ARTICLE

FROM RINGING TO IMPINGING: THE INTRUSION OF TECHNOLOGY INTO THE EMPLOYMENT RELATIONSHIP

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ABSTRACT

Technology has fundamentally altered how individuals contact and connect with each other. This has troubling ramifications for the employment sector, as employees may receive electronic communications from their employer outside of their scheduled work hours. Employees may feel various professional or societal pressures to answer these communications, resulting in the employee engaging in unpaid labour. This paper asks if Canada should seek to regulate after-hours communications between employers and employees by conducting an international analysis of approaches taken by other jurisdictions. Three potential methods of reform are examined, and a recommendation is made for Canada to implement a "right to disconnect." The right to disconnect means that employees cannot be penalized for ignoring communications received after-hours. The right to disconnect could be legislated through the *Employment Standards Act* and the *Canada Labour Code* to provide additional protections to employees.

INTRODUCTION

Technology has fundamentally altered how society functions by connecting individuals regardless of time or place. As new technologies, such as smartphones and social media, become more prevalent and essential for modern life, concerns arise that individuals are becoming increasingly incapable of disconnecting from them, and therefore from each other. This constant level of connectivity is especially troubling with regard to the employer-employee relationship, as it distorts the separation of professional work hours and personal time.[1] If an employer sends an e-mail or a text message to an employee after hours, is this time compensable? If not, should it be compensable? Canada has been slow to answer these questions, especially when compared to various other jurisdictions. For example, France has enacted legislation to limit an employer's ability to contact employees outside of working hours,[2] and American courts have witnessed a rise in lawsuits in which workers claim additional wages for time spent communicating outside of work hours.[3]

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1 Openyemi Akanbi, "Policing Work Boundaries on the Cloud" (2018) 127 Yale LJ 637 at 638.

2 Tanya Marcum, Elizabeth A Cameron & Luke Versweyveld, "Never off the Clock: The Legal Implications of Employees' After Hours Work" (2018) 69 Lab LJ 73 at 78.

3 *Ibid* at 74.

While Canadians were recently asked to complete a national government survey[4] on this topic, there has been no indication to date as to whether the government intends to further pursue this avenue.

This paper begins by briefly examining the development of protective legislation in the British Columbia *Employment Standards Act ("ESA")*[5] and the *Canada Labour Code ("CLC")*,[6] with a specific focus on overtime and on-call provisions. Next, this paper examines the rising prevalence and pervasiveness of smart technology in Canadian society and how this technology erodes boundaries between an employee's work life and private life. This eroding boundary is discussed through the evaluation of international jurisprudence, including by examining how American court systems are handling the intrusion of technology into the employment sphere. This paper argues that Canada's response to the increasing use of technology to contact employees outside of working hours has been inadequate and that the existing legislative regime is insufficient to regulate the use of technology outside the workplace. This paper concludes with proposals for three methods of reform that would provide necessary protections to vulnerable employees who fall within the scope of the *ESA* or *CLC*.

I. THE *EMPLOYMENT STANDARDS ACT* AND THE *CANADA LABOUR CODE*

The inherent power imbalance between employers and employees raises the concern that employees may not be adequately compensated for their labour.[7] Therefore, legislation has been enacted in Canada over the past century to protect workers' rights. Specifically, these statutes have created minimum standards that employers must follow when scheduling employees for shifts. The *Canada Labour Code* governs federal workers, such as employees of banks and railroads, and stipulates that a federal employee's standard work week must not exceed eight hours in a day and 40 hours in a week.[8] If an employer requires an employee to work in excess of these standards, they must pay for each additional hour at a premium wage.[9] This premium wage, known as overtime, must be a minimum of one-and-a-half times the employee's normal wage.[10] Provincial legislation echoes these provisions, and British Columbia's *Employment Standards Act* adds that if an employee exceeds 12 consecutive hours of work, any subsequent hours must be paid at double the normal wage.[11] The *ESA* also outlines rest periods to which an employer must adhere. Each employee must receive 32 consecutive hours free of work each week, and any hours worked in contravention of this section must be paid at an overtime rate.[12] Barring very specific exceptions, these statutes prohibit overtime work from occurring without additional compensation.

The *Employment Standards Act* also dictates how remuneration will occur if an employee is on-call, and notes that this remuneration is subject to the overtime regulations specified

4 Canada, Employment and Social Development Canada, *What We Heard: Modernizing Federal Labour Standards* (30 August 2018) [*What We Heard*] at 10.

5 RSBC 1996, c 113 [*ESA*].

6 RSC 1985, c L-2 [*CLC*].

7 *What We Heard, supra* note 4.

8 *CLC, supra* note 6 at s 169(1)(a).

9 *Ibid*, s 174.

10 *Ibid*.

11 *ESA*, *supra* note 5 at s 35(1). There are many professions that fall outside the purview of the *ESA* and are therefore unentitled to its benefits (e.g., independent contractors) The scope of this paper is limited to those who qualify for the protections within the *ESA* or the *CLC*.

12 *Ibid*, s 36(1)(a)-(b).

above.[13] As per the *ESA*, an employee is deemed on-call if they are required to remain at or close to a specific location designated by the employer, as long as this location is not their personal residence.[14] On-call employees that fall within the Act are considered to be working and, therefore, must be compensated for any time spent on-call, even if they do not perform work during this period.[15] For example, firefighters who must remain at the firehall during their shift are on-call, as are maintenance workers who must remain within a specified radius of their facilities. The rationale, according to the *ESA*, is that on-call employees should be entitled to compensation because they are limited in their activities during the on-call period and are unable to "spend time effectively on their own pursuits."[16] This explains why being on-call at home disqualifies an employee from compensation: the employee is presumed capable of indulging in personal time.[17] As later discussed, some employees have argued that the degree of exertion needed to respond to after-hours texts, calls, and e-mails constitutes being on-call, and that they should be compensated accordingly.[18]

The provisions in the *CLC* and the *ESA* are aimed at protecting workers' rights and ensuring fair compensation for labour, including for overtime and on-call work. Despite the provisions, however, there has been a notable increase in the amount of unpaid overtime work engaged by Canadians since the 1990s.[19] One study suggests that, as of 2009, 1.6 million Canadians averaged 8.4 hours per week of unpaid overtime.[20] Suspected reasons for this unpaid overtime include advertent or inadvertent pressure from the employer and the employees' desire to stay connected.[21] Regardless, the law is clear: an employee must be compensated for any work in accordance with the relevant legislation, irrespective of the employer's intention.[22] If work occurs after an employee's standard eight-hour day or 40-hour week, that work must be treated as overtime work, even if the employer did not intend for this work to occur.[23] The knowledge that at least some employees perform unpaid overtime work raises the question of why an employee would voluntarily perform labour without compensation.

II. THE RISE OF TECHNOLOGY IN THE EMPLOYMENT SPHERE

Canadian literature on the field of technology in the employment sphere is limited, but a consensus exists that a substantial portion of unpaid overtime is due to the influence of modern technology.[24] Technology has fundamentally reshaped society and redefined how individuals interact with one another. Constant connectivity is the new norm, as demonstrated by a recent *Globe and Mail* article, which notes that Canadians self-reported being online for an average of 24.5 hours per week, with millennials exceeding five

13 *Ibid,* s 1(2).
14 *Ibid*.
15 *Ibid*.
16 Akanbi, *supra* note 1 at 643.
17 *Ibid*.
18 Jana M Luttenegger, "Smartphones: Increasing productivity, creating overtime liability" (2010) 36:1 J Corp L 260 at 274.
19 Richard Pereira, "The Costs of Unpaid Overtime Work in Canada" (2009) (Master's Thesis, Athabasca University, 2009) [unpublished].
20 *Ibid*.
21 Marcum et al, *supra* note 2 at 73–74.
22 Kenneth G Dau-Schmidt, "The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law" [2017] U Chicago Legal F 63 at 70.
23 *ESA, supra* note 5, s 35(1).
24 Akanbi, *supra* note 1 at 637–38.

hours per day.[25] Communication platforms, such as smartphones and social media, allow professional work to encroach into the private sphere, whether by after-hours e-mails or texts from employers.[26] Scholars have noted that "employees are constantly connected,"[27] and they suggest this creates "explicit… and implicit… expectations that employees remain constantly connected to their jobs."[28] Employees may feel an unspoken expectation to respond to an after-hours communication, especially if the sender knows it has been received.[29] Additionally, employees may prefer to answer an e-mail during their time off, instead of letting it compound an already busy workday, or they may worry that a lack of response will be viewed as lazy and indicative of their dedication to their work.[30] Regardless of the reason, the statistics regarding after-hours work are startling. For example, half of American employees check their work e-mail on the weekend, and one-third of employees check their work e-mail during their vacation.[31] Across the European Union, one in five employees communicates about work-specific topics with their employer after-hours, and 20 percent of employees are required to respond to work e-mails when they are not on shift.[32] Canadian workers are similar to their international counterparts, as just over half of all Canadians complete additional work from home.[33]

Proponents for the use of modern technology in this fashion argue that it offers unprecedented flexibility when allocating an employee's work hours. An often cited example is the growing percentage of the workforce that telecommutes to work. An employee is deemed to telecommute if they work a portion of their job remotely through technology.[34] For example, an employee who Skypes into a business meeting from their home has telecommuted. The number of employees who telecommute for work has increased fourfold over the past two decades, from nine percent in 1995 to 37 percent in 2016.[35] Purported benefits of telecommuting include the ability to "cut commuting time and costs, reduce energy consumption and traffic congestion, and contribute to work-life balance for those with caregiving responsibilities."[36] Despite these benefits, research suggests that employees who telecommute do not substantially reduce the time spent at their physical workspace. Instead, the majority of workers who telecommute work more than 40 hours per week, which suggests that at least some of the telecommuted hours are

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25 See Aly Thomson, "Concerns raised as report suggests Canadians spending more time online" (last modified 17 May 2018), online: *The Globe and Mail* < www.theglobeandmail.com/news/national/concerns-raised-as-report-suggests-canadians-spending-more-time-online/article34360751> archived at [https://perma.cc/TXB6-7QM3]. This article summarizes a survey conducted by the Media Technology Monitor.

26 Dau-Schmidt, *supra* note 22 at 70.

27 Marcum et al, *supra* note 2 at 74.

28 Justin A Walden, "Integrating Social Media Into the Workplace: A Study of Shifting Technology Use Repertoires" (2016) 60:2 J Broadcasting & Electronic Media 347 at 348.

29 Pereira, *supra* note 19 at 14.

30 Marcum et al, *supra* note 2 at 75–76.

31 *Ibid*.

32 Anna Arlinghaus & Friedhelm Nachreiner, "Health Effects of Supplemental Work from Home in the European Union" (2014) 31:10 Chronobiology Intl 1100 at 1101.

33 Linda Duxbury & Christopher Higgins, "Revisiting Work-Life Issues in Canada: The 2012 National Study on Balancing Work and Caregiving in Canada" (2012), online: <newsroom.carleton.ca/wp-content/files/2012-National-Work-Long-Summary.pdf> at 4 archived at [https://perma.cc/AG8W-E7GE].

34 Employment Standards Act Reform Project Committee, "Consultation Paper on the Employment Standards Act" (June 2018) at 72, online (pdf): *British Columbia Law Institute* < www.bcli.org/wordpress/wp-content/uploads/2018/06/Consultation-Paper_ESA.pdf> archived at [https://perma.cc/6B2Z-FRMJ].

35 Dau-Schmidt, *supra* note 22 at 69.

36 Mary C Noonan & Jennifer L Glass, "The Hard Truth About Telecommuting" (2012) 135 Monthly Lab Rev 38 at 38.

overtime.[37] The implication is that telecommuting does not relocate where an employee conducts their work, but instead increases the overall amount of work that must be completed.[38] The more sobering implication is that telecommuting not only increases an employee's overall workload, but also infiltrates an employee's private life and decreases their leisure time.[39]

Telecommuting serves as a useful illustration of how technology can increase the hours an employee spends working, but care must be taken not to conflate telecommuting with the use of technology after hours. Telecommuting workers are typically considered "on-shift" and, therefore, will be remunerated appropriately for any hours worked from home.[40] Even if these are overtime hours, additional overtime compensation should be granted in accordance with the *CLC* or the *ESA*. This contrasts with the earlier example of a worker who reads and responds to an e-mail after their shift has been completed. Using technology after hours in this manner does not guarantee that the employee's activities will be recompensed, because there is uncertainty as to whether the employee's activities constitute work. If it is considered work, the employee must be compensated as per the relevant legislation. If it is not work, the employee is owed no compensation. While there has been minimal litigation in Canada on this specific topic, American courts have attempted to clarify whether using technology in brief intervals fits within the definition of work.[41] In doing so, they have created both the *de minimis* rule and a two-part test to determine when an employee's activities should be deemed compensable.[42] The next section of this paper discusses the definition of work by reviewing the recently decided 7th Circuit decision of *Allen v City of Chicago* and the limits of the *de minimis* rule.

III. DEFINING WORK AND THE DE MINIMIS RULE

The modern definition of work in the American jurisprudence is articulated by the United States Supreme Court in *Anderson v Mt Clemens Pottery.*[43] Here, the Court held that work occurs if the employee is "required to give up a substantial measure of his time and effort."[44] "Substantial measure," as subsequent cases have dictated, can be determined by analyzing three factors: the degree of administrative difficulty in determining the amount of time worked, the total amount of alleged time worked, and the consistency in which the alleged work was performed.[45] This framework creates a consensus that a claim is most likely to succeed if it is consistent, chronicled work that expends more than a few minutes of effort. If the activity engaged in by the worker does not fit within this framework, it is deemed trivial, or *de minimis*, and not compensable.[46] Application of the *de minimis* rule in the employment context has traditionally focused on the compensability of actions immediately preceding or following an employee's shift while the employee is still at the job location.[47] The rule is designed to assist the judiciary in determining what qualifies as work and is not meant to be applied rigidly. As there is no specific threshold that must be

37 *Ibid*.
38 *Ibid* at 39.
39 Teresa Coelho Moreira, "The Impact of New Technologies in Balancing Private and Family Life with Working Time" (2017) 3:1 Labour & L Issues 2 at 3.
40 Noonan & Glass, *supra* note 36 at 38.
41 Pereira, *supra* note 19 at 6; Duxbury & Higgins, *supra* note 33.
42 Marcum et al, *supra* note 2 at 74.
43 328 US 680 (1946).
44 *Ibid*.
45 Jeffrey Brecher & Eric Magnus, "A Matter of Time: Managing Wage and Hour Risks in a Digitally Connected World" [2017] J Internet L 2 at 5.
46 *Ibid*.
47 *Ibid*.

met, the trier of fact is granted discretion in determining whether work was performed.[48] However, the use of this discretion has resulted in an arguably inconsistent application of what qualifies as trivial.

The inconsistent application of the *de minimis* rule is exemplified in several cases. In *Corbin v Time Warner,* the court held that an employee was not entitled to compensation for the one minute spent loading computer software prior to clocking in each day.[49] Similarly, the court in *Lindow v United States* concluded that arriving seven to eight minutes early to review prior shift logs was not compensable.[50] By contrast, in *Sandifer v United States Steel Corporation*, the United States Supreme Court held that the time spent by employees each day donning their work uniforms was not necessarily *de minimis* activity, even though it took less than three minutes.[51] Justice Scalia, in *Sandifer*, stated that "there is no reason to *disregard* the minute or so [it takes to get changed] than there is to regard the minute or so."[52] The activity was ultimately deemed non-compensable due to the terms of a collective bargaining agreement, but the Court's statement on the *de minimis* aspect highlights the inconsistencies in judicial determinations of whether an activity should be remunerated.[53] There is no "magic" amount of time that an activity must take before it is considered work, analysis of these cases reinforces.

The inconsistencies are concerning when applied to the situation of an employee using technology to work from home because there is no clear guideline for when this activity exceeds the *de minimis* threshold and becomes work. By these standards, how many e-mails must an employee answer before this *de minimis* threshold is exceeded? Is corresponding with an employer via text message over the course of an evening *de minimis*, since each message is quick to send, even though the total duration of the conversation is prolonged? It is concerning that technology may enable an employee to perform non-compensable *de minimis* work. Even though these actions may not take much physical time, they still have the effect of dissociating an employee from their leisure time.[54] The discretion exhibited by the courts could result in employees feeling uncertain as to whether they have a valid case against their employer, and it may reduce the number of allegations brought forward.

A. *Allen v City of Chicago*

The most current decision involving communication technology and after-hours work is *Allen v City of Chicago* ("*Allen*").[55] This United States Court of Appeals for the Seventh Circuit ruling regards the use of smartphone technology to work from home. Fifty-two current and former police officers from the Chicago Police Department alleged that they were not properly compensated for work completed on their department-issued smartphones after hours and that some of the hours were overtime hours.[56] The plaintiffs claimed that the defendants cultivated an environment that discouraged the reporting of overtime work and that the defendants chose not to compensate for hours worked on smartphones, despite having constructive knowledge of the work's occurrence. The defendants rebutted by arguing that they were unaware of any after-hours work completed by the officers and noted that the proper procedure for recording hours was to submit

48 Marcum et al, *supra* note 2 at 77.
49 821 F (3d) 1069 (9th Circ 2016).
50 738 F (2d) 1057 (9th Circ 1984).
51 134 S Ct 870 (7th Circ 2012).
52 *Ibid* at 13.
53 *Ibid*.
54 Luttenegger, *supra* note 18 at 1.
55 Jon Hyman, "About Those Off-the-Clock Emails", Case Comment on *Allen v City of Chicag*o 135 F (3d) 16-1029 (7th Circ 1998).
56 *Allen v City of Chicago*, 135 F (3d) 16-1029 (7th Circ 1998) [*Allen*].

a time sheet to the department. The officers failed to record their off-duty work in this manner, meaning that the department had no way of knowing the work was occurring. Compensation should therefore not be owed, the defendants argued.

The trial court applied a two-part test to determine that the officers' work should not be compensated even though some of it was above the *de minimis* threshold.[57] The first step assessed whether the activity in question was of a *de minimis* nature. If the activity was not *de minimis*, the second step asked whether the employer knew or ought to have known the work was occurring.[58] With regard to the first step, the trial court specifically noted that the legal distinction between *de minimis* and non-*de minimis* activity is murky and that clarification may be needed in the law.[59] Of note was that the trial court did not determine whether the activity was beyond *de minimis* by examining the amount of time spent per e-mail sent. Instead, it held that "off-duty activities… pursued necessarily and primarily as part of plaintiffs' jobs… constituted compensable work under the FLSA [Fair Labour Standards Act]." This ruling appears to add a new requirement to the definition of work, specifically that work must be essential to the employee's job to qualify as beyond *de minimis*. Based on this new articulation of *de minimis*, the first branch of the test was decided in favour of the plaintiffs, as the smartphone activity fell within the definition of work and had been performed without compensation.[60]

Having established that the smartphone activity was work, the court then applied the second step of the test to determine whether the employer had actual or constructive knowledge that this work was occurring.[61] Work is compensable if the employer knew or ought to have known that it was happening, and employees will be denied remuneration if they took steps to ensure their superiors were unaware of the additional hours worked.[62] This exception is narrow and will not protect employers if the employee volunteers to do the work or engages in overtime against company policies. This caveat exists solely to protect an employer who truly had no way of knowing about the work being performed, not just an employer who "turned a blind eye" or instituted hollow policies[63] to avoid liability.[64] The court held in favour of the defendants, noting that they had no constructive or actual knowledge of the work being performed by the plaintiffs. The court reasoned that the officers could log their overtime hours on their biweekly time sheet, and that officers who did so were paid for their additional hours.[65] There was no reason for the bureau to assume that the officers would fail to record and submit their hours in this fashion. Ultimately, their failure to do so meant that the bureau had no actual or constructive knowledge about the alleged work.[66] In other words, the failure of the officers to record their hours

57 *Ibid*.

58 *Allen v City of Chicago*, 226 (ND Ill) 3183 (2015) [*Allen, Trial*].

59 *Ibid* at 29.

60 *Ibid* at 28–29.

61 *Ibid*.

62 Hyman, *supra* note 55 at 26.

63 Lutteneger, *supra* note 18. An employer can fit within this exception by instituting strong policies prohibiting unauthorized overtime work and enforcing violations of this prohibition with meaningful penalties. It will not be enough for the employer to institute these policies and then ignore infractions.

64 Marcum et al, *supra* note 2 at 76.

65 Brecher & Magnus, *supra* note 45 at 10. American courts have emphasized that there is a distinction between an employer who *should have known* work was occurring versus an employer who *could have known* work was occurring. Being capable of discerning whether work was occurring is not sufficient to find an employer liable, as there must also be some sort of indication that the employer *ought* to have known about the work as well.

66 *Allen, supra* note 56 at 34–35; Hyman, *supra* note 55 at 26.

fell within the above exception to when overtime work is not compensable. Therefore, the officers' claim was dismissed, a finding upheld by the appellate court.[67]

Although *Allen* was decided in favour of the employer, the case has been interpreted as reinforcing the rights of workers to receive overtime pay for work done remotely.[68] The plaintiffs lost their case not because their after-hour activities were not considered work, but because they had not sufficiently notified the employer of the work they performed.[69] *Allen* successfully establishes that using a smartphone at home can constitute work, meaning that future lawsuits can rely on this precedent. Furthermore, this case is one of the first to deal with overtime allegations related to working on a smartphone from home.[70] It extends the caselaw toward acknowledging that technology can enable after-hours work, and that employees have the right to be compensated for this work. While this development is promising, there are some concerning inferences raised from the commentary of what constitutes *de minimis* work. The requirement that work performed at home via technology be "of necessary and of primary importance to the job itself," for example, could leave employees vulnerable to engaging in subsidiary or miscellaneous work from home without compensation.

When should the use of technology outside of work hours be considered compensable? Should the ways an employer can contact an employee after hours be regulated, considering the goals of the *ESA* and the *CLC* are to protect workers from abuses of power? Three potential methods of regulation, as well as areas for potential Canadian law reform, may be able to address these questions."

IV. POTENTIAL METHODS OF REFORM

The normalization of technology has resulted in its increasingly frequent use by employers to contact their employees. This is ostensibly beneficial to both the employer and employee, as it allows for the exchange of a simple and instantaneous message, as opposed to coordinating a phone conversation or an in-person meeting.[71] However, the ability of technology to constantly remind an employee of work, regardless of the time, place or location, has led to an "explicit and implicit expectation that employees remain constantly connected to their jobs."[72] Research suggests, in fact, that employees who work after hours increase their total amount of hours worked per week, suggesting any work performed from home is in excess of what the employee would otherwise accomplish.[73] Social scientists have termed this phenomenon "presence bleed"[74] to reflect how professional work can "bleed" into private time.[75] Labour organizations have protested the rise of "presence bleed," arguing that employees require time to disconnect from work to relax and refocus, and that work obligations should not extend into personal time off.[76]

The societal and psychological implications of constant connectivity and presence bleed have been investigated by social scientists, but the legalities of this phenomenon are only beginning to emerge. After-hours work is often informal and undocumented, meaning that

67 *Allen, supra* note 56.
68 Marcum et al, *supra* note 2 at 74.
69 *Ibid* at 74.
70 Brecher & Magnus, *supra* note 45.
71 Akanbi, *supra* note 1 at 638.
72 Walden, *supra* note 28 at 348.
73 Akanbi, *supra* note 1 at 638.
74 Walden, *supra* note 28 at 348.
75 *Ibid*.
76 *What We Heard, supra* note 4 at 11.

employees are not always adequately compensated for this labour.[77] Even if workers were to document and submit their hours, there is a possibility that the work would be deemed *de minimis* and therefore not worthy of pay. This legal ambiguity can leave workers uncertain about what work they are required to perform and whether it is compensable. Unions, advocacy groups and legal scholars have made calls to reform Canadian employment legislation so it is better equipped to handle the introduction of modern technology in the workplace.[78] However, little guidance has been offered within the Canadian legal sphere on how reform should be facilitated.[79]

The remainder of this paper proposes three potential methods of reform: assigning an automatic reimbursement for after-hours use of technology; modifying on-call laws; and implementing a right to disconnect. Each of these methods will aim to satisfy two entwined goals: preserving workers' free time and ensuring any work they perform is appropriately compensated in accordance with the *ESA* or the *CLC*. The discussion begins with the novel idea of predetermining remuneration for after-hours text messages, e-mails and other forms of technological communication. The paper then analyzes international regimes to demonstrate certain methods of reform—modifying on-call laws and implementing a right to disconnect— that have already been successfully implemented and to estimate the probability of their success in Canada. Commentary on whether any of these methods should be implemented in Canada concludes the paper.

A. Predetermined Remuneration for Technological Communication

The first proposed method of reform involves firmly establishing when the use of technology from home constitutes a valid and compensable work endeavour. Answering an e-mail or text message may be viewed as a brief affair, especially if it only requires a quick and perfunctory response and is not of fundamental importance to the employee's role.[80] However, if viewed through the lens of the "presence bleed" phenomenon, time spent on these activities may extend beyond the number of seconds or minutes needed to perform the action. Instead, time spent anticipating the message, receiving and replying to the message, and then having to disengage from work, should all be considered when determining the aggregate time consumed by the action.[81] It may be more accurate, then, to assign a weighted value to each activity, or to pay a premium for any technological communication that is performed after hours. This approach is already used successfully by professionals, such as lawyers, to calculate their billable hours. Such an initiative would have to be legislated within the *ESA* or the *CLC*, but this is not unlike the *ESA*'s mandate that any employee called in for a shift must be paid for a minimum of two hours regardless of how long they actually work.[82] The goal of this approach would be to reduce after-hours communication by deterring employers from contacting employees unless their assistance was truly required, while also ensuring that employees are adequately compensated when after-hours work occurs.

This approach would provide simple and clear guidelines as to what is considered work while also providing a predictable basis for compensation. It would also skirt the requirement raised in *Allen* that work should only be compensable if it is of necessary and primary importance to the employer.[83] Avoiding this requirement protects employees from completing miscellaneous work for their employer that would not be compensable as per

77 See e.g., Marcum et al, *supra* note 2 at 74–75.
78 Pereira, *supra* note 19 at 70; What We Heard, *supra* note 4.
79 Pereira, *supra* note 19 at 6.
80 Hyman, *supra* note 55 at 26.
81 Akanbi, *supra* note 1 at 642–45.
82 *ESA, supra* note 5 at s 4(1).
83 *Allen,* supra note 56 at 28.

Allen. Although this case is not binding in Canada, courts commonly evaluate international perspectives when litigating a new area of law.[84] It is possible that the Canadian judiciary could adopt similar restrictions to those imposed in *Allen*, considering Canadian courts are currently silent on the definition of work in relation to technology. Following *Allen*, though, could create a loophole where an employer is capable of obtaining free labour by sending subsidiary work to the employee.[85] The plaintiffs in *Allen* noted that many of the e-mails they received were of a trivial nature, such as a department-issued notice regarding happenings of the week. Although these communications were not essential to the officers' jobs, reading and archiving the messages still detracted from the employees' personal time. In addition, dealing with these messages would have clearly been a compensable activity had it occurred during work hours. This loophole is even more alarming when considering the pressure that employees may feel to respond to after-hours communications. Legislating when the use of technology is considered work would help avoid such problems.

Despite the benefits of such an approach, assigning a weighted value to each of these activities is accompanied by a unique set of difficulties. It could be difficult to determine the "true" amount of time each activity takes or how much an employee's response is worth. For this type of reform to succeed, research would be required to determine the average time used to perform these tasks. This would provide a logical basis for weighted values to be assigned, as opposed to an arbitrary number being chosen. However, the use of an average could still result in unpaid labour from employees who perform their tasks below the median speed. This type of solution also would only help the narrow subsection of employees who choose to report hours worked from home.[86]

B. Modifying On-Call Laws

The second proposed method for reform entails modifying existing on-call laws to more thoroughly protect employees who engage with technology to work from home. In a 2018 Canadian government survey, some employers argued that being "available and on-call"[87] through technology is now a condition for many jobs, and that employers should retain discretion to contact the employee whenever required.[88] In the United States, some employees consider after-hours communications similar to being on call and argue they should be compensated according to the same standard.[89] Specifically, they argue that they are being "engaged to wait"[90] as opposed to "waiting to be engaged".[91] This distinction comes from judicial interpretation of the United States' *Fair Labour Standards Act* ("*FLSA*"), which governs how on-call work is compensated.[92] In contrast to the *CLC* and the *ESA*, the *FLSA* holds that compensation is owed if time spent on-call chiefly benefits the employer and if the employee is not free to engage in their own personal undertakings.[93] These criteria distinguish an employee who is on-call, yet free to pursue their own endeavours, from an employee whose on-call status prevents them from pursuing any of their own activities. The former is referred to as "waiting to be engaged" and is not

84 See generally *NCC et al v Pugliese et al*, [1979] 2 SCR 104 (This case considers how international jurisdictions regulate percolating water, and serves as an example of how courts will evaluate international regimes when determining an unchartered area of law).

85 See e.g., *Allen supra* note 56.

86 It is difficult to gauge the potential success of such a regime, given that it is beyond the scope of this paper to consider whether any jurisdictions currently endorse such an approach.

87 *What We Heard, supra* note 4 at 11.

88 *Ibid*.

89 Luttenegger, *supra* note 18 at 274.

90 *Ibid*.

91 *Ibid*.

92 29 USC § 203 (1938) (*"FLSA"*).

93 Luttenegger, *supra* note 18 at 268.

compensable under the *FLSA*, while the latter is referred to as "engaged to wait" and is compensable under the *FLSA*.[94] Additional factors that can assist in distinguishing these two categories of on-call status include how often the employer contacts the employee, and how quickly an employee must respond to any such contact.[95]

As noted, some employees who use technology after-hours allege they are "engaged to wait" and that they should be granted the appropriate compensation outlined in the *FLSA*. Their argument is that not only must they respond to any work-related communications, but also that the terms of doing so infringe on their ability to effectively enjoy their personal time.[96] Some employers, for instance, require that their employees respond within minutes of receiving a message.[97] Analyzing this claim through the *FLSA*'s guidelines suggests that some employees could have a convincing argument that they are "engaged to wait." For example, if an employee must respond to a smartphone notification within 15 minutes, this could arguably restrict their ability to pursue their own initiatives during their off-time. The "presence bleed" phenomenon, as well, suggests that an employee's ability to relax for an evening will be impeded if technology constantly reminds them of their work obligations. These considerations could indicate that the employee is not truly free to engage in their own personal undertakings.

While this argument has merit, it has not yet been successfully litigated in the United States.[98] This paper suggests that this type of accusation requires deeper exploration of phenomena such as "presence bleed" before successful litigation or statutory amendment is likely to occur. Even if research was available to substantiate these workers' claims, compensating them as if they were "engaged to wait" would be quite complex, as this approach requires determining when an employee begins and completes their on-call shift. For example, should the employee be considered on-call from the moment they leave their work premises? Should they be compensated for being on-call even if the employer does not contact them for that entire evening? Answering these questions in a Canadian context is even more difficult due to the lack of distinction between "engaged to wait" and "waiting to engage" in Canadian overtime laws.[99] Despite these uncertainties, this approach can still assist in guiding conversation on potential reforms.

As previously mentioned, the *ESA* currently specifies that time spent waiting on-call is not compensable if the employee is at their personal residence.[100] However, once the employee receives a call-in, their work is remunerable regardless of where it occurs.[101] In regard to on-call laws, the British Columbia *ESA's* interpretation guidelines state that when an "employee responds to a page, or a cellular call, the employee has in effect, 'reported' to work and is entitled to minimum daily pay.… This has the effect of 'reporting to work' and is not limited to physically reporting to the workplace."[102] If after-hours communications were governed by on-call doctrines, then at bare minimum, employees who answer communications from home would be entitled to pay for the duration of their answer. Clarifying and enforcing this requirement could assist in shifting the mindset of employers who feel entitled to

94 *Ibid* at 273–274.
95 *Ibid*.
96 *Ibid*.
97 *Ibid*.
98 *Ibid*.
99 *ESA*, *supra* note 5 at s 1(2).
100 *Ibid*.
101 *Ibid*.
102 British Columbia, Employment, Business and Economic Development, *Interpretation Guidelines Manual British Columbia Employment Standards Act and Regulations*, (Guide), online: <www2.gov.bc.ca/gov/content/ employment-business/employment-standards-advice/employment-standards/igm/esa-definitions/esa-def-work> archived at [https://perma.cc/66GU-2CKZ].

contact employees after-hours without compensating them. Furthermore, it could also help reverse the trend of increasing unpaid overtime work in Canada[103] by providing clearer guidelines to employees on when their work is compensable. This would also have the effect of bolstering the *ESA*'s purpose of protecting vulnerable employees without requiring significant reform to current employment legislation. Clarification could be made by legislating that remuneration for contacting an employee after their shift is completed will be governed by current on-call legislation. More thorough reform could implement an on-call wage for these types of scenarios.[104] However, the same issues arise regarding difficulties in enforcing any violations of this legislation. For a claim to be successful, the employee would have to report these hours being worked from home. Modification and reform to on-call laws may help to inform employees of these rights, but only employees who are willing to bring forward a claim and potentially litigate their allegations would gain protection under these amendments.

C. The Right to Disconnect

The third potential method for reform would be to implement a ban on all employer-initiated after-hours communication, subject to limited exceptions. Prohibiting after-hours communication would aim to protect employees who are unable or unwilling to ignore after-hours communication, while also strengthening the eroding boundary between professional and personal life. This approach has gained international traction over the past few years, becoming a movement known as the "right to disconnect."[105] The right to disconnect advocates for increased regulations and policies that allow employees to "disconnect" from work after their shift is complete. It notes that the "current tendency is to request broader participation of workers in the life of the enterprise"[106] and argues that this overburdens the employee. This movement is relatively new to Canada but has been predominant in other countries for years. In fact, select countries have already codified this right. Recent legislation in Italy, for example, guarantees workers the right to disconnect after their shift, and the Philippines has legislated that an employee cannot be reprimanded at work for ignoring after-hours communications.[107] France recently joined these countries in enacting right to disconnect legislation during a wave of labour reforms, and the City of New York has brought forward a municipal proposal.[108]

Both France's judiciary and legislature have set strong precedents of protecting workers' rights and personal time through restricting after-hours contact. In 2001, the French Supreme Court acknowledged the right of workers to disconnect upon finishing their shift by holding that employees are under no obligation to conduct work from home.[109] In 2004, the French Supreme Court again tackled this issue, but in the explicit context of technological communication. The Court reinforced workers' rights by holding that "not being reachable on one's mobile telephone outside working hours is not a fault."[110] The sentiment behind this decision was echoed by the French government when it passed legislation enforcing the right to disconnect. These laws came into effect on January 1, 2017 and outline the ways in which an employer can and cannot contact an employee after-hours.[111] This legislation takes an interesting approach, as there is no outright prohibition of after-hours communication. Instead, any employer with more than 50 workers must

103 Pereira, *supra* note 19 at 4.
104 Luttenegger, *supra* note 18 at 277.
105 Marcum et al, *supra* note 2 at 78–80.
106 Moreira, *supra* note 39 at 2–3.
107 Marcum et al, *supra* note 2 at 78–79.
108 *Ibid*.
109 Supreme Court, Social Chamber, 2 October 2001, nº 99-42.727.
110 Supreme Court, Social Chamber, 17 February 2004, nº 01-45.889. (Note that this is a translation).
111 Moreira, *supra* note 39 at 2–3.

collaborate with their employees to outline acceptable modes and methods of contact for after-hours communication.[112] Once this collaboration is complete, the employer is required to "create a charter establishing and defining employees' right to disconnect"[113] that must be re-negotiated on a yearly basis.[114]

This approach forces employees and employers to agree upon situations in which technology can be used, and thereby affords greater flexibility than an outright ban. This process of negotiation may help educate employees about their rights under this new legislation and alleviate unspoken expectations that they should be available after hours.[115] Also, the implementation of a mandatory annual re-negotiation period allows charters to stay relevant despite the constant and rapid growth of technology. The benefits of this new legislation, however, are not solely restricted to the employee. Employers will be given an opportunity to clearly outline their expectations, which may potentially minimize lawsuits claiming uncompensated or overtime work. Employers are also able to create their own prohibitions, exemplified in one corporate charter where employees agreed to ignore their own personal e-mails for the duration of their shifts to increase productivity.[116] While this legislation provides benefits to both the employer and employee, a brief note must be made on its limitations. These regulations exclusively apply to corporations with more than 50 employees, resulting in coverage of only a portion of the French workforce.[117] There are no protections to ensure that the inherent power imbalance in employment relationships does not negatively impact the outcome of these negotiations. A mediator or negotiator may be required to ensure these proceedings are of fair and of equal benefit to the employee. Finally, there is no specified remedy if an employer violates the terms of a charter other than litigation.[118] These restrictions narrow the effectiveness of this regime by reducing the scope of included participants and limiting their potential remedies.

While France's approach provides a valuable starting point, New York City's recent proposal for a right to disconnect bylaw makes beneficial modifications to its French predecessor. The American approach underlines the French consensus that workers should have a say in the regulation of after-hours communications. However, New York's recently proposed bylaw would apply to any corporations with 10 or more employees. This widens the scope of the right and captures a far greater number of workers than France's regulations.[119] If passed, the bylaw would differ from its French counterpart in its application of the right to disconnect. Instead of negotiating a charter, the bylaw would dictate that employees cannot be penalized for ignoring communications received when off shift or during sick days and vacation days.[120] Finally, this proposal is unique in its suggested complaints process: an employee could claim directly to the City of New York, and the municipality would then be required to conduct an investigation.[121] If a breach of the bylaw were found, the employer would be required to pay a fine to both the City and to the wronged

112 Akanbi, *supra* note 1 at 648.

113 *Ibid*.

114 *Ibid*.

115 Pereira, *supra* note 19 at 73. Many Canadians are unaware of the protections granted to them by legislation such as the *ESA*, and this ignorance leaves them more vulnerable to working schemes that violate these existing legislations. He recommends education as a tool to help educate workers and to counteract the rising rate of unpaid overtime work in Canada.

116 Moreira, *supra* note 39 at 3.

117 *Ibid* at 2.

118 *Ibid*.

119 Marcum et al, *supra* note 2 at 79.

120 *Ibid*. This form of the right to disconnect is similar to the form enacted in the Philippines.

121 See Jonathan Wolfe, "*New York Today: The Right to Disconnect"* (23 March 2018), online: <www.nytimes.com/2018/03/23/nyregion/new-york-today-the-right-to-disconnect.html> archived at [https://perma.cc/UQY3-R7F4].

employee.[122] This process would be primarily handled by the City and, therefore, would be more accessible and affordable than litigation. The costs of litigation can hinder access to justice, and this proposed method could provide an accessible means for resolving complaints.[123] Considering both the French and American approaches can help shape and direct possible Canadian reform.

The right to disconnect is a relatively new concept in Canada, but it is not revolutionary. In August 2018, the Canadian federal government released a report outlining the findings of a nationwide survey regarding labour reform issues.[124] The survey canvassed public opinion on a number of topics surrounding the right to disconnect, and included responses from citizens, corporations, and labour organizations.[125] Ultimately, 93 percent of respondents agreed that off-shift employees should be entitled to ignore any after-hours communications including e-mails, text messages, and phone calls.[126] Labour organizations strongly advocated for the right to disconnect, noting that "responding to inquires [such as e-mails, phone calls, text messages] impacts quality of family time, acts as a source of stress, and reduces effectiveness of rest time."[127] However, support for the right to disconnect was not as widespread among employers and employment organizations. Employers argued that legalizing the right to disconnect would reduce an employee's flexibility by limiting how they are allowed to do work, with some employers stating it would be a "legislative overstep."[128] Out of these respondents, 27 percent justified their stance by noting that the business day does not always end with an employee's shift, and as such, employees should remain available to their employers.[129] The results of the survey suggest that implementing a right to disconnect would be viewed positively by the majority of Canadian workers. While employers appear to be less enthused about this possibility, it must be remembered that the goal of employment standards legislation such as the *ESA* and *CLC* is to protect employees from exploitation. Therefore, while employers' input should be considered, the priority must remain on protecting workers' rights. The right to disconnect, then, may be a viable option for protecting workers' personal time.

Although the aforementioned survey indicates that adopting some form of the right to disconnect would be viewed positively by Canadians, it provides little guidance on how this implementation should occur. If Canada were to adopt the right to disconnect, it should do so through incorporation into the *ESA* and the *CLC,* as opposed to simply trusting employers to incorporate such a mandate into their company policy, because employers may prioritize the success of their business over the protection of their employees. Legislating this right would be in accordance with the approach used by other international jurisdictions and would allow for legal enforcement. Concerns raised by employers that legislating this right will force an employee to disconnect when they would otherwise "choose to remain connected outside of work"[130] are tenuous, as these policies do not necessarily require an outright ban. In fact, the converse argument can be made that the right to disconnect actually increases an employee's flexibility and autonomy by allowing them to choose the manner in which they use technology for work.

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122 *Ibid*.

123 See generally Canada, Department of Justice, *Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework* (online): Government of Canada <www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/p2.html> archived at [https://perma.cc/6STL-D5PQ].

124 *What We Heard, supra* note 4 at 1–3.

125 *Ibid*. This online survey garnered responses from 3,138 respondents over a one-year period.

126 *Ibid* at 10.

127 *Ibid*.

128 *Ibid*.

129 *Ibid* at 11.

130 *Ibid*.

While either standard could be adopted in Canada, combining France's charter-based approach with New York's complaints process would provide the most effective relief to employees. 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.[131] 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.

If the *ESA* or *CLC* were to adopt this type of regime, the potential legislation could benefit from the incorporation of a streamlined complaints process. This regime would be similar to New York in that employers could be fined for violations, but I propose that a Canadian system adopt modifications that would provide additional meaningful remedies to employees. Employers could be ordered to amend their charters or to implement changes within their organization to adhere to the outlined minimum standards. These modifications would provide relief to the complainant, as well as other workers in the organization who are unwilling or unable to register a complaint. Implementing a complaint process could also help minimize litigation, which is ideal when considering Canada's overburdened courts and access to justice concerns.[132] A variation of this method would be to implement the right to disconnect in conjunction with modifying on-call laws. 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.

In summary, implementing a right to disconnect could benefit Canadian workers by regulating how technology can be used in the employment sphere. It would provide a clear, mandatory policy and offer financial and systemic remedies to wronged employees. However, the implementation of such a right would involve updating both the *ESA* and the *CLC* and would involve substantial labour reform.

CONCLUSION

Research suggests that the rising use of technology in Canadian society has resulted in increased connectivity between employers and employees. This connectivity is correlated to employees engaging in higher levels of unpaid, after-hours work, partially because they feel pressured to answer e-mails, text messages, and phone calls from home. Regardless of whether this is due to employer pressure, societal pressure, or another unknown factor, it is critical that Canada's labour statutes legislate protections from exploitation. There are multitudes of ways in which the *Canadian Labour Code* and the *Employment Standards Act* could be reformed to enhance employee protections. This paper has focused on three potential reforms: assigning a weighted value to after-hours activities; modifying existing on-call laws; and the right to disconnect. Each of these potential reforms aim to reduce the prevalence of unpaid work from home, and specifically target unpaid work that is facilitated through the use of modern technology. These reforms have the effect of educating employees about their rights to compensation and establishing firmer boundaries between employees' professional and private lives.

131 Pereira, *supra* note 19 at 73.

132 Employment Standards Act Reform Project Committee, *supra* note 34 at 35.

While each proposed reform offers unique benefits, the most effective approach may be to legislate a right to disconnect. Although this approach would require substantial amendments to the *CLC* and the *ESA*, it could be modified to suit Canada's unique employment background and provide thorough protection for workers. The right to disconnect would allow employees to increase their autonomy by choosing the circumstances in which they are willing to work from home, and would ensure that any work completed is properly compensated. If a right to disconnect were to be legislated, care would have to be taken to establish a clear definition of "work" to prevent ambiguities such as those created by the murky *de minimis* rule in the United States. Canadian jurisdictions could define "work" within their employment standards legislation and provide examples of when using technology fits within this definition. This would clarify employment standards for employees, assist them in recognizing when their rights have been compromised, and bolster their confidence to refuse unpaid work.

As technology continues to become more commonplace, employment standards legislation must continue to adapt in order to protect vulnerable workers. While these suggested reforms may involve substantial amendments to existing employment standards legislation, failure to make these amendments will result in protective legislation that is ill-equipped to handle the unique challenges of the modern workplace.