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Friday, February 24, 2023

Employer update on competition issues in the workplace

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

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Competition Law – Employer update No Poach & Wage Fixing

Sandy Walker

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No Poach and Wage Fixing - Agenda

1. **Introduction to the *Competition Act* and Key Concepts**
   – *Adam Goodman*

2. **Wage Fixing**
   – *Sandy Walker*

3. **No Poach**
   – *Adam Goodman*

4. Final Comments
   – *Sandy Walker*

Introduction to the Competition Act and key concepts

Introduction – the *Competition Act*

- *Competition Act* is Canada's general anti-trust statute
- Federal law that provides businesses with the rules governing the regulation and promotion of competition in the economy
- Dividing line between **criminal conduct** and **civil reviewable conduct**
- **Criminal** conduct is *per se* prohibited, punishable by prison sentences and fines
  - Private damages claims possible
- **Civil reviewable** conduct can be challenged by the Competition Bureau (or a private party granted leave – for some cases)
  - Remedies are injunctive in nature → prohibition order
  - AMPs (potentially high) only for abuse of dominance
  - No damages

Criminal Cartels

Section 45 of the *Competition Act*

- Section 45 is the key prohibition on cartel conduct
- It makes it a criminal offence for competitors to agree to:
  - **fix prices;**
  - **allocate markets; or**
  - **restrict output**
- Currently → 45 applies only to **competing sellers** and not to **competing buyers**.
- Will be amended to add a prohibition on **wage fixing** and **no poach**.

Other key provisions of section 45

Evidentiary Considerations and the Ancillary Restraints Defence

- Provision address the evidentiary challenge PPSC has in proving an “agreement” for the purposes of section 45
  - Court may **infer** the existence of an **agreement** from **circumstantial evidence**

- Also establish an important defence for conduct that on its face contravenes section 45 but is **ancillary** to a broader / separate agreement between the parties
  - No conviction under section 45 if the accused establishes
    - The section 45 conduct is **ancillary** to a **broader / separate agreement** involving the same parties;
    - The section 45 conduct is **reasonably necessary** for giving effect to the broader / separate agreement; and
    - The broader / separate agreement considered alone **does not contravene section 45**

Civil Reviewable Conduct

Section 90.1

- Certain conduct is permissible but can be challenged
  - Remedies based on anti-competitive effects
- This includes **agreements between competitors** that are likely to substantially lessen or prevent competition in a market
- This provision has historically applied to any agreement between competing purchasers
    - This includes wage fixing and no poach agreements between competing employers
- The Bureau, Federal Court, and the BC Supreme Court → current section 45 does not apply to agreements between employers concerning employees
  - Will change on June 23, 2023

The New Provision

Subsection 45(1.1)

- Comes into force on **June 23, 2023**

Conspiracies, agreements or arrangements regarding employment

(1.1) Every person who is an employer commits an offence who, with another employer who is not affiliated with that person, conspires, agrees or arranges

(a) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or

(b) to not solicit or hire each other's employees.

Penalty

(2) Every person who commits an offence under subsection (1) or (1.1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine in the discretion of the court, or to both.

- Aligns Canadian approach to the US approach → prosecute wage fixing and no poach agreements criminally
- Subject matter focus today

Origins of Criminalization

No Poach & Wage Fixing

USA

- 2010 – No poach agreement between large technology firms is prosecuted civilly by the US DOJ
- 2016 – US DOJ and FTC issue guidance to HR professionals
  - Warning that the DOJ may prosecute no poach or wage fixing criminally
- 2022 – DOJ brings several criminal prosecutions to trial with mixed results

Canada

- 2020 – Competition Bureau issues guidance saying that wage fixing and no poach agreements → outside the scope of section 45
- Remedy must be predicated on section 90.1 → requires proof of anti-competitive effects & injunctive relief only
- 2020 – Large grocery chains cancel “hero pay” around the same time
- 2022 – *Budget Implementation Act* → adds subsection 45(1.1)
- June 23, 2023 – subsection 45(1.1) will come into force

Competitor Collaboration Guidelines

Competition Bureau Guidance

- In 2009, before current section 45 came into force, Bureau released the CCGs
- Framework of analysis → application of section 45
- Not every potentially technical instance of price fixing, market allocation, or output restriction is treated as criminal under section 45
  - Bureau chooses between civil track (90.1) and criminal track (45)
- Bureau's approach in the CCGs (section 1.3):
  - "only certain types of agreements or arrangements may be subject to criminal prosecution under section 45 of the Act. **This provision is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition**; these types of agreements are often referred to as "hard core" cartels. **Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under the Act's civil agreements**, merger or (joint) abuse of dominance provisions but only where they are likely to substantially lessen or prevent competition."
  - On January 18, 2023, Bureau released draft Guidelines on Wage Fixing and No Poaching Agreements

Draft Guidelines

Enforcement Guidance on Wage-fixing and No Poaching Agreements

- Consultation period ongoing into March 2023
- Reaffirms the framework under CCGs →
  - “Subsection 45(1.1) is directed at “**naked restraints**” on competition, that is, restraints on wages or job mobility that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture.”
- Other key guidance relates to scope of guidance
  - “Employers”
  - No application to affiliated employers
  - Draft Guidelines suggest that practices engaged in by employers / HR professionals may be particularly risky after June 23, 2023

Wage fixing

Wage Fixing Between Employers Prohibited as of June 23, 2023

- Penalties: jail for a maximum of 14 years or a fine in the discretion of the court or both
- “Naked restraint”: Bureau guidance states that its concern is “naked restraints” on competition, i.e., restraints on wages or job mobility that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture
- However, later commentary in the guidance raises questions about focus on “naked restraints”

What Does the Prohibition on Wage Fixing Apply To?

- Agreements or arrangements to fix, maintain, decrease or control:
  - salaries or wages;
  - “terms and conditions of employment”: Bureau describes as responsibilities, benefits and policies associated with a job which may include:
    - job descriptions,
    - allowances, e.g., per diem and mileage reimbursements,
    - non-monetary compensation,
    - working hours,
    - location and
    - non-compete clauses, or other directives that may restrict an individual’s job opportunities.
- Ask whether “terms and conditions” could affect a person’s decision to enter into or remain in an employment contract? [Bureau draft guidance]

Who Does Prohibition on Wage Fixing Apply To?

- Agreements between unaffiliated employers regarding their employees
- Affiliation is defined in Competition Act with reference to “control”
- What is an “employer”? Not defined in Competition Act. Bureau draft guidance states: “employer” includes a company’s “directors, officers, as well as agents or employees, such as human resource professionals.”
- What is an “employee”? Whether an employer-employee relationship exists between parties will depend on the laws and circumstances under which the relationship was entered into
- Employers do not need to be business competitors for the prohibition to apply; however, Bureau indicates it will prioritize its enforcement of agreements where employers can be viewed as competitors in their purchase of labour

Ancillary Restraints Defence:

- **Hypothetical #1:**
  - The parties to an M&A transaction include an interim covenant not to increase compensation to certain employees.
- **Analysis:**
  - Bureau draft guidance: generally won't assess wage-fixing clauses that are ancillary to merger transactions, joint ventures or strategic alliances under the criminal track.
  - BUT may do so if those clauses are clearly broader than necessary in terms of covered employees, territories or duration, or where the merger, joint venture or strategic alliance is a sham.
  - Concern about Bureau draft guidance: above suggests criminal prosecution if wage fixing is drafted in an overly broad manner (e.g., duration or geographic scope) that may not be considered "reasonably necessary" by the Bureau.
  - Unclear how Bureau guidance will treat case law on reasonableness of restraints in contract disputes;
    - uncertainty in the law and contracting parties may enter into agreements in good faith that are subsequently found to be unenforceable.
- Bureau guidance should make clear that restraints would have to be egregiously overbroad or part of a sham agreement before they are criminally prosecuted. Will need to wait for final version of Bureau guidance.

Information Exchange and Benchmarking = Wage Fixing?

- Pure information exchange is not illegal under the Act
- **BUT** a court may infer the existence of an agreement from circumstantial evidence with or without direct evidence of communication between parties
- **Hypothetical #2:**
  - HR professionals from Co. A, Co. B and Co. C each separately gather market intelligence through new recruits about the salaries offered by other companies in the market. A, B and C personnel do not discuss the salary levels with each other but they do respond to what they hear from new recruits. **Violation?**
- **Analysis:**
  - Bureau does not consider there to be a violation when a business acts independently with awareness of the likely response of its competitors or in response to the conduct of its competitors
    - so-called “conscious parallelism” is not caught
- But Bureau’s draft guidance is confusing on this point: it also states that “parallel conduct coupled with taking steps to monitor each other’s employment practices” could be sufficient to prove an agreement
- Questionable: there should at least be an inference of an understanding among A, B and C

Wage-fixing?

- **<u>Hypothetical #3</u>:**
  - The last three law firms in Toronto remaining in the market following widespread introduction of ChatGPT are having difficulty coping with bonus and work/life demands from their associates. They meet over lunch and share detailed plans for bonuses for associates and return to work policies. Soon their bonuses and RTW requirements are aligned. A competition law-savvy associate complains to the Bureau. **Violation?**
  - The Bureau might investigate in this scenario. Bonuses and RTW policies may influence an employee's decision to remain with the law firms.
  - Bureau's draft guidance: parallel conduct coupled with facilitating practices, such as sharing sensitive employment information, may be sufficient to prove that an agreement was concluded.
    - Under subsection 45(3), such conduct could result in an inference by the Bureau of an agreement between the parties in violation of subsection 45(1.1).
  - The alignment of the three law firms' bonuses and work policies following the meeting might give rise to an inference that the firms came to an understanding.

Wage-fixing?

- **<u>Hypothetical #4</u>:**
  - The 100 plus members of the Widget Manufacturers Association (WMA) provide salary data to the WMA which then aggregates the information and sends each member a report of average salaries for different categories of employment in comparison to the member's salary. **Violation?**
  - The employers who are members of the association do not know what any individual employer is paying in salary because only the third party has that information and is required not to share that information with individual employers. Accordingly, it would be difficult to find or infer an agreement between employers provided WMA has in place safeguards to ensure members do not receive information of other members.
    - If the members directly exchanged the same information in non-anonymized fashion → much riskier

How are Existing Agreements Affected?

- **Bureau draft guidance:** The provision will apply only to new agreements entered into by employers on or after
  June 23, 2023, **as well as to conduct that reaffirms or implements older agreements**.

- **“Reaffirmed or implemented”:** suggests have to do something active but failure to communicate illegality of existing wage fixing or failure to amend existing contracts could lead to the reaffirmation or implementation of existing provisions. Looking for better Bureau guidance on this point.

Exception/Defence:

- Section 4 of *Competition Act* still applicable: Agreements reached between employers in the course of collective bargaining are insulated from the conspiracy provision
  - Section 4(1)(c): contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession, whether effected directly between or among the employers or through the instrumentality of a corporation or association of which the employers are members, pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment.
- Regulated conduct defence under common law applies where there is a requirement or authorization by or under federal or province law

No Poach

No Poaching Agreements

Scope of paragraph 45(1.1)(b)

- Unaffiliated employers are prohibited from **agreeing not to solicit / hire each other's employees**
  - No need for the employers to compete for the supply of labour
- Bureau confirms in Draft Guidelines → "solicit" and "hiring" includes **any limitation** on hiring opportunities
  - This language goes further than the actual wording of the provision
  - Restricting "communication of job openings" → is this covered?
  - Adopting hiring mechanisms to prevent employees from being poached or hired by another party to the conspiracy
    - Unclear what exactly the Bureau means by "hiring mechanisms" or "point systems" → appears to concern implementation of an existing conspiracy
- Welcome confirmation in the Draft Guidelines that paragraph (b) text applies only to **bilateral** agreements
  - Based on the wording of paragraph (b) → applies to agreements between employers "to not solicit or hire **each other's** employees"
  - Does not apply to **unilateral** agreements → only one side agrees not to solicit or hire the other's employees
  - If bilateral agreements exist in two or more agreements → Bureau may still "take appropriate enforcement action"

Naked Restraints / Ancillary Restrains

No poach context

- Common for no poach provisions to be included in typical commercial arrangements
  - Joint ventures
  - M&A / purchase and sale of a business
  - Consulting agreements
  - Internship or secondment arrangements

- First issue: Is the restraint **bilateral** or **unilateral**?
  - If unilateral → not covered
  - If bi-lateral, need to consider whether this is a “naked restraint” or an ancillary restraint

- Second issue: Assess context of restraint to determine whether it is ancillary
  - Is there a **separate** and **broader** agreement?
  - Is the restraint **directly related to** / **reasonably necessary** to achieve the objective of the separate / broader agreement?
  - Does the broader / separate agreement violate section 45?

Draft Guidelines

Approach to ancillary restraints

- Bureau says it will not “second guess” parties to ask whether less restrictive means available to achieve objective
- Problem → Draft Guidelines go on to say it will in fact “second guess”
  - “if the parties could have achieved **an equivalent or comparable arrangement** through **practical, significantly less restrictive means** that were reasonably available to the parties at the time when the agreement was entered into, then the Bureau will conclude that the restraint was not reasonably necessary” – section 3.1 Draft Guidelines
  - If the territorial scope or duration is too long or too broad → may suggest illegality
    - Previously would impact enforceability only
- Implications are that employers need to seriously consider whether bilateral no poach provisions are commercially reasonable to achieve a legitimate commercial outcome
- Cannot simply rest on trying to push the envelope to achieve the best HR outcome
  - Need to think about why you and the other employer need / want the restriction

Hypothetical Scenario 2

No-Poaching Agreements and Employee Secondments

- Company A is a consulting company that embeds its employees in its clients' businesses for a set period
- Consulting agreement with Company B
  - Company B covenants not to hire Company A's employees
  - Company A does not make a similar covenant regarding Company B's employees
- Bureau says because unilateral → not covered by paragraph (b)

- Harder question to consider is what if Company A made a similar covenant?
- Why is this provision necessary?
  - May be clear rationales, including embedded Company A's employees being exposed to Company B's employees within the Company B workspace, being in a position to assess employees and gain information about Company B's training, etc.
  - Having embedded employees exposes the Company B to risk that information about its employees would be exposed to competing employers

Hypothetical Scenario 3

No-Poaching Agreements and Recruitment Agencies

- Staffing Co X provides staffing and recruitment services.
- Agreement with Co Y regarding staffing → specialized labourers for a short period
- Cos X and Y agree not to hire each other's employees during the term of the agreement

- Bureau indicates that although covered by paragraph (b) → agreement may qualify as ancillary

- Bureau's warning – it will assess whether the restriction is too broad
  - Geographic scope, etc.

Hypothetical Scenario 4

No-Poach in Franchise Context

- Company A is a franchisor of fast-food restaurants
- Company A and its franchisees spend money to train new employees
  - Company A and each of its franchisees agree not to hire each others' current employees
  - Franchisees understand other franchisees are similarly prohibited under their agreements with Co A
- Bureau doesn't think franchisees can benefit from ancillary restraint defence
  - Not clear from the example that there even is an actual agreement between the franchisees
- Bureau says each agreement between Co A and its franchisees needs to be assessed individually
- Draft Guidelines to date indicates that Bureau may be aggressive the franchise context
  - Consistent with interest in these restrictions in other jurisdictions

Final comments

Non-competes when selling/buying a business

- Non competes in the context of a sale of a business
- Agreements by sellers of a business not to compete for a period of years in the same business within a particular territory could in theory be viewed as a criminal conspiracy in respect of the supply of a product in violation of section 45 of the Act.
- BUT under a discussion of ancillary restraints defence in the Bureau's CCGs: Bureau will generally NOT assess a non-compete clause found in an agreement for the sale of assets or shares between parties under the criminal provision in section 45 of the Act
  - these restraints may be subject to civil review under section 90.1 of the Act [agreements between competitors that are likely to prevent or lessen competition substantially in a market].
  - remedy is a prohibition order. No damages or fines are applicable (at least currently).

Information Exchange During Due Diligence in a Sale Context:

- Currently competitors who are merging need to be careful about sharing competitively sensitive information (CSI) relating to prices, markets, customers, supply and market strategies.
- With wage fixing amendment, parties to the sale of a business will need to be more careful about sharing competitively sensitive information relating to wages, salaries and terms and conditions of employment to avoid an inference of an agreement on those matters prior to the sale or if the sale does not proceed
- Ancillary restraints defence may apply in the acquisition context.

Where From Here?

Next Steps:

- Review your agreements or category of agreements.
- Do they contain prohibited clauses?
  - If no poach → bilateral or unilateral? → unilateral not covered
- Does the ancillary restraints defence or regulated conduct defence apply?
- Amend agreements to eliminate offending clauses.
- Communicate to your employees that agreements have been amended or will be amended to no longer include these provisions.
- Even if an agreement has not yet been amended to delete offending provision, advise employees that clauses should not be enforced or threaten to be enforced.

Updates on non-competition and non-solicitation provisions

Andy Pushalik

The Newest Endangered Species:

Non-Competition Clauses

- Effective October 25, 2021, provincially regulated employers in Ontario are prohibited from entering into employment contracts or other agreements with an employee that include a non-compete agreement.
- Exceptions:
  - Sale or lease of business
  - Executives – The Ministry of Labour's Guidance provides that an executive includes any person who holds the office of:
    - chief executive officer; president; chief administrative officer; chief operating officer; chief financial officer; chief information officer; chief legal officer; chief human resources officer; chief corporate development officer; any other chief executive position
  - Non-compete agreements entered into before October 25, 2021
  - Non-solicitation and Non-Disclosure Agreements are not prohibited
- January 2023, US Federal Trade Commission proposed a rule that would amount to almost a complete ban on the use of non-compete agreements

The Next Generation Non-Compete?

Rhebergen v. Creston Veterinary Clinic Ltd., 2014 BCCA 97

- **Facts**
  - Veterinary Clinic located in Creston, BC
  - There are no other clinics within a 100-mile radius save for two, about 60 miles distant, across the American border in Idaho
  - There are 13 clinics within a 130-mile radius
  - Clinic hired Dr. Rherbergen on a 3-year contract
  - Non-Competition Clause stated as follows:

> 11. NON-COMPETITION
>
> 1. The Associate acknowledges and agrees that she will gain knowledge of and a close working relationship with the CVC's [Creston Veterinary Clinic Ltd.'s] patients and clients which would injure CVC if made available to a competitor or used for competitive purposes.
>
> 2. The Associate covenants and agrees that in consideration of the investment in her training and the transfer of goodwill by CVC, if at the termination of this contract with CVC she sets up a veterinary practice in Creston, BC or within a twenty-five (25) mile radius in British Columbia of CVC's place of business in Creston, BC, she will pay CVC the following amounts:
>
> If her practice is set up within one (1) year termination of this contract - $150,000.00;
> If her practice is set up within two (2) years termination of this contract - $120,000.00;
> If her practice is set up within three (3) years termination of this contract - $90,000.00.
>
> * * *

The Next Generation Non-Compete?

Rhebergen v. Creston Veterinary Clinic Ltd., 2014 BCCA 97

- **Facts (continued)**
  - Amount to be paid by Dr. Rhebergen in the event that she set up a practice within 25 miles of Creston was based on the investment made in employing her with respect to mentoring, training and equipment
  - Dr. Rehnbergen leaves the clinic after 14 months
  - Approximately 5 months later, Dr. Rhenberger files an application with the Court pleading that she “intends to set up a mobile dairy veterinary practice in Creston and vicinity” and seeking to have the non-competition clause declared unenforceable

The Next Generation Non-Compete?

Rhebergen v. Creston Veterinary Clinic Ltd., 2014 BCCA 97

- **Trial Decision**
  - The judge recognized that the non-competition clause did not prohibit Dr. Rhebergen from setting up a practice within 25 miles of Creston but only required that she pay the clinic as per the contract if she did
  - Despite this finding, the judge considered the clause to constitute a restraint of trade
  - Judge determined that the amounts to be paid under the clause were a penalty and that the time over which the non-competition period applied was too long
- **Appeal Decision**
  - Court of Appeal agreed that the clause constituted a restraint of trade BUT disagreed with trial judge that the amounts contemplated by the clause constituted a penalty
  - Court of Appeal ultimately dismissed employer's appeal on the basis that the clause was ambiguous because the words "sets up a veterinary practice" had a variety of meanings

The Next Generation Non-Compete?

Rhebergen v. Creston Veterinary Clinic Ltd., 2014 BCCA 97

The uncertainty lies in there being no prescribed or understood basis upon which it can be said a professional practice has been established in the circumstances. Once it is accepted Dr. Rhebergen can engage in some measure of practice, however limited, without incurring liability to the clinic, it cannot be said how many animals, on how many occasions, with what frequency, for how long, and over what period of time she could render treatment before she would have crossed the line, so to speak, and become liable to pay the clinic $150,000 because a practice had been set up. The phrase "set up a veterinary practice" is simply not definitive. The meaning is not clear and it renders clause 11, s. 2 ambiguous.

What’s Next for Employers?

- Greater scrutiny of non-competition agreements
- There may be an opportunity for employers to rely on clauses that put a price on competition so long as they are drafted narrowly and clearly
- Greater reliance on non-solicitation clauses
- Potentially longer resignation notice periods

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