Kluwer Competition Law Blog

Collective Bargaining and the Canadian Competition Act

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Friday, May 31st, 2013

Here is an interesting note by my colleague John Bodrug (jbodrug@dwpv.com) on the collective bargaining exemption under Canada's Competition Act.

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A current investigation by the Canadian Competition Bureau into alleged illegal agreements among several residential low rise concrete forming contractors in Toronto, Ontario includes allegations that some provisions in a collective agreement between the contractors' association and a local union violated the federal Competition Act. As such, the investigation serves as a useful reminder to both employer groups and labour unions to ensure that their collective agreements comply with the Competition Act.

2010 Amendments to the Conspiracy Offence

Parties to collective bargaining should be aware of the implications of significant changes to the conspiracy provisions of the Act that came into effect in March 2010. The Act was amended to prohibit agreements among competitors to fix prices, allocate sales, customers or markets, or control or lessen production or supply, without the need that existed under the prior offence to prove an "undue" lessening of competition. A defence is available where the parties can demonstrate that such an agreement is reasonably necessary for, and ancillary to, a separate or broader lawful agreement. In addition, if the Commissioner of Competition considers that any agreement between competitors is likely to substantially lessen or prevent competition, the Commissioner can apply to the Competition Tribunal for an order prohibiting implementation of the agreement. However, the amendments did not change the long standing qualified exemption in the Act for collective bargaining.

The Concrete Contractors Investigation

In January, 2013, some Toronto media outlets reported on and released a copy of an Information filed by the Bureau with an Ontario court in 2012 to obtain warrants authorizing searches of the premises of three contracting companies and The Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity (LFRA). LFRA is the accredited bargaining agent for its members with respect to the union representing their employees.

The Information alleged both (1) agreements to unduly lessen competition contrary to the conspiracy offence as it existed prior to March 2010 and (2) subsequent agreements among

competitors to allocate customers contrary to the current offence.

Among other conduct described in relation to the first alleged offence, the Information asserts that the following provisions in a collective agreement between LFRA and the union restricted entry of small and medium sized contractors, contrary to the former conspiracy provision:

• a requirement that any contractor operating under the collective agreement post a $100,000 bond (later modified to require a letter of credit rather than a bond);

• a ban on the use of subcontractors (except during temporary crew shortages); and

• a requirement that all contractors pay into an industry fund administered by LFRA a fee based on labour hours worked. (The Information alleges that the fund was used to pay for social conventions for members and families, and was not refunded if a LFRA member chose not to attend.)

Qualified Collective Bargaining Exemption

Collective bargaining benefits from a qualified exemption in section 4 of the Act. The Act does not apply to combinations or activities of workmen or employees "for their own reasonable protection as such workmen or employees". Similarly, agreements among two or more employers in a trade, industry or profession "pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment" are also not subject to the Act. The Act further clarifies that the scope of these exemptions does not extend to agreements entered into by an employer to withhold a product from any person, or to refrain from acquiring any product from another person other than the services of workmen or employees.

The Bureau's Information acknowledges the collective bargaining exemption, but asserts that the alleged agreements "were never part of any collective bargaining process" and therefore did not fall within the exemption. The Bureau seems to allege or imply that the impetus for these provisions arose from the contractors' own interests, independent of consideration of employees, and the subsequent inclusion of the agreements in the collective agreement did not invoke the section 4 exemption. It remains to be seen, however, whether a Court would agree that an agreement subsequently included in a collective agreement was not even part of the collective bargaining process.

In any event, to qualify for the exemption, potentially anti-competitive restrictions in a collective agreement must meet the criteria of being for the reasonable protection of workers or pertaining to salary or wages and terms or conditions of employment, as applicable. On its face, the exemption for employees may be broader than that for employers, if the concept of reasonable protection for workers is broader than salary, wages or terms or conditions of employment. While there is limited case law or authority considering section 4, older commentary may provide some guidance.

Assurance of solvency and stability.

For example, a 1965 report by the Restrictive Trade Practices Commission (RTPC), a predecessor to the Competition Tribunal, considered a clause in a collective agreement providing that a non-member of a plumbing contractors association who wished to obtain union labour had to first obtain approval from a joint conference board (consisting of contractor and union representatives). The RTPC found that the joint conference board could be used to prevent competition from competitors outside the employer group, and its existence may have had the effect of deterring a

competitor from pursuing an authorization from the joint conference board. However, the RTPC also found that the clause was intended to enable the union to assure itself that it was granting labour agreements only to solvent and responsible contractors, who would not leave union members with unpaid wages. In the result, the RTPC found no agreement or arrangement between the union and the employer group to prevent a competitor from undertaking a project. In light of that decision, if the employees and their union are permitted to enter into a collective agreement that requires a prospective employer to demonstrate its solvency, and they genuinely consider such terms to be for the reasonable protection of the employees, it may be questioned whether the employer group would be in violation of the Act by entering into the same agreement, regardless of who proposed such terms.

Subcontracting.

A December 1999 Bureau advisory opinion relating to the construction industry (apparently given to an employer or employer group) considered proposed prohibitions on subcontracting. According to a redacted version of the advisory opinion released by the Bureau, the proposed contract provision would have prohibited unionized subcontractors from subcontracting work from non-union general contractors or project managers, except where all work on the relevant project is agreed to be performed by unionized employees. In the Bureau's view, such an agreement would be a "group boycott" that was not for the reasonable protection of employees. Rather such an agreement would deprive non-union general contractors of the services of unionized firms and impair competition in the supply of sub-contract construction work. However, the Bureau indicated that a requirement that unionized employers must have all of their contractual work performed by only unionized employees would most likely be exempted by section 4.

Liability of Bargaining Agents and Unions

The Bureau's information alleged that LFRA illegally aided and abetted or counselled an offence under the pre-March 2010 conspiracy offence. An entity that is not a "competitor" of other parties to the agreement could still commit an offence by aiding and abetting or counselling the formation of an illegal agreement among competitors.

Suggested Guidelines

While the scope of the collective bargaining exemption remains largely untested in the courts, employers could minimize the risk of a Competition Act challenge to their collective agreements by:

• even in the context of collective bargaining, avoiding where possible discussions or agreements among or with competing employers on matters other than salary, wages, terms or conditions of employment; and

• where collective bargaining may involve agreements on other matters that could exclude competitors or have other anti-competitive effects, documenting the rationale linking the provision in the collective agreement to the context in which it arose and how it meets the section 4 exemption criteria – e.g., as a practical matter, it may be easier to defend a provision requested by the union than a proposed limitation initiated by employers. In any event, it may be helpful for the union to expressly acknowledge in the collective agreement that it has independently determined that all of the provisions (or at least those that might be construed as restricting entry by competitors of the employers) are for the protection of the employees as employees.

On the other hand, either the employer group or the union may find it useful to rely on the Competition Act in opposing a proposed term to a collective agreement that is both exclusionary of competing employers and not reasonably related to the protection of employees or to salary, wages or terms or conditions of employment.

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