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Lost in Transition: The Regulation of Unpaid Labour during the School-to-Labour Market Transition in Ontario

Andrew Langille *

1. An Introduction to Unpaid Labour in Ontario's Labour Market

Unpaid labour has become firmly situated as a growing area of concern in Ontario by academics, media outlets, labour activists, students, and young workers. There is growing consensus that the unpaid labour extracted from youths during the school-to-labour market transition is a serious public policy issue demanding attention. Multiple advocacy groups have appeared, such as the Canadian Intern Association and Students Against Unpaid Internship Scams, which are dedicated to drawing attention to precarious forms of employment such as unpaid internships and the increasing demands from post-secondary education institutions that students undertake unpaid labour as part of their academic studies.

Currently, there is a dearth of research into the deployment of unpaid labour during the school-to-labour market transition. Over the past three years there has been a growing awareness in society about the effects arising from unpaid labour on youths and increasing calls from various actors for government intervention to renormalize the youth labour market in Ontario which has been beset by high unemployment in urban centres, rampant underemployment, a growth in precarious employment, and an increasingly fractured school-to-labour market transition.

The main goal of this paper is provide a baseline analysis of the regulatory protections that youths receive, or don't receive, during the school-to-labour market transition. This paper is divided into two sections. The first

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section overviews the current regulatory environment in Ontario pertaining to the unpaid labour that youths undertake as part of the school-to-labour market transition. This section examines the exclusions, under statutes and policy, which deny youths critical protections under employment standards, occupational health and safety, workers' compensation, and human rights laws. The second section analyzes the current regulatory environment and argues that Ontario's regulatory approach is largely little more than a series of statutory exclusions which deny youths key protections during the school-to-labour market transition, which is arguably the most critical phase in any person's working life. Given the current lack of research, this paper largely focuses on providing a descriptive analysis of the jurisprudence, statutes and regulations, and internal government policy related to unpaid labour. The goal here is to lay out a framework that other researchers can build upon in critiquing the regulatory approach and to offer prescriptive policy solutions to tackle to growing prevalence of unpaid labour in Ontario's labour market.

1.1 What is Meant by “Youths”?

Throughout this paper the plural “youths”, rather than the singular “youth”, is used in recognition that youths are not a homogenous group, but a distinct heterogeneous class within Ontario society representing a staggering amount of diversity and difference alongside many commonalities. The term “youths” captures the age range when persons are engaged in a variety of training and education, both formal and informal, that youths engage in during the school-to-labour market transition, in the period of early adulthood when their life-courses are still be worked out, and during the early years of entering the labour force.

In terms of being a theoretical tool, “youths” recognizes there are multiple narratives occurring: at the individual level, within the family, the community, and as a cohort and a social generation. Fifteen to thirty-four years of age are the demarcation points on the spectrum of age that have been selected for the purposes of this paper. This broad net was cast for two reasons. First, unpaid labour is increasingly being extracted from youths at various points, it can happen as easily to secondary-school age students as it can workers in their early thirties. Second, this was done in recognition that the transition period into full “adulthood” and hence independence is taking longer due to the following factors: increased lifespan; increasing levels of educational attainment, credentialism, and youths holding multiple degrees; the rise of delayed adulthood; and, the

increasing amount of time it takes youths to achieve financial independence.

1.2 An Overview of Unpaid Labour During the School-to-Labour Market Transition

This section provides a brief overview of the deployment of unpaid labour in Ontario during the school-to-labour market transition. The following areas are discussed: overall trends; the number of internships; the location of internships in the economy; and, the impacts arising from internships. Ontario is currently seeing the erosion of the entry-level positions; paid employees are being replaced with unpaid interns and other forms of precarious employment. Unpaid labour has a direct effect on the economy: they contribute to youth unemployment, drive-down wages, slow economic growth, and allow employers to replace paid employees with unpaid workers who are often vulnerable youths or recent immigrants. In a market-economy that is predominantly consumer driven if you have a sizable segment of the youth population foregoing wages for prolonged periods you are going to see structural problems emerge which impact demographic trends, such as the marriage rate, adult children co-habiting with their parents, the birthrate, and home ownership. All of these trends have the capacity to detrimentally impact the wider economy and slow economic growth. The rapid ascent of intern culture in Ontario is not a particularly good development for anyone except employers who are obtaining a lot of unpaid labour.

The growing use of unpaid labour implicates a series of problems linked to socio-economic class and social mobility. Youths coming from historically marginalized populations and lower socioeconomic classes often have a reduced capacity to engage in unpaid labour. These barriers are an insidious problem that's leading to a creeping cultural apartheid that blocks youths from entering high-status that control Ontario's economic, social, and political levers. What we're seeing is that students from wealthy families are being rewarded with employment on the basis of their family's socio-economic status, which erodes any semblance of a meritocracy and reduces social mobility.

Ontario is at the point where unpaid labour can be found in almost any industry, but the overall trend is that unpaid labour is most prevalent in the tertiary sector (i.e. service sector). The prevalence of unpaid labour in the primary or secondary sectors appears to be quite low. The explosion of internships in Ontario's economy can be linked to the following long-

term economic trends, which are deindustrialization, the expansion of the service sector, the relative collapse of manufacturing and processing of raw materials, the exit of government from utilizing robust labour market policy and active labour market programs, and the commodification of post-secondary education and the reduction of funding. The growth of unpaid labour is also being driven by various trends within the labour market, which are lack of employment standards enforcement by the Ministry of Labour, cost-cutting measures by employers, the increased use of migrant workers, ignorance and lack of knowledge around workplace law, credentialism and the need for youths to differentiate their skill-set amid an over-saturated youth labour market, and the drive for increased profits by employers.

There is a complete lack of data in relation to the deployment of unpaid labour in Ontario's labour market. This lack of data poses problems when it comes to structuring public policy responses, as no one knows the actual number of people undertaking unpaid labour in the labour market. Current estimates for Ontario place the number of positions requiring youths to provide unpaid labour at somewhere between 125,000 to 250,000 annually. This figure would be a combination of students undertaking unpaid labour as part of requirements in a secondary or post-secondary program and unpaid labour being completed in informal training positions outside the confines of a formal educational programs. The total number of illegal positions requiring unpaid labour (i.e. non-compliant with the Ontario's employment standards laws) occurring annually would fall between 75,000 to 150,000. The total number of positions where students are required to provide unpaid labour would sit between 50,000 to 100,000 annually. At first blush this figure may appear high, but some aspects related to positions requiring unpaid labour need to be understood. These positions can often be part-time, be of short-duration, and a youth can hold multiple positions concurrently. Only a small fraction of the youths in Ontario would have to undertake positions requiring unpaid labour annually for the above-noted figure to be reached. In 2012 the total number of Ontario residents in the 15 to 34 cohorts was 3,682,138, while the total post-secondary enrolment was 760,731.

In terms of the geographical prevalence of unpaid labour in Ontario, it is clear that a number of key ingredients give rise to unpaid labour during the school-to-labour market transition, these are: an urban environment; the presence of a large number of students and recent graduates from post-secondary education institutions; and, a well-developed tertiary sector. In Ontario, the largest amount of unpaid labour exists in Toronto and the surrounding urban environs. Additionally, anecdotal evidence

suggests that Ottawa also has a lot of unpaid labour occurring, which is linked to presence of government, non-profits, and various professional service firms and to a lesser extent there is appears to be a significant amount of unpaid labour being provided by youths in the following cities: Kitchener-Waterloo; Guelph; Kingston; London; and, Windsor.

1.3 Developing Typologies: Who Gets Impacted by Unpaid Labour and How it Happens

Within Ontario's youth labour market there are various points of entry and different forms of training, both formal and informal, available to youths during the school-to-labour market transition. Ontario requires mandatory attendance at school until the age of eighteen, so the typical initial entry point into the labour occurs during or just after secondary education when youths take on part-time jobs. While Ontario has programs that allow secondary students to undertake apprenticeship training, the vast majority of Ontario's youths do not enter the labour market directly from secondary school, rather they pursue further post-secondary education at a community college, a private career college, or a university.

There are a variety of forms of unpaid labour that youths can find themselves undertaking during the school-to-labour market transition. Within the realm of formal education there are work-integrated learning programs where youths complete unpaid career training opportunities offered by post-secondary education institutions in conjunction with employers. There is also a parallel system outside the auspices of formal education where youths do unpaid labour as part of informal training opportunities offered by employers, government, or non-profit agencies. Both these formal and informal programs are part of the larger process of the school-to-labour market transition.

There is a great variation between forms of formal and informal training that comprise the school-to-labour market transition. Vast differences exist in duration, types of learning opportunities, regulatory coverage, duties, employment status, level of remuneration, evaluation methods, and degree of supervision. Some examples of the options available to youths in the school-to-labour market transition include co-op programs, traineeships, practicums, volunteering, clinical education, internships, work placements, and conducting research. One of the difficulties assessing the regulatory framework in governing unpaid labour associated with the school-to-labour market transition is that there are no standard

definitions for the various forms of training that youths engage in. While it is relative easy to identify an example of fieldwork, research, or clinical education in the context of medical or law school, tracing the differences between a co-op semester, work placement, or internship can be exceedingly difficult.

Popular culture has created the idea that unpaid labour is the domain of youths who are in school or are looking to launch their careers. While this perception is accurate to a degree, it masks the wider deployment of unpaid labour in Ontario's labour market. Today a person undertaking unpaid labour can be a young person who recently graduated, a mother hoping to re-enter the workforce, an injured worker retraining for a new career, or a recent immigrant obtaining "Canadian experience". The point being is that illegal (and legal) unpaid labour is impacting a far wider segment of the labour force than anyone has previously imagined. It should be noted that anecdotal evidence suggests that young females are the most likely to engage in unpaid labour as part of the school-to-labour market transition and this is suggestive that there is a deep gendered dimension in play. There is a skew towards requiring unpaid labour from young workers in traditionally female dominated professions and a disturbing trend in post-secondary programs dominated by females which demands hundreds of hours of unpaid labour (i.e. teaching, social work, law, and nursing).

Tracking the specific groups within society that are being affected by unpaid labour is relatively easy. Within the category of youths the following subgroups have a greater prevalence of undertaking unpaid labour: students engaging in unpaid labour as part of work-integrated learning associated with formal academic requirements set by a secondary or post-secondary education institution; students engaging in unpaid labour outside of formal academic requirements; international (or foreign) students who are studying in Ontario, but who are not Canadian citizens or permanent residents; trainees undertaking unpaid labour as part of preparing for careers in regulated professions; and, persons who have graduated from post-secondary education institutions in the past five years. It should be noted that the growth of unpaid labour in Ontario's labour market has not been limited to youths with the following groups being heavily affected by unpaid labour, these groups are: women returning from an absence in the labour market; recent immigrants and refugees; and, injured workers in retraining programs.

1.4 A Brief Explanation of Workplace Law in Ontario

Ontario, along with other Canadian province except Quebec, utilizes a common law system, which was inherited from the United Kingdom. Canada has a Federal political system and due to the internal division of power the regulation of employment is mainly a provincial responsibility. Workplace law in Ontario comes from a variety of sources, but is heavily rooted in the legacy of Master and Servant law developed during the Middle Ages in England and brought over to Canada during the colonial period.

There are various aspects of workplace law which taken together form an overarching legal framework. Under a common law system the legislature enacts statutes that outline the law in broad-strokes and can also enact technical regulations through the Executive branch. The Courts, arbitrators, and administrative tribunals then interpret these laws, which gives rise to case law and precedence. These decisions interpret the laws and give a great deal of context to workplace law.

There are different parts of workplace law and a brief explanation of each area is in order. Labour law deals with labour relations in unionized environments. Employment standards laws deal with interactions between employers and employees when there is no union and sets out the minimum floor of rights for all workers. Human rights laws, which are quasi-constitutional, address issues like harassment, discrimination, racism, and sexism. Workers' compensation laws provide workers who have injured on the job with a form of social welfare. Occupational health and safety laws protect workers from unsafe situations in the workplace. Ontario has statutes in each of these areas and these are the main sources of workplace law. Some additional statutory sources of workplace law include the Canadian Charter of Rights and Freedoms, privacy laws, and the Canadian Constitution. These laws don't explicitly speak to the issue of unpaid internships, but are highly important statutes that have impacted on the development of workplace law in Ontario.

Unpaid labour is commonplace in Ontario during the school-to-labour market transition and it is routine for students and young workers to engage in multiple periods of unpaid labour prior to obtaining paid employment post-graduation. The laws governing the use of unpaid labour by employers in Ontario are relatively well developed when compared with other jurisdictions in Canada and the United States. Although the scope, clarity, and degree of regulation over unpaid labour in Ontario appears extensive at first blush there it is necessary to remember that little if any enforcement of laws governing unpaid labour

and there is a deep reluctance on the part of youths to challenge probable violations of workplace law due to a deep power imbalance they face from employers.

4. 2. Employment Standards

In Ontario, the *Employment Standards Act, 2000* (“the *ESA*”) governs the minimum employment standards. The *ESA* regulates areas such as the minimum wage, hours of work, vacation pay, and break times. The *ESA* is a broad remedial statute structured to regulate the minimum standards of the conditions of employment. The Ministry of Labour administers the *ESA* and appeals arising from administrative decision from the Ministry of Labour are heard by the Ontario Labour Relations Board. There are four major exclusions under the *ESA* permitting the use of unpaid labour by employers, these are: the student exclusion; the professional exclusion; the person receiving training exclusion; and, volunteers. The exclusions vary in effect and either totally exclude people from the protections under the *ESA* or can deny protections under specific parts of the *ESA*.

Two critical aspects of Ontario’s employment standards laws have to be understood. First, there is a presumption under the *ESA* that a person performing work for an employer is an employee as the definition of “employee” under the *ESA* is extremely broad. This definition reads:

- (a) a person, including an officer of a corporation, who performs work for an employer for wages, (b) a person who supplies services to an employer for wages, (c) a person who receives training from a person who is an employer, as set in subsection (2), or (d) a person who is a homemaker.

Absent meeting the criteria for a statutory or common law exclusion, which are typically quite narrow, the employer must avail their employees with the minimum standards set out in the *ESA*. Second, there is a key protection against the proliferation of unpaid or underpaid labour is section 5 of the *ESA* prohibits contracting out of minimum employment standards and voiding employment contracts that contain a condition that falls below the minimum employment standards. Section 5 reads:

- (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void. (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to

an employee than the employment standard, the provisions or provisions in the contract or Act apply and the employment standard does not apply.

Section 5 is a critical statutory provision in the context of regulating unpaid labour as it severely curtails the ability of employers to pressure employees to accept remuneration or labour under conditions less than the statutory minimums. Section 5(2) could be utilized to counter the assertion that the intrinsic value of training has a monetary value.

2.1 The Student Exclusions

This section covers the exclusions targeting students engaged in unpaid labour as part of a formal education program. There are several exclusions pertaining to secondary students and post-secondary students engaged in fulfilling the requirements of their academic programs. Under section 3(5) of the *ESA* there is a powerful exclusion targeting students enrolled in secondary, or post-secondary education, it reads:

This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation: 1. A secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled. 2. An individual who performs work under a program approved by a college of applied arts and technology or a university.¹

This is the critical piece of the statutory infrastructure that allows for the creation of academic programs that contain requirements which demand unpaid labour such as co-op semesters, unpaid internships, clinical education, practicums, or field placements. The exclusion under subsection 3(5) of the *ESA* is a total exclusion that completely removing students from any of the protections under the Act.

The case law related to subsection 3(5) of the *ESA* is extremely limited. The three reported cases contain some deeply troubling aspects. *Villeneuve*

¹ Beyond the exdusions set out for secondary and post-secondary students, there are exdusions for persons participating in programs under the *Ontario Works Act, 1997*; prisoners in custody and those fulfilling a part of sentence under the *Youth Criminal Justice Act*; and, persons working in a simulated working environment as part of rehabilitation programs.

v. 833420 Ontario Inc.,² an Ontario Labour Relations Board decision dealing with whether an application under s. 116 of the *ESA* was properly brought, contains commentary that would lead a reasonable observer to believe that the Employment Standards Officer overseeing the initial investigation actively discouraged the employee from appealing. A more troubling aspect of this decision is the possibly is that the Employment Standards Officer utilized subsection 3(5)(2) as a means to refuse jurisdiction to avoid a ruling that would have considered participants in the Government of Ontario's Job Connect program legal employees and shielded government sponsored training programs from having to adhere to minimum employment standards. The employer and employee eventually reached a settlement in this matter.

In *Cosimo's Garage Ltd. v. Smith*,³ Vice-Chair McKellar analyzed the interaction between subsections 1(2) and 3(5)(2) in finding an apprentice mechanic was an employee under the *ESA*. Subsequently, the employer sought reconsideration of Vice-Chair McKellar's decision and alleged that the Labour Relations Officer assigned to the case assured the employer they would succeed in contesting the Employment Standards Officer's order for pay wages and vacation pay. The Ministry of Labour's Director of Employment Standards declined to appear at a hearing to make submissions on whether apprentices in Ontario enjoy protection under the *ESA*. In *Dobreff v. Davenport*,⁴ subsection 3(5)(2) was judicially considered in passing. Given the context of the case, which involves what is essentially a vexatious litigant, the import of subsection 3(5)(2) was not examined in great detail and it appears that Justice Ross erroneously applied subsection 3(5). While none of the aforementioned cases is conclusive of systemic bias against young workers on its own or even in unison, it leaves some troubling unresolved questions about what may be occurring outside public purview within the confines of the Ministry of Labour when dealing with the difficult terrain surrounding the protection of youths engaged in the school-to-labour market transition.

² *Villeneuve v. 833420 Ontario Inc.*, 2003 CanLII 35624 (ON LRB). The parties eventually reached a settlement, see: *Villeneuve v. 833420 Ontario Inc.*, 2003 CanLII 39965 (ON LRB).

³ *Cosimo's Garage Ltd. v. Smith*, 2005 CanLII 25323 (ON LRB). The employer sought reconsideration, but was unsuccessful, see: *Cosimo's Garage Ltd. v. Smith*, 2005 CanLII 28970 (ON LRB).

⁴ *Dobreff v. Davenport*, leave to appeal to S.C.C. refused in 2009 CarswellOnt 2415 2009 Carswell 15 (ONCA), aff'g 2008 CarswellOnt 8244 (Ont. S.C.J.).

2.3 The Person Receiving Training Exclusion

This exclusion is tied to the definition of “employee” contained in s. 1(1) of the *ESA*, which states “(c) a person who receives training from a person who is an employer, as set out in subsection (2)...”. Subsection 1(2) sets out a six-pronged reverse-onus test to assess whether a person receiving training is an employee:

Person receiving training – For the purposes of clause (c) of the definition of “employee” in subsection (1), an individual receiving training from a person who is an employer is an employee of that person if the skill in which the individual is being trained is a skill used by the person’s employees, unless all of the following conditions are met: 1. The training is similar to that which is given in a vocational school. 2. The training is for the benefit of the individual. 3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained. 4. The individual does not displace employees of the person providing the training. 5. The individual is not accorded a right to become an employee of the person providing the training. 6. The individual is advised that he or she will receive no remuneration for the time that he or she is in training.

The employer must meet every part of the test must be met for the exclusion to be engaged and for the person receiving training to be excluded from the operation of the *ESA*. In actual work environments the criteria in the six-pronged test are extremely difficult to adhere to and this will be illustrated in the case law discussed below.

The Ontario Labour Relations Board has issued ten decisions that in some manner consider subsection 1(2) of the *ESA*. In eight decisions there was a finding there was employee misclassification occurring and a breach of the provisions under the *ESA*.⁵ Only one reported case, the decision in *Swift Trade Securities Training Inc. v. Pace*, which is discussed below, found that the provisions set out in subsection 1(2) were complied with and that the trainees were properly excluded from the protection of

⁵ See: *Sandhu v. Brar*, 2013 CanLII 43024 (ON LRB); *Girex Bancorp Inc. v. Hsieh*, 2004 CanLII 24679 (ON LRB); *Urban Development of Essanjay v. Kim*, 2004 CanLII 30724 (ON LRB); *Cosimo’s Garage Ltd. v. Smith*, 2005 CanLII 25323 (ON LRB); *Select Driver Services Ltd. v. Beyene*, 2006 CanLII 25984 (ON LRB); *Infosys Canada v. Shourjeb*, 2007 CanLII 5945 (ON LRB); *Reyhani v. 1391367 Ontario Inc. (Beikabadi Dentistry Professional Corporation)*, 2011 CanLII 1863 (ON LRB); *1760530 Ontario Corporation (Mac’s) v. Rehman*, 2012 CanLII 4272 (ON LRB); and, *Lifetime Security Tech Inc. v. Yu*, 2012 CarswllOnt 10402.

the *ESA*.⁶ A plain reading of the case law reveals that the exclusion under subsection 1(2) of the *ESA* is quite narrow.

Girex Bancorp Inc. v. Hsieh,⁷ dealing with an appeal of a Ministry of Labour administrative decision, is the leading case on interpreting subsection 1(2) and is the only misclassification case that explicitly deals with an unpaid internship situation where the interns were programming computer software. The employer claimed that the interns were “voluntary trainees” gaining work experience, skills, and training through the program. The only remuneration that the interns received was a letter of recommendation. Vice-Chair Wacyk utilized the six-pronged test in her analysis and found that the employer had breached two parts of the test. Subsequent to this finding, she confirmed the Employment Standards Officer’s order to pay wages and vacation pay. In *Lifetime Security Tech Inc. v. Yu*,⁸ a case involving misclassification of an electronics technician, Vice-Chair Wacyk made a pointed comment at paragraph 58 of the decision stating: “However, subsection 1(2) of the Act provides that persons who are being trained are entitled to the protections of the Act except in the narrowest of circumstances.” This is a revealing insight in that it shows that subsection 1(2) should be given a narrow reading given the exclusion totally removes the trainee from *ESA* protections.

*Swift Trade Securities Training Inc. v. Pace*⁹ is the only case in Ontario where an employer successfully defended a claim where a breach of subsection 1(2) was alleged. In this case the employer brought an application under s. 116 of the *ESA* appealing an order from an Employment Standards Officer requiring them to pay wages to a misclassified employee. The employer had set up two distinct corporations, one focused on trading securities while the other focused on training people who wanted to become traders. Trainees paid \$99.00 to attend a two-month program where they would trade actual securities in real time and be given training on how to trade stocks. At paragraph 18 of the decision Vice-Chair McKellar stated that because the employer:

...employs trainers, not traders. The claimant was being trained to be a trader, not a trainer. Consequently the claimant was not being trained in a skill used by

⁶ See: *Swift Trade Securities Training Inc. v. Pace*, 2004 CanLII 18595 (ON LRB). It should be noted that in *Surujnairn v. Chin*, 2011 CanLII 23489 (ON LRB), Vice-Chair Albertyn utilized the *Swift* in his decision, but the discussion subsection 1(2) of the *ESA* was *obiter* as the claim for unpaid wages during the apprenticeship period was time-barred.

⁷ *Girex Bancorp Inc. v. Hsieh*, 2004 CanLII 24679 (ON LRB).

⁸ *Lifetime Security Tech Inc. v. Yu*, 2012 CanLII 47762 (ON LRB).

⁹ *Swift Trade Securities Training Inc. v. Pace*, 2004 CanLII 18595 (ON LRB).

Training's employees. In the Board's view, this was a sufficient basis on which to allow this application.

While on the surface the logic appears sound, in paragraph 12 of the decision it is stated “[o]f the Training registrants who obtain work as traders, some are hired by Training and some are hired by its competitors...”, this is troubling as the employer was likely subverting the intent of *ESA* via the clever use of corporate structures. There are two published decisions relating to the other corporation that engaged in trading securities where the matters were settled before it went to a full hearing at the Ontario Labour Relations Board,¹⁰ while it is impossible to state these cases are definitively related to misclassification of trainees, there is a strong possibility.

2.4 Volunteers and Pre-Employment Testing

This section deals with two emerging forms of employee misclassification that demand unpaid labour from youths. In Ontario's youth labour market employers are increasingly bringing on youths as "volunteers" without wages, fringe benefits, or any of protections offered under workplace law or demanding that youths provide unpaid labour for an extended period of time as a form of pre-employment testing.

As greater attention is focused on unpaid internships and other highly visible forms of unpaid labour there is a concern that employers will simply alter their language and begin calling people “volunteers” in an attempt to subvert the *ESA* and other social protective statutes aimed at providing employees with a minimum floor of rights. Traditionally volunteers have been limited to the non-profit and charitable sectors, but increasingly for-profit employers have been utilizing misclassified volunteers and utilizing their unpaid labour as a substitute for paid employees (i.e. music festivals, the live event industry, and the hospitality sector). The Ministry of Labour has stated that these are the following factors that are considered to test if a person is an employee or volunteer:

Because volunteers are not “employees”, the *ESA* does not apply to volunteers. The following factors are generally considered when determining whether an individual is a volunteer: (a) the extent to which the person performing the services views the arrangements as being pursuant to his pursuit of livelihood on

¹⁰ *Swift Trade Inc. v. Khoo*, 2005 CanLII 21508 (ON LRB); and, *Thompson v. Swift Trade Securities Inc.*, 2003 CanLII 3620 (ON LRB).

the one hand, and the extent to which the person receiving the services is conferred a benefit on the other hand; (b) the circumstances of how the arrangement was initiated; (c) whether an economic imbalance between the two parties was a factor in structuring the arrangement. The fact that there is or isn't some form of payment is not determinative of volunteer vs. employee status.¹¹

The above noted factors constitute the only guidelines that the Ministry of Labour utilizes in adjudicating cases where there question of whether a person is an employee or volunteer. These guidelines remain unpublished and the Ministry of Labour has done little to address the growing problem of employers misclassifying employees as volunteers. It should be noted that volunteers are not explicitly excluded from the *ESA*. Another form of misclassification that employers are increasingly exploiting is not paying young workers for a period of time at the start of employment. The Ministry of Labour does not have a published policy on pre-employment testing and this subject is not addressed in the *ESA*. An internal Ministry of Labour policy document states:

[p]ersons who are engaged in some form or pre-employment activity are generally not considered employees under the Act (and therefore are not entitled to the protections of the *ESA*), provided that the amount of time spent in the program is reasonably limited in duration and the activities involved do not displace the substantive training, instruction and orientation needed once an employee is hired.¹²

This statement is troubling, as it does not provide clear guidance on pre-employment testing. No bright line exists in Ontario per se, but an example of illegal pre-employment selection or volunteer would be requiring prospective employees to work a "trial shift", which is quite a common demand in the hospitality industry and is known as a "stage". There are four known cases in Ontario which address misclassification of volunteers or pre-employment testing under the *ESA*. The decision in *Re Consumer Liability Discharge Corp.*¹³ dealt with unpaid labour in the context of volunteer for a for-profit employer. In finding that the employee was misclassified as a volunteer, Referee Davis made a number of interesting comments. The critical passage from the case reads:

¹¹ Ministry of Labour House Notes on Internships, February 22, 2012, pg. 5. This is confidential internal government document currently in the possession of the author.

¹² Ibid.

¹³ *Re Consumer Liability Discharge Corp.*, Jul. 24, 1981 (Davis) E.S.C. 1032. It should be noted that this case was decided under an old employment standards statute.

...one of the key factors in determining whether there has been a true volunteering of services...is the extent to which the person performing the services views the arrangement as being pursuant to his pursuit of a livelihood on one hand, and the extent to which the person receiving the services is conferred a benefit on the other hand. Another factor will be the circumstances of how the arrangement was initiated, and again, whether an economic imbalance between the two parties was a factor in structuring the arrangement.

Referee Davis goes on to state that the definitions of “employee” were designed, in part, to “preclude within limits the shifting of the cost of training from the employer to the employee.” This is critical observation as in the period since this case was decided employers have begun using unpaid labour as a means to shift training costs onto youths directly. In *Re Glenn William Robinson o/a Station Street Café*,¹⁴ Referee Adamson considered whether an employee agreeing to undertake unpaid labour as part of trial period of managing a restaurant. The Referee found that the employees were owed back wages for the time they worked. It was found that the lack of remuneration was not critical for the determination of volunteer status. One particularly interesting passage about the ability of volunteers to avail themselves of the protections of the *ESA* reads:

[t]he Employment Standards Act is remedial legislation. Its application, in almost every instance, is sought by workers who consider themselves to have a grievance. If for some reason, a volunteer worker was to seek the application of the Act doubtless the claim would need to be considered, since the legislation does not exclude such workers from its application...the application of the of the Employment Standards Act, which they have every right to do, and it must be made available to them.¹⁵

This indicates that in the absence of an explicit statutory exclusion, volunteers have the ability to invoke the protections of the *ESA* if they feel the volunteer arrangement has become a de-facto employment relationship. In *Re Mrs. Dorothy Haight o/a Gladway Gardens Wheel Inn*¹⁶ Referee Rose ordered the payment of back wages in a situation where an employee undertook six weeks of voluntary unpaid labour while training in a flower shop. The most recent case discussing volunteer misclassification is *Iannuzzi vs. 1747981 Ontario Inc. o/a Platinum Events*

¹⁴ *Re Glenn William Robinson o/a Station Street Cafe*, Dec. 30, 1988 (Adamson) E.S.C. 2434. It should be noted that this case was decided under an old employment standards statute. This is also the only case dealing explicitly with pre-employment testing.

¹⁵ *Ibid.*

¹⁶ *Re Mrs. Dorothy Haight o/a Gladway Gardens Wheel Inn*, Jul. 13, 1982 (Rose) E.S.C. 1249.

Group,¹⁷ which was a decision from an Employment Standard Officer that found the employer had misclassified an employee by utilizing their unpaid labour “in an unpaid volunteer capacity” and in calling them a “Wedding and Event Intern”.

3. Occupational Health and Safety

This section deals with occupational health and safety. These are laws designed to protect the physical safety of workers and increasingly psychological safety with the implementation of Bill 168. The *Occupational Health and Safety Act* ("the *OHSA*") is a key statute in Ontario containing key protections relating to health, safety, and workplace violence. In subsection 1(1) of the *OHSA* "worker" means a person who performs work or supplies services for monetary compensation". The inclusion of "monetary compensation" excludes 'persons who receive training', students, unpaid interns, and possibly interns who are receiving honourariums or stipends. The *OHSA* does not apply to a person working in an unpaid capacity. An internal Ministry of Labour document provides this overview of how the *OHSA* applies to workers undertaking unpaid labour, it reads:

[t]he *Occupational Health and Safety Act* (OHSA) defines a “worker” as a person who performs work or supplies services for monetary compensation. This definition would exclude unpaid interns (students, trainees, volunteers) from OHSA coverage. MOL has historically interpreted “monetary compensation” broadly (to include, for example, an annual stipend, or an honorarium) so that the OHSA will apply as widely as possible. Although the rights conferred upon workers by the OHSA do not apply to unpaid interns, these individuals would still have the benefit of a safe workplace where the employer complies with its duties under the OHSA.¹⁸

The exclusion under the *OHSA* is extremely powerful and excludes a large number of youths engaging in unpaid labour during the school-to-labour market transition.

The *OHSA* creates a gap in protection by linking its protection to “monetary compensation.” This creates a quandary where a misclassified

¹⁷ This is an unpublished decision as it only reached the level of an Employment Standards Officer. The author of this paper has a copy of the Employment Standard Officer's Reasons for Decision in his possession.

¹⁸ Unpaid Internships, Briefing for Minister's Office, Ministry of Labour, March 27, 2013, Pg. 10

worker undertaking unpaid labour would be entitled to the minimum wage under the *ESA*, but would be excluded from coverage under *OHS*A because of the absence of remuneration. Case law reiterates this, in *Hillis v. Boyko Rentals Ltd.*¹⁹ the absence of an advanced agreement to be paid disentitled the unpaid worker to rights under the *OHS*A. The interplay between the *ESA* and the *OHS*A creates a quandary, the *ESA* stipulates that its provisions cannot be contracted out of, including minimum wage, but the *OHS*A requires contemporaneous compensation for it to be applicable. Another critical definition for the *OHS*A is “workplace,” it is defined as “any land, premises, location or thing at, upon, in or near which a worker works.” If a paid worker is present in a workplace, but for purposes unrelated to their work they might not be covered by the *OHS*A. This was the situation in *R. v. Frank Wilson Grandview Services Ltd.*²⁰ where an employee was injured during an after-hours party and it was found that during that event he was not a “worker” for the purposes of *OHS*A.

In December 2013, *Bill 146, Stronger Workplaces for a Stronger Economy Act, 2013* was tabled in the Legislative Assembly of the Province of Ontario. This piece of legislation would expand the definition of who was a “worker” under *OHS*A. Under Schedule 4 of the legislation the following definition of “worker” is proposed:

‘worker’ means any of the following, but does not include an inmate of a correctional institution or like institution who participates inside the institution or facility in a work project or rehabilitation program: 1. A person who performs work or supplies services for monetary compensation. 2. A secondary school student who performs work or supplies services for no monetary compensation under a work experience program authorized by the school board that operates the school in which the student is enrolled. 3. A person who performs work or supplies services for no monetary compensation under a program approved by a college of applied arts and technology, university or other post-secondary institution. 4. A person who receives training from an employer, but who, under the Employment Standards Act, 2000, is not an employee for the purposes of that Act because the conditions set out in subsection 1 (2) of the Act have been met. 5. Such other persons as may be prescribed who perform work or supply services to an employer for no monetary compensation;²¹

¹⁹ *Hillis v. Boyko Rentals Ltd.*, [1988] O.J. No. 211.

²⁰ *R. v. Frank Wilson Grandview Services Ltd.*, 2000 CarswellOnt 9418.

²¹ *Bill 146, Stronger Workplaces for a Stronger Economy Act, 2013.*

If passed, *Bill 146* would drastically tighten the pre-existing exclusion that deny critical protections to vast numbers of young workers during the school-to-labour market exclusions.

4. Workers' Compensation

This section overviews the exclusions under Ontario's workers' compensation law for youths during the school-to-labour market transition. Adequate coverage under Ontario's workers' compensation law for youths during the school-to-labour market transition is critical, but this is not the case for many youths engaged in the school-to-labour market transition. Workers' compensation laws are a form of welfare that provides for workers who have been injured on the job. The main law governing workers' compensation in Ontario is the *WSIA*. The critical protections under the *WSIA* are the ability to receive income replacement benefits and medical benefits. The WSIB administers the *WSIA*, which is an agency of the Ministry of Labour, while the Workplace Safety and Insurance Appeals Tribunal is the appellate body that hears appeals from WSIB decisions. The Ministry of Training, Colleges, and Universities ("MTCU") is the insurer for post-secondary education students covered under the *WSIA* and also carries a separate insurance policy for some students who are in training programs but not covered under *WSIA*. The Ministry of Education ("MOE") is the insurer for secondary students covered under the *WSIA*.

Under subsection 2(1) of the *WSIA* a "worker", those who are protected under the Act, means "a person who has entered into or is employed under a contract of service or apprenticeship and includes the following: 1. A learner. 2. A student." The definitions contained under subsection 2(1) are not entirely determinative for establishing coverage of youths engaged in unpaid labour during the school-to-labour market transition, rather the WSIB has established a series of policies that delineate the coverage that youths receive under *WSIA* during the school-to-labour market transition. The exclusions under the *WSIA* are not contained in the Act itself; rather the exclusions are policy-driven and not well understood. These policies are outlined in: WSIB Document No. 12-04-04; WSIB Document No. 12-04-05; and, WSIB Document No. 12-04-07. Moreover, these policies never contemplated a labour market where there was rampant employee misclassification and unpaid labour.

Secondary school students are generally covered under *WSIA* during formal work education programs offered by their school board, but

students are not protected during mandatory voluntary community service or other forms of unpaid labour. This is a significant gap as employers are increasingly classifying students as interns and have been taking advantage of the requirement that students must complete forty hours of voluntary community service to obtain their Ontario Secondary School Diploma. Post-secondary education students are covered under the *WSIA* under formal education programs offered by a community college, a career college, or a university. The MOE pays the WSIB for the costs associated with paying benefits of secondary students and students are treated as employees of the MOE for the purposes of the WSIB.

There are exclusions under internal WSIB policy with respect to coverage under the *WSIA* for post-secondary students undertaking unpaid labour as part of training programs. Persons in the following situations are not eligible for coverage under *WSIA*: students in post-secondary education institutions or training programs that are not funded through operating grants provided by the MTCU; student trainees performing unpaid labour as part of work placements which are not a required part of their program and which they have arranged or organized themselves, this includes students involved in voluntary training programs entered into at their own volition; students whose work placement is with the same training agency that trains them; students who are in the classroom portion of their training program; students undertaking an unpaid placement in Ontario but whose training agency is outside the province; and, students in a training agency who, as part of a formal course or program, attend a training placement with an Ontario Placement Employer but the placement occurs outside of Ontario. The MTCU pays the WSIB for the costs associated with paying benefits of post-secondary students injured while engaged in training and also carries a separate insurance policy with ACE-INA.

There are also serious exclusions under internal WSIB policy with respect to young workers undertaking unpaid labour during the school-to-labour market transition (this statement would also apply to other groups of vulnerable workers). The following examples are not eligible for coverage under the *WSIA*: persons volunteering their services to an employer to develop skills; persons who are volunteering their time or services for community, non-profit, or charitable purposes; persons performing unpaid labour as a component of therapy or correction in health care or correctional institutions; persons performing unpaid labour due to a Community Service Order; persons in a workplace solely for the purposes of visiting, casual observation, or work placement and who are not participating in the activities of the placement employer's industry; post-

secondary education students who are performing unpaid labour while conducting research for a university or community college; and, persons who are not on placement but as part of the training program perform work on the training agency's premises.

There are only a handful of cases that deal with coverage of persons undertaking unpaid labour and this had led to the situation where there is little judicial guidance as to the exclusions that exist due to WSIB policies. In Decision No. 1461/08²² the WSIAT ruled in regards to a case of an employee who was injured during the course of an unpaid training period that:

[i]n my view, section 69 of the Act does not apply to this and neither do Operational Policy Manual Document Nos. 12-04-05 and 12-04-04. These policies and section 69 of the Act are intended to extend coverage to individual who are placed in workplaces by a training institution as part of a formal educational or upgrading program. They are not intended to narrow coverage or exclude individuals who are learners under the broader definition of 'learner' found in section 2 of the Act. In my view, the definition of learner is intended to provide coverage to individuals who are involved in informal learning arrangements such as the arrangement in this case."

This decision also references the six-fold test from subs. 1(2) of the *ESA* concluding:

[t]he appellant was a person who was receiving training from a person who is an employer. She was receiving training in a skill used by the restaurant's employees. The conditions set out in section 1(2) are not all met because the training was not similar to that given in a vocational school and the person providing the training provided benefit from the activity of the appellant while she was being trained as she was doing work that would otherwise have been done by another employee.

The reasoning in the aforementioned case was adopted by another adjudicator in Decision No. 2210/10,²³ which dealt with an Application for an Order removing the right to a civil action.

The effect of these decisions appears to open the door to unpaid interns seeking protection under the *WSLA*, although they would have to first prove that they are employees under the *ESA*. It is problematic that the exclusionary nature of the six-fold test under subsection 1(2) of the *ESA* operates in concert with the provisions under the *WSLA*. The interaction between the two statutes clearly deepens the impact of

²² Decision No. 1461/08, 2008 ONWSIAT 2029.

²³ Decision No. 2210/10, 2010 ONWSIAT 2642.

mischaracterization of employees as interns are prevented from obtaining compensation for injuries suffered in the workplace. This is not a theoretical concern as Appeals Resolution Officer C. Rubino was criticized for mischaracterizing a learner as a volunteer in the aforementioned Decision No. 1461/08.

5. Human Rights

This section overviews the protections currently granted to interns under Ontario's human rights laws. Young workers engaged in work experience programs are completely covered under Ontario's *Human Rights Code* ("the Code"). The body hearing human rights application is called the Human Rights Tribunal of Ontario. Human rights laws, as quasi-constitutional documents, are broadly applied with the term "employment" having a far broader meaning in the human rights context than it is normally ascribed under workplace law, contract law, or the Common law. Youths have protection under the Code. These protections are gained via the prohibition against discrimination and harassment in the delivery of services or during the course of employment.

The leading decision in Ontario is *Rocha v. Pardons and Waivers of Canada*,²⁴ the Human Rights Tribunal of Ontario held that even when a person agrees to work in an unpaid capacity without remuneration for a period of time it does not remove them from the protections guaranteed under the provisions relating to employment under the Code. Despite interns and students being covered under the Code there are two recent decisions from the Human Rights Tribunal of Ontario, which raise the prospect that discrimination is a regular occurrence for young workers in the school-to-labour market transition. In *Aratski v. Physical and Health Education Canada*,²⁵ a student undertaking an academic internship at the University of Ottawa alleged that she experience discrimination on the basis of disability. The application in this case was dismissed for procedural reasons and the substantive matter of the alleged discrimination was not considered. In *McMaster v. Ubisoft Toronto*,²⁶ a recent graduate alleged that she experienced discrimination on the basis of family status and due to her mother being in receipt of Ontario Disability

²⁴ *Rocha v. Pardons and Waivers of Canada*, 2013 HRTO 1261 (CanLII).

²⁵ *Aratski v. Physical and Health Education Canada*, 2013 HRTO 1212 (CanLII).

²⁶ *McMaster v. Ubisoft Toronto*, 2011 HRTO 627 (CanLII).

Support Plan benefits. The application was dismissed as there was no reasonable prospect of success.

It should be noted that a review of the American experience relating to intern culture reveals that interns face heightened vulnerability to harassment, discrimination, and sexual harassment. It is clear that interns face a serious power imbalance in the workplace and often are not in a position to contest breaches of their human rights. There is also an emerging school of thought that argues that the expectation for young workers to provide unpaid labour is a form of age discrimination contrary to the *Code*. It should be noted that this theory has not been tested in the Courts.

6. Analyzing the Regulatory Environment

Tracing the demarcation lines when it comes to various types of unpaid labour, such as work-integrated learning programs and informal training, associated with the school-to-labour market transition is not an easy task. In assessing the coverage under workplace law in Ontario it must be understood there is there is a tremendous amount of overlap between situations involving trainees, employees, interns, and volunteers. Often employers use terms interchangeable, for example consider the difference between an unpaid intern and a volunteer in a for-profit enterprise, this leads to much confusion among youths about what their rights are and has led to the widespread notion it is permissible for private sector employers to not pay young workers in entry and lower level positions. Beyond this, even individuals some times have shifting status within the same organization: fulfilling both volunteer responsibilities and the duties of a paid employee.

The four exclusions under the *ESA* that target young workers are extremely powerful and are the most far-reaching of any Canadian jurisdiction. The cumulative effect of these exclusions, when combined with lax enforcement from the Ministry of Labour, has been the rapid expansion of the use of unpaid labour by employers in Ontario. The school-to-labour market transition has become extremely rocky for many youths and they often lack the ability to gain economic security during the early years of their working lives.

The exclusion under subsection 2(1) of the O. Reg. 285/01 students in training to become a member of architecture, law, professional engineering, public accounting, surveying, or veterinary science; chiropractic, dentistry, massage therapy, medicine, optometry, pharmacy,

physiotherapy, or psychology are excluded from Parts VII, VIII, IX, X, and XI of the *ESA* which deal with hours of work, overtime pay, minimum wage, public holidays, and vacation with pay. This is a near totalizing exclusion and allows for informal unpaid WIL programs in many of the key professions within society. This removes the ability of trainee to contest the conditions of their employment, have effective control over their uses of time, or earn an income. This primes elite sectors of the labour market to become accepting of unpaid labour. The proliferation of unpaid labour under this exclusion is extremely troubling given recent moves to institutionalize and entrench this practice in Ontario's labour market.

The exclusion under subsection 3(5) of the *ESA* targeting secondary and post-secondary students is also a totalizing exclusion that allows for unpaid labour in formal education programs. The concern here is that employers could well enter into partnership with educational providers to obtain unpaid labour to replace paid employees with and recent trends would suggest that certain corporations are moving in this direction; particularly, this is a trend that is being heavily seen in the broadcasting, creative, high-tech, and telecommunications industries in Ontario. The two cases considering the exclusion under s. 3(5) of *ESA* are the most troubling as a reasonable observer could conclude that staff at the Ministry of Labour at best showed bias against young workers bring complaints and at worst were actively attempting to subvert the protections under the *ESA*.

The exclusion under subsection 1(2) of the *ESA* is the most problematic of any exclusion in any Canadian jurisdiction as it creates a legal loophole (albeit a narrow one if one considers the jurisprudence) that allows employers to download training costs onto workers, creates an environment for misclassification and wage theft, and incentives employers to abuse of one of the key statutes aimed at ensuring social minimums. While the purpose of this paper was not to track the legislative history of exclusions, this one was imported directly from the United States, which is perhaps the worst offender when it comes to permitting the abuse of youths via unpaid labour. This exclusion creates the perfect conditions for youths to experience profound precarity.

Perhaps the most troubling of the exclusions are the ones under the *OHSA* and the *WSIA*, which deny youths critical protections aimed at protecting physical health and offering benefits in the event of a workplace accident. The current set of exclusions does not strike any sort of fair balance and put youths in an extremely vulnerable position in the workplace. There is a risk that employers are taking advantage of the

current situation by sending youths into harms way because the economic or legal risk from a young worker suffering a workplace injury is sometimes non-existent given the current wording of the *OHSA* and the *WSIA*. While the reforms proposed under Bill 146 would go a long ways to close the exclusion targeting youths under *OHSA*, it would do nothing to ensure that youths receive adequate coverage under *WSIA*.

Overall, the power imbalances that are created through the exclusions under *ESA*, *OHSA*, and *WSIA* and the permissive regulatory environment towards unpaid labour in Ontario has created the condition where tens of thousands of youths forego wages every year due to misclassification and wage theft. This is a profound problem in Toronto, Ottawa, and other urban centres due to the large numbers of students seeking to differentiate themselves in a crowded labour market. While the jurisprudence shows a clear trend towards addressing misclassification and protecting the employment standards of employees, serious questions remain about whether the Ontario government is taking appropriate enforcement action to address the growing amount of unpaid labour being undertaken by youths during the school-to-labour market transition. Much more research needs to be conducted before the true extent of this problem is understood, but increasingly various actors are calling on the Ontario government to take decisive action to stem the growth arising from unpaid labour. It remains to be seen what action the Ontario government will undertake.

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