In almost all cases, except where a person is genuinely a student, unpaid “internships” will be against the law.

Unpaid interns often do the work of employees and are subject to a great deal of control and direction by their employers. Just because an intern agrees that he or she will not be paid does not mean that the employer is complying with their provincial employment standards. Any such clause in an oral or written contract is null and void if it contravenes the respective law.

Employers should be aware that courts and provincial authorities will apply employment standards provisions broadly based on the common law test for an employee, which will catch many interns. If an intern is not specifically exempted, they should be paid at least minimum wage.

A Vancouver-based social media company recently faced a backlash on the popular social news website, Reddit, after an online post suggested that their unpaid intern positions were illegal. Stories on the backlash were subsequently published in major Canadian newspapers. The company quickly removed their posted position and issued a statement saying that they would stop hiring unpaid interns and would offer six months of payment to all current interns.

Today, a bad story goes “viral” within hours and it can stick to a company for years. Hiring unpaid interns is clearly viewed with derision by many on those sites. If obeying the law isn’t incentive enough, negative publicity should make most companies think twice.

This article examines the issue in general under Canadian law, then takes a closer look at the
rules in three provinces: British Columbia, Alberta and Québec.

The Issue

WANTED: busperson for a luxury hotel; must be willing to work for free.

That was the essence of an advertisement seeking an unpaid “food and beverage intern” at a Vancouver hotel in September 2013. The ad was circulated on social media and hastily taken down by the hotel after a series of negative comments and tweets. This was just one example of a number of stories in recent months which have highlighted the plight of unpaid “interns” across Canada.

An unpaid internship is generally a fixed-term position which is promoted as an opportunity to gain experience in a certain industry. Although most interns are students or recent graduates, many “internships” don’t come with such pre-requisites. There’s just one downside: you have to work for free. Even expenses an intern incurs as a requirement of his or her job (such as gas or cell phone bills) might not be covered.

Proponents of these positions tout the valuable experience and connections they provide to otherwise unqualified applicants, arguing they give interns a chance to show they deserve to be hired. The critics of these programs suggest that companies are exploiting vulnerable young people. The exploitation argument is particularly strong when one considers the entry-level nature of many unpaid internships. The busperson advertisement is a particularly blatant example.

Are unpaid internships legal? The short answer is that, unless the intern is a student, probably not. The ubiquity of these positions in certain industries suggests that companies are not particularly concerned, but the increasing negative coverage might lead provincial employment standards officials to take a closer look. The risks to a company found in violation of provincial employment standards include fines, an obligation to pay back wages, vacation pay and statutory holiday pay, and, perhaps most seriously, negative publicity.

The Law

Most employees in Canada are protected by employment standards set and enforced by each province. These provincial laws apply to all “employees” and “employers” in the province unless specifically exempted. Thus, to determine whether an unpaid intern is protected by the legislation it is necessary to determine whether he or she fits into the definition of an
While the extended definitions vary, a person is an employee in all provinces if he or she receives or is entitled to receive wages in exchange for work. Clearly, an unpaid intern receives no wages, but are they entitled to receive wages? Some might argue that if an intern signs an agreement acknowledging that they will not be paid, they have no entitlement, but all provincial employment standards laws have a clause which makes agreements to contravene the law null and void. Thus, whether the intern signed an agreement acknowledging that he or she would not be paid is not determinative.

Provincial employment laws were adopted with the goal of preventing the exploitation and abuse of workers who are in a vulnerable position relative to their employers. The Supreme Court of Canada has held that provincial employment laws should be construed and interpreted in a “broad and generous manner” because they provide minimum benefits and standards to protect workers.¹ Courts have commented that provincial employment standards laws tend to define “employee” and “employer” in a vague and circular manner.² Such definitions are often unhelpful. As such, and consistent with the policy goals of employment standards legislation, courts will turn to the common law definition of employee to supplement the statutory one.

At the risk of oversimplifying, a person is generally an employee at common law if the person performs work for the would-be “employer” and the “employer” exercises a high degree of control and direction over and gains an economic advantage from that work. Interns will often meet this definition: they are usually required to be at work for certain hours, their work and timeline for completion is dictated by their boss, they are not free to come and go as they please, and the company often derives an economic benefit from hiring an intern. When viewed objectively, unpaid interns often “look” like employees who don’t get paid.

If an intern makes an employment standards complaint, the onus is on the alleged employer to prove that the intern was a true volunteer or was otherwise exempt from the law. True volunteer arrangements are difficult to prove and are uncommon outside of the not-for-profit sector, but there may be other applicable exemptions, depending on the province.

A detailed consideration of employment standards legislation and possible exemptions for interns in British Columbia, Alberta, Ontario and Québec is below.

**British Columbia**

In B.C., an “employee” is defined very broadly in the Employment Standards Act to include, among others, “a person an employer allows, directly or indirectly, to perform work normally performed by an employee” and “a person being trained by an employer for the employer’s
business”. In most cases, unpaid interns would fall within the plain language of one of these two definitions.

The B.C. Employment Standards Branch has produced an Interpretation Guidelines Manual which sheds light on the treatment of interns. The B.C. Manual makes a distinction between a “practicum” and an “internship”. A “practicum” is defined as hands-on training for students required by the curriculum of a public or private post-secondary institution which results in a degree or diploma. The B.C. Guide states that a practicum is not considered “work” under the B.C. Employment Standards Act and thus an intern who falls within this narrow exception is not required to be paid.

On the other hand, the B.C. Manual defines an “internship” as on-the-job training to provide a person with practical experience, often offered for new graduates. The Manual states that if an intern falls within the definition of “employee” and performs services for an “employer”, the intern must receive at least minimum wage. Although the B.C. Manual is not binding on a court, it does present the position of the B.C. Employment Standards Branch (which enforces the standards) and it is persuasive in court.

Thus, given the broad definition of “employee” in the B.C. Employment Standards Act, the narrow exception for practicum students, and the generally liberal application of employment standards laws, most interns must be paid at least minimum wage in B.C. unless they are a student engaged in an internship required by the student’s education program.

Alberta

The Alberta Employment Standards Code has a relatively narrow definition of employee compared to B.C. Under the Alberta Code, an “employee means an individual employed to do work who received or is entitled to wages”. There is an exception in the regulations for the requirement to pay minimum wage for “a student engaged (i) in a formal course of training approved by the Director, (ii) in an off-campus education program provided under the School Act, or (iii) in a work experience program approved by the Minister of Enterprise and Advanced Education or the Minister of Human Services”. Thus, student interns engaged in programs which meet the exception are not required to be paid.

Alberta has no published interpretation policy, but it is likely that the Alberta Employment Standards Branch would interpret their Code in a manner consistent with that of other provinces. Likewise, an Alberta court would likely find that if an intern meets the common law definition of employee and is not a student exempted from the Code as discussed above, the intern must be paid at least minimum wage.

Ontario

Like B.C., Ontario has a broad statutory definition of “employee”. The Employment Standards
Act, 2000, defines an “employee” as including “a person who receives training from a person who is an employer”. The Ontario Act further clarifies the definition of employee by stating that “an individual receiving training from a person who is an employer is an employee...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 spends in training” (underlining added).

In addition to the above exception, the Ontario law provides that it does not apply to “an individual who performs work under a program approved by a college of applied arts and technology or a university”. These Ontario Act provisions create an arguably wider exemption for interns than other provinces, as they catch students and non-students.

The Ontario Ministry of Labour released a guideline on unpaid internships in June 2011. The document reiterates the common law definition of employee: “generally, if you perform work for another person...and you are not in business for yourself, you would be considered to be an employee”. The guideline suggests that where not specifically exempted, an intern is an employee and must be paid at least minimum wage. While, like the B.C. Manual, the guideline is not legally binding, it does represent the view of the Ministry of Labour (who enforces the standards) and it is persuasive in court.

Thus, unpaid interns who are not students in an approved work program or who do not meet all of the six conditions set out above must be paid at least minimum wage in Ontario.

Québec

In Québec, An Act Respecting Labour Standards defines an “employee” as “a person who works for an employer and who is entitled to a wage; this word also includes a worker who is a party to a contract, under which he or she

(i) undertakes to perform specified work for a person within the scope and in accordance with the methods and means determined by that person;

(ii) undertakes to furnish, for the carrying out of the contract, the material, equipment, raw
materials or merchandise chosen by that person and to use them in the manner indicated by him or her; and

(iii) keeps, as remuneration, the amount remaining to him or her from the sum he has received in conformity with the contract, after deducting the expenses entailed in the performance of that contract”.

The Québec Act explicitly excludes students who work during the school year “in an establishment selected by an educational institution pursuant to a job induction program approved by the Ministère de l'Éducation, du Loisir et du Sport”.

Like British Columbia and Ontario, the Québec Commission des Normes du Travail (the government body responsible for enforcing Québec employment standards) has published an Interpretation Guide. In the Guide, the Québec Commission emphasizes that the definition of “employee” is broad, but excludes volunteer arrangements. The Guide, however, explicitly states that “alleging that the smooth operation of the enterprise does not require the hiring of new employees, that the applicant has no experience or that the workers agreed to work for free does not justify non-compliance with labour standards”. This sentence appears squarely aimed at addressing the typical justifications for hiring unpaid interns.

The Québec Guide emphasizes that factors similar to the common law employee test should be used to determine whether a person is an employee entitled to least minimum wage. These factors are: (a) whether the “employee” is performing work, (b) whether there is a relationship of subordination between the employer and “employee”, including whether the employee’s services are integral to the employer and whether the employer exercises control over the “employee”, and (c) whether the employer operates a “profit-oriented undertaking” for which “voluntary work should not exist”.

The Québec Commission adopts a similar approach to that of other jurisdictions: if a person performs work subject to a high degree of employer control from which the employer derives an economic benefit and that person is not specifically exempted, that person is an employee entitled to minimum wage. A Court would likely find the Québec Commission’s position persuasive in light of the Supreme Court of Canada’s jurisprudence on the purpose of employment standards legislation.

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1 Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27 at para. 36.
2 Re Telegram Publishing Co. Ltd. and Amm (1977), 77 DLR (3d) 369 (Ont. Div. Ct.) at 377.
3 Are Unpaid Internships Legal in Ontario?