Bill 27, Working for Workers Act, 2021

Written Submissions to the Standing Committee on Social Policy

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About

Fleet Street Law is an incubator for innovation and access to justice in the legal sector operating in the Greater Toronto Area since 2011. It provides strategic support, advocacy, and law reform on areas of public interest and of importance to the Ontario bar.

Omar Ha-Redeye is a lawyer operating in the Greater Toronto Area. He holds a JD from Western University, and an LLM from Osgoode Hall. He has received numerous awards for his efforts in law reform and advocacy on behalf of historically marginalized and low-income populations, including the Queen Elizabeth II Diamond Jubilee Medal, and the OBA Foundation Award.

Robert Richler is a lawyer and human resources advisor at Bernardi Human Resource Law LLP who has obtained a wide range of experience as an employment and labour lawyer, both as in-house counsel and in private practice. His time as in-house counsel coupled with his MBA has given Robert great insight into the needs of organizations. He is attuned to the types of considerations organizations must weigh when making decisions regarding their employees. Robert works with both unionized and non-unionized employers to find innovative ways to resolve conflicts and legal challenges in a cost-effective manner that is sensitive to the business needs of an organization.

Oksana Romanov is second-year law student at the Lincoln Alexander School of Law. She is passionate about fostering inclusive communities, effecting social change and advocating for human rights of persons with disabilities in order to remove attitudinal and environmental barriers to their full participation is society. Prior to starting law school, Oksana worked in the non-profit sector creating opportunities for inclusive recreation and sport while managing a portfolio of day and overnight camps as well as after-school programs for children, youth and young adults with diverse abilities.

Joel Prajs is a third-year law student at Osgoode Hall, and assisted with the research for Bill 13. He holds a Bachelor of Arts form York University, and a Bachelor of Arts, business Administration from the Interdisciplinary Center in Herzliya, Israel. He has volunteered for Covid Relief with United Jewish Appeal, Ve'ahavta to support the homeless, and the Yorkville Jewish Center to organize cultural and religious activities. Joel assisted with the research on this submission.

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Part 1 - Overview

1. Bill 27 makes a number of amendments in various statutes related to the labour and employment law regimes in Ontario. These submissions will focus on Schedule 2, which makes several amendments to the *Employment Standards Act, 2000*.[1]
2. Schedule 2 of Bill 27 proposes a new Part VII.0.1, requiring a written policy for disconnecting from work for all employers that employ 25 or more employees. It also proposes a new Part XV.1 to the Act, prohibiting employers from entering into employment contracts with non-compete clauses.
3. No position is taken on the remainder of Schedule 2, or Bill 27 generally.

Part 2 – Right to Disconnect

4. The COVID-19 fostered radical transformation as to how work is done across Ontario, in nearly every industry. Public health protocols required most workers, especially in the office context, to work primarily or exclusive from home.
5. This transition to remote work also necessitated communication with co-workers, managers, clients, employees, vendors and others through digital technology, even where this communication may have previously occurred directly and in-person. The volume of digital communications, and especially via e-mail, has also increased exponentially, with the potential for these communications to easily spill over into the personal lives of employees.

[1] SO 2000, c 41.

6. The proposed Part VII.0.1 introduces ss. 21.1.1, 21.1.2, requiring a written policy on disconnecting from work for work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, for all employers with 25 employees or more.
7. Specific information may be required in regulations, as enabled by s. 21.1.2(4), and could include more realistic response times for e-mails, and out-of-office notifications for hours when employees are not available.[2] These types of details may be essential for these types of policies to be effective.[3]
8. A "right to disconnect" does not currently exist anywhere in Canada. Instead, this idea emerges from other trends worldwide, especially in Europe.[4] However, there is academic support for this initiative that can also be found in Canada.
9. Some of the policy-based reasons for instituting a right to disconnect include that cloud-based and remote work environments allow some employers to skirt overtime regulations, which is a central labour rights issue.[5] This, in turn, has the potential to create adverse health effects for employees.[6]

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[2] Government of Ontario, "Ontario Creating a Better Future for Workers," Oct. 25, 2021, available at: <https://news.ontario.ca/en/release/1001033/ontario-creating-a-better-future-for-workers>.
[3] 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, available at: <https://lawjournal.mcgill.ca/article/its-the-end-of-working-time-as-we-know-it-new-challenges-to-the-concept-of-working-time-in-the-digital-reality/>.
[4] For a more comprehensive overview of these international trends, see: Omar Ha-Redeye, "Could Capping Billables Force Work-Life Balance?," Slaw, Nov. 7, 2021, available at: <https://www.slaw.ca/2021/11/07/could-capping-billables-force-work-life-balance/>; Yosie Saint-Cyr, "Employer and Employee Disagree About Right to Disconnect," Slaw, March 7, 2019, available at: <http://www.slaw.ca/2019/03/07/employer-and-employee-disagree-about-right-to-disconnect/>.
[5] Opeyemi Akanbi, "Policing Work Boundaries on the Cloud," The Yale Law Journal Forum, Jan. 11, 2018, at 639-640, available at: <https://www.yalelawjournal.org/pdf/Akanbi_xvahte12.pdf>.
[6] Helene Jorgensen and Lonnie Golden, "Time After Time: Mandatory Overtime in the U.S. Economy," Economic Policy Institute, Jan. 1, 2002, available at: <https://www.epi.org/publication/briefingpapers_bp120/>.

10. Katie Dukas explores the regulation of after-hours communications, looking at options that include assigning automatic reimbursement for after-hours use of technology, modifying on-call laws, and implementing a right to disconnect, and concludes,[7]

> While the right to disconnect would dictate when and how an employee can be contacted, on-call laws would reinforce that any such contact must be compensable. Regardless of what approach Canada adopts, safeguards must be implemented to ensure that any work performed is given adequate compensation, including requisite overtime pay.

11. While some critics of Bill 27 have suggested that this right to disconnect will simply be disregard by employers,[8] this does not fully explain its use in benefitting employees, and providing them additional protections. For example, on termination of an employee, the existence of a right to disconnect policy and the lack of its adherence would itself actionable and provide an additional basis for damages.

<u>Need for Exemptions</u>

12. Numerous exemptions exist under the ESA, for a variety of different sections including overtime, especially as it relates to specific professions. Specifically, Parts VII, VII.1, VIII, IX, X and XI do not apply to practitioners in certain professions,

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[7] Katie Dakus, "From Ringing to Impinging: The Intrusion of Technology Into the Employment Relationship," (2020:25) *Appeal: Review of Current Law and Law Reform* 27 at 41.
[8] CBC Radio, "Right-to-disconnect legislation welcome, but experts say workers won't benefit equally," Oct. 31, 2021, available at: <https://www.cbc.ca/radio/checkup/do-you-have-the-right-to-disconnect-after-work-1.6230017/right-to-disconnect-legislation-welcome-but-experts-say-workers-won-t-benefit-equally-1.6231692>

including law.[9] This submission suggests that the proposed Part VII.0.1 also be extended to these professions, and specifically to the practice of law.

13. Lawyers are regulated in Ontario by the Law Society of Ontario (LSO), which sets the standards of practice, competence, and discipline for the industry.

14. Under these *Rules*, a lawyer is expected to communicate with all parties with "reasonable promptness" (r. 7.2-5),[10] and reply to the communications from the Law Society "promptly" (r. 7.1-1).[11] It would make sense that a prudent lawyer would govern her behaviour accordingly with the view of the circumstances of each particular case and the area(s) of law that they are practising.

15. Interpreting the right to disconnect provisions of s. 21.1.1 in this context given rise to a number of professionalism issues for lawyers. Applying it in this way could interfere with addressing urgent issues in criminal, family or immigration law, or even emergency evictions. After hours e-mail communications may be necessary the night prior to a motion or discovery, or throughout a trial. In these circumstances, 'reasonable promptness' may mean an imperative to respond 'immediately,' and any hour of day or night. This self-governance model may work for a sole practitioner or small-sized law firm.

16. While lawyers should manage client expectations and set boundaries for communications, there are many contexts within the practice of law that do not practically allow for a right to disconnect. For this reason, the regulations that

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[9] *Exemptions, Special Rules and Establishment of Minimum Wage*, O Reg 285/01, s. 2.

[10] Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2009, section 7.2, rule 7.2-5:

> A lawyer shall answer with reasonable promptness all professional letters and communications from other legal practitioners that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

[11] Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2014, section 7.1, rule 7.1-1:

> A lawyer shall reply promptly and completely to any communication from the Law Society in which a response is requested.

exempt lawyers from other aspects of the *ESA* should be extended to Part VII.0.1 as well.

Part 3 – Non-Competition Clauses

Restrictive Covenants Generally

17. Non-competition clauses, which can comprise part of the employment contract or employment relationship, are typically referred to as an example of a "restrictive covenant" in common law. These covenants reflect a balance in the employment relationship, between potentially legitimate business interests on one hand, and the need for the employee to find alternative employment on the other.
18. The proposed Part XV.1 would void any non-competition agreement under s. 67.2 of the Act, subject to exceptions that include the sale of a business.
19. Restrictive covenants are routinely "read down" by courts, meaning that they are limited, overridden, or struck entirely. The policy rationale for this is that restrictive covenants are considered a restraint on trade, with the potential to inhibit the vocational mobility of employees, creating adverse economic impacts, and are therefore contrary to public policy.
20. Courts frequently substitute or disallow a non-competition clause on these grounds, specifically because in most contexts a non-solicitation clause would be sufficient to address any legitimate business interests.
21. Non-competition clauses are therefore typically deemed to be overly restrictive on employees, even if they willingly agreed to such terms on entering the business relationship. This unusual type of intervention by the courts reflects the unique

understanding of the inherent power imbalances in the employment relationship, and the limited ability of an employee to refuse such terms at the time of contract.[12]

22. The presence of a non-competition clause can even result in employers being liable for a longer notice period in common law.[13] These clauses therefore reflect a hidden expense even to employers which typically is not appreciated or experienced at the time of contract, or the time of termination. Statutory restrictions on their use therefore reflect some symmetry with the common in Ontario.

<u>Amendments to ESA</u>

23. The proposed Part XV.1 provides greater certainty as to how non-competition clauses will be dealt with, will potentially reduce the conflict and litigation between employers and employees, and ultimately may result in a reduction of the burden on the court system generally.

24. One of the leadings cases in Ontario on the subject is *Lyons v Multari*,[14] where the court found that a non-competition clause was unenforceable, especially where a non-solicitation clause would suffice to protect proprietary interests of the employer. As MacPherson J.A. states in the analysis section of the case at para 19:

> **The general rule in most common law jurisdictions is that non-competition clauses in employment contracts are void.** This proposition, and the rationale for it, were succinctly stated by Lord Macnaghten in the leading English case,

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[12] Slaight Communications Inc. v Davidson, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; Wallace v United Grain Growers Ltd, 1997 CanLII 332 (SCC), [1997] SCJ No 94; Matthews v Ocean Nutrition Canada Ltd, 2020 SCC 26 (CanLII), [2020] SCJ No 26.

[13] *Dimmer v. MMV Financial Inc.*, 2012 ONSC 7257 (CanLII) at para 99; *Groves v. UTS Consultants Inc.*, 2019 ONSC 5605 (CanLII) at paras 75-104. See also, *Munoz v. Sierra Systems Group Inc.*, 2015 BCSC 269 (CanLII) at para 95.

[14] 2000 CanLII 16851 (ON CA), 50 O.R. (3d) 526, [2000] O.J. No. 3462 ["*Lyons*"].

Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Ltd., [1894] A.C. 535 at 565 (H.L.):

> The public have an interest in every person carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.

[Emphasis added.]

25. MacPherson J.A. also noted at paras 20-23 that this general rule does have some exceptions, specifically where the restraint on trade is reasonable in the interests of the contracting parties, and reasonable in the public interest. He cited the Supreme Court of Canada decision in *Elsley v J.G. Collins Insurance Agencies Ltd.*[15] to support this proposition.[16]

26. Justice Dickson explained the policy rationale behind the public interest in *Elsey* at p. 923 as follows:

> The principles to be applied in considering restrictive covenants of employment are well-established ... **A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed.** There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power. [Emphasis added.]

27. Examples where courts have recently upheld non-competition clauses includes in *Devon Poole v. City Wide Towing and Recovery Service Ltd.*,[17] where the Alberta

[15] [1978] 2 S.C.R. 916, 3 B.L.R. 183, 36 C.P.R. (2d) 65, 83 D.L.R. (3d) 1, 20 N.R. 1 ["*Elsley*"]. See also, *Canadian Industrial Distributors Inc. v Dargue*, (1994), 20 O.R. (3d) 574, 7 C.C.E.L. (2d) 60, 58 C.P.R. (3d) 22 (Gen. Div.); *Gordon v. Ferguson*, (1961), 30 D.L.R. (2d) 420 (N.S.S.C.); *Simoni v. Sugarman*, [2000] N.J. No. 28 (T.D.).

[16] See also SCC in *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 (CanLII), [2009] 1 SCR 157 at 17-19. The Court has differentiated restrictive covenants in the employment context from those found in the context of a contract for the sale of a business; *Payette v. Guay inc.*, 2013 SCC 45 (CanLII), [2013] 3 SCR 95.

[17] *City Wide Towing and Recovery Service Ltd v Poole*, 2020 ABCA 305 (CanLII); 2020 ABCA 400 (CanLII); 2021 CanLII 13260 (leave to appeal to SCC ref'd).

Court of Appeal reviewed an interim injunction enforcing a non-competition clause, and found it to be overly broad in geographic scope in enforcing it anywhere in Canada. Instead, the court restricted this clause to the Province of Alberta alone. The facts involved the sale of a business, where the owner entered into a non-competition agreement with the purchaser.

28. Restrictions on geographic scope duration for non-competition clauses can also be found in Ontario,[18] especially since non-solicitation clauses typically suffice.[19] These clauses have also been struck or modified as well as for ambiguity, can also be found in the common law in Ontario.[20]

29. Bill 27 mirrors these contemporaneous trends found in the common law, to impose a complete restriction on non-competition clauses, save for the singular exception of the sale of a business. This measure may be warranted by the unique circumstances in Ontario at this time, which may require legislative intervention to promote the transfer of businesses that have struggled during the pandemic, and to otherwise promote greater workforce mobility outside of this singular exception.

30. Employers concerned about their legitimate business interests, and who would otherwise want to rely on a non-competition clause, should consider employing a reasonably construed non-solicitation clause instead.

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[18] *H.L. Staebler Company Limited v. Allan*, 2008 ONCA 576 (CanLII).
[19] *Ims Health Canada Inc. v Harbin*, 2014 ONSC 4350 (CanLII) at para 118; *Kohler Canada Co. v. Porter*, 2002 CanLII 49614 (ON SC) at paras 48, 67; *Craig v. CEO Global Network Inc.*, 2019 ONSC 3589 (CanLII) at para 53; *Reservoir Group Partnership v. 1304613 Ontario Ltd.*, 2007 CanLII 921 (ON SC).
[20] *Veolia ES Industrial Services Inc. v. Brulé*, 2012 ONCA 173 (CanLII); *Mandeville Holdings Inc. v. Santucci*, 2021 ONSC 4321 (CanLII)

Part IV - Conclusions

31. These submissions focus on two narrow changes to the *ESA*, regarding a right to disconnect, and a general prohibition on non-competition clauses.
32. These changes are directly informed and address the emerging needs of businesses and workplaces in Ontario, and may assist with the economic recovery following the pandemic.
33. Exemptions to some of these changes may be found in regulations to the ESA, and will ensure that in some specific contexts these new requirements are not imposed universally.