CLASS ACTION ▸

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No-Poach No More:
The New Competition Act

The criminal provisions of the *Competition Act* are about to be updated and will come into force on June 23, 2023. The updated legislation has a greater emphasis on protecting labour competition.

Notably, no poach agreements between employers will be illegal; a breach of the criminal provisions of the *Competition Act*. A no poach agreement is a deal between employers not to hire each other's employees. It is similar to a non-compete clause, as it is a tool used by employers to prevent their employees from leaving, thereby creating greater employer bargaining power and stagnating wages. However, unlike non-compete clauses, no poach agreements are typically hidden from the employees they affect.

Recently, there has been judicial comment on no poach agreements. While no poach clauses have harmful effects of these agreements, courts have held that no poach clauses do not breach the criminal provisions of the *Competition Act*. This approach is in line with previous guidance published by the Competition Bureau which suggested these agreements are not inherently anticompetitive. Unfortunately, this approach does not protect labour competition and leaves employees with no recourse under the *Competition Act*.

Criminalizing no poach agreements indicates a changing political mindset. Whereas previous regimes determined that no poach agreements are not inherently anticompetitive and warrant criminal penalties; now, the government wants to penalize this behaviour. It appears that the government now accepts that no poach agreements are inherently anticompetitive. These soon-to-be criminal conspiracies will be subject to fines at the discretion of the court and up to 14 years in jail.

The Current Competition Act

At the moment, the *Competition Act* criminalizes the following behaviour:

> 45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
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> (a) to fix, maintain, increase or control the price for the supply of the product;
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> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
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> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Various entities have determined that the agreements listed in section 45 does not include buy-side agreements between employers, such as no poach agreements.

In November 2020, the Competition Bureau released its statement on the application of section 45 to no poach agreements. The Bureau determined no poach agreements do not attract criminal review. The rationale is that no poach agreements *may* have anticompetitive effects; the Bureau was not certain that these agreements *will* have anticompetitive effects.[1]

The Competition Bureau subsequently released their Competitor Collaboration Guidelines in May 2021. They note that section 45 is reserved for agreements which constitute "naked restraints" on competition. Naked restraints are restraints which are "so likely to harm competition and have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effect."[2] Since buyer (employer) side agreements are not inherently anti-competitive, they should not be reviewed as a criminal offence.[3]

Additionally, the Competition Bureau highlighted the wording of section 45, which is directed at the *supply* of a product or service; not the *purchase* of a product or service.[4] Thus, only supply-side agreements breach section 45; buy-side agreements do not.

The Competition Bureau's statement was reviewed in *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183. This case dealt with a no poach agreement within Tim Hortons standard form franchise agreements. Pursuant to the franchise agreements, franchisees — who owned and operated Tim Hortons restaurants across Canada — could not hire current employees at other Tim Hortons restaurants.

The Honourable Justice Sharma reviewed the Competition Bureau's statement that it considers no poach agreements to fall outside the ambit of s.45 of the *Competition Act*. Justice Sharma queried whether the Bureau's statements were admissible, concluding that regardless of whether they are admissible, the statements are neither binding nor determinative (at paragraph 73). While Justice Sharma considered the "naked restraints" concept, she ultimately concluded that no poach agreements fall outside of section 45 because the section does not include the purchase of a product or service:

> [31] TDL submits s. 45 was never meant to apply to the type of agreement in which the No-hire clause appears. Its position rests on distinguishing between "buy-side" and "sell-side" agreements. TDL submits s. 45 applies to inherently anti-competitive "sell-side" agreements, specifically those where competing suppliers agree to fix prices, allocate markets, or limit output.
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> [32] These are contrasted to "buy-side" agreements where purchasers of a product agree to fix the price of products they purchase. TDL submits buy-side agreements are not inherently anti-competitive; therefore, they are not captured by s. 45, which has penal consequences. Instead, buy-side agreements can in some circumstances enhance competitiveness, for example, allowing medium-sized business to pool their purchasing power to better compete with larger businesses.
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> ...
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> [37] TDL submits it is clear on its face that s. 45 is aimed at the supply or the production of products, not the purchase of products. Its position is that the provision aims to prohibit certain conspiracies or agreements amongst competitors engaged in the supply of a product, which are deemed to be anti-competitive.
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> ...
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> [44] This reflects what TDL say is Parliament's intent to prohibit inherently anti-competitive supply-side agreements. TDL maintains the No-hire clause is not a supply-side agreement, and therefore the claim is bound to fail.
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> ...
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> [55] Section 45 uses the phrases "the supply of the product" and "the production or supply of the product". It also identifies in subsections (a)–(c) the specific types of agreements amongst competitors that are prohibited.

> Notably, each one refers to a prohibited activity with regard to "the supply" of the product.
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> [56] I find a plain reading of section 45 supports TDL's position. The focus of s. 45 is to prohibit certain agreements amongst people who are competitors with each other "with respect to a product". It creates an offence if those competitors do certain things with regard to "the supply" or "the production or supply" of "the product". Grammatically, there is no need to include the word supplier in s. 45, and arguably, it would be unwieldy and redundant to do so.

In *Mohr v. National Hockey League*, 2021 FC 488, the Honourable Chief Justice Crampton came to the same conclusion. The case involved conspiracies between the National Hockey League, American Hockey League, and East Coast Hockey League, in addition to other hockey leagues. The plaintiff alleged the leagues conspired to impose nominal wages on hockey players and to restrict rights to market their image, sponsorship and endorsement opportunities.

Justice Crampton focused on the plain wording of the statute, noting at paragraph 35:

> As is apparent from the plain language of subsection 45(1), it applies only to "competitors" who enter into a conspiracy, agreement or arrangement concerning either the "supply" or the "production or supply" of the product in respect of which they compete.

Justice Crampton also highlighted the Competition Bureau's "naked restraints" rationale at paragraph 33:

> [S]ection 45 does not apply to the types of agreements that are alleged in the Amended Statement of Claim. Among other things, those agreements are not the types of unambiguously harmful "hard core cartel" agreements, also known as "naked" cartel agreements, that are contemplated by section 45.

The Federal Court of Appeal affirmed Justice Crampton's decision in *Mohr v. National Hockey League, 2022* FCA 145, but did not delve into the "naked restraints" rationale. Instead, the appeal court focused on the wording of the statute:

> [33] ... Section 45 is limited to agreements between competitors to fix prices or allocate markets relating to "the production or supply" of a product or a service— otherwise known as "sell-side" conspiracies.

As a result of these decisions, employees do not have recourse under the *Competition Act* for conspiracies entered into by their employers.

The New Competition Act: A Changing Mindset

It appears the Government of Canada took note of a gap in the criminal provisions of the *Competition Act*, allowing buy-side agreements between employers, such as no poach agreements, to go unpenalized.

Among the many changes to the *Competition Act* is the addition of subsection 45(1.1) to the existing criminal provisions. Subsection 45(1.1) will state:

> 45 (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
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> (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.

No poach agreements will now attract criminal penalties.

After the announcement of this subsection, the Competition Bureau released a new statement on no poach agreements: "Enforcement guidance on wage-fixing and no poaching agreements". This guidance, published in February 2023, supplements the Competitor Collaboration Guidelines from May 2021.[5]

The Competition Bureau's new guidance is a radical change from the statements made less than two years prior. The Bureau highlights that the Government of Canada is concerned with protecting competition in labour markets by prohibiting agreements to fix wages and restrict job mobility: "Maintaining and encouraging competition among employers results in higher wages and salaries, as well as better benefits and employment opportunities for employees." This includes no poach agreements.

Surprisingly, the Competition Bureau now appreciates that no poach agreements are "naked restraints" on competition: "that is, restraints on wages or job mobility that are not implemented in furtherance of a legitimate collaborations, strategic alliance or joint venture." In a reversal from their 2020 statement, the Competition Bureau now intends to seek criminal penalties for this inherently anticompetitive behaviour.

The Competition Bureau provides an example of a no poach agreement which would raise criminal concerns:

> Company A is in the business of franchising fast food restaurants across Canada. Company A and each franchisee spend a lot of money and time training new employees. To this end, the franchise agreements entered into by Company A and each franchisee include a no-poaching clause whereby the franchisor and franchisee each undertake to not hire persons who are currently employed by the franchisor and other franchisees. Each franchisee has an understanding that the hiring of its employees by another franchisee or Company A is prohibited.

This example is practically identical to the Tim Hortons no poach agreement analyzed in *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183. Evidently, there has been a shifting mindset over the last couple years.

In its current form, section 45 of the *Competition Act* is focused on supply of products and services; but not the purchase of those products and services. The wording of section 45 led the Competition Bureau and the Federal Court to believe that no poach agreements are not "naked restraints" on competition. It allowed no poach agreements to go unpenalized. However, the Government of Canada rectified this issue with the addition of subsection 45(1.1). By focusing on maintaining competition in the labour market and protecting employees from wage fixing agreements, the government has signalled that they view no poach agreements to be inherently anticompetitive, having little-to-no social value. Offenders can face prison time.[6]

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1 Competition Bureau Canada, "Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements," November 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>

2 Competition Bureau Canada, "Competitor Collaboration Guidelines," May 6, 2021: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/competitor-collaboration-guidelines#sec01-1>

3 Competition Bureau Canada, "Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements," November 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>

4 Competition Bureau Canada, "Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements," November 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>

5 Competition Bureau Canada, "Enforcement guidance on wage-fixing and no poaching agreements," February 6, 2023: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/enforcement-guidance-wage-fixing-and-no-poaching-agreements>