

Are Exclusive Covenants About to Become Extinct?

In October 2022, the federal Competition Bureau (the “Bureau”) launched a market study of grocery store competition in Canada in response to cries from the Canadian public for lower prices, more convenience and greater innovation. The Bureau is an agency created under the auspices of the *Competition Act* (the “Act”), and it describes itself as the “watchdog” of competition. The role of the Bureau is to monitor whether commercial competitors are complying with the Act and to bring parties in front of the Competition Tribunal (the “Tribunal”) if they are not. The Tribunal is the federal adjudicative body in Canada responsible for cases regarding infringements upon the Act. The Act contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace and empowers the Bureau and Tribunal to investigate, monitor and adjudicate anti-competitive matters.

On June 27, 2023, the Bureau released the Competition Bureau Retail Grocery Market Study Report aptly named “Canada Needs More Grocery Competition”. This report contained recommendations to the government, including that the Tribunal take measures to limit exclusive use covenants (referred to in the Bureau’s report as “property controls”) in the grocery industry. An exclusive use covenant grants to a tenant the right to be the only tenant to conduct a particular use within a prescribed set of lands.

On September 14, 2023, the federal government announced its intention to amend the Act and, shortly thereafter, Parliament introduced Bill C-56, dubbed the *Affordable Housing and Groceries Act*. If enacted, it will empower the Bureau to take action against agreements that “lessen competition”. It is a given that the Bill has its eye on major grocery retailers, intending to promote competition for the benefit of consumers. Bill C-56 will

expand the Tribunal’s power to issue orders against anti-competitive agreements under Section 90.1 of the Act.

In its current form, Section 90.1(1) of the Act allows the Bureau to apply to the Tribunal for an order that a particular agreement prevents or lessens competition in those cases where at least two parties to the agreement are competitors. As an example, an agreement between competitors to set the pricing on a particular product is caught by the current version of Section 90.1(1). The type of order that may be issued ranges from prohibition to criminal prosecution.

Bill C-56 amends Section 90.1(1) to permit the Tribunal to make such an order where the parties to the agreement are not competitors. The proposed Section 90.1(1.1) states: “**if the Tribunal finds that a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market, it may make an order under subsection (1) even if none of the persons referred to in that subsection are competitors.**” This provision, if enacted, will expose exclusive use covenants to sanction.

Although the common law holds that covenants in restraint of trade are generally considered unenforceable and void, courts in Canada have upheld agreements restraining competition such as exclusive use covenants, in certain circumstances. For example, in *Russo v. Field*, the Supreme Court of Canada upheld an exclusive covenant in the context of a shopping centre. It noted that if a limited number of prospective purchasers in a small shopping centre are faced with several prospective vendors of the same goods and services there may not be enough business to support the vendors, causing both them and the landlord to suffer.

It is indisputable that Bill C-56 will, if proclaimed into force, empower the Tribunal to find that an exclusive covenant violates the Act. If it so finds, it may prohibit enforcement of the exclusive, effectively nullifying it.

At this point, it is pure speculation as to how the Bureau and Tribunal might exercise the new powers. Due to its limited resources, it is hard to imagine that the Bureau will embark on a document review of leases of private developments.

Here are some questions that come to mind: Will operators of a business that contravenes an exclusive use covenant tip off the Bureau for action against the landlord and tenant, just to turn up the heat? Will tenants such as fruit and vegetable stands, bakeries, dollar stores, convenience stores and bulk food stores contact the Bureau with a roster of desirable locations and ask the Bureau to demand disclosure by landowners of all restrictive use covenants? Will landlords and tenants take matters into their own hands by issuing demands that the grocery store operators relax their rights, or risk being reported to the Bureau? Or, in instances where there is express wording in the exclusive covenant to the effect that it need not be enforced if doing so would be an offence under the Act, will that wording serve to nullify the covenant?

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.

At this time, we have no legal outcomes to report as Bill C-56 has yet to be proclaimed. However, current lease negotiations suggest that Bill C-56 has already induced some level of nervousness among grocery store tenants. We also know that similar developments in the law in the U.K. and Australia have been significantly impactful on the retail sector. For example, when the Australian Competition and Consumer Commission ("ACCC") considered exclusive use covenants to be an impediment to competition, the ACCC pursued the matter until two of Australia's largest grocery retailers agreed to phase out exclusive use covenants and not enter into new ones. These agreements are enforceable by the courts.

Takeaways

If enacted, Bill C-56 will provide the Bureau and Tribunal with greater power to intervene in anti-competition agreements. These changes may place landlords and tenants at risk of the Bureau and Tribunal attacking exclusive use covenants. Although these proposed changes to the Act theoretically apply across all retail sectors, it seems that the current focus on grocery competition has placed grocery store tenants in the crosshairs.

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