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Maximizing Opportunity, Minimizing Risk: Aligning Law, Policy and Practice to Strengthen Work-Integrated Learning in Ontario


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Maximizing Opportunity, Mitigating Risk: Aligning Law, Policy and Practice to Strengthen Work-Integrated Learning in Ontario

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and Lisa Philipps



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1. Executive Summary

A broad consensus is emerging in Ontario and at the federal level in favour of expanding postsecondary students' access to experiential or "work-integrated learning" (WIL) opportunities. One of the challenges in implementing this vision is navigating the complex legal status of students as they leave campus and enter workplaces in a wide range of industries and roles. This study aims to support these efforts by mapping the current legal landscape for WIL to identify both risks and opportunities for students, post-secondary institutions (PSIs) and placement hosts alike (referred to collectively in this study as "WIL participants"). It makes recommendations to streamline, clarify and strengthen key legal frameworks and improve institutional practices in managing WIL programs and their legal implications.

WIL includes "a variety of applied and work-based experiences through which students are able both to contextualize their learning and gain relevant work experience" (PhillipsKPA, 2014), including co-op, internships and applied research projects. This study focuses on the law with respect to off-campus placements completed as part of a university or college program, as distinct from broader questions about the regulation of internships or training positions in the labour market as a whole.

The potential benefits of WIL are often framed in terms of human capital development. WIL is identified as a means of building workforce capabilities, as well as the skills and individual prospects of students as members of the labour force (Australian Collaborative Education Network [ACEN], 2015). However, not all those who have studied WIL are equally convinced of its benefits, at least as it is currently delivered. The human capital perspective stands in contrast with a more critical stream of analysis that associates WIL with the rise of precarious employment. A further concern is that WIL opportunities are distributed unequally among students in ways that reflect and reinforce larger labour market inequities. This report keeps both perspectives in mind and analyzes the legal frameworks surrounding WIL in Ontario to identify ways of ameliorating these concerns and promoting WIL programs that deliver real benefits.

The study examines two primary research questions: (1) How are legal issues currently impacting WIL programs in Ontario? (2) What steps could be taken to help legal frameworks and processes align more closely with the goal of expanding the availability of quality WIL programs and opportunities?

We addressed these questions through a combination of in-depth qualitative interviews with WIL experts in both legal and non-legal roles and a review of relevant provincial and federal legislation and regulations, as well as legal cases dating back to 1990. We also reviewed secondary literature on WIL in Canada and in the United States, the United Kingdom and Australia. As well, the report analyzes Canadian tax expenditures designed to support WIL to assess the size and scope of tax-delivered investments in these programs.

Findings

Overall, the study found that WIL-related legal issues have become a growing preoccupation within the postsecondary sector as placement programs expand and diversify. While only a small number of situations result in litigation, a great deal more time is spent interpreting unclear laws and regulations, mediating disputes and negotiating agreements that address a changing legal and policy environment. Our research

identified four overarching reasons to pay attention to WIL-related legal issues as both a potential stumbling block and a powerful lever to promote the growth and success of such programs:

- **protecting students** who stand to benefit from WIL but are also vulnerable in workplace settings, perhaps more so, if placements are a mandatory requirement to graduate;
- **reducing costly disputes** by ensuring that parties understand their rights and responsibilities and take proactive steps to manage placements accordingly;
- **reducing duplication of effort** by sharing knowledge and promoting strategies across the postsecondary sector as it works to scale up WIL programs;
- **maximizing the return on public investments in WIL** by ensuring that legal frameworks are aligned to encourage participation and support positive outcomes for students and employers.

The report discusses seven key areas of law that are impacting most directly on the implementation of WIL programs in Ontario. In each area listed below the report documents good practices currently in use for managing or reducing risks, and identifies areas where changes may be beneficial to support the growth of WIL programs that deliver intended benefits and make optimal use of available resources. Depending on the context, these steps may include legal reforms or less formal policy interventions by government, as well as the development of legal information guides, template agreements, clear policies and best practice guidelines by PSIs, employers or others.

1. *Employment Standards.* WIL students are not covered by basic employment standards on placement, whether they are paid or unpaid. In the short term, efforts are needed to improve comprehension of this fact and to set clear terms and expectations with placement hosts about conditions of work. We also recommend the province undertake a review of this aspect of employment standards law. We concluded that even if some placements need to remain unpaid, there is scope to extend non-monetary employment standards to WIL students and to reinforce the need for genuine learning opportunities while on placement. The report outlines a number of law reform options as well as the need for consultation with all WIL participants.
2. *Health and Safety.* The province has already passed legislation to clarify that students on placement are covered by occupational health and safety laws. However, the study identified two issues of ongoing concern. The first is confusion and complexity surrounding the health and safety training that students are legally required to have for placements and who is responsible for delivering it. The second relates to insurance for accidents and injuries in the workplace. The current regime imposes administrative barriers and burdens that affect the student experience, the willingness of employers to participate and the capacity of PSIs to manage WIL expansion.
3. *Human Rights.* The Ontario Human Rights Code applies to students on placement. However, the study revealed deficits in human rights awareness, implementation and enforcement. The growing demand for police record checks by placement hosts is creating administrative barriers to WIL and, more seriously, the potential for misuse of information concerning mental health or other interactions with police that don't result in charges or convictions. WIL programs also need strategies for addressing discrimination in the workplace and in the selection of students for

placements. Finally, the dearth of clear policies for disability accommodation on placement came out strongly in the research.

4. *Intellectual Property.* With students placed in a wide range of technology-driven and business settings, questions arise about who owns the products of their work and how placement hosts can best protect their own confidential and proprietary information. The report discusses the role of IP agreements and policies in mediating the interests of students, employers and institutions.
5. *Employment Insurance.* The courts have held that the need to complete a WIL placement is not “just cause” for quitting another job, disintitling students from claiming employment insurance based on previous qualifying hours. Moreover, unpaid placements do not qualify as “insurable employment,” and even some paid placements are deemed ineligible. The report calls for clear guidance on the EI implications of going on a WIL placement. The province should also consider seeking amendments to EI regulations to ensure that low-income students in particular are not disadvantaged in accessing WIL opportunities.
6. *Immigration Law.* International students face specific legal hurdles in participating in off-campus work placements. Though in principle these can be overcome by obtaining a co-op work permit, WIL experts described this process as a common source of delays that operate as a de facto barrier to program completion. The report recommends that governments consider seeking changes at the federal level to clarify and liberalize the rules to ensure international students have equal WIL opportunities. In the meantime, access to on-campus placements will be critical for these students.
7. *Tax Expenditures.* The report reviews federal and provincial tax credits aimed at encouraging employers to hire WIL students. Fiscal data reveals that Ontario is the highest spending jurisdiction in Canada in this regard, in both absolute and per capita terms. More evidence is needed to substantiate the effectiveness of these programs. We present concerns about employer uptake, the narrow range of WIL placements that are eligible and the challenge of enforcing eligibility requirements. Tax credits must be compared to other funding mechanisms that could encompass unpaid placements as well as public sector and non-profit employers or that could support students more directly. Rather than simply expanding tax credits further as some are advocating, we recommend that decision makers evaluate carefully whether they represent the best mechanism for supporting the growth of WIL programs.

The reports concludes with three general recommendations that would help to reduce risks and maximize the quality and benefits of WIL. These are:

- *Greater clarity and consistency in the use of terms* to improve communication about the legal norms affected by different forms of WIL;
- *More collaboration, communication and knowledge sharing* among the partners to a WIL placement and across the sector as a whole including government;

- *Better and more publicly accessible data* about the numbers, types and outcomes of placements in Ontario and the demographics of WIL students to facilitate inquiry and analysis of the strengths and potential improvements to programs, policies and laws.

2. Introduction

A broad consensus is emerging in Ontario and at the federal level in favour of expanding postsecondary students' access to experiential or "work-integrated learning" (WIL) opportunities. One of the challenges in implementing this vision is navigating the complex legal status of students as they leave campus and enter workplaces in a wide range of industries and roles. This study aims to support these efforts by mapping the current legal landscape for WIL to identify both risks and opportunities. It makes recommendations to streamline, clarify and strengthen key legal frameworks, and improve institutional practices in managing WIL programs and their legal implications.

The June 2016 report of the premier's Highly Skilled Workforce Expert Panel recommends "Ontario should ...commit to ensure that every student has at least one experiential learning opportunity by the time they graduate from postsecondary education" (*Building the Workforce of Tomorrow*, 2016). In response, the Premier's office announced it will work towards "expanding opportunities for learning by experience by funding more placements so that every student completes at least one experiential learning opportunity before graduating from high school, and another before finishing college or university" (Office of the Premier, 2016). Many colleges and universities have already committed to enhancing WIL offerings as part of their 2014-17 Strategic Mandate Agreements with the province. In addition, the Canadian government announced its intention to create a Postsecondary Industry Partnership and Co-operative Placement Initiative that will support new work-integrated learning opportunities for young Canadians "with a focus on high-demand fields, such as science, technology, engineering, mathematics and business" (Government of Canada, 2016). This growing interest is in line with international trends and has attracted support from groups representing students, employers and postsecondary institutions (Business/Higher Educational Roundtable, 2016; OUSA, 2015a; Canadian Chamber of Commerce, 2014).

However, a potential hurdle stands in the way: the prevailing uncertainty and dissatisfaction surrounding the legal rights and responsibilities of those participating in WIL — whether as students, employers, community partners or postsecondary institutions (PSIs) (referred to collectively in this study as "WIL participants"). Even as a pro-WIL consensus emerges, several high-profile cases have highlighted the possible dangers for students in unmonitored or unregulated work placements, and the corresponding legal and reputational risks to institutions and employers. Such cases include the tragic deaths of postsecondary students while completing unpaid internships that were required to graduate from their academic programs (McKnight, 2014; Tomlinson, 2013). Worst-case scenarios such as these raise critical questions about whether existing protections for students are sufficient and who is responsible for ensuring that the rights and responsibilities of all WIL participants are clearly communicated and respected. Previous research on WIL has highlighted the need to focus not just on the number of students placed in these programs, but also on the quality of their experiences (Sattler & Peters, 2013). Some have voiced concern that if programs are not well designed and implemented, WIL could exacerbate rather than ameliorate a broader labour market shift toward precarious and nonstandard forms of employment, particularly for some groups of students (Langille, 2015).

The purpose of this study is not to discourage the development and expansion of WIL programs. On the contrary, its central goal is to assist the development of WIL opportunities by informing government and other actors of steps that may be needed to minimize the risks and maximize the educational and economic opportunities of WIL. Our research identified four overarching and compelling reasons to pay attention to WIL-related legal issues as both a potential stumbling block and a powerful lever to promote the growth and success of WIL programs:

- **protecting students** who stand to benefit from WIL but are also vulnerable in workplace settings, perhaps more so if the placement is a mandatory requirement to graduate;
- **reducing costly disputes** by ensuring that WIL participants understand their rights and responsibilities and take proactive steps to manage placements accordingly;
- **reducing duplication of effort** by sharing knowledge and strategies across the postsecondary sector as it works to scale up WIL programs;
- **maximizing the return on public investments in WIL** by ensuring that legal frameworks are aligned to encourage participation and support positive outcomes for students and employers.

Following a thematic literature review, we discuss seven key legal frameworks that affect the implementation of WIL programs in Ontario in the following areas: employment standards, health and safety, human rights, employment insurance, immigration law, intellectual property and taxation law. The study documents a number of good practices currently in use for reducing risks and identifies areas where changes to law, policy or practice could support the growth of WIL programs that deliver intended benefits and make optimal use of available resources. Depending on the context, these steps may include legal reforms or less formal policy interventions by government, as well as the development of legal information guides, clear policies and best practice guidelines by PSIs, employers or others.

3. Review of Literature

Since 2011, HEQCO has published a range of studies on WIL. These reports cover an array of literature, providing background and context for understanding WIL in Ontario (Sattler, 2011). Subsequent studies have examined the perspectives of employers (Sattler & Peters, 2012), faculty (Peters, 2012) and graduates (Sattler & Peters, 2013); a review of the WIL programs at the University of Waterloo (DeClou et al., 2013); and examinations of internships (Stirling et al., 2014) and apprenticeships (Dion, 2015; Refling & Dion, 2015) in Ontario. Most recently, HEQCO has released *A Practical Guide for Work-integrated Learning: Effective Practices to Enhance the Educational Quality of Structured Work Experiences Offered through Colleges and Universities* (Stirling, et al., 2016). Our report builds on these studies and examines the legal frameworks and issues affecting WIL.

Rather than an exhaustive literature review, which has been covered elsewhere (Sattler, 2011), this report offers a thematic review focusing on what WIL is; the case for WIL as a strategy for developing human capital; reservations and concerns about WIL in the context of rising precarious employment; empirical

evidence about the quality of WIL experiences in Ontario; and comparative lessons about the role of law in regulating and managing WIL.

3.1 What is WIL?

WIL includes “a variety of applied and work-based experiences through which students are able both to contextualize their learning and gain relevant work experience” (PhillipsKPA, 2014). Approaches that link theoretical or classroom-based learning with experiential forms of knowledge acquisition have a long history, dating back to the apprenticeship systems of the Middle Ages (Frenette, 2015). More recently, apprenticeships and internships, as well as related strategies for incorporating experiential forms of learning, have been grouped under WIL — an umbrella term for integrating theory and practice under the auspices of PSIs (Patrick et al., 2008).

WIL placements and experiences can differ in terms of the financial compensation offered to participating students (i.e., some forms of WIL are paying jobs while others are not), as well as in the duration of a placement, which ranges from multiple semesters to just a few days or hours (Kramer & Usher, 2011). To enable clear discussion among stakeholder groups, Sattler (2011) proposed a typology of seven distinct forms of WIL:

- **Apprenticeships** – “Apprenticeship combines in-school training for employment in a skilled trade or skilled occupation with on-the-job workplace training over the designated length of the apprenticeship program. Workplace training makes up about 90% of the apprenticeship program, and is delivered under the guidance and instruction of qualified or certified journeypersons. The remaining in-school training provides both theoretical and practical instruction and is typically offered by community colleges. The length of apprenticeship in each trade varies, with most programs two to five years (or levels) in length.”
- **Field experience** – Field experience includes “placements and other work-related experiences that prepare students for professional or occupational fields but are not required for professional licensure. It encompasses both ‘field placements/work placements’ and ‘fieldwork’ as defined by the [Ministry of Advanced Education and Skills Development].”
- **Mandatory professional practice** – Mandatory professional practice consists of “any professional practice-based arrangements that are necessary for professional licensure or designation. The work may be paid or unpaid and is typically drawn from the range of work contexts graduates may be expected to encounter. It includes ‘clinical placements’ defined by the [Ministry of Advanced Education and Skills Development] as ‘scheduled hours of activities intended to give students hands-on experience in a hospital or health care setting,’ and characterized by activities that are core to the program curriculum and necessary for the successful completion of the program, in which students are closely supervised by institutional staff or individuals working on behalf of the institution.”
- **Co-op** – The definition of the Canadian Association for Co-Operative Education, which has been endorsed by the Ministry of Advanced Education and Skills Development, establishes the following

criteria for co-op: “A Co-operative Education Program is one that formally integrates a student's academic studies with work experience. The usual plan is for the student to alternate periods of experience in career-related fields according to the following criteria: Each work situation is approved by the co-operative education institution as a suitable learning situation; the co-operative education student is engaged in productive work rather than merely observing; the co-operative education student receives remuneration for the work performed; the co-operative education student's progress on the job is monitored by the co-operative education institution; the co-operative education student's performance on the job is supervised and evaluated by the student's employer; the time spent in periods of work experience must be at least 30% of the time spent in academic study.”

- **Internships** – “Internships are work experiences, often a year or more in duration, planned to occur at or near the end of a program of study. They are offered in professional fields, with supervisors encouraged to provide mentoring support as well as supervision. They engage students in meaningful work, but can also include job shadowing.”
- **Applied research projects** – “Project-based learning is used extensively in the humanities, social sciences and sciences, and is based on research suggesting that real-world projects can pedagogically assist in enhancing student experience. Work-based projects are theoretically underpinned by situated learning theory, which recognizes projects as learning environments in which students can participate in authentic practices, and apply skills needed in real life (Helle et al., 2006). The two key features of project-based learning are the presence of a problem that drives activities and the inclusion of the results in a final product (Helle et al., 2006).”
- **Service learning** – “Service-learning programs are intended to provide equal benefits to both the provider of the service (the student) and the recipient of the service (the community), while ensuring equal focus on both the service being provided and the learning that is occurring (Parker-Gwin & Mabry, 1998). Service-learning programs are not add-ons to a student's course of study, but are integrated into the program (Furco, 1996). The primary goals of service-learning are positive civic and academic outcomes. They must include high-quality services intended to meet the goals defined by the community in which they are provided.”

As this study demonstrates, a failure to distinguish clearly among these various forms of WIL often leads to confusion, including confusion about legal rights and responsibilities.

3.2 The Case for WIL: The Human Capital Perspective

The potential benefits and opportunities of WIL are often framed in terms of human capital development. WIL is identified as a means of building workforce capabilities as well as the skills and individual prospects of students as members of the labour force (Australian Collaborative Education Network [ACEN], 2015).

Sattler (2011) identified the perceived benefits of WIL that motivate different stakeholder groups in Ontario to participate:

- **Students** – Benefits to students include opportunities for career development and greater employability; the opportunity to apply theory to practice; skill acquisition and development; improved confidence; personal development and civic engagement; financial benefits; and access to quality work experiences.
- **Employers and community partners** – Partners in industry or the community who offer WIL opportunities identified the following benefits: improved productivity and service delivery; an additional and early form of recruitment, screening and training; the creativity and motivation that students bring to the workplace; cost savings associated with wage offsets and other measures; human resource development; associations and connections with postsecondary institutions; and benefits from service to the community or profession.
- **Postsecondary institutions** – Representatives from postsecondary institutions identified the key benefits as the creation and strengthening of community and industry partnerships; institutional reputation; differentiation in terms of student recruitment and marketing; alumni relations and development opportunities; and the opportunity to improve programs and curricula through external knowledge exchanges.

Others have promoted WIL as a means of preparing highly-skilled workers who can adapt to rapidly changing technologies and workplaces in a knowledge-based economy (Jackson 2013; Organization for Economic Co-operation and Development [OECD], 1996; Business/Higher Education Roundtable, 2016b). WIL is also considered helpful in developing the “soft skills, such as communication and teamwork” that employers value (OECD, 2014), and as a means of addressing skills shortages and skills mismatches, especially in the trades (Rajotte, 2014). WIL has also been associated with increased rates of school completion and greater economic competitiveness (Science Technology and Innovation Council of Canada (“STIC”), 2013).

Provincial policy has sought to encourage WIL for all these reasons. The Ministry of Advanced Education and Skills Development (MAESD) has set out a vision to ensure that “Ontario will have the most educated people and highly skilled workforce in the world to build the province’s competitive advantage and quality of life” (MAESD, 2015) and to “expand co-op and work-integrated learning options to make future Ontario students more career and job ready than ever before” (MAESD, 2012). Similarly, the Government of Ontario’s 2013 *Making an Impact: Youth Jobs Strategy* identified many aspects of WIL as desirable and crucial for Ontario’s students, including co-op and internship programs, as well as apprenticeships with partners in industry and not-for-profit sectors.

This vision is in line with international attempts to leverage postsecondary education and training to strengthen the human capital of students as they transition into the labour market. Australian researchers have identified several key conditions to ensure WIL provides opportunities to develop students’ capabilities and human capital so that they can contribute to domestic economies (Australian Collaborative Education Network, 2015). These include clarifying government and institutional policies and regulations to support

WIL; building collaborative opportunities among and between stakeholder groups; ensuring that investments in WIL are targeted toward sustainable, high-quality placement experiences and growing stakeholder participation; addressing equity and access issues so that students from marginalized communities are not excluded from participating in WIL; and increasing WIL opportunities for international students, as well as for domestic students studying abroad (*ibid.*). These themes are echoed in the findings of our study, as discussed below.

3.3 Reservations about WIL: Precarious Employment and Equity Perspectives

Not all those who have studied WIL are equally convinced of its benefits, at least as it is currently delivered. The human capital perspective summarized above stands in contrast to a more critical stream of analysis that associates WIL with the rise of precarious employment and broader labour market inequities.

3.3.1 What is Precarious Employment?

Over the past two decades, there has been an increase in the number of workers in nonstandard employment in Ontario. Since 1997, nonstandard or precarious forms of employment have been growing twice as fast as standard employment (Ontario Ministry of Labour, 2015a; Noack and Vosko 2011). The province has recognized this trend as problematic and has appointed an expert panel to investigate potential responses. The *Changing Workplaces Review: Guide to Consultations* (Ontario Ministry of Labour, 2015b) notes that precarious work includes involuntary part-time work, on-call work, temporary work and self-employment without paid employees (see also Ontario Ministry of Labour, July 2016). Two sets of workers are more likely to be in non-standard employment: youth under the age of 25 and seniors over the age of 65 (Ontario Ministry of Labour, 2015a).

A recent report from the Poverty and Employment Precarity in Southern Ontario (PEPSO) research group summarizes the impacts of precarious employment (PEPSO, 2013):

- (1) Precariously employed workers earn about 46% less than those in steady full-time employment and consequently their household incomes are 34% lower;
 - (2) They face variability in their wages;
 - (3) Most do not receive any employment benefits;
 - (4) They have limited opportunities for promotion;
 - (5) They often face weeks without income;
 - (6) They may ignore health and safety concerns due to fear of losing their job;
 - (7) They are subjected to more employer monitoring;
 - (8) They frequently hold multiple jobs;
 - (9) They commonly do on-call work;
 - (10) Training is often not included in their terms of work; rather, they often have to pay for their own training in the workplace.
- (see also Ministry of Labour, 2015b; Vosko, 2010; Nichols, 2016; Noack and Vosko, 2011)

Other research describes precarious work in terms of lack of job security, growing income polarization and a more complicated working environment where low-income workers often have to hold two lower-end jobs

(Mikkonen & Raphael, 2010). The OECD found that Canada has relatively poor employment protections and benefits for temporary workers, ranking it 32nd out of 34 OECD nations (OECD 2013).

3.3.2 Precarious Employment Perspectives on WIL

In the precarious employment literature, the rise of unpaid and poorly-paid internships is seen as yet another form of nonstandard employment and as one facet of the broader changes affecting labour market conditions. Some characterize WIL placements as part of this trend and a response to a market-based demand for less experienced and more flexible forms of labour (Frenette, 2015; Langille, 2013). Students in WIL placements “are seen as newcomers in the army of precarious labour” (Chong, 2015). For example, in a widely read book on the so-called intern economy, Ross Perlin warns that US colleges and universities are not adequately designing their WIL programs and “take the easier and cheaper road of promoting unpaid, insubstantial work off-campus” (Perlin, 2011).

Critics contend that many WIL placements have the same characteristics associated with precarious employment (Salamon, 2015). In particular, WIL placements often have no guarantee of future work and may condition students to expect lower wages and precarious employment in the future (Rodino-Colocino & Beberick, 2015). Students experience insecurity in relation to both their terms of employment and their rights as employees (Webb, 2015). Development economist Guy Standing has argued that even in a paid WIL placement, students may still be performing “cheap dead-end labour,” (Standing, 2011) which contributes to limiting the opportunities available for others seeking employment and keeps wages stagnant (Standing, 2011; Cohen and de Peuter, 2015). De Peuter et al. (2015) argue that culturally attractive industries such as media and technology companies are hiring youth for unpaid WIL placements rather than hiring entry-level employees who require training and mentoring as well as a longer-term employment commitment. Thus, the rise of unpaid internships is seen as one factor contributing to an erosion of entry-level positions (Langille, 2015). The federal government has also begun to question the practice of having federal departments use unpaid interns (Beeby, 2016). The lack of reliable data on the number of unpaid WIL placements in the country and province makes it difficult to analyze the scope and scale of the issue (Langille, 2015).

3.3.3 Equity Issues in WIL

A further concern is that WIL opportunities may be distributed unequally among students in ways that reflect and reinforce larger labour market inequities. Critics contend that women and racialized, immigrant and low-income students can face barriers when attempting to access WIL placements, compounding the feminization and racialization of poverty (Shade and Jacobson, 2015; Attfield and Couture, 2014 and Boulton, 2015). Low-income students may lack financial support to undertake an unpaid WIL placement and may feel compelled to maintain a paid job that is unrelated to their education. There is anecdotal evidence that women tend to be relegated to unpaid placements in traditionally “female” fields like nursing, teaching and early childhood education, while men are more likely to secure paid placements in engineering or technology industries (Canadian Intern Association, 2015; Langille, 2015). Others contend that students with disabilities confront barriers to WIL that mirror their experiences in the broader labour force, including limited placement options, prejudiced attitudes that make placement hosts reluctant to select them, negative assumptions about what students are capable of and poor quality experiences due to inadequate

accommodations while on placement (Pardo and Tomlinson, n.d.). These studies suggest the need for strategies to promote equitable access to WIL, especially as PSIs work to attract and retain more students from historically underrepresented groups including indigenous and low income students and those with disabilities.

3.4 Empirical Evidence on WIL Outcomes

Recent research from HEQCO lends some degree of support to both the human capital and the precarious employment/equity perspectives on WIL. This research includes empirical surveys of postsecondary students (Sattler & Peters, 2013), WIL employers (Sattler & Peters, 2012) and faculty members (Peters & Academica Group Inc., 2012).

Sattler and Peters (2013) conducted a Graduating Student Learning and Work survey at 14 Ontario institutions to gather information about students' experiences with WIL programs. Most college and university students surveyed did not report experiencing challenges relating to their WIL placements. However, a sizeable minority of respondents identified both minor and major challenges. Respondents graduating from colleges identified financial challenges, such as not receiving their promised compensation and incurring unexpected costs. College graduates also mentioned time-management issues, noting that they had difficulties balancing their WIL commitments and family commitments. The graduating university students also expressed challenges relating to financial compensation, though to a lesser extent. Some university respondents also described a lack of clarity about the role and responsibilities of their university in delivering the WIL program as well as inadequate preparation prior to starting the program, and questioned the applicability of classroom work and theory in the work environment. Respondents from both colleges and universities who did not engage in WIL programs during their studies indicated that concerns about delaying the completion of their program factored into their decision not to participate. These students also cited uncertainty about the time and financial commitments entailed by WIL, as well as concerns about conflicts with other academic requirements, as factors in their decision not to participate.

A similar study by Sattler and Peters (2012) focused on the experiences of Ontario employers with WIL. This research found that "employer participation in WIL is influenced by economic considerations. However, more significant factors are type of work available, the demands on staff time, lack of awareness of WIL programs and perceptions that students lack the necessary skills." These perceived administrative and training burdens compound employers' concerns about not being able to influence WIL programs adequately to meet their own needs. A lack of employer involvement in designing and implementing WIL programs has been described as "one of the most profound impediments to improving post-school transitions for young people" (Lehmann, 2012). Similar to the results of the graduating students survey, however, Sattler and Peters (2012) found that the majority of employers offering WIL placement did not experience any challenges.

A lack of information about or support for engaging in WIL activities was identified as a further challenge for WIL participants. These institutional barriers complicate the attempts of PSIs to facilitate linkages and opportunities among students, industry and community partners, as well as faculty. Tellingly, at the University of Waterloo, which has a large and established WIL structure, faculty were less likely to face challenges when adopting WIL programs or components than their peers at other universities (DeClou et al.,

2013). Students and employers associated with the University of Waterloo also diverged from other respondents from across the province, regarding the majority of challenges as “minor.” Students were most concerned about the quality of work performed during their placements, and employers said that the soft and technical skills of students did not meet their expectations. Although these insights offer limited scope for generalization, when compared with the responses from across Ontario, the responses associated with the University of Waterloo suggest that more institutionalized support and communication works to alleviate some of the challenges of participating in WIL.

More empirical research will be needed to evaluate different forms of WIL and the design features and governance practices that contribute to positive outcomes.

3.5 Literature on Legal Regulation of WIL

Few Canadian studies have analyzed how WIL intersects with various forms of legal regulation in the workplace. One exception is the work of labour law scholar Andrew Langille (2015), who has analyzed provincial workplace laws applicable to WIL and to other forms of unpaid work prevalent among youths. His work is closely linked to the issues of precarious employment discussed earlier and focuses on the inadequacy of substantive legal protections and the weak enforcement of the protections that do exist. For example, he has commented on the exclusion of WIL students from employment standards protection in Ontario, arguing this has a negative impact on young people who already lack stability at the beginning of their careers and are vulnerable to exploitation (Langille, 2015). Similarly de Peuter et al. (2015) argue “that higher education institutions, whose formal involvement in an internship is frequently required to comply with the law, economically benefit when tuition is charged to a student working unpaid to earn course credit; that interns’ vague employment status often excludes them from certain entitlements and health and safety protections; [and] that there is inadequate oversight of internships on the part of government regulators.”

This last point speaks to enforcement issues. Vosko (2013) points out that many workers have rights but they do not have “genuine opportunities for redress” (see also Noack, Vosko and Grundy, 2015; Banks, 2016). Ontario workers’ access to protection under Ontario’s employment standards law depends on the capability of the Ministry of Labour to oversee actual employment practices. For workers covered by the law, Employment Standards Officers (ESOs) can enforce an order to pay, levy fines, issue compliance orders and undertake prosecutions. However, they have no mandated policies for resolving cases; rather, they have discretion based on the practices and policies of individual employment standards units (Vosko, 2013; Vosko, Tucker, Gellatly & Thomas, 2011). Other problems identified with the enforcement regime include a backlog of unresolved cases, a reactive complaint process that places the burden on individual workers to initiate the process without any confidentiality protection and a lack of funding for legal assistance with complaints.

The Canadian Intern Association has published a guide to help interns, including WIL students, to understand their rights under federal and provincial employment standards, health and safety and human

rights laws. However, given its purpose — which is to provide information in simple and plain language — the guide includes limited details about how different WIL students may be impacted by these or other laws.

PSIs and employers must also navigate the laws surrounding WIL, but there is even less Canadian research looking at these issues from their perspective. International research is instructive for identifying key legal issues. An Australian survey of legal counsel found that they were providing advice to their institutions on various issues related to WIL programs including:

...the purpose of placement; the responsibilities of the university, student and host organization; indemnification and insurance coverage; non-discrimination; term of agreement; student status (employee or non-employee); student evaluation; intellectual property; confidentiality; termination of placement; and supervision” (Cameron & Klopper, 2015).

Furthermore, Cameron and Klopper synthesized other research from the United States indicating that WIL program administrators have sought legal counsel or advice relating to the following areas (cited in Cameron & Klopper, 2015):

- Termination of students from WIL program (Cole & Lewis, 1993);
- Insurance coverage and indemnification agreements (Goldstein, 1981);
- Potential actions in negligence against the university and student arising from misconduct by students on placement (Gordon, McBride & Hage, 2004);
- Admission and continuation policies for students with criminal records (Farnsworth & Springer, 2006);
- Student privacy, in particular the disclosure of information to host organizations (Goldstein, 1981);
- Handling of problematic students (Rothstein, 2009; Vacha-Haase et al., 2004);
- Pre-screening of students as part of a discipline’s gatekeeping function (Gibbs, 1994; Jones Jr, Glynn & Francis, 2012);
- Responsibility of university, WIL administrators and the host organization for harm suffered during a placement (Munger, 2006);
- The development of sexual harassment policies (Valentine, Gandy, Burry & Ginsberg, 1994).

Our research confirmed the relevance of many of these issues and more for WIL administrators in Ontario.

4. Research Questions and Methodology

This study had two primary research questions: (1) How are legal issues currently impacting WIL programs in Ontario? (2) What steps could be taken to help legal frameworks and processes align more closely with the goal of expanding the availability of quality WIL programs and opportunities?

These questions raise a number of secondary research questions:

- What are the most important federal and provincial legislative measures impacting WIL stakeholders and how are regulators and the courts applying them?

- What regulatory gaps, risks and opportunities need to be considered by those designing or participating in WIL programs, whether as students, educational institutions or employers?
- What policies or practices have Ontario PSIs put in place to help them navigate the legal landscape and take advantage of facilitative measures that can support WIL participation?
- Have tax incentives such as Ontario's Co-op Education Tax Credit been effective in promoting WIL?
- What can Ontario and its PSIs learn from the legal experience of other jurisdictions?

4.1 Scope of Study

This study focused on off-campus WIL opportunities that are delivered to students as part of an academic program offered by a university or a college of applied arts and sciences in Ontario. The experience of other jurisdictions is referenced for comparison only. The study did not look at post-doctoral fellowships or professional licensing processes that involve a post-graduate work requirement. Apprenticeships were also beyond the scope of the study and are referenced for comparison purposes only. Nor did we examine WIL programs delivered by private colleges or career colleges, beyond a few specific examples. Further, the provision of on-campus WIL opportunities raises issues that are not examined here. While these are all important forms of WIL or professional training, they are beyond the scope of this study.

4.2 Methodology

This study combined in-depth qualitative interviews with WIL experts in legal and non-legal roles with a review of relevant provincial and federal legislation and regulations, as well as legal cases dating back to 1990. We also reviewed secondary literature on WIL in Canada and in the United States, the United Kingdom and Australia. As well, we analyzed Canadian tax expenditure programs designed to support WIL to assess the size, scope and impact of tax-delivered investments in WIL.

Our research includes interviews with 19 participants including two legal counsel to Ontario PSIs, three counsel at university-based student legal aid clinics, seven WIL program managers, six legal or policy staff members with non-government organizations involved in WIL-related advocacy or program delivery, and one independent researcher with expertise in WIL. We did not interview any employers. The interviews were conducted in person or by telephone and lasted from 20 minutes to an hour and a half. At least two of the three research team members attended and conducted each of the interviews. The interviews were in-depth and were semi-structured to allow mutual interests and points of discussion to emerge (Reinharz & Davidman, 1992).

Informants had no prior relationship to the project or research team and no interest in its outcomes, except as interested parties engaged in creating or managing WIL programs or advising about legal issues related to WIL. They were recruited through convenience sampling and snowballing (Bryman et al., 2012), as they were readily accessible through the websites or other publicly-available information of various legal clinics, institutions and organizations; as well, we found participants through suggestions from previous participants. Informants were contacted through email, telephone calls, in person or a combination of these methods. Informants were guaranteed anonymity and confidentiality with respect to their disclosures. Research informants answered a standardized set of questions, which helped identify key legal frameworks

and areas of concerns for our subsequent research, analysis and discussion. This research study followed the Tri-Council Policy Statement (2014) ethics policy. Prior to the commencement of the interviews, a consent form was explained and signed.

5. Key Legal Frameworks

Our research identified seven legal frameworks that are impacting most directly on WIL participants and which should be considered closely by policy makers seeking to maximize the opportunities and mitigate the risks associated with scaling up WIL in Ontario. These are: employment standards; health and safety; human rights; intellectual property; employment insurance; immigration; and tax law measures used to deliver public funding for WIL. Each is analyzed and discussed below.

Readers should note that the following study of legal frameworks and risks is not comprehensive or exhaustive, but rather focuses on the issues that arose most frequently as areas of concern in our research. Further, this report synthesizes legal information for the purposes of policy analysis only, and should not be treated as legal advice regarding any particular case or situation. Details and nuances are often omitted due to space constraints.

5.1 Employment Standards

Ontario's Employment Standards Act (ESA) regulates the most basic workplace conditions for employees in the province (other than workers in federally-regulated industries such as banking and transportation). The ESA mandates minimum wages, statutory holidays, vacation pay, maximum work hours, regular breaks and eating periods, rights to unpaid medical, caregiver or emergency leave and rights on termination of employment, among other matters. Students on a WIL placement generally are not covered by the ESA, subject to some ambiguous areas discussed below.

The exclusion of WIL students from employment standards coverage raises two main issues in the context of this study. The first is a simple lack of comprehension. Even individuals knowledgeable about experiential education are sometimes unclear about whether the ESA applies to a student on a WIL placement. The second issue is a common perception that the ESA needs to be reviewed and probably reformed in response to the growth of WIL programs. The study identifies some options for clarifying the legal status and minimum working conditions of students when they complete part of their program in a workplace setting. We elaborate on each of these issues below.

5.1.1 Lack of Comprehension

The ESA excludes from its scope students who undertake a work placement as part of their postsecondary education program due to the following provision:

s.3(5) 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:...

2. An individual who performs work under a program approved by a college of applied arts and technology or a university. ... [emphasis added]

This language appears to exclude all work placements, paid or unpaid, that are referenced in an institution's course syllabus or other official documents describing the components of an academic program or for which a student will receive academic credit. This exclusion is "totalizing," in that WIL students and employers are completely excluded from all rights and obligations under the ESA, and not just the minimum wage (Langille, 2015).

Ontario is not alone in this regard. The employment standards laws of most other Canadian provinces include a similar exemption for work that is part of an academic program. The Atlantic provinces and the Canada Labour Code (Part III) are exceptions to this: these provinces as well as the federal code do not exclude WIL students outright, but coverage is unclear especially for unpaid placements. Parliament passed a 2015 amendment to the Canada Labour Code, which expressly excluded WIL students in federally regulated industries from basic employment standards coverage (Economic Action Plan 2015 Act). However, as of the writing of this report, that amendment had not been declared in force.

Though broad, there are limits to the scope of the exclusion in ESA s.3(5)2. It does not apply to those studying at private or career colleges, which qualify as neither "a college of applied arts and technology" nor "a university." In addition, the Ontario Labour Relations Board (OLRB) has held that the exclusion does not apply to apprentices, who enjoy ESA coverage even if they are simultaneously enrolled in a college of applied arts and technology (see *Cosimo's Garage Ltd. v. Theodore Smith and Director of Employment Standards*). In the case of *Cosimo's Garage*, the issue before the board arose from a Mohawk College automotive technician program that, as a condition of enrolment, required students to also be registered as apprentices. Despite the connection to the college program, the board reasoned that apprenticeships "are administered by the Ministry of Education, not by individual academic institutions..." The college had "no contractual or other relationship" with the employer, and the required apprenticeship hours could be logged with any licensed mechanic. Noting that exemptions from basic employment standards should be construed narrowly in favour of workers, the board concluded that s.3(5) of the ESA "does not create an exception from the Act's application for registered apprentices and their employers."

The interpretive principle cited in *Cosimo's Garage*, that ESA exemptions should be read narrowly, could potentially be applied to other scenarios. Consider, for example, an internship arranged with the help of a university office as an optional, non-credit opportunity. It is not clear whether such a placement would be considered part of a "program approved by" the institution. As WIL offerings proliferate and take on new forms across the sector, a narrow reading of ESA s.3(5)2 could open the possibility of some placements being covered while others are not.

Interviews conducted for this study revealed two common misunderstandings about the nature and scope of Ontario's student exemption: 1) that ESA coverage depends on whether a placement is paid or unpaid; and 2) that the ESA's "trainee" provisions cover WIL students.

- *Misunderstanding #1: That ESA coverage depends on whether the placement is paid or unpaid.*

Though we did not set out to test interview subjects on their knowledge of the law, a lack of a clear understanding sometimes emerged in the course of discussion. In three separate interviews, all with non-lawyers, informants asserted incorrectly that ESA coverage depends on whether a placement is paid or unpaid. These informants believed that if students are paid they have full ESA coverage or at least partial rights to statutory holidays and vacation pay. In fact, as discussed above, both paid and unpaid WIL placements are excluded from the ESA if they are part of an approved university or college program. This is reinforced by the language in s.3(5)2 which clearly excludes even a student who “receives compensation.” Another informant who managed WIL programs did understand the ESA exclusion but reported that employers often did not. She found that employers commonly assumed that paid co-op students had the same legal status as any other employee.

Given the confusion on this issue, it is worth reiterating that even paid placements operate completely outside the employment standards regime. For example, there is no obligation for compensation to meet the minimum wage, to pay for all the hours a student works, to pay overtime wages or to grant vacation time or statutory holidays. One informant pointed out that co-op students, whether paid or unpaid, can have their positions terminated early without notice or pay in lieu thereof. Beyond financial hardship, this may delay completion of their programs if another placement cannot be found quickly. WIL students also lack entitlement to take unpaid parental, family, or medical leaves.

Leaving aside for now the question of whether the student exemption is justifiable, the point here is that some WIL participants have the false impression that their placements are regulated in whole or in part by the minimum standards in the ESA. This creates risks most obviously for students, but also for institutions and placement hosts who fail to set clear expectations at the outset only to find they are operating in a legal vacuum when issues arise. The converse problem also exists in that novel forms of WIL might not qualify for the ESA exemption. For example, can non-credit WIL programs developed through a central administrative unit be considered part of a “program approved by” the institution? In light of the principle that exemptions should be construed narrowly in favour of workers, as cited in *Cosimo’s Garage*, the answer is unclear. These issues should be on the radar of all those who are developing new structures and programming to meet the growing demand for WIL.

- *Misunderstanding #2: That ESA provisions relating to “trainees,” sometimes referred to as interns, apply to WIL students.*

WIL placements have a unique status for employment standards purposes. They are entirely distinct from training positions undertaken outside a postsecondary program, which are subject to special trainee rules in the ESA. Confusion arises from the fact that both can be called “internships.” Public debate about the experiences of interns more broadly has often blurred this distinction contributing to misunderstanding about which rules apply.

Outside of WIL programs, the ESA applies fully to trainees or interns unless the position meets *all* of the following conditions:

- 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.

Where even one of these conditions is not met, a trainee or intern is legally entitled to minimum wages and all other ESA protections (Ontario Ministry of Labour, 2016).

Some informants for this study (once again, non-lawyers) at times suggested that the above conditions also cover WIL students, providing some assurance that at least in principle a student must get the benefit of real training or else be paid for their work. This is inaccurate. Students who perform work as part of an approved academic program are entirely excluded from the ESA, regardless of the terminology used to describe the placement (internship, co-op, practicum or otherwise). The exclusion in s.3(5)2 for students working under an approved academic program is distinct from, and overrides, the provisions relating to “trainees.”

For internships that are not part of a WIL program, the Ontario Labour Relations Board has confirmed that employees must be paid if the job does not meet the six conditions for “trainees.” For example in the case of *Girex Bancorp Inc. v. Lynette Hsieh, David-Paul Sip and Director of Employment Standards*, the board ordered payment of wages and vacation pay to Ms. Hsieh and Mr. Sip for software development work they performed under the “Girex Internship Program,” which purported to establish a “voluntary training arrangement.” The Board found the internship did not meet the conditions in s.1(2), in part because there was little if any training benefit to the claimants. Notably, Ms. Hsieh and Mr. Sip were enrolled as students at the Institute for Computer Studies at the time they performed the work. However, the student exemption in s.3(5)2 was not mentioned in the board’s reasons — presumably because the institute was not a university or a college of applied arts and technology. To the best of our knowledge, the trainee requirements have never been applied to a WIL student who fits within the parameters of the exemption in s.3(5)2.

The Ministry of Labour has conducted enforcement blitzes to promote compliance with the trainee requirements. However, because of s.3(5)2, enforcement officers currently have no legal basis to act on complaints from WIL students, even when investigating other possibly illegal internships in a workplace.

In the absence of employment standards regulation, the onus rests entirely on PSIs, their WIL partners and sometimes individual students to negotiate decent conditions of work and to ensure that a placement provides educational or training benefits. Some PSI informants shared strategies that have been useful for this purpose, such as:

- articulating learning objectives for placements
- requiring employers to post written job descriptions

- monitoring placements with check-in calls
- providing students and employers with access to program staff throughout the placement
- intervening where necessary to mediate problems
- conducting student satisfaction surveys to assess the quality of placements

HEQCO has also published a guide of best practices for ensuring the educational quality of WIL programs (HEQCO, 2016). The consistency of such practices across the sector is not clear, however. Monitoring requires resources and our interviews revealed that some programs take a more hands off approach, helping to secure placements but then leaving students to set terms and expectations with employers. Once again, employment standards law provides no background protection regarding the conditions of work and no assurance of any training benefit from such placements.

Interestingly, provincial tax legislation does provide an incentive through the Co-operative Education Tax Credit for employers to offer WIL placements that involve students in “productive work,” and that are both supervised by the employer and monitored by the school (discussed in detail in section 5.7). It is difficult to understand why basic quality requirements such as these would be limited to those placements where the employer is eligible for and claims the tax credit.

5.1.2 The Case for Reviewing the Postsecondary Student Exemption

Our research suggests there is a strong case for reviewing the scope of the postsecondary student exclusion in s.3(5)2 of the ESA. Though perspectives tend to diverge on this issue, our interviews also revealed some potential common ground.

Ontario’s *Changing Workplaces Review* has provided a recent opportunity for interested parties to make submissions on this question (Ontario Ministry of Labour, 2015b). The Special Advisors’ Interim Report expressly declined to comment on the exclusion in s.3(5)2, though it recommended a process for reviewing certain other ESA exemptions (Ministry of Labour, 2016). In our view it would be timely also to review s.3(5)2 and to consider whether it remains appropriate in a context of rapid WIL expansion. Several options for reform are outlined below.

The perceived pros and cons of reforming the exemption can be captured in two competing perspectives that emerged in the interviews and are summarized below. However, it should be noted that most informants recognized a degree of merit in both perspectives and the need to find a middle ground.

Criticisms of the current ESA exclusion: These tended to echo the points raised in the precarious employment literature reviewed earlier in this report. Some informants (including both WIL program managers and legal counsel) voiced dismay that in certain fields even large, profitable enterprises have persisted in not paying students. Students were described as vulnerable and reluctant to complain about problems because they fear the loss or failure of their placement, do not want to jeopardize their chances of graduating, or fear alienating an employer who may provide future references or job opportunities. Some informants (both legal and non-legal) observed that access to placements depends in part on socio-economic status, gender, disability or other social factors. For example, they noted a greater prevalence of unpaid placements in fields with traditionally higher numbers of female students, such as social work, nursing, child care, education and dietetics, whereas areas with larger numbers of male students, such as engineering or trades

apprenticeships, tended to be paid. One informant described WIL as a “two-tier” system in which only students from affluent families can afford to take unpaid placements. For those identifying most with this side of the debate, PSIs were generally seen as having insufficient capacity or incentives to monitor students’ experiences in the workplace or to intervene effectively on their behalf.

Arguments in defence of the ESA exemption: Informants in both legal and non-legal roles worried that requiring all placements to be paid would make it harder to increase or even maintain the number of WIL opportunities, especially with smaller businesses and non-profit organizations (see also Council of Ontario Universities, 2015). Another common theme was that unpaid placements are fair if they provide genuine learning opportunities. Some pointed out that employers already contribute financially by paying staff who spend time supervising and training students. Barriers to low-income students are seen as a valid concern but better addressed through direct and targeted financial aid programs. Some voiced a more fundamental caution that treating students as ordinary workers could shift the focus of placements away from learning and toward meeting the immediate labour force needs of an employer. A related concern was that legally defining students as workers could lead to additional administrative burdens on academic institutions or placement hosts; labour law and existing collective agreement issues at PSIs were seen as detracting from the educational focus of WIL programs.¹ Those most concerned with preserving the ESA exclusion often suggested policies and practices that PSIs can adopt to reduce the risks of unfair treatment and promote good quality placements.

Although the debate may seem polarized, in fact there was substantial agreement that students should be protected from harsh or exploitative working conditions and that WIL placements should provide meaningful learning opportunities.

5.1.3 Options for ESA Reform

Overall, our research revealed little support for entirely abolishing the exclusion. More commonly, informants suggested narrowing its scope in some way that would provide students with a degree of protection while still recognizing the unique nature and objectives of WIL, the inability of some organizations to pay student trainees and the costs to employers of supervising students. Several options for this type of reform were identified through the interviews or in the literature:

- a) Set a threshold number of hours that can be treated as purely educational and not regulated by employment standards through the ESA. This was seen as a possible means of preventing the exploitation of students who do longer or multiple placements that enable them to contribute meaningful value to the employer’s enterprise.
- b) Disaggregate minimum standards so that even if a WIL placement is unpaid, students would still be covered by other “non-monetary” employment standards (for example, those relating to hours

¹ As an example of a union grievance related to work assigned by the employer to unpaid WIL students, see *Winnipeg Free Press v. Communications, Energy and Paperworkers Union of Canada, Local 191* (2011).

of work, family or emergency leaves, and notice of termination) (Canadian Intern Association, 2015). An example of such an approach is Manitoba's law with respect to students-in-training for professional accreditation, who don't need to be paid minimum wage but who are entitled to certain limited protections including vacation time, leaves for family and medical reasons, and termination notice periods. Another is the 2015 private member's bill proposed in Ontario by NDP MPP Peggy Sattler, which proposed to extend certain non-monetary ESA protections to WIL students (Bill 64, Protecting Interns and Creating a Learning Economy Act, 2015).

c) Make unpaid placements conditional upon the student receiving genuine educational benefits. One version of this proposal would be to apply the six "trainee" conditions in s.1(2) of Ontario's current ESA to students on WIL placements (Canadian Intern Association, 2015; and Ontario Undergraduate Students Alliance (OUSA), n.d.). The requirement that training must benefit the trainee over the employer seems well suited to the objectives of WIL and may strengthen the ability of academic institutions to insist that students receive meaningful work. As discussed earlier, some non-lawyer informants assumed, albeit incorrectly, that the six conditions already applied to WIL students. A similar requirement for educational benefit was included in a federal private member's bill proposing changes to the Canada Labour Code (Bill-636, *Intern Protection Act*).

Any of the above options taken individually or in combination could serve to backstop the good faith efforts of PSIs to secure placements that provide reasonable working conditions and educational value to students. Reforms could also assist employers by clarifying their obligations to a WIL student. Further work would be required to analyze in detail the potential impact of any reforms.

In order to be meaningful, legal reforms would need to be accompanied by a well-funded plan for communicating and upholding any new rights and obligations. As discussed earlier in this report, the literature on precarious employment has identified enforcement deficits as a key source of vulnerability for workers.

5.1.4 Employment Standards Recommendations

- *Ontario should review the ESA exclusion for students who perform work as part of an approved postsecondary program, in light of the growth and diversification of WIL programs in the province. The review should take into account the perspectives of students, postsecondary institutions and employers.*
- *Greater clarity of terms and clear legal information is needed to improve understanding of the employment standards regime with respect to WIL placements, including the scope of the current exclusion in s.3(5)2.*
- *PSIs should review their institutional practices to ensure that WIL programs are designed and managed to promote educational quality and reasonable working conditions, and that clear processes are established to identify problems and assist in resolving them.*

5.2 Health and Safety

Of all the issues covered in this study, the health and safety rights of WIL students have received the most public attention. A number of tragic incidents have prompted legislative reforms to clarify the health and safety rights of students. Nonetheless, this study identified two ongoing sources of uncertainty and risk that are impacting students, institutions and employers. The first relates to the need for appropriate health and safety training for students on placements. The second concerns insurance coverage for students who are injured while on a placement.

5.2.1 Health and Safety Training

Ontario passed legislation in 2014 to clarify that students on unpaid placements are covered by the *Occupational Health and Safety Act (OHSA)*. Bill 18, the *Stronger Workplaces for a Stronger Economy Act, 2014*, amended the definition of “worker” under the OHSA to include “[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 postsecondary institution.” Likewise, federal occupational health and safety legislation was reformed in 2015 to cover individuals who are not employees but who perform “activities whose primary purpose is to enable the person to acquire knowledge or experience.” These reforms followed cases such as that of Aaron Murray, an Ontario college student who died in a 2014 car accident after an overnight shift at his unpaid WIL placement, after having worked at his paid job during the day (McKnight, 2014; see also Tomlinson, 2013, regarding Alberta college student Andy Ferguson).

In general terms, the OHSA provides workers with the right to a safe workplace, to be advised of potential dangers in the workplace and to refuse dangerous work. It also requires employers to provide health and safety training for all workers. The Ministry of Labour is responsible for enforcing the OHSA.

None of the informants for this study questioned the need for WIL students to have OHSA coverage. However, informants in both legal and non-legal roles described the challenges of implementing health and safety training for placements that are often short in duration and where students may be working in a limited capacity as learners. Although employers have the legal responsibility under the OHSA to ensure workers receive appropriate health and safety training, we heard that in practice PSIs are taking on some of this work. Employers may require, as a condition of taking students on, that the school deliver health and safety training on their behalf. More generally, schools are concerned about not overburdening employers on whom they rely to provide placement opportunities. It is unclear whether PSIs may be exposed to new legal risks as a result of their growing role in health and safety training. Informants were primarily concerned about the complexity and time required in establishing training requirements and responsibilities for many different industries and employers.

WIL program administrators and other experts in the field described a complex landscape in which each employer may take a distinct view of what health and safety training is needed for essentially the same type of placement. In the health care sector, for example, the requirements can vary from hospital to hospital for students doing similar work, creating the need for multiple training programs and retraining of students who are doing more than one placement. We heard that administrative staff members are devoting substantial

resources to negotiating employer-specific training requirements and the division of training responsibilities between PSIs and individual employers.

Health and safety training was one of several areas where informants suggested that better internal coordination within the provincial government could help institutions to manage their growing WIL programs. For example, whereas the OHS and the Ministry of Labour make employers responsible for training, MAESD has stated that PSIs are responsible for ensuring that unpaid placement students receive safety training as part of their academic program, and that institutions are expected to evaluate the safety practices of potential placement employers (MAESD, 2014). One informant suggested the Ministry of Labour could do more to enable compliance, for example, by reviewing proposed student training programs to confirm their sufficiency. There is a perception that not enough was done by either ministry to anticipate or address the implications of Bill 18 for WIL programs and that some coordination between the two is needed to streamline implementation.

5.2.2 Health and Safety Insurance

Insurance for students who suffer injuries while working on placements emerged repeatedly as a point of concern during our interviews. We found that the law and policy on this issue are complex and not well understood. Informants of all types described the status quo as confusing and the process to sort out the treatment of different students on different kinds of placements as time consuming. Moreover MAESD's interpretive guidelines are seen as adding to the concern by creating potential gaps in coverage as well as new insurance costs for institutions. Informants expressed a need for stronger internal communication within government and for a more collaborative approach between government and PSIs to ensure that all students have adequate workplace insurance while also reducing the overall costs of administering WIL programs.

A comprehensive analysis of the law in this area is beyond the scope of this study. In basic terms, however, the avenues of legal recourse available to students injured on placement depends on a combination of the following factors:

- is the placement host an employer covered by the Workplace Safety and Insurance Act (“WSIA”)?
- is the placement paid or unpaid?
- is the placement a required component of the student’s program?
- what agreements have been made between the parties to the WIL placement?
 - a) *WSIA versus private insurance*

The Workplace Safety and Insurance Act is a publicly administered scheme under which injured workers may claim a range of benefits including health care, earnings replacement, retraining, permanent impairment and death benefits. Claims are administered by the Workplace Safety and Insurance Board (WSIB).

In general terms, an individual can file a claim with the WSIB for benefits if he or she is a “worker,” is employed by a covered employer, and sustains “a personal injury by accident arising out of and in the course of his or her employment.” Crucially, the term “worker” is defined broadly to include students

working on a placement authorized by their educational institution, whether paid or unpaid. Accordingly, a student is entitled to claim insurance benefits through the WSIB if he or she undertakes a placement with a WSIA-covered employer.

However, not all industries are covered by the WSIA. For students placed with a WSIA-excluded employer, any insurance coverage for legal damages arising out of a workplace injury must be obtained in the private-insurance market. Depending on the circumstances, securing private insurance to cover such risks may be the responsibility of the PSI, the placement host or the provincial government.

b) Insurance for paid versus unpaid, and required versus elective, placements

As noted earlier, a student's eligibility to claim WSIA benefits does not depend on whether a placement is paid or unpaid. Nor does it matter if the placement was undertaken as a mandatory or elective component of the student's program. While these factors do not affect benefit entitlement, they can affect who is responsible for covering the cost of any successful claim and the process for claiming benefits.

In general, employers are responsible for funding all WSIA benefits through a system of insurance premiums and, in some cases, by paying benefits directly to workers. An exception exists for certain WIL students. MAESD has a policy of reimbursing the WSIB for the cost of any WSIA benefits where the claim arose out of a placement that is unpaid and that was "a requirement" of the student's program (MAESD, 2014). The ministry has also secured private insurance to cover students who complete required placements with WSIA-excluded employers. Special claim forms must be used to submit WSIB claims in these categories (see MAESD, *Postsecondary Student Unpaid Work Placement Workplace Insurance Claim*). The stated purpose of the policy is "to encourage the participation of employers in providing unpaid work placements...required as part of Ontario's publicly assisted postsecondary education and training programs" (MAESD, 2014).

A key concern of several informants was MAESD's decision in 2013 or 2014 (we received conflicting information) to limit its commitment to pay for benefits only to those placements that are required to complete a student's academic program, whereas previously it covered both mandatory and elective placements. Although in principle this should not affect a student's entitlement to claim benefits from the WSIB, we heard that in practice the restriction is highly complex to administer. These challenges may grow as institutions launch new, experimental programs partly in response to government direction about its priorities for the sector.

The meaning of a "required" placement for this purpose is not entirely clear. The guidelines indicate that students are not eligible for "placements which are not a required part of their program and which they have arranged or organized themselves" (MAESD, 2014). However, in a separate Question and Answer

document MAESD gives a broader reading to the term “requirement” that could exclude “optional” placements organized, approved and supported by the school:

Q.9: We have an internship course in our Management Program that is optional. Are students enrolled in this course eligible for ministry coverage while at their work placement?

No, given that this is an optional course and not a program requirement, the students would not be eligible for ministry coverage. To be eligible the work placement must be a program requirement.

Note, however, that once a student has enrolled in the internship course described above, completion of the internship presumably is then required to pass the course and perhaps the program, unless the student takes extra credits. From this point of view, it could be seen as “required.” Further, one informant observed that a single course can include both mandatory and optional placements, meaning that students in the same class could be treated differently under MAESD guidelines. Aside from the ambiguity and complexity of the guidelines, it is not clear why the provincial government would wish to encourage employer participation in some WIL courses but not others or how this will facilitate the desired expansion of WIL opportunities.

The decision to cease covering elective placements has required institutions to provide complicated new advice to placement hosts and students and to purchase their own insurance coverage for students who are no longer covered by MAESD. One informant expressed the opinion that this policy change has not only shifted costs but also raised them overall, as the private insurance premiums being paid by institutions exceed the amount of claims previously paid out by the ministry.

It is beyond the scope of this study to ascertain the reasons for MAESD’s position as reflected in its 2014 guidelines, or the cost or adequacy of the private insurance which has replaced MAESD’s coverage for elective placements. However, our documentary research substantiated informants’ concerns about administrative complexity for students, employers and educational institutions. Following the completion of our interviews we received information that MAESD may now be reconsidering its interpretation of what is a “required” placement to address concerns about gaps in coverage. This is a positive sign, but as of the time of the writing of this report, no clarification had been issued publicly.

c) Private agreements

The legal framework described above is supplemented by private agreements governing WIL placements or partnerships. For example, both legal and non-legal informants told us that employers who are required under the WSIA to pay premiums or benefits in respect of placement students may negotiate agreements with educational institutions to assume these responsibilities on their behalf as a condition of providing placement opportunities. More concerning is that we also heard of cases in which employers asked students to sign liability waivers before commencing their placements. It is unclear if such waivers would be legally effective. However, the presence of a signed waiver could at the very least discourage or complicate a

student's efforts to seek recourse following a workplace injury. This is an area where students could benefit from more legal information and advice about their rights in the event of a workplace injury.

5.2.3 Health and Safety Recommendations

- *The Ministry of Labour and the Ministry of Advanced Education and Skills Development should work together to identify a more streamlined process or supports for meeting health and safety training requirements so they are manageable for PSIs and employers and do not present a barrier to WIL expansion.*
- *WIL participants should clearly indicate who is assuming responsibility for health and safety training prior to the beginning of a partnership or placement.*
- *MAESD should review its June 2014 Workplace Insurance Guidelines in consultation with stakeholders with a view to removing gaps in coverage and reducing the overall administrative and insurance costs of offering WIL programs.*

5.3 Human Rights

Human rights are protected in the province by the *Ontario Human Rights Code* (OHRC) and, for those working in federally regulated industries, the *Canadian Human Rights Act*. Students on a paid or unpaid WIL placement are covered by the OHRC, either as recipients of educational services, as employees or both.

With respect to services the OHRC states:

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Postsecondary education is considered a “service” meaning that the provisions of the OHRC cover students registered at Ontario PSIs, even while they are on a WIL placement. WIL students who enter into an employment relationship with a host organization also have the right

...to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Furthermore, the province's Occupational Health and Safety Act was amended in 2009 to require employers to implement policies to address workplace harassment and violence.

Case law has established an expansive definition of “employment” for the purposes of human rights law. The Human Rights Tribunal of Ontario (HRTO) has held that “all employment relationships,

unionized or non-unionized, long-term or short duration, fixed-term or indefinite, whether formed by oral or written agreement, whether casual or formal, are covered by the *Code*,” including volunteer positions or unpaid work that is done in hopes of gaining a paid position (*Rocha v. Pardons*, 2012). Unlike employment standards law, there is no exclusion for students working under an approved postsecondary program.

The OHRC defines “disability” to include mental, learning and developmental disabilities. A person with a disability is entitled to be accommodated to exercise their rights

unless [a tribunal or court] is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

This section discusses four areas where human rights law can interact with WIL programs at different points in the process of a student obtaining and completing a placement:

- Police record checks to secure admission to a WIL program or placement
- Equity in selecting students for placements
- Disability accommodation for placements
- Discriminatory workplace conduct

5.3.1 Police record checks

One of the issues most frequently raised by informants for this study was the amount of time spent to secure police record checks required by placement hosts and the potential for information obtained through such checks to be used in unreasonable or discriminatory ways. In particular, students may be disqualified from a placement due to uncertainty surrounding a “positive” record — even in cases where no legal action has been taken against the individual.

This concern was described as particularly acute for programs involving work with designated “vulnerable sectors” including social work, nursing, teaching and early childhood education. The *Criminal Records Act* defines a vulnerable person as:

a person who, because of his or her age, a disability or other circumstances, whether temporary or permanent, (a) is in a position of dependency on others; or (b) is otherwise at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them.

Though the law generally does not require organizations to secure record checks, the Canadian Civil Liberties Association (CCLA) has documented a marked increase in the number of such requests by potential employers, volunteer organizations, educational programs and professional organizations (CCLA, 2014). This trend is not limited to the designated vulnerable sectors. The CCLA identified a number of reasons for the rise in police checks including heightened awareness of the risk of legal liability for institutional sexual abuse

and an erroneous perception that police checks are required to comply with provincial legislation on workplace harassment and violence (CCLA, 2014).

With more and more police checks required, informants described their frustration with the variation in procedures among police forces and increasing delays which can jeopardize a student's ability to commence a placement on time. As a result, some programs are now requiring students to submit a police check up front as a condition of admission (a practice also observed by the CCLA, 2014). A student may also be required to update their police check at additional cost if a placement organization requires one that is more recent. If nothing else, the growing cost and administrative burden of this process for students and PSIs could become an obstacle to expanding WIL opportunities, particularly but not only in vulnerable sectors.

A more serious concern is the potential for human rights violations based on the use or misuse of information received through a police check. Police have wide discretion to reveal information that may have no relevance to the work a student will do on a placement. In particular, a record may reveal apprehensions under s. 17 of the Mental Health Act, 1990 (MHA), which allow police to take an individual to be assessed by a psychiatrist if they have reason to believe there is a risk of the person harming themselves or others. It may also reveal past 911 calls, traffic stops or other interactions that led to no criminal charges or no convictions.

Our research found that this is more than a hypothetical issue. A 2014 series in the *Toronto Star* highlighted cases such as that of Gordon Sinclair, who was unable to obtain a placement to complete his college nursing program due to a criminal charge that had been dropped over a decade earlier (Cribb, 2014). Sinclair was not aware there was a record of the charge until the placement was denied, leading ultimately to his withdrawal from the program and a legal action against the college to recover his tuition.

In a more recent case, George "Knia" Singh filed a human rights complaint "alleging police discriminated against him on the grounds of race and colour, ancestry, ethnic origin and reprisal or threat of reprisal" (Rankin, 2016). Singh was an award-winning student at Osgoode Hall Law School and a former volunteer worker with young people in "at-risk areas of the city." He was denied the opportunity to take part in a ride-along with the Toronto Police Services as part of his criminal law program. The *Toronto Star* reports that,

Singh, according to his human rights application, was told by a senior officer that background checks revealed he had 'associated' with people with 'serious criminal records.' This was most likely related to contact cards filled out by officers in non-criminal encounters where Singh was documented as being in the company of people with criminal records. (Rankin, 2016).

The use of a background check to prevent completion of an experiential component of an academic course, even when no charges have been laid or convictions registered, may carry legal ramifications not just for placement hosts but also potentially for PSIs if they are screening students out of programs based on police checks submitted with a student's application for admission. Legal and non-legal informants for this study noted the damaging impacts that these police checks may have on students' educational opportunities and their potential to create a chilling effect in which students self-select out of certain programs because they fear disclosure of past mental health incidents or family conflicts in which police were called.

The Ontario Association of Chiefs of Police (OACP) has recognized the over-use and misuse of police record checks as a problem, noting that,

employers, volunteer co-ordinators, educators and others, who are receiving and making decisions based on non-conviction entries, frequently do not understand what a police contact or non-conviction record is and have little or no guidance as to how this information should factor into their decision-making process. The result is that many organizations adopt the most risk-averse position, automatically disqualifying a wide range of individuals solely on the basis of these records.

Following consultations with the CCLA, the Ontario Human Rights Commission and other organizations, the OACP issued a guideline for police forces that presumes non-conviction records should not be disclosed save for “exceptional cases” where there is “a concrete and compelling concern for the safety of vulnerable persons” (OACP, 2014). The guideline places the onus on organizations that request checks (not police) to be mindful of their obligations under human rights law and to satisfy themselves before requesting a police check that it is a bona fide occupational requirement. The guideline flags “the potential discriminatory effect the release of information can have on persons with mental health illness and addictions who come into contact with police.”

The OACP guidelines are non-binding and, based on our research, have not significantly reduced the challenges for students or PSIs. Each police service still sets its own procedures, forms and fees. Notably, the OACP has also called for new provincial legislation to create consistent rules for how police services conduct police record checks and for a centralized, evidence-based procedure for determining when non-conviction information can be disclosed. The CCLA has made similar recommendations, citing British Columbia’s *Criminal Records Review Act* as a model to follow, along with recommendations for human rights law amendments to prohibit discrimination based on non-conviction police records (CCLA, 2014).

The Ontario Human Rights Commission has published best practices for employers in this area explaining that police checks, “may have an adverse impact on racialized persons or persons with mental illness who may disproportionately have encounters with police because of racial profiling or discrimination.” The commission recommends that a check be requested only if it is a bona fide occupational requirement and then only as a final stage after a (conditional) offer of employment has been made, preferably in writing (Ontario Human Rights Commission, 2008). Though likely designed with the regular employment market in mind, these suggestions are equally relevant to WIL placements.

5.3.1.1 Recommendations on Police Record Checks

- *The province should review the current police record checks regime and consider whether co-ordination mechanisms could be adopted to streamline the process for students doing short-term placements as part of their academic program.*
- *The province should consider whether legislative reforms proposed by the CCLA and others would achieve a better balance between protection of vulnerable persons and the human rights of students seeking to access experiential education opportunities.*

- *Police services should implement the OACP guidelines in their local practices and procedures.*
- *Students should have access to legal information and assistance in the event their education is jeopardized by a “positive” police record check.*
- *PSIs should make clear in negotiating partnerships that placement hosts are expected to follow the best practices guidelines of the Ontario Human Rights Commission on police record checks.*

5.3.2 Equity in Selecting Students for Placements

WIL program managers reported occasional instances of an employer making potentially discriminatory requests of institutions (e.g. to have only applications from male students or students of a certain racial background). When such issues were raised overtly, informants said they were sometimes able to resolve the issue through discussion with the employer. On rare occasions they declined to post positions due to concerns about discriminatory attitudes. PSIs that are alert to these issues can at times protect students from discriminatory hiring practices or educate placement hosts about their human rights obligations. The greater challenge lies in tackling systemic biases that operate more subtly and often unconsciously. For example, some informants were troubled that male students seemed to have access to paid placements more often than women.

5.3.2.1 Recommendations on Equity in Selecting Students for Placements

- *PSIs should make clear in their communications with placement hosts and students that human rights protections against discrimination apply to the recruitment of students for WIL placements in the same manner as regular employees.*
- *PSIs should consider whether their general policies on equality and non-discrimination are being implemented as well as possible in the context of WIL programs.*

5.3.3 Disability Accommodation for Placements

Another recurring theme in our interviews was the pressing need for strategies to ensure that students with disabilities can be accommodated not just in traditional classroom learning, but also in WIL placements. Common challenges mentioned by both legal and non-legal informants included:

- a heightened reluctance on the part of students to disclose disabilities, perhaps due to fears about not getting a placement or that information will be shared more widely in the workplace than they want (especially with “invisible” disabilities such as mental illness and psychiatric or learning disabilities);
- a lack of capacity within PSI disability counselling offices, whose expertise is in accommodation for classroom settings, to identify what students need in a wide variety of external workplace contexts;

- a lack of internal communication and co-ordination between WIL program managers and disability counselling services;
- a need for more proactive communication to encourage students to self-identify early, so that they can be supported in identifying a placement that can work for them and arranging needed accommodations with the placement host;
- a need to clarify that accommodation is a shared responsibility of the school and the placement host and that costs should be shared between the two.

The decision in the case of *Hickey v. Everest Colleges Canada* offers a cautionary tale about the potential costs of failing to make reasonable efforts to accommodate a student in the context of a placement. The student suffered from physical disabilities as a result of a motor vehicle accident, restricting the amount of time she could stand or sit continuously as well as her ability to perform static and repetitive tasks. She provided medical documentation and notified the college that she required accommodation for her disability in order to complete her dental practicum. The HRTO found:

no evidence that the respondents ever investigated or attempted to work with the applicant on finding accommodation in her practicum. The respondents do not dispute that [they] did not contact the placement to discuss the idea of a shorter shift. The respondents also did not have any further discussions with the applicant regarding a possible four-hour arrangement.

The student experienced physical complications and began to refuse to perform tasks complicated by her injury and to miss days of work. The practicum host subsequently failed her and terminated the practicum.

The college contended that it was the student's responsibility to negotiate a work schedule with the placement host. However, the tribunal found that "although the applicant agrees that she was asked to discuss the specifics of her schedule with the practicum host herself, this request does not excuse the respondents from following the Course Outline or from their overall duty to explore accommodation."

PSIs have an obvious interest in avoiding litigation which can damage their reputation and consume tremendous human resources, regardless of the final disposition on the merits (see also *Gamache v. York University*, 2012). One informant noted the irony that supporting students to meet academic requirements without ensuring they can also pass their required practicums, can aggravate conflict because students face potential failure after investing significant time and money in their education. Nonetheless, some informants observed there is a temptation for WIL programs to take a hands-off approach with placement hosts rather than communicating proactively about the need for students with disabilities to be accommodated. This sometimes resulted in disabilities being disclosed late when the student was already encountering challenges on the placement, increasing the risk of failure and disputes. Informants also observed a more insidious cost — that students with disabilities sometimes self-select out of these programs rather than face an unwelcoming or uncertain environment. The need to address such barriers seems compelling given that students with disabilities often confront a more difficult school-to-work

transition than others and that a primary rationale for WIL is precisely to facilitate this transition (Buhai, 1999).

On the positive side, we learned that work is underway at a number of institutions to strengthen policies and practices in this area. WIL program managers related instances of positive co-operation with placement hosts, especially larger organizations, some of which are becoming more sensitized to the need for an accessible workplace. Others have struck committees to research best practices and are revising their communications with students and placement hosts to express their commitments to inclusivity and to provide information about accommodation protocols early and often. Others have developed or are developing educational resources for program co-ordinators and clinical instructors about common barriers experienced during placements, examples of universal design practices that can make a workplace accessible for all, and the process for negotiating specific accommodations. Finally, some have committed to sharing student feedback on placement accommodation experiences with other students to inform placement selection in the future (e.g., Wilfrid Laurier University).

5.3.3.1 Recommendations for Ensuring Disability Accommodation on Placement

- *Promote sharing of accommodation policies and best practices by PSIs that have developed them in the context of WIL, so that others can learn from their work (for example through a dedicated conference, workshops or website).*
- *For PSIs, review current accommodation services, procedures and communications to assess whether changes are needed to enable the development of inclusive WIL programs.*

5.3.4 Discriminatory Workplace Conduct

WIL program managers interviewed for this study mentioned only rare instances of a student complaining of discriminatory conduct during a placement, such as harassment, bullying, or sexist or racist comments. They reported some instances of successfully mediating such complaints with the help of human-resources staff at employer organizations. These informants stressed the importance of program co-ordinators making check-in calls or visits to monitor how placements are going and being available for students to contact them during the placement in the event that problems arise. Other informants were less sanguine, pointing out that the power imbalance with a placement host will often make students reluctant to complain. Knowing that a placement is for a limited duration and that they must pass to complete their course or program, students may decide it is not in their interests to attempt to do anything about discriminatory conduct.

This is a prime example of an area where legal rights and responsibilities are clear and the challenges have more to do with implementation and enforcement. PSIs can play a positive role by communicating proactively with placement hosts about expectations and ensuring students can access advice and assistance when problems occur.

5.3.4.1 Recommendations on Discriminatory Workplace Conduct

- *The applicability of human rights law to students on placement should be referenced in WIL program communications as well as agreements between PSIs and partner organizations.*
- *Monitoring of placements by PSI staff and through post-placement surveys should include questions about workplace climate and equity.*
- *Students should have continuous access during a placement to advisers at their PSI.*
- *PSIs should not post placements if they are not confident about an organization’s commitment to a workplace free of discriminatory conduct.*

5.4 Intellectual Property

Leveraging public investments in the postsecondary education sector for overall social and economic growth is becoming a larger area of concern for the federal and Ontario governments. In particular, WIL placements are promoted as a means for student to develop their “soft skills” and human capital as they contribute to their own education as well as to the productivity of partnering hosts. Intellectual property (IP) law and agreements are an emerging area of concern for WIL participants.

The human capital of participating students can be undermined if IP agreements between students and organizations are not properly defined. This is especially the case in high-tech sectors. IP law has cultural, social and political implications beyond the often-discussed economic benefits associated with the ownership of knowledge and inventions (Coombe and Turcotte, 2012). Restrictive IP agreements run the risk of “locking in” the knowledge that students acquire and generate while on placement. Conversely, partnering organizations may be worried about the loss of confidential, proprietary and valuable information.

The Auditor General of Ontario reports that government ministries are working to leverage public investments in the postsecondary sector to advance the province’s Innovation Agenda and the goal of promoting “a high and sustainable level of prosperity, and healthy communities, that provide high-quality jobs and better lives for people in Ontario.” However, the Auditor General finds that the Ontario government, generally, and the Ministry of Research, Innovation and Science, in particular, “does not coordinate or track the province’s investments in research and innovation” and “without knowing the payback from either benefits to society or economic benefits through commercialization activities, it is difficult for the government to determine whether it is getting value for money from its significant investment in university research” (Auditor General of Ontario, 2015). As the Ontario government and PSIs work to encourage and provide funding for WIL placements, the social and economic benefits of these investments to WIL stakeholders and the province need to be considered. IP created during a WIL placement as well as

the soft skills and human capital developed by students provide both risks and opportunities for assessing the role of WIL in Ontario's Innovation Agenda.

The World Intellectual Property Organization (WIPO) defines IP as: "creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce." The Canadian Intellectual Property Office (CIPO) describes how IP rights attach to tangible expressions of knowledge and information, including "inventions, literary and artistic works, designs and symbols, and names and images used in business." Employment contracts generally include provisions relating to IP as well as trade secrets. Trade secrets are confidential information or business practices that provide economic benefits due to their confidentiality. IP law in Canada is governed federally and in accordance with international treaties and trade agreements. In Canada, IP law is governed through six pieces of federal legislation: 1) *The Patent Act*; 2) *The Trademarks Act*; 3) *The Copyright Act*; 4) *The Industrial Design Act*; 5) *The Integrated Circuit Topography Act*; and 6) *The Plant Breeders' Rights Act*. Canada is also a signatory to international treaties and trade agreements that create responsibilities and expectations for Canadian IP law.

Our legal informants as well as WIL program managers identified IP issues as a growing area of concern, an observation that is confirmed in international research literature. An Australian study found that university lawyers spend 66% of their time working on WIL-related issues dealing with IP issues and identified IP as a growing and significant area of risk (Cameron and Klopper, 2015). Along with non-disclosure, non-compete and confidentiality agreements, IP agreements between students and partner organizations must be designed to balance the needs, interests and concerns of all stakeholders involved. Informants demonstrated a growing but limited understanding of the importance of these types of agreements. Our informants indicated that their WIL programs are not privy to the contracts signed between students and host organizations. These informants feel constrained by a lack of knowledge regarding this subject and indicated that if and when students raise IP-related issues they attempt to assist the student(s) without necessarily providing legal advice. Given the technical and specialist nature of IP contracts, students and WIL program operators may be ill equipped to deal with sensitive information and legal procedures.

Legal ownership of IP created during the course of employment is governed in various ways depending on the type of IP at issue. *The Patent Act* does not explicitly assign ownership in employment contexts aside from inventions created by employees of the Crown with respect to instruments of munitions of war. In most cases, *The Copyright Act* assigns first ownership to employers for works created during the course of employment:

Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a

right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

The complexity of IP law in employment situations is usually addressed through IP provisions contained in employment agreements. With respect to WIL placements, students may not be completely aware of their rights and responsibilities with respect to IP law. Students may also feel compelled to sign their employment agreements without understanding the IP terms of the contract due to their desire to work with the host and the necessity of the WIL placement for completing their programs, potentially affecting the enforceability of the contract in the event of a dispute.

Issues relating to IP law and employment contracts can manifest in various ways, including: 1) where a student has access to and illegally uses sensitive company information or trade secrets; or 2) when a student creates a new technology or business practice while doing their placement. Uncertainty surrounding the terms of the IP agreement can complicate the process of resolving disagreements.

To paraphrase one informant, institutions and government shouldn't be in the game of transferring IP out of PSIs or the hands of students; they should be contributing to new IP, research and skills. At the same time, partners need to be re-assured that involving students in IP creation and giving students access to valuable IP will not harm their business interests. Institutions, students, partners and government must become more active in this regard. Students should be free to develop their skills, while partners are assured that their valuable resources will not be exploited.

Various universities across Ontario have implemented IP policies that relate to WIL placements. In particular, the University of Ottawa clearly states the IP ownership conditions relating to graduate students involved in Mitacs Internships programs. These agreements state that the "sponsor organization" owns the IP resulting from projects, except where:

(1) any Intellectual Property or other subject matter covered by one or more separate agreements to which uOttawa and the Sponsor Organization are parties and active during the dates of the Project; (2) any third party proprietary tools that are used in the performance of the Project; and (3) the copyright in the materials produced by the Intern or the Academic Supervisor as a result of the Project as more particularly described in the Publications and Copyright section of these Terms. (Mitacs & uOttawa, 2015).

Furthermore, the university, students and academic advisers are to be granted a "royalty-free, non-exclusive, perpetual, irrevocable licence to use the Results for the purpose of carrying out the Project and for research, scholarly publication, educational or other non-commercial use." Such clarity helps establish a basic understanding of what knowledge and information can be used during a WIL placement and elsewhere.

5.4.1 Recommendations on Intellectual Property

- *WIL participants must become more active in clarifying and communicating the rights and responsibilities relating to IP agreements in WIL placements. Students should be free to develop their skills, while partners need to be assured that their valuable resources will not be exploited. In particular, PSIs should provide information to WIL students regarding their rights and responsibilities with respect to IP law.*

5.5 Employment Insurance

The federal Employment Insurance Act (EI) is designed to provide partial income replacement during periods of temporary, involuntary unemployment. It is also the primary public mechanism used to deliver parental leave and compassionate-care leave benefits in Canada. Completing a WIL placement can impact students' access to Employment Insurance in at least two important ways that many may not anticipate. First, quitting a paid job in order to complete a WIL placement is considered voluntary and not "just cause" for leaving employment, meaning that previous hours of work in the paid job will not qualify an individual for EI benefits. Second, work done on a placement may not count as "insurable employment" for EI purposes, even if paid. Each of these issues is discussed below.

5.5.1 Quitting a Paid Job to Complete a WIL Placement

An individual who "voluntarily left employment without just cause" is expressly disqualified from receiving EI benefits in respect of hours worked at that job or any previous job. In effect, an individual who quits a job without just cause loses all past qualifying hours of insurable employment and must start over in a new job to accumulate the requisite hours to qualify for EI in future. A claimant is considered to have "just cause" if there was "no reasonable alternative to leaving...having regard to all the circumstances..." The legislation lists several circumstances that must be taken into account as contributing to just cause, including, for example, harassment, discrimination, unsafe working conditions or "reasonable assurance of another employment in the immediate future." The list is not exhaustive and decision makers may take any relevant circumstance into account. In applying these provisions, however, the Federal Court of Appeal has held that leaving employment in order to complete a WIL placement for academic credit does not constitute "just cause" within the meaning of the EI legislation.

One example is the case of *Canada v. Beaulieu*, where the claimant quit her part-time job at a grocery store in order to complete a three-week internship that was required in order to graduate from her program at a secretarial college in Quebec. The court noted that Beaulieu "asked her employer to change her hours of work to allow her to do the internship, but the employer refused because she was asking to take time off during busy periods." Beaulieu left the job, completed the internship, and then claimed EI when she could not find employment for a few months afterward. When her EI claim was denied she appealed to the Board of Referees, which awarded benefits reasoning that "she had been required to carry out the internship in order to obtain her diploma, her job was a student job, and she had tried to fit her hours of work around the compulsory internship by negotiating with her employer, but the latter had been inflexible and had left her no other choice but to leave her employment." This decision was upheld at the next level by the Umpire but

ultimately rejected by the Federal Court of Appeal, which quoted the following passage from one of its previous decisions:

An employee who voluntarily leaves his employment to take a training course which is not authorized by the Commission certainly has an excellent reason for doing so in personal terms; but we feel it is contrary to the very principles underlying the unemployment insurance system for that employee to be able to impose the economic burden of his decision on contributors to the fund.

A similar issue arose in *Canada v. Greey*, where a licensed pilot was denied EI benefits after he left his coffee shop and grocery store jobs in Newfoundland and moved to Ontario to take an unpaid position as a pilot with a skydiving company. This position allowed Greey to complete the flying hours he was required to log to be considered for employment as a commercial pilot. Unlike Beaulieu, he argued that the unpaid position should be construed as “employment,” and that he, therefore, had just cause for leaving his paid jobs because he had “reasonable assurance of another employment in the immediate future,” within the meaning of s.29 of the EI legislation. The court disagreed, holding that “employment” must be financially remunerated or provide some other immediate material benefit. Though logging the flying hours did benefit Greey more generally by positioning him to earn wages in the future, the unpaid position was nonetheless characterized as a volunteer role. Writing for the court, Justice Trudel, agreed with the Crown’s argument that,

The purpose of the Act is not to subsidize the pursuit of the laudable goal of professional advancement. One cannot rely on the EI system when one quits paid full time employment in order to volunteer. Qualifying such activities as “employment” could expand the EI system into a subsidy program for informal means of education through volunteering.

As the province seeks to make WIL a more pervasive or even mandatory element of higher education, the EI implications for some students could be significant. Moreover, the strict reading of the “just cause” requirement by the courts may take many students and program managers by surprise. Students should certainly be cautioned about the potential implications if they quit a paid job to complete a WIL placement. They should also know that it may be possible to avoid losing all previous qualifying hours of insurable employment by reaching an agreement with the employer for a temporary leave. Not all employers will be prepared to grant such a leave, of course, as illustrated by the facts in the *Beaulieu* case.

The province should also consider approaching the federal government in consultation with other provinces about possible changes to the EI rules in order to encourage and support student participation in WIL programs and to ensure students with financial challenges do not face inordinate barriers to accessing WIL. Notably, this could be accomplished with a regulation as the EI legislation allows the federal government to prescribe circumstances that amount to “just cause” for leaving employment.

5.5.2 When Do Placements Count as Insurable Employment?

Unpaid work hours cannot ground a claim for EI, in part because benefits are calculated as a percentage of earnings. In addition, the *Greey* case makes clear that unpaid work is not considered “employment” for EI

purposes, even if the worker is obtaining some form of reciprocal benefit in the form of credit towards a professional qualification. Academic credit alone will not be seen as a substitute for cash remuneration. Further, “insurable employment” is defined in the EI legislation to mean “employment...under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person...” This definition presumes that insurable employment is paid.

More surprising is that students may also face challenges in establishing that a paid WIL placement constitutes insurable employment. The issue is whether the payment is in substance wages for services rendered, or is instead characterized as some form of financial support for education, such as a scholarship or research grant. The case law suggests the answer will vary depending on the context and the relationship between the parties to the WIL placement.

In one case, pharmacy students who completed paid, eight-month internships at private pharmaceutical companies were deemed not to have been in insurable employment, despite receiving monthly payments of \$1,470 that were funded by the host companies (*Université de Montréal v. Canada*). Students pointed out that under the EI regulations, insurable employment includes “employment of a person as an apprentice or trainee, notwithstanding that the person does not provide any services to their employer.” However, the Tax Court of Canada held this provision “does not automatically apply to all situations involving trainees” and it must first be established that they were in an “employer-employee relationship.” Justice Lamarre Proulx found that the internships were more in the nature of training than employment and payment was more in the nature of a scholarship than wages. The judgment acknowledged, however, that “[o]n rare occasions, it is possible for a scholarship to be considered a salary,” citing the presence of a written employment contract and a relationship of subordination as relevant factors to consider.

By contrast, in its earlier decision in *Charron v. Canada*, the Tax Court of Canada held that a graduate student who was paid for doing research in a professor’s lab was in insurable employment as an “apprentice.” Even though the payment had been described in writing as a “grant” and the student also received academic credit for the work, the court found that the working relationship in this case had the hallmarks of employment. In particular, Ms. Charron was required to follow the professor’s instructions, was not free to choose the research projects or experiments, and had no ownership in the results of the research.

Students as well as WIL program designers and administrators would benefit from knowing in advance how a placement will be characterized for EI purposes, or how best to set up a placement so that its treatment for EI purposes will be clear one way or another. The interests of students, placement hosts and PSIs may diverge with respect to which is the preferred characterization. From the perspective of academic institutions and placement hosts, having an employee requires the employer to withhold and remit not only EI premiums but also Canada Pension Plan contributions and source deductions on account of income tax. From a student perspective, scholarships can be received free of income tax, but do not create entitlement to EI or CPP. Clear guidelines about how the Canada Revenue Agency (CRA) draws this distinction could facilitate planning and prevent disputes.

5.5.3 Employment Insurance Recommendations

- *Students and academic program advisers should have clear information on the EI implications of quitting a job to complete a WIL placement, so that students can factor EI into their planning about how best to choose and complete their academic programs. Given the financial implications, students should be made aware that even if they have already accumulated sufficient hours at a paid job to qualify for EI, they would be disqualified if they quit the paid job in order to complete a placement. They should also be aware of the potential to avoid losing EI entitlement by negotiating a temporary leave with their employer.*
- *The province should consider approaching the federal government to prescribe by regulation that completing a post-secondary WIL placement is “just cause” for leaving employment, where the employer is not able or willing to grant a leave.*
- *The province should seek clarification and guidelines from CRA as to when a paid placement will be considered insurable employment versus a training arrangement that gives rise to a scholarship or grant.*

5.6 Immigration Law

Ontario colleges and universities have attracted rising numbers of international students who now make up roughly 10% of the province’s postsecondary student population (Statistics Canada, 2015). Like domestic students, many are interested in WIL programs. However, participating in WIL can raise immigration law issues for international students because of the work restrictions on study permits issued by Immigration, Refugees and Citizenship Canada. This section summarizes the federal law governing how and when visa students can work in Canada, and how these legal requirements translate into practical challenges for WIL students and programs.

5.6.1 What counts as “work” for international students?

The term “work” is defined as follows under federal immigration regulations: “work means an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market.” This definition would clearly encompass a paid WIL placement. It is unclear whether an unpaid placement would also be included on the basis that it is part of the “Canadian labour market.”

5.6.2 On-campus work

Foreign nationals may work on a college or university campus for which they have a study permit to attend, provided they are full-time students. While this project focuses on WIL placements off campus, it should be noted that on-campus forms of WIL may be of particular value and importance to international students because it is the least restricted avenue for them to engage in work activities without a separate work permit.

5.6.3 Off-campus work

Off-campus employment options have expanded for some visa students since June 1, 2014, when the regulations were changed to allow up to 20 hours per week of off-campus work during the academic term and full-time work during regularly scheduled breaks such as holiday periods, reading breaks and the summer. In order to qualify, the student must be enrolled full-time in a “postsecondary academic, vocational or professional training program...of a duration of six months or more that leads to a degree, diploma or certificate.” While the new regulation expands work opportunities for many international students, it does not cover a co-op or other WIL placement that involves full-time work during an academic term. Note that the summer counts as an academic term for this purpose (limiting off-campus work to 20 hours per week) if the student is registered to study full-time between May and August (Immigration, Refugees and Citizenship Canada website). Accordingly, in order to undertake a full-time placement as part of their academic program, an international student must normally obtain a special co-op work permit, discussed below.

5.6.4 Co-op work permits

For placements involving more than 20 hours of work per week, an international student must obtain a co-op work permit separate from their study permit. Even where students meet the legal requirements for such a permit, program managers and legal counsel consulted for this study indicated that delays are common and can be a barrier to completing the requirements of a WIL program or completing it on a normal schedule.

In order to obtain a study permit to attend a Canadian postsecondary program, foreign nationals must have a letter of acceptance from an educational institution. The letter must indicate whether the student’s program will include an “internship or work practicum” and, if so, the length of the practicum and field of work.

An individual who has secured a study permit must then also obtain a co-op work permit before commencing a placement (assuming the placement exceeds the 20 hours per week that are allowed without a permit). While the definition of “work” in the regulations is not entirely clear, it could be read to require a co-op work permit even for an unpaid placement.

A condition for obtaining the co-op work permit is that the intended employment is “an essential part” of the student’s academic, professional training or vocational program of study, as certified by an original letter from their academic institution. Moreover, the student’s “co-op or internship employment cannot form more than 50% of the total program of study.”

Informants indicated that students can encounter significant delays in obtaining a co-op work permit, sometimes beyond the intended start date of their placement. In addition, these situations create additional administrative work for program managers and no doubt can inconvenience placement hosts. Further changes to federal immigration regulations are likely needed in order to expand WIL opportunities in a way that fully includes Ontario’s growing population of international students.

5.6.5 Immigration Law Recommendations

- The province should encourage PSIs to develop meaningful on-campus forms of WIL for international students who are restricted in their ability to take placements off campus.
- Federal immigration authorities should collaborate with the province to find ways of streamlining the process for international students to obtain co-op work permits in a timely fashion.
- The province should consider approaching the federal government to further liberalize the rules that allow international students to participate in WIL based on their study permit alone.

5.7 Tax Expenditures

Tax laws are often used to deliver indirect funding in the service of various government policy objectives, through targeted forms of relief such as credits against tax otherwise payable. These measures are known as “tax expenditures” because they are a substitute for direct spending by government. The income tax laws of Ontario and several other Canadian jurisdictions currently provide tax credits related to WIL, specifically co-op and apprenticeship programs. For this reason, we have included tax expenditures in our analysis. The Canadian Association for Co-operative Education (CAFCE) has advocated that the Canadian government move further in this direction by creating a new federal Co-operative Education Hiring Tax Credit (CAFCE, 2015). This section surveys existing tax-credit programs and the limited evidence that is available regarding their cost and effectiveness, identifying trends and themes that should be of interest to governments considering the merits of tax incentives relative to other possible instruments for supporting WIL. To facilitate this comparison we briefly examine select direct- funding alternatives.

5.7.1 Survey of Provincial and Federal Tax Credits for WIL

Ontario currently offers two income-tax credits to WIL employers:

- The *Co-operative Education Tax Credit* (CETC) was introduced in 1996 and enhanced in 2009. It is available to corporations or unincorporated businesses that are subject to Ontario income tax when they hire students enrolled in a “qualifying co-operative education program” at a college or university. The name of the credit is somewhat misleading as certain placements described as “internships” can also qualify. It is a refundable tax credit, meaning it is reimbursable to an employer who has no provincial income tax payable. Employers may claim 25% of their eligible expenses including wages, taxable benefits and fees to employment agencies up to a maximum of \$3,000 per four-month placement (small businesses may claim 30% of eligible expenses). The credit is reduced by the amount of any other government assistance received in respect of the placement. Placements can be optional or mandatory but must be for academic credit and “recorded on the student’s academic transcript.” There are minimum and maximum limits for the time spent on placement and on the credit value of placements versus traditional academic requirements. In

addition, the college or university must certify for each placement that it has been approved by the institution as a “suitable learning situation;” the student is required “to engage in productive work during the placement, not just to observe the work of others;” the student is entitled to remuneration; the employer is required to supervise and evaluate the student; and the institution must monitor the student’s progress during the placement. As noted in section 5.1, these conditions stand in contrast to provincial employment standards law which currently provides a blanket exclusion for WIL students and imposes no requirements for supervision, monitoring or educational benefit to the student.

- The *Apprenticeship Training Tax Credit* (ATTC) was introduced in 2003 and scaled back in 2015. It is a refundable tax credit for employers who hire apprentices in qualifying skilled trades, meaning trades that are regulated under the Ontario Colleges of Trades and Apprenticeship Act. Unlike the CETC, there is no requirement to be enrolled at a college or university, though in practice some apprentices are enrolled. Qualifying employers can claim 25% (30% for small businesses) of eligible expenses for apprenticeships commencing after April 24, 2015 (before this date the rates were 35% and 45% respectively). The maximum credit per eligible apprenticeship is \$5,000 per year (previously \$10,000 per year) and is reduced by other government assistance received for the apprenticeship. For apprenticeships beginning after April 24, 2015, the ATTC can be claimed for up to 36 months (previously 48 months). Eligible expenses for the ATTC are similar to those of the CETC and include salaries and wages as well as taxable benefits paid to the student.
- The federal *Apprenticeship Job Creation Tax Credit* (AJCT) was introduced in 2006. It allows employers to claim a non-refundable tax credit (i.e. the credit is deducted from income tax otherwise payable) equal to 10% of salaries and wages paid to apprentices, up to a maximum of \$2,000 per year, per apprentice, for the first 24 months of their apprenticeship contract.

Across Canada, similar measures include:

- The government of British Columbia’s Training Tax Credit for Apprentices (2007)
- The government of British Columbia’s Training Tax Credit for Employers (2007)
- The government of Quebec’s refundable tax credit for on-the-job training periods - corporate tax system (1994)
- The government of Quebec’s refundable tax credit for on-the-job training periods - personal tax system (2008) (note, the expenditures for this credit have been underreported and amount to less than \$2 million; they have been excluded from this analysis)
- The government of Manitoba’s Paid Work Experience Tax Credits (PWETC), 2015, which combines its former Co-op Education and Apprenticeship Tax Credits (2003)

5.7.2 Cost of Tax Credits

A common criticism of tax expenditures among tax policy analysts is the lack of transparency regarding their costs in terms of foregone revenue. Unlike direct spending, which appears in the government’s annual expenditure budget, the impact of tax expenditures tends to be buried in a lower figure for overall revenues collected. However, both federal and provincial governments estimate the revenue costs of specific tax

expenditures. Ontario is legally required to do so under its *Fiscal Transparency and Accountability Act, 2004*. This study examined publicly-available tax-expenditure data to analyze the relative costs of different WIL-related credits.

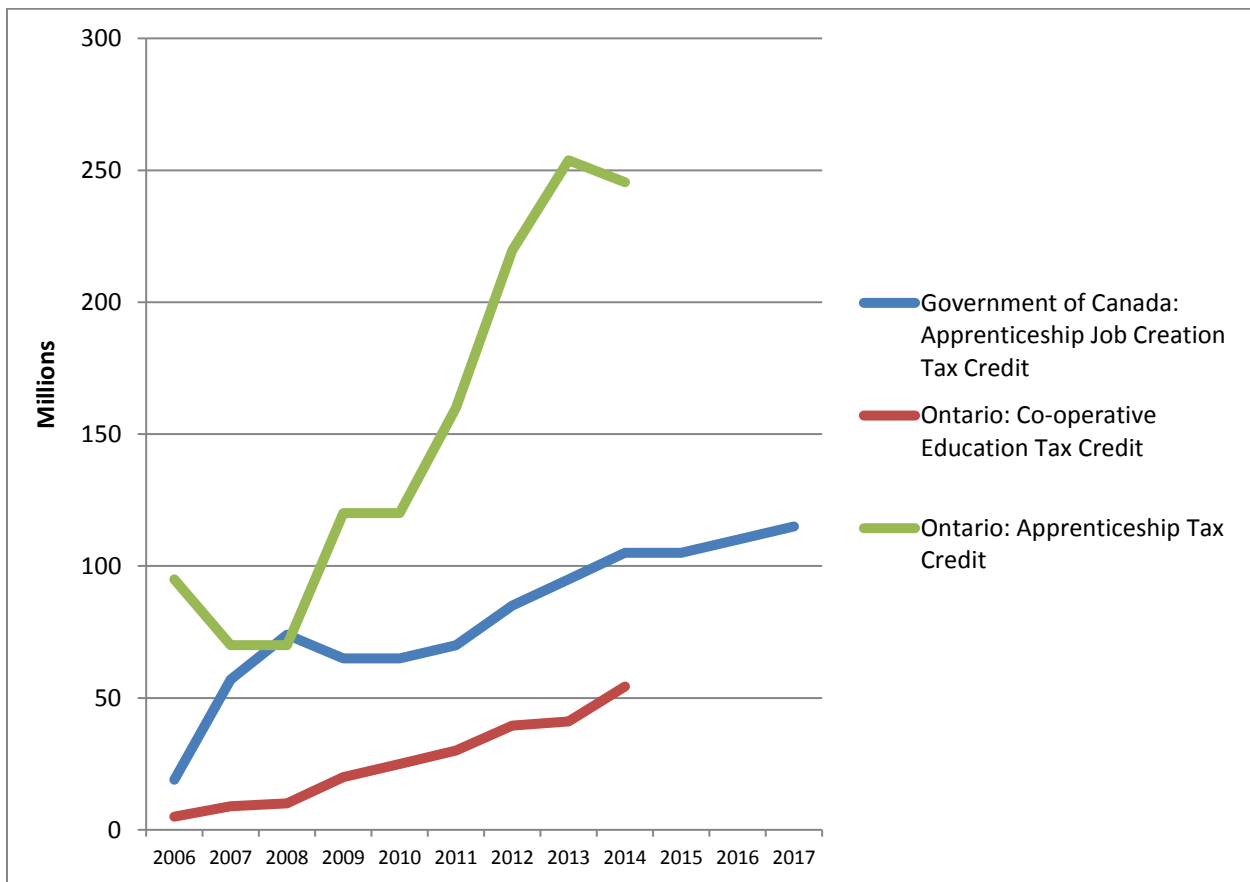
Figure 1 focuses on federal and provincial tax expenditures available to employers in Ontario. The cost of each of the CETC, ATTC, and AJCT has risen since 2006. In 2015, the ATTC was projected to cost over \$245 million, more than both the AJCT (approximately \$105 million) and CETC (over \$54 million) combined (Figure 1).

Figure 2 provides the national picture and shows that tax-delivered spending on WIL varies widely in different jurisdictions.

Our analysis of these tax expenditures together with related cost data suggests six trends and observations:

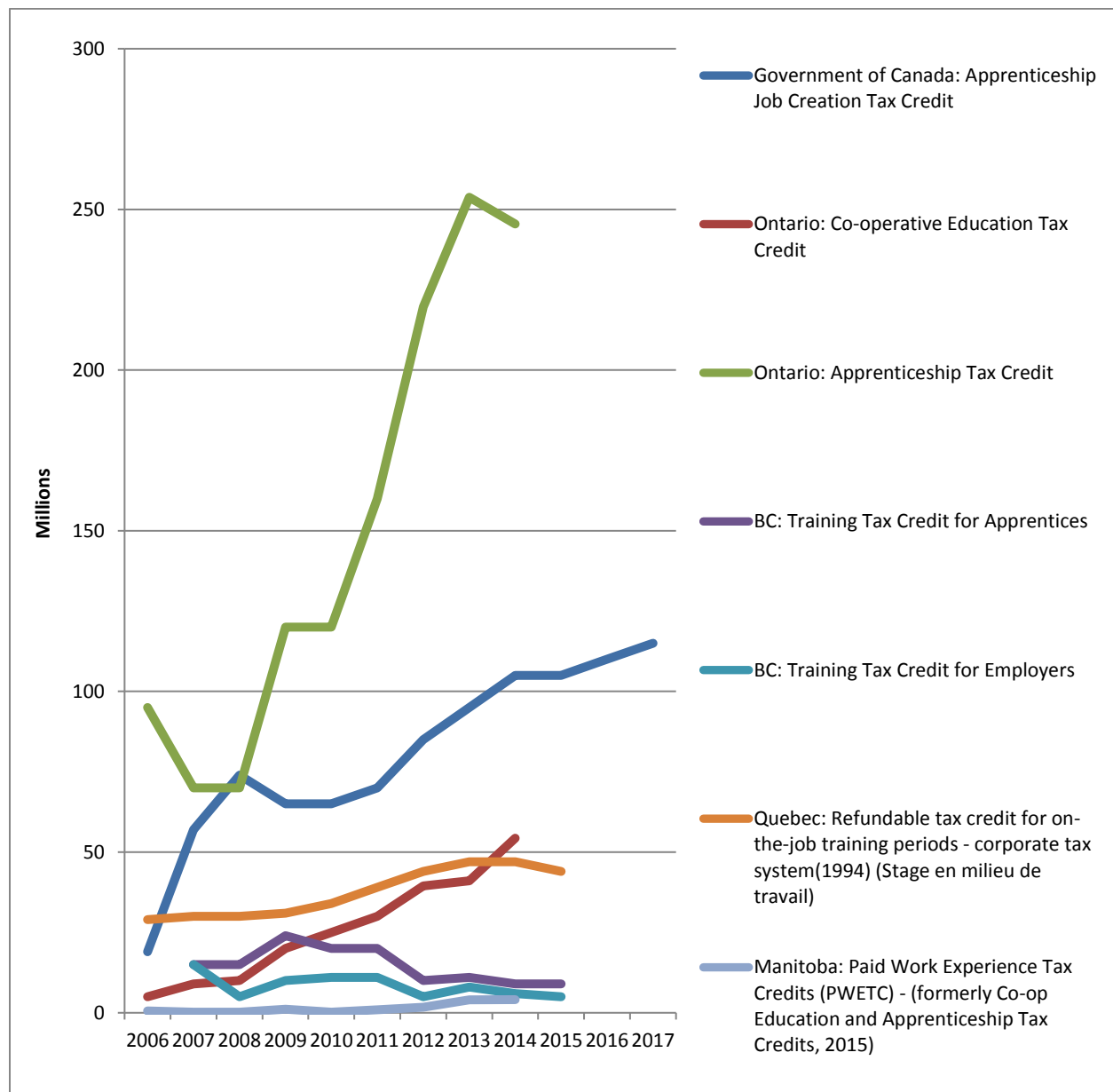
- a) In terms of total foregone revenue, Ontario is by far the highest spending jurisdiction in Canada (in both absolute dollars and per capita) and its tax expenditures have increased steadily with almost no interruptions over the past decade. The maximum credits that may be claimed differ in each province based on types of eligible programs; however, Ontario has some of the most generous tax credit amounts available across the country.
- b) Most WIL-related tax expenditures are delivered to employers, not students; British Columbia's refundable training tax credit for apprentices is an exception. Below we discuss some alternative models that deliver financial support directly to students.
- c) Apprenticeships are far more heavily subsidized through the tax system than other forms of WIL.
- d) The provinces provide refundable tax credits while the federal government offers a non-refundable tax credit. This is an important distinction, as refundable credits tend to be more costly to governments, while non-refundable tax credits only reach claimants who are in a taxable position. Small- and medium-sized enterprises may be less likely to benefit from non-refundable credits.
- e) Existing tax credits support only a select category of WIL placements. In particular, they are not available for unpaid placements or for placements with public-sector or non-profit organizations.
- f) Tax law is indirectly regulating the development of WIL through the eligibility criteria for claiming these credits. In particular, Ontario's CETC is the only provincial law we have identified that attempts to impose requirements about the educational quality of placements or responsibility for supervision and monitoring. It is worth considering whether these requirements are best located in the tax system, where they apply only to some employers and likely complicate administration of the credit, or in some other legal regime such as employment standards law.

Figure 1: Comparison of the WIL-related Tax Expenditures of the Governments of Ontario and Canada



Original Analysis of Government of Canada Reports of Federal Tax Expenditures; Government of Ontario Budget Estimates and Expenditure Reports

Figure 2: Comparison of the WIL-related Tax Expenditures across Canada



Original Analysis of Government of Canada Reports of Federal Tax Expenditures; Government of Ontario Budget Estimates and Expenditure Reports; Government of British Columbia Budget Estimates and Expenditure Reports; Government of Quebec Budget Estimates and Expenditure Reports; Government of Manitoba Budget Estimates and Expenditure Reports

5.7.3 Evaluating the Effectiveness of Tax Credits

Evaluating the impact of tax expenditures on behaviour is difficult. While rising revenue costs show that Ontario employers increasingly are taking up these credits, it is unclear how many students or apprentices

would have been hired in the absence of the tax credits, or how the availability of the credits changed overall hiring decisions by employers. The dearth of information about the number and different types of WIL placements in the province at different times creates a further challenge for evaluating the impact of existing tax measures, or designing and estimating the cost of any proposed new ones. As a result, the target effectiveness and impact of these tax expenditures remains largely unknown.

Ontario appointed an expert panel in 2013 to review its business support programs, including tax expenditures, following the Drummond Report (Commission on the Reform of Ontario's Public Services, 2012). The results of the panel's work have not been published. However, in its 2014 budget the province announced a review of the CETC and ATTC:

Together, [these credits] provided support to employers of about \$295 million in 2013–14. The average annual growth rate of these tax credits has been 22% since 2005–06 — the first full year the ATTC was available. Since these tax credits are refundable, businesses can receive tax support even if no income tax is payable in a year. This differs from federal tax support to business for apprenticeship training, which is in the form of a non-refundable tax credit and is limited to the amount of income tax liability in a year. The government will review training tax credits for large businesses with the intention of limiting these tax credits to the amount a business pays in income tax. Making these tax credits non-refundable would recognize that larger businesses have access to other sources of financing; smaller businesses would be able to continue to claim refundable credits. The government is also continuing to review training tax credits to make them more effective.

In the following year's budget, the government stepped back from the proposal to eliminate refundable tax credits for large businesses (Ontario Budget 2015). Instead, the ATTC was made less generous for all employers. The government explained that the changes would return the ATTC to its previous level before enhancements were made in 2009, as the enhanced credit had not produced sufficient results. Whereas registrations of new apprenticeships had increased by an average of 3% per annum since 2009, the tax credit grew by 17%. Moreover, completion rates for apprenticeships had been stagnant at around 50%. No changes were made to the CETC, which was also enhanced in 2009. The budget provided no commentary on any evaluation of the CETC.

Sattler and Peters's survey of WIL employers in Ontario found that many who may have been eligible for tax credits did not take advantage of them (2012). Despite 53% paying their WIL students, only half of apprenticeship employers (49%) and one-third of co-op employers (33%) claimed tax credits. The authors commented further as follows:

A recent inventory of programs and policy interventions for Poorly-Integrated New Entrants (PINE) identifies wage subsidies and tax incentives for "internship-like work opportunities" as "effective strategies in getting PINES' feet through the door, helping them to gain valuable experience and helping employers identify and recruit promising workers" [citing Bell & Benes, 2012]. This finding is echoed in the strong support from both WIL and non-WIL employers for financial incentives as the top strategy that would make it easier for them to

participate in WIL. Yet, this survey also revealed limited uptake among WIL employers of the currently available apprenticeship and co-operative education tax credits. To make meaningful policy decisions about financial assistance for employers, more research is needed to probe employer reasons for not accessing these tax credits (e.g., lack of information, eligibility criteria, too much paperwork, the amount of the credit, etc.) and to investigate the implications of wage subsidies as an alternative form of financial support.

When informants for our study were asked for their views about the importance of the tax credits in developing placements, the responses were ambivalent. Program managers had the impression that most employers highly value the CETC and make concerted efforts to obtain the institutional letter that certifies their eligibility to claim it. However, informants generally did not see the credit as the initial or primary motivator for involvement, but rather a “sweetener” once a prospective placement host has already expressed interest in taking a student. In that sense, it was perceived as a useful tool for encouraging employers to commit. Yet informants also indicated that many employers are keen to offer WIL placements as a means of “giving back” to their profession and community. They also confirmed Sattler and Peters’s findings that not all employers are aware of or bother to claim the credit, perhaps indicating a need for greater publicity.

One WIL manager expressed a concern that some PSIs in the province issue tax credit eligibility letters for programs that do not meet all of the legislated criteria for the CETC. This raises a question about the administration of a relatively complex credit and whether it is being delivered in practice to the intended market.

At the federal level, Budget 2016 announced the government’s intention to create a “Postsecondary Industry Partnership and Co-operative Placement Initiative” as part of a plan to “strengthen work-integrated learning.” Finance Minister Bill Morneau also announced an upcoming review of federal tax expenditures (Cheadle, 2016). These two initiatives together should ideally provide an opportunity to consider whether tax expenditures are really the most effective and cost-efficient means of promoting WIL, as compared to other possible ways of delivering financial aid and incentives. In this regard, it is notable that both the federal and provincial governments have recently signaled an intention to shift their financial support for postsecondary students away from personal tax credits, which are often claimed by a parent or other supporting relative, toward more direct grants and loans to students (Government of Canada, 2016). Budget 2016 announced the elimination of the federal Education and Textbook tax credits, with the savings to be used to enhance direct assistance to students in financial need. Similarly, the 2016 Ontario Budget announced that the provincial tuition and education credits will be eliminated in 2017, with savings being redirected to the Ontario Student Grant and other forms of direct student support. The budget explained that “[g]rants are more effective than tax credits at targeting financial support to students with the greatest needs and providing support upfront” (Ontario Budget 2016). In a similar manner, the time seems ripe for a serious evaluation of the relative merits of employer tax credits versus more direct forms of financial support for WIL participants.

5.7.4 Comparison to Direct Funding Models

A full review of possible funding models to support WIL is beyond the scope of this study and its focus on legal regulation. However, our research identifies a group of funding programs that provide a useful comparison to the tax credits examined above.

As we have discussed, one of the challenges posed by WIL is the risk that low-income students will have unequal opportunities in practice because they cannot afford to take unpaid placements that are viable for students with family support or other independent means. When asked about this issue, some informants raised the possibility of using targeted bursary programs for WIL placements as an alternative to requiring that all placements to be paid.

Notably, such a bursary program is already in place at some Australian universities, which offer Work Integrated Learning (WIL) Support Grants through funding provided by the Higher Education Participation and Partnership Program (HEPPP) (for example, see Deakin University, 2016). These grants are available to students “experiencing financial hardship” or “other demonstrable hardship.”

Universities in Ontario are beginning to test pilot programs that create “work-study” placements with partners external to the university. In the past, such positions have only been offered internally, with professors or on-campus employers. These external, subsidized WIL placements are being introduced to support underrepresented and marginalized communities as well as students experiencing financial hardship. Our informants have indicated that, if successful, these pilot programs will be a better use of financial aid resources as they will expand the knowledge and skills base of students while providing the students themselves with direct financial support.

Also notable are a number of direct financial aid programs targeted to apprentices across the country, including the federal Apprenticeship Incentive Grant and Apprenticeship Completion Grant and Ontario’s Apprenticeship Scholarship.

Wage subsidies would be yet another model to consider if the province wishes to direct non-tax financial incentives to employers.

Another option is to invest in a specialized agency or specialized staff at existing institutions to focus on the systematic scaling up and implementation of WIL programs. The Mitacs organization, which brokers applied research internships for graduate students, is perhaps the most well-known example of such an approach. Mitacs funds student stipends, which are matched by participating employers. In addition, it maintains a network of business development officers at universities around the country and runs a transparent, standardized application process with staff assistance and collateral programming for employers, students and faculty. Mitacs has succeeded in growing its programs, internships and employer pool through active outreach and by streamlining the process to participate (Mitacs, 2016). This kind of facilitation may be more effective than financial subsidies alone because it reduces the administrative burdens for employers to participate.

5.7.5 Tax Expenditure Recommendations

- *The Canadian and Ontario governments should evaluate existing tax credits to see if they are effective in broadening access to and participation in WIL. In particular, they should examine the costs, administrative complexity, distributive impact and impact on behaviour of different tax credit designs and how tax incentives can best be communicated to intended beneficiaries. They should also compare the performance of tax-delivered support to that of other possible incentives or funding mechanisms.*

6. Conclusions and General Recommendations

This study has outlined current issues of concern in seven areas of law that are directly relevant to Ontario's efforts to maximize the benefits of WIL in higher education. It has sought in particular to clarify how provincial and federal laws regulate off-campus work placements undertaken by PSE students, as distinct from more general questions about interns or trainees in the broader labour force. Stepping back from the specific legal details, there are four overarching and compelling reasons to pursue better management of these issues:

- Protecting students:* A driving motivation for the expansion of WIL programs is to benefit students through deeper learning and skills acquisition and better pathways to career success. However, this study demonstrated that WIL may also open students to new vulnerabilities, that legal frameworks to protect students from exploitative or discriminatory treatment could be stronger in some areas and that communication and enforcement of existing legal rights could be stronger.
- Reducing costly disputes:* Litigation is costly in budgetary, human resource and reputational terms for all parties. Though the number of WIL-related disputes going to court is small, our interviews revealed that significant resources are being devoted to informal resolution of conflicts and complaints among students, placement hosts and institutional actors. Taking students off campus and into a workplace multiplies relationships, challenges communication and changes learning needs and performance expectations. Stakeholders naturally approached the issues with their own interests in mind, such that the larger aim of delivering successful WIL programs can get lost. PSI staff indicated that mediating WIL-related disputes is a growing demand on their time. Better understanding and management of legal risks and a more collaborative approach to problem solving is needed both to prevent disputes and to reduce the costs of resolving them.
- Reducing duplication of effort:* The challenges discussed in this report are shared across the sector. Many PSI staff are working in good faith to develop strong practices and protocols for managing these rapidly growing programs. But their efforts are often unfolding in isolation, due in part to reputational and privacy concerns and also a lack of obvious venues to co-ordinate the sharing of knowledge and experience on the legal frameworks surrounding WIL. As a result, we observed an unfortunate amount of duplicated effort. In a world of finite administrative resources, it makes sense to promote more co-ordinated sector-wide efforts to promote awareness and strengthen institutional capacity on this front.

- d) *Maximizing the return on public investments:* Federal and provincial governments are already funding WIL through a range of direct and indirect mechanisms. Further strategic investments will likely be required to continue expanding these opportunities, whether to remove financial barriers for students, to encourage participation by employers or to support program development, delivery and evaluation. Legal complexity and uncertainty will undermine these efforts by adding time delays and administrative burdens and risk, all factors that discourage participation. Most importantly, appropriate regulatory frameworks are needed to ensure that WIL experiences deliver the quality and achieve the outcomes that governments are seeking to promote through these investments.

Throughout our review of key legal frameworks we recommended possible responses to specific legal issues and concerns. While there is a case for considering law reform in some areas, this should not be the sole focus. Many of the challenges identified in our research could be addressed through educational and communications strategies and by more effective implementation and enforcement of existing legal norms. Indeed, no legislative reform can achieve its objectives unless it is backed up with these kinds of strategies.

By way of conclusion we offer three more general recommendations for moving forward.

6.1 Use Clear and Consistent Terminology

- *Greater consistency in the use of terms could aid clarity and communication about the legal norms engaged by different forms of WIL.*

Our literature review and interviews revealed terms being used in different and confusing ways that can lead to miscommunication among WIL participants, including about legal rights and responsibilities. One example is the term “co-op.” Formal definitions generally specify that co-op placements are paid. In practice, though, many co-op programs include unpaid placements as allowed by provincial employment standards law. However, the difference between paid and unpaid can have other legal implications. Unpaid placements are not eligible for the Co-operative Education Tax Credit, do not constitute insurable employment for EI purposes and may or may not require a co-op work permit for immigration law purposes. Another example is the use of “internship” to describe postsecondary placements that have a very different legal status from post-graduate internships or internships that are not for academic credit. A unified approach to WIL definitions would help to clarify expectations and, in some cases, legal rights. Some PSIs have attempted to move in this direction (e.g. Ryerson University, 2011).

6.2 Promote Collaboration and Co-operation among Stakeholders

- *Good communication among the partners to a WIL placement — student, school, and employer — can clarify roles, responsibilities and expectations and prevent negative experiences and disputes.*

One example of how this principle can be put into practice in an efficient manner is Seneca College’s *Employer Handbook 2015: A Guide to Co-op Success*. This document sets out a clear definition of what Seneca means by the term “co-op” including the expectation that co-op students be paid; offers guidance

about what constitutes a fair wage; notes the need for an accurate job description and meaningful work; describes the employer’s responsibilities to provide a health and safety orientation and to supervise students; and explains the role of college staff in monitoring progress and mediating disputes if they arise. Aside from managing legal risks, the Seneca Handbook reflects many of the good practices that HEQCO has identified as helpful to maximize the educational quality of WIL (Stirling, 2016).

Our research uncovered other promising strategies as well such as written policies and procedures for accommodating disabilities on placement; mandatory pre-placement courses to prepare students for what to expect; mid-term conversations or feedback forms; and post-placement surveys. Implementing protocols of this kind may seem resource intensive. However, managing negative experiences after the fact is also proving to be costly, not only in terms of human resources but also to student experiences and satisfaction, and to institutional and employer reputations. To quote one counsel who spoke to us, “checklists are better than contracts” for setting ground rules and building good working relationships from the outset.

- *PSIs should develop communication channels to share their experiences, policies and resources for managing risks to improve WIL outcomes.*

Informants told us they derive great benefit from various ad hoc cross-institutional tables of co-op program managers or university counsel. Legal and other risk management strategies are often shared at such tables. However, there is a clear appetite for more WIL-related legal information and opportunities to discuss emerging issues and best practices with colleagues, both internally within institutions and more broadly within higher education communities. The Council of Ontario Universities, the Canadian Association for Co-operative Education or some other sectoral body should consider convening a conference series, regular legal update service or a special purpose network to bring together legal counsel, WIL managers, disability counsellors and others with an interest in managing these issues more effectively.

To support work at the institutional level, there is also a need for more accessible public information on the legal frameworks for WIL. With the sole exception of the Canadian Intern Association guide, these kinds of resources do not yet exist in publicly available formats. They could be especially helpful to smaller employers and organizations that do not have in-house legal or human resources expertise. Individual PSIs may lack the capacity and incentives to create these kinds of general legal information resources on WIL. Industry associations and higher-education agencies could potentially play a useful role in filling this gap, with input from their members with direct experience of managing WIL programs.

PSIs should also consider the opportunities to share their knowledge with employer groups, labour and student associations. Existing networks that could be leveraged for this purpose include Colleges and Institutes Canada’s Industry-College Coalition, which brings labour organizations and industry together to identify modes to overcome Canada’s current skills challenges (Colleges and Institutes Canada, 2014). Likewise, the Business/Higher Education Roundtable is a coalition of higher education and private sector leaders that has advocated for the expansion of WIL and could assist in implementing this vision by

disseminating members' legal knowledge and best practices for success (Business/ Higher Education Roundtable, 2016).

- *The province should play a leadership role in promoting collaboration within government and among government and other WIL stakeholders to address some of the more complex legal and policy issues addressed in this study.*

Some of the specific recommendations outlined above — for example with respect to employment standards, human rights, health and safety and tax expenditures — require deeper analysis and consensus building across different provincial ministries and among stakeholders with different perspectives on WIL. Our interviews left the impression that too many actors are currently working in silos. The need for more collaboration was a recurring theme, both to draft new laws and policies in areas where they are needed and to address troublesome regulatory barriers that are currently impeding the implementation of WIL.

MAESD is the key champion of WIL within government and is uniquely positioned to secure the co-operation of other ministries to break logjams and advance a common agenda, for example in the areas of employment standards, human rights and health and safety. MAESD should also use its convening power to foster collaboration among the various groups impacted by the legal regulation of WIL, encouraging them to find common ground. Bill 43, the Learning through Workplace Experience Act, proposed a formal advisory body as one model for achieving this kind of collaborative approach, though it is not clear that legislating the make-up of such a body is necessary or helpful. Another is the Planning and Partnership Table recommended by the Premier's Highly Skilled Workforce Expert Panel in its June, 2016 report.

6.3 Improve Data about Placement Numbers, Types and Outcomes

- *Publicly accessible information about the numbers, types and outcomes of placements in Ontario and the demographics of WIL students should be created to aid inquiry and analysis into the WIL system.*

The Ontario Ministry of Advanced Education and Skills Development performance metrics for colleges and universities include the “the number of students enrolled in a co-op program” as indicators of institutional

strength or progress (MAESD, 2013). The definition of co-op used for this purpose is very similar to the eligibility criteria for the Co-operative Education Tax Credit (discussed above):

- Each work situation is approved by the co-operative education institution as a suitable learning situation.
- The co-operative education student is engaged in productive work rather than merely observing.
- The co-operative education student receives remuneration for the work performed.
- The co-operative education student's progress on the job is monitored by the co-operative education institution.
- The co-operative education student's performance on the job is supervised and evaluated by the student's employer.
- The time spent in periods of work experience must be at least 30% of the time spent in academic study.

This definition captures only a select group of programs, rather than the full array of WIL forms and experiments that are being introduced in the province. Nor would this data provide information about who is entering WIL programs and how different demographic groups are impacted in terms of the quality of student experiences, employment rates, choice of career path or otherwise. In order to develop and promote evidence-based policy making and program development, there needs to be better information regarding the numbers, types and outcomes of WIL placements being undertaken by students.

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