

# Competition Act (Canada)

## Wage-fixing and no-poach provisions

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# Competition Act – subsection 45(1.1)

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## Overview – Wage-Fixing and No-Poach Provisions

- Changes to Competition Act adding subsection 45(1.1) to existing criminal conspiracy provisions came into effect **June 23, 2023**
- 45(1.1) prohibits agreements between unaffiliated employers to fix or control wages or other terms of employment or to not solicit or hire each other’s employees
- Prompted by simultaneous cancellation of COVID “hero-pay” by grocery chains
- Competition Bureau released its ***Enforcement Guidelines on wage-fixing and no poaching agreements*** on May 30, 2023 outlining its anticipated enforcement approach and priorities (not binding on the Bureau or a court)

# Competition Bureau

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## Overview - Enforcement Guidelines

- Rationale for subsection 45(1.1):
  - “... protects competition in labour markets, as it prohibits agreements between employers to fix wages and restrict job mobility”
  - “....wage-fixing and no-poaching agreements undermine competition and efficient allocation of resources. Maintaining and encouraging competition among employers results in higher wages and salaries, as well as better benefits and employment opportunities for employees”

## Part VI – Offences in Relation to Competition

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Conspiracies, agreements or arrangements regarding employment

**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

- **(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.

# Subsection 45(1.1)

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## Application

- Applies to agreements entered into between employers on or after **June 23, 2023**, and to conduct that ***reaffirms or implements*** agreements made before that date which contravene the provisions
- Applies to agreements between ***unaffiliated employers, regardless of whether they compete***; agreements are ***per se illegal*** (i.e., deemed to be illegal without requiring proof of anti-competitive effects)
- “**Employers**” – Guidelines interpret broadly to include directors, officers, and agents or employees, such as HR professionals – “senior officers” entering into an agreement may be subject to prosecution as well as the corporation on whose behalf they are acting
- “**Employee**” – not defined in Act – will be assessed as a question of fact and applicable law

# Subsection 45(1.1)(a)

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## Wage-Fixing Agreements

45(1.1)(a) prohibits agreements between unaffiliated employers to fix, maintain, decrease or control salaries, wages or terms and conditions of employment

- Enforcement Guidelines:
  - “**terms and conditions**” include the responsibilities, benefits and policies associated with a job (e.g., job descriptions, allowances, non-monetary compensation, working hours, location, non-compete clauses or other directives that may restrict job opportunities)
  - enforcement generally is limited to those terms that could affect a person’s decision to enter or remain in an employment contract
  - whether an agreement “fixes, maintains, decreases or controls” will be measured relative to the wages, salaries or terms and conditions that likely would exist in the absence of the restraint

# Subsection 45(1.1)(b)

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## No Poaching Agreements

45(1.1)(b) prohibits agreements between unaffiliated employers to not solicit or hire each other's employees

- Enforcement Guidelines:
  - only prohibits ***reciprocal*** agreements between employers
  - “***one-way***” agreements (in favour of one employer but not both) may still be used

## Subsection 45(2)

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### Penalty

**45(2)** Every person who commits an offence under subsection (1) or (1.1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine in the discretion of the court, or to both.



## Subsection 45(3)

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Evidence of conspiracy, agreement or arrangement

**45(3)** In a prosecution under subsection (1) or (1.1), the court may infer the existence of a conspiracy, agreement or arrangement from *circumstantial evidence, with or without direct evidence of communication* between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved *beyond a reasonable doubt*.

# Defences

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## Ancillary Restraints Defence (ARD)

- Enforcement Guidelines:
  - Bureau distinguishes between naked restraints and ancillary restraints
  - 45(1.1) is directed at “naked restraints” on competition – these include restraints on wages or job mobility that are not implemented to further a legitimate collaboration, strategic alliance or joint venture
  - 45(4) provides a defence for “ancillary restraints”
  - ARD is available when certain desirable business transactions or collaborations require restraints on competition to make them efficient, or even possible

# Subsection 45(4)

## Ancillary Restraints Defence

**45(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.

## Subsection 45(4)

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Ancillary Restraints Defence: is the reverse onus constitutional?

- Compare with Criminal Code 22.2(c) which states: “knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence”
- **This provision does not shift the legal onus, which remains on the prosecution to prove the absence of all reasonable measures**

## Subsection 45(4)

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### Reverse Legal burdens in strict liability offences

- Strict Liability offences with a reverse legal burden have been upheld in [\*R. v. Wholesale Travel Group Inc\*](#)
- Strict liability offences were the “halfway house” created in [\*R. v. Sault Ste. Marie \(City\)\*](#) (1978), 40 C.C.C. (2d) 353 (S.C.C.):

# Subsection 45(4)

## Reverse Legal burdens in strict liability offences

- 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, **leaving it open to the accused to avoid liability by proving that he took all reasonable care**. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called **offences of strict liability**. Mr. Justice Estey so referred to them in *Hickey's* case.

## Subsection 45(4)

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### Reverse Legal burdens in strict liability offences

- A majority of the court in [\*R. v. Wholesale Travel Group Inc\*](#) agreed that the requirement that the accused must establish due diligence on a balance of probabilities is a reverse onus that infringes [s. 11\(d\) of the Charter](#) and **the presumption of innocence**. This conclusion shifted the battleground to a s. 1 analysis.

## Subsection 45(4)

### Strict Liability and **lower stigma**



- Former Chief Justice Lamer (with whom six other members of the Supreme Court of Canada agreed on this point), placed misleading advertising on the lower end of this scale of stigma in [R. v. Wholesale Travel Group Inc.:](#)<sup>2</sup>
- Given that the stigma attaching to theft was explicitly contemplated in [R. v. Vaillancourt](#) as one which may well necessitate a subjective *mens rea*, it was argued that the offence of false/misleading advertising also requires an element of subjective *mens rea* in order to comply with the principles of fundamental justice. In my view, while a conviction for false/misleading advertising carries some stigma, in the sense that it is not morally neutral behaviour, **it cannot be said that the stigma associated with this offence is analogous to the stigma of dishonesty which attaches to a conviction for theft.** A conviction for false/misleading advertising will rest on a variety of facts, many of which will not reveal any dishonesty but, rather, carelessness and the conviction of same does not brand the accused as being dishonest. In my opinion, the same cannot be said for a conviction for theft.

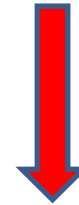


# Subsection 45(4)

Levels of **stigma**



Low stigma



Wage or price fixing is  
**tantamount to fraud which  
has much higher stigma**



## Canada Bread agrees to \$50M fine for role in bread price-fixing scandal: June 2023

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The company made the revelation in an Ontario court on Wednesday, acknowledging that under a previous management regime, it colluded with its competitors in Canada's bakery industry to work in unison to raise the wholesale prices they charge to grocery chains, pushing up prices for consumers in the process.

The company — which makes dozens of brands of baked goods, including Dempster's, Stonemill, Vachon and others — has been owned by Mexican food giant Grupo Bimbo since 2014, but prior to that, it was majority controlled by Maple Leaf I

### News release

June 21, 2023 - GATINEAU, QC - Competition Bureau



## Canada Bread agrees to \$50M fine for role in bread price-fixing scandal: June 2023

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### ***R. v. Canada Bread Co.* 2023 ONSC 3790**

**19** The offences in this **case were extremely serious**. Price-fixing was aptly described in *R. v. Maxone Auto Parts*, 2012 FC 1117 at paragraph 54 **as analogous to fraud and theft**. Effectively, this was a fraud on the public. The offences had a far-reaching and long-standing impact on the victims. Bread is a dietary staple for many and these offences affected millions of consumers.

**Wage fixing will arguably carry the same stigma as fraud and theft and may not pass the section 1 test under Wholesale Travel.**



# Subsection 45(4) - Ancillary Restraints Defence

## Enforcement Guidelines: May 30, 2023

Factors the Bureau will take into account include:

- whether the parties could have achieved an equivalent or comparable arrangement through practical, significantly less restrictive means that were reasonably available to them at the time the agreement was entered into
- the **duration**, **subject matter** and **geographic scope** of the ancillary restraint (e.g., whether it applies to employees unrelated to the collaboration)
- whether, in absence of the restraint, the agreement could only be implemented under considerably more uncertain conditions, at substantially higher cost or over a significantly longer period
- what led to the adoption of the restraint (e.g. evidence created during evaluation and negotiation of the agreement that demonstrates the objectives of the agreement, evidence of alternative options considered at the time the agreement was negotiated, and any submissions made by the parties to the Bureau)

# Subsection 45(4) - Ancillary Restraints Defence

## Enforcement Guidelines

- Bureau recognizes the significance that labour-related restraints can play in many business agreements. *Reasonably necessary restraints* can play an important role in stabilizing and protecting parties' business interests in the course of advancing legitimate pro-competitive objectives.
- Bureau will *generally not* assess wage-fixing or no-poaching clauses that are ancillary to *merger transactions, joint ventures or strategic alliances* under the criminal provisions.
- It also recognizes the role these types of restraints can play in certain business arrangements such as *franchise agreements and certain service provider-client relationships (e.g., staffing or IT service contracts)*.
- However, the Bureau may start an investigation under 45(1.1) where those clauses are "*clearly broader than necessary in terms of duration or affected employees*", or where the business agreement or arrangement is a "sham".
- Even when the ARD applies, Bureau may still examine the agreement under the reviewable matters provisions in Part VIII of the Act, including the civil agreements provision in section 90.1.

# Subsection 45(1.1)

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## Sample Fact Scenario

- Pre-June 23, 2023 Services Agreement
  - small-mid sized service provider embedded employees with large organization
  - agreement up for renewal post June 23, 2023
  - contained reciprocal non-solicit/no-hire covenants and other restrictions regarding reassignment of service providers' key employees
  - imbalance of bargaining power
  - Considerations: remove reciprocal offending covenants; make one-way; review reasonableness of restrictions and try to establish basis for ARD (but still risk/uncertainty); ... ?

# Other Exemptions and Defences

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## Collective Bargaining Exemption and Regulated Conduct Defence

Other exemptions or defences under the Act may apply to conduct described in subsection 45(1.1) including:

- section 4 - exemption for agreements between employers with respect to *collective bargaining* with their employees over salaries or wages and terms or conditions of employment
- subsection 45(7) - defence for conduct required or authorized by or under another Act of Parliament or the legislature of a province (*regulated conduct defence*)

# Additional Considerations

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## Potential Additional or Other Liabilities

- Exposure to civil actions by private parties (on individual or class basis) for civil damages (e.g., pursuant to section 36 of Competition Act)
- Debarment or disqualification for public contracts under the federal integrity regime or provincial equivalents
- Reputational damage



# Subsection 45(1.1)

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## Takeaways / Good Practices

- Review commercial agreements (pre- and post- June 23, 2023)
- Provide training to appropriate personnel (e.g., directors, officers, HR or other key employees) on new offences
- Update any applicable internal policies related to the practices targeted by the new offences
- Review/re-assess process for sharing commercially sensitive information with, or receiving commercially sensitive information from, other employers, as applicable



**Questions?**

