Canada's new wage-fixing and no-poach offence

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I. Wage-fixing and no-poach agreements now prohibited

1. Wage-fixing and no-poach agreements are now prohibited in Canada. As of June 23, 2023, it became a criminal offence for non-affiliated employers to agree to fix wages or not to poach each other's employees. In addition to criminal prosecution, employers that enter into these agreements also face class action liability.

2. This article outlines the parameters of this new offence and discusses some of the interpretive issues that are likely to arise when the first cases are brought.

II. The new offence

3. The new wage-fixing and no-poach offence has been grafted onto the existing conspiracy offence in section 45 of the Competition Act.[1] The new provision reads as follows:

> "*Conspiracies, agreements or arrangements regarding employment*
>
> *(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*
>
> *(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.*"

4. Like the price-fixing offence, this offence is a per se indictable offence punishable by up to 14 years in jail, or a fine in the discretion of the court, or both.

5. Two defences are available. The ancillary restraints defence applies to wage-fixing and no-poach agreements that are contained within otherwise legitimate arrangements. The regulated conduct defence may apply where wage-fixing or no-poach agreements have been mandated by other provincial or federal legislation.

III. Elements of the wage-fixing and no-poach offence

6. To obtain a conviction, the Crown must prove all elements of the offence beyond a reasonable doubt. There are two components to this: the *actus reus*, or the prohibited conduct, and the *mens rea*, or the intention.

7. The *actus reus* of the wage-fixing and no-poach offence has two main elements:

- An agreement between unaffiliated employers
- To fix employees' wages or to not hire or solicit each other's employees

8. The offence is a full *mens rea* offence. That means that the Crown must prove that the accused intended to enter into the prohibited agreement and had knowledge of its terms.[2]

1. Agreements between unaffiliated employers

9. The wage-fixing and no-poach offence only applies to conspiracies, agreements, or arrangements between unaffiliated employers.

1 Competition Act, RSC 1985, c. C-34, s. 45.

2 Canada v. Pharmaceutical Society of Nova Scotia, [1992] 2 SCR 606.

1.1 "Employer"

10. Both parties to the agreement must be employers. "Employer" is not defined in the Competition Act. While it is often obvious whether someone is an employer or not, that is not always the case. There are two interpretive issues.

11. The first issue revolves around proving whether the employer has in fact entered into a prohibited agreement with another employer.

12. In its guidance on the new provision, the Competition Bureau says that "employer" "*includes directors, officers, as well as agents or employees, such as human resource professionals.*" For there to be an offence, however, there must be an agreement between employers, that is, the entities that are considered at law to be employers. One would think that this would be entities that are parties to a contract of employment, as employer, with an employee. Directors, officers, agents, employees, and human resource professionals are not themselves employers. They are not, for example, personally liable to pay the employees' wages (except in certain limited circumstances).

13. Of course, corporations can only act through individuals. Section 22.2 of the Criminal Code provides that where a "senior officer" of the corporation, acting within the scope of their authority, is a party to the offence, the corporation is a party to the offence.[3] "Senior officer" is meant quite broadly as "*a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities.*"[4] This provision begs the question, however, since there can only be an offence if the employer has entered into the agreement; if it has not, there is no offence for the senior officer to be a party to.

14. Because of this difficulty, the better question likely is whether the person who acted on behalf of the employer in entering into a wage-fixing or no-poach agreement had the authority to bind the corporation to that agreement. This may involve the application of the common law "directing mind" approach.

15. It should be noted, however, that section 22.2 has been applied in a price-fixing case.[5] That case was decided under the pre-2010 version of the price-fixing offence in section 45, however. Currently, the price-fixing offence only applies to agreements between competitors, which potentially raises the same issue for section 22.2 as "employers" in the wage-fixing provision. Before 2010, however, section 45 applied to all agreements that lessened competition unduly. It was not necessary for the parties to the agreement to be competitors.

16. The second issue is whether the provision will apply to agreements to fix terms applicable to contracts with independent contractors. In principle, it does not. Apart from the wage-fixing and no-poach offence, section 45 exempts buyer-side agreements entirely. Thus, unaffiliated firms are in theory free to fix the terms of their contracts with independent contractors.

17. However, even courts have struggled to work out when someone is an independent contractor or an employee for purposes such as vicarious liability, taxation, labour and employment legislation, common law severance pay, and workplace health and safety legislation. The answer can be different depending on the context. The common law applies a list of factors, principally relating to the degree of control exercised by the putative employer (the "control test"), and the degree of integration of the employee/independent contractor in the business of the employer (the "integration test").[6] Quebec's Civil Code relies on a control test.[7] The common law tests may not be determinative in cases involving labour and employment legislation, which contain very broad statutory definitions of "employee"[8] that may be broader than the common law or Civil Code concepts.[9]

18. As a result, it will be difficult for two firms that propose to fix terms for independent contractors to know whether they are "employers" for purposes of subsection 45(1.1).

1.2 "Unaffiliated"

19. Unlike the price-fixing offence, which requires that the parties be competitors or potential competitors with respect to a product, the wage-fixing and no-poach offence merely requires that they be "unaffiliated." There is no requirement that they be competitors.

20. This difference arises because of the differences between supplier-side and buyer-side conspiracies. Underlying the price-fixing offence is the notion that price fixing will only cause harm if the products involved compete with each other. An agreement between two automobile repair shops on their hourly rates would harm consumers, but an agreement between an automobile repair shop and a law firm on hourly rates would not, because those rates would ultimately be disciplined by each firm's competitors. (Of course, there would be no reason for an automobile repair shop and a law firm to fix rates together, precisely because they are not competitors.)

21. Underlying the "unaffiliated" requirement is the notion that firms that do not compete with each other when selling products may nevertheless compete with each other when buying labour. Thus, the automobile repair

3 Criminal Code, RSC 1985, c. C-46, s. 22.2.

4 Criminal Code, s. 2.

5 R. c. Pétroles Global inc., 2013 QCCS 4262.

6 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59.

7 Civil Code of Quebec, art. 2085.

8 Golden Feet Reflexology Ltd. (Re), 2018 BCEST 1.

9 Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec, 2019 SCC 28.

shop and the law firm might compete with each other when hiring a receptionist. (They do not compete when hiring automotive technicians or lawyers, yet it would still be an offence for them to fix wages for those roles.)

22. The Competition Act provides a definition of affiliation. In essence, firms are affiliated with each other if one is controlled by the other, or they are each controlled by the same firm or individual. As well, if two firms are affiliated with a third firm, then they are affiliated with each other. The Act also defines control as requiring ownership of securities to which are attached more than 50% of the votes that may be cast to elect directors of the corporation, and that those votes are sufficient to elect a majority of the directors.[10]

1.3 "Conspires, agrees or arranges"

23. The terms "conspires, agrees or arranges" are considered synonymous; they all connote a "*meeting of the minds or a mutual understanding*"; that is, an agreement.[11] In its guidance, the Competition Bureau suggests that a "tacit" agreement could constitute an agreement for purposes of section 45.[12] But so-called conscious parallelism is not enough. Nor is it enough that the parties "*have communicated and thereby aroused in each other an expectation that they will act in a certain way*."[13] Rather, there must be a communication of an offer and acceptance of it, although the acceptance may be tacit in the sense that it is inferred from a course of conduct.[14]

24. The offence is complete upon the making of an agreement with a prohibited object (wage-fixing or no-poach); no implementation or negative effects on labour markets are needed.

2. Wage-fixing

25. The first type of prohibited agreement is an agreement to "*to fix, maintain, decrease or control salaries, wages or terms and conditions of employment*."

26. The verbs used are similar to those used in the price-fixing offence ("*fix, maintain, increase or control the price*"). Interestingly, "increase" is absent from the wage-fixing provision. Nevertheless, an agreement to increase wages would likely constitute an agreement to "fix" or "control" wages. Moreover, even an agreement to increase wages could be characterized as an agreement to decrease wages, if it is in reality an agreement to limit a salary increase, as the Competition Bureau notes in its guidance.[15]

2.1 Salaries and wages

27. The wage-fixing provision also uses two sets of synonyms to describe what cannot be fixed: "*salaries, wages*" and "*terms and conditions of employment*."

28. Although the Bureau appears to draw a distinction between salaries and wages in its guidance,[16] there is no meaningful distinction between the two words. "Wages" is the term generally used in employment standards legislation to refer to monetary remuneration paid to an employee, including hourly wages, salaries, commissions, and amounts payable pursuant to statute.[17] However, "wages" is generally defined as excluding gratuities, discretionary bonuses, and expenses.[18]

29. It is likely that the terms "salaries" and "wages" as used in the wage-fixing provision are broader still; the provision would likely apply to a conspiracy to limit discretionary bonuses, for example. A conspiracy to withhold gratuities would likely also contravene the wage-fixing provision, but withholding gratuities is typically illegal under provincial employment standards legislation in any event.[19]

2.2 Terms and conditions of employment

30. "Terms and conditions" are also likely synonymous. Indeed, the French version uses one word, "conditions."

31. What is captured by "terms and conditions" likely is extremely broad. The expression likely includes everything that can be included in the employment contract. This could include:

- Job descriptions and responsibilities
- Working hours and location (including, currently, how often an employee must be in the office)
- Allowances and reimbursements
- Vacation, sick leave, and other kinds of leave
- Parental leave and top-up during parental leave
- Benefits (drug, dental, etc.)
- Pensions or pension plan contributions
- Policies on promotion and advancement
- Ethics policies
- Post-employment restrictive covenants such as non-solicitation and confidentiality clauses

10 Competition Act, s. 2(2)–(4).

11 *R. v. Gage (No. 2)* (1908), 13 CCC 428 at 449 (MBCA); *R v. Armco Canada Ltd.* (1976), 13 OR (2d) 32, 70 DLR (3d) 287 (CA); *Watson v. Bank of America Corporation*, 2015 BCCA 362.

12 Canada, Competition Bureau, Competitor Collaboration Guidelines (2021), § 2.2.

13 R v. Armco Canada Ltd.

14 Atlantic Sugar Refineries Co. v. Canada (Attorney General), [1980] 2 SCR 644.

15 Canada, Competition Bureau, Enforcement Guidelines on wage-fixing and no poaching agreements (2023), § 2.1

16 Ibid.

17 The term typically used in French for wages is "salaire"; *see* Canada Labour Code, RSC 1985, c. L-2; Ontario Employment Standards Act, 2000, SO 2000, c. 41, s. 1; Quebec's Act Respecting Labour Standards, c. N-1.1, s. 1. For some reason, the French version of subsection 45(1.1) of the Competition Act uses "*les salaires, les traitements*" for "salaries, wages."

18 *See* for example Ontario's Employment Standards Act, 2000, SO 2000, c. 41, s. 1 and British Columbia's Employment Standards Act, RSBC 1996, c. 113, s. 1.

19 *See* for example Ontario's Employment Standards Act, c. 41, s. 14.2 and British Columbia's Employment Standards Act, c. 113, s. 30.3.

32. In its guidance, the Bureau notes that in enforcing the provision, it is concerned with terms and conditions that "*could affect a person's decision to enter into or remain in an employment contract*."[20] While that may be so, the provision is actually broader than that.

3. No-poach

33. The second type of prohibited agreement is an agreement "*to not solicit or hire each other's employees*."

34. For the provision to apply, the no-poach agreement must be mutual—an agreement not to solicit or hire each other's employees. A one-way or unilateral no-poach agreement does not contravene the provision. Thus, for example, a clause in a consulting agreement that prohibits the client from poaching the consultant's employees, but contains no reciprocal obligation on the part of the consultant, is lawful. Nor would the provision apply to a post-employment non-solicitation of employees clause in an employment contract.

35. The Bureau suggests that limitations in an agreement that are designed to prevent employees from being solicited or hired by another party to the agreement, such as restrictions on communication of information related to job openings or the adoption of biased hiring mechanisms, might constitute no-poach agreements. This is a somewhat strained interpretation. The provision requires an agreement not to solicit or hire each other's employees. An agreement that falls short of that is unlikely to breach the provision. Indeed, the Bureau adds in a footnote that it "*will examine the matter to determine whether there is evidence of an agreement between employers to not solicit or hire each other's employees*."

IV. Criminal and civil penalties

1. Criminal penalties

36. The wage-fixing and no-poach provision creates a per se indictable criminal offence (felony) that is punishable by up to 14 years' imprisonment, a fine in the discretion of the court, or both.

37. This is the same penalty as that provided for price-fixing offences. As a result, case law under that provision can be of assistance in identifying likely penalties.

38. First, despite the potential for a 14-year jail term, it is extremely rare for individuals to serve any time behind bars for price-fixing offences. When individuals are convicted of price-fixing offences, the typical sentence is a conditional sentence of 12 to 18 months "*to be served in the community*." While this means that the individual does not physically serve time in jail, they are potentially subject to restrictions during this time, and do have a criminal record that can have a serious effect on their ability to obtain employment or to travel outside Canada.

39. Second, from March 2010 until June 2022, the maximum fine for a breach of section 45 was CAD 25 million. Before then, it was CAD 10 million. The bid-rigging provision (section 47) has long provided for fines in the discretion of the court, however. There have been no fines imposed for price fixing that took place since the cap was removed. However, fines for price fixing have rarely reached the CAD 25 million maximum (or even the earlier CAD 10 million maximum), and only one fine for bid rigging has ever exceeded that amount (a CAD 40 million fine paid by an auto parts manufacturer). More recently, in June 2023, Canada Bread Company was sentenced to pay a CAD 50 million fine for fixing the price of bread. A fine of this magnitude was only possible because Canada Bread pleaded guilty to four counts of price fixing, under two different versions of section 45.

2. Civil damages actions

40. Firms that enter into wage-fixing or no-poach agreements also face civil liability through class actions.

41. The Competition Act creates a statutory cause of action to recover damages caused by breaches of the Act's criminal provisions, including section 45. That provision, section 36, provides that "*any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI*" can sue for and recover damages, plus costs of the investigation and proceedings.

42. Section 36 does not require prior criminal proceedings. In fact, most class actions brought under section 36 have not followed on a conviction. If a defendant has been convicted, however, the record of any criminal proceedings that resulted in a conviction can be used in a section 36 action as proof that the defendant committed the offence.[21]

43. As well, section 36 actions can be configured as class actions under provincial class proceedings legislation (and in the Federal Court under its class proceedings rules).

44. So far, no class actions claiming damages for wage-fixing or no-poach agreements have been filed. It may not be long before such claims are filed, however. Canada has a very active class action plaintiff bar that has filed numerous price-fixing class actions and collected multi-million-dollar settlements.

20 Enforcement Guidelines on wage-fixing and no poaching agreements, § 2.1

21 Competition Act, s. 36(2).

3. Immunity and leniency programs

45. The Competition Bureau and the Public Prosecution Service of Canada offer immunity or leniency to parties that self-report an offence and cooperate with the investigation. These programs are available for breaches of the wage-fixing and no-poach offence.

46. The immunity program offers full immunity from criminal prosecution to the first individual or company to admit involvement in criminal activity and agree to cooperate with the Bureau's investigation and subsequent prosecutions.

47. Once a participant in a particular conspiracy has been granted a marker under the immunity program, other participants are only eligible for leniency, which offers a reduced sentence in exchange for cooperation and an agreement to plead guilty.

V. Defences

1. Ancillary restraints defence

48. The ancillary restraints defence is designed to exempt legitimate competitor collaborations (such as joint ventures) and legitimate restrictions (such as non-competition clauses in merger transactions) from the reach of section 45. This defence is potentially available in wage-fixing and no-poach cases.

49. The provision reads as follows:

> "*Defence*
>
> *(4) No person shall be convicted of an offence under subsection (1) or (1.1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if*
>
> *(a) that person establishes, on a balance of probabilities, that*
>
> *(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and*
>
> *(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and*
>
> *(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.*"

50. The ancillary restraints defence has four components:

- There must be a broader or separate agreement that includes the same parties
- The restraint must be ancillary to that broader or separate agreement
- The restraint must be directly related to and reasonably necessary for giving effect to the objective of the broader or separate agreement
- The broader or separate agreement must not itself contravene subsection 45(1) or (1.1)

The defendant has the burden of proving the first three of the above components, but not the fourth.

51. In its guidance, the Bureau notes that while all of the parties to the restraint must be parties to the broader agreement, it is not necessary that all of the parties to that broader agreement be parties to the restraint.

52. The question of whether a restraint is ancillary is to some extent bound up with whether it has the requisite relationship with the objective of the broader agreement. According to the Bureau, a restraint is "*ancillary*" if it is a part of an agreement, or, if separate, is "*functionally incidental or subordinate to the objective of some broader agreement*."[22] Similarly, to show that the restraint is directly related to and reasonably necessary to the objective, the parties must show that it is "*directed at the promotion or facilitation of an objective of the broader agreement*."[23]

53. The "reasonably necessary" requirement does not create a requirement that the restraint be the least restrictive alternative open to the parties. But it does mean that if the parties could have achieved their objective without the restraint, or with a significantly less restrictive restraint, the restraint may not have been reasonably necessary.

54. An important consideration in determining the reasonable necessity of any restraint is whether it goes outside the bounds of the broader agreement, either with respect to its subject matter, geographic scope, or duration.[24]

55. The Bureau's guidance on the application of the ancillary restraints defence to wage-fixing and no-poach agreements mirrors its guidance on its application to other restraints. Just as non-competition agreements are important in merger transactions, wage-fixing and no-poach agreements can "*play an important role in stabilizing and protecting parties' business interests in the course of advancing legitimate pro-competitive objectives*."[25] Thus, the Bureau will generally not assess these restraints under the criminal provisions when they are ancillary to mergers, joint ventures, or strategic alliances, as well as when they are in franchise agreements and certain service provider-client relationships. But, the Bureau cautions, when wage-fixing or no-poach clauses are clearly longer in duration and affect more employees than necessary, it may investigate them under the criminal provision.[26]

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22 Competitor Collaboration Guidelines, § 2.5.2

23 Ibid., §2.5.3

24 Ibid.

25 Enforcement Guidelines on wage-fixing and no poaching agreements, § 3.1

26 Ibid.

56. While the Bureau's guidance provides less certainty than businesses might like, a few practical conclusions can be drawn.

57. First, restraints, whether they involve wage-fixing or no-poach restraints, or restraints that fall under subsection 45(1), such as a non-competition clause, should never be included in a contract without considering whether they are necessary and not over-broad.

58. Second, it is routine for merger transactions to include restraints. Unless these restraints are clearly over-broad, they will not raise an issue.

59. Third, while the Bureau softened its position on no-poach clauses in franchise agreements, it is not a fan of the practice. Franchisors should consider whether they really need a no-poach provision, and if they do, they should draft it as narrowly as possible.

60. Fourth, while the Bureau recognizes the usefulness of no-poach clauses in staffing and IT service contracts, consideration should be given as to whether a mutual no-poach clause is needed. Typically, it is the service provider that wants to protect its employees from being hired by the client. Where that is the concern, a one-way clause will protect the service provider's interests.

61. Fifth, no-poach clauses should not be included in agreements entered into in anticipation of a business transaction (such as a non-disclosure agreement) without careful consideration as to whether they are truly necessary. If they are included, they should be strictly limited to the personnel who will be working on the transaction.

2. Regulated conduct defence

62. Section 45 also contains a defence commonly known as the regulated conduct defence. This defence was developed under section 45 as it stood before March 2010. That provision made it an offence to lessen competition "unduly." Courts held that the undueness element created leeway for provincial laws to authorize or mandate conduct that would otherwise breach section 45.[27] When the new section 45 was enacted in 2010, this defence was continued. The ambit of this defence remains somewhat uncertain and the subject of some debate.

63. This defence likely would apply where a provincial statute authorizes conduct that might otherwise breach the new wage-fixing and no-poach provision.

64. One area might be the collective bargaining context. For example, Ontario's Labour Relations Act provides for collective bargaining between unions and organizations representing a group of employers in the construction industry[28] and more generally, for any industry, on a province-wide basis.[29] Once an employers' organization is accredited, the organization becomes the bargaining agent for all of its members; it must enter into only one agreement, and the individual employers are prohibited from bargaining directly with the union. These activities are already exempt from the Competition Act pursuant to the collective bargaining exemption in section 4, however. As a result, the regulated conduct defence would only be needed if a provincial statute authorized conduct that did not fit within this exemption.

VI. Constitutional validity

65. There is a serious issue as to whether the wage-fixing and no-poach provision is within the legislative competence of Canada's federal Parliament. Canada's constitution assigns criminal law to the federal Parliament, but labour and employment law is generally a matter of exclusive provincial jurisdiction (except for employers in federally regulated sectors such as banks and airlines).[30]

66. The justification for the new provision centres on protecting workers, as opposed to competition more generally. The fact that Parliament chose to criminalize only buyer-side conspiracies affecting workers, and not other buyer-side conspiracies, supports an argument that the pith and substance of this provision is employment law, not criminal law, which would render the provision ultra vires the federal Parliament (except with respect to federally regulated employers).

67. The constitutional validity of the provision will thus almost certainly be challenged. ■

27 Canada (Attorney General) v. Law Society of British Columbia, [1982] 2 SCR 307.

28 Labour Relations Act, 1995, SO 1995, c. 1, Sched. A, s. 134–140.

29 Ibid., c. 1, Sched. A, s. 151–168.

30 Constitution Act, 1867, 30 & 31 Victoria, c. 3 (UK), s. 91–92.