Do no-hire clauses in franchise agreements violate the Competition Act?

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On November 9, 2021, the Supreme Court of British Columbia allowed an application by Tim Hortons to dismiss a novel claim by a plaintiff alleging that "no-hire" clauses contravene the federal *Competition Act*. In *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183 (*Latifi*), the court held that the plaintiff's allegation that the scope of the *Competition Act* should be expanded to regulate such clauses did not have a reasonable prospect of success, and the plaintiff's claim with respect to the *Competition Act* was accordingly dismissed.

Latifi is consistent with guidance issued by the Competition Bureau in its *Competitor Collaboration Guidelines* that state that "no-hire" clauses drafted by Canadian franchisors do not fall within the purview of section 45 of the *Competition Act*.

Background

Beginning in 2012, the plaintiff, Mr. Latifi, had been employed at a single Tim Hortons location in B.C., which was independently owned and operated by a Tim Hortons franchisee. He later sought to obtain employment at another franchised Tim Hortons location. However, the standard franchise agreement for all Tim Hortons restaurants included a clause prohibiting the hiring of any person who is currently employed at another franchised Tim Hortons location (the No-hire Clause).

The plaintiff brought a class action lawsuit on behalf of all Tim Hortons' employees alleging a novel claim that the No-hire Clause contravened section 45(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (the Act). Mr. Latifi argued that the No-hire Clause unlawfully supresses class members' wages because employees cannot seek better wages and benefits at other Tim Hortons restaurants. As a result, the plaintiff contended that Tim Hortons enjoys increased profits. The plaintiff also argued that the Act should apply to no-hire clauses because workers should be considered "suppliers" of labour, and the Act restricts the manipulation of supply.

In response, Tim Hortons argued that the plaintiff's claim should be dismissed agreeing that the Act was only intended to apply to suppliers. However, Tim Hortons considered that franchisors should actually be considered purchasers of labour in this situation, rather than suppliers. It also noted that the purpose of section 45(1) is to regulate "sell-

side" arrangements, rather than "buy-side" arrangements, which are not anti-competitive.

The court was therefore tasked with determining whether section 45(1) of the *Competition Act* should be expanded to apply to no-hire clauses.

Decision

The court's analysis began by setting out the seminal principles of statutory interpretation derived from *Rizzo & Rizzo Shoes Ltd.* (Re), [1998] 1. S.C.R. 27, which involves considering the words of the legislation in light of its entire context and purpose. The court then applied these principles to section 45(1), as follows, to determine whether it governs situations where franchisors implement no-hire clauses in their franchise agreements:

> 45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> > (a) to fix, maintain, increase or control the price for the supply of the product;
> > (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
> > (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Madam Justice Sharma first determined that a plain reading of the words of section 45(1) indicates that it is to apply to suppliers of products.

Sharma J. then considered the legislative history of section 45, which was analyzed in the case of *Mohr v. National Hockey League*, 2021 FC 488 (*Mohr*). *Mohr* involved the dismissal of a claim by a junior hockey player who argued that the NHL was limiting his sports opportunities by conspiring with junior hockey leagues when hiring players. The court in *Mohr* determined that section 45 only applied to supply-side agreements and that coordinating with other organizations with respect to the hiring of employees does not contravene section 45. It also observed that the Competition Bureau guidelines openly state that section 45 does not apply to agreements concerning the hiring of labour (including no-poaching agreements).

The court in *Latifi* finally determined that the objective of the provision was focused on the price-fixing of products, rather than the wage-fixing of employees.

In light of these findings, the court dismissed the plaintiff's claim, concluding that section 45(1) does not apply to situations where the competitors of a product are different from the suppliers of that product.

Implications

The decision in *Latifi* coincides with recent guidance from the Competition Bureau stating that it does not believe that no-hire clauses within standard franchising agreements fall within the purview of section 45 of the *Competition Act*. Per the *Competitor Collaboration Guidelines*, such clauses remain reviewable under Part VIII of

the *Competition Act*. Therefore, *Latifi* demonstrates that plaintiffs are effectively unable to bring a private action under the *Competition Act* against franchisors with respect to franchise agreements containing potentially anti-competitive terms, as private actions are not available to address alleged violations of Part VIII. Rather, plaintiffs may only file a complaint with the Competition Bureau who may then apply to review such agreements before the Competition Tribunal.

By

Blair Rebane, Nikhil Pandey

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BLG Offices

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Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749