

# CANADIAN WHITE-COLLAR CRIME PERSPECTIVES: GOVERNMENT INVESTIGATIONS AND COVID-19

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The current pandemic caused by SARS-CoV-2 virus and the COVID-19 illness will have an impact on white-collar investigations in Canada. There is a short-term disruption in adjudication methods and shift in focus of regulator resources.

The question is not whether government investigations will continue or be performed in the future, but rather how they will be adjusted in the near and long-term. In general, parties should expect that near-term investigations may shift focus to deal with immediate market conduct. Notwithstanding, investigators likely will not abandon current priority targets and may be well-resourced to aggressively pursue matters in a committed fashion once immediate market conduct has settled. This pattern can be observed through both current regulatory statements and historical trends.

## Immediate Focus on COVID-19

There is no question that Canadian government investigators are focused on COVID-19 related conduct. Various regulators have made public statements regarding the impact of COVID-19 on their operations.

The Commissioner of Competition issued a statement on March 20, 2020 regarding the Competition Bureau's enforcement during the COVID-19 situation. He stated that, "[T]he Competition Bureau remains vigilant against potentially harmful anti-competitive conduct by those who may seek to take advantage of consumers and businesses during these extraordinary circumstances." The Commissioner emphasized that the Bureau will be scrutinizing deceptive marketing practices and collusion by competing businesses that result from the virus.<sup>[1]</sup> On April 8, 2020, the Commissioner issued a further statement<sup>[2]</sup> explaining that the Bureau was open to relaxed enforcement of competitor collaboration rules where the conduct involves actions to address COVID-19 issues, such as in the health sector, but warning that it has zero tolerance for any attempts to abuse this flexibility or the guidance offered herein as cover for unnecessary conduct that would violate the *Competition Act*.

Similarly, the Canadian Securities Administrators and the Investment Industry Regulatory Organization of Canada have put out a joint statement addressing recent volatility in the Canadian equity markets.<sup>[3]</sup> In this

statement, the regulators addressed volatility resulting from COVID-19 and the possibility of abusive short selling and market manipulation. The Ontario Securities Commission has already issued a news release concerning alleged "Aggressive Stock Promotion" exploiting "Fears of Coronavirus Recession".<sup>[4]</sup> A previous notice from the Ontario Securities Commission, stated that it would be flexible with respect to regulatory filings, but that investor protections and regulatory requirements remain fully in place.<sup>[5]</sup> Alberta's securities regulator, the Alberta Securities Commission has made a similar announcement.<sup>[6]</sup>

While environmental obligations and enforcement have relaxed somewhat in response to the COVID-19, the majority of obligations under Canadian environmental legislation remain in effect.<sup>[7]</sup> For example, Fisheries and Oceans Canada has confirmed that its enforcement functions remain operational and that they retain the capacity to respond to incidents on the water. The Province of Saskatchewan's Ministry of Environment has issued a notable Temporary Enforcement Policy affording enforcement discretion for environmental regulations at all industrial and municipal operations it governs.<sup>[8]</sup> This policy permits consideration of COVID-19 related impacts and may impact reporting obligations, depending on the nature of the underlying issue.

### **Urgent Matters Will be Prioritized in the Near-term**

While it is unlikely that any governmental investigating authority would convey that its normal market focuses are not a priority, the sort of priority monitoring referred to by the Competition Bureau and Canadian Securities Administrators takes resources. Given economic pressures on virtually all markets, it is reasonable to expect that all investigators will be focusing their energy on immediate events. This is perhaps one reason why some regulators have expressed an intention to weigh additional factors before taking enforcement action in customary areas.

Many forms of investigation depend on cooperation of witnesses or gathering of evidence. There are obvious limitations and challenges to these processes given the travel restrictions and non-centralization of information flowing from the pandemic. Even if a government investigation obtains access to a key witness, for example, coordination and logistics of obtaining their information is now more challenging. Matters involving site visits, such as environmental matters, are likely to pose particular challenges.

Even after sufficient information is gathered, the ability of government investigators to pursue matters to a hearing will depend on the forum and urgency of the matter.

Many of Canada's courts are not currently hearing non-urgent matters. In-person hearings are all but eliminated. In many jurisdictions, timelines under the various court rules have been suspended.<sup>[9]</sup> Generally speaking, tribunals which may adjudicate corporate conduct are following similar strategies as the courts in limiting in person hearings.

Impacts on adjudication vary nationally. In some provinces, such as Ontario, provincial offences matters are not expected to be heard in the next couple of months.<sup>[10]</sup> In others, such as Alberta, provincial offences matters have not been suspended and regulators remain required (as of the date of this bulletin) to initiate prosecutions under the applicable timelines whereas limitation periods under a number of other Alberta statutes have been suspended from March 17, 2020 to June 1, 2020.<sup>[11]</sup>

That said, the courts have been very clear that they will be accessible for urgent matters and have modified practices to permit increased use of remote hearings.<sup>[12]</sup> The scope of what matters will be heard by the courts and when has varied from week-to-week.

Many tribunals have emphasized their willingness to conduct urgent hearings. Ontario has passed legislation to permit all forms of tribunal hearing to proceed electronically even if not normally permitted by their rules.<sup>[13]</sup> The Ontario Securities Commission is assessing the feasibility of teleconference and hearings in writing.<sup>[14]</sup> Environmental tribunals and planning tribunals are also focused on the availability of teleconferences and written submissions to resolve matters. Federal tribunals are taking a similar approach. The Competition Tribunal will hear urgent matters, but only by teleconference.<sup>[15]</sup>

The willingness of tribunals to proceed with urgent matters will mean that interlocutory relief is likely available in many of these forums. For example, prior to the pandemic, we observed an increase in threats of injunctive relief sought by the Commissioner of Competition. It is reasonable to believe that a hearing could be scheduled for such relief, if an investigative body felt it required.

We also note that some tribunal adjudicators remain willing to schedule future steps. It is not clear whether such scheduling is prudent in light of current uncertainty as to the trend and direction of health measures being taken in Canada.

### **Post-pandemic Enforcement Action**

The first stage of normalization will likely involve regulators proceeding with previously scheduled and non-urgent matters that developed during Q1 and Q2 2020. Activities that were shelved due to the pandemic will resume. Just as courts will have backlogs to work through, regulators will be forced to prioritize and follow through with matters that were previously underway.

Unless they have suffered budget cuts, it is unlikely that government regulators will be satisfied with ending 2020 with a reduced number of investigations. In addition, some bodies will want to demonstrate that they have remained functional despite the pandemic. These soft political concerns are likely to lead to a second stage of committed post-pandemic enforcement.

In this second stage of committed enforcement, companies can expect that they will be subject to increased

regulatory intervention and investigation in a broader range of areas. One example of such a phenomenon can be observed in how securities administrators dealt with public markets immediately after the 2007-2008 financial crisis. The Ontario Securities Commission's Statement of Priorities for 2010-2011 described the development of regulations related to the failings leading to the financial crisis and expressly referred to "maintain[ing] a strong and visible enforcement presence".<sup>[16]</sup>

The Canadian government and regulators have taken unprecedented steps in an effort to mitigate the economic fallout resulting from COVID-19. Billions of dollars of public money will be injected into the Canadian economy through government programs designed in a matter of days, while at the same time, regulators are providing blanket relief to certain corporate obligations imposed by statute. Programs and relief measures of this nature would have taken months or even years to design and implement in the past. While swift implementation is necessary, the quick rollout also means that there is a heightened risk that wrongdoers will exploit frailties in the system. Anyone caught illegally taking advantage of such frailties can expect a swift response from regulators and enforcement authorities.

### **Appropriate Steps to Ensure Responsiveness to Urgent Matters and Long-Term Viability**

Companies should thus remain prepared to deal with both the risk of urgent enforcement and the subsequent committed enforcement phase that we expect to follow. Advisable steps include:

- **Maintaining corporate compliance efforts.** Corporate compliance programs should be reiterated and key compliance staff should remain engaged with their mandates. Compliance officials should focus on key risk areas related to their businesses (e.g. avoiding deceptive marketing practices and collusive activity, ensuring securities law filings adequately disclose new and increased risks, etc.) and make a point to distribute communications to employees to ensure that they are aware of relevant policies. This may later contribute to due diligence defences, where available. To the extent that job duties are eliminated as a consequence of the pandemic, companies should try to ensure that compliance efforts are minimally impacted.
- **Focus on accurately tracking internal investigations.** All internal investigation steps should be documented and decision-making tracked. This is particularly important at a time when corporate decision-making may be increasingly decentralized. It would be prudent to arrange for cloud-based managerial tools and use of remote communication tools and resources.
- **Ensure that ongoing defences are not prejudiced.** For matters where government investigations already exist, management should be aware of the scope of evidence needed to defend against potential liability and take steps to ensure relevant information is preserved. Interviews should be dutifully recorded with staff who are removed from a firm. If there is any question as to the viability of customary

external corporate counsel remaining independent because of transitions arising from the pandemic, separate counsel should be retained to deal with those specific issues.

- **Ensure that insurance policies do not lapse.** Many issues arising during the pandemic will focus attention on the availability of coverage for business interruptions. These issues should not distract from the usefulness of corporate and director/officer policies covering other regulatory matters involving potential losses and legal/regulatory proceedings. Pressures to reduce expenses should not cause firms to forego coverage that may come needed on an urgent basis.

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[1] Competition Bureau, "[Statement from the Commissioner of Competition regarding enforcement during the COVID-19 coronavirus situation](#)" (20 March 2020), online. For more information on cartel enforcement, see James Musgrove & William Wu, "[Cartels in a Time of COVID](#)", *McMillan LLP* (6 April 2020), online.[ps2id id='1' target='']

[2] Competition Bureau, "[Competition Bureau statement on competitor collaborations during the COVID-19 pandemic](#)" (8 April 2020), online. For more information on cartel enforcement, see James Musgrove & William Wu, "[Need to Collaborate with Competitors to Respond to the COVID Crisis? Competition Bureau is Ready to Provide Guidance](#)", *McMillan LLP* (13 April 2020), online.[ps2id id='2' target='']

[3] Canadian Securities Administrators & Investment Industry Regulatory Organization of Canada, "[Joint statement by Canadian Securities Administrators and Investment Industry Regulatory Organization of Canada on recent volatility in Canadian equity markets](#)" (9 April 2020), online.[ps2id id='3' target='']

[4] Ontario Securities Commission, "[Aggressive Stock Promotion Exploits Fears of Coronavirus Recession](#)" (14 April 2020), online.[ps2id id='4' target='']

[5] Ontario Securities Commission, "[Update on OSC operations in response to COVID-19](#)" (24 March 2020), online.[ps2id id='5' target='']

[6] Alberta Securities Commission, "[COVID-19: Operations continue at the ASC](#)" (24 March 2020), online.[ps2id id='6' target='']

[7] Ralph Cuervo-Lorens et al, "Cross-Country Check-In: COVID-19 Related Impacts on Environmental Matters", *McMillan LLP* (15 April 2020), online.[ps2id id='7' target='']

[8] Saskatchewan Ministry of Environment, "[Temporary Enforcement Policy during the COVID-19 Pandemic](#)", online (pdf).[ps2id id='8' target='']

[9] For example, a regulation was passed in Ontario suspending limitation periods and procedural deadlines. For further analysis, see Guneev Bhinder & W. Brad Hanna, "[COVID-19: Ontario Suspends Limitation Periods and Procedural Deadlines](#)", *McMillan LLP* (22 March 2020), online.[ps2id id='9' target='']

[10] Ontario Court of Justice, "[Notice to Public Regarding Provincial Offences Act Matters](#)" (23 March 2020),

online.[ps2id id='10' target='']

[11] Minister of Justice and Solicitor General of the Province of Alberta, "[Ministerial Order 27/2020](#)" (17 March 2020), online.[ps2id id='11' target='']

[12] See e.g. Superior Court of Justice, "[NOTICE TO PROFESSION - TORONTO](#)" (2 April 2020), online.[ps2id id='12' target='']

[13] O Reg 73/20.[ps2id id='13' target='']

[14] Ontario Securities Commission, "[Update On Proceedings Before The Ontario Securities Commission Tribunal](#)" (19 March 2020), online.[ps2id id='14' target='']

[15] Competition Tribunal, "[Notice regarding the COVID-19 Pandemic](#)" (March 2020), online.[ps2id id='15' target='']

[16] Ontario Securities Commission "[Statement of Priorities for Fiscal 2010-2011](#)", online (pdf).[ps2id id='16' target='']

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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