Level of discretion/judgment	Key points of decision-making	Potential impact on workers in precarious jobs
1. Claims Processing (Step #3)	Mainly low but increases to medium at two key points	• Decision on whether or not to deny a claim on the grounds that the worker failed to contact their employer prior to filing a claim • Decision on withdrawal of an ESA claim	High: Denial of claims issue is closely connected to precarious employment through MOL policy
2. Initial Investigation by ESO1 (Step #4)	Varies from low to high but there are key decision points involving moderate to high discretionary decisions and legal judgments	• May deny claim on several grounds or close claim through voluntary compliance or voluntary settlement. Definition of Employee may be used to deny claim	High: Definition of employee often impacts those that are self-employed or independent contract workers
3. Meetings and Settlements by ESO2 (Step #6)	Varies but key points where discretion and judgment are medium to high	• Officers may facilitate 'fact-finding meetings' or 'decision-making meetings' during the investigation • The parties may settle at any time during the course of the investigation • ESO2s may facilitate a settlement, often during the course of meeting	Medium: Many issues regarding meetings and settlements face all workers, though employees may have economic (time/resources) and social (fear) factors that impact their ability to attend meetings

and make sense of a greater range of possibilities. As we accumulated more interviews, we also began to recognize certain differences between officers in how and why they made certain decisions, and we began to detect themes around how those differences were constructed by them, the significance of which we might have missed otherwise, or at least misunderstood. Most notably, we were able to recognize when decisions and actions were within or outside the parameters of duties and powers—that is, to reconcile and distinguish discretionary decisions that are granted under law and legally mandated policy from decisions which 'stretch' or even ignore the rules (Portillo and Rudes, 2014).

This approach affirms Lipsky's (1980) original point that front-line decision-makers are also *making*, rather than just administering or applying fixed, laws and policies through the exercise of their powers. Yet, as suggested by our distinction between discretionary decisions authorized by the law and legal judgment involving the interpretation of law and finding of fact, our framework aims to open up the conceptual space for nuanced analysis of the process of how front-line public officials may make law and policy. We suggest that this top-down approach provides a useful analytical grounding for research into front-line enforcement, and front-line decision-making, more generally. Indeed, scholars' ability to identify and understand the bottom-up making of policy by front-line staff is arguably enhanced by clearer understandings of, and differentiation between, the scope and complexity of discretion and judgment, as defined in law and policy. Just as important, these distinctions may allow us to elucidate different conditions underlying the various types of decisions and their complexity.

Conclusions

In this article, we have introduced a framework for analyzing decision-making in front-line enforcement. Our main interest has been to clarify concepts and offer tools to better understand the scope and nature of discretionary decisions and judgments made by front-line officers and the powers and duties that shape decision-making contexts. The framework devised and applied herein achieves several significant advantages over one-dimensional conceptions of front-line decision-making.

First, the distinction between discretion and judgment provides us with a more finely grained understanding of decision-making than studies that collapse the two into the single category of discretion. It also opens the door for exploring, in future empirical studies, the ways in which the wording of legislation, regulations and policy documents granting and limiting the decision-making powers of front-line officials can influence their discretion and judgment in different or complementary ways. For example, it is quite possible that while legal reforms or administrative policies concerning temporary agency workers may narrow some of the officers' discretion regarding how they address these cases, the room for judgment may actually be expanded due to the increased complexity of temporary agency work. Second, the distinction between scope and complexity enables us to better understand what is involved in exercises of discretion or judgment and will offer openings for probing more deeply into the ways in which front-line decision-makers think about the choices they

have to make in exercising their powers. Discretion is often conceptualized as making choices from a finite list of options, suggesting limited scope relative to the range of possibilities open to interpretation, but the conceptual separation of discretion and judgment allows for investigating more fully how constrained or creative both discretion and judgement can be.

Third, the assessment of moments of decision-making, whether they involve exercises of discretion or making judgments, on a scale of low, medium, and high, provides a more complex picture of the ability of the front-line decision-maker to influence an outcome. This picture is crucial to our argument that a framework drawing a sharper distinction between discretion and judgement and revealing distinct levels in the scope and depth of discretion does not take analysts back to a top-down approach of decision-making but rather encourages us to identify and differentiate between top-down and bottom-up influences and processes. Fourth, by identifying the importance of different decisions to differentially situated workers (e.g., workers in precarious jobs), analysts can better situate the role of front-line decision-makers in addressing the needs of particular groups. Finally, by clarifying the role of legislation, regulations, and policies, we can better understand the relative influence of the different state actors in the claims process. The latter two conclusions are especially important to our current and future research efforts to assess the impact of Ontario's efforts to protect "vulnerable workers" in precarious jobs. Since 2010, the Ontario government has made a number of significant public claims regarding its priority to protect the rights of workers engaged in precarious employment through ES. A key question for further exploration is the role of officer discretion and judgment in realizing or altering such objectives.

While we developed the foregoing framework through a particular case study, our approach has a wider application to the analyses of front-line decision-making in many different contexts. Our attempt at greater socio-legal analytical precision endeavour to offer analysts more conceptual tools for in-depth exploration of the contours shaping front-line decision-making and their implications, enabling more targeted assessment of law and policy. Furthermore, by including "significance" as a dimension of our analytical tool, we encourage greater investigation of broader socio-political issues of access to, and experience with, frontline enforcement.

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