

Competition & Regulatory Scrutiny in 'The New Normal'

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There has been a distinct shift in the scope and breadth of investigations by global competition regulators, and the Canadian competition law landscape has followed suit. From the continued focus on merger review, the rise in corporate investigations and the expanded scope of the *Canadian Competition Act*, the Canadian competition law landscape continues to evolve. Our panellists shared their perspectives on regulators activity when investigating anti-competitive behaviour and the strategic role of technology.

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PRE-GAME MEETING

There has been a significant global surge in merger review and merger control filings, and much of this activity has been impacted by the expansive antitrust agenda launched by the Biden administration.

In 2022, the comprehensive review of *The Competition Act* was launched by the Minister of Innovation, Science, and Industry. This was supplemented by a series of amendments announced in the 2022 federal budget that were largely technical in nature, but which provided an indication of the movement towards modernizing the Canadian competition regime. Changes to the act include:

- The amendments to the abuse of dominance provisions expand the types of conduct captured to include practices that “have an adverse effect on competition” or are “a selective or discriminatory response to an actual or potential competitor.” The provisions also cover conduct that negatively affects non-price considerations. There are increased financial penalties associated with the abuse of dominance provisions and a private right of action, such as quality, choice and consumer privacy, that was not in place previously.
- The Bureau’s evidence gathering powers under Section 11 have been expanded.
- Merger review developments include consideration of non-price factors when assessing the competitive impact of a transaction, such as network effects, quality, consumer choice, and consumer privacy.
- If a non-notifiable transaction was structured or “designed to avoid” the pre-merger notification regime, the Act’s notification requirements may apply.
- Two amendments, introduced in the *2022 Budget Act*, relate to cartels. The first removes the \$25-million limit on fines for criminal agreements between competitors to fix prices, or for violating Section 45 of the *Competition Act* (which creates an indictable offense for anyone who conspires, combines, agrees, or arranges with another person to restrain or injure competition), and the second makes it an offence for employers to agree to fix, maintain, decrease, or control wages or other terms of employment, which comes into effect in June 2023.

FIRST LINE OF DEFENCE: PREPARING FOR THE INCREASED LITIGIOUS NATURE OF THE BUREAU

- There has been a recent uptick in litigation being brought by the Commissioner of Competition (for example in relation to the Rogers/Shaw Communications Inc. merger, and the Secure Energy Services/Tervita Corporation decision).
- The Bureau is taking the stance of “what is the risk of not taking action,” and is building its investigation and litigation capacity, so that it is able to bring timely and evidence-based enforcement actions, focused on both traditional and digital marketplaces.
- There is an increased sentiment that the Bureau may be more willing than it has been in the past to advance novel or aggressive theories of competitive harm, less inclined to accept remedies or modifications offered by the parties to a transaction, and, more inclined to see a transaction blocked, which parallels the enforcement trend that we are seeing in other jurisdictions.
- Parties need to be careful when negotiating transactions - in particular, how far they are willing to go with the transaction if the Bureau launches an investigation.

2 SECOND LINE OF DEFENCE: MANAGING INCREASED VOLUMES OF DATA

- There is increased collaboration across all global regulators, and they are in lockstep with this more aggressive stance, regarding both merger control and litigation of anti-competitive behaviour.
- The increased focus expands beyond pure competition issues, to areas such as Environmental, Social and Governance considerations, and how organizations are evaluating the potential impact on consumers.
- As we are seeing in the US and UK, there is a focus in Canada around COVID compliance, as well as a focus on the labour issues associated with a merger.

3 THIRD LINE OF DEFENCE: PREPARE FOR THE RISE IN CORPORATE INVESTIGATIONS

The Bureau has invested heavily in ensuring that corporations have robust compliance programs, and recently launched a [compliance portal](#) to support organizations in building credible and effective compliance programs. The portal includes guidance around risk-based compliance assessments, compliance training and communication, monitoring, and ongoing compliance evaluation. A credible compliance program can help if the Bureau launches an investigation. For example, such a program may:

- Increase the company's ability to demonstrate that it has been exercising diligence under a robust compliance program, thus possibly persuading the Bureau to pursue a civil track offense rather than a criminal track offense.
- Lower the magnitude of the administrative monetary penalty levied against the company.
- Help to determine whether to grant a leniency application.

Adopting a risk-based approach and underlining compliance as a key component of a company's corporate culture helps it to maintain a good reputation, internally and externally, thus avoiding infringements by educating employees and mitigating risk factors before they occur. Considerations in building a corporate compliance program include:

- Ensure that the corporate team is aware of the provisions of the *Competition Act*, and how they affect their responsibilities.
- In an environment with rapid regulatory change, ensure that the training materials are up to date, and meaningful to your employees (practical, useful guidance and commercial advice while still addressing the regulatory risk).
- Demonstrate that management is committed to a culture of compliance, including, for example, an open-door policy with the legal team.

DON'T END UP IN THE PENALTY BOX: UNDERSTAND HOW EDISCOVERY PROCESSES CAN SUPPORT YOUR COMPLIANCE PROGRAM

Regulators are generally moving towards data driven compliance programs – both proactive and reactive – that evaluate communications as they are happening to understand if there are emerging compliance issues and areas of risk. This proactive approach allows companies to mitigate risk, address issues, and retrain individuals before the situation must be disclosed to the regulators. Implementing eDiscovery processes and tools will help companies understand their data and ultimately speed up the process.

- Apply eDiscovery processes within this compliance context, such as reviewing email and Chat App (Slack, Teams, WhatsApp etc.) data and apply AI-based models to identify issues, to find key documents early, and to analyze accordingly.
- AI (Artificial Intelligence) can support compliance proactively by flagging signs of non-compliance in email threads so that company can be in a proactive position to start an internal investigation.
- Work closely with the company's eDiscovery and IT teams to get everyone on board to make sure that any issues are identified, and processes and responsibilities are assigned accordingly.

PLANNING IS A TEAM SPORT

In a transactional context, advanced planning is key. Lawyers need to understand their position early in a potential transaction to assess regulatory risk and to effectively negotiate the competition provisions:

- Identify and educate the team to be mindful of the importance of the company's ability to assert legal privilege over documents, and to build privilege protections.
- Ensure that the team knows there are document creation and circulation guidelines.
- Ensure that materials which are given to the organization are carefully vetted.

Some proactive organizations are getting certified under an ISO standard to highlight their robust compliance program to external stakeholders.

RALLY THE CROWD: NEW DATA TYPES

Once an investigation is initiated, there is a dual challenge posed by remote work and the proliferation of data in Chat Apps. Organizations need to understand what is happening in the data and how to follow communication trains.

eDiscovery experts look in all the places that communication and conversations are happening and where work is being done. It is critical to have a provider who has bespoke and defensible solutions for each of these particular data sources, not only to collect but also to analyze and understand what that data is going to look like (format, individual messages, conversation roll-ups) and how this might impact a company's discovery plan. In some cases, a Supplementary Information Request or Section 11 Order require data from a Chat App for a certain time period, which can be difficult as each Chat App may have a different retention policy – and so it can be challenging to track the story and flow of the conversation. Increasingly, enforcement agencies in Canada, and globally, have dedicated forensic laboratories and skilled forensic investigators, and they are really getting up to speed on all these different applications and how they work.

OVERTIME DISCUSSIONS

A well-developed tech enabled strategy can create and tell a story. Start early and leverage AI to build the company's story and understand your data and risk factors. The Bureau and other global regulators are focusing on compliance and getting ahead of issues as part of their aggressive enforcement action, and companies, and their external counsel and eDiscovery providers, need to be prepared and in the position to advise on the best way to bring technology to the forefront. Given the scope of

the amendments and possible potential changes to come, companies, both small, medium, and large, need to conduct a compliance assessment internally to make sure that their compliance programs are up to par with requirements. Overall, the evolution of competition law in Canada reflects the government's commitment to promoting a fair and competitive marketplace for business and consumers alike.

The views and opinions expressed during the referenced Webinar are those of the panelists and do not necessarily reflect or represent the views and opinions of their respective employers, or their affiliates.

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