October 18, 2024

Via email: matthew.boswell@canada.ca

Mr. Matthew Boswell
Commissioner of Competition
Competition Bureau
50 rue Victoria
Gatineau, Quebec, K1A 0C9

Dear Mr. Matthew Boswell:

Re: Competition Bureau Preliminary Enforcement Approach to Competitor Property Controls

I. Introduction

The Competition Law and Foreign Investment Review Section of the Canadian Bar Association (**CBA Section**) welcomes the opportunity to submit comments on the Competition Bureau's (**Bureau**) preliminary enforcement approach to competitor property controls (**Guidance**)[1], issued for consultation on August 7, 2024.

The Canadian Bar Association is a national association representing over 40,000 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 and promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.[2]

The enforcement approach to property controls under the *Competition Act* (**Act**) has been a matter of public interest following significant amendments that expand the Act's reach to commercial agreements between non-competitors. The CBA Section appreciates that the Bureau has acted quickly to provide preliminary guidance on its approach to enforcing property controls under the Act. The Guidance is particularly important for businesses, as property controls are widely used use in commercial leases and related agreements—a fact acknowledged by the Bureau.[3]

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1 Competition Bureau Canada, Competitor property controls and the *Competition Act*, ("Guidance") available online.

2 Additional information about the CBA Competition Section is available online.

3 Guidance, *supra* note 1.

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The CBA Section appreciates that the Guidance is preliminary and may be revised based on this consultation. We also understand that the Bureau seeks to provide guidance in plain language and that a comprehensive overview of the relevant provisions of the Act will follow in future updates, which we welcome. However, as outlined below, the CBA Section believes that any guidance issued by the Bureau —whether preliminary or partial, or in plain language—must clearly describe the scope of conduct that the Bureau is likely to review and challenge. This clarity Is essential to help market participants take appropriate steps to ensure compliance and avoid unnecessarily discouraging activities that are unlikely to raise concerns under the Act.

II. Clarity on application of the Competition Act to property controls

The principal purpose of issuing the Guidance, in the CBA Section's view, should be to provide clarity to market participants on the interpretation and expected application of the new and amended provisions of the Act to property controls, which were singled out by the Minister of Innovation, Science and Industry as an area of high priority.

The Bureau should consider that stakeholders awaiting guidance on the Bureau's enforcement approach to property controls include a wide range of market participants whose arrangements may be subject to review under the Act for the first time. These provisions carry significant financial penalties and other legal exposure. Parties to these types of agreements include the commercial actors seeking the restrictions (usually tenants), and the counterparties whose actions are being restricted (usually landlords or owner/operators of commercial real estate properties). While commercial real estate arrangements are ubiquitous and touch on all aspects of the Canadian economy, they have hardly ever been the subject of enforcement scrutiny under the abuse of dominance or other provisions of the Act. For most commercial landlords and tenants, this will be the first time they have had to consider whether their leases and ordinary-course clauses might contravene the Act.

From this perspective, the absence of meaningful explanation about the legal analysis required under the new non-competitor agreements provision in section 90.1(1.1) and/or the abuse of dominance provisions in sections 78-79—particularly the assessment of a substantial prevention or lessening of competition (**SPLC**) —should be rectified. The CBA Section's comments on specific areas where additional guidance would be useful are discussed in Part V below.

III. The role of justification in the analysis

The CBA Section urges the Bureau to clarify the Guidance regarding when it will consider property controls "justified". While the introductory portion of the Guidance acknowledges that property controls are common across Canada, it also states that such controls can only be justified "in limited cases" and that restrictive covenants are not justifiable "outside of exceptional circumstances".

The Guidance further indicates that the Bureau's position applies not just to the analysis under section 79, providing that "the same rationale that competitor property controls are generally anti-competitive business practices in the context of the abuse of dominance provisions will also apply to the analysis under section 90.1." The CBA Section recommends that the Bureau clarify whether it considers the legitimate business justification case law under the abuse of dominance provisions applicable to property controls, and whether this case law will also be applied within the legal framework of section 90,1(1.1). In addition, the CBA Section considers there is no principled basis under the Act to treat property controls differently from other types of vertical agreements that confer some form of exclusivity. The Guidance should acknowledge that commercial leases are a common type of vertical supply agreement.

The Section notes that the Guidance does not reflect that the rationale for property controls should be assessed based on context and the provision under which the conduct is being examined. The Guidance suggests a very high general standard for justification and that this will be the determining factor when assessing the use of property controls by all firms, regardless of size or context and whether a tenant is a dominant firm, or whether the lease with the property control allows market power to be exercised.

In practice, many cases will not require an assessment of the justification for property controls. Section 90.1(1.1) provides for a finding of anti-competitive conduct only where an agreement satisfies the required purpose element, ***and*** it can be shown to be likely to lead to a SPLC in a relevant market. Accordingly, property controls that do not have the effect of a SPLC are not anti-competitive. By including a requirement to show an SPLC in section 90.1(1.1), Parliament determined that competition law should not interfere with ordinary commercial arrangements where market power is not present in a properly defined market. Like many vertical contracts, property controls can have efficient and pro-competitive rationales and effects. For example, they may allow businesses to enter markets, gain a loyal following and grow. The Act does not, and the Bureau should not, seek to discourage such activity where the relevant market remains competitive. The CBA Section therefore submits that the Guidance should make it clear to market participants that (i) property controls are not presumptively anti-competitive, and (ii) a full analysis will be undertaken in accordance with the required statutory elements and factors.

As the Guidance stresses that the duration and scope of a restriction are critical in assessing whether a property control can be justified, market participants would benefit greatly from the Burau's initial views on acceptable, or inacceptable, boundaries. For instance, when might the Bureau determine that a restriction is too broad with respect to the scope of captured products and services? Will the Bureau consider that restrictions need to be limited to the tenant's direct competitors (e.g., grocery chains, pharmacy chains, etc.) or core offering (i.e., that the restriction cannot cover products outside the tenant's core offering)?

Similarly, with respect to reasonable geographic scope and duration, market participants would benefit from the Bureau's initial views on the criteria it is likely to consider when assessing whether the scope of a property control is too broad. For example, will the Bureau consider that exclusivity clauses are not justified when they are (i) not limited to the property for which a beneficiary is negotiating its lease, or (ii) are for a duration longer that generally recognized by the industry as being necessary for a tenant to build a sufficient goodwill? It would be helpful for the Bureau to develop meaningful 'hypothetical examples' on what constitutes reasonable scope and duration, as has been done in other Bureau guidelines.

IV. Compliance advice should not be overly broad

The CBA Section believes that the advice to market participants on steps that should be taken to ensure compliance are overbroad and should be reconsidered.

The Guidance calls on all "tenants, lessors, landowners and former landowner to eliminate or modify competitor property controls that are not necessary for new entry or investment or are broader than they need to be".[4] It should be recognized that property controls, including restrictive covenants, are legally valid and continue to be so unless an order is made following a finding under one of the applicable reviewable practices provisions. Thus, the CBA Section believes that plain language guidance should clearly and prominently state that, in many cases, there will be no basis for any competition concern under the Act.

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[4] Guidance, *supra* note 1.

The CBA Section also suggests the Bureau remove or revise its general recommendation that lessors, when negotiating with potential tenants, conduct an exhaustive search for potential tenants that may not require (or require less stringent) property controls. There is no basis in the Act to suggest that such actions are required.

V. Additional guidance is needed

As noted above, the Guidance (though preliminary) provides little detail on how the Bureau will investigate and pursue enforcement actions with respect to property controls. It would be helpful if the Guidance provided a plain-language description of the steps the Bureau would take in examining a property control, as well as in assessing whether an SPLC is likely to occur, when the joint dominance option will be invoked, and how the purpose element of section 90.1(1.1) will be assessed.

Additionally, the CBA Section believes it would be helpful for the Bureau to develop meaningful 'hypothetical examples' to effectively communicate its enforcement approach for property controls in different scenarios, as has been done in previous guidance.

A. Substantial Prevention or Lessening of Competition (SPLC)

An SPLC is a required element of any enforcement action under section 90.1(1.1). It is also required in most cases under section 79, except where the Bureau pursues the limited remedy of a prohibition order based on an intentional anti-competitive act undertaken by a dominant firm. Further discussion on the Bureau's analytical approach to assessing the likelihood of an SPLC in markets in which commercial leases exist would be welcome.

The CBA Section recommends that such guidance could usefully include market definition, assessment of market power, and the factors that would be considered in the analysis. Regarding market definition, the Bureau has substantial experience in examining retail markets that could be shared even at a level (e.g. how customer shopping patterns are analyzed). Regarding the SPLC test, the Tribunal assesses "whether the impugned practice has preserved, is preserving or is likely to preserve any existing market power enjoyed by the respondent(s)". It would be helpful for the Bureau to describe factors and types of evidence it would likely consider in this assessment. Among other examples, would the Bureau:

- Begin with an assessment of a tenant's market share and, if there are numerous effective competitors in a relevant market, conclude that no market power could be present?
- Consider the availability of alternative leasing options for tenants in a market, and if those are plentiful, consider that an important factor?
- Factually assess whether a property control has prevented or is preventing competition and, if not, conclude the analysis?

The key question with the amendments to section 90.1 is which property controls previously unlikely to raise concerns under the abuse of dominance provisions could now be subject to review? We invite the Bureau to elaborate on the above questions separately under section 79 and section 90.1.

The CBA Section also recommends that the Guidance include a discussion on the extent to which the Bureau's SPLC analysis will take into account market dynamics not attributable to the specific conduct at issue.

B. Joint dominance

The Guidance briefly alludes to the possibility of joint abuse of dominance. The CBA Section considers that the application of that concept requires further clarification in the property controls context. We have in the past provided extensive commentary on the need for a coherent and principled approach to consideration of joint dominance.[5] We maintain that (i) an overly expansive approach to joint dominance risks chilling legitimate and pro-competitive or competitively neutral behavior, and (ii) as a matter of principle as well as statutory interpretation, simple parallel marketplace conduct can be pro- competitive or competitively neutral and is not an anti-competitive act under the abuse of dominance framework.[6]

C. Anti-competitive agreements or arrangements

With respect to the Bureau's review of property controls under section 90.1(1.1), the CBA Section believes that future guidance should, at a minimum, clearly state the Bureau's views on the following:

- What is the meaning of a "significant purpose" of an agreement?
- How will the Bureau interpret the language "any part of an agreement" in section 90.1(1.1)? How will it approach determining whether a "part" of an agreement has a "significant" anti-competitive purpose? For example, will the Bureau review contractual clauses in the context of the overall contractual arrangement or consider specific clauses in isolation from the overall agreement in which they reside?
- At what stage(s) in the analysis will the Bureau consider business justifications for property controls under section 90.1(1.1)?
- The Guidance states that that all parties to an agreement (i.e., lessors and lessees) would likely be targets of an investigation. Further clarity is needed on whether the Bureau would intend to treat all parties in the same manner, rather than take differences between them into account (for example, intent, knowledge of prior conduct, etc.) in an inquiry and in seeking remedies before the Competition Tribunal.
- How does the Bureau believe that restrictive covenants which run with the land should be remedied?
- When and under what circumstances will the Bureau seek administrative monetary penalties? Will penalties generally be sought only against the restrictor or also against the restrictee?

D. Potential enforcement under other sections of the Act

The Guidance seems to imply that property controls allowing a competitor to engage in a line of business may raise concerns under other sections of the Act if they include restrictions on product availability or pricing. Lessors may negotiate "waivers" from tenants benefiting from exclusivity clauses in favor of a new tenant in a plaza. The waiver will allow the new tenant to offer products or services otherwise included in the restrictions in favor of the "restrictor". This reference in the

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[5] CBA, Competitor Collaboration Guidelines Canadian Bar Association Competition Law Section (October 2020) at section IIA, available online. CBA, Abuse of Dominance Enforcement Guidelines, Canadian Bar Association Competition Law Section (May 2018) at section III, available online. CBA, Competition Bureau Bulletin on Amendments to Abuse of Dominance Provisions, Canadian Bar Association Competition Law and Foreign Investment Review Section (January 2024) at Section III, available online.

[6] CBA, Future of Competition Policy Submission (March 2023) at pp 19-20, available online.

Guidance is unclear but seems to refer to potential risk under section 45. It is however unclear how a waiver, essentially a carve-out to a legitimate property control, negotiated, by the landlord, in order to allow more competition in favor of a new tenant could raise *per se* criminal market allocation or price-fixing risk under section 45. If the Bureau has concerns with property control waivers, it would be important for market participants to clearly understand when negotiating waivers could be problematic and potentially raise criminal risk. Again, this is an area that where a hypothetical example could be helpful.

Thank you for giving us the opportunity to comment on this important matter.

Yours truly,

(original letter signed by Noel Corriveau for Neil Campbell)

Neil Campbell
Chair, Competition Law and Foreign Investment Review Section