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Out of Control? – Recent Changes to the *Competition Act* and their Potential Impact on Commercial Leasing

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Changes to the Competition Act

In the landscape of Canadian commerce, maintaining fair competition is important to fostering economic growth and protecting consumer interests. Through two pieces of legislation in December 2023 and June 2024, the Canadian Government introduced a series of amendments to the *Competition Act* which, in principle, aim to curb anti-competitive practices and promote affordability in key sectors such as grocery retail, while also introducing enhancements to competition enforcement.

Of note, the *Competition Act* and its amendments extend beyond the retail grocery sector and apply to any market where anti-competitive practices may arise. Although grocery retail was a focus in speeches and publicity surrounding the legislative changes, the industry was not specifically mentioned anywhere in these amendments. Landlords and tenants of all types and in all industries should be aware of the amendments and possible impacts in their respective markets.

Among other changes, the amendments empower the Competition Bureau (the "**Bureau**") to seek a prohibition order against an alleged anti-competitive agreement. Notably, in deciding whether to enforce a prohibition order, the amendments provide guidelines for assessing prohibited agreements, including considerations such as the fixing, maintenance, or control of prices, allocation of territories or customers, and efforts to limit or eliminate product supply.

Release of Preliminary Property Control Guidelines

On August 7, 2024, the Bureau outlined its ***preliminary*** enforcement approach to competitor property controls ("**CPCs**") under the *Competition Act*, with the intention to provide interim guidance to businesses to help them comply with the new laws. While acknowledging that CPCs (notably exclusive use covenants in leases (restrictions on competition by other tenants) and restrictive covenants (restrictions binding on the owner of land)) can, at times, be justified by business concerns, the Bureau reiterated that these types of restrictions create serious competition concerns. Further changes to this preliminary approach are likely to be made following the end of the consultative period on October 7, 2024.

The Bureau has encouraged businesses that use CPCs to consider the following criteria in determining whether to include such controls – and the scope thereof – and has advised that adjusting property controls accordingly *may* reduce the risk of an offence under the *Competition Act*:

1. Is the property control necessary to allow a new business to enter the market or to encourage a new investment?
2. Could this property control last for a shorter period of time?
3. Could this property control cover fewer products or services?
4. Could this property control cover less geographic area?

The guidelines conclude by "[encouraging] tenants, lessors, landowners, and former landowners to eliminate or modify competitor property controls that are not necessary for new entry or investment or are broader than they need to be." This notion of eliminating or modifying existing restrictions is particularly interesting and will be further discussed below.

When Competitor Property Controls can be Justified

As noted above, the Bureau has acknowledged that, at times, CPCs can be justified on the basis that they increase competition overall; for example, by providing an incentive for a retailer to enter a new market/make additional investments into a market where the overall effect would be to ***increase*** competition in the marketplace, thereby creating more choice for consumers. However, the Bureau is of the view that CPCs must be narrowly created and cannot have the effect of ***limiting*** competition. As such, both the duration and the scope of CPCs are key considerations when assessing if CPCs are justified; CPCs that limit competition more than necessary are not justifiable according to the Bureau. Obviously, the concern for landlords and tenants alike with this language stems from the question: *what is "more than necessary"?*

Exclusivity clauses in leases: In order to remain in compliance with the *Competition Act*, exclusivity provisions in leases may go no further than necessary to encourage new entry or to allow a tenant to make investments to develop their premises. For example, the Bureau gives the following example as a guideline: "This could be because once a key tenant has made the investments necessary to open their store and attract customers to the plaza, the increased customer base may make it more attractive for competitors to open stores in the plaza as well. The presence of competitors could in turn reduce the benefit the key tenant receives from its investments in opening their store. This could reduce or eliminate their incentive to make the investments unless they are protected by the exclusivity clause". However, even where such justifications exist, the Bureau advises landlords to also consider *if there are other suitable tenants who do not require an exclusivity clause or would require a less restrictive exclusivity clause*. How the Bureau plans to police (and indeed, enforce) this provision remains of concern. What will be the "test" required of landlords? Must they show that they called certain retailers first and offered the same deal? What other documentation in the landlord/tenant negotiations should be kept in place to substantiate that the CPCs were as narrow as possible in the circumstances?

Restrictive covenants on land: It is noteworthy that in contrast to exclusive use clauses in leases, the Bureau "does not consider [the use of CPCs] to be justified outside of exceptional circumstances" as part of restrictive covenants. The Bureau provides no examples of what constitutes "exceptional circumstances". Accordingly, parties should proceed very cautiously when creating restrictive covenants on land that have the effect of reducing competition.

Clearly, it would benefit both landlords and tenants if the Bureau provided concrete examples and scenarios of what constitutes "unjustified" CPCs and what qualifies as "exceptional circumstances." Given the strict standards, it is crucial for all parties to fully understand the implications and risks associated with these controls.

With its aggressive stance against CPCs, the Bureau does not seem to fully appreciate the crucial role that CPCs play in attracting retailers and fostering pro-competitive investments in commercial centres. One can imagine that this is likely to be a point of contention through the Bureau's consultive process until October 2024.

Enforcement Proceedings

While the foregoing preliminary property control guidelines are important and instructive, breaching them will not necessarily lead to prosecution.

The Bureau intends to prosecute anti-competitive CPCs through two primary mechanisms: (1) abuse of dominance provisions; and (2)

anti-competitive collaboration provisions.

Abuse of Dominance:

- Dominance is the ability to exercise a "substantial degree" of market power, which can be thought of as a significant ability to influence competition in that market. This can include the ability to restrict competitors or competition.
- When considering if a firm or group of firms is **dominant in a market**, the Bureau may consider several factors, including:
    - the ability of the parties to restrict competitors or competition;
    - the presence of effective competitors (often measured by market share);
    - barriers to entry in the market, including barriers to entry created by the CPCs;
    - the position of the company in the broader industry; and
    - evidence of bargaining leverage, including the ability to seek the CPC.
- The **scope of the CPC** itself may be one factor to consider in determining if there is an abuse of dominance. For example, what products are restricted and what geographic area is covered by the CPC?
- Notably, the Bureau has stated that in most cases, it considers the party who proposed or benefits competitively from the CPC to be the **target of an abuse of dominance investigation** – in commercial leasing terms, this would usually be the tenant in whose favour the CPC is written.
- The Bureau has stated, effectively, that the **burden of proof** lies on the parties to prove that their use of CPCs is not anti-competitive or an abuse of dominance; absent a pro-competitive justification, exclusive use clauses will be *prima facie* considered anti-competitive, and restrictive covenants will almost always be considered anti-competitive.
- Where a dominant firm uses a competitor property control that is an anti-competitive business practice or has the effect of harming competition, the Bureau has advised that it will likely seek an order prohibiting its use or enforcement.
- Where the Bureau determines that a CPC is both an anti-competitive business practice and has the effect of harming competition, it can seek additional measures to restore competition (such as voiding the CPC) and/or administrative monetary penalties. For restrictive covenants, the Bureau has advised that it is "likely" to seek administrative monetary penalties where possible, essentially as a punitive deterrent, as they create "heightened concern".
- The Bureau is already using abuse of dominance provisions to challenge CPCs: announced in a Bureau news release on June 11, 2024, two court orders have now been obtained to advance the Bureau's investigation into Empire Company Limited's and George Weston Limited's use of CPCs (being Sobeys' and Loblaw's parent companies, respectively).

Anti-competitive collaboration: Prior to the 2023/2024 amendments, the *Competition Act* granted the Bureau the power to: (i) prohibit any person from doing anything under the agreement or arrangement; or (ii) to require any person (with the consent of that person and the Commissioner) to take any other action, if the Competition Tribunal finds that an agreement or arrangement ***between competitors*** lessens or is likely to prevent or lessen competition. The newly amended section 90.1, which comes into effect on December 15, 2024, expands the definition of the type of non-criminal agreements caught by s. 90.1 to include not only agreements between competitors, but ***agreements between any persons*** that have the significant purpose of restricting competition in a market, even if the parties to the agreement are not competitors. This is the crucial change that will make section 90.1 applicable to CPCs, which are not usually made between competitors.

The Bureau has stated that since CPCs are generally anti-competitive business practices, the same rationale in the context of the abuse of dominance provisions will also apply to an analysis under section 90.1. Therefore, section 90.1 could apply to CPCs where there is proof that the agreement has the effect of harming competition. In investigating breaches of section 90.1, the Bureau will consider *all parties to the agreement* to be targets of its investigation – meaning **both landlords and tenants**.

Where a CPC raises issues under section 90.1, the remedies the Bureau will pursue will depend on the circumstances of the case, including: (i) prohibiting the terms of the CPC and their enforcement; (ii) requiring other measures to restore competition where necessary; and (iii) seeking administrative monetary penalties.

Next Steps and Future Outlook

While the amendments and guidelines offer enhancements to competition enforcement in sectors like grocery retail, their direct implications for leasing agreements generally remain uncertain. For instance, it is unclear whether a business like a convenience store can now report a larger grocery store as benefitting from an exclusive covenant and have the Bureau step in to void the exclusive or even enforce a monetary penalty. Likewise, can a landlord report one of its *own* exclusive use clauses with a major (or problematic) tenant with the hopes of voiding that restriction and allowing the landlord to then lease space in the centre to a competitor? This is perhaps the biggest question that remains unanswered: *how will the Bureau find out about restrictions that are already in place and then what action will it take?*

One possible answer (and perhaps a key mechanism for bringing potential restrictions that warrant investigation to light) is through whistleblowers. Under Section 66.1 of the *Competition Act*, individuals who have reasonable grounds to believe that an offence under the *Competition Act* has been committed, or is about to be committed, may notify the Commissioner. Whistleblowers are afforded protection, as the Commissioner must keep the identity of the whistleblower confidential if requested. This confidentiality provision is designed to encourage the reporting of anti-competitive practices without fear of retaliation. Beyond whistleblower reports, it remains to be seen how else the Bureau will be alerted to restrictive covenants they may wish to investigate.

It also remains unclear whether the Bureau will prioritize reviewing existing leases or targeting new leases, or prioritize those leases involving the larger players in the industry (or even a specific segment – such as grocery).

Can parties rely on new (and existing) clauses that state (as many do) that the exclusive use clauses only apply to the extent same are permitted by law? Would this create a circular logic whereby the Bureau looks at an exclusive clause, says that it's illegal and levies a penalty, but then the landlord and tenant point to the wording of the clause and say that since it would be an illegal clause it is actually void – and thereby try to avoid the penalty?

Finally, one can easily imagine a situation where landlords and tenants take the exclusive use clauses "out" of the leases – and either rely on a handshake deal (likely to be more prevalent between national landlords and retailers, where there is a larger business relationship at stake) or a "side agreement" or some other mechanism to protect what would have been a principal tenant's right to carry on a particular use without competition. That way, there is no offending language in the lease for any third party to complain about (but a corresponding inability to either put existing exclusives into a future tenant's lease as a prohibited use or register same on title). Another alternative might be that the parties enter into a separate contract between themselves, which they could enforce in the event of a breach through private arbitration – or even abatements, etc. under the lease (despite such rights being outside of the lease). Of course, such an agreement would go against the spirit (and depending on whether there is a formal agreement, the letter) of the new rules and the Bureau would not look kindly on such an arrangement were it to be discovered. This scenario also raises one last implication – what about "prohibited use" clauses under a lease? Could a landlord enter into a lease with a grocery store that does *not* contain an exclusive use clause and then put into new leases that any new tenant cannot operate as a grocery store or sell food? This would not be an "agreement" (on paper) between the landlord and the grocer, but would be an agreement between the landlord and the new tenant – does this mean that under the new definition of section 90.1 all prohibited use clauses are now void as restricting trade? These are the types of questions that have not yet been resolved.

Ultimately, while the amendments are promising for the benefit of Canadians generally, their practical implications for leasing arrangements require further clarification and examination. There remains a great deal of uncertainty in terms of how the Bureau will actually enforce the new laws, but it seems likely that, at least in the near term, the changes to the *Competition Act* will likely have some degree of a "chilling effect" on the use of CPCs as landlords (and tenants) attempt to get the lay of the land as we enter a period of uncertainty.

Should you have any questions about the impact of these changes to the *Competition Act* on your business, or should you have any

other commercial leasing questions, please reach out to Robert Eisenberg at reisenberg@weirfoulds.com or by telephone at 416-619-6287.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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