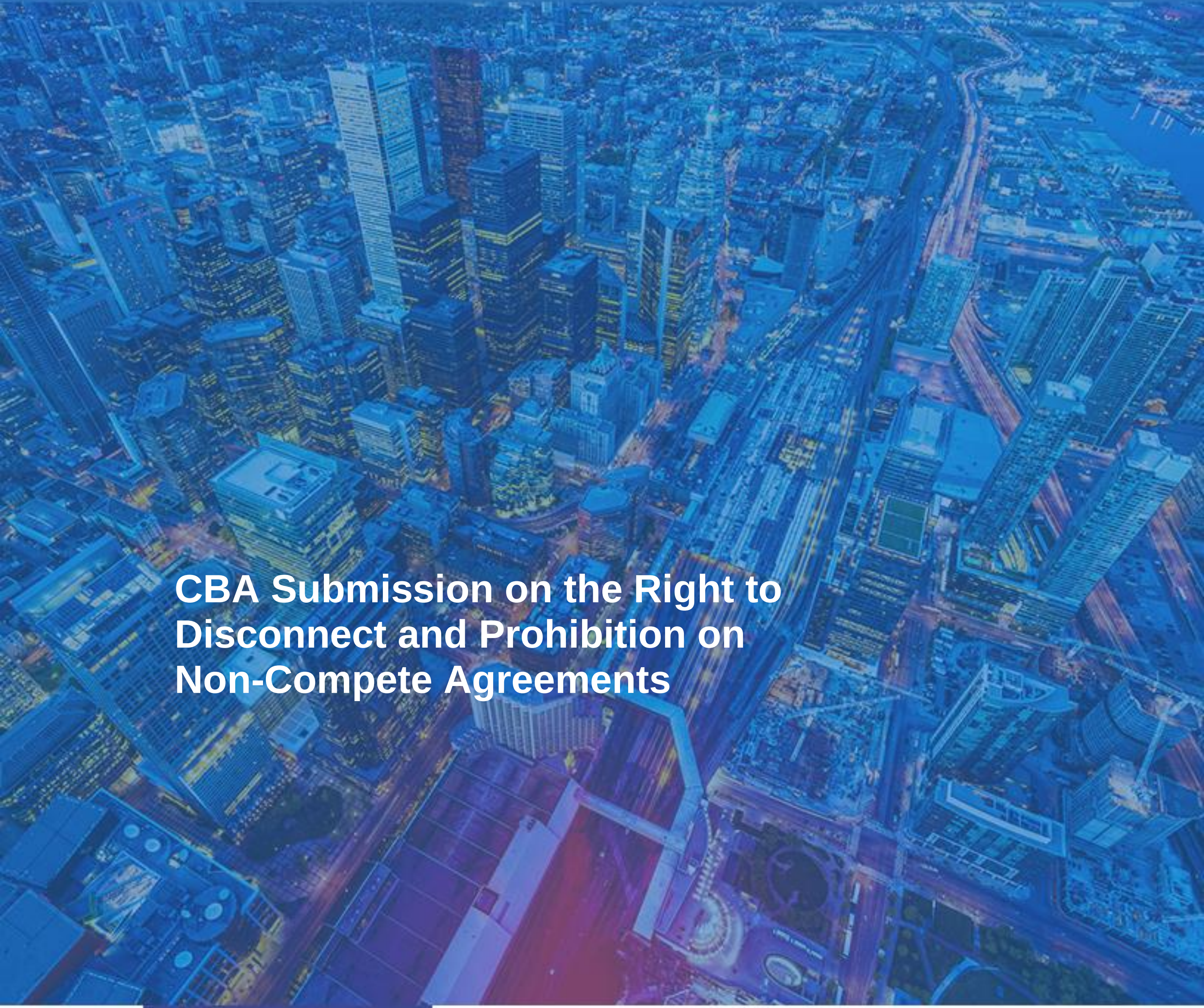

# CBA Submission on the Right to Disconnect and Prohibition on Non-Compete Agreements

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Standing Committee on Social Policy

ASSOCIATION DES BANQUIERS CANADIENS

CANADIAN BANKERS ASSOCIATION

## I. Introduction

The Canadian Bankers Association (CBA) would like to thank the Ontario Government for providing us with the opportunity to comment on the proposed legislation, *Bill 27, An Act to amend various statutes with respect to employment and labour and other matters* (Bill 27). Our comments below focus on the proposed amendments to the *Employment Standards Act, 2000* (the Act), in connection with employees' right to disconnect as well as the prohibition on non-compete agreements.

In relation to the former, we believe that a legislative requirement for a right to disconnect policy is unnecessary given the effectiveness of existing protections and arrangements, and it may lead to unintended consequences that negatively impact employees' and customers. However, if the requirement proposed under Bill 27 were to be brought into force, we suggest the definition of "disconnecting from work" be amended to exempt essential customer services and the policy be highly flexible (e.g., form, nature and content) to help mitigate the unintended consequences.

Similarly, we do not support the proposed prohibition on non-compete agreements. Existing requirements and safeguards established under caselaw guide the reasonable use of these agreements, and it is unclear that there is an issue that requires a legislative solution. Further, there may be unintended consequences from broadly eliminating the use of these agreements. They often are used to help to protect businesses' confidential, proprietary information, which if released after an employment relationship ends, would likely impact a business's efficiency, competitiveness and innovative capacity.

If Bill 27's proposed prohibition is passed, we suggest it should be amended to exclude senior roles where employees have access to proprietary, confidential information. While it would be preferable to not introduce the proposed prohibition, this approach may help to mitigate the unintended consequences it may cause as currently drafted.

## II. Comments on Proposed Right to Disconnect Legislation

### a) The Importance of Flexible Work Arrangements

The CBA and its members do not believe that a legislative requirement to maintain a right to disconnect policy is required in Ontario, and it may impact existing flexible work arrangements. Our members understand the importance of work life balance. Existing protections under the Act related to hours of work and overtime provide strong protections for employees. Further, our members and their provincially regulated subsidiaries are leaders in developing flexible arrangements with their employees and maintain longstanding, robust flexible work arrangement policies. These policies have developed even further as a result of the pandemic. As physical workplaces are no longer seen as indispensable to the employment relationship and the challenges employees face are diverse, banks provincially regulated subsidiaries' policies are evolving to take into account employees' other family responsibilities such as childcare, home schooling, etc. In these flexible work arrangements, electronic devices are not burdensome. Instead, they provide employees with the flexibility to perform their work during hours that are convenient for them and take full advantage of flexible work arrangements. We are concerned that limitations related to e-communications and the performance of work within pre-defined "work hours" may undermine these gains that have been made around flexible work arrangements, particularly as there are already strong protections for employees under the Act.

While we believe that a formal policy is not required, if Bill 27's proposed legislative requirement is passed in relation to the right to disconnect, we suggest that there should be suitable flexibility around the form, nature and content of the policy to allow for the continuation of existing employment relationships. As we have suggested, these relationships permit the flexibility that employees want and need. Consequently, we would not want to see them disrupted by new legislative requirements.

### b) The Importance of Preserving Operations

We are also concerned that a legislative requirement to maintain a formal disconnecting from work policy may unintentionally impact consumers in Ontario. For example, during the public health emergency (i.e., the COVID-19 pandemic), customers of banks' provincially regulated subsidiaries have required fast access to their financial services and often need expedient solutions to their issues. We are concerned that a right to disconnect policy, particularly one that is prescriptive, may undermine the ability of banks' provincially regulated subsidiaries to respond to emergencies and provide around the clock operations that address customers' needs and protect them from threats. In particular, these essential operations are related to customer services, cyber security and financial fraud. To ensure customers are not impacted by a disruption to these essential services, we suggest that a requirement to maintain a right to disconnect policy, particularly one that is perspective, should be avoided.

If Bill 27's proposed approach to a disconnect from work policy is passed, we suggest that the proposed definition of "disconnecting from work" (see section 21.1.1) should be amended to preserve essential customer services. More specifically, we suggest the definition should be narrowed to make it clear that essential customer services are exempt from requirements in relation to disconnecting from work. This approach may further help to ensure that Ontario consumers receive the services they need and want during emergencies, such as the pandemic.

In addition to the foregoing amendment, if Bill 27's proposed approach to a disconnect from work policy is passed, we also suggest that the from, nature and contents of the proposed policy should be highly flexible as a further protection to essential customer services. Allowing for this kind of flexibility will also help to preserve businesses' relationships with their customers. These relationships have deepened through the pandemic, and it is important they are not disrupted.

### c) Technological implications of implementing a right to disconnect policy

We are concerned that imposing a right to disconnect policy will require significant system upgrades and technological builds. For example, a right to disconnect policy could entail tracking, reporting and blocking of employee communications to ensure that employees are not connected during the disconnect period. In addition, such disconnect periods would need to be tailored to individual employee's circumstances since broad-based disconnect periods would not be feasible for the reasons we have noted in this submission. In that regard, it would be technologically challenging to track when employees are using work-related technology and to block their ability to receive or send messages during the disconnect period, which would also be inconsistent with employees' flexible work arrangements. Accordingly, if a right to disconnect policy is required, it is essential for the policy to not alter current technological builds to impose employee tracking, reporting and blocking of communications.

## III. Comments on Prohibition on Non-Compete Agreements

We are strongly of the view that prohibiting the use of non-compete agreements would have negative unintended consequences for provincially regulated employers, such as certain bank subsidiaries. For example, higher level employees may have knowledge of sensitive competitive information that should be protected for the legitimate business purposes of their employer. As a result, prohibiting the use of non-compete agreements may have a significant impact on business operations across organizations, as employers' intellectual property and proprietary rights may be less protected through narrower clauses. These potential outcomes could unintentionally disrupt competition and innovation in the Ontario marketplace.

In addition, we note that the caselaw regarding disputes involving non-compete agreements is well-developed, providing existing guardrails for the reasonable use of non-compete agreements in specified circumstances. As a result, the use of these agreements among banks' provincial subsidiaries is limited to narrow groups of certain employees (i.e., senior roles where employees have access to confidential, proprietary information). They are not used broadly. Considering the limited manner in which non-compete agreements are currently permitted and used, it is unclear that a legislative solution is required, particularly as a legislative restriction could significantly impact an organization's operational efficiency, competitiveness and ability to innovate.

It is also important to note that prohibiting the use of non-compete agreements would put Ontario out of step with other jurisdictions. This potential misalignment may unintendingly impact the labour market in Ontario. For example, some businesses may need to adjust their operations and staffing practices in light of this prohibition and its impact on operational efficiency, competitiveness and innovative capacity.

For the foregoing reasons, we are of the view that introducing a strict, comprehensive prohibition on non-compete agreements is not required. However, if the proposed prohibition is adopted, we suggest that it be amended to exclude certain senior roles where employees in certain business areas (such as wealth businesses) are equipped with confidential, proprietary information which should be protected. This approach may help to mitigate the unintended consequences we have noted in our submission.

## IV. Conclusion

Thank you for considering our comments on Bill 27 and the proposed changes to the *Employment Standards Act, 2000,* reflecting employees' right to disconnect and the prohibition on non-compete agreements. The CBA remains available to answer any questions regarding the content of our submission.