To include or not include, that is the (real estate) question: Competitor property controls under Amended Competition Act

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The *Affordable Housing and Groceries Act* (Bill C-56), which came into force on Dec. 15, 2023, and Bill C-59, which received Royal Assent on June 20, 2024 included sweeping amendments to the abuse of dominance provisions (s.79) and the civil anti-competitive agreements provisions (s.90.1) of the Competition Act (Act) which are forcing parties to consider new factors in negotiating the terms of various real estate agreements nationwide. A clear impetus of the changes is concern about the impact of property controls in real estate agreements (Property Controls) that could restrict competition in the retail sector.[1]

Following these amendments, the Competition Bureau (the Bureau) issued preliminary guidelines outlining its enforcement approach to "Competitor Property Controls" under the Act (Preliminary Guidelines) and has already taken enforcement action utilising the revised provision. As we discuss below, in 2024 the Commissioner commenced inquiries into major Canadian grocers and real estate companies relying on the amended abuse of dominance provisions, and more recently, on Jan. 16, 2025, announced that following its investigations, one of the large Canadian grocers agreed to remove a Property Control that restricted grocery store competition in Crowsnest Pass, Alberta.

Below, we describe the changes that have been implemented, provide an overview of the Preliminary Guidelines, and share our perspective on what needs to be proven to successfully challenge Property Controls under the new regime, and what the implications have been and are likely to be.

The amendments

The 2023 amendments made it significantly easier for the Commissioner of Competition (the Commissioner), or a private party in some cases, to challenge provisions of real estate agreements, such as Property Controls as being "abuses of dominance". Such challenges can also result in an order not to enforce the anti-competitive portions of an agreement, or an entire agreement.

On top of that, effective Dec. 15, 2024, purely "vertical" agreements – meaning agreements that do not include competitors, but which are instead among entities at different levels of the supply chain – were be added to the types of "civil agreements" that can be challenged by the Commissioner before the Competition Tribunal (Tribunal) as harming competition under s.90.1 of the Act. If harm to competition is found, the Tribunal can order that the anti-competitive portions of an agreement, or an entire agreement, not be enforced.

Further, Bill C-59, which received Royal Assent on June 20, 2024 includes certain amendments that will, as of June 20, 2025 also allow private parties to bring such claims and grant the Tribunal powers to issue administrative monetary penalties (AMPs) and civil monetary recovery orders against respondents.

Overview of the Preliminary Guidelines

Competitor Property Controls are restrictions on the use of commercial real estate. The Bureau's Preliminary Guidelines address two types of Property Controls:

- **Exclusivity Clauses** – clauses found within commercial leases that limit how the land can be used by competitors of a tenant.
- **Restrictive Covenants** – restrictions on land that prevent a purchaser or owner of a commercial property from using the location to operation or lease to operators of certain types of businesses that compete with a previous owner.

In the Preliminary Guidelines, the Bureau takes the strict stance that Property Controls "raise serious competition concerns" and are only justified in limited cases "if they are necessary for a firm to make investments that increase competition, such as to enter a market." With regards to Exclusivity Clauses, the Bureau notes that "a limited exclusivity clause may be pro-competitive if no retailer would otherwise make the necessary investments to become a key tenant in a new shopping plaza", and further adds that the duration and scope of the restrictions will be key in determining whether they are justified. The Bureau takes an even stricter stance against Restrictive Covenants noting that it "does not consider their use to be justified outside of exceptional circumstances", because these restrictions "tend to be long lasting, and can create areas where no competitors can operate".

The Bureau notes that the changes to the abuse of dominance provisions and the anti-competitive collaboration provisions will inform its enforcement approach. With regards to the abuse of dominance provisions, the Bureau notes that "restricting competition is inherent in a competitor property control and takes the position that in the absence of evidence of pro-competitive justification, it will consider property controls used by dominant firms to be anti-competitive.

As to the targets of its investigations, the Bureau notes that where it investigates agreements under s.90.1, it will consider all parties to the agreement (both tenants and lessors) to be targets of the investigations; where the Bureau proceeds under the abuse of dominance provision, the party who proposed or benefits competitively from the property control will be the target "in most cases."

Overall, the Preliminary Guidelines fail to provide an adequate analysis of core factors in the abuse of dominance provisions and the anticompetitive collaborative provisions to justify the Bureau's overbroad and strict conclusions. In the next sections we provide our perspective on what needs to be proven to successfully challenge Property Controls under the revised s. 79 and s. 90.1.

The amended abuse of dominance provisions

Property Controls were already reviewable under the Act's abuse of dominance provisions (s.79) before the recent spate of amendments. However, the statutory test for a finding that a Property Control (or other conduct) violated s. 79 required proof of more onerous elements than is (and was) required under the anti-competitive collaboration provision in s.90.1 of the Act. For example, to prove an abuse of dominance, in addition to showing (a) that the conduct did or was likely to prevent or lessen competition substantially in a market (an SPLC), – an element that is also required under s.90.1–the Commissioner also had to prove : (b) that a respondent was "dominant" in a market and (c) that the conduct at issue was intended to be anti-competitive, which proof of a legitimate business purpose for the conduct could defeat.

However, Bill C-56 changed the abuse of dominance provisions to make it possible for a Property Control that does not give rise to an SLPC to *still* violate the abuse of dominance provisions, as amended, if the respondent was dominant and had anti-competitive intent, which arguably most Property Controls could be seen to have. Alternately, Bill C-56 made it possible for an abuse of dominance to be found without proof of anti-competitive intent, through proof merely that a dominant respondent (a) engaged in any conduct (i.e. entering a lease) that is not the result of superior competitive performance that (b) causes an SLPC. This means that the standard by which an abuse of dominance can be found is now similar to that on which an agreement can be found to violate the civil agreements provision (other than the dominance element), as discussed below.

While the bar for establishing "dominance", which is still required under the amended provisions is high (more than 50% according to the Bureau's guidelines)[2], the analysis is conducted on a "relevant market" by "relevant market" basis, which in most retail sectors is likely to be no broader than metropolitan areas, and in many cases smaller. Therefore, the key question is likely to be whether a respondent that seeks Property Controls in its deals could be dominant in any local areas, not on a national basis, which significantly expands risk.

The bureau is already exploring the use of the amended abuse provision

Not waiting for the passage of Bill C-59 or for the changes to s.90.1 to take effect at the end of 2024, on March 1, 2024 the Commissioner initiated inquiries into the use of Property Controls in leases that dictate the terms upon which competitors may carry on business by George Weston Limited (GWL) and its subsidiaries, including grocer Loblaw Companies Limited (Loblaw) and real estate affiliate Choice Properties Real Estate Investment Trust (Choice), and Empire Company Limited (Empire) and its subsidiaries, including grocer Sobeys Inc. (Sobeys) and real estate affiliate ECL Developments Limited (ECL).

In applications for court orders filed May 6, 2024[3] seeking the production of material relevant to the inquires, the Bureau said that it was considering whether (a) by Loblaw or Sobeys demanding terms in their leases that limit what products other lessees from a given lessor in a given area may sell, and/or (b) by Choice or ECL including terms in their leases with their lessees that limit products that compete with Loblaw or Sobeys that leases may sell, GWL and Empire may be violating the abuse of dominance provisions of the Act. These filings did not rely on the amended s.90.1 of the Act, presumably because it was not yet in force, but future proceedings on similar facts could also cite this amended provision. The Bureau may also be keen to take advantage of the less stringent test to establish abuse of dominance, as covered above.

With respect to the relevant markets within which each is dominant, the Bureau highlights the local nature of the inquiry, and the potential for the risk of including Property Controls in real estate agreements to differ significantly on a region-by-region basis. It states that "in certain markets, a store owned or affiliated with Loblaws or Sobeys may be either the only, or one of two sellers of full-line grocery products."[4] In fact, recently, on Jan. 16, 2025, the Bureau issued a press release announcing that it had reached agreement with Empire whereby the latter agreed to remove a restrictive covenant for its IGA store in Crowsnest Pass, Alberta. The Bureau's investigation found that the restrictive covenant protected Empire's grocery store from competition and ensured that it would be the only grocery store in the area.

Different test to obtain prohibition orders vs. penalties

It is important to note that the new, easier tests that Bill C-56 established for finding abuse of dominance (dominance and (a) either anti-competitive acts **or** (b) SPLC) **only applies to securing "prohibition orders"** – orders to cease the conduct (i.e. enforcement of the restrictive covenant). The abuse of dominance provisions do allow the Tribunal to order AMPs against a respondent[5], but only if the formerly applicable, three-part test (dominance, SLPC and anti-competitive act) is met. While it is likely that any claims brought under s.79 going forward will claim, out of an abundance of caution, that all three factors are met, the different standards suggest that prohibition orders are likely to be more common than penalties, as demonstrated in the recent agreement reached with Empire.

The biggest change: Broadening the civil agreements provision

Prior to Dec.15, 2024, the civil agreements provision in s.90.1, provided that if the Tribunal found that an agreement (or arrangement) between two or more legal persons – ***provided that at least two of the parties were competitors (or potential competitors)*** – caused an SLPC, it could order any person to refrain from carrying out any portion, or all, of the agreement.

The key change effected by Bill C-56 is that as of Dec. 15, 2024, s.90.1 now allows the Commissioner to challenge agreements even where it does ***not include parties that are competitors*** where a **"significant purpose"** of the agreement ***or any part thereof*** is to prevent or lessen competition in any market.

How a property control in a real estate deal could fall under the new anti-competitive collaboration provision

Proving that an SPLC results from any Property Control will be a significant burden for the Commissioner or a private applicant to demonstrate and, in some cases, require detailed evidence from economic experts. Demonstrating an SPLC requires proof that the challenged agreement or portion thereof is likely to create, maintain or enhance the ability of a party to the agreement to exercise market power, such as by sustaining higher prices than would exist in the absence of the agreement or portion thereof or by diminishing existing or future competition. In the case of a Property Controls insisted on by a tenant that prevents a landlord from leasing to competing retailers, the Preliminary Guidelines confirm that this would require that it be proven that the Property Control "creates, increases or protects" the retailer's market power, and that the Bureau's analysis will focus on barriers to entry and the existence of effective remaining competition.

The SLPC language in s.90.1, which remained unchanged following the amendments, has previously been interpreted by the Tribunal. Based on the existing guidance (which will likely be updated following changes to the merger provisions) and precedent interpreting this language to-date, it is very likely that the minimum market share in the market alleged to be harmed held by the party/parties alleged to be causing the SLPC will have to be at least 35 per cent. Therefore, where a tenant retailer insists on a Property Control preventing its landlord from leasing to competing retailers, in order for this to constitute an SLPC, the tenant will likely need to have at least a 35 per cent market share.

Defining the "relevant market" within which this market share is determined will be key to any challenge. In the context of a challenge to a Property Control, it will require determining both the "product market" (i.e. the product, service or group thereof within which the harm to competition is alleged) and the "geographic market" (i.e. the geographic region within which competition for the products/services in the product market takes place). It is possible that parties will need to consider the risk of entering into/enforcing certain Property Controls on a lease-by-lease/location-by-location basis. Note that other considerations beyond market share will be considered by the Tribunal in any challenge, including those listed in s.90.1(2), but for parties seeking to evaluate their risks, looking at their shares of any potentially relevant markets is a helpful starting point.

The "significant purpose " requirement

The amended language of s.90.1 requires that it be established that a "significant purpose" of a part of the agreement in question is to prevent or lessen competition in a market if it is to be successfully challenged. "Significant purpose" is not defined in the Act, and the Preliminary Guidelines did not provide any insight, therefore, its interpretation by the Tribunal will be very important in determining the breadth of the amended provision and its application to Property Controls in real estate agreement.

Given that the Bureau has taken the position in the Preliminary Guidelines that "restricting competition is inherent in a competitor property control" we expect that the Bureau will take the position in any future guidance that such clauses presumptively

have preventing or lessening competition in a market as a significant purpose and suggest that parties act accordingly.

Parties should also review existing agreements

Before the amendments, s.90.1 only applied to "ongoing or future conduct" and not to prior conduct. The amendments changed this such that the provision can now be used to examine past behavior, although there is a limitation period of three years.[6] However, it is likely (based on similar questions that were raised about recent amendments that criminalized wage-fixing and certain no-poach agreements) that the Bureau will take the position that in addition to new agreements entered after Dec. 15, 2024, the new provision will be applicable to any action taken after that date to enforce an agreement entered before Dec 15, 2024. Therefore, for example, a party enforcing in 2025 a Property Control in an agreement signed in 2020 could still see the agreement challenged.

Therefore, parties should consider whether any of their existing agreements give rise to risk under the new provision.

Effect of a finding that a property control violates the new civil agreements provision

With the passage of Bill C-59, the remedies available under s. 90.1 have dramatically changed. Previously, the Tribunal could only issue a remedial order. Now, the Tribunal may order additional penalties for violations of the new provision, as follows:

(**a**) The Tribunal can order AMPs of up to the greater of either:

i. C$10 million (for a first offence, $15 million for all subsequent); and

ii. Three times the value of the benefit derived from the violative conduct, or if that amount cannot be reasonably determined, 3 per cent of respondent's annual worldwide gross revenues.

(**b**) Private parties will be allowed, with leave, to bring suits under s.90.1 as of June 20, 2025 and if successful in their application, can be awarded civil monetary recovery equal to the value of the benefit derived by the respondent(s) from the violative conduct, to be distributed among the private party applicant and any other persons affected by the conduct, in any manner the Tribunal considers appropriate.

Based on the more difficult standard to be established for AMPs to be awarded under the abuse of dominance provisions (unchanged under both Bill C-56 and Bill C-59), it may be that going forward, the Bureau or parties seeking to challenge the use of Property Controls in real estate agreements will claim under both s.79 and s.90.1, with the hope AMPs are more achievable under s. 90.1. Where parties would be satisfied with prohibition orders and where market shares in any region for a retailer would meet the "dominance" requirement, parties may opt to proceed under s.79, given the less stringent test for prohibition orders.

Conclusion

The Bureau's recently-commenced inquiry into GWL and Empire, as well as the consent agreement entered with Empire show that there is strong appetite to use the amended Act, as well as any additional changes brought by Bill C-59, to aggressively challenge competitor Property Controls in real estate agreements.

In its Preliminary Guidance on Property Controls, the Bureau encourages business to review their property controls to confirm compliance with the Act, with a particular focus on the following questions:

- Is the property control necessary to allow a new business to enter the market or to encourage a new investment?
- Could this property control last for a shorter period of time?
- Could this property control cover fewer products or services?
- Could this property control cover less geographic area?

These questions reflect the strict view that the Bureau has taken that Property Controls are only justified in limited circumstances–a position that we consider unjustified in light of test that must be satisfied under the abuse of the dominance provisions and the civil anticompetitive agreements provisions.

It is important to note that any of the provisions under which challenges to Property Controls could be brought require that a respondent have a significant market share within a relevant market. Therefore, although some businesses may choose to avoid all such provisions as a matter of policy, it is very likely that many existing and future Property Controls are unlikely to give rise to risk. This will be the case in most situations in which the party seeking to insert such a provision to their benefit does not have a significant share of the relevant market at issue.

Ultimately, the determination of whether any Property Control in a real estate agreement is likely to give rise to any risk under the amended Act will require a detailed analysis, with market share data essential to triaging the risk.

Footnotes

[1] The changes to s.90.1 were made with the issue of Property Controls in real estate agreements in mind. Just before introducing Bill C-56, the federal government specifically said that its coming amendments would empower the Bureau "to take action against collaborations that stifle competition and consumer choice in particular situations where large grocers prevent smaller competitors from establishing operations nearby". This followed the Bureau's explicitly saying that "Property controls limit how real estate can be used by competing grocers [and] make it difficult, or even impossible, for new grocery stores to open, which reduces competition in communities", which many saw as a call for the government to make challenging them easier.

[2] In its *Abuse of Dominance Enforcement Guidelines*, the Bureau states **that market shares of less than 50%** (or 65% in a joint dominance case) will generally be

considered as indicating the absence of dominance, unless other evidence indicates that the firm possesses a substantial degree or market power.

[3] The applications were heard by the Federal Court of Canada on June 6, 2024 and decisions are pending. On April 12, 2024, Sobeys filed an application for judicial review of the Commissioner's decision to commence the inquiry, arguing that the Commissioner could not have "reason to believe" that grounds exist for making of an order under the abuse of dominance provisions and therefore that the decision to launch the inquiry was made on an unfounded factual basis and/or that the Commissioner exercised his discretion for an improper purpose. The Commissioner brought an application to strike Sobeys' application, and the Federal Court granted the Commissioner's request on May 28, 2024. The Court found that the Commissioner's decision to commence the inquiry was not reviewable because that decision, in and of itself, did not affect any rights of Empire or Sobeys, did not impose legal obligations upon them, and did not cause them any prejudicial effects. See *Empire Company Limited v. Canada* (*Attorney General*), 2024 FC 810.

[4] *Commissioner of Competition v Empire Company Limited*, T-1143-24-ID 5, *Affidavit of Stephanie Guitard, May 6, 2024*.

[5] The AMPs that the Tribunal may order are the greater of (a) $25M (for a first offence, $35M for each subsequent order); and (b) three times the value of the benefit derived from the anti-competitive practice, or if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

[6] *Competition Act*, s.90.1(9.1).

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