

No-Poaching and Wage-Fixing Agreements: Developments in Canada

By William Wu, McMillan LLP*

Introduction

Historically, the application of Canada’s *Competition Act* to labour market and employment-related issues has not received much attention.¹ In the last two years, in part due to events related to COVID-19 pandemic response, the issue of how the *Act* treats no-poaching and wage-fixing agreements has come to the forefront. This note provides a brief summary of these recent developments.

Competitor Agreements under the *Competition Act*

The *Act* contains two distinct sections applicable to agreements between competitors. On the one hand is section 45, which makes it a *per se* criminal offence for competitors to agree to fix prices, allocate markets or restrict supply. Violation of section 45 could result in a maximum of 14 years’ imprisonment and fines of up to C\$25 million.

On the other hand is section 90.1. This is a civil provision, which empowers the Commissioner of Competition, the head of Competition Bureau, the main competition law enforcement agency, to make an application to the Competition Tribunal in respect of an agreement between competitors that is likely to substantially lessen or prevent competition. The remedies that the Competition Tribunal can order under this section are limited to prohibiting any person from doing anything under the impugned agreement, or requiring any person to take some other action (only if with that person’s and the Commissioner’s consent). The approach to reviewing agreements under section 90.1 is similar to the rule of reason doctrine in U.S. antitrust law.

“Hero Pay” Controversy

In March 2020, at the beginning of the COVID-19 pandemic, three of Canada’s largest grocery chains announced that they would begin paying temporary “hero pay” raises to their employees. As the pandemic conditions abated in June 2020, each grocery chain announced that their respective “hero pay” programs would end within a day of each other.

These announcements led to questions as to whether the grocery chains had jointly agreed to end their “hero pay” raises. The controversy generated significant news coverage, and ultimately led to a parliamentary committee hearing at which the executives of each business were questioned. During the hearing, the grocery chain executives acknowledged that there had in fact been communications among them before they announced the end of their hero pay programs, but each insisted that they made their decisions independently without coordination.

The Competition Bureau received an increasing number of questions and inquiries about whether, and if so, how the *Competition Act* applied to the conduct of the grocery chains, and to employment-related agreements between

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¹ In fact, collective bargaining activities are expressly exempted from the application of the *Competition Act*.

competitors more generally. In particular, there were questions about whether the grocery chains' conduct amounted to a violation of the criminal provisions in section 45 of the *Competition Act*.

The Competition Bureau's Position

These questions were answered on November 27, 2020, when the Competition Bureau published a statement clarifying its enforcement approach to no-poaching, wage-fixing, and other buy-side agreements.²

The Competition Bureau expressed its position that no-poaching, wage-fixing and other types of buy-side agreements are not subject to the criminal provision of the *Competition Act*, confirming the longstanding view of many in Canada's competition bar. The Competition Bureau observed that section 45's language limits its application to agreements with respect to the "supply" of products and services, and it contains no provision for the "purchase" of products and services. In fact, when section 45 was last amended in 2009, the word "purchase" was removed.

Therefore, the Competition Bureau has adopted the view that buy-side agreements, including employee no-poaching and wage-fixing agreements, are not within the scope of section 45 of the *Act*, and it reiterated this position more recently in its *Competitor Collaboration Guidelines* published in May 2021.³

The Competition Bureau further stated that certain types of buy-side agreements, especially no-poaching and wage-fixing agreements, raise "serious competition issues" and "are anti-competitive and have no pro-competitive consequences."⁴ The Competition Bureau indicated that it may investigate and take enforcement actions against such agreements under the civil provision in section 90.1, but noted that the requirement to prove substantial lessening of competition is "not a low threshold."⁵

Jurisprudential Developments

The Competition Bureau's guidance only reflects its enforcement position and is not an authoritative or definitive statement of the law in Canada. However, two recent class action decisions have confirmed the Bureau's position.

*Mohr v National Hockey League*⁶

A proposed class of junior hockey players alleged that a consortium of hockey leagues conspired to impose unreasonable terms and conditions on the standard player agreements, which had the effect of limiting the players' wages, and depriving them of marketing, sponsorship and endorsement opportunities. The claim alleged that, among other things, this is a violation of the criminal provision of section 45 of the *Competition Act*.

The Federal Court traced the legislative history of section 45 and concluded that Parliament intended to exclude buy-side agreements from the application of section 45 when that provision was last amended in 2009. The court dismissed the proposed class action.

This decision is currently under appeal.

² Competition Bureau Canada, Competition Bureau Statement on the Application of the Competition Act to No-Poaching, Wage-Fixing and Other Buy-Side Agreements (Nov. 27, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html> [hereinafter Competition Bureau Statement].

³ COMPETITION BUREAU CANADA, COMPETITOR COLLABORATION GUIDELINES 21 (May 6, 2021), [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-BC-CCGs-Eng.pdf/\\$file/CB-BC-CCGs-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-BC-CCGs-Eng.pdf/$file/CB-BC-CCGs-Eng.pdf).

⁴ Competition Bureau Statement, *supra* note 2.

⁵ *Id.*

⁶ 2021 FC 488.

*Latifi v The TDL Group Corp.*⁷

This case relates to Tim Hortons franchise restaurants. A proposed class of employees challenged a standard clause in the Tim Hortons franchisor's franchise agreements, pursuant to which franchisees agreed not to employ nor to induce any person who was already employed by a fellow franchisee to leave their employment, alleging that this is a violation of section 45.

The British Columbia Supreme Court dismissed the claim, on the basis that section 45 is limited to agreements between competitors that relate to the supply of a product or service. The court also relied on the Federal Court's analysis in the *Mohr* decision described above.

Potential Amendments

There are growing calls for the Canadian government to conduct a broad review of and consider reforms to the *Competition Act*. Some, including a parliamentary committee⁸ and a prominent law professor,⁹ have recommended that the criminal provision of section 45 should be amended to bring no-poaching, wage-fixing and other types of buy-side agreements within its scope. Some members of the Canadian bar have expressed a concern that a wholesale criminalization of buy-side agreements would chill legitimate and pro-competitive collaborations in the market, such as buying groups. This issue is sure to receive continued attention as Canada embarks on a review and reform of its competition law.

William Wu is a Partner in the Competition, Antitrust & Foreign Investment group at McMillan LLP and is based in Toronto.

⁷ 2021 BCSC 2183.

⁸ Parliament Comm. Report, Wage Fixing in Canada and Fairness in the Grocery Sector (June 2021), see Recommendation 1, <https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/report-6/page-39>.

⁹ Edward M. Iacobucci, Examining the Canadian *Competition Act* in the Digital Era 70 (Sept. 27, 2021), <https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>.