

*Cartel*

## No-Poach and Wage-Fixing Agreements in Canada – So What’s the Issue?

*By Chris Margison & Robin Spillette*



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## Introduction

The application of antitrust laws to no-poach<sup>2</sup> and wage-fixing agreements<sup>3</sup> is currently being debated in many jurisdictions around the world. While it is generally accepted that these types of agreements may result in lower wages for employees and reduced output in downstream product markets, there is significant disagreement on whether they are inherently anti-competitive or whether they may, at least in certain circumstances, result in pro-competitive and efficiency-enhancing benefits. Given these differing views, there is also significant disagreement on whether no-poach and wage-fixing agreements should be subject to a *per se*, quick look or rule of reason analysis, with different antitrust agencies applying different approaches.

This article considers no-poach and wage-fixing agreements from a Canadian perspective. In particular, it provides an

overview of the dual-track approach to agreements between competitors included in the Canadian *Competition Act* (the “Act”);<sup>4</sup> explains why no-poach and wage-fixing agreements have become such a “front and center” issue in Canada for both the Canadian Competition Bureau (the “Bureau”) and politicians; describes the Bureau’s current approach to no-poach and wage-fixing agreements, as set out in its recent statement issued in late November 2020;<sup>5</sup> and discusses the path forward in Canada, including our expectation that the Bureau will likely push for amendments bringing no-poach and wage-fixing agreements within the scope of the Act’s *per se* criminal cartel provision – something that the Commissioner of Competition (the “Commissioner”) recently noted would align the Bureau’s approach with that of the U.S. agencies and “be beneficial in multiple ways.”<sup>6</sup>

What is evident from our review of relevant materials is that there are very few “black and

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<sup>2</sup> No-poach agreements, also known as non-solicitation or no-hire agreements, involve agreements between firms not to solicit or hire each other’s employees either during their employment or for a period of time after their employment has ended.

<sup>3</sup> Wage-fixing agreements are not limited to agreements that specify a precise wage to be paid to employees, but can include more general agreements regarding the absolute or relative level of compensation paid to employees. For example, agreements to pay employees \$2 above minimum wage, or agreements to cap bonuses at 10% of an employee’s salary, could potentially be considered wage-fixing agreements.

<sup>4</sup> R.S.C. 1985, c. C-34 (Competition Act).

<sup>5</sup> Competition Bureau, “Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements” (Competition Bureau Canada, 27 November 2020), see [www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html](http://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html) accessed 2 March 2021.

<sup>6</sup> Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, *Minutes of Proceedings and Evidence*, 43rd Parl, 2nd Session, No 9 (3 December 2021) [Standing Committee Minutes]. The U.S. agencies’ approach is set out in U.S. Department of Justice and Antitrust Division & Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals” (October 2016) <https://www.justice.gov/atr/file/903511/download>.

white” issues when it comes to no-poach and wage-fixing agreements. As such, we recommend that the Canadian government proceed slowly and cautiously, particularly as it considers any amendments to bring these types of agreements within the ambit of the *per se* criminal cartel provision.<sup>7</sup> At a minimum, there is a need for a thorough policy debate to consider the complex issues raised by no-poach and wage-fixing agreements.

### **Canada’s Dual-Track Approach to Agreements Between Competitors**

In Canada, agreements between competitors can be reviewed under Section 45 or Section 90.1 of the Act. Section 45 is a criminal provision that is reserved for horizontal agreements between competitors to fix prices, allocate markets or restrict output that constitute “naked restraints” on competition.<sup>8</sup> As noted in the Bureau’s *Competitor Collaboration Guidelines* (the “CCGs”), “naked restraints” on competition lack any redeeming virtue and “are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects.”<sup>9</sup> In other words, just as they are in the United States, such agreements are

considered *per se* illegal. In contrast, other types of horizontal competitor collaborations, such as strategic alliance and joint ventures, may be reviewed under Section 90.1 of the Act, which is a civil provision that prohibits agreements only where they are likely to substantially prevent or lessen competition. Section 90.1 involves a full rule of reason analysis, including, for example, consideration of market shares, barriers to entry, the extent of remaining competition and the likely pro-competitive benefits arising from the agreement.

As discussed in more detail in the CCGs, Section 45 currently applies only to agreements relating to the *production* or *supply* of a product. It does not apply to agreements for the *purchase* of a product. This was not always the case. In fact, prior to the 2009 amendments to the Act, Section 45 extended to agreements that “[prevented] or [lessened], unduly, competition in the production, manufacture, *purchase*, barter, sale, storage, rental, transportation or supply of a product.”<sup>10</sup> Given that the word “purchase” was deliberately removed from the Section 45 of the Act, it has generally been understood that buy-side agreements between competitors, including no-poach and wage-fixing agreements between competing

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<sup>7</sup> We understand that a group of federal Members of Parliament will start considering changes to the Act in April 2021, prompted in part by a series of controversies in the grocery business discussed in Part 3 below. See Financial Post Staff, “Canada’s competition laws come under scrutiny after grocery business controversies” Financial Post (Toronto, 10 March 2021) see <https://financialpost.com/news/retail-marketing/canadas-competition-laws-come-under-scrutiny-after-grocery-business-controversies> accessed 10 March 2021.

<sup>8</sup> More specifically, Section 45 of the Act is reserved for horizontal agreements between competitors to (a) fix, maintain, increase or control the price for the supply of a product; (b) allocate sales, territories, customers or markets for the production or supply of a product; or (c) fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

<sup>9</sup> Competition Bureau, *Competitor Collaboration Guidelines* (Competition Bureau, 23 December 2009), Section 2.1. Agreements between competitors to fix prices, allocate markets or restrict output are commonly recognized as the most egregious forms of anti-competitive conduct. See, for example, OECD, *Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels* (OECD, 1998).

<sup>10</sup> *Competition Act*, R.S.C. 1985, c. C-34, s. 45 as it appeared between 22 June 2007 to 11 March 2007 [emphasis added].

purchasers of labor, would not be *per se* illegal under Section 45 of the Act. Rather, they would be subject to a detailed review pursuant to Section 90.1 of the Act.

### **Increased Prominence of No-Poach and Wage-Fixing Agreements**

The application of the Act to “employment-related” agreements is not a new issue. Rather, it has been the subject of discussion and debate in Canada for many years. However, this issue came to the forefront following events that took place earlier during the pandemic.

Specifically, Loblaws, Sobeys and Metro, three large grocery store chains in Canada, began paying so-called “hero pay” to their hourly workers beginning in early March 2020. Each of these grocery chains ended this bonus program on the same day in mid-June 2020, causing many to question whether they had jointly agreed to do so.

These events resulted in significant news coverage and ultimately led to hearings before the House of Commons Standing Committee on Industry, Science and Technology (the “Committee”), including a hearing in mid-July 2020 in which the heads of Loblaws, Sobeys, and Metro appeared to answer questions about their decision to end “hero pay.” While the representatives of these grocery chains were adamant that they had acted independently and that there had been no communication in contravention of the Act, it became apparent that certain “courtesy” emails and other communications had been

exchanged among the grocery retailers regarding “hero pay.”<sup>11</sup>

At the same time, the Bureau was receiving an increasing number of questions about whether and how the Act applied to this conduct by the grocery chains and to “employment-related” agreements more generally. In particular, stakeholders were seeking clarity on whether these types of agreements could result in criminal charges under Section 45 of the Act.

### **Competition Bureau Statement**

On November 27, 2020 – less than a week before the Commissioner was scheduled to appear before the Committee – the Bureau issued a short statement clarifying its position regarding no-poach and wage-fixing agreements between competitors.<sup>12</sup> In short, the statement, which was informed by legal advice provided by the Department of Justice Canada and the Public Prosecution Service of Canada, confirmed the current approach that these agreements are not subject to Section 45 of the Act. Specifically, the Bureau’s statement provides as follows:

The Competition Bureau recognizes that certain buy-side agreements are anti-competitive and have no pro-competitive consequences.

Buy-side agreements not to hire employees away from competitors (no-poaching agreements) or agreements that set wages at a specific lower level or range (wage-fixing agreements) may have anti-

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<sup>11</sup> Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, *Minutes of Proceedings and Evidence*, 43rd Parl, 1st Session, No 9 (July 10, 2021).

<sup>12</sup> *Supra* note 5.

competitive effects in the labor and related product markets. While the Competition Bureau views such buy-side agreements between competitors as raising serious competition issues, the 2009 amendments to the *Competition Act* included the removal of the word “purchase” from section 45, limiting its scope to supply-side agreements.

Given the 2009 amendment and based on the legal advice it has received, the Competition Bureau will not assess buy-side agreements for the purchase of products and services – including employee no-poaching and wage-fixing agreements – under section 45.<sup>13</sup>

Following the publication of the Bureau’s statement, the Commissioner was called before the Committee and questioned regarding various competition issues, including buy-side agreements.<sup>14</sup> During his testimony, the Commissioner reiterated the point that no-poach and wage-fixing agreements would not be caught under the criminal provisions of the Act. He also noted that this resulted in divergence with the approach to these types of agreements adopted by the U.S. antitrust agencies – something that he described as “a serious issue for Canadian workers.”

It is worth noting that collective bargaining activities, including the negotiation of wages, salaries and terms of employment, are expressly exempted from the application of the Act.<sup>15</sup> As noted by the OECD, “[t]he purpose of this exclusion is to shield collective bargaining activities from competition law, in the light of the social objective they pursue.”<sup>16</sup> The types of agreements discussed in this paper do not fall within the scope of collective bargaining activities and, as such, do not benefit from this exemption.

### **Impact of No-Poach and Wage-Fixing Agreements**

There have been relatively few studies of the effects of no-poach and wage-fixing agreements.<sup>17</sup> However, it is recognized that such agreements can have a variety of effects on employers, employees and end-use customers – both pro-competitive and anti-competitive. Ultimately, the impacts of such agreements are nuanced and contextual, and depend on, among other things, the particular labor market to which the agreement applies and the unique characteristics thereof.

For example, no-poach agreements are often viewed as anti-competitive on the basis that they suppress competition between firms in

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Supra*, Standing Committee Minutes, note 6.

<sup>15</sup> *Supra*, Competition Act (n 4), s 4(1).

<sup>16</sup> OECD (2020), *Competition in Labour Markets*, 9 see <http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm> accessed 3 March 2021.

<sup>17</sup> See Evan Starr, “The Use, Abuse and Enforceability of Non-Compete and No-Poach Agreements: A brief review of the Theory, Evidence and Recent Reform Efforts” (2019) Economic Innovation Group February 2019 Issue Brief <https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf> accessed 3 March 2021.



respect of labor<sup>18</sup> and result in, among other things, lower compensation, reduced benefits, fewer employment opportunities and worse working conditions for employees.<sup>19</sup> Moreover, a recent study has linked the proliferation of no-poach agreements to an increase in companies' monopsony power, which, in turn, may result in wage stagnation, rising inequality and reduced productivity.<sup>20</sup> In contrast, others have suggested that no-poach agreements can result in various pro-competitive effects, including incentivizing investment in human capital, protecting know-how and safeguarding intellectual and quasi-intellectual property rights.<sup>21</sup>

Similarly, wage-fixing agreements are often viewed as anti-competitive on the basis that they artificially reduce employees' wages and

decrease competition between firms, which, in turn, may result in reduced output.<sup>22</sup> In fact, the U.S. DOJ has suggested that wage-fixing agreements are analogous to price-fixing agreements, noting that "monopoly and monopsony are symmetrical distortions of competition from an economic standpoint."<sup>23</sup> In contrast, others have suggested that wage-fixing agreements result in positive effects, such as reduced costs for employers and lower prices for end-use consumers.<sup>24</sup> Additionally, it has been hypothesized that, at a macroeconomic level, wage-fixing agreements may actually lead to greater labor market stability for both low and highly skilled workers.<sup>25</sup>

The nuanced effects of no-poach and wage-fixing agreements is also clearly reflected by

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<sup>18</sup> Alan Krueger, Orley Ashenfelter, "Theory and Evidence on Employer Collusion in the Franchise Sector," National Bureau of Economic Research Working paper, July 2018, <http://www.nber.org/papers/w24831> accessed 2 March 2021.

<sup>19</sup> See, for example, (n 16); and Matthew Gibson, "Employer market power in Silicon Valley," Mimeo, 2019. See also *California v. eBay, Inc.*, 2015 WL 5168666 (N.D.Cal. 3 September 2015), in which the court noted that no-poach agreements in question "harmed California's economy by depriving Silicon Valley of its usual pollinators of ideas, hurting the overall competitiveness of the region."

<sup>20</sup> Alan B. Krueger and Eric A. Posner, "A Proposal for Protecting Low-Income Workers from Monopsony and Collusion," The Hamilton Project Policy Proposal 2018-05 [www.hamiltonproject.org/papers/a\\_proposal\\_for\\_protecting\\_low\\_income\\_workers\\_from\\_monopsony\\_and\\_collusion](http://www.hamiltonproject.org/papers/a_proposal_for_protecting_low_income_workers_from_monopsony_and_collusion) accessed February 2018.

<sup>21</sup> Krueger, *ibid*; Carl Shapiro, "Protecting competition in the American economy: Merger control, tech titans, labor markets" (2019) 33(3) *Journal of Economic Perspectives* 69; Aaron M. Fix, Jee-Yeon K. Lehmann, and Michael J. Schreck "Recent Developments in Litigation and Regulation Related to No-Hire and Employee Non-Compete Agreements: Implications for Franchise Systems" (2018) 22(1) *The Newsletter of the Distribution & Franchising Committee of the Section of Antitrust Law of the American Bar Association*.

In contrast, while acknowledging that firms may have an interest protecting investment in employee education or some intellectual property rights such as trade secrets, Professor Hovenkamp has noted that, employers do not need agreements with each other in order to achieve these results. Rather, "[i]t is in each individual employer's best interest to protect itself from improper theft of its own employees" and, as a result, "a purely vertical noncompetition agreement should be sufficient for this purpose." See Herbert Hovenkamp, "Competition Policy for Labour Market" (OECD, 2020), 9 see [https://one.oecd.org/document/DAF/COMP/WD\(2019\)67/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)67/en/pdf).

<sup>22</sup> John M. Taladay & Vishal Mehta, "Criminalization of wage-fixing and no-poaching agreements" (2017) *CPI Competition Policy International* 1.

<sup>23</sup> *U.S. and State of Arizona v. Arizona Hospital and Healthcare Association and Azhha Service Corp.*, Competitive Impact Assessment (22 May 2007) citing *Vogel v. American Soc. of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984); and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 127 S.Ct. 1069, 1076 (2007).

<sup>24</sup> Taladay (n 22). However, some literature has shown that costs savings from lower wages will not necessarily be passed on to the end-use consumer, particularly where employers cannot wage-discriminate. See, for example, Volpin (n 16).

<sup>25</sup> Natalya Y. Shelkova, "Collusion at the Non-Binding Minimum Wage: An Automatic Stabilizer?," University of Connecticut Department of Economics Working Paper, December 2009, <https://media.economics.uconn.edu/working/2009-41.pdf>.

the general lack of international conformity regarding these agreements. For instance, the Federal Trade Commission and U.S. Department of Justice have been clear that they intend to pursue such agreements on a *per se* basis (whether this approach stands up in court, however, is another matter).<sup>26</sup> Spain has also advocated for a more *per se* approach, stating that no-poach and wage-fixing agreements “cannot but be anticompetitive” and that no impact analysis or labor market study should be required.<sup>27</sup> There is no unified approach in Europe, and countries have reviewed no-poach and wage-fixing agreements using both an “effects based”<sup>28</sup> and “object based”<sup>29</sup> approach. It is notable that even the “object based” approach used in the European Union is not comparable to the *per se* approach in the U.S., as it allows for an effects based defense.<sup>30</sup> Other countries, such as Japan, have a more divided approach pursuant to which stricter rules apply to wage-fixing agreements, while no-poach

agreements are subject to a fuller effects based analysis.<sup>31</sup>

So, what does all of this mean? Simply put, the ultimate impact of no-poach and wage-fixing agreements in a given scenario is far from certain, whether assessed from the perspective of employees, employers or end-use customers. In our view, this uncertainty supports an approach that requires a detailed consideration of all relevant factors – such as the analysis required under Section 90.1 of the Act.

### Path Forward in Canada

As discussed above, the Bureau is currently of the opinion that no-poach and wage-fixing agreements should be considered under Section 90.1 of the Act. That being said, the Commissioner has stated that “[p]roving a substantial lessening or prevention of competition is not a low threshold”<sup>32</sup> and that the divergence in approach in Canada and the

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<sup>26</sup> Division 17-D-20 of October 19, 2017 regarding practices implemented in the hard-wearing floor covering sector, see <https://www.autoritedelaconurrence.fr/en/decision/regarding-practices-implemented-hard-wearing-floor-covering-sector>; Decision of the Competition and Markets Authority, Conduct in the modelling sector, Case CE/9859-14 (December 16, 2016), at Section 5.1; Decision n° 16-D-20, September 29, 2016, concerning practices in sector of services provided by model agencies.

<sup>27</sup> Spain, “Competition Issues in Labour Markets – Note by Spain” (OECD, June 5, 2019) [https://one.oecd.org/document/DAF/COMP/WD\(2019\)48/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)48/en/pdf).

<sup>28</sup> See for example: LJN: BM3366 (Court of Hertogenbosch) HD 200,056,331 Date of judgment: 04-05-2010, Date of publication: 04-05-2010, see <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2010:BM3366>; Decision 97-D-52 of 25 June 1997 on practices identified in the temporary employment sector in the Isère and Savoie départements, see <https://www.autoritedelaconurrence.fr/en/decision/decision-97-d-52-25-june-1997-practices-identified-temporary-employment-sector-isere-and>.

<sup>29</sup> See for example: Decision 17-D-20 of October 19, 2017 regarding practices implemented in the hard-wearing floor covering sector, see <https://www.autoritedelaconurrence.fr/en/decision/regarding-practices-implemented-hard-wearing-floor-covering-sector>; Decision of the Competition and Markets Authority, Conduct in the modelling sector, Case CE/9859-14 (December 16, 2016), at Section 5.1; Decision n° 16-D-20, September 29, 2016, concerning practices in sector of services provided by model agencies.

<sup>30</sup> Treaty on the Functioning of the European Union, Article 101(3).

<sup>31</sup> Japan Fair Trade Commission Competition Policy Research Center, “Report of the Study Group on Human Resource and Competition Policy” (Japan Fair Trade Commission, 2018) see [https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215\\_files/180215\\_3.pdf](https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215_files/180215_3.pdf).

<sup>32</sup> Competition Bureau (n 5).

United States is “a serious issue for Canadian workers.”<sup>33</sup> As such, we expect that the Bureau will likely push policy-makers for amendments bringing no-poach and wage-fixing agreements within the scope of Section 45 of the Act, thereby aligning the enforcement approach in both countries.

Moving forward, the path that Canada chooses with respect to no-poach and wage-fixing agreements should take into consideration various key factors, including (i) the potential pro-competitive and anti-competitive impacts caused by no-poach and wage-fixing agreements; (ii) the way these impacts can differ based on context, and (iii) the possibility and effects of divergence with the approach taken by the United States.

#### *Potential Pro-Competitive Benefits*

It is widely-recognized that *per se* illegality should be reserved for “naked restraints” on competition that lack any redeeming virtue and “are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects.”<sup>34</sup> As discussed above, in contrast to agreements to fix prices, allocate markets or restrict output for the supply or production of products, which are commonly recognized as the most egregious forms of anti-competitive conduct, there may be pro-competitive justifications for no-poach and wage-fixing agreements.

In fact, the CCGs expressly recognize that buy-side agreements can be pro-competitive.

For example, these guidelines provide as follows:

The prohibition in paragraph 45(1)(a) applies to the price for the supply of a product, and not to the price for the purchase of a product. Accordingly, joint purchasing agreements – even those between firms that compete in respect of the purchase of products – are not prohibited by section 45, but may be subject to a remedy under the civil agreements provision in section 90.1 where they are likely to substantially lessen or prevent competition. The Bureau recognizes that small and medium-sized firms often enter into joint purchasing agreements to achieve discounts similar to those obtained by larger competitors. Given that such agreements can be pro-competitive, they are not deserving of condemnation without a detailed inquiry into their actual competitive effects; as such, they should only be subject to review under the civil agreements provision in section 90.1.<sup>35</sup>

In the hiring context, employers are purchasers of a labor. It follows that, in addition to the direct effects experienced by employees, agreements among employers regarding the purchase of labor could produce pro-competitive effects ultimately benefitting consumers downstream. While the impact of these effects depends on the level of

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<sup>33</sup> Standing Committee Minutes (n 6).

<sup>34</sup> Competition Bureau (n 9), Section 2.1.

<sup>35</sup> Competition Bureau (n 9), Section 2.4.1.



competition in the downstream product market and the ability of an employer to wage discriminate, they cannot be ignored.

### *Contextual Analysis*

As discussed above, the effects of no-poach and wage-fixing agreements can be very contextual, and depend on the nature of the employee and the specific labor market. If Canada were to adopt a *per se* approach to no-poach and wage-fixing agreements, this would not allow for a contextual approach and would be akin to declaring that all such agreements have the same effect, regardless of the specific context. Ignoring the differential impact of no-poach and wage-fixing agreements through the application of Section 45 would, in our view, be overbroad and wholly inappropriate, and would run the risk of either banning some possibly pro-competitive agreements or failing to adequately protect certain sectors of the labor market.

### *Possibility of Divergence*

Historically, the Act included a criminal cartel provision that applied to agreements that prevented or lessened competition unduly. However, as noted above, this provision was repealed and replaced with (1) a *per se* criminal offense that applies to supply-side price-fixing, market allocation and output restriction agreements and (2) a civil provision that applies to other types of agreements that are likely to result in a substantial lessening or

prevention of competition. These amendments were intended to, among other things, harmonize Canadian conspiracy laws with those in the U.S. – something that both the Bureau and policy-makers in Canada had been supporting for several years.<sup>36</sup>

While there are certainly benefits associated with convergence, we are of the view that politicians should not rush to amend Section 45 of the Act to extend to no-poach and wage-fixing agreements, as doing so may ultimately result in our laws still diverging from those in the United States and eliminate potential pro-competitive benefits.<sup>37</sup> In this regard, the U.S. Supreme Court has historically limited the *per se* rule to those types or categories of agreements that judicial experience has shown are nearly always anti-competitive.<sup>38</sup>

Notwithstanding that the U.S. agencies will be pushing courts to accept that no-poach and wage-fixing agreements should be added to the small subset of agreements subject to *per se* liability, there is no guarantee that this position will be accepted – especially given that the “the domain of the *per se* rule has been narrowing”<sup>39</sup> and that the debate around the competitive effects of no-poach and wage-fixing agreements is ongoing.

Convergence of laws should not be the sole or the primary consideration of policy-makers. The Canadian government should be concerned first and foremost with empirical evidence and a principled application of

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<sup>36</sup> See, for example, Competition Policy Review Panel, “Compete to Win: Final Report – June 2008” (Government of Canada 2008) see [https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete to Win.pdf/\\$FILE/Compete to Win.pdf](https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete%20to%20Win.pdf/$FILE/Compete%20to%20Win.pdf).

<sup>37</sup> Importantly, while the DOJ and the FTC were able to shift enforcement policy to criminally investigate and prosecute naked employee no-poach and wage-fixing agreements as *per se* offences outside any legislative amendment process or court decision (and would be able to easily shift its policy back if it was required to do so), the codified nature of Canada’s competition law does not allow the Bureau to adopt a similar enforcement posture without legislative change.

<sup>38</sup> See, for example, *California Dental Ass’n v. F.T.C.*, 526 U.S. 756 (1999) at 781.

<sup>39</sup> Herbert Hovenkamp, “The Rule of Reason” (2018) 70 *Fla L Rev* 81, 83.

Canadian competition laws. No such careful and principled approach has been undertaken in the U.S., and even if it had been, the characteristics of Canadian labor markets likely differ from those in the U.S. Accordingly, Canada must make choices that make sense for the Canadian economy.

## **Conclusion**

There is no doubt that no-poach and wage-fixing agreements can adversely impact wages or benefits for employees, result in reduced output in downstream product markets and negatively affect competition. However, there is significant debate as to whether there may also be redeeming virtues or pro-competitive justifications for these agreements. Additionally, while it is not surprising that the Bureau would like its approach to no-poach

and wage-fixing agreements to align with the *per se* approach adopted by the U.S. agencies in 2016, proceeding too quickly could potentially result in Canada's cartel laws being out of step with those in the United States.

As such, any amendments to the Act should, in our view, wait until after the U.S. courts have thoroughly considered whether the U.S. agencies' approach is the correct one and until the ultimate impact of no-poach and wage-fixing agreements on employees, employers, output and competition in Canadian labor markets generally is better understood. At a minimum, the complex issues raised by no-poach and wage-fixing agreements should be carefully considered and subject to a detailed policy debate, which includes lawyers, economists, Bureau officials and policy-makers.