THE RIGHT TO DISCONNECT FROM WORK IN CANADA: SECTION 21.1.1 OF ONTARIO'S EMPLOYMENT STANDARDS ACT IN CONTEXT

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Ontario's provincial government enacted legislation in 2021 mandating employers to develop and maintain workplace policies with regard to employees disconnecting from work. The aim of this article is to examine the suitability of Ontario's legislative response under the Employment Standards Act in the context of the "right to disconnect". This paper argues that the Canadian "right to disconnect" in its current form is inadequate from a regulatory perspective and advocates for a stronger framework in this respect.

Le gouvernement de l'Ontario a promulgué en 2021 une loi obligeant les employeurs à établir et à ad-ministrer des politiques concernant le droit des employés de se déconnecter du travail. L'auteur de cet article vise à examiner le degré d'adéquation de l'intervention de la province quant à son applica-tion de la Loi de 2000 sur les normes d'emploi dans le contexte du « droit à la déconnexion ». Tel qu'il est énoncé actuellement au Canada, ce droit est inadéquat sur le plan réglementaire, et son encadre-ment doit être renforcé.1. Introduction

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1. Introduction

"Employees physically leave the office, but they do not leave their work. They remain attached by a kind of electronic leash-like a dog. The texts, the messages, the e-mails-they colonise the life of the individual to the point where he or she eventually breaks down."[1]

New information and communications technologies (ICT) have revolutionized everyday work and life in the 21st century.[2] They enable people to connect with friends and family—as well as with work colleagues and supervisors—at any point in time; however, they also facilitate the encroachment of paid work into the spaces and times normally reserved for personal life.[3] Employees, managers and workers are "constantly connected" to the workplace, often performing unpaid work-related tasks during rest or leisure times. This has potentially negative effects on the health and well-being of various categories of workers.

The inability to disconnect from work has been recognized as a significant problem in many western countries, including Canada. In a survey conducted by the Angus Reid Institute in 2015, 40% of working Canadians stated that technology had them working longer hours, with over half of respondents admitting to engaging in work-related activities outside of working hours as a result of technology.[4] Another study conducted in March 2022 showed that 28% of Canadians were unable to

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1 French socialist MP Benoit Hamon to Hugh Schofield, quoted in Hugh Schofield, "The plan to ban work emails out of hours" (11 May 2016), online: *BBC News* <www.bbc.com/news/magazine-36249647> [perma.cc/Z47A-QBM4].

2 See Eurofound and the International Labour Office, "Working, anytime, anywhere: The effects on the world of work" (2017) at 1, online (pdf): *International Labour Organization* <www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_544138.pdf> [perma.cc/].

3 *Ibid.*

4 See Angus Reid Institute, "Canadians at work; technology enables more flexibility, but longer hours too; checking in is the new normal" (9 February 2015) at 1, online (pdf): *Angus Reid Institute* <www.angusreid.org/wp-content/uploads/2015/02/2015.02.09-Work-Tech.pdf> [perma.cc/3RQP-WERD].

disconnect from work after work hours, with this group having the lowest mental health score.[5]

As with many other areas, existing employment standards legislation regulating employee work hours have been unable to maintain pace with the technology-induced evolution of workspaces and work times. In a 2018 survey by Canada's Ministry of Employment and Social Development, 93% of respondents expressed the need for employees to have a right to disconnect from work, with 79% expressing the need for work policies limiting the use of work-related technology outside of working hours.[6] While there is no federal legislation in this respect, in 2021, Ontario's provincial government enacted legislation mandating employers to develop and maintain workplace policies with regard to employees disconnecting from work.[7]

The aim of this article is to examine the suitability of Ontario's legislative response under the *Employment Standards Act* (ESA) in the context of the "right to disconnect." In Part I of this article, I provide a brief discourse on the approach to the right to disconnect in other jurisdictions. In Part II, I outline the legal history of the right to disconnect in Canada. In Part III, I briefly review Section 21.1.1 of Ontario's ESA, which regulates disconnecting from work policies. In Part IV, I consider the relevance of a separate "right to disconnect" to Canadian employment standards legislation, bearing in mind existing provisions relating to employee work hours. Finally, in Part V, I examine the possible implications of a separate "right to disconnect" under Canadian law and make a number of recommendations for developing a stronger framework to protect the "right to disconnect" in Canada.

2. The Right to Disconnect: Europe and the Americas

France was the first country to take major steps towards recognizing a right to disconnect from work. As early as 2013, a national cross-sectoral

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[5] Over half of this group reported being unable to disconnect due to heavy workload while 25% attributed their inability to disconnect to after-hours contact from managers. 23% of this group attribute after work hours contact with colleagues as being responsible for their inability to disconnect. See Telus Health, "The Mental Health Index by Lifeworks: March 2022" (March 2022) at 3, online (pdf): *Telus Health* <www.lifeworks.com/en/resource/mental-health-index%E2%84%A2-report-march-2022> [perma.cc/K326-3W2S].

[6] Employment and Social Development Canada, "What We Heard: Modernizing Federal Labour Standards" (30 August 2018) at 10, online (pdf): *Government of Canada* <www.canada.ca/content/dam/canada/employment-social-development/campaigns/labour-standards/1548-MLS_WWH-Report_EN.pdf> [perma.cc/P5HP-8UA7].

[7] *Employment Standards Act*, SO 2000, c 41, s 21.1 [*ESA*].

agreement was signed by social partners in France under which businesses were to avoid intruding on employees' private lives by specifying periods when devices should be switched off.[8] This "right to switch off" was made law in France in August 2016, by Article L2242-17 of France's *Code du travail*. Under this law, employers and unions are required to establish a dialogue in order to regulate the use of digital tools beyond working hours, specify employee rights to switch off and regulate use of digital tools beyond working hours.[9] In the event that no agreement is reached or employers are required to draw up a charter that defines the exercise of the right to disconnect and also provides for the implementation of the right.[10] Employers in such cases must also implement means of monitoring compliance with the right to disconnect.[11]

In Italy, a right to disconnect was established in 2017 through legislative provisions requiring individual agreements between "smart workers" and employers to identify rest periods for the worker and the measures in place to ensure disconnect from technological work tools.[12] This law is limited to only employees who work outside employer premises and does not provide any concrete measures regarding the exact meaning of the right.[13] In Spain, a right to disconnect law was enacted in 2018, providing employees with a right to respect of non-labour time including leaves and holidays.[14] Employers are required, in conjunction with employee representatives in this regard to draw up internal policies outlining the manner of exercising the right.[15]

Since the pandemic, four other European countries have introduced or passed legislation on the right to disconnect. Greece's Law No. 4808-19-06-2021 provides that employees must have a right to disconnect and

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8 See Frederic Turlan, "France: A legal right to switch off from work" (18 December 2014), online: *Eurofound* <www.eurofound.europa.eu/fr/publications/article/2014/france-a-legal-right-to-switch-off-from-work> [perma.cc/5NZN-TMGZ].

9 See art L2242-17(7) Code du travail.

10 *Ibid.*

11 *Ibid.*

12 Tammy Katsabian, "It's the End of Working Time as We Know It: New Challenges to the Concept of Working Time in the Digital Reality" (2020) 65:3 McGill LJ 379 at 395.

13 *Ibid.*

14 See Protección de Datos Personales y garantía de los derechos digitales [Personal Data Protection and guarantee of digital rights], Ley Orgánica/Organic Law 3/2018 (Spain), online (pdf): <www.boe.es/boe/dias/2018/12/06/pdfs/BOE-A-2018-16673.pdf> [perma.cc/7U3N-X4G3]. For an English summary, see "Organic Law 3/2018, December 5, Protection of Personal Data and Guarantee of Digital Rights" (11 December 2018), online: *ECIJA* <www.ecija.com/en/sala-de-prensa/organic-law-3-2018-of-december-5-protection-of-personal-data-and-guarantee-of-digital-rights/> [perma.cc/CGP5-XG3T].

15 *Ibid.*

defines disconnect as "completely refraining from carrying out any work-related activities and in particular the right to not communicate online or respond to calls, emails for communication of any other nature.[16] Luxembourg's Bill No. 7890 requires employers to develop a specific regime ensuring respect for the right to disconnect when employees use digital tools for work purposes.[17] Portugal's Law No. 83/2021 prohibits employers from contacting any employee regardless of place of work during rest periods except in cases of force majeure.[18] Slovakia has also provided teleworkers with the right to disconnect and employers are prohibited from punishing employees for not fulfilling work tasks during rest period.[19] In Greece, Italy and Slovakia, the right to disconnect only applies to teleworkers.[20]

In 2021, the European Parliament also passed a resolution recognizing the right to disconnect as a fundamental right and recommending that the European Commission issue a directive enabling digital workers to disconnect.[21] Other European countries are either engaged in discussions towards establishing a right to disconnect or have governmental codes of practice to this effect.[22] However, the right to disconnect has only been enforced by European courts in a few cases. In 2018, the French wing of British pest control company Rentokil Initial, was ordered to pay a former employee 60,000 euros for breaching the employee's right to disconnect from work.[23] In the same year, the Irish Labour Court held an employer liable for failing to curtail the working time of an employee who had exceeded statutory work time by sending e-mails outside working hours.[24]

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16 See Eurofound, "Telework in the EU: Regulatory Frameworks and recent updates" (2022), online (pdf): *Eurofound* <www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef22032en.pdf> [perma.cc/ACP5-5TWF] [Eurofound, "Telework in the EU"].

17 For a summary of Luxembourg's Bill 7890, see Ius Laboris, "A new right to disconnect in Luxembourg" (11 March 2021), online: *Ius Laboris* <www.iuslaboris.com/insights/a-new-right-to-disconnect-in-luxembourg/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration> [perma.cc/54X7-XY7C].

18 See Uría Menéndez, "Employment Law" (7 December 2021) at 6, online (pdf): *Uría Menéndez* <https://www.uria.com/documentos/circulares/1467/documento/12606/Newsletter-Teletrabalho_ENG.pdf?id=12606> [perma.cc/AJ3J-A8PN].

19 Eurofound, "Telework in the EU", *supra* note 16 at 28.

20 *Ibid.*

21 See EC, *Resolution concerning recommendations to the Commission on the right to disconnect (Decision 2019/2181 of the European Parliament)*, [2021] OJ, C 456/15.

22 Eurofound, "Telework in the EU", *supra* note 16 at 1.

23 CW Von Bergen, Martin S Bressler & Trevor L Proctor, "On the Grid 24/7/365 and the Right to Disconnect" (2019) 45:2 Employee Relations LJ 1 at 7.

24 See *Kepak Convenience Foods v O'Hara* [2018] 7 JIEC 1901 at 1905–1906 (Ireland). The Labour Court found Kepak Convenience Foods to be in breach of Section

A number of South American countries have also implemented the right to disconnect. Under Article 5 of Argentina's Law No 27,555, teleworkers have the right to disconnect from digital devices outside of their working hours and during leave periods.[25] Employers may also not require teleworkers to carry out tasks outside working hours.[26] In Chile, employers must respect the right of teleworkers and remote workers to disconnect for 12 continuous hours in a 24-hour period.[27] Employers are also precluded from requiring employees to work during rest days or annual holidays.[28]

3. Right to Disconnect in Canada

A) History

The right to disconnect is a comparatively new subject under Canadian employment legislation with a short history. In May 2017, the Canadian government began a ten-month consultation with various stakeholders regarding modernizing labour standards to reflect changing workplace conditions.[29] One of the issues raised during the consultation period was rest time for employees outside of working hours.[30] Pursuant to these consultations, the Canadian government created an independent Expert Panel on Modern Federal Labour Standards in February 2019.[31] The panel was tasked with examining and providing advice on, among other issues, the disconnection from work-related electronic communications outside of work hours.[32] In a June 2019 report, the Committee recommended against a statutory right to disconnect, citing difficulties with operationalizing and enforcing such a right.[33] The Panel, however, recommended that employers under the Code issue policy statements

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15(1) of Ireland's Organisation of Working Time Act, 1997, which precludes an employer from permitting an employee to work more than 48 hours in each period of seven days.

25 Loïc Lerouge & Francisco Trujillo Pons, "Contribution to the study on the 'right to disconnect' from work. Are France and Spain examples for other countries and EU law?" (2022) 13:3 Eur Labour LJ 450 at 462.

26 *Ibid*.

27 *Ibid*.

28 *Ibid* at 463.

29 See Government of Canada, "More information on the Expert Panel on Modern Federal Labour Standards" (last modified 8 March 2021), online: *Government of Canada* <www.canada.ca/en/employment-social-development/campaigns/expert-panel.html> [perma.cc/9XMU-ZMAL].

30 *Ibid*.

31 *Ibid*.

32 *Ibid*.

33 See Employment and Social Development Canada, "Report of the Expert Panel on Modern Federal Labour Standards" (June 2019) at 177, online (pdf): *Government of Canada* <www.canada.ca/content/dam/canada/employment-social-development/services/labour-

on the issue of disconnecting following consultation with employees or employee representatives.[34]

In March 2018, Quebec Solidaire Member Gabriel Nadeau-Dubois introduced Bill 1097 to Quebec's legislative assembly, which would require Quebec employers to adopt an after-hours disconnection policy in order to ensure employee rest periods were respected.[35] Under the proposed Act, employers with 100 or more employees were required to establish a committee to develop an after-hours disconnection policy, with at least half of which representing employees.[36] Employers that failed to comply with the Act would face punitive fines.[37] This Bill was subsequently dropped by Quebec's legislative assembly.

In June 2021, the Ontario government established the Ontario Workforce Advisory Committee for the purpose of "exploring the future of work." The Committee was tasked with the responsibility of examining the changing landscape of work and providing recommendations that "position Ontario as the best place in North America to recruit, retain and reward workers."[38] Following a period of consultation with various stakeholders, the Committee released a report in November 2021 recommending the introduction of the right to disconnect into legislation to protect workers' ability to balance personal obligations with work commitments.[39] Bill 27, the *Working for Workers Act, 2021*, was subsequently introduced to Ontario's Legislative Assembly. Among other changes, the *Working for Workers Act, 2021*, made changes to the ESA introducing a "right to disconnect". The *Working for Workers Act, 2021*, received royal assent in December 2021. [40]

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standards/reports/expert-panel-final/expert-panel-final-report-20190826.pdf> [perma.cc/NJ57-UCPJ] [ESDC, "Modern Federal Labour Standards"].

34 *Ibid*.

35 Bill 1097, *Right-to-Disconnect Act*, 1st Sess, 41st Leg, Quebec, 2018, c 1.

36 *Ibid*, c 3.

37 *Ibid*, c 5.

38 Ontario, Legislative Assembly, *Official Report of Debates (Hansard*), No 13 (1 November 2021) at 593.

39 See Ontario Workforce Recovery Advisory Committee, "The Future of Work in Ontario: Findings and Recommendations from the Ontario Workforce Recovery Advisory Committee" (November 2021) at 88, online (pdf): *Government of Ontario* <www.ontario.ca/files/2022-06/mltsd-owrac-future-of-work-in-ontario-november-2021-en-2021-12-09.pdf> [perma.cc/79KT-YDNA]

40 Bill 27, *Working for Workers Act*, 2nd Sess, 43rd Leg, Ontario 2021 (assented to 2 December 2021), SO 2021, c 35.

B) Section 21.1.1 of the ESA

Section 21.1 of the ESA provides as follows:

> **21.1.1** In this Part,
>
> "disconnecting from work" means not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.
>
> **Written policy on disconnecting from work**
>
> **21.1.2** (1) An employer that, on January 1 of any year, employs 25 or more employees shall, before March 1 of that year, ensure it has a written policy in place for all employees with respect to disconnecting from work that includes the date the policy was prepared and the date any changes were made to the policy.
>
> **Copy of policy**
>
> (2) An employer shall provide a copy of the written policy with respect to disconnecting from work to each of the employer's employees within 30 days of preparing the policy or, if an existing written policy is changed, within 30 days of the changes being made.
>
> **Same**
>
> (3) An employer shall provide a copy of the written policy with respect to disconnecting from work that applies to a new employee within 30 days of the day the employee becomes an employee of the employer.
>
> **Prescribed information**
>
> (4) A written policy required under subsection (1) shall contain such information as is prescribed by regulations.[41]

A fundamental issue with Section 21.1.1 of the ESA noted by various employment law practitioners, is the fact that Section 21.1.1 does not in itself create an actionable right or any right whatsoever.[42] In its online

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41 *ESA*, *supra* note 7, s 21.1.

42 Zena Olijnyk, "Ontario 'right to disconnect' law doesn't actually create that right, webinar attendees told" (21 April 2022), online: *Canadian Lawyer* <www.canadianlawyermag.com/practice-areas/labour-and-employment/ontario-right-to-disconnect-law-doesnt-actually-create-that-right-webinar-attendees-told/365998> [perma.cc/7J9H-4JYY].

guide to Section 21.1.1, Ontario's Ministry of Labour, Immigration, Training and Skills Development indicates that Section 21.1.1 does not require employers to create a new right for employees to disconnect from work, citing other provisions of the ESA as establishing such rights.[43] Employers are simply required to have a written policy in place with respect to disconnecting from work. There is also no guidance under the ESA as to the content of such policy as no regulations have been made with respect to Section 21.1.1 and the employer is responsible for determining the content of the policy.[44] Therefore, employers will have complied with the ESA by merely outlining a policy and indicating its relation to disconnection from work as defined under Section 21.1.1. Whether regulations will be made defining the nature of such policies in the future remains unclear.

Other issues include the fact that employers are also under no obligation to abide by the written policy, and there is no sanction for any employer who fails to do so.[45] Furthermore, employees are also protected from discriminatory action for attempting to "disconnect from work".[46] For this reason, work law professor David Doorey describes Section 21.1.1 of the ESA as "basically useless" in its current form.[47] Section 21.1.1 has been criticized, possibly unfairly, as "importing a view of work-life balance that is tied to a traditional workday," which may not reflect the future of the workplace climate.[48] In addition, unlike some European countries, employee or employee representatives do not have any input in the formulation and implementation of the disconnect from work policy. Section 21.1.1 is also of limited effect, as it only applies to organizations

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[43] See Government of Ontario, "Written policy on disconnecting from work from work" (last modified 3 March 2023), online: *Government of Ontario* <www.ontario.ca/document/your-guide-employment-standards-act-0/written-policy-disconnecting-from-work> [perma.cc/9ACT-EF98]. However, where employers choose to include a provision in their written policy providing an employee with the right not to perform work where other rules in the ESA would otherwise permit work, such provisions may be enforceable under the ESA if it confers a "greater right or benefit" than other provisions of the ESA.

[44] *Ibid.*

[45] Note the exception in footnote 43. See Government of Ontario, *supra* note 43.

[46] Section 74 of the ESA, however, prohibits reprisals or threats of reprisals against an employee for asking employers to comply with the provisions of the Act.

[47] York University work law professor David Doorey to Holly McKenzie-Sutter, quoted in Holly McKenzie-Sutter, "Ontario's right to disconnect law too vague to help work-life balance, experts say" (19 June 2022), online: *CBC News* <www.cbc.ca/news/canada/toronto/ont-labour-disconnect-1.6494010> [perma.cc/EV5X-8SL3].

[48] Zena Olijnyk, "Plugging into the right to disconnect" (9 March 2022), online: *Human Resources Director* <www.hcamag.com/ca/specialization/employment-law/plugging-into-the-right-to-disconnect/398026> [perma.cc/8WT6-DES3] [Olijnyk, "Plugging into the right to disconnect"].

with 25 or more employees.[49] This excludes over 85% of Ontario businesses, including organizations such as technology startups that are highly susceptible to the "always on" culture.[50]

However, there are some positive aspects to Section 21.1.1. For instance, the employer's duty to develop a policy respecting disconnection from work is with respect to all the employers' employees, including inter-provincial remote workers.[51] Furthermore, as noted above, policies made pursuant to Section 21.1.1 may be enforceable in certain circumstances.[52] The failure of the ESA to provide guidance on the content of a policy created under Section 21.1.1 may also enable employers, more likely than legislators, to have expert knowledge of the work schedules of their employees and develop suitable organization-specific policies. Employee representatives such as trade unions may also rely on Section 21.1.1 as a basis for negotiating clearer and more specific provisions on disconnecting from work in collective agreements, as is the case in European countries such as France and Spain.[53] Moreover, in a broader societal context, Section 21.1.1 of the ESA inadvertently "force[s] conversations about the varied roles of work in our lives and some of the mileage we get from an increasingly connected 24/7 work culture."[54]

4. A "Right to Disconnect" in Canada: A Discourse on Necessity

One of the major issues directly impacting the effect of the right to disconnect is what is best described as a "conceptualization struggle". While some consider the right to disconnect as a new autonomous and differentiated right, others classify it as a derivation of the classic

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49 In Ontario, over 1.8 million individuals aged 15 or over work for businesses with less than 20 employees. See Statistics Canada, "Employment by Establishment size, annual (x1000)" (last modified 20 May 2023), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410006801> [perma.cc/6CAC-US9R].

50 *Ibid*.

51 While interprovincial remote workers not domiciled in Ontario may be excluded from the jurisdiction of the ESA in principle, they are included in determining the size of an organization for the purposes of Section 21.1.1 of the ESA.

52 See Eurofound, "Telework in the EU", *supra* note 16 at 11.

53 Eurofound, "Right to disconnect; Exploring company practices" (2021) at 19, online (pdf): *Eurofound* <www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef21049en.pdf> [perma.cc/MCJ2-BTV2] [Eurofound, "Right to disconnect"].

54 Nicholas Balaisis, "Will 'Right to Disconnect' Laws Improve Our Mental Health?" (6 June 2022), online: *Psychology Today* <www.psychologytoday.com/us/blog/our-devices-our-selves/202206/will-right-to-disconnect-laws-improve-our-mental-health> [perma.cc/FQB5-WAH6].

right to rest times, adapted to the contemporary reality conditioned by digital technology.[55] Most employees, unions and non-governmental organisations would favour the former while employers are more likely to argue the latter, emphasizing the sufficiency of existing laws in regulating the employee's connection to the workplace environment and questioning the relevance of new legislation.[56]

A) Working Time Under the ESA

Section 15 of the ESA requires employers to record the number of weekly and daily hours worked by an employee.[57] While the ESA does not define work, Section 1.1 of Ontario's *Regulation 285/01* deems work to be performed in instances where work is performed by an employee notwithstanding a term of the contract of employment expressly forbidding or limiting hours of work.[58] Section 17 of the ESA prohibits employers from requiring employers to work more than eight hours a day or 48 hours a week unless otherwise agreed.[59] Section 18 also prescribes a minimum number of consecutive hours for which employees are to be "free from performing work."[60] These provisions may not apply in cases where variation of work hours is necessary to deal with an emergency, ensure continued delivery of essential public services, ensure continuity of processes or seasonal operations and carry out urgent repairs.[61] At various times, the Ontario Labour Relations Board has issued compliance orders and awarded administrative penalties for violations of Section 18.[62]

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55 Facundo Martin Chiuffo, "The 'Right to Disconnect' or 'How to pull the Plug on Work' (2019) 4 SSRN Electronic J 1 at 11.

56 This conflict was evident in the federal government's consultation with representative organizations with respect to the right to disconnect. See ESDC, "Modern Federal Labour Standards", *supra* note 33.

57 *ESA*, *supra* note 7, s 15(1).

58 O Reg 285/01, s 1.1(a)(ii).

59 *ESA*, *supra* note 7, s 17(1)(a)–(b).

60 An employee must be free from performing work for at least 11 consecutive hours. See *ESA*, *supra* note 7, s 18(1). Shift workers must be free from performance of work for at least 8 hours between shifts See *ESA*, *supra* note 7, s 18(3). Employers must give employees a period free from performance of work equal to at least 24 consecutive hours in every work week or 48 consecutive hours in every period of 2 consecutive work weeks. See *ESA*, *supra* note 7, s 18(4).

61 *Ibid*, s 19.

62 For a compliance orders issued by the Ontario Labour Relations Board for a violation of Section 18, see e.g. *Calabogie Peaks ULC v Payant*, 2019 CanLII 32808 (OLRB). For an administrative penalties issued by the Ontario Labour Relations Board for a violation of Section 18, see e.g. *1276061 Ontario Limited v James*, 2016 CanLII 21813 (OLRB).

B) Other Canadian Jurisdictions

In most provinces, there is an upper limit on working time with employers prohibited from requiring employees to work beyond a particular number of hours, unless otherwise agreed.[63] For example, in Saskatchewan, the prohibition extends to employees being "at the employer's disposal."[64] As such, employees in most provinces do not work beyond 40 hours a week and less than ten percent of Canadian workers usually work very long hours.[65] Employment standard legislation in many provinces also include provisions respecting hours for which an employee is to be free from work on a daily or weekly basis.[66] The *Canada Labour Code* also sets a maximum work hour limit and weekly rest periods for federally regulated workers.[67] In addition, many provinces protect employees from reprisals for exercising their rights under employment standards legislation, including those relating to work hours.[68] In some jurisdictions, there is a statutory right of refusal to work beyond a certain number of hours or on particular days.[69]

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63 See *Employment Standards Code*, RSA 2000, c E-9, s 128 (Alberta) [*Alberta ESC*]; *The Saskatchewan Employment Act*, SS 2013, c S-15.1, 2-12 [*Saskatchewan Employment Act*]; *Employment Standards Act*, RSPEI 1988, c E-6.2, s 15 (Prince Edward Island) [*Prince Edward Island ESA*]; *Employment Standards Act*, RSY 2002, c 72, s 6–7 (Yukon) [*Yukon ESA*]. See also *Canada Labour Code*, RSC 1985, c L-2, s 171 [*CLC*]. However, there is no upper limit respecting work hours in New Brunswick.

64 *Saskatchewan Employment Act*, *supra* note 63, s 2-12.

65 Statistics Canada, "Long working hours, 1976 to 2021" (30 May 2022), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/14-28-0001/2020001/article/00009-eng.htm> [perma.cc/H8UZ-7ZFZ].

66 For provincial legislation that include provisions regulating hours to be free from work on a daily basis, see e.g. *Employment Standards Act*, RSBC 1996, c 113, s 36(1)(a) (British Columbia) [*British Columbia ESA*]; *Labour Standards Act*, RSNL 1990, c L-2, s 23 (Newfoundland and Labrador) [*Newfoundland and Labrador LSA*]; *Yukon ESA*, *supra* note 63, s 14. For provincial legislation that include provisions regulating hours to be free from work on a weekly basis, see e.g. *Employment Standards Code*, CCSM c E110, s 45 (Manitoba) [*Manitoba ESC*]; *Employment Standards Act*, SNB 1982, c E-7.2, s 17 (New Brunswick) [*New Brunswick ESA*]; *Labour Standards Code*, RSNS 1989, c 246, s 66 (Nova Scotia) [*Nova Scotia LSC*]; *An Act Respecting Labour Standards*, CQLR c N-1.1, s 78 (Quebec) [*Respecting Labour Standards Act*]; *Prince Edward Island ESA*, *supra* note 63, s 16.

67 For the maximum work hour limit under the *Canada Labour Code*, see *CLC*, *supra* note 63, s 169. For the set weekly rest periods under the *Canada Labour Code*, see *CLC*, *supra* note 63, s 173.

68 *ESA*, *supra* note 7, s 74(1). See also *New Brunswick ESA*, *supra* note 66, s 28; *Nova Scotia LSC*, *supra* note 66, s 30; *Saskatchewan Employment Act*, *supra* note 63, s 2-8.

69 For the statutory right to refuse work beyond a certain number of hours, see e.g. *Respecting Labour Standards Act*, *supra* note 66, s 59.0.1. Under the *CLC*, employees can also refuse to answer work-related communications outside working hours if doing

Notwithstanding all the above, there are certain limitations to existing statutory protection. For instance, Section 18(1) of Ontario's ESA does not apply where employees are "on-call".[70] In certain provinces, employees "on-call" are also not entitled to monetary compensation. In *Sauer (Re)*, the complainant had argued that his availability by cellular phone and responding to calls from tenants implied that he was on-call seven days a week and was entitled to compensation.[71] In dismissing this argument, the British Columbia Employment Standards tribunal stated the following:

> The complainant asked the Delegate and asks this Tribunal to imply that because he was packing a cellular phone on the weekends which number was known to the tenants that he was effectively on call. I do not accept that argument. Had the complainant been able to show specific dates, calls, and his attendance on those calls I may have been persuaded that he should be entitled to compensation. However, with the lack of such evidence I am not prepared to imply that carrying a cellular telephone and enjoying the freedom of mobility that those devices allow makes the fact that he may be accessible to tenants tantamount to being on-call. I confirm the Delegate's finding on this point.[72]

Furthermore, as with most Canadian jurisdictions, under the ESA, employees are only free from "performing work" but not necessarily other aspects of the working relationship, particularly receiving electronic communication.[73] Additionally, the provisions relating to freedom from work do not apply in emergency cases which is typically undefined under legislation.[74] Practically speaking, it implies that employees must in some way remain available in emergency circumstances. Even in provinces where employers have been prohibited from requiring employees to work excessive hours detrimental to their health or safety, proving "excessive hours" has been difficult for employees, particularly for compensation purposes.[75] In *Perera (Re)*, the complainant alleged that she had been required to work excessive hours detrimental to her

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so would exceed the maximum number of hours under the Code or the employees need to attend to family responsibilities. For the statutory right to refuse to work on particular days, see *ESA*, *supra* note 7, s 73 (retail workers); *Manitoba ESC*, *supra* note 66, s 81 (retail employees); *New Brunswick ESA*, *supra* note 66, s 17.1; *Nova Scotia LSC*, *supra* note 66, s 66A(2); *Prince Edward Island ESA*, *supra* note 63, s 16.1.

70 *ESA*, *supra* note 7, s 18(2).

71 2000 CanLII 49589 (BCEST).

72 *Ibid*.

73 See *ESA*, *supra* note 7, s 18(1) and the exception in *ESA*, *supra* note 7, s 18(2).

74 *ESA*, *supra* note 7, s 19.

75 See *Re Johnston*, 2010 CanLII 151227 at paras 26–36 (BCEST). The British Columbia Employment Standards Tribunals disagreed with the notion that working more than 12 hours a day was by itself excessive as other provisions of the Act contemplated working for longer hours.

health and safety.[76] Notwithstanding a determination that the applicant's employer had violated the provisions of the Act by failing to keep record of work hours, the applicant was unsuccessful as she had been unable to "present calculations to demonstrate extra hours worked in a day or month."[77] Majority of claims relating to excessive hours worked have also been dismissed by administrative tribunals for insufficient documentary evidence.[78]

Furthermore, many employment standards provisions respecting work hours, particularly those related to rest periods are based on traditional notions of work, where employees "clock in" and "clock out" at certain times under the supervision of a manager. Globalized economic activity and in particular the digital economy has challenged and continues to challenge these traditional norms. As explained by Loic Lerouge and Francisco Trujillo Pons:

> The world of work has become globalised and the information necessary to carry out a large number of tasks is currently available in real time through an Internet connection. This means that the spatial and temporal borders on which it has been legislated to date and which previously constituted insurmountable barriers for business management no longer exist, allowing this new competitive advantage to be developed to the maximum, in turn making it possible to meet demand from any part of the world as well as allowing professionals to be settled in multiple places.[79]

Many modern employers require a flexible workforce available round-the-clock to meet demand and remain competitive.[80] In addition, there is an ever-increasing demand for flexible work arrangements globally and among Canadian employees.[81] However, employment standards

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76 2012 CanLII 151080 at para 4 (BCEST).

77 *Ibid* at para 7.

78 See *Re Ulrike Roth and Benoit Brochu*, 2020 CanLII 97 (BCEST).

79 Lerouge & Pons, *supra* note 25, 450 at 454.

80 Government of Canada, "Final Report of the Right to Disconnect Advisory Committee" (February 2022) at 24, online (pdf): *Government of Canada* <www.canada.ca/content/dam/canada/employment-social-development/corporate/portfolio/labour/right-to-disconnect-en.pdf> [perma.cc/NGW4-WNF3] [Government of Canada, "Final Report of the Right to Disconnect"].

81 Employment and Social Development Canada, "Flexible work arrangements: What was heard" (September 2016), online: *Government of Canada* <www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/labour-standards/reports/what-we-heard-flexible-work-arrangements.html#h2.2-h3.2> [perma.cc/N4J4-HECP]. See also "The workplace revolution: A picture of flexible working 2017" (January 2017) at 27, online (pdf): *Regus* <www.regus.ca/work-canada/wp-content/uploads/sites/131/2017/06/GBS-Report.pdf> [perma.cc/M6DH-CYN2].

provisions in their current form do not adequately cater to such demands and are also insufficient for protecting employees from exploitative labour undertaken outside of work hours without requisite compensation.

In addition, there are a number of exemptions provisions contained in provincial legislation regarding all or part of employment standards legislation. In most Canadian jurisdictions, professionals such as lawyers, medical practitioners, engineers and real estate agents are excluded from all or part of employment standards legislation.[82] Most provinces exclude managers, senior leadership, professors, information technology professionals and teachers from provisions respecting work hours and overtime.[83] Many of the professionals excluded from work hours provisions are those arguably in greatest need of protection through disconnect from work provisions. Research conducted by Lifeworks has shown a consistent pattern of more managers suffering from work-related mental health struggles than non-managers, often due to constant connectivity.[84] Research in European countries such as France and Luxembourg also indicate that managers occupying high positions in companies experience greater difficulties in disconnecting from work.[85] Accordingly, in provinces where certain individuals are excluded from work hour requirements, a separate right to disconnect under employment standards legislation may be necessary.

5. Transforming a Policy Into a Right: Possible Challenges

The necessity of introducing a right to disconnect into employment legislation has been evaluated in the previous section, with the conclusion that notwithstanding the detailed and fairly well-defined provisions in various provinces regarding work times and disconnection from work, these provisions are not fully suited to the dynamics of modern working arrangements established by the influence of technology in the workplace. Whether as a fully recognized distinct right or as a contemporary extension of existing employment standards protections, employers and employees are typically in agreement on the need for adaptation of the modern workplace to protect employment standards on employee

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[82] See e.g. BC Reg 396/95, s 32.

[83] In most cases, managers or senior leadership are likely to be engaged in work-related activities outside of regular working hours. See Alta Reg 14/1997, s 2(1); *Respecting Labour Standards Act*, *supra* note 66, s 3(6).

[84] Based on an evaluation of LifeWork's Mental Health Index between January and August 2022. For more, see Telus Health, "Mental Health Index", online: *Telus Health* <www.lifeworks.com/en/mental-health-index> [perma.cc/U7YD-HAB3].

[85] Iñigo Isusi, Jessica Durán & Antonio Corral, "Working conditions in telework during the pandemic and future challenges" at 7, online (pdf): *Eurofound* <www.eurofound.europa.eu/sites/default/files/wpef22032.pdf> [perma.cc/TP2N-TR79].

freedom from work. Establishing a specific right to disconnect under employment legislation is a step in this direction. It is, however, not without its implications. Employees can bring an action against employers for violating this right, particularly in cases where such violation also breaches existing provisions respecting work hours. Employees are also protected from reprisal for exercising this right.[86]

A) The Implementation Challenge

The primary challenge with establishing a right to disconnect under Canadian law lies in its implementation and enforcement. While the right to disconnect is in its infancy globally, there has been very little by way of legal enforcement of right to disconnect provisions.[87] Implementation and enforcement of the right to disconnect has been a struggle, even in pioneering countries like France. As of 2021, 60% of teleworking employees in France did not have a formal right to disconnect, and only half of employees had specifically defined hours when they could be reached and a similar proportion felt "overconnected."[88] In another 2021 survey of engineers, managers and tech workers in France, 78% of remote workers stated that they enjoyed no right to disconnect during the pandemic.[89]

A few factors contribute to the complexities associated with enforcement and implementation. For example, under the ESA, there is no penalty for violating the "right to disconnect" provisions and as is the case in France. Under the ESA, law enforcement authorities are not provided with the power and means to enforce the right to disconnect. Further to this point is the fact that, as journalist Donalee Moulton notes, it is unclear what penalties would be acceptable for violating the right to disconnect.[90] In Italy, employee unions have also called for the introduction of a voluntary clause in the provisions on the right to disconnect, allowing

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86 *ESA*, *supra* note 7, s 74(1).

87 A 2019 study of the impact of the right to disconnect in France showed limited impact of statutory provisions nearly two years after the promulgation of the law. See Luc Pansu, "Evaluation of 'Right to Disconnect' Legislation and Its Impact on Employee's Productivity" (2018) 5:3 Intl J of Management and Applied Research 99.

88 Oscar Vargas Llave, "Do we really have the right to disconnect?" (13 July 2022), online: *Eurofound* <www.eurofound.europa.eu/publications/blog/do-we-really-have-the-right-to-disconnect> [perma.cc/HSC2-BWS4%20].

89 "Investigation Report: Teleworking in Degraded Mode", online: *Lutte Virale* <www.luttevirale.fr/enquete/rapport/teletravail/> [perma.cc/9F4A-H575].

90 Donalee Moulton, "The problem with a "right to disconnect" law" (11 April 2017) at 2, online (pdf): *Torys LLP* <www.torys.com/-/media/files/pdfs/articles/2017/the-problem-wiht-a-right-to-disconnect-law.pdf> [perma.cc/43C6-E6CU].

workers to freely resign from the smart working arrangement without risking dismissal.[91]

Secondly, as noted above, there has been a remarkable shift, particularly post-pandemic, towards flexible work arrangements and many more employees are reporting an increase in employer recognition of a work-life balance.[92] Such employees may not see the need to pursue the enforcement right to disconnect laws. In addition, there is no settled procedure regarding implementing the right to disconnect. An examination of the European approach to implementing the right to disconnect shows an extremely varied approach. In some cases, employees exercise a voluntary initiative to disconnect or refuse to connect with employer while in some other instances managers are requested not to contact employees after work hours.[93] By failing to prescribe a means of implementation, the European countries with legal provisions have relied on social dialogue at the sectoral and company level to determine the modalities of implementation.[94] Furthermore, developing uniform standards of implementation is particularly difficult in Canada, where labour laws are generally regulated by provinces. Such uniform legislation will also likely to impact industries differently.

In addition, outlining an explicit right to disconnect may also force organizations to hire contractors, who are not covered by the "right to disconnect" as they are not employees under employment standards provisions in majority of the Canadian provinces.[95] Included in the transformation of the modern world of work is a notable shift towards more precarious form of employment, including zero-hour contracts. Organizations with a more global reach may decide to outsource work to contractors in other countries to maximize productivity and circumvent labour standards requirements. Even if the employment relationship is not undermined in this respect, laws establishing a right to disconnect may also serve as a disincentive for companies to offer other flexible work arrangements.[96] Additionally, employment and labour partner

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91 See Tutela Del Lavoro Autonomo [Protection of Self-Employment], Atto Senato/Senate Act 2233 (Italy), online (pdf): <www.senato.it/service/PDF/PDFServer/BGT/00993441.pdf> [perma.cc/RVZ4-WL5Z]. For an English summary, see Eurofound, "Italy: New Rules to protect self-employed workers and regulate ICT-based mobile work" (2 August 2017), online: *Eurofound* <www.eurofound.europa.eu/publications/article/2017/italy-new-rules-to-protect-self-employed-workers-and-regulate-ict-based-mobile-work> [perma.cc/6FZ9-LSXD].

92 Eurofound, "Right to disconnect", *supra* note 53 at 44.

93 *Ibid* at 44-45.

94 *Ibid*.

95 Bergen, Bressler & Proctor, *supra* note 23 at 12.

96 Moulton, *supra* note 90 at 3.

Kathleen Chevalier notes how Section 21.1.1 of the ESA with its noble purpose of providing work-life balance could have the opposite effect if employers imposed "strict lines."[97] Current research suggests that for the most part, Canadian employers are open to various forms of flexible work arrangements.[98] Introducing a legal "right to disconnect" may undermine this flexible relationship and drive employers towards a more rigid approach to other working conditions, particularly for non-unionized employees. Also, as noted regarding the Italian version of the right to disconnect, in cases where the implementation depends on agreements between employee and employer, the law is vulnerable to the unequal power dynamics of the workplace.[99]

B) The "Mindset" Challenge

Assuming a robust framework for the right to disconnect can be developed through legislation, there is no guarantee that employees themselves will exercise the right to disconnect. As explained by labour and technology researcher Tammy Katsabian with respect to the relationship between individuals and mobile connectivity:

> This habit applies not only to working time but also to many other aspects of life. The sociologist Ursula Huws, for example, provides "four snapshots" from the digital reality in which people are supposedly interacting with one another, and yet at the same time they are obsessively dealing with their cellphone for purposes that are not necessarily work-related. Modern youth also demonstrate how the need (and ability) to be constantly connected online or to conduct several activities simultaneously is present well beyond the scope of the labour field and has become an everyday norm . . . In other words, the digital age has generated new habits that are difficult to resist. If we wish to encourage a change in working habits, we need to provide both employees and employers with concrete tools and guidance on how to do so.[100]

In a 2015 survey conducted by the Angus Reid Institute, nearly half of respondents who reported working overtime stated that they did so out

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97 Stikeman Elliott LLP employment and labour partner Kathleen Chevalier to Zena Olijnyk, quoted in Olijnyk, "Plugging into the right to disconnect", *supra* note 48.

98 According to the Conference Board of Canada, almost nine out of ten organizations offer at least one form of flexible work arrangements. Majority of \`organizations also offer flexible work hours, part-time remote work and ad-hoc remote days. 45% of organizations also offer full-time remote work. See Kathryn Maclean, "Flexible Work Arrangements: Transforming the Way Canadians Work" (2018), online: *The Conference Board of Canada* <https://www.conferenceboard.ca/product/flexible-work-arrangements-transforming-the-way-canadians-work/> [perma.cc/J68Q-AQRA].

99 Katsabian, *supra* note 12 at 395.

100 *Ibid* at 398.

of choice.[101] In a 2018 survey conducted by the Myers-Briggs Company, employees across different western countries, including Canada, who were able to access work e-mails or phone calls outside of work, although reporting having more difficulty switching off, also reported higher levels of job satisfaction.[102] Employees may choose to work longer hours for a number of reasons including workload pressure and career progression due to increased productivity.[103] In a 2019 survey conducted by Robert Half Technology, 48% of Canadian employees stated that they would still be tempted to check e-mails after work hours.[104] A similar or a slightly greater percentage of surveyed employees reported struggling or being unable to completely detach from work in the United Kingdom and the United States.[105] Thus, employees with a right to disconnect may not end up exercising this right, particularly where exercise of such right is at the employee's discretion or involves a rigid adherence to a scheduled time frame. Having said this, the focus of employment standards legislation is the provision of minimum employment standards to protect employees basic work rights, not a paternalistic regulation of individual work choices. From a legal perspective, this implies more emphasis on availability of stronger regulations and enforcement mechanisms and less speculation as to the approach of employees to such rights.

Notwithstanding the foregoing, the case for an explicit right to disconnect under Canadian law remains a strong one from both a rights and privacy perspective. While the right to disconnect is not explicitly recognized under international and human rights law as a fundamental right, it is inextricably linked to a number of legal and human rights

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101 See Angus Reid Institute, "Half of working Canadians call overtime a 'choice', but the vast majority are doing it" (16 February 2015) at 3, online (pdf): *Angus Reid Institute* <www.angusreid.org/wp-content/uploads/2015/02/2015.01.16-Overtime1.pdf> [perma.cc/QB8R-LF3W%20].

102 The Myers-Briggs Company, "Type and the always-on culture" (2019) at 11, online (pdf): *The Myers-Briggs Company* <https://ap.themyersbriggs.com/content/Type_and_the_always_on_culture__TheMyersBriggsCo_2019.pdf> [perma.cc/AE3E-673Z].

103 *Ibid* at 14.

104 Robert Half, "New Research: Majority of Canadian Tech Leaders Confident They Can Disconnect from Emails, Employees Less Convinced" (26 February 2019), online: *Robert Half* <www.roberthalf.ca/en/new-research-majority-of-canadian-tech-leaders-confident-they-can-disconnect-from-emails-employees> [perma.cc/CVZ5-84WW].

105 For the survey report from the United Kingdom, see Aviva, "Embracing the Age of Ambiguity: Re-invigorating the workforce in a rapidly evolving world" (2020) at 9, online (pdf): *Aviva* <https://www.aviva.co.uk/business/age-of-ambiguity/embracing-the-age-of-ambiguity/> [perma.cc/N54U-LAB4]. For the survey report from the United States, see Liuba Y Belkin, William J Becker & Samantha A Conroy, "The Invisible Leash: The Impact of Organizational Expectations for Email Monitoring After-Hours on Employee Resources, Well-Being and Turnover Intentions" (2020) 45:5 Group & Organization Management 709 at 722.

protected under international and domestic law.[106] Another case for a specific right to disconnect may also be made from a privacy perspective. Research conducted in 2021 by Toronto Metropolitan University showed an acceleration in employee surveillance during the pandemic, particularly remote workers.[107] Only three Canadian provinces have privacy laws directly impacting private sector employment and as noted by MJ Masoodi et al, Canada's current legal framework with respect to workplace surveillance provides employers with considerable leeway to surveil employees, provided such surveillance is appropriately linked to employer's interests and goals.[108] Therefore, employees being able to disconnect enhances their capacity to protect their privacy, particularly teleworkers who use personal networks for work-related activity.

6. Developing a Stronger "Right to Disconnect" Framework in Canada: The ESA and Beyond

While there is consensus on the need for a stronger framework for preserving employees' work-life balance, opinions remain divided on the relevance of legislation in building this framework. However, as discussed in preceding sections, the introduction of the right to disconnect is an attempt to reestablish and in some cases, preserve boundaries between employees' work and personal lives. In its current state, Section 21.1.1 of the ESA, Canada's flagship attempt is incapable of achieving this purpose. Nevertheless, it is a useful base for developing a more comprehensive framework.

Building a stronger framework undoubtedly entails the introduction of a specific right to disconnect into employment standards legislation. This can assume various forms. For instance, lawyer Katie Dakus suggests

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106 Article 24 of the *Universal Declaration of Human Rights* declares that "everyone has the right to rest and leisure, including reasonable limitation of working hours…." GA Res 217A (III) UNAGOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 24. This right is also recognized under Article 7 of the *International Covenant on Economic, Social and Cultural Rights, 1966*. See *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 7 (entered into force 3 January 1976). See also *International Labour Organization Hours of Work (Commerce and Offices) Convention, 1930*, 28 June 1930 (entered into force 29 August 1933).

107 MJ Massodi et al, "Workplace Surveillance and Remote Work: Exploring the Impacts and Implications Amidst Covid-19 in Canada" (September 2021) at 27, online (pdf): <https://static1.squarespace.com/static/5e9ce713321491043ea045ef/t/6166d5e131d8606af68eccf9/1634129758502/Workplace+Surveillance+and+Remote+Work.pdf> [perma.cc/UE5X-2RNA].

108 *Ibid* at 44–45.

a combination of France's Charter-based approach with a complaints process for violating the right to disconnect.[109] According to Dakus:

> Using a clearly defined charter of acceptable and non-acceptable communications would allow for employees to identify any inappropriate employer requests. A clear outline of the employer's expectations may also reduce concerns that employees will perform unpaid overtime work because of unspoken employer pressure. As well, having a definitive, written document would provide an evidentiary foundation for alleged violations, and could force a corporation to be held to these agreed-upon minimum standards.[110]

The above approach resonates with the "soft approach" to implementation of the right to disconnect favoured by European organizations.[111] However, ascertaining what is "acceptable" and "non-acceptable" communication may be difficult and making such distinction may be potentially defeatist as employees may still be obliged to receive and act upon "acceptable" communication. In contrast, Katsabian contemplates a combined approach comprising of both mandatory, unchangeable, legally binding arrangements and default arrangements that can be altered following negotiation between the employer and employee representatives.[112] The complexity of applying this approach in practice, particularly in the context of continuous dialogue between employer and employee representatives, is rightly acknowledged by Katsabian.[113]

Applying the above contributions to the development of a useful "right to disconnect" framework implies a number of things with respect to Section 21.1.1 of the ESA. For example, regulations made pursuant to the ESA can require employers to include in such policies conditions under which an employee is free to disconnect from work. Such conditions can be connected with existing work times and rest provisions. Regulations may also be used to clarify categories of employees exempted or included under Section 21.1.1. Allowance for variations regarding timing of the exercise of the right to disconnect, provided such variations do not violate employment standards legislation may also be included in the regulations. Additionally, statutory provisions protecting the employee from discriminatory action for disconnecting from work in accordance

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109 Katie Dakus, "From Ringing to Impinging: The Intrusion of Technology into the Employment Relationship" (2020) 25 Appeal 27 at 39.

110 *Ibid* at 40–41.

111 Among other things, the soft approach entails a complaints procedure relating to breaches of right to disconnect, procedures for monitoring connection and protection from reprisal for exercising a right not to respond to messages outside working hours.

112 Katsabian, *supra* note 12 at 404.

113 *Ibid* at 419.

with policies issued pursuant to Section 21.1.1 must also be included in the Act.[114]

An alternative for both federal and provincial lawmakers is the introduction of separate legislation or amendments to existing legislation explicitly affirming the right to disconnect, in which case employees are protected from discriminatory action for asserting their right to disconnect. This is preferable to an express prohibition on employer-employee communication after work hours, as is the case in Portugal. As rightly noted by Thomas Klebe and Manfred Weiss,

> There is no doubt that constant availability must be opposed. But switching off the server at 6 p.m.—in other words, with no access to e-mails after this time—is not necessarily the best solution. This should happen only if the employees want it; otherwise, they will feel that they do not have a say.[115]

Thus, employees contacted after working hours would be under no obligation to respond and are at liberty to disconnect from work-related devices without any fear of repercussion. This approach is similar to the following contemplations of the Ontario Labour Relations Board in a case dealing with the application of Section 18 of the ESA:

> I agree that the subject matter of the employment standard in section 18 is hours free from work, but I am of the view that it is better characterized as hours free from which the employer can require the employee to work. I simply do not accept that the ESA should be construed as denying employees the ability to work overtime hours of their own free will when they wish to do so. There is nothing precluding an employee who wishes to earn extra pay from finding a second job and working eight more hours at straight time rates. It defies logic to conclude that the intention of section 18 of the ESA is to deny that employee the ability to stay at the same workplace and work those hours at overtime rates when that is what the employee wishes to do.[116]

By establishing the existence of the right to disconnect and leaving the modalities of its implementation to the dynamics of the employer-employee relationship (or collective agreements for unionized employees), the freedom of good employment relationships is preserved and the negative influence of exploitative employment relationships is limited.

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[114] Section 74 of the *ESA* currently protects employees from reprisal for a number of actions including an exercise or attempt to exercise a right under the *ESA*. See *ESA*, *supra* note 7, s 74.

[115] Thomas Klebe & Manfred Weiss, "Workers' Participation 4.0—Digital and Global?" (2019) 40:2 Comp Labor L & Pol'y J 263 at 273.

[116] *Durham (Regional Municipality) v CUPE, Local 132*, 2016 CanLII 8803 at para 21 (ONLA).

Employment standards legislation prescribes minimum standards and parties in the employment relationship are not precluded by legislation from negotiating better terms, either through collective bargaining or contractual arrangements.

Existing provisions can also be amended to implicitly safeguard the right to disconnect. For instance, a definition of "work" can be included (or expanded in cases where a definition exists) in employment standards legislation to cover situations such as monitoring or responding to e-mails and other work-related activity contemplated under the definition of disconnecting from work. This ensures that existing provisions relating to work or the performance of work can be applied to employees without employers having to deal with a "right to disconnect". The expanded definition may also be restricted to working time provisions under employment standards legislation.

7. Contemplating a Right to Disconnect Under Occupational Health and Safety Laws?

Given the connection between disconnecting from work and the physical and mental well-being of workers, there is also the possibility of including the right to disconnect under occupational health and safety (OHS) legislation. Lerouge and Pons share this perspective with respect to the connection between telework and health:

> Periods of rest and disconnection are necessary for employees. There is a trend in remote working and work-life imbalance in society. There is a feeling that this trend is incompatible with the right to disconnect. However, the right to disconnect is more than necessary in the current technological age. Very few employees manage to disconnect from their work once the day is over. This causes them to find themselves constantly remembering pending tasks, thinking about the next day's tasks, etc., which generates anxiety and constant stress. If we add to this the continuous connectivity to emails, SMS, instant mobile messages or calls from the employer or the supervisor after working hours, some employees never rest from work. Rest periods must be ensured because, otherwise, employees experience greater psychological and occupational exhaustion.[117]

Employee burnout, a result of chronic workplace stress that has not been successfully managed, has been classified as an occupational phenomenon by the World Health Organization.[118] In a 2021 global survey conducted by Microsoft, 54% of workers reported feeling overworked and 39% feeling

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[117] Lerouge & Pons, *supra* note 25 at 456.

[118] World Health Organization, "Burn-out an 'occupational phenomenon': International Classification of Diseases" (28 May 2019), online: *World Health Organization*

exhausted, mostly due to an increase in the digital intensity of workdays.[119] In another 2021 survey by Mental Health Research Canada, 40% of Canadian workers occupying managerial positions and 53% of healthcare workers—both categories of workers typically excluded from employment standards legislation—indicated feeling burned out at work.[120] Quebec's *Act respecting occupational health and safety* in particular provides workers with a right to working conditions that have proper regard to their health, safety, and physical and mental well-being.[121] Current trends also suggest an increased connection between employers' perspective on disconnection policies and the mental well-being of workers.[122] In commenting on a 2022 report by a right to disconnect advisory committee, Canada's Minister of Labour expressed how the workplace has become the "biggest battleground for mental health."[123]

In many provinces, employers are already required to prepare and implement policies with respect to other aspects of occupational health and safety such as workplace violence or harassment, particularly in worksites where such risk is present.[124] In addition, workers are able to refuse to work where there is a reason to believe their health or safety is in danger.[125] Employers may also be required to develop such policies necessary for the protection of worker's occupational well-being, including in relation to work hours. However, OHS legislation is based on a particular notion of the workplace which does not contemplate the

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<www.who.int/news/item/28-05-2019-burn-out-an-occupational-phenomenon-international-classification-of-diseases> [perma.cc/X7MP-HLXD].

119 See Microsoft, "Work Trend Index Annual Report: The Next Great Disruption is Hybrid Work—Are We Ready?" (22 March 2021), online: *Microsoft* <www.microsoft.com/en-us/worklab/work-trend-index/hybrid-work> [perma.cc/Q8QL-HXTW].

120 "Psychological Health & Safety in Canadian Workplaces" (December 2021) at 20, online (pdf): *Mental Health Research Canada* <https://static1.squarespace.com/static/5f31a311d93d0f2e28aaf04a/t/61e59ce735bb7b247057299d/1642437865230/Long+Form+EN+Final+-+MHRC+PHS+Report.pdf> [perma.cc/28VX-28T2].

121 CQLR c S-2.1, s 9 [*Act respecting occupational health*].

122 See Microsoft, *supra* note 119.

123 Canadian Minister of Labour Seamus O'Regan Jr, quoted in Employment and Social Development Canada, News Release, "Minister O'Regan welcomes report on the right to disconnect" (10 February 2022), online: *Government of Canada* <www.canada.ca/en/employment-social-development/news/2022/02/minister-oregan-welcomes-report-on-the-right-to-disconnect.html> [perma.cc/6VKF-USZ6].

124 See BC Reg 296/97, s 4.28–4.29 (British Columbia); NLR 05/12, s 22.1 & 23 (Newfoundland and Labrador); *Occupational Health and Safety Act*, RSO 1990, c O.1, s 32.0.1–32.0.2 (Ontario) [*Ontario OHSA*]; PEI Reg EC180/87, s 52.2–52.3 (Prince Edward Island).

125 See e.g. *Occupational Health and Safety Act*, SNB 1983, c O-0.2, s 19 (New Brunswick); *Occupational Health and Safety Act*, RSPEI 1988, c O-1.01, s 28 (Prince Edward Island); *Act respecting occupational health*, *supra* note 121, s 12 (Quebec).

activities that are most applicable to the right to disconnect. Very few Canadian jurisdictions discuss psychological or mental health under occupational health and safety legislation in the context most relevant to employee connectivity. In most cases, the right of refusal under OHS legislation is limited to "dangerous" work and linked to a physical work environment or machinery.[126] Mental or psychological health as a distinct category of workplace safety under OHS legislation is in its infancy and is unable to sustain the inclusion of a separate right to disconnect as is currently conceptualized. Quebec's OHS legislation nevertheless holds a degree of promise for the future in this respect.

8. Conclusion: A Peek Into the Future

As it stands, Ontario remains the only jurisdiction with specific provisions relating to the right to disconnect. In December 2021, however, Quebec's Solidaire party introduced QS Bill 799 requiring employers to develop a policy regarding the right to disconnect.[127] Unlike Section 21.1.1 of the ESA, Bill 799 requires that such policy must determine the weekly periods where employees are entitled to disconnect from all work-related communications.[128] For companies with 100 or more employees, a committee must be established by the employer to develop the disconnection policy with half of the committee membership being employee representatives.[129] Policies developd in organizations with fewer than 100 employees must be approved and validated by Quebec's Labour Commission.[130] Employers that fail to develop a right-to-disconnect policy are guilty of an offence and are liable to a fine.[131] Majority of the remaining Canadian jurisdictions have not made any significant moves towards legislating the right to disconnect.

Nationally, in December 2019, the Canadian government issued a mandate to the Ministry of Labour to improve labour protections in the *Canada Labour Code*, including the development of new provisions that provided federally regulated workers with the right to disconnect. Pursuant to this mandate, a federal right to disconnect advisory committee was established with representatives from federally regulated employers,

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126 For OHS limitations to "dangerous" work, see e.g. BC Reg 296/97, *supra* note 124, s 4.28–4.29; NLR 05/12, *supra* note 124, s 22.1 & 23, *Ontario OHSA*, *supra* note 124, s 32.0.1–32.0.2; PEI Reg EC180/87, *supra* note 124, s 52.2–52.3. For OHS limitations linked to a physical work environment or machinery, see e.g. *Ontario OHSA*, *supra* note 124, s 43(3).

127 Bill 799, *Right-to-Disconnect Act*, 2nd Sess, 42nd Leg, Quebec, 2021.

128 *Ibid*, s 2(1).

129 *Ibid*, s 6.

130 *Ibid*, s 18.

131 *Ibid*, s 24.

unions and non-governmental organisations.[132] In February 2022, the federal advisory committee issued a report on consultations regarding the right of federally regulated employees to disconnect from work. Under the report, it was jointly agreed by unions, non-governmental organizations and employers that any right to disconnect must be crafted in a way that ensures employers retain the ability to contact workers in emergency situations and communicate critical health and safety information to employees.[133] There was however substantial divergence with regard to the implementation of the right to disconnect. The Canadian government has reportedly welcomed this report and stated its intention to create a plan for a right-to-disconnect policy respecting federally-regulated employees.[134]

The right to disconnect is a relatively novel subject with limited research on its implications in the modern workplace. As a result, it is difficult to determine the impact of the existence of such a right on employment relations in the Canadian workplace. There are nevertheless a number of realities justifying some form of legislative or administrative response. First, conventional notions of the workplace and work times have been significantly disrupted by technology, with the result being a blurring of the lines between employees' work and personal lives. Second, while technological advancements have enhanced flexible work arrangements and employee autonomy, a significant portion of the Canadian workforce struggle to disconnect from work and sustain a healthy work-life balance. Third, existing legislative provisions relating to work schedules and rest breaks are inadequate in responding to the challenges created by technological advancement. These realities imply that there is a place for administrative regulation of employee connectivity to the workplace, particularly beyond regular work hours. This article has examined Ontario's statutory response in this regard, comparing it to legislative responses in other jurisdictions with more advanced frameworks. The policy implications of establishing a statutory right to disconnect have also been considered. As it stands, complexities relating to definition, implementation and enforcement of a right to disconnect makes the effectiveness of right to disconnect laws highly doubtful. While Section 21.1.1 of the ESA falls far short of creating any real "rights" or protections, the European experience has shown that even more precise and specific statutory provisions on the subject can still encounter these complexities. A creative, inclusive, multi-sectoral framework is needed to ensure that broader goals relating to employee well-being through the

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132 See Government of Canada, "Final Report of the Right to Disconnect", *supra* note 80 at 7.

133 *Ibid* at 8.

134 *Ibid*.

right to disconnect can be effectively realized. It is important to consider Section 21.1.1 of the ESA and similar laws in the context of a much bigger picture; raising important questions about the organization of modern work alongside expectations regarding the work society values and the time it ought to consume.[135]

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[135] Ope Akanbi, "The right to disconnect: Why legislation doesn't address the real problems with work" (15 November 2021), online: *The Conversation* <www.theconversation.com/the-right-to-disconnect-why-legislation-doesnt-address-the-real-problems-with-work-170941> [perma.cc/NNU9-JMR8].