Kluwer Competition Law Blog

Canada Joins the Labour Party: "Wage-Fixing" and "No-Poaching" Agreements are now Illegal Under the Competition Act

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Competition authorities globally continue to focus attention on potential anticompetitive conduct affecting labour markets, with a particular emphasis on "wage-fixing" and "no-poaching" agreements.

Although Canada was somewhat late in addressing this issue, the federal government has now passed amendments to the Canadian Competition Act that criminalize wage-fixing and no-poaching agreements between parties. In enacting this amendment, the government was influenced by developments in other jurisdictions – principally the United States – but also by a specifically Canadian incident that brought the issue of employer coordination to the forefront. The new provisions now expose parties who enter into wage-fixing and no-poaching agreements to severe consequences, including the risk of both criminal prosecution and civil litigation for damages.

Current Legislative and Enforcement Context

The Conspiracy Offence – Section 45

Section 45 of the Competition Act makes it a criminal offence for competitors (or potential competitors) to enter into certain types of anticompetitive conspiracies, agreements or arrangements. Until the recent amendments were enacted, the criminal prohibition in section 45 was limited to agreements that:

1. fix, maintain, increase or control prices for the supply of a product;
2. allocate sales, territories, customers and markets for the production or supply of a product; or
3. fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.

Section 45 is intended to prohibit the most egregious forms of cartel conduct ("hard core" cartels). Because such agreements are considered to be inherently anticompetitive, the offence created by section 45 is *per se*, meaning that there is no requirement to show that the agreement in question had an anticompetitive effect in a relevant market; it is only necessary to prove that (a) there was an agreement falling within one of the enumerated categories, and (b) the parties intended to enter into that agreement.

Consistent with the gravity of the conduct involved, the penalties for violating section 45 are severe. Parties convicted of an offence under section 45 are liable to (a) a fine in the discretion of the court (i.e., there is no maximum fine); (b) imprisonment for a term of up to 14 years; or (c) both. Private parties are also entitled to bring civil damage claims for injuries allegedly suffered as a result of the conduct in question.

The offences under section 45 can also be proved on the basis of circumstantial evidence. Thus, for example, even if the prosecution cannot tender direct evidence of an actual agreement between parties, the court can infer the existence of an unlawful agreement based on surrounding circumstances, such as exchanges of confidential information and other so-called “facilitating practices”.

Section 45 also includes certain defences, the main one being the ancillary restraints defence (ARD), which provides that no person shall be convicted of an offence if that person can demonstrate that the agreement in question:

1. is ancillary to a broader or separate agreement that includes the same parties and that is not itself criminal; and
2. is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement.

However, the ARD has never been judicially considered, and its scope and application are uncertain.

Section 45 in its current form was enacted in 2009. Prior to that, the conspiracy offence applied broadly to any type of allegedly anticompetitive agreement provided that it had the effect of “unduly” lessening competition in the relevant market. The Competition Bureau, which administers and enforces the Competition Act, had long considered the requirement to prove “undueness” to be an impediment to successful prosecutions. Accordingly, the 2009 amendments eliminated this requirement and created a *per se* offence which does not require evidence of market impact. As part of the legislative *quid pro quo*, however, the new *per se* offence was limited to the specific categories of “hard core” cartel conduct enumerated in the section. All other agreements with alleged anticompetitive effects were designated to be dealt with under a new civil provision, section 90.1, which authorizes the Competition Bureau to seek relief from the Competition Tribunal when an agreement between existing or potential competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market. In other words, unlike under section 45, evidence of an anticompetitive effect in the relevant market is required to prove a contravention of section 90.1. Moreover, relief under section 90.1 is limited to an order prohibiting parties from engaging any further in the impugned conduct; the Competition Tribunal cannot impose fines in this case (it can in others) and cannot order persons to be incarcerated.

Application to Wage-Fixing/No-Poaching Agreements

Canadian competition law has not historically concerned itself very much with labour markets. The Competition Act contains an express exemption for agreements reached between parties in the context of collective bargaining (section 6), and there is a prohibition against certain types of agreements that may affect the opportunities of players in professional sports leagues (but not participants in amateur sports – agreements relating to amateur sports are also exempted from the Competition Act). But that’s about it.

Nor was there any widespread sense that the Competition Act should address labour market issues more extensively or directly. Rather, the prevailing attitude was best expressed by a former Commissioner of Competition, who said in a 2018 speech that competition law should not be regarded as a "cure-all" to "remedy social issues like inequality and unemployment."

The interesting aspect of this speech is that it came in the midst of the growing effort in the United States to raise the profile of labour market issues in antitrust enforcement. For example, it was already in 2016 that the United States Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (Antitrust Division) jointly issued special compliance guidelines for human resource (HR) professionals and others involved in hiring and compensation decisions (HR Guidelines). These guidelines stated that the FTC and the Antitrust Division would treat wage-fixing and no-poaching agreements among employers as *per se* illegal under U.S. law and would proceed criminally against implicated parties. According to the HR Guidelines, no-poaching and wage-fixing agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hard core criminal conduct." Since that time, the U.S. has seen a significant increase in the number of investigations, criminal indictments, and private lawsuits based on alleged anticompetitive agreements affecting employees, and the Biden Administration has reiterated that competition in labour markets will be an enforcement priority. Other jurisdictions have stepped up their enforcement activities as well.

The issuance of the U.S. HR guidelines in 2016 raised questions about whether the Competition Bureau would follow suit, and in particular if the Competition Act even gave the Bureau the authority to pursue such matters criminally. However, as noted above, the issue never gained traction with the Competition Bureau and was not an enforcement priority at all.

That changed after allegations surfaced in June 2020 claiming that certain major Canadian food retailers had simultaneously ended their temporary $2 per hour wage increases for front-line employees who had stayed on their jobs during the Pandemic. A political firestorm then ensued, with the question asked why the Competition Bureau had not taken any action to address what seemed to be collusive conduct in eliminating this "hero pay".

The Competition Bureau subsequently released a statement in November 2020 to explain its position. The Competition Bureau acknowledged that agreements between competing employers affecting employees, such as wage-fixing and no-poaching agreements, may raise "serious competition issues". However, the Competition Bureau expressed the view (based on a Canadian Department of Justice opinion) that section 45 of the Competition Act did not give it the jurisdiction to pursue such agreements as criminal violations because the categories of prohibited conduct in section 45 relate only to collusion with respect to the supply of products and not to the purchase of products, such as the purchase of labour services. The Bureau added that while it could pursue anticompetitive "buy-side" agreements under the Competition Act's civil provision governing anticompetitive agreements between competitors (section 90.1), this would require proving that the agreements substantially prevented or lessened competition, which is not "a low threshold" to meet.

The Competition Bureau's position did not come as a surprise. Many observers had expressed skepticism that section 45 could be used to pursue wage-fixing and no-poaching agreements criminally. It was also no surprise when two courts in unrelated litigation cases subsequently confirmed this view. Having said that, it was not necessarily predictable that the Competition

Bureau would effectively forego all enforcement action simply because the criminal conspiracy offence in section 45 did not apply.

With the Competition Bureau having basically said it could do nothing, the issue was then taken up by the House of Commons Standing Committee on Industry, Science and Technology, which had initiated hearings into the conduct of the retailers. The Committee released its report in June 2021, concluding that the "lack of provisions prohibiting purchase-side agreements between competitors that amount to cartel-like practices, such as wage-fixing agreements, is a significant gap" in the Competition Act. The Committee also noted that this gap made Canadian law inconsistent with U.S. law, at least as enforced by the FTC and Antitrust Division. Accordingly, the Committee recommended "that the Government of Canada introduce legislation amending Section 45 of the Competition Act to prohibit cartel-like practices related to the purchase of goods and services, including wage-fixing agreements between competitors." In later statements, the Competition Bureau agreed that the Competition Act should be amended to address wage-fixing and no-poaching agreements between employers.

The irony, of course, is that, prior to 2009, conspiracies relating to the purchase of products and services were theoretically prohibited by the conspiracy offence, provided that they lessened competition "unduly" in the relevant market. When the section 45 offence was amended in 2009 to create a *per se* offence (as discussed above), the categories of prohibited conduct were deliberately narrowed to explicitly exclude "buy-side" agreements from potential criminal liability. The apparent thinking was that these types of agreements were not so invidious as to merit *per se* treatment and should be accorded the type of "rule of reason" standard applicable under section 90.1 where anticompetitive effects must be proved. The proposal to include "buy-side" agreements in section 45 was effectively asking the government to undo the changes made to the Competition Act in 2009 (presumably with the Competition Bureau's approval at the time).

The Amendments

In April 2022, the Canadian government proposed various amendments to the Competition Act as part of omnibus legislation to implement the federal budget for 2022. The draft legislation included a proposal to amend section 45 by adding two new categories of *per se* prohibited conduct specifically directed at employee-related agreements, i.e., agreements to "fix, maintain, decrease or control salaries, wages or terms and conditions of employment" (wage-fixing) and agreements to "not solicit or hire each other's employees" (no-poaching).

The proposed amendments to section 45 were enacted on June 23, 2022 after minimal review and debate, along with the rest of the budget implementation legislation (including the other amendments to the Competition Act). Unlike the other amendments, however, the amendments to section 45 will only come into effect on June 23, 2023, presumably to allow employers a grace period of one year to rearrange their affairs for compliance purposes.

A few observations about the proposed amendments are in order.

First, the fact that section 45 has been amended to include wage-fixing and no-poaching agreements demonstrates the extent to which political trends in Canada, and enforcement trends outside of Canada, can influence the development of Canadian competition law. Restrictions on employees were never a high priority for the Bureau, and there is even an argument that these

restrictions can be pro-competitive by keeping down costs (a particular issue now that inflation has returned in a serious way). But by virtue of the amendments, wage-fixing and no-poaching agreements will now be included among the most serious types of anticompetitive violations that can be committed in Canada, on an equal plane with "hard core" criminal conduct such as price-fixing and market allocation. The one saving grace is that, contrary to the suggestion of the Industry Committee, not all "buy-side" agreements were criminalized (or re-criminalized if you prefer), only wage-fixing and no-poaching.

Second, the amendments do not require that the parties engaging in the prohibited conduct be competitors of each other, even in the non-conventional sense of being competitors for the same class of employees. This is different from the other conduct covered by the section 45 offence, which requires as a basic precondition for liability that the parties to the impugned agreement be competitors or potential competitors of each other. Accordingly, the potential scope for liability with wage-fixing and no-poaching agreements is much broader than that for the traditional hard-core cartel offences also covered by section 45.

Third, given the breadth of the amendments' wording, it is possible that the new offences could extend to non-solicitation arrangements and other employee-related provisions in business acquisition agreements, such as interim restrictions on changes in salaries, wages and/or terms and conditions of employment. Historically, the Competition Bureau has taken the view that these types of provisions are not an issue because they are regarded as being "ancillary to" and "reasonably necessary for" otherwise legitimate merger agreements. However, it is unclear what the Bureau's position will be now that wage-fixing and no-poaching agreements have been criminalized. The Bureau has said that it will update its guidance documents to reflect the new amendments; hopefully, that will include addressing this issue.

Fourth, the amendments have nothing to say about agreements to exchange information regarding compensation or other terms and conditions of employment, which was another area of concern highlighted by the US HR Guidelines. However, given that section 45 offences can be proved on the basis of circumstantial evidence, there is a real risk that benchmarking exercises, where parties exchange information about their hiring practices, such as salaries and other terms and conditions of employment, could be used by the prosecution (and private plaintiffs) as evidence to support allegations of illegal wage-fixing or no-poaching agreements.

Fifth, as recent experience in the U.S. demonstrates, it is by no means a foregone conclusion that criminalizing wage-fixing and no-poaching agreements will lead to successful prosecutions. This is especially true for Canada, where the Bureau's success rate in cartel prosecutions is fairly poor.

That said, a real concern is that the amendments could provide the legal basis for a wave of civil claims against parties alleged to have violated the new prohibitions in section 45. Section 36 of the Competition Act allows private plaintiffs to sue for civil damages in relation to alleged criminal conduct regardless of whether the Competition Bureau has commenced its own enforcement proceedings. As such, the amendments could open the door to potential civil class actions against parties independent of whether the Bureau takes successful enforcement action or not.

Another concern is that should any parties in fact be convicted of employee-related collusion (whether in a contested proceeding or more likely by entering into a guilty plea on consent), they could be disqualified from contracting with the federal government and/or certain provincial governments. That would be in addition to the other criminal penalties available under section 45

of the Competition Act or any related civil damages.

Finally, the expansion of section 45 to include wage-fixing and no-poaching agreements could be the "thin edge of the wedge," presaging the incorporation of impacts on labour in other areas of competition law enforcement, most notably merger review. This would be consistent with a more general receptivity on the part of the Bureau to "hipster antitrust" and incorporating non-traditional factors into competition assessments.

Conclusion

There are still many questions and uncertainties about what the new amendments to section 45 will mean in practice. However, given the potential consequences involved – criminal prosecution and claims for civil damages – businesses operating in Canada and their HR professionals must now consider issues of competition law compliance and risk avoidance that were never a real concern before. As immediate steps, companies should:

1. audit their HR practices to ascertain whether they are involved in wage-fixing or no-poaching arrangements with other parties, or in any discussions or exchanges of information on these topics. One area to focus on is whether the company is involved with industry organizations that may share employment-related information as part of benchmarking exercises. Depending upon the results, it may be advisable to consult with experienced competition law counsel.
2. ensure that internal compliance materials and training encompass a discussion of potential HR risks, and that HR personnel are included in compliance training.
3. avoid using non-solicit clauses or other interim employee-related provisions in transaction agreements that go beyond what would be considered typical (in duration and scope); alternatively, be prepared to explain why atypical terms are reasonable and necessary to achieve the objectives of the broader agreement.
4. always be vigilant in ensuring that internal, ordinary course documents do not create the erroneous impression of anticompetitive intent or conduct, and that they document the pro-competitive nature of business decisions and initiatives.

Companies and HR professionals in Canada are faced with a more fraught environment of possible competition law exposure. Fortunately, the amendments will not come into force until June 2023. That time should be used profitably to enhance compliance efforts and mitigate the new risks of liability that the law now presents.

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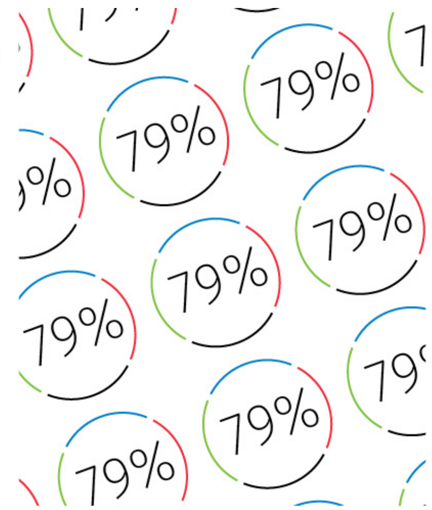

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