

October 4, 2024

EXCLUSIVES UNDER ATTACK! *Changes to the Competition Act*

In our November 29, 2023 News ReLease entitled, ‘*Are Exclusive Covenants About to Become Extinct?*’, we reported on changes to the federal Competition Act (‘Act’). On December 15, 2024, any agreement in Canada that ‘lessens competition’ may be subject to an order under the Act.

Since exclusive use clauses and restrictive covenants may lessen competition, landlords, tenants and property owners agreeing to such terms are exposed to sanction.

The Competition Bureau recently published guidelines (‘**Guidelines**’) outlining its preliminary enforcement approach to what it dubs ‘*anti-competitive controls on the use of commercial real estate*’. The Guidelines declare that they are intended to help businesses comply with the new law; unfortunately, the Guidelines raise more questions than they answer. They describe exclusive use clauses and restrictive covenants as raising ‘*serious competition concerns*’ and point to various sanctions that may be imposed by virtue of the new law. At the same time, the Guidelines also recognize that exclusive use clauses may enhance competition in certain circumstances, yet they offer no concrete examples.

General Enforceability of Exclusives and Restrictives

Canadian courts have long recognized a general proposition of law that exclusive use clauses should be narrowly construed. In some instances, the courts have limited exclusive use clauses to the smallest ambit necessary to afford adequate protection. For example, in *Aktion Capital Co. et al, v. Everything for a Dollar Store (Canada) Inc.*, the Ontario Court of Appeal upheld a lower court ruling that partially invalidated an exclusive use clause preventing price-point retailers from selling

products at \$10 or less, because the tenant benefiting from the exclusive use clause only sold goods for \$2 or less. The Court held that the exclusive use clause was unenforceable to the extent it prohibited the sale of products priced above \$2.

Thus, although exclusive use clauses and restrictive covenants have long been subject to restraint in their application at law generally, the Act has introduced a legislative regime for attacking them.

The Guidelines

The Guidelines state that exclusive use clauses will only be permitted in limited circumstances, such as where they are necessary to allow a new business to enter a particular market or to encourage a new investment. This suggests that an exclusive use clause will only be valid in cases where, without that protection, the business decision to enter the market could not be made. How the investigating Bureau or the adjudicating Tribunal will evaluate that degree of necessity is not specified by the Guidelines.

The Guidelines state that the Bureau does not consider restrictive covenants to be justified outside of exceptional circumstances.

Why the Bureau is attempting to delineate between exclusive use clauses and restrictive covenants is not clear. In many ways, the anti-competitive protection offered by restrictive covenants and exclusive use clauses is the same. For example, consider a situation where a supermarket landowner sells a portion of vacant land adjacent to its store. It would be ordinary for the supermarket landowner to encumber the sold parcel with a restrictive covenant prohibiting some degree of competition. By contrast, had

the supermarket come to the property as a tenant under a lease, it would be ordinary for the lease to contain a clause prohibiting the landlord from allowing other premises to be used by certain types of competition. If the supermarket landowner developed the lands itself (to include multiple ancillary tenants) it would be ordinary for the ancillary tenants' leases to contain limited use clauses. Why the Bureau views these types of legal devices differently is perplexing.

The Tribunal is empowered to order a prohibition or behavioural order, such as prohibiting the enforcement of an exclusive use clause or restrictive covenant, or order 'other measures to restore competition'. It can also impose divestiture orders and hefty financial penalties.

Notably, the Guidelines don't address other provisions that lessen competition, such as radius clauses. Such clauses prevent a tenant from expanding into nearby markets, thus restricting availability of options to consumers. Perhaps they will not be perceived as 'lessening competition' as they don't prohibit third party competitors from entering a market.

What about other typical 'prohibited uses' preventing the operation of liquidation or discount stores? These clauses restrict availability of options to consumers and may lessen competition. They are not mentioned in the Guidelines.

Does the new Act affect existing leases or agreements?

Existing leases or agreements are not exempt from these changes in law. The Guidelines address possible justifications for the inclusion of exclusive use clauses or restrictive covenants in new deals, but this should not be taken to mean that existing leases or agreements will not be investigated.

Landlords, tenants, and competitors may 'tip-off' the Bureau of anti-competitive behaviour. The Act allows for whistleblowers to remain anonymous. Under the new law, landlords, tenants and competitors may themselves seek monetary penalties and/or nullification of contractual terms at the Tribunal.

What is the best way to write a new restrictive/exclusive?

The Guidelines offer little insight which can be used to craft suggestions for new deals. If the clause or covenant is actually, 'necessary to allow a new business to enter the market or to encourage a new investment', the Guidelines suggest imposing a time limit, covering fewer products or services, and referencing a smaller geographic area. Some landowners will undoubtedly demand that they be indemnified if an exclusive use clause or restrictive covenant becomes the subject of an investigation.

What next?

The Guidelines are just guidelines. They do not have the effect of law, but they provide insight. The Guidelines are under a public consultation period until October 7, 2024.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward. The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

RAQUEL ALEMAN
416-598-7054
raleman@dv-law.com

DYLAN ARMSTRONG
416-597-5742
darmstrong@dv-law.com

RAUF AZIMOV
416-597-9306
razimov@dv-law.com

MARY ANN BADON
416-598-7056
mbadon@dv-law.com

FRANCINE BAKER-SIGAL
416-597-8755
francine@dv-law.com

DYLAN BAKER
416-597-8668
dbaker@dv-law.com

LATISHA COHEN
416-301-9119
lcohen@dv-law.com

CANDACE COOPER
416-597-8578
ccooper@dv-law.com

DENNIS DAoust
416-597-9339
dadaoust@dv-law.com

ALLISON FEHRMAN
416-304-9070
afchman@dv-law.com

GASPER GALATI
416-598-7050
ggalati@dv-law.com

PAUL HANCOCK
416-597-6824
phancock@dv-law.com

NICO JONES
416-479-4357
njones@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MELISSA M. MCBAIN
416-598-7038
mmcbain@dv-law.com

PORTIA PANG
416-597-9384
ppang@dv-law.com

JAMIE PAQUIN
416-598-7059
ipaquin@dv-law.com

BRIAN PARKER
416-591-3036
bparker@dv-law.com

DINA PEAT
416-598-7055
dpeat@dv-law.com

JACK SARAIVA
416-597-1536
jsaraiva@dv-law.com

CHRISTINE SHAHVERDIAN
416-598-7049
cshahverdian@dv-law.com

SARAH TEMOR
416-597-6647
stemor@dv-law.com

SHARIE THOMPSON
416-597-6648
sthompson@dv-law.com

RENE G. VARGAS
416-597-0830
rgvargas@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

DEBORAH WATKINS
416-598-7042
dwwatkins@dv-law.com