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Competition Law Issues for HR Professionals in Canada

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Introduction

On October 20, 2016, 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 (HR Guidelines)[1] for human resource (HR) professionals and others involved in hiring and compensation decisions. The HR Guidelines focus attention on an area that is not typically regarded as an antitrust "hot spot" but has been the subject of several high-profile proceedings in recent years in the United States. In particular, the HR Guidelines discuss the potential antitrust risks when employers agree (i) not to hire each other's employees (non-poaching agreements); (ii) not to compete on wages/other terms of employment (wage-fixing agreements); and (iii) to share information regarding compensation and other sensitive employment-related matters.

Canada's *Competition Act* (Act) also contains provisions that could apply to prohibit anticompetitive agreements between competitors (or potential competitors) on employee-related matters, principally section 45 (criminal conspiracies) and section 90.1 (civil agreements between competitors).[2]

Section 45

Under section 45 of the Act, it is a criminal offence for competitors (or potential competitors) to enter into conspiracies, agreements or arrangements that

(i) fix, maintain, increase or control prices for the supply of a product;

(ii) allocate sales, territories, customers and markets for the production or supply of a product; or

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1 Antitrust Division, U.S. Department of Justice/Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (October 2016).

2 Sections 45 and 90.1 are the Act's principal provisions governing anticompetitive agreements between competitors (other than bid-rigging, which is covered by section 47 of the Act). However, depending on the circumstances, it might also be possible to conclude an anticompetitive agreement on employee-related matters under another civil provision – that is, "joint" abuse of dominance under section 79 of the Act. One enforcement advantage to proceeding under section 79 is that the potential sanctions include administrative monetary penalties (AMPs) of up to C$10 million, which are not available under section 90.1

(iii) fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.[3]

The offence created by section 45 is a *per se* offence, meaning that the prosecution (the Crown), is not obliged to demonstrate that the agreement in question had an anticompetitive effect in a relevant market; it is required to prove only that (i) there was an agreement and (ii) the parties intended to enter into that agreement.[4] Indeed, the section 45 offence does not even require proof that the offending agreement was actually implemented. Moreover, in a prosecution under section 45, the court is entitled to infer the existence of an agreement based on circumstantial evidence, with or without direct evidence of communication between or among the alleged conspirators. That said, given that section 45 is a criminal offence, the Crown bears the higher criminal burden of proof associated with such offences – namely, it must prove the elements of section 45 beyond a reasonable doubt.

Section 45 provides for certain defences, the main one being that no person shall be convicted of an offence if that person can demonstrate that the agreement in question

(i) is ancillary to a broader or separate agreement that includes the same parties and that is not itself criminal; and

(ii) is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement.

Parties convicted of an offence under section 45 are liable to (i) a fine of up to C$25 million (this is per count so the total could be higher than this amount); (ii) imprisonment for a term of up to 14 years; or (iii) both. Significantly, private parties are also entitled to bring claims for damages allegedly suffered as a result of the conduct in question.

A final and important consideration is that any person who has suffered injury as a result of conduct under the Act's criminal offence provisions (including section 45) may bring a civil action to recover damages from the person or persons who engaged in that conduct.[5] Civil claims of this nature are now commonplace in Canada and are typically brought as class actions under relevant provincial legislation.[6] The financial risks associated with such class action claims could be significant.

Section 90.1

Section 45 is intended to prohibit the most egregious forms of cartel conduct ("hard core" cartels) – that is, price fixing, market allocations and output restrictions. Agreements between

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3 "Product" is defined in the Act to include both articles and services. As such, section 45 and other provisions of the Act can apply to anticompetitive practices in relation to employment services.

4 Criminal prosecutions are carried out by the Public Prosecution Service of Canada (PPSC). In the context of the Act, the Competition Bureau (Bureau) will investigate alleged offences, such as under section 45. If persuaded that there has been an offence, the Bureau will refer the matter to the PPSC for prosecution.

5 Section 36 of the Act.

6 The section 36 right of action does not apply to breaches of the Act's civil provisions, such as section 90.1, discussed below.

competitors that fall outside these categories, however, may still have anticompetitive effects. Under the Act, any such agreements are subject to potential enforcement action under section 90.1, which authorizes the Bureau to seek relief when an agreement between existing or potential competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.

Unlike the criminal offence under section 45, section 90.1 is a civil "reviewable practice." This entails several important differences:

(i) Applications for relief under section 90.1 are brought directly by the Bureau – the PPSC is not involved.

(ii) Applications are adjudicated by a specialized administrative tribunal – the Competition Tribunal (Tribunal) – rather than the courts.

(iii) As noted, the standard for obtaining relief is that the agreement in question "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 (although the burden of proof is the lower standard associated with civil cases in Canada, i.e., "on a balance of probabilities").

(iv) On a finding that section 90.1 has been infringed, the Tribunal may issue an order prohibiting any person (whether or not a party to the agreement) from doing anything under the agreement in question. In contrast to a section 45 offence, there is no exposure to potential fines or imprisonment. Similarly, private parties are not permitted to bring civil actions claiming damages for injuries allegedly suffered due to the conduct at issue.

Section 90.1 also provides for an "efficiencies defence," which allows parties to argue that no order should be issued against them on the grounds that the agreement in question has brought about or is likely to bring about gains in efficiency that will be greater than and offset any anticompetitive effects.

Application of the Act to Specific Conduct

Non-Poaching/Wage-Fixing Agreements

The U.S. HR Guidelines state that the FTC and the Antitrust Division will treat wage-fixing and non-poaching agreements among employers as *per se* illegal under U.S. law and will proceed criminally against implicated parties. According to the HR Guidelines, non-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."

In Canada, as noted above, section 45 of the Act also makes it a *per se* criminal offence for competitors (and potential competitors) to enter into price-fixing or market-allocation agreements.

Similar to the U.S. approach, therefore, a non-poaching agreement could also be regarded under section 45 as an act of market allocation (agreeing not to compete for the services of

certain employees) or even as a price-fixing agreement (in the sense that the purpose and effect of the agreement is to fix the "price" paid to employees for their services). By the same token, it seems clear that wage-fixing agreements could also be classified as price-fixing agreements under section 45.

An important point to note in this regard, however, is that the specific offences under section 45 are limited to the "supply" of a product. It is arguable that use of the term "supply" in section 45 means that the offence applies only to cases in which an agreement fixes prices or allocates markets with respect to products or services that are *supplied by* the conspirators. On that reading, non-poaching agreements or wage-fixing agreements would fall outside the section 45 offence because they relate to services that are *purchased by the conspirators, not supplied by them*. Still, there is no case law yet interpreting this aspect of section 45, so the scope of the provision remains an open question.

Another important point to recall is that section 45 does not apply if the impugned agreement is "ancillary" and "directly related" to, and "reasonably necessary" for, the implementation of an otherwise non-criminal arrangement. This means, for example, that section 45 might not apply to employee-related restrictions that are entered into as part of merger transactions, joint ventures and other legitimate collaborations between competing employers.

Even if section 45 does not apply, the Bureau could still pursue non-poaching/wage-fixing agreements under section 90.1 of the Act, the civil provision prohibiting anticompetitive agreements between competitors. Although criminal sanctions would not be available, the negative consequences to parties found to have violated section 90.1 are still substantial (prohibition orders, legal costs, diversion of management time, loss of reputation, etc.).

To make out a case under section 90.1, the Bureau would have to demonstrate that the impugned agreement prevents or lessens, or is likely to prevent or lessen, competition substantially in the relevant market. Insofar as wage-fixing/non-poaching agreements are concerned, relevant factors would likely include the position of the agreement's participants in the relevant "employment" market and whether alternative options are available to employees and prospective employees affected by the agreement.

Information Exchanges

The U.S. authorities are also very concerned about employers exchanging information regarding compensation or other terms and conditions of employment. As noted by the U.S. HR Guidelines, while agreements to share information are not *per se* illegal under U.S. law, they could serve as evidence of an illegal agreement – for example, to fix wages. These agreements may also be independently subject to antitrust liability if they have or are likely to have an anticompetitive effect.

The situation under Canadian law is very similar. For example, it is clear that an agreement to exchange competitively sensitive information does not fall within one of the prohibited types of agreements in section 45. Therefore, exchanging sensitive recruiting information or compensation information would not, in and of itself, constitute a criminal offence under the Act. However, an exchange of competitively sensitive information between competitors could be the type of circumstantial evidence relied on by a court to infer the existence of a prohibited agreement under section 45: As noted by the Bureau's *Competitor Collaboration Guidelines* (Collaboration Guidelines), "parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one

another's prices, may be sufficient to prove that an agreement was concluded between the parties."[7] At the very least, the existence of an agreement of this nature could give the Bureau grounds on which to open an inquiry under the Act into possible criminal conduct.

Even if agreements to exchange information are not caught by section 45, they can constitute violations of section 90.1 of the Act. Indeed, the Bureau's Collaboration Guidelines expressly reference information exchange agreements as a type of agreement that could give rise to anticompetitive effects under this provision. According to the Collaboration Guidelines, agreements to exchange competitively sensitive information can harm competition by facilitating the ability of the participants to act in concert, thus diminishing competitive rivalry. [8]

In assessing whether an arrangement to share information will likely harm competition, the Collaboration Guidelines indicate that the Bureau will generally consider the following factors:

- the nature of the information to be exchanged (i.e., whether the information is competitively sensitive);
- the timing of the information exchange (i.e., whether the information relates to historical, current or future activities, with current and future information considered more likely to raise concern);
- whether the parties participating in the information exchange have market power;
- the manner in which the information is collected and disseminated (i.e., whether the information is shared directly between competitors or aggregated by a third party, with direct exchanges between competitors being more likely to raise concern); and
- whether any anticompetitive effects are offset and outweighed by the efficiencies generated through the information-sharing arrangement.

It is, therefore, clearly possible that exchanging sensitive recruiting or compensation information could violate section 90.1 of the Act, provided that the requisite negative impact on the relevant market is present or likely to occur.

What Should You Do?

Agreements between competitors on employee-related matters could lead to significant consequences under the Act, both in terms of enforcement proceedings and associated class actions brought by aggrieved employees. Given these consequences, it is important that Canadian businesses add these potential issues to their compliance agendas.

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7 See Collaboration Guidelines, section 3.7 (pages 26-28) for the discussion of information exchange agreements.

8 In a 2012 speech, Canada's Interim Commissioner of Competition, John Pecman, cited information-sharing agreements as the type of conduct that "reduces incentives to compete vigorously." He stated: "Competitively sensitive information exchanged among competitors…can have serious negative effects on competition, especially if these are in highly concentrated markets with relatively homogenous product offerings."

Here are a few practical compliance steps to consider:

(i) In the absence of relevant Canadian guidance on the subject, we recommend reviewing the *U.S. HR Guidelines*, which contain helpful FAQs and tips on identifying potentially illegal conduct.(ii) Review the practices and procedures of the company's HR department to determine whether any of the following red flags exist:

- agreements with other companies about employee salaries or other terms of compensation, either at a specific level or within a range;
- agreements with other companies about soliciting or hiring that other company's employees;
- agreements with other companies about employee benefits or other terms of employment;
- exchanges with other companies of information about employee compensation or terms of employment; and
- discussions of the above topics with other companies, including during trade association meetings, social events or in other non-professional settings.

(iii) Ensure that internal compliance policies incorporate a discussion of the potential application of the Act to HR issues.

(iv) Expand compliance training to include HR personnel.

It may not always be clear whether an agreement touching on employment issues in fact violates the Act. Accordingly, it may be prudent to consult experienced competition counsel to help assess the level of risk involved should existing conduct that is potentially problematic be identified or the suggestion be made to engage in such conduct in the future.

If you have any questions regarding the foregoing, please contact George Addy (416.863.5588), Mark C. Katz (416.863.5578), Charles Tingley (416.367.6963), or *Jessica Bullock (416.863.5503) in our Toronto office or Louise Patry (514.841.6428) in our Montréal office.*