

Canadian competition bureau's strategic vision calls for more interim orders, digital enforcement

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- Interim orders needed to deal with speed of innovation
- Caveats over whether enforcement will increase
- AI and other technology raise questions and concerns

The Canadian Competition Bureau's (CCB) "[Strategic Vision for 2020 – 2024](#)" calls for an increase in the use of interim orders and for a focus on enforcement in the digital economy, lawyers said.

The increase in interim orders called for by the plan may consist of production orders, said Melanie Aitken, a competition lawyer at Bennett Jones. Aitken served as CCB commissioner from 2009 to 2012 and recruited the Bureau's current commissioner, Matthew Boswell, responsible for the new plan.

However, a "more likely inference ... is that they're referring to injunctions," Aitken said, noting that interim injunctions are generally "hard for the Bureau to get" because the legal test is difficult. She argued that the CCB will have to be somewhat "cautious" when seeking an injunction to stop a merger or anticompetitive conduct, because case law interpretations of the operative sections of the Competition Act set a "high bar".

The CCB's view on the increased use of interim orders is consistent with the Bureau's understanding of "how fast innovation can happen and how fragile the conditions for positive innovation" are, said David Rosner, a competition lawyer at Goodmans. Innovation moves at a high speed, he argued. An investigation that "takes two years and litigation that takes another two years" doesn't help a company facing anticompetitive conduct in the digital economy. The CCB's plan, he noted, promotes interim orders as a means to "protect" the "market dynamics" that lead to innovation.

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The four-year plan's call for a "main focus" on enforcement in the digital economy comes with caveats, both lawyers noted.

Although "we're far more likely to see active enforcement under [Boswell] than under the prior five years," Aitken called digital enforcement cases "incredibly resource intensive" and "tough", partially because the pace of growth in online industries is "exponential".

She supports Boswell's approach of "looking for surgical cases – bite-sized if you will, rather than trying to change the world".

When enforcing the giant tech platforms, Aitken suspects the CCB will start by "piggybacking on other, bigger agencies who may have more resources to throw at these things", followed by the CCB "taking their own look at the issues".

Bricks, mortar remain in frame

Despite the plan's emphasis on the new economy, the CCB remains active in old-economy sectors, which Aitken agrees with. "Everything hasn't become digital," she said. "The old economy does still tick along and we don't want to be ignoring it [or] getting bedazzled by the shiny new thing."

"Innovation is affecting every corner of our economy, so it's pretty difficult to say that the old economy is untouched by innovation or the digital economy," Rosner said. The CCB "continues to care [about] what takes place" in the old economy, he added, referring to recent CCB activity in agriculture and in the pulp and paper segment.

Rosner disputes the idea that Boswell has increased the overall level of enforcement. "It's generally steady," he said. Enforcement "vigor" doesn't change much from one commissioner to the next, he argued. "What is more influential on the rate of enforcement they do is the amount of resources the Bureau has." He noted that the CCB "has been indicating for some time their need for more resources" and that the Bureau needs to "select the cases that they will invest resources in ... that's the biggest factor."

Aitken notes that the strategic vision "talks a lot about trying to use more sophisticated intelligence gathering," adding that a big question at the CCB and elsewhere is whether artificial intelligence is capable of autonomous price fixing.

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The CCB, she stated, is likely working together with other national competition enforcers to determine the best detection tools.

Rosner expressed some skepticism about the CCB's embrace of high-tech tools. "For many years, agencies have been looking for screens that would let them more efficiently detect cartels," he said. "That effort has been unsuccessful ... It's difficult to see what a truly effective screen for anticompetitive conduct looks like."

A "more pressing" concern for competition lawyers, Rosner argued, is the CCB's intention to use data-based investigative tools "in active investigations and potentially for the development of evidence in litigation or enforcement."

He urged the CCB to "provide more transparency" about its new tools and to "permit a broader public conversation about the quality of evidence that the tools are generating."

Rosner noted that such transparency may ultimately assist the CCB in future litigation, "if the tools are third-party tested by the time they get to the courtroom."

A decision to invest the CCB's resources into "using a particular tool as opposed to older investigative techniques," he said, may create delays – either in the investigatory stage, due to CCB staff having to "figure out how to use the tool," or during the litigation stage, where cases may "get sidetracked" as parties argue over the use of the tool.

by Mark Coakley in Toronto

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