Heenan Blaikie LLP

Labour & Employment in the News

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Agreements Regarding Employee Recruitment Under Competition Law

INTRODUCTION

On March 12, 2010, the law relating to conspiracy under the *Competition Act* (the "Act") was amended to become broadly more similar to the law in the United States (the "U.S.") and significantly more strict than Canada's former conspiracy laws. Previously, competitors who entered into horizontal agreements with respect to price or price related matters (i.e. price fixing) were engaging in an illegal conspiracy only if competition was or was likely to be unduly lessened or prevented as a result. Under the new rules, however, particular conduct does not require proof of an undue prevention or lessening of competition. Agreements between competitors to fix price, allocate markets or control supply are *per se* illegal, meaning that the existence of the agreement is sufficient to find the existence of a conspiracy, subject to certain defences and exemptions. The penalty for contravention of the new criminal conspiracy provision is now a fine of up to $25 million per count and/or up to 14 years imprisonment.

The change in the conspiracy laws is relevant any time companies enter into agreements with competitors or potential competitors, even in the employment context, as recent U.S. enforcement activity suggests. In particular, U.S. antitrust authorities have sued parties who were competitors for injunctive relief for entering into non-solicitation agreements regarding employee recruitment. Given the similarities between the U.S. and Canadian laws relating to price fixing, this is also relevant in Canada.

UNITED STATES V. LUCASFILM LTD.

The most recent development occurred in December 2010, when the Antitrust Division of the United States Department of Justice (the "Division") filed a suit alleging the existence of a similar agreement between Lucasfilm Ltd. ("Lucasfilm") and Pixar Animation (which was not named as a defendant in the complaint as it was a party in the *Adobe* settlement, discussed below). In particular, it is alleged that the two companies agreed not to cold call each other's employees; agreed to notify each other when making an offer to an employee of the other company; and agreed, when offering a position to the other company's employee, not to counteroffer with compensation above the initial offer. The Division found that the non-solicitation agreement was anticompetitive for the same reasons as in *Adobe* and on December 21, 2010, the parties tendered a consent Final Judgment that includes the same prohibitions as the *Adobe* Final Judgment.

UNITED STATES V. ADOBE SYSTEMS, INC. et al.

Beginning in approximately May 2005, Apple Inc. and Adobe Systems Inc. entered into an agreement pursuant to which they agreed not to solicit each others' employees through "cold

calling." Over time, Apple Inc. entered into similar bilateral agreements with Google Inc. and Pixar Animation, and Google Inc. entered into similar bilateral agreements with Intel Corp. and Intuit Inc. (collectively, the "No Cold Call Agreements").

The Division filed a suit against the above-mentioned companies alleging that the No Cold Call Agreements contravened antitrust laws and were *per se* illegal. Further, it maintained that the agreements were anticompetitive for the following reasons:

1. They eliminated a significant form of competition to attract high tech employees;

2. They substantially diminished competition to the detriment of high tech employees who were likely deprived of competitively important information and access to better job opportunities; and

3. They interfered with the proper functioning of the price-setting (i.e. salary) mechanism that would have otherwise prevailed.

On September 24, 2010, the parties tendered a consent Final Judgment. The Final Judgment is broadly more prohibitive than disallowing the No Cold Call Agreements. Pursuant to the settlement, which will be in effect for five years, the companies are prohibited from entering, maintaining or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees. The companies are also required to implement compliance measures tailored to these practices.

THE SIGNIFICANCE FOR BUSINESSES OPERATING IN CANADA

From a Canadian perspective, the *Adobe* and *Lucasfilm* cases illustrate that agreements between competitors, even in the labour and employment context, can raise serious competition law issues, particularly when the agreement can be seen as resulting in a coordination on price, productivity or other aspects of competition. In particular, the *Adobe* and *Lucasfilm* cases indicate that the following types of agreements between competitors or potential competitors can raise concerns:

1. Agreements that restrict a business's ability to solicit or recruit employees in any manner, including cold calling.

2. Agreements that restrict a business's ability to compete in recruiting employees on terms such as compensation.

3. Agreements that require businesses to provide a competitor with notice when making an offer to a potential employee.

It is important to consider the application of the Act when contemplating entering into such agreements with competitors or potential competitors.

We hope that you have found this general update helpful. Should you have any questions about its contents, please do not hesitate to contact any of the members of Heenan Blaikie LLP's Competition Law group.■

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Labour & Employment in the News

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