Dewart Gleason LLP Lawyers
T: 416.971.8000
F: 416.971.8001
Suite 102-366 Adelaide Street West
Toronto ON M5V 1R9
www.dgllp.ca

Submission to the Standing Committee on Finance in respect of Bill C-59, Part 3 (Division 7):

Amendments to the *Canada Labour Code*

Tim Gleason
Dewart Gleason LLP

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1. Introduction

Dewart Gleason LLP is pleased to provide comments to the Standing Committee on Finance with respect to amendments to the *Canada Labour Code* (*CLC*) proposed in Bill C-59. We are a law firm with a wide range of experience advocating for both individual workers and trade unions. We have grave concerns with the proposed amendments.

The proposed amendments profoundly alter the legal landscape for a group of workers, who are predominantly young people. They exempt them from the basic minimum rights accorded to working people by a consensus of all civilized jurisdictions in the modern world, including: the right to pay, the right to time off and the right to be free from sexual harassment. These amendments endorse and legitimize a practice more akin to indentured servitude than the basic minimum requirements for human dignity, that have been recognized as intrinsic to work in society.[1] Parliament of Canada ought not to effect such a perverse result.

2. Concerns with the proposed amendments to the *CLC*

The proposed exemption of the majority of interns from Part III of the *CLC* effectively carves out a loophole that would allow federally regulated employers to avoid paying students and other employees for their work. While interns that meet the criteria set out in the proposed section 167 of the *CLC* will be subject to regulations to be made pursuant to section 264, these regulations are not required by law, and will be at the discretion of the executive and not subject to parliamentary scrutiny. As written, the proposed conditions that would exempt an intern from the application of Part III of the *CLC* are vague, difficult to enforce, and will lead to the increased vulnerability of young workers at the hands of employers.

(i) Unpaid work is not the answer

This issue is critically important, given that youth unemployment in Canada is on the rise. As of February 2015, the unemployment rate for youth aged 15 to 24 was 13.3%, which is nearly double the national average.[2] There is no doubt that it is increasingly difficult for young people to find meaningful, entry-level work and many turn to unpaid internships - although the number of interns in unpaid positions is not certain. In response to these challenges, Bank of Canada Governor Stephen Poloz recently advocated that youth should simply "get some real life work experience even though [they're] discouraged, even if it's for free."[3]

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[1] *Reference re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313 at p. 368, as cited in *Machtinger v. JOH Industries,* [1992] 1 S.C.R. 986 at p. 1002.

[2] Statistics Canada, "Labour Force Survey, February 2015", online: http://www.statcan.gc.ca/daily-quotidien/150313/dq150313a-eng.htm

[3] "Excerpt: Stephen Poloz on youth employment", *The Globe and Mail,* (4 November 2014), online: http://www.theglobeandmail.com/report-on-business/stephen-poloz-on-youth-unemployment/article21448687/

Perhaps unsurprisingly, Mr. Poloz's comment resulted in a substantial backlash. One commentator, Mike Moffatt, assistant professor in the Business, Economics, and Public Policy Group at the Richard Ivey School of Business at the University of Western Ontario, highlighted the blatant inequality inherent in Mr. Poloz's approach to unpaid internships:

> Children from wealthier families can afford to take unpaid positions thanks to generous grants from 'The Royal Bank of Mom and Dad' while children from poorer families are effectively shut out. If working as an intern is résumé enhancing, then lower income kids are disadvantaged in the labour market (even more than they already are).[4]

Mr. Poloz's message spurred extensive debate in the media.[5] This brought to light both the sense of privilege underlying this approach to youth unemployment and ignorance about the fundamental realities facing many young Canadians. This approach further devalues youth labour, sends the message that youth seeking entry-level work are not entitled to the statutory minimum wage, and encourages employers to cycle through unpaid interns rather than create full-time, paid positions.

(ii) Leaving it up to employers to apply the law is the wrong approach

Prior to the proposed amendments to the *CLC,* the legislation contained no specific language relating to students or trainees. The law with respect to unpaid internships was ambiguous in the federal context. Professor Doorey has suggested that where legislation is overly complex and vague, it is "easy to ignore and difficult to enforce in practice."[6]

Nevertheless, the Department of Human Resources and Skills Development Canada's Labour Program clarified the issue of hours of work for interns to whom the *CLC* applies in the document "Hours of Work -802-1-IPG-002.[7] This policy gives "work" a broad definition, and includes in its commentary that training required by an employer should

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[4] Mike Moffatt, "Unpaid internships and the economy", *Canadian Business,* (25 June 2013), online: http://www.canadianbusiness.com/blogs-and-comment/unpaid-internships-and-the-economy-mike-moffatt/

[5] See, for example, Tavia Grant, "Poloz's prescription for unemployed youth: Work for free," *The Globe and Mail,* (4 November 2014), online: http://www.theglobeandmail.com/report-on-business/economy/poloz-having-something-unpaid-on-your-cv-is-very-worth-it/article21439305/, Adam Seaborn, *Canadian Intern Association,* "Our Response: Stephen Poloz's Comments on Unpaid Internships" (6 November 2014), online: http://www.internassociation.ca/our-response-stephen-polozs-comments-on-unpaid-internships/, The Canadian Press, "Stephen Poloz comments on unpaid work raise ire of youth groups," *CBC News* (5 November 2014), online: http://www.cbc.ca/news/business/stephen-poloz-comments-on-unpaid-work-raise-ire-of-youth-groups-1.2824388.

[6] Professor Doorey, "A three step solution for tackling the problem of unpaid internships in Ontario," *Law of Work (Blog)*, online: http://lawofwork.ca/?p=7123.

[7] Department of Human Resources and Skills Development Canada, Labour Program, "Hours of Work – 802-1-IPG-002", online: http://www.labour.gc.ca/eng/resources/ipg/002.shtml.

be paid as hours of work. Where candidates are "learning and performing certain aspects of the job… [and] where a *de facto* employment relationship has been established, the time constitutes hours of work".[8] Yet, the fact that interns are receiving training does exclude them from entitlement to wages.

Bill C-636 proposed to address this uncertainty by including interns in the definition of "employee", and by carving out a smaller exemption to allow interns to work without pay when receiving credit from an accredited educational institution. This proposal is not radical. In fact, this bill would have simply brought interns in the federal sector in line with the regulation of interns in the majority of provinces throughout the country. There is no sound reason for interns of federally regulated employers to have less protection, given that federal employers are generally enterprises with substantial means.

If unpaid internships are to continue, they should be restricted to positions that satisfy requirements at accredited educational institutions. This approach is consistent with the objective of the proposed amendments to the *CLC* "to strengthen the *Canada Labour Code* protections for all employees and interns under federal jurisdiction." Employers have a stake in the classification of their workers as employees or otherwise; educational institutions do not. Instead of leaving it to employers to determine, based on vague criteria, whether they are permitted to "hire" an intern without pay, the regulation of internships through accredited institutions that have objective and easily definable criteria provides some measure of oversight and accountability.

(iii) <u>The exemptions from Part III of the CLC are vague and unenforceable</u>

The proposed section 167(1.2) of the *CLC* carves out broad exceptions to the application of Part III to interns, subject to regulations, as follows:

- where the work is being performed to fulfill the requirements of a secondary, post-secondary, or vocational program, "or an equivalent educational institution outside of Canada"; or
- where the work takes place between 4 and not more than 12 consecutive months;
- where the benefits of the work are "primarily" for the worker;
- the employer supervises the worker;
- the work is not a prerequisite to being offered a paying position with the employer and the employer is not "obliged" to offer such a position;
- the worker does not replace any employees; and
- the worker is informed in writing, before the position starts, that they will not be remunerated.

[8] *Ibid.*

If the proposed amendments are accepted, Part III of the *CLC* will carve out a distinct sphere of regulation that will apply only to federal interns. What this regulation will look like, precisely, is not yet clear; however, the conditions set out in the proposed amendments appear vague, unenforceable, and will invariably place a significant amount of power in the hands of employers.

The above-noted amendments also propose to include international students among those who can work without pay for a large, for-profit federal employer. This is problematic, and ripe for abuse. Students are among the most vulnerable workers when at home. This risk of exploitation is much greater when they are far from home, where English may be their second language, and where rights at work may be different or unclear.

The exclusion of interns from the protections of Part III of the *CLC* based on criteria to be assessed and essentially regulated by employers is perverse*,* given the significant power imbalance between employers and interns, and considering all that an employer has to gain through the misclassification of its workers. This power imbalance makes it difficult, if not impossible, for interns to exercise their rights at work. Students often work for free (if they are financially able to) to gain meaningful experience in order to be more competitive for entry-level positions later on. They depend on reference letters from their employers. When power rests entirely in the hands of employers, this creates countless disincentives not to report violations of workplace rights.

The law should not only protect young workers from violations of their rights at work, but establish a responsible and accountable regulatory system that supports the realization of these rights. If the law does not do so, the burden of speaking up about violations of rights rests solely with young workers themselves.

In short, what these amendments do is open up a broad sphere of exclusion from the *CLC,* which is certain to encourage employers to exploit the unpaid labour of young people and to shield employers from their ordinary responsibilities under Part III of the *CLC.*

3. Recommendations

- The common law definition of “employee” should be adopted throughout the *CLC,* in accordance with the proposed amendments in Bill C-636.

- Unpaid internships should be restricted to those that fulfill the requirements of a program at an accredited Canadian educational institution.