THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Draft Enforcement Guidance on Wage-Fixing and No-Poaching Agreements

CANADIAN BAR ASSOCIATION
COMPETITION LAW AND FOREIGN INVESTMENT REVIEW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Competition Law and Foreign Investment Review Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Policy Committee and approved as a public statement of the CBA Competition Law and Foreign Investment Review Section.

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I. INTRODUCTION

The Canadian Bar Association Competition Law and Foreign Investment Review Section (CBA Section) is pleased to comment on the draft Enforcement Guidance On Wage-Fixing And No Poaching Agreements (Draft Guidance) published by the Competition Bureau.

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers, and students across Canada. We promote the rule of law, access to justice, effective law reform and offer expertise on how the law touches the lives of Canadians every day. The CBA Section comprises approximately 1,000 lawyers. It promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.

II. COMMENTS

A. Guidelines Should Better Define "Employer" and "Employee"

We appreciate that determining if an employment relationship exists can be complex and fact specific. However, given the severity of the consequences and penalties, the Draft Guidance should include a more detailed discussion than the current indication that it will depend on the laws and circumstances establishing the relationship (section 1.2.3). This should include a framework to clarify the parameters of who would be considered an "employee" for purposes of subsection 45(1.1) of the *Competition Act* (Act).

There are no definitions of "employer" or "employee" for the purposes of subsection 45(1.1).[1]

The Bureau should consider including a non-exhaustive list of factors distinguishing an employee from a non-employee such as an independent contractor. To define "employee," the

[1] *Competition Act*, RSC 1985, c. C-34, s-s. 66.2(3) states that "[i]n this section, employee includes an independent contractor and employer has the corresponding meaning," This extended definition only applies in the limited context of protecting whistle-blowers against retaliation and has not been extended by parliament to any other sections of the Act.

Bureau should refer to federal, provincial and territorial laws, guidance and standards as well as give a non-exhaustive list of general application that distinguish an employee from a non-employee or make reference to applicable case law.

The Supreme Court of Canada stated in 671122 Ontario Ltd. v. Sagaz Industries Canada Inc.:

> What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.[2]

We recommend highlighting any federal, provincial or territorial differences that may apply when determining the existence of an employment relationship for purposes of subsection 45(1.1). This should include consideration of the analysis when dealing with a relationship that falls under the employment laws of Quebec.

The CBA Section suggests giving further clarity on who can criminally bind a company and what safeguards a company can put in place to guard against an employee's conduct that deviates from company policies.

In the Draft Guidance, "employer" is defined to include "directors, officers, as well as agents or employees, such as human resource professionals." In addition to the individuals potentially being prosecuted, the Draft Guidance states that "corporations may be subject to prosecution as a result of an agreement between their respective employees if those employees are acting as senior officers."[3] The Bureau should offer more guidance on the criteria it would evaluate when deciding to charge the company in addition to the individual.

We recommend that Example 3, No-poaching agreements and recruitment agencies, explain why specialized labourers are considered "employees" of the staffing and recruitment agency. The Bureau should consider including other examples to highlight the issue's nuances.

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2 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59 (CanLII), [2001] 2 SCR 983.

3 Draft Guidance, *supra* note 7 at section 1.2.2.

B. Carve out Vertical Arrangements for Supply of Employment

While section 1.1 of the Draft Guidance indicates the Bureau will generally not review mutual no-poaching clauses that are ancillary to merger transactions, joint ventures or strategic alliances, the commentary does not expressly cover other common and procompetitive business arrangements requiring these clauses.

This is particularly the case for professional services companies, consultancies and subcontractors (e.g., IT services), and recruitment agencies. In most cases, these are vertical arrangements for employment supply and should not be subject to *per se* criminal treatment in the first place.[4] The Bureau should state that, given the nature of these agreements, they will not ordinarily be scrutinized under section 45, as it has done in the *Competitor Collaboration Guidelines* (CCGs) with respect to dual distribution.[5]

In any event, if subsection 45(1.1) applies to vertical arrangements, the Bureau should expressly state that the ancillary restraints defence (ARD) would normally be applicable in vertical situations (as suggested specifically with reference to recruitment agencies in Example 3 of the Draft Guidance).

Recruitment agencies often require these types of clauses to prevent clients from circumventing the recruitment agency and directly poaching the agency's candidates or employees for the term of the agreement and beyond. However, the Draft Guidance suggests that these types of provisions may be scrutinized under the new regime, despite the fact that they should qualify as "ancillary" restraints.

For professional services companies and consultancies, it is common (and often essential) for them and their clients to include mutual non-solicitation provisions in their agreements to protect their investments in employee training and development and to prevent their respective employees from using their knowledge of the other's business to solicit the other's employees. Similarly, contractors want non-solicitation provisions in their agreements to prevent the client from hiring the contractors' employees. Competing professional services

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4 The treatment of vertical employment supply arrangements under Section 1 of the US *Sherman Act* is considered in Mutchnik et al, "The Evolution of DOJ's Vies on No-Poach Litigation," Online. The authors note that contracts with "consultants or recipients of consulting services" and "outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers" were carved out of the DoJ's civil settlement of the *Lucasfilm* case (Proposed Final Judgment, United States v. Lucasfilm Ltd., 1:10-cv-02220-RBW, Dkt. 6-1 (D.D.C. May 9, 2011), Online)

5 Competition Bureau Canada, *Competitor Collaboration Guidelines* (6 May 2021) at example 4. **[CCGs]**

firms may also negotiate "teaming agreements" for certain contracts, where one firm acts as main contractor and the other as subcontractor. In these instances, each firm appropriately wants to guard against the other party soliciting its employees.

If the Bureau is not prepared to include these types of arrangements in its list of agreements that it will not generally review under the new regime (along with agreements that are ancillary to merger transactions, joint ventures or strategic alliances), it should give more specific guidance on how the ARD analysis would be applied in practice, particularly for industries or business models that use no-poach clauses for legitimate supplier-customer business practices. For example, the Bureau could offer examples of valid and invalid mutual non-solicitation clauses in different contexts or give guidance on how to assess the procompetitive and anticompetitive effects of these clauses.

C. Subsection 45(1.1) Should Only Apply to Naked Restraints

We are concerned that the Draft Guidance's proposed application of subsection 45(1.1) to employer agreements is not consistent with the longstanding reservation of section 45 for agreements that constitute "naked restraints" on competition, also referred to as hard core cartel conduct.

The reservation of section 45 to apply only to so-called "naked restraints" on competition has been endorsed by the Federal Court and the British Columbia Supreme Court.[6]

Although section 1.1 of the Draft Guidance acknowledges that subsection 45(1.1) is "directed at 'naked restraints' on competition",[7] it does not specify that the Bureau will apply the same analysis to determine whether to pursue the criminal or civil track for subsection 45(1.1) conduct as set out in section 1.3 of the CCGs, which reads as follows:

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6 "[I]t is clear that Parliament intended to limit the application of section 45 to hard core cartel agreements, namely, agreements that are unambiguously harmful to competition. These are also known as "naked" cartel agreements. Other agreements between competitors, including those that include ancillary provisions that can adversely impact the production or supply of a product, were intended to be reviewed under the new non-criminal provision in section 90.1 of the Act" *Mohr v. National Hockey League*, 2021 FC 488 at para. 57.

"Viewed in light of this legislative history, it is evident that Parliament intended that s. 45 of the Competition Act would criminalize a narrow range of conduct—agreements between competitors to fix prices, allocate markets, or restrict output, that constitute naked restraints that can only have negative effects—and permit civil review by the Competition Tribunal of other agreements between competitors." *Williams v Audible Inc.*, 2022 BCSC 834 at para. 101.

7 Competition Bureau, Draft Enforcement Guidance on Wage-Fixing and No Poaching Agreements (January 18, 2023) at section 1.1.

> Where the Bureau has determined that an agreement should be assessed under either section 45 or 90.1, as distinct from other provisions of the Act, the Bureau will then determine, based on evidence in its possession or to be gathered, whether the criminal provision in section 45 or the civil agreements provision in section 90.1 is applicable to the agreement. As described in section 2 below, only certain types of agreements or arrangements may be subject to criminal prosecution under section 45 of the Act. This provision is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition; these types of agreements are often referred to as "hard core" cartels. Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under the Act's civil agreements, merger or (joint) abuse of dominance provisions but only where they are likely to substantially lessen or prevent competition.[8]

Instead of explicitly stating that the Bureau will reserve the application of subsection 45(1.1) to agreements constituting "naked restraints" between employers, the Draft Guidance suggests that only conduct that, in the Bureau's view, qualifies for the ARD under subsection 45(4) may be reviewed civilly rather than criminally under subsection 45(1.1).[9]

We appreciate that the ARD is an important element of the evaluation of agreements between competitors (and between employers). However, limiting the analysis of whether conduct is criminal to the scope of the ARD is under-inclusive, because it is possible that conduct that may fall short in fully establishing every element of the ARD (such as the "reasonably necessary" standard) may nevertheless not constitute a "naked restraint" on competition – which the Bureau defines in the CCGs as, "restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture."[10]

As such, we recommend that the Bureau state explicitly, consistent with the CCGs, that it will only apply subsection 45(1.1) to agreements that constitute "naked restraints" on competition and not to conduct that is found in a *bona fide* joint venture, strategic alliance, research and development. professional services, consulting or other legitimate commercial agreement.

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8 CCGs, *supra*, note 5 at section 1.3. (emphasis added)

9 Draft Guidance, *supra* note 7 at section 3,1.

10 CCGs, *supra*, note 5 at footnote 1.

D. Only a Sham Agreement Should Result in the Application of Subsection 45(1.1) to a Restraint in a Broader Agreement

The Draft Guidance suggests that restraints drafted too broadly may be considered to violate subsection 45(1.1). In the first bullet in section 3.1 of the Draft Guidance, the Bureau states that it "will not 'second guess' whether a restraint could have been less restrictive in some significant way" when assessing whether it is "directly related" and "reasonably necessary" to give effect to a broader or separate agreement between the parties under subparagraph 45(4)(b)(ii) of the ARD. However, the next sentence of the Draft Guidance suggests that the Bureau will in fact be prepared to second guess the parties on whether a restriction could have been less restrictive.[11] The Draft Guidance then suggests that "clauses that are clearly broader than necessary" will be considered under subsection 45(1.1).

The next bullet in section 3.1 of the Draft Guidance indicates that factors such as the duration of the restraint and its geographic scope will be used to determine if it is "reasonably necessary."

In our view, consideration of these factors is beyond the scope of the "naked restraints" framework that should be applicable, in conformity with the approach in the CCGs. In circumstances where the restraint at issue arises in a broader or separate agreement between the parties (i.e., a broader agreement that does not itself violate section 45), the only relevant consideration should be if the purported broader agreement is a bona fide broader agreement between the parties or so unreasonable as to be tantamount to a "sham" intended to disguise what is in fact a naked restraint. In those circumstances, the restraint would not be ancillary but the primary purpose of the agreement. This approach would be consistent with the concept of "naked restraints" and the ARD. The approach in the Draft Guidance confuses the issue and materially risks chilling potentially procompetitive conduct.

E. Bureau Should Not Second Guess the Scope of Restraints for Bona Fide Agreements

We do not believe the Bureau should attempt to conduct a detailed analysis of whether a non-solicitation/no-hire or wage-fixing provision ancillary to a bona fide agreement is too broad.

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11 "The Bureau will not "second guess" the parties with reference to some other restraint that may have been less restrictive in some insignificant way. However, if the parties could have achieved an equivalent or comparable arrangement through practical, significantly less restrictive means that were reasonably available to the parties at the time when the agreement was entered into, then the Bureau will conclude that the restraint was not reasonably necessary" Draft Guidance, *supra* note 7 at section 3.1.

Considering whether the duration, geographic scope and/or subject matter of a restraint are reasonable should only be relevant to an assessment of whether the restriction is, in effect, the main objective of the agreement between the parties.

The Bureau should not, for example, assess whether a restraint should be three rather than seven years, or cover the Greater Toronto Area rather than Ontario. Whether such restraints in a legitimate broader agreement go "too far" and potentially harm competition are questions that should inform a section 90.1 analysis of whether there is a substantial lessening or prevention of competition in a market. In other words, parties should be granted a very large margin of discretion in contracting before being subject to criminal liability.

Consider, for example, a reciprocal no-poaching provision in a consulting agreement where Consultant Co. embeds a team of consultants to work for a specified term in the headquarters of Widget Co. to launch a five-year growth strategy. Consultant Co. requires a no-poaching condition for its employees in the consulting agreement to preserve its ability to continue to function as a consulting firm while having its employees work closely with its clients. Without this protection, Consultant Co. would not embed its employees to provide its services.

At the same time, Widget Co. is concerned with having embedded employees of Consultant Co. on its premises, exposed to its employee talent pool as well as confidential information about Widget Co.'s human resources strategy and statistics. This firsthand access would give Consultant Co. an improper advantage that would permit it to recruit key members of Widget Co.'s management team, who could be employed at Consultant Co. to consult for other widget companies.

In these circumstances, the mutual non-compete provisions would not be "naked restraints" and would not violate subsection 45(1.1) because the purpose of the restraint is intended to give effect to the broader consulting agreement between them. The term of the restriction, which employees it applies to, and the territories covered should not matter to determine criminality but rather to determine the potential anticompetitive effects under section 90.1 and enforceability.

The Draft Guidance suggests that in this hypothetical example, a term of one year from conclusion of the consulting agreement and limited to employees working on the consulting project may be permissible, but if an aggressive human resources professional pushed for a longer term (potentially three years) or employees who did not participate in the delivery or

use of the consulting services on site or in territories beyond where the services were delivered, the Bureau would treat the agreement as criminal.

In our view, this approach would be contrary to the CCGs and case law that acknowledges that section 45 is reserved for "naked restraints". Only where the agreement is a sham – where the consulting provisions of the agreement are intended to cover or give effect to the restraint – should subsection 45(1.1) apply.

F. Clarify No-poaching Examples in Guidelines

The Bureau's examples in the Draft Guidance suggest that employers may be in violation of paragraph 45(1.1) (b) for adopting creative retention practices to prevent employees from being poached or hired by another employer that is a party to such an agreement.[12] It would be helpful if further detail could be given on hiring mechanisms designed to prevent employees from being poached or hired by another party. Moreover, it would be useful to give additional detail on "point systems" as this terminology is not commonly known.

G. Clarify Application of Draft Guidance to Existing Agreements

As a result of the enactment of the new criminal provisions, companies of all sizes across Canada must determine how to best manage the potential compliance risk associated with their existing commercial agreements that may contain terms that could be caught once subsection 45(1.1) comes into force. Companies who are most concerned with managing the potential compliance issues associated with their existing agreements are typically those who already have a compliance-oriented approach.

While the Draft Guidance and the CCGs assist companies to understand when and how the ARD may be applied, the Bureau and Director of Public Prosecutions have significant discretion on whether the ARD will apply in particular circumstances. Given the potentially significant costs of managing the compliance risks associated with a company's portfolio of existing contracts, it is important that the Bureau give clear and actionable guidance for companies.

The Draft Guidance does not recognize that modifying existing provisions may be complex, requiring both parties to agree to modify potentially problematic terms and reach a mutually acceptable solution.

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12 Draft Guidance, *supra* note 7 at section 2.2.

For this reason, and in particular for agreements entered into before June 23, 2023, there is a risk that the uncertainty created by the new criminal provisions will be used by larger firms to renegotiate agreements (possibly including insisting on one-way non-solicit or no-poaching clauses in their favour) to the detriment of the party with less negotiating power. This concern is especially acute for existing agreements, as the party with less negotiating power is unlikely to be able to negotiate other protections. Effectively, ambiguity in the Draft Guidance creates the opportunity for strategic behaviour that will primarily disadvantage smaller and medium-sized businesses.

The Draft Guidance statement that the new criminal provision will apply to "conduct that reaffirms or implements older agreements" is welcome, but merits further prominence and elaboration. For example, it should have its own section, not simply form part of the preface.

Most importantly, a clear explanation of what sort of conduct could be viewed as "reaffirming" or "implementing" older agreements would be helpful. For example, what sort of conduct (and evidence) would give rise to enforcement action if two parties entered into a mutual non-solicitation agreement prior to June 23, 2023 and did not hire each other's employees after June 23, 2023, but did not have any further communications after June 23, 2023?

We believe that the Draft Guidance would be improved by including:

1. A discussion of what constitutes "conduct that reaffirms or implements older agreements," including in respect of "naked" conduct. Examples of how the Bureau would assess an existing agreement would be helpful. As one example, it would be useful to know how the Bureau would approach an agreement that, on its face, may be problematic, but is actually implemented in a way that is consistent with the application of the ARD (for example, where the agreement is overly-broad, but a party seeks to enforce it in a manner where the ARD applies);
2. Clear statements of the Bureau's enforcement approach to existing agreements that are viewed as ongoing. We believe that the appropriate enforcement approach for existing agreements is that:
    a. The Bureau will not recommend criminal enforcement with respect to agreements entered into prior to June 23, 2023 absent clear evidence that the impugned restriction is a naked restraint, including pure sham agreements;

b. Where an agreement entered into prior to June 23, 2023 is not a naked restraint, the Bureau will not investigate such restraints on a criminal basis.

H. Additional Guidance to Address Franchise Relationships and Other Examples of Unilateral Conduct Impacting Third Parties

In our view, the Draft Guidance fails to appreciate and reflect the unique situation of franchise systems and franchised businesses and the role of the franchisor in managing a franchise system (as is done in the CCGs).

The Draft Guidance should clarify that agreements between a franchisor and a franchisee, including where these indirectly affect how franchisees interact with each other, will benefit from the ARD and be subject to consideration on a civil basis only, absent exceptional circumstances (i.e., only where the broader agreement is tantamount to a sham). This would align with the Bureau's previously articulated view that agreements captured by section 45 are in the nature of "naked restraints."[13]

While franchisors and franchisees are generally not affiliates, the franchise business model normally involves franchisors imposing certain standards and rules on franchisees including terms and conditions related to the employment of the franchisees' employees (including some that may indirectly affect how franchisees interact with one another). These standards and rules facilitate the operation of the franchise business model and the procompetitive outcomes that arise when franchise systems compete in the marketplace.

The franchisor typically develops a business system in association with a trademark. It licenses the use of that business system and trademark to the franchisee. The content and substance of a franchise system will vary considerably amongst the hundreds of networks that exist throughout Canada, across a multitude of industry segments.

However, these systems normally include detailed operating standards, methods, processes and other requirements that require consistent implementation at franchised locations in order to preserve the integrity and uniformity fundamental to the success of the business model. This contributes to the strength and goodwill of a trademark, which is important to the

13 CCGs, *supra*, note 5 at section 1.3.

franchisor and is one of the primary benefits of the franchise system for prospective franchisees who will operate their business relying on the franchisor's brand and trademarks.

In order to protect their business system, the goodwill associated with their brand and trademarks and other legitimate business interests, franchisors impose obligations on their franchisees. This is normally done through the franchise agreement and supplements, including operating manuals which are updated from time to time. Some of these obligations may impact the franchisees' employees' terms and conditions of employment. For example, confidentiality agreements are used almost universally in franchise arrangements to protect confidentiality associated with the franchisor's business system.

Franchisors usually impart trade secrets and other confidential and sensitive information to franchisees in connection with the ongoing training and support that is granted to franchisees and which is necessary for franchisee compliance with system operating requirements. These confidentiality covenants and related in-term and post-term non-compete clauses provide the basis on which franchisors are willing to disclose commercially and competitively sensitive information and give such training and support.

Similarly, non-solicitation and no-hire clauses are necessary to incentivize and protect franchisees' investment in their employees' education and training and to avoid intra-franchise cannibalization. In addition, franchisors commonly impose franchise system standards including those relating to employee attire, qualifications and minimum training, which are appropriate to promote consistency and protect the goodwill in the franchisor's brand and trademarks.

In *Fairview Donut Inc v The TDL Group Corp*,[14] Strathy J (as he then was) recognized the benefits a franchise can offer to an independent businessperson, including:

- access to a well-recognized brand that immediately brings customers into the store due to goodwill associated with the brand;
- a comprehensive business system with a proven track record;
- a high quality, consistent and dependable product;

[14] 2012 ONSC 1252; affirmed 2012 ONCA 867; leave to appeal to Supreme Court of Canada refused 2013 CanLII 26760.

- extensive market research, which enables franchisees to remain competitive in a constantly changing market;
- national marketing, which promotes new products; and
- access to ongoing assistance from the franchisor.

The Draft Guidance creates significant uncertainty and criminal risk for franchisors and franchisees on clauses and business practices that have long (and so far) been viewed as legitimate, lawful and procompetitive, and are integral to the franchise model.

The Draft Guidance may require fundamental changes to franchise models in Canada and still fails to offer clear direction to facilitate compliance. The Draft Guidance also appears to reflect a lack of appreciation of the administrative and financial burden of the case-by-case (agreement-by-agreement, clause-by-clause) analysis it mandates for individual franchisors with hundreds or even thousands of affected agreements.

With respect to the wage-fixing prohibition, the Draft Guidance is too vague on the scope of the "terms and conditions of employment" caught by subsection 45(1.1). The statement that "[t]he Bureau's enforcement generally is limited to those 'terms and conditions' that *could affect a person's decision to enter into or remain in an employment contract"* means that virtually any standard set by franchisors which affect a franchisee's employees' terms and conditions of employment could expose the franchisor and franchisee to potential criminal liability.

The Draft Guidance should give assurances that (absent a sham) franchisors will not be exposed to criminal prosecution if they impose standards customary in the franchise model that their franchisees must adhere to, and that may dictate conditions of employment for franchisees' employees'. Alternatively, the Draft Guidance should specifically identify the types of clauses that will **not** attract potential criminal review in the franchise context. Additionally, the Bureau should give specific examples of what it considers to be invalid no-poach clauses and terms and conditions of employment for franchises.

The discussion of ARD in the Draft Guidance compounds this uncertainty by suggesting that the Bureau intends to second guess parties on the reasonableness of an impugned term or condition of employment on factors such as its duration and geographic scope. We believe the Draft Guidance should be revised to state that, provided the broader franchise agreement is not a sham, the Bureau will apply the ARD and the impugned term or condition of employment will be subject to potential Part VIII review only, if at all.

Example 4 of the Draft Guidance does not address any of the preceding concerns. To the contrary, it reinforces them. It gives no meaningful guidance insofar as it merely restates the general "principles" in the document, without any discussion or assessment of the no-poaching agreements in question or acknowledgement or appreciation of the context in which those agreements arise.

In our view, considering the legitimate (and procompetitive) reasons for no-poach agreements in the franchise context, Example 4 should be revised to confirm that, outside of a sham scenario, these agreements will only be subject to potential review under Part VIII of the Act. Alternatively, the Bureau should give more detailed and meaningful guidance on how it will assess and apply ARD in these circumstances (and in the franchise context more broadly) and, in particular, in what circumstances it will (and will not) find that an impugned clause is necessary and flows from a franchise agreement.

Example 4 also seems to accept that there are agreements between franchisees arising simply because each individual franchisee signs an agreement with the franchisor. We question the validity of that view. The franchisee has signed on to the franchise system through its agreement with the franchisor and this will necessarily affect its interactions with other franchisees but it is not the same as agreeing with all the other franchisees.

Moreover, if the franchisor-franchisee relationship is viewed as establishing inter-franchisee agreements, the Bureau's requirement in the Draft Guidance for the ARD to apply (i.e., that the restraint must be ancillary to a broader or separate lawful agreement that includes the same parties (the Same Parties Requirement)) means that the ARC would never be available as the franchisees are not all parties to the same broader or separate lawful agreement.

If the Bureau decides to retain the possibility that no-poaching clauses and term or conditions of employment in franchise agreements may be subject to criminal scrutiny, it should clarify that the Same Parties Requirement is not a condition precedent for ARD to apply in the franchise context.

The Draft Guidelines should also recognize that there are many other contexts in which a person may have a legitimate reason to impose a no-poaching or no-hire restriction on multiple third parties who may otherwise potentially look to the same pool of employees (e.g. sub-contractors hired to work on a time sensitive project). It should clarify that a unilateral

decision by the project manager to impose on the sub-contractors on site a restriction on hiring each other's employees during the course of the project does not create an illegal agreement.

I. Additional Guidance Needed to Distinguish Between Non-Solicit and No-Hire Clauses

We recommend that the Draft Guidance give more detail on the difference between no-hire and non-solicit clauses other than in the context of transactions and strategic alliances. Non-solicits may be less restrictive than no-hire clauses and may have greater justification in a range of circumstances.

On the other hand, while no-hire clauses may be more restrictive than non-solicits, there may be cases where a no-hire is necessary (a history of suspected poaching but solicitation is difficult to prove). Clearer guidance would help businesses better understand when these clauses are appropriate, and when they could be considered anticompetitive, thereby avoiding uncertainty and potentially chilling legitimate and often procompetitive business practices.

J. Guidelines Should Directly Address Collective Bargaining Exemption

Canada has an estimated unionization rate of 29% (13.8% in the private sector and 74.1% in the public sector). Section 4(1) of the Act establishes broad exemptions from the Act for conduct of "workmen or employees" for their own reasonable protection and agreements between employers pertaining to collective bargaining with their employees on salary or wages and terms or conditions of employment.

The predecessors of section 4 trace to the earliest days of competition legislation in Canada and the express exemption for agreements between employers engaged in collective bargaining was added as part of the "Phase I" amendments to the *Combines Investigation Act* in the mid-1970s.

The Draft Guidance contains broad, unqualified statements about the scope of Section 45(1.1) and the prohibition on "wage-fixing" without clear recognition that the new provision will not apply to significant constituencies of the labour force and their employers engaged in collective bargaining.

Given the prevalence and importance of unionization, the Draft Guidance should acknowledge the section 4 exemptions prominently in both the Preface and the discussion on what is

prohibited. The guidelines should also quote and explain relevant portions of section 4 and their interaction with section 45(1.1) noting that section 4 is neither a "defence" nor an "exception" but a full exemption.

We recommend that the Bureau explain its enforcement perspective given that, to our knowledge, the Bureau does not address its approach to section 4 in any of its publications and there is a dearth of case-law construing the provision. Amongst other things, it would be useful to know whether the Bureau is of the view that the "no poaching" prohibitions in section 45(1.1)(b) have any application to employer agreements reached by collective bargaining, whether section 4 only applies to formal collective bargaining engaged in pursuant to labour legislation and the extent to which the regulated conduct doctrine would apply in face of such legislation.

K. Monitoring is Procompetitive and Does Not Indicate an Illegal Agreement

Section 1.2.4 of the Draft Guidance distinguishes agreements from conscious parallelism but contends that "parallel conduct coupled with facilitating practices, such as sharing sensitive employment information or taking steps to monitor each other's employment practices, may be sufficient to prove that an agreement was concluded." The suggestion that monitoring is improper or may circumstantially establish an illegal agreement is unwarranted.

Monitoring – or gathering information about conditions prevailing in the market – is an essential aspect of the competitive process. Prospective employers and employees alike need to understand wages or other terms of employment prevailing in markets to inform their decisions. There is nothing inherently suspect of unilateral efforts taken to monitor a market.

Sections 2.2 and 3.2 of the CCGs explain that facilitating practices such as "activities that assist competitors in monitoring one another's prices" may, together with parallel conduct, be sufficient to provide that an agreement was concluded between the parties. The mischief identified in the CCGs is not monitoring per se, but rather the act of assisting another party to monitor one's activities.

The CBA Section recommends that the discussion in the Draft Guidance be made consistent with the formulation in the CCGs. Moreover, the Draft Guidance would benefit from giving examples of ways employers may lawfully monitor and gather information needed to make competitive decisions about wages, terms of employment and hiring decisions.

L. Draft Guidance Should Address Interaction with Debarment Regimes

Because the new criminal offence for certain employer agreements was added as a subsection in section 45, rather than introduced as a standalone new provision, there are unanswered questions with respect to the interaction between section 45(1.1) and the federal and provincial ineligibility regimes for public contracts (debarment regimes).

We understand that the Bureau is not responsible for the enforcement of debarment regimes. Still, because of the important consequences that debarment may have on businesses that have public contracts, the Guidelines should not remain silent on those issues.

First, we note that the conduct captured under subsection 45(1.1) is very different from the listed offences under the federal Ineligibility and Suspension Policy and the Quebec Act Respecting Contracting by Public Bodies. The rationale to support debarment for problematic non-solicit and wage fixing agreements is unclear.

The Draft Guidance should state whether the Bureau considers that the conduct captured under section 45(1.1) should attract debarment. If the Bureau believes there should not be debarment, the guidelines should indicate that the Bureau will engage in discussions with relevant federal and provincial counterparts to provide clarity and, ideally, a timeline for clarification.

The Bureau should also, in consultation with the Public Prosecution Service of Canada (PPSC), clarify the potential use of prohibition orders and agreed penalties under section 34 of the Act as an available mechanism for resolution of subsection 45(1.1) matters in order to avoid debarment for cooperating parties.

M. Bureau Should Update Immunity and Leniency Programs

We understand that the Bureau is working on updates to the Immunity and Leniency Programs to explain how they will apply to the employer conspiracy offence in subsection 45(1.1). It will be important to clarify, among other matters, how the base fine and leniency credit will be calculated in cases under subsection 45(1.1) and the "information checklist" included in Appendix 2.

Updating the Immunity and Leniency Programs will assist businesses that discover problematic conduct or are subject to an inquiry under section 45(1.1) to determine the pros

and cons of seeking immunity or leniency. It is advantageous to the Bureau as well as private parties to quickly give those clarifications, and we encourage the Bureau to provide its current timeline.

N. Guidelines Should Address Several Hypotheticals

The Bureau's enforcement approach to the following hypothetical situation would be informative.

Information Sharing

1. In the post-COVID economy, job seekers increasingly demand that employers be upfront in job postings and workers expect transparency from employers on compensation and benefits before they are offered the job. In that context, Company A wants to ensure that it is able to find the best and brightest talent in today's competitive hiring marketplace. One of Company A's practices is an active presence on LinkedIn, including (i) posting job listings and (ii) reaching out to potentially strong candidates. Two of Company A's biggest competitors, Company B and Company C, are also active on LinkedIn. In addition to posting some "terms and conditions" of employment with their job listings, including compensation, benefits, work from home policies and professional development opportunities, Company A monitors job postings of its competitors to ensure that Company A's terms and conditions of employment remain competitive.

Would this activity contravene subsection 45(1.1) of the Act?

Wage-Fixing

2. X owns a bakery and has hired new staff. During a coffee meeting with Y, who owns a butcher shop, X and Y decide to reward their employees by giving them a longer lunch break two times a week.

By agreeing to fix a non-tangible reward, have X and Y contravened subsection 45(1.1) of the Act?

3. X owns a candy store and has hired new staff. During a lunch meeting with Y, who owns a coffee shop, X and Y decide to reduce the lunch break of their employees from two hours to only one hour.

By agreeing to limit a non-tangible reward, have X and Y contravened subsection 45(1.1) of the Act?

4. ABC School Board and DEF School Board are part of a transportation consortia. As part of the consortia, the two school boards contract with transportation companies to provide transportation to students attending schools in their district. One transportation company with which the consortia contracts is XYZ School Bus Company. It does so in accordance with a Student Transportation Services Agreement, which outlines the bus operator's hourly rate per kilometer, along with additional labour rates.

Would the agreement between the consortia and XYZ School Bus Company contravene subsection 45(1.1) of the Act?

No-Poaching

5. Company A and Company B enter into a professional services agreement where Company A agrees to provide commercial cleaning services to Company B for one year. The agreement includes a non-solicitation provision: during the term of the agreement and for 12 months after, neither party shall, directly or indirectly, in any manner solicit or induce for employment any person who performed any work under the agreement. The provision also states that a general advertisement or notice of a job listing or opening or other similar general publication of a job search or availability to fill employment positions, including on the internet, shall not be construed as a solicitation or inducement, and hiring any employee or independent contractor who freely responds to the job posting shall not constitute breach of applicable provision in the agreement.

Would this agreement contravene subsection 45(1.1) of the Act?

6. Company A is an engineering firm providing engineering services to Company B, a utility company, by seconding its employees to Company B. In the independent contractor agreement, both companies agree that neither party would, during the term of the agreement or for one year after, without the prior written consent of the other party, actively solicit or offer employment to any employees or personnel of the other party or the other party's associates or affiliates who have been engaged in or associated with the services provided under the agreement.

Would this agreement contravene subsection 45(1.1) of the Act?

7, Company A and B are competing IT services firms. Company A does not have enough employees to respond to a large RFP. Company A enters into an agreement with Company B, where Company B will act as subcontractor for Company A, therefore allowing Company A to submit a bid. As part of this "teaming agreement,", Companies A and B enter into a mutual agreement and agree not to hire each other's employees

assigned to the performance of the services while the agreement is in effect and for 12 months thereafter. The agreement also stipulates that each company may hire the others' employees if the employees respond to a general, non-targeted solicitation.

Would this agreement contravene subsection 45(1.1) of the Act?