

## **Submission to the Special Advisors for the Changing Workplaces Review**



**Prepared by the Canadian Intern Association  
September 2015**

## Executive Summary

The Canadian Intern Association would like to thank you for the opportunity to submit to the Changing Workplaces Review. This submission hopes to demonstrate why and how the situation facing interns in Ontario must improve. Our submission today focuses on four main areas:

- Part 1: In response to question 8 in the *Guide to Consultations*, we discuss changes we believe need to be made to the current exclusions and exemptions for interns and students under the *Employment Standards Act, 2000* (“the *ESA*”);
- Part 2: In response to question 5, we suggest implementing new provisions in the *ESA* to better protect interns and students;
- Part 3: In response to question 10 from the *Guide to Consultations*, we discuss reforms we consider necessary to strengthen enforcement of and compliance with the *ESA*; and
- Part 4: In response to question 12 from the *Guide to Consultations*, we discuss amending the definition of membership in trade unions to Ontario’s *Labour Relations Act, 1995* (“the *LRA*”) to include broader concerted activity protection.

### GREATER PROTECTIONS FOR INTERNS

Three main statutory exclusions exclude students, interns, and trainees, either in full or in part, from the protections extended to workers under the *ESA*:

1. The trainee exclusion contained in Section 1(2) of the *ESA*;
2. The secondary and post-secondary student exclusion contained in Section 3(5) of the *ESA*; and
3. The professional trainee exclusion contained in Section 2(1) of O. Reg 285/01.

These are all relatively recent exemptions, enacted under the Bill 147 reforms that were introduced by Premier Mike Harris’ Progressive Conservative government. We believe all three of these exemptions should be eliminated, are possibly not compliant with the *Canadian Charter of Rights and Freedoms* (“the *Charter*”), and place an unfair burden on historically marginalized groups within the labour force.

## Introduction

Since the early 1980s, the Canadian economy has witnessed the deterioration of labour market opportunities that have directly affected youth's transition into the labour market. Not only have real wages stagnated, but there has been a dramatic shift away from the standard employment relationship towards more precarious forms.<sup>1</sup> Consequently, young workers found themselves at a disadvantage and sought post-secondary education in hopes of securing full-time paid positions.<sup>2</sup> Between 2000 and 2015, an increasing number of highly qualified graduate students have become heavily underemployed.<sup>3</sup> It has been determined that "the proportion of young employees working non-permanent jobs has nearly doubled, from 6.9% in 1997 to 11.6% in 2011, while the proportion of older employees in these types of jobs has only grown from 4.0% to 5.7% during the same time period. This is important for what permanent jobs are more likely to provide."<sup>4</sup> As a result, there has been a delayed transition for youth into adulthood as a consequence of poor labour market outcomes.

Governments and post-secondary institutions, in an attempt to assist youth in the transition from school-to-work, have been adopting work-integrated learning programs (internships, traineeships, practicums etc.) as part of academic study. Work-integrated learning programs have been integrated in curriculums on the premise that they provide exceptional opportunities for students to enhance their skills, build their resume, network and learn more about the field of their choice. The requirement for young workers to have relevant work experience has been ever increasing, therefore work-integrated learning programs are viewed as an opportunity for students to break free from the stigma of not having the practical experience in order to land a full-time paid position. However, the reality of work-integrated learning programs often greatly differs from the ideals expressed by educators, policy-makers, and policy makers with growing concerns expressed about the quality of work-integrated learning in Ontario. A substantial amount of work-integrated learning programs do not provide enhanced learning opportunities to equip students with the skills they need and experiences they seek. Instead, students often find themselves trapped in dead-end jobs where they receive

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<sup>1</sup> Andrew K Langille, "The Low End Theory: The Legal Regulation of the School-To-Labour Market Transition in Canada" Unpublished manuscript, Osgoode Hall Law School, York University, Toronto, Canada (2012) at 3 and 4.

<sup>2</sup> Maureen Baker, Parliamentary Research Branch, *Canadian Youth in a Changing World*, (Ottawa, Library of Parliament, 1989) at 17.

<sup>3</sup> Langille, *supra* note 1 at 5.

<sup>4</sup> Karen Foster, "Youth Employment and Un(der)Employment in Canada" Canadian Centre for Policy Alternatives (October 2012), online: CCPA <<http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2012/10/Youth%20Unemployment.pdf>>.

minimal, or no pay for carrying out monotonous tasks that are unrelated to the future careers they aspire to attain.

Internships and other emerging forms of work-integrated learning stand in sharp relief to apprenticeships and co-operative education programs. Apprenticeships and co-ops are heavily regulated, strictly supervised, and serve as a bridge from the classroom into the world of work. It is no surprise that internships have emerged during a period where governments at the national and sub-national level have been pushing flexible labour markets, as the internship, as a theoretical and practical concept, is highly flexible and can be applied to a myriad of formal and informal training. The Canadian Intern Association's position is that students, young workers, and society at large are far better served by training modeled on formal apprenticeship and co-op programs, compared to work-integrated learning programs such as internships, traineeships and practicums.

Over the past two decades, we have witnessed the explosive growth of unpaid internships in Canada. While Statistics Canada does not have any records documenting the number of unpaid internships or other forms of work-integrated learning, the most commonly cited estimate places the total number of unpaid internships in Ontario at approximately 100,000 annually.<sup>5</sup> This is an inexcusably high figure. During the time the internship was first introduced, its fundamental purpose was, and should continue to be, for the employer to engage in a socially beneficial service by providing students exposure to the workplace that will enhance their skills and educational experience. This should not be used as an opportunity for employers to gain access to cheap or free labour.

Workers in all provinces have been impacted by the rise of unpaid internships, but the problem appears to be particularly pronounced in Ontario's major urban centres, such as Ottawa and Toronto. We believe Ontario's lax regulatory regime plays a contributory role in this matter. Leah Vosko has stated, that the "dearth of support for [employment standards] enforcement, coupled with an outmoded complaint-based system, is cultivating a situation in which an unprecedented number of workers are bearers of rights without genuine opportunities for redress."<sup>6</sup> In accordance with this statement, the Canadian Intern Association has proposed multiple solutions that we see fit in order to tackle this issue and strengthen the *ESA*.

The dilemmas that interns are confronted with extend far beyond the individual as the consequences of a rising number of internships affect broader social issues. The

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<sup>5</sup> Andrew Langille, "Why Canada Needs Better Labour Market Data and the Canadian Internship Survey" Youth and Work (12 October 2013), online: Youth and Work.

<sup>6</sup> Vosko, Leah F. "'Rights without Remedies': Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs." *Osgoode Hall Law Journal* 50.4 (2013): 845-874, at 846.

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first being the need for businesses to cut costs through deploying interns in a manner that displaces workers who would otherwise be paid for these entry-level positions.<sup>7</sup> This should be of great concern to the Government of Ontario as it will become more challenging for young people to invest back into the economy if they have minimal income and are not able to contribute to the taxation base. Often interns are forced to take out a loan, gain assistance from family members if possible, or work an additional job to make up for the unpaid wages from the internship position. Second, unpaid internships stunt social mobility due to the inability of individuals from historically-marginalized and equity seeking groups to afford the privilege of participating in the unpaid labour market.<sup>8</sup> Third, unpaid interns are predominately female, which reflects the continuing devaluing of women's labour in Ontario's labour market and the repetition of historical inequities that women have faced. Fourth, internships and other forms of exploitative work-integrated learning strike at the heart of intergenerational equity as young people are asked to assume an unreasonable burden and risk for their training, education, and transition into the labour market.

In the *Guide to Consultations* it was mentioned that Chief Justice of the Supreme Court of Canada Brian Dickson wrote:

[...] A person's employment is an essential component of his or her sense of identity, self-worth and emotional wellbeing. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.<sup>9</sup>

We would suggest that another quote, from another Supreme Court, also applies here:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.<sup>10</sup>

We strongly uphold and support both assertions. The ideals underpinning the aforementioned statements sit at the heart of our submission and encapsulates why action on exploitive internships in Ontario is desperately needed. While this review

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<sup>7</sup> Guy Standing. "The Precariat: The New Dangerous Class, Bloomsbury Academic." London. At 76

<sup>8</sup> Low Pay Commission, "National Minimum Wage: Low Pay Commission Report" 2012, The Stationery Office, London, 2012, p 98.

<sup>9</sup> Ontario Ministry of Labour, 2015. "Changing Workplace Review: Guide to Consultations." Online: Ministry of Labour <[http://www.labour.gov.on.ca/english/about/pdf/cwr\\_consultation.pdf](http://www.labour.gov.on.ca/english/about/pdf/cwr_consultation.pdf)> at 6.

<sup>10</sup> Chief Justice Hughes, U.S.S.C. in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

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was called into action in order to build up Ontario, we think it is imperative to remind ourselves that doing so involves building up the next generation. In an increasingly competitive global economy, we must provide meaningful opportunities for students to strengthen their knowledge and skills to have a fair chance at competing.

## **PART 1: ADDRESSING EXCLUSIONS AND EXEMPTIONS FOR INTERNS AND STUDENTS**

The Canadian Intern Association, in response to question 8 in the Guide to Consultations, has five specific recommendations to address the problem of unpaid internships in Ontario concentrated on current exclusions and exemptions for interns and students under the *ESA*.

### **1.1 Eliminate the Trainee Exclusion under Subsection 1(2) of the *ESA***

The Canadian Intern Association recommends the Ontario government repeal the exclusion for unpaid internships not formally linked to secondary or post-secondary academic programs. Subsection 1(2) of the *ESA* permits employers to hire unpaid interns not formally linked to an academic program so long as they meet a stringent six-part test. In practice, few, if any, unpaid internships meet the requirements of this test. Unfortunately, despite the narrow scope of this exclusion, illegal unpaid internships in Ontario are pervasive. The six-part test is confusing and creates uncertainty for both interns and employers. Neither the *ESA*, nor the Ministry of Labour guidance adequately explains to employers how difficult it is to meet the six-part test given the Ontario Labour Relations Board jurisprudence relating to subsection 1(2).

Subsection 1(2) of the *ESA* was extremely poorly conceived, is possibly not compliant with the *Charter*, and has essentially permitted unpaid labour to flourish in Ontario's labour market. We note that the Employment Standards Work Group predicted downstream consequences of subsection 1(2), in an analysis paper from October 2001 they state:

While this subsection places the onus on the employer to establish that all six conditions are met before a trainee is excluded from the definition of employee (and thus the protections and entitlements of the E.S.A.) it opens up a loophole that was not in the old E.S.A. In effect, it allows for private or public sector employers (and not simply schools or community colleges - see old E.S.A., Regulation 325 2(1) and Bill 147 s.3(5)) to provide training to individuals who perform services. Essentially, it takes a pernicious legal interpretation under the old E.S.A. (Re Seketa [1994] O.E.S.A.D.33, affirmed Re Seketa and Wacyk (1995) 23 O.R. (3d) 546 (Ont. Div. Ct.) and legislates it. It also

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mirrors the law in the U.S., where trainees are excluded from employee status. This is an important and negative change.<sup>11</sup>

Subsection 1(2) should have never been enshrined in the ESA and it is critical that the Changing Workplace Review recommend the elimination of this provision to help renormalized the youth labour market in Ontario and to forestall continued deterioration of the labour market outcomes of young workers in Ontario.

In 2014, the Ontario Ministry of Labour conducted an internship blitz between April 1, 2014 and June 15, 2014. During the span of this investigation 56 inspections were completed. These investigations found serious breaches of the *ESA* in fully 50% of workplaces that had internship programs. Some of the findings include, but are not limited to, the following: 13 employers had internship positions with *ESA* contraventions, 37 compliance 'tools' were issued (e.g. Compliance Order and Order to Pay Wages) and \$48,543.00 was assessed as owing to employees.<sup>12</sup> These results demonstrate the widespread and intentional flouting of the laws surrounding unpaid internships in Ontario.

We attribute the rise of illegal unpaid internships to the complete failure of the current regulatory approach that places the responsibility onto employers to self-assess the legality of their unpaid internship programs. Furthermore, the laws and the Ministry of Labour have placed the onus onto interns to file complaints against their employers if they wish to enforce their rights. This 'shared responsibility' approach is harmful to young workers across Ontario since employers are profit driven and young workers are put in a vulnerable position that impedes them from making formal complaints. It has been documented that most employee standards complaints are made after the employee has left the organization due to fear of reprisal.<sup>13</sup> Young workers simply cannot afford to take on the burden of policing the legality of internships, nor do they typically have the legal knowledge necessary to enforce their rights relating to workplace standards, human rights, workers' compensation, or occupational health and safety. The precarious economic status of students and young workers creates a dependent relationship whereby they feel compelled to preserve their relationships with former and current employers since they need future references and must try to remain in good standing.

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<sup>11</sup> "Out With The Old, In With the New: An Analysis of the *ESA* 2000 (Bills 147 and 57)." Employment Standards Work Group, October 2001. Online: <[http://www.cavalluzzo.com/docs/default-source/publications/2001-10-01-out-with-the-old-in-with-the-new\\_-an-analysis-of-the-esa-2000-\(bills-147-and-57\).pdf?sfvrsn=2](http://www.cavalluzzo.com/docs/default-source/publications/2001-10-01-out-with-the-old-in-with-the-new_-an-analysis-of-the-esa-2000-(bills-147-and-57).pdf?sfvrsn=2)>.

<sup>12</sup> Ontario Ministry of Labour, 2014. *Blitz Results: Internships*, Online: Ontario Ministry of Labour <[http://www.labour.gov.on.ca/english/es/inspections/blitzresults\\_internships.php](http://www.labour.gov.on.ca/english/es/inspections/blitzresults_internships.php)>.

<sup>13</sup> Mark P. Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal, McGill-Queen's University Press, 2009) at 104-105.

*I completed a three month unpaid internship with one of Canada's biggest publishing houses. I received no training; the majority of my time was spent either packing boxes or doing the work of my supervisor. Each publicist was supposed to be responsible for writing their own press releases, and yet by the time I left I was writing almost all of them (they even tried to get me to prepare them in advance for releases scheduled after my departure). I felt I deserved to be paid for these tasks, since I was doing the work that others were being paid for, but I completed the internship for fear getting blacklisted in the industry.*

-Roselyn, Richmond Hill

The current regulatory regime has failed to protect interns and trainees. It has also given rise to the replacement of paid employment with unpaid internships, which has significant negative impacts on Ontario's economy. The Ontario government should repeal the exclusion from the *ESA's* protections set out in Section 1(2) of the *ESA*.

## **1.2 Eliminate the Exclusion of Professional Students from the ESA**

The Canadian Intern Association recommends that the Ontario government eliminates the exclusion for students in training for the professions enumerated in sections 2(1)(a)-(d) of O Reg. 281/01. This exemption excludes these students from Parts VII-XI of the *ESA*, disentitling them to basic protections surrounding hours of work, overtime pay, minimum wage, public holidays, and vacation with pay. We strongly recommend the exclusion contained in section 2(1)(e) of that regulation be repealed.

Whatever the merits of this exclusion at the time it was enacted, it does not reflect the lived realities of students in training for these professions today. For instance, as an example, the average law student graduates with \$70,000 of debt.<sup>14</sup> Furthermore, in the legal profession, students in Ontario are increasingly recruited for unpaid articling positions. Reports also indicate that a substantial portion of positions in the first year of the Law Practice Program trial were either unpaid or underpaid. Clearly, these young workers would benefit from the *ESA's* protection.

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<sup>14</sup> The average debt of borrowing students was found to be \$71,444 at the end of their law program. See Law Students' Society of Ontario, "Just or Bust? Results of the 2014 Survey of Ontario Law Students' Tuition, Debt, & Financial Aid Experiences" (17 September 2014), pp 4 and 32, online: LSSO [LSSO Report].

*Tuition fees are exorbitant and I think on top of this, having unpaid internships over the summer being an accepted part of a law student's life is just not acceptable.*

- Riaz Sayani-Mulji, Law Student

Students in law and other professional programs in Ontario undertake years of academic training, during which they pay high tuition fees. These are highly skilled workers who have accumulated large sums of debt. At the very least, they should be entitled to compensation and basic workplace protections under the *ESA*.

### **1.3 Narrow the Exclusion for Secondary and Post-Secondary Internships**

Third, the Canadian Intern Association recommends that the Ontario government amend section 3(5) of the *ESA* in order to apply the six-part test currently contained in section 1(2) of the *ESA* to experiential learning programs approved or authorized by secondary school boards, colleges of art and technology and universities. Amendments should also be made to hold school boards, colleges of art and technology, and universities to a duty to ensure compliance with these provisions. Each year, students perform countless person-hours of unpaid work as a requirement of their secondary or post-secondary programs.

*I have been required to complete four unpaid internships over the past five years as a mandated component of my academic studies. That is over 2000 hours of unpaid labour, all while paying tuition, acquiring student debt, and having my available hours for paid labour drastically reduced. The Ontario government must review the broad exclusion for unpaid internships in academic programs.*

- Tamara, Toronto

Reports of students simply performing work, which would otherwise be performed by employees, raise concerns about the appropriateness of certain unpaid placements and the need for greater oversight. In some industries, entry-level paid positions have been replaced with an overflowing pool of interns. This is detrimental to Ontario's economy as it displaces paid entry-level positions and further increases the youth unemployment rate. The youth unemployment rate in Ontario sits at 15.9%, whereas the unemployment rate for the larger population is

6.9%.<sup>15</sup> This rate is quite concerning as it is considerably higher than the provincial average.

Addressing exploitative unpaid internships organized through secondary and post-secondary educational institutions should be part of a broader strategy to address youth unemployment and support vulnerable youth workers. Otherwise, government funding will be spent towards subsidizing payrolls for employers while an increasing number of youth will rely upon social programs to sustain themselves.

The need for reform has been further highlighted by the tragic deaths of students in experiential learning programs in Ontario in recent years. The Canadian Intern Association recommends that the Ontario government narrow the scope of the exclusion under section 3(5) of the *ESA*. We recommend that the Ontario government amend section 3(5) of the *ESA* to apply the six-part test contained in section 1(2) of the *ESA* to work-integrated learning placements organized through secondary and post-secondary programs to ensure that students are receiving *bona fide* training, learning, and skills developments opportunities, rather than being a source of free labour for employers.

### **1.3 Extend Basic Workplace Protections to Unpaid Interns in Secondary and Post-Secondary Placements**

The Canadian Intern Association strongly believes that the Ontario should extend all basic workplace protections to unpaid interns in secondary and post-secondary placements. The *ESA* should be amended to ensure that secondary and post-secondary students receive the most fulsome workplace protections possible.

## **PART 2: ESTABLISHING BETTER PROTECTIONS FOR INTERNS AND STUDENTS**

In addition to the basic protections granted to workers, the Ontario government should enact the following provisions to guard the vulnerability of students.

### **2.1 Prohibition on Overnight Work and Maximum Working Hours for Students and Unpaid Interns**

It is imperative that we prohibit overnight work for students in experiential learning programs, along with a maximum weekly hour threshold that reflects the fact that these workers are also likely to have to undertake paid employment in addition to their unpaid placement.

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<sup>15</sup> Ministry of Training, Colleges and Universities. "Ontario Labour Market Statistics for February 2015." Online:  
<<https://www.tcu.gov.on.ca/eng/labourmarket/currenttrends/docs/monthly/201502.pdf>> at 1.

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The tragic case of Aaron Murray, a twenty-one year-old student working an unpaid placement at Trent University as a security guard, sheds light on this issue. On April 3, 2014 Mr. Murray was driving home from an overnight shift at Trent University when he crashed his vehicle at 5:30a.m. It was noted that the day before the crash, Mr. Murray “had slept for a few hours after his overnight shift before heading to an afternoon shift at a Trenton McDonald’s, where he is a manager. After a short break in the evening, he made the hour’s drive back to Peterborough to check in for 9 p.m.”<sup>16</sup> This appalling incident highlights the hardships students face by the need to complete mandatory placements, while earning an income to support themselves – multiple job holding is known as an indicator of precarious work. Therefore, we suggest amending the *ESA* to include a provision governing the maximum hours unpaid interns are permitted to work, as well as prohibiting overnight work between the hours of 11:00 p.m. and 5:00 a.m. We suggest restricting unpaid interns and students undertaking work-integrated learning from working more than 125 unpaid hours per semester or the equivalent of one course.

## **2.2 Prohibition for Unpaid Interns to Work Public Holidays**

We would like Part X of the Act to restrict unpaid interns from working public holidays. Students that partake in unpaid internships are not entitled to compensation and consequently would not receive the premium pay that is offered to employees for working public holidays. Forcing interns to work public holidays would be advantageous for employers that seek to mitigate any fees that would otherwise be paid out to employees. Enacting on such a situation would be in contravention of the *ESA* as the employer would violate subsection 1(2) of the Act; this situation does not benefit the individual receiving training and the intern would be replacing an employee that would otherwise be paid extra to work a public holiday.

## **2.3 Prevent Volunteer Misclassification through Filling Gaps in the ESA**

The Canadian Intern Association recommends that the *ESA* be amended to provide for a statutory definition of “volunteer”, and clarify when a volunteer should be correctly classified as an employee protected by the *ESA*.

As the law around internships becomes strengthened, business entities will seek alternate ways to shift costs. The burden of costs and liabilities associated with the application of the *ESA* has given an incentive to organizations to avoid establishing employment relationships. The International Labour Organization has opined on this issue by stating that:

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<sup>16</sup> Zoe McKnight, “College Student Dies after Hwy 7 Crash Near Trenton” Toronto Star (10 April 2014), online: Toronto Star.

A disguised employment relationship is one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law or evading tax and social security obligations. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form. Disguised employment relationships may also involve masking the *identity of the employer*, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers.<sup>17</sup>

Thus far, volunteers as a class of workers remain unaddressed in the legislation. The prima facie reasoning for this silence on volunteers comes from the very basic notion of an employee under the *ESA*. As per subsection 1(1),<sup>18</sup> generally a worker is classified as an employee when their work is done in return for “wages”. A volunteer presumably provides their time and services altruistic purposes and for no monetary remuneration.<sup>19</sup> Given that the *ESA* applies only to the employees and workers fitting the criteria set out in 1(1) or the trainee exemptions in subsection 1(2), volunteers would presumably not be protected by the *ESA*.

Volunteerism is widely encouraged in our province – official statistics from the Canada Survey of Giving, Volunteering and Participating estimate that in 2010 47.7% of Ontarians over the age of fifteen volunteered in some form, logging an average of 164 hours. The lack of protection for volunteers in the *ESA* becomes an alarming gap when this trend crosses over into the for-profit sector, or where volunteers are performing work that may substitute paid workers’ roles. A report by Volunteer Canada denotes a rise in volunteerism partly due to post-recession economics of unemployed or underemployed people turning to volunteering as a way of foraying into new careers.<sup>20</sup> Examples of grey areas exist in sectors such as in the entertainment industry at music festivals, in the live event industry and in the hospitality sector.<sup>21</sup> Much like formal unpaid internship schemes, many young workers are often encouraged to volunteer, or offer their services for free, under the guise of volunteering as a way of getting their foot in the door while trying to gain work experience, at the outset of their career. The concern is that employers may

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<sup>17</sup> *The Employment Relationship*, Report (V)(1), International Labour Conference, 95th Session, 2006, [46] (emphasis in original).

<sup>18</sup> *Employment Standards Act 2000*, S.O. 2000, c.41, s.1(1)

<sup>19</sup> Travel and lunch expenses do not count as wages under the Act – s. 1(1).

<sup>20</sup> *Bridging the Gap in Ontario: A Profile of Current Trends in Volunteering*, at p.5. Online <<https://volunteer.ca/content/bridging-gap-ontario>>.

<sup>21</sup> Andrew Langille, “Lost in Transition: The Regulation of Unpaid Labour During the School-to-Labour Market Transition in Ontario.” *E-Journal of International and Comparative Labour Studies* 4(1)(January 2015) at p.9.

simply change their language and call these workers “volunteers” in order to avoid minimum wage and rights obligations.

The risk of employee misclassification and loopholes is amplified by lack of information and guidance available in the law surrounding volunteers. Part 5.12.2 of the *Employment Standards Act, 2000* Policy and Interpretation Manual indicates that the Act does not apply to volunteers, but is cautious to conclude that a person is not automatically termed a volunteer because no wages were paid. It still asks for an inquiry into whether a person is a “true volunteer” as opposed to an employee.

Only four cases are known thus far to have examined the volunteer misclassification issue, with three dating back to the 1980s and the fourth remaining unpublished.<sup>22</sup> The Policy Manual quotes Referee Davis’ 1981 decision in *Re Consumer Liability Discharge Corporation* to grant lost wages to a young volunteer recruited on the basis of “learning by observation” without pay until the said volunteer was able to contribute to producing – a process that could take three months. Referee Davis provided the following set of factors to make the determination of whether a volunteer was truly a volunteer, or an otherwise employee, foregoing wages that they were due according to established employment standards:

- 1) The extent to which the person performing his services views the arrangement as part of his pursuit of a livelihood;
- 2) The extent to which the person receiving the services is conferred a benefit; and
- 3) Circumstances in which the arrangement was initiated and whether there was an economic imbalance between the two parties in structuring the arrangement.

These criteria have not been followed in the three subsequent decisions to deal with the volunteer issue. Furthermore, they are from an era that pre-dated the current version of the *ESA*. Yet here are *ESA*-friendly factors that could be updated and put towards a proper provision in the legislation for volunteers in order to prevent misclassification.

There has, however, been slightly more guidance in unionized workplaces from cases such as *Toronto District School Board v. CUPE* (2011) wherein an employer was ordered to pay wages to educational assistants for asking them to volunteer for duties that would otherwise constitute paid work under the collective agreement. The case points out that one cannot volunteer to do one’s own job. More

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<sup>22</sup> *Re Consumer Liability Discharge Corporation v Anthony Molica* (1981) E.S.C. 1032; *Re F.A.T.E. Self-Help Publications Inc* (1987) E.S.C. 2287; *Re Glen William Robinson o/a Station Street Café v Linda Ramsay* (1988) E.S.C. 2434; *Iannuzzi v 1747981 Ontario Inc o/a Platinum Events Group* (unreported – unpaid volunteer work misclassified as “Wedding and Event Intern”).

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importantly, clarity is of the utmost importance in order to distinguish paid and unpaid work.

In volunteer situations it would be rare to see a comprehensive contract delineating duties similar to an employment agreement or a collective agreement – providing a volunteer with such a document may denote an employment relationship rather than volunteer services. Yet simultaneously, the lack of such a document may make it more difficult to single out rights and obligations within the context of a specific volunteer relationship. For this reason, it is crucial that the law provide the groundwork and basis on which any sort of misclassification can be prevented from the outset. Provisions preventing the use of volunteers by for-profit employers would be effective, as would be greater clarity on when volunteers should be used by the not-for-profit and public sectors.

With a rise in volunteerism across the province, now is an appropriate time to shift attention towards this grey area of workplace protections in order to prevent the misclassification of employees as volunteers.

### **PART 3: STRENGTHENING ESA ENFORCEMENT**

Noncompliance with the trainee exemption in Section 1(2) of the *ESA* is pervasive. This causes harm to these workers and to our economy more broadly. It also breeds disrespect for the law and a lack of confidence in the bodies, we charge, to enforce it. The Canadian Intern Association, in response to question 10 of the *Guide to Consultations*, recommends that the Ontario government undertake a number of reforms to better support the enforcement of, and compliance with, the *ESA*.

#### **3.1 Formalized System of Anonymous and Third Party Complaints**

We recommend the adoption of a formalized system of anonymous and third party complaints. This approach would provide opportunities to, workers, to come forward and raise issues without fear of reprisal. As mentioned previously, many interns shy away from reporting exploitive internships due to a fear of tarnishing their reputation in an industry and ruining their future job prospects. Furthermore, more investigations can be conducted to provide more security for interns. Leah Vosko suggests that the anonymous complaints process operating in Saskatchewan and the third-party complaints system in Australia offer preferable models.<sup>23</sup> Additionally, instead of sharing complaints with co-workers, we propose that Ontario follow Saskatchewan's model through expanded investigations.

In relation to complaints related to work-integrated learning there should be consideration given to setting up a separate oversight body to regulate co-ops,

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<sup>23</sup> Vosko, *supra* note 6 at 860.

internships, and other forms of non-apprentice training. Students are currently left with few avenues to pursue grievances as neither the Ministry of Labour, nor the Ministry of Training, Colleges, and Universities offers any formal complaints mechanism to address working conditions as they intersect with academic issues that students encounter while engaged in work-integrated learning. The most logical approach would be to enshrine a complaints process in the *ESA* and resource the Ontario Ombudsman to take complaints from students who are facing problems in their work-integrated learning programs. The Ontario Ombudsman is the only governmental actor with sufficient power and authority to protect the interests of students given the apparent regulatory capture occurring within the Ministry of Training, Colleges, and Universities and the Ministry of Labour.

### **3.2 Expanded Investigations**

We recommend that the Ministry of Labour return to a practice of undertaking an expanded investigation of employers' practices in the event that a complaint results in a finding of a violation of the *ESA*. This was the practice during the heyday of *ESA* enforcement and certainly should be the practice today. Shortly after the *ESA* came into effect in 1969, thorough investigations of business entities were conducted, triggered by employees that filed formal complaints.<sup>24</sup> Unfortunately, we have seen a steady decline of investigations conducted.<sup>25</sup> In 1971, 52,263 employees received remuneration due to contraventions of the Act, while in 2009-2010, a mere 20,762 claims were investigated.<sup>26</sup> This sharp decline in investigations conducted has not been a result of improved work conditions; instead it is a reflection of the ineffective, stunted enforcement system currently in place.

### **3.3 Inspection Blitzes**

We recommend that the Ministry of Labour continue and expand the use of proactive enforcement and inspection blitzes. Interns and other vulnerable workers face many barriers to enforcing their rights under the *ESA* through the complaints system. The Ministry of Labor's intern inspection blitz from Spring 2014 highlighted widespread violations of the laws surrounding unpaid internships and further demonstrates the need for wider proactive enforcement. Additionally, we recommend that the Ministry of Labour conduct follow-up inspections with employers that were found to have violated the *ESA* during inspection blitzes.

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<sup>24</sup> Vosko, Leah F. et al. "New approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada." Toronto, Law Commission of Ontario. 2011 at 8-17.

<sup>25</sup> Ibid at 16-18.

<sup>26</sup> Ibid at 17.

### 3.4 Greater Oversight for Academic Internships/Trainee Programs

We recommend greater oversight of internship, trainee, practicum, and work-integrated learning programs organized through educational institutions. While some colleges and universities have made it a priority to provide legitimate unpaid experiential learning opportunities outside the classroom, others have not been able to meet the provisions that have been enshrined in the *ESA*. Students who pay tuition to enroll in a program that has an unpaid work term experience as part of the program essentially pay to work for free. Initiating a correct, fair, structured work experience program would be quite valuable to students and future employers. However, there has been a substantial rise in students claiming of participating in unpaid work that is irrelevant to their educational development. For instance, media coverage has identified alarming cases of the misclassification of jobs in the hospitality industry as ‘internships’. College students have shared experiences in which they worked as unpaid interns cleaning hotel rooms and bussing tables in order to fulfill a core requirement of their academic program.<sup>27</sup>

It is evident that unpaid internships offered through academic programs must be regulated to ensure that students gain valuable experience rather than offering free labour. While academic institutions encounter financial strains as a result of inadequate funding from the province of Ontario, they have been steered towards using internship programs as a way to deter fees that would otherwise be spent on in-class learning. With great concern, we stress that the Ministry of Labour provide greater oversight, as a preventative measure, of exploitative unpaid internships organized through academic programs. We suggest some of the following proposals of which could be implemented:

1. Academic institutions submit an annual report of affiliated internship programs. This report would include details of the nature of the work, the hours and students that participated in the internship as well as a feedback component of what students thought about the internship.
2. Inspections of internship programs every two years.
3. Monetary fines as well as suspensions for unpaid internship programs that are in contravention of the *ESA*.

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<sup>27</sup> Zoe McKnight, 2013. "Unpaid Interns: Toronto College Students Clean Tubs for Nothing" Toronto Star. Online:  
<[http://www.thestar.com/news/gta/2013/10/14/unpaid\\_interns\\_toronto\\_college\\_students\\_clean\\_tubs\\_for\\_nothing.html](http://www.thestar.com/news/gta/2013/10/14/unpaid_interns_toronto_college_students_clean_tubs_for_nothing.html)>.

### 3.5 Development of a Litigation Strategy

Fifth, we recommend that the Ministry of Labour, through its Legal Services Branch, develops a litigation strategy to conduct prosecutions against employers who have been identified as (i) utilizing a business structure that predominantly utilizes unpaid labour; (ii) repeatedly advertising positions requesting unpaid labour; and, (iii) which have been subject to repeated complaints from the public or employees.<sup>28</sup>

### 3.6 Amending the ESA to Include Treble Damages

Our final recommendation is that the Ontario government follows the best practices of American states including Arizona, Idaho, Maine, Maryland, Massachusetts, Michigan, Nebraska, North Dakota, Vermont and West Virginia and enact reforms entitling employees for treble damages for monetary violations of the *ESA*. This approach will incentivize employer compliance, encourage settlements that better reflect wages owed, and allow the private bar to pursue cases involving employment standards due to improved economic viability.

## **PART 4: PROVIDING BROADER PROTECTION FOR CONCERTED ACTIVITY**

In response to question 11, the Canadian Intern Association recommends that Section 5 of the *LRA* be amended to provide broader protection for employees to engaged in concerted activities in the advancement of their workplace rights. Guidance can be drawn from the approach taken by the American *National Labor Relations Act* (“*NLRA*”).

Essentially, interns and other non-unionized workers need broader protections when it comes to both individual and concerted activity related to organizing, communicating, and protesting conditions of work. Section 7 of the *NLRA* provides a model, which although not perfect, could form the basis for the development of much broader rights protection under the *LRA*. Section 7 of the *NLRA* has been interpreted by the National Labour Relations Board in such a manner to grant wide-ranging protection for a host of concerted activities by non-unionized workers. The Canadian Intern Association recommends that section 5 of the *LRA* be amended to provide broader protection for workers’ individual and collective action outside of the activities of trade unions; additionally, the Canadian Intern Association further recommends that the *ESA* be amended to mirror the language contained in the updated section 5 of the *LRA*.

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<sup>28</sup> Andrew Langille.. “Recommendations Re: Regulation of Unpaid Internships In Ontario.” Academia: online: <[http://www.academia.edu/6302484/Recommendations\\_Re\\_Regulation\\_of\\_Unpaid\\_Internships\\_In\\_Ontario](http://www.academia.edu/6302484/Recommendations_Re_Regulation_of_Unpaid_Internships_In_Ontario)> at 9.

## CONCLUSION

In closing, we graciously thank the Special Advisors and the Ministry of Labour staff for reviewing this submission. The Canadian Intern Association recognizes that the Ministry of Labour has made advancements in its understanding of the socioeconomic issues that students, interns, and young workers face, but are still cognizant that the system is currently failing some of the provinces' most vulnerable workers.

It is our position that the current framework, as set out by the *ESA*, does not properly address the fundamental issue of exploitive employment relationships that interns are subject to. Moving forward, we hope that our submission has shed light on this issue in order to amend the *ESA* and the *LRA* to reflect the current state of the economy.

## About the Canadian Intern Association

The Canadian Intern Association is a not-for-profit organization that advocates against the exploitation of intern workplace rights and aims to improve internship experiences. Founded in June 2012 and incorporated federally in July 2013, the Canadian Intern Association has consistently called upon the Government of Ontario to enact legislative reforms to provide greater protections for interns.

Our mission is to work with businesses, charities, government, universities and individuals to improve labour conditions for interns. We are the resource for interns to learn their rights and share their experiences, and for employers to run better internship programs. We believe that all interns deserve to be treated fairly. That means minimum wage for interns who are doing the work of employees, and better conditions for interns receiving academic credit.

Our work loosely falls within the four categories:

- (i) Education
- (ii) Law reform
- (iii) Media outreach
- (iv) Research

As Canada's primary advocacy organization for the rights of interns, we hear from interns whose workplace rights have been violated on a daily basis. We routinely hear stories from interns who are misclassified and mistreated at work and want to know what to do about it. Unfortunately, given their limited legal protections and the weakness of Ontario's enforcement and compliance mechanisms, these workers have inadequate options. We welcome the opportunity to submit, to you, our recommendations concerning this issue.

## About this Submission

This submission to the Changing Workplaces Review could not have been possible without the hard work of a number of individuals. The Canadian Intern Association is eternally grateful for the contributions of the following individuals: Schenella Pinto, Director of Research; Richa Sandill, Director of Advocacy; Josh Mandryk, Executive Director; Claire Seaborn, Chair; and, Andrew Langille, General Counsel.