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Cleanup on Aisle 5: Competition Bureau and Empire Reach Deal on Property Controls

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The Competition Bureau's (the Bureau) registered consent agreement with Empire Company Limited (Empire) – parent of Sobeys, Safeway, FreshCo, Farm Boy and other banners – gives landlords, developers and retail tenants some much needed direction regarding grocery-sector property controls. Despite the fact that Empire published long-term commitments regarding its use of property controls, the Bureau nonetheless required it to enter into a binding consent agreement. The agreement states that Empire did not admit any wrongdoing and does not agree with the Commissioner's conclusions set out in the agreement.

This represents the latest step in the Bureau's ongoing scrutiny of property controls that it believes creates artificial barriers to competition or otherwise harm competition in retail markets.

What Changes

Restrictive Covenants: Under the agreement, Empire will not enforce existing grocery-related restrictive covenants, or seek (directly or indirectly) expanded or new restrictive covenants that benefit its business.

Exclusive Use Covenants: The agreement identifies 19 local markets in which Empire will not enforce existing exclusivity clauses at premises where Empire operates a grocery store. The agreement also addresses the use of radius clauses that restricts the ability of specialty food retailers, including bakeries, butcher shops, pharmacies, dollar stores and convenience retailers to access retail space.

What Stays the Same

The agreement does not eliminate all existing exclusivity rights. Outside the 19 identified local markets, certain existing exclusive clauses may still apply to competing full-service grocery stores, although the agreement separately addresses radius clauses and restrictions affecting specialty food retailers.

For example, an exclusivity clause granted to an Empire-affiliated grocery operator in a shopping centre in the Greater Toronto Area may still restrict another full-service grocery store, but can no longer be used to prevent occupancy by specialty food retailers. The same enforcement principles will likely apply to tenants in other industries that seek similarly extensive restrictive exclusive-use covenants.

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Practical Impact

The agreement contains a process for addressing affected restrictions in appropriate cases. Where a request to remove a property control within the scope of Empire's commitments, Empire must take the necessary steps to waive or eliminate the relevant property control within 20 business days. Where Empire declines a request as being outside the scope of its commitments, it must do so in writing, with reasons, within the same timeline.

Key Takeaway

The consent agreement and the investigation that precipitated it clearly indicate that the Bureau is focused on property controls and that it will take enforcement action where it believes the controls may harm competition. In addition to possible enforcement by the Bureau, private parties can bring enforcement action and seek remedies, including behavioural remedies, as well as significant administrative monetary penalties and restitutionary orders.

Owners, developers, landlords, tenants and prospective tenants should review existing restrictions to understand whether they are enforceable or create potential compliance concerns.

For assistance reviewing restrictive covenants, exclusivity provisions, redevelopment opportunities or related risks, please contact any of the authors or a member of our Competition & Foreign Investment, Real Estate & Development or Franchise groups.
