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Non-Solicitation and "No-Poach" Agreements – Clarity on Canadian Law?

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Non-solicitation or "no-poach" clauses that prohibit franchisees from soliciting or hiring the employees of other franchisees are commonly included in Canadian and American franchise agreements. However, these provisions have increasingly been scrutinized by US antitrust regulators, who have indicated that no-poach clauses, including those in franchise agreements can be subject to criminal prosecutions. Adding to this are the aggressive campaigns taken against these types of clauses (including in the franchise context) by enforcement agencies under state antitrust laws.

In Canada, the prevailing view has been that these types of clauses in franchise agreements are not subject to the criminal provisions of the *Competition Act* (the Act). This is because the criminal provisions of the Act apply only to agreements between competitors relating to the supply of products (which includes both goods and services). No-poach or similar type agreements do not, on their face relate to the supply of products and a franchise agreement is not an agreement between competitors. This view is supported by the fact that the Canadian Commissioner of Competition (the Commissioner), the agency responsible for enforcement of the Act, has not taken enforcement action in this area.

Despite this, given the increased attention to no-poach agreements in the US, stakeholders have requested that the Commissioner provide clarity regarding the treatment of non-solicitation, wage-fixing and other types of agreements between purchasers, also known as buy-side agreements, under the Act (unlike the US, Canada does not have provincial antitrust laws due to the federal/provincial division of powers under the *Constitution Act*).

In response to increasing pressure to provide clarity on this issue as a result of recent allegations that several large Canadian grocery retailers coordinated the rollback of "hero pay" increases during the COVID-19 pandemic, the Commissioner issued a statement on November 27, 2020, stating that the Competition Bureau will not assess buy-side agreements for the purchase of products and services or employee no-poaching and wage-fixing under the criminal provisions of the Act

However, the Commissioner's statement indicates buy-side agreements may be subject to the non-criminal provisions of the Act that apply to agreements or arrangements between competitors and prevent or substantially lessen competition. These civil provisions are remedial in nature, with the main remedy being an order to terminate or not enforce the offending agreement (other remedial orders can be made - for example the modification of the offending agreement - with the consent of both the party to the agreement and the Commissioner). An order made under these provisions does not give rise to a claim for civil damages under the Act.

These remedial civil provisions may apply to buy-side agreements between competitors. While it is not likely that they apply to the terms of a franchise agreement, remedial provisions could be applied to an agreement between competing franchisees or an agreement between a franchisor and competing franchisees.

Although the statement does not have force of law and is not binding on the Commissioner, the statement indicates that the Commissioner considered legal advice from the Department of Justice Canada and the Public Prosecution Service of Canada, which suggests that the Commissioner is not likely to depart from this position.

Despite the Commissioner's stated enforcement position, given the negative optics and limited utility of no-poach provisions, Canadian franchise lawyers are increasingly recommending that franchisors either remove employee related non-solicitation/no-poach clauses from their franchise agreements altogether, or draft focused non-solicitation provisions for specialized employee positions.
