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January 6, 2005

Ms. Annie Galipeau
Competition Bureau
Place du Portage
150 Victoria Street
Gatineau QC K1A 0C9

Dear Ms. Galipeau:

Re: Request for Comments on the Regulated Conduct Doctrine

The Canadian Bar Association's National Competition Law Section (CBA Section) is pleased to provide its comments to the Competition Bureau on the December 2002 *Information Bulletin on the Regulated Conduct Defence* (Bulletin) and we also enclose our previous submission of October 2003.

The Bureau had not invited public comment on this issue prior to the issuance of the Bulletin. The CBA Section is pleased that consultations are now taking place, as we suggested in our original comments.

The comments contained in the CBA Section's original submission remain relevant and we incorporate them by reference into this letter. While the CBA Section agrees with the enforcement approach articulated in the Bulletin in a number of areas, in other important respects the CBA Section believes that the Bulletin took a view of the regulated conduct doctrine (RCD) which was at odds with the underlying jurisprudence and ignored the very jurisprudence which forms the basis of the RCD.

The case of *Garland v. Consumers' Gas Company*¹ (*Garland*) has raised additional issues and complexity to the formulation of a bulletin whose purpose is to summarize the jurisprudence and principles relevant to the application of the RCD. The CBA Section has not developed a definitive view as to all of the potential implications for the application of the RCD raised by *Garland*. Further time is required for academic comment and jurisprudence which directly considers these issues to resolve what effect *Garland* may have on the RCD as it applies to the *Competition Act*.

Garland was not a *Competition Act* case and the Supreme Court of Canada's comments regarding the application of the RCD to competition cases could be taken to be *obiter dicta*. That said, the statements of Iacobucci J. regarding the inapplicability of the RCD to that case could be interpreted

¹ [2004] 1 S.C.R. 629, 2004 SCC 25 (Q.L.).

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to support an argument that the RCD does not apply to *per se* criminal offences under the *Competition Act* (at least with respect to conflicts between the *Competition Act* and provincial legislation), as such *per se* offences might be considered not “either expressly or by necessary implication...[to grant] leeway to those acting pursuant to a valid provincial regulatory scheme”.² In this context, the *Garland* decision raises the following issues, among others:

1. The cases³ that articulate the principle that individuals adhering to valid provincial marketing regulation necessarily lack the requisite degree of intent or criminal *mens rea* were not referred to in *Garland* nor did *Garland* consider the issue of *mens rea* at all. The CBA Section believes that the RCD continues to apply to *per se* criminal offences under the *Competition Act* on the basis that those adhering to or exercising powers under a provincial regulatory scheme would not act with criminal intent.
2. If the CBA Section’s views on the point above are wrong, then there are implications respecting inconsistent application of the RCD in the competition law sphere. It would be a peculiar result for a pricing scheme devised by a provincial marketing board to be exempt from prosecution as an unduly anti-competitive cartel under section 45 of the *Competition Act*, while price maintenance mandated by such regulation could be subject to criminal prosecution under section 61.
3. If the *Competition Act* is amended to create a *per se* criminal offence for “hard core” cartels, what are the implications for provincial marketing boards and other agencies whose activities would raise issues under section 45 or other sections of the *Competition Act* but for the RCD?
4. Many provisions in the *Competition Act* contain a competitive effects test similar to the undue lessening of competition test that was considered by the SCC in *Garland*, but use instead the words “substantially lessen or prevent competition” or “have an adverse effect on competition”. In light of *Garland*, does the RCD extend to the civil provisions of the *Competition Act* in such cases?
5. The SCC’s decision in *Garland* arguably equates the word “unduly” with the public interest. This is possibly at odds with the approach taken in the Court’s most recent

² *Ibid.* at para. 77. In this regard, we note also that the first question posed to the Supreme Court of Canada in the 1982 case *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (the “*Jabour*” case) was: “Does the *Combines Investigation Act*, R.S.C. 1970, c. C-23 as amended, apply to the Law Society of British Columbia, its governing body or its members?” The unanimous decision of the Court as delivered by Estey J. was “No”. The Court did not distinguish between *per se* and other types of offences under the *Combines Investigation Act*.

³ See *Rex v. Chuck Chung et al.*, [1929] D.L.R. 756 (B.C.C.A.) at 3 (Q.L.) where the Court writes that “the essential elements in criminal restraints of trade are absent from the intent and acts of individuals charged with carrying out the provisions of the Act. This is true whether the Act simply authorized or on the other hand, compels two or more persons to do the acts therein enumerated. It is not reasonable to place such an interpretation upon an Act intended to protect and safeguard an industry as would bring it within the ambit of the criminal law.” See also *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 348 which states that this case’s “principal thrust ... was that adherence to the provincial statute could not amount to an intent “unduly” to limit production.” See also the *PANS* case, *infra* note 4, for a general discussion of the relationship between a minimal *mens rea* requirement for constitutionality and the prohibitions in section 45 of the *Competition Act*.

decision on the meaning of “unduly”⁴. It may be that *Garland* reintroduces non-economic considerations into the issue of whether a lessening or prevention of competition is “undue”.

Given all of these complex issues and possible implications arising from *Garland*, the CBA Section is of the view that it may be inappropriate for the Bureau to simply revise and re-issue the Bulletin now. Moreover, issues outside of the scope of *Garland* also remain the topic of potential debate, including the basis of the application of the RCD to federal legislation and regulatory schemes that conflict or may conflict with the *Competition Act*.

To properly understand the full implications of *Garland* and to settle other questions will require further academic debate, the call for comments on *Garland* and the Bulletin being an excellent beginning. The CBA Section recommends that the Bureau sponsor further consideration of the RCD, perhaps by retaining an expert to prepare a study and/or by sponsoring a roundtable to examine:

- the different types of regulation currently in force that may be affected by the RCD (*e.g.*, provincial and federal marketing board legislation, other regulatory regimes such as energy, environmental, telecommunications and broadcasting), issues of forbearance, and the legal basis for and significance of inter-agency agreements, alternatives to the RCD (including the merits of codifying the RCD in legislation versus its continuation as a common law principle);
- *Garland* in light of the prior RCD jurisprudence, applicable constitutional law and principles of legislative interpretation; and
- the possible consequences of *Garland* for both the current and a proposed *per se* section 45 (and related civil provisions).

Given that there are currently so many questions about the RCD, and reservations expressed about the Bulletin in the CBA Section’s 2003 submission, it would be preferable for the Bureau to rescind its (now draft) Bulletin. The CBA Section would be pleased to participate in any roundtable discussions and to comment on any further drafts of the Bulletin which the Bureau may re-issue.

Yours truly,

(Original signed by Trevor Rajah on behalf of Donald S. Affleck)

Donald S. Affleck, Q.C.
Chair, National Competition Law Section

Encl.

⁴ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

**Submission on the
Competition Bureau
Information Bulletin on the
Regulated Conduct Defence**

**NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION**



October 2003

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

Submission on the Competition Bureau Information Bulletin on the Regulated Conduct Defence

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) supports the efforts of the Competition Bureau in publishing guidance on the application of the *Competition Act*. The Bureau's practice of issuing information bulletins and interpretation guidelines increases the transparency and predictability of its interpretation and enforcement of the Act. The CBA Section also supports the Bureau explaining how it interprets and applies case law arising under the Act, including the jurisprudentially developed regulated conduct defence (RCD). Accordingly, the Bureau's Information Bulletin on the Regulated Conduct Defence (the RCD Bulletin) was eagerly anticipated, more particularly as the jurisprudence establishing the RCD does not fully address the scope for application of the doctrine under the *Competition Act*. It was most disappointing, therefore, that the published RCD Bulletin not only fails to provide the desired degree of clarification of the law in areas of uncertainty, but also appears to be contrary, in several respects, to areas which otherwise seem to be settled in the case law that forms the legal basis of the RCD.

II. ABSENCE OF STAKEHOLDER CONSULTATION

Given the importance of the RCD and the unanswered questions respecting its scope, it is both surprising and regrettable that the Bureau did not consult with stakeholder groups prior to releasing the RCD Bulletin. The Bureau has engaged in broad consultations with stakeholders before adopting significant policy

guidelines in other areas (including guidance documents which purport to state the Bureau's enforcement policy).¹ The CBA Section believes that stakeholder consultations on other guidance documents contributed importantly to their quality. As well, it opened up dialogue between stakeholders and the Bureau about the enforcement issues addressed in the guidelines.

The Bureau has characterized the RCD Bulletin as an Information Bulletin that merely sets out its enforcement approach to the RCD and is not meant to be a definitive statement of the law. On this basis, it argued against stakeholder consultations. However, the Bureau's other guidelines are also not legally binding documents, but have benefited from such consultations. Moreover, the Bureau's administrative guidance — whether characterized as "guidelines" or "information bulletins" — often serves in practice as a statement of law. Simply stated, there is often a disincentive to litigate competition cases, particularly in the merger context with often-severe time restraints and where the parties need the approval of the very regulator against whom a case might be litigated.

The CBA Section strongly recommends that the Bureau consult with interested stakeholders on the RCD Bulletin, and consider making revisions where warranted, based on the consultations and this submission.

III. CONTENT OF THE RCD BULLETIN

While the CBA Section agrees with the enforcement approach articulated in the RCD Bulletin in a number of areas, in other respects we believe that the Bulletin takes an overly narrow view of the RCD that is seriously at odds with the underlying jurisprudence. Even more significantly, the RCD Bulletin does not cite

1

For example, the Merger Enforcement Guidelines (in both 1991 and 2003), the Abuse of Dominance Guidelines, the Intellectual Property Enforcement Guidelines, and the Predatory Pricing Enforcement Guidelines.

a single case or attempt to reconcile the Bureau's enforcement approach with the case law establishing the RCD. In this sense, the RCD Bulletin not only fails to state the law. It effectively ignores the body of cases that form the very basis of the RCD. This is of considerable concern, since practical opportunities to obtain judicial clarification on the scope and content of the RCD (or judicial vindication of a broader view of the doctrine) are relatively rare.

A. Application of the RCD in the Federal Sphere

The CBA Section agrees with the Bureau's policy of allowing parties to invoke the RCD in the case of inconsistencies between the Act and federal regulatory legislation, as articulated in the RCD Bulletin. Canadian courts have primarily applied the RCD in cases where conduct mandated or authorized by valid *provincial* regulatory legislation was found to be inconsistent with the Act, although it has also been applied in the federal regulatory context. The CBA Section believes that, from a policy perspective, there is no reason to differentiate between federal and provincial regulators or regulated parties to determine who may invoke the RCD, and supports the position of the Bureau in this regard.

B. Application of the RCD to Mergers

The CBA Section supports the Bureau's enforcement position to the extent that it will allow parties to invoke the RCD in the context of civil reviewable practices,² including mergers. The Bureau's acknowledgement that the RCD applies to mergers appears to validate the view taken by a number of our members in merger cases. However, on closer examination of the RCD Bulletin, it would appear that the circumstances in which merging parties could successfully invoke the RCD in the merger context would be few and far between. In particular:

- It is difficult to conceive of a merger case with a “clear operational conflict” between regulatory legislation and the Act required in the RCD Bulletin in order to rely on the defence. In the merger context,

2 The Ontario Court (General Division) established the principle that the RCD is available where the regulated conduct is contrary to the civil reviewable practices provisions of the Act in *Law Society of Upper Canada v. Canada (A.G.)* (1996), 67 C.P.R. (3d) 48 (Ont. Ct. Gen. Div.).

such a conflict would exist only if a regulator *mandated* a merger otherwise prohibited under the Act. It is difficult to envision a merger being *mandated* by legislation or regulation (even where the industry regulator has the power to approve a merger). Most (if not all) mergers arise from a private decision to combine operations.

Accordingly, the “clear operational conflict” standard appears to be at odds with the statement that the RCD applies to mergers.

- In the same vein, the RCD Bulletin indicates that the RCD does not apply where the conduct of the regulated party is voluntary; i.e. where not mandated or required by regulation or legislation. Here again, because the decision to merge is almost always a voluntary one, the statement that the RCD cannot apply to voluntary conduct appears to be at odds with it being available in the merger context.
- Regulation in an industry is also relevant in that it may prevent the exercise of market power post-merger. In particular, where prices or volumes are regulated, it may be impossible for a merger to lessen or prevent competition substantially. For example, in the *Canadian Breweries*³ case, Canadian Breweries, which had acquired a series of smaller breweries, was charged under the then criminal merger provision, prohibiting mergers likely to operate to the detriment or against the interest of the public. The Ontario High Court held that, because a provincial board regulated the price of beer, the mergers had no effect on prices and could not operate to the detriment of the public. Whether this is characterized as a regulated conduct case, or as a case in which regulation was considered in connection with what would today be called a “section 93 factors” analysis, *Canadian Breweries* demonstrates that there may be circumstances in the merger context where regulation effectively answers the question of whether a merger may be anti-competitive. It is notable that the merger in *Canadian*

Breweries would not meet the “involuntary” or “mandated” standards of the RCD Bulletin. The CBA Section believes that the RCD Bulletin should acknowledge the case law where regulation has provided an effective defence in the merger context, and should explain how the Bureau will analyse the relevance of regulation in similar cases (under the RCD or under section 93).

The narrow interpretation of the RCD in the merger context means that there will be greater scope for concurrent jurisdiction over mergers, and for direct conflicts in approach between the Bureau and other regulators (e.g. in the Astral/Télémedia case where the CRTC recently blocked a divestiture approved by the Bureau). The CBA Section believes that the Bureau should clarify these issues in a manner that gives meaningful scope to the application of the RCD in the merger context.

C. The “Operational Conflict” Standard

The RCD Bulletin indicates that the RCD applies, and the Act becomes inoperative, only where there is clear operational conflict between the regulatory regime and the Act, such that obedience to the regime would contravene the Act. In the CBA Section’s view, the operational conflict standard adopted by the Bureau is misplaced in this context and finds no support in the jurisprudence that forms the legal basis for the RCD. None of the cases applying the RCD⁴ has required an operational conflict between the Act and the regulatory legislation for the doctrine to apply. Indeed, the RCD is a principle of statutory interpretation by which the Act has been “read down” so as not to apply to conduct that is the subject of regulation, in order to avoid conflicts between the Act and regulatory legislation. (In other words, the Act implicitly permits conduct authorized or mandated by regulation.) The proposed operational conflict approach in the RCD Bulletin appears to derive from the Supreme Court decision in *Shaw Cable*

⁴ The notion of conflict was referred to in *Alex Couture Inc. v. Canada (A.G.)* (1991), 38 C.P.R. (3d) 293 (Que. C.A.), leave to appeal to the Supreme Court denied; however, in that case the Court stated that there was no conflict and no need to look at whether the RCD applied as both the federal and provincial laws could stand together.

Systems (B.C.) Ltd. et al. v. British Columbia Telephone Co. et al.,⁵ which dealt with conflicts between decisions by two federal regulators (and did not involve the potential application of the Act) and does not clearly fit with the RCD in the context of resolving inconsistencies between regulatory legislation and the Act. Moreover, it is difficult to conceive of a situation where there would be a clear operational conflict in the context of a merger case, since mergers are not generally mandated or required under regulatory legislation. At the very least, even if it does no harm, the use of a clear operational conflict standard further (and unnecessarily in our view) complicates the enforcement of the RCD.

In previous public statements on the scope of the RCD,⁶ the Bureau made no reference to a preliminary conflicts test for application of the RCD. The Bureau has generally described “four necessary elements or factors that must be met before the RCD [regulated conduct defence] will be accepted by the courts”:

These [factors] are: (i) the relevant legislation must be validly enacted; (ii) the activity or conduct in question must not only fall within the scope of the relevant legislation but must be specifically authorised; (iii) the authority of the regulator is exercised (not mere tacit approval or acquiescence); and (iv) the activity or conduct in question has not frustrated the exercise of authority by the regulatory body.⁷

The Bureau appears to have applied a similar “test” in 2000 in the Toronto taxi licences matter. The Bureau’s news release on this case provided:

The regulated conduct defence applies when a specific activity is authorized or carried out in keeping with valid regulation; such activity is deemed to be in the public interest and cannot be found to be in violation of the Competition Act. The defence applies as long as the regulator has exercised its authority and has not been frustrated in its operations by the conduct or activity in question.⁸

5 (1995), 125 D.L.R. (4th) 443 (S.C.C.).

6 The RCD Bulletin explicitly supersedes any and all prior statements by the Bureau respecting the scope of the RCD.

7 D. Mercer, Paper presented to the 1995 Canadian Bar Association Annual Conference on Competition Law, pp. 1-2. These same factors were reiterated in an address given by Gilles Ménard, then Deputy Director of Investigation and Research (Civil Matters), to the Canadian Institute 1997 Canadian Resale/IXC Industry Congress (17 February 1997).

8 News Release, “Regulated Conduct Defence Applies to Issuance of Taxi Licences – Allegations of Conspiracy Unsubstantiated” (May 2, 2000).

We question why the Bureau does not enumerate these same factors in the RCD Bulletin. In our view, they more accurately reflect the jurisprudence than the operational conflict criteria it now appears to be relying on.

The CBA Section recommends that the RCD Bulletin be revised to remove reference to the “operational conflict” standard, and to refer instead to the test articulated previously by Bureau staff and in the Toronto taxi licences matter.

D. Self-Regulatory Bodies

The RCD Bulletin adopts what the CBA Section considers to be an unduly narrow view of its potential application to self-regulatory bodies. The case law establishing the RCD makes no distinction between self-regulatory and other regulatory bodies. Indeed, in *Jabour v. Law Society of British Columbia*,⁹ which involved a self-regulatory body and is the most recent Supreme Court of Canada case to consider the RCD, the Court exercised deference in determining that the Law Society had sufficient authority to regulate advertising based on its general mandate to establish standards for the legal profession and punish conduct unbecoming of a member. Estey J. emphasized that there were a number of reasons why self-regulation made sense for lawyers and that the mode of regulation (i.e. self-regulation vs. provincially-controlled regulation) was in the discretion of the provincial legislature. We believe that the Bureau should apply a similar degree of deference to self-regulatory bodies in its enforcement activities. The Supreme Court’s message in *Jabour* was clearly that the Commissioner has no authority to question a legislature’s determination that self-regulation is the most appropriate means to serve the public interest, and indeed no jurisdiction to

enforce the Act in the context of conduct mandated, required or authorized by the self-regulatory body.

The CBA Section recommends that the Bureau delete statements in the RCD Bulletin to the effect that self-regulatory bodies will be subject to greater scrutiny than other regulators.

E. Extent of Regulatory Oversight Required for the RCD to Apply

The RCD Bulletin states that where the person whose conduct at issue is a regulator, the courts will generally show more deference due to public interest considerations, but that “[e]ven so, an operational conflict between the regulatory regime and the Act must be demonstrated before the RCD will supplant the Act.”

If this statement means that a regulator can only rely on the RCD if its actions are compelled (i.e. not discretionary) under the regulatory legislation (which seems to be the implication if “operational conflict” means that one cannot simultaneously comply with the regulatory regime and the Act), then it is, in our view, an incorrect statement of the law. In *Jabour*, the Supreme Court of Canada found that the Law Society’s general mandate to set standards for the legal profession gave it sufficient authority to regulate advertising, and the RCD applied to exempt from the Act its actions in regulating advertising by lawyers. The Law Society was not compelled or required to prohibit advertising. It chose to exercise its legitimate discretion to impose a prohibition. Similarly, a number of cases involving marketing boards in which the RCD has been applied have involved the exercise of discretionary powers by the boards to approve marketing agreements entered into by producers and purchasers.

The RCD Bulletin also provides that, in the case of those subject to the regulatory regime, it is important to evaluate whether their conduct is voluntary, since the RCD applies only to situations where a regulated party’s conduct is mandated or required by the regulator, and that conduct is contrary to the Act. Again, this statement finds no support in the case law. It is difficult to understand how the

conduct of a regulatory body in, for example, authorizing a certain agreement among competitors, could be exempt from *Competition Act* scrutiny while the conduct of private persons acting in compliance with that authorization would not.

The CBA Section recommends that the RCD Bulletin be revised to clarify that conduct (whether of a regulator or regulated party) that is mandated, required or authorized by valid regulatory legislation may benefit from application of the RCD.

F. Scope of Regulation

The RCD Bulletin takes a narrow view of the permitted scope of regulation, stating that regulatory action must be “grounded in” a statute or regulation for the RCD to apply. It is unclear whether this means that the Bureau would not apply the RCD to governmental executive action, although certainly if such action was supported by valid regulation it would be required to do so.

The CBA Section recommends that the RCD Bulletin be revised to clarify that the RCD applies to all forms of valid regulation, including discretionary and executive actions.

G. Relationship with Inter-Agency Agreements

A further point to be clarified is the status of inter-agency agreements that the Bureau has entered into with the CRTC¹⁰ and with the Ontario Energy Board and Independent Market Operator for Electricity.¹¹ These agreements purport to establish concurrent jurisdiction of the relevant regulators and the Bureau over certain matters. We assume that, although the RCD Bulletin supersedes other Bureau policy papers (see RCD Bulletin, note 1), it does not replace these agreements. Moreover, we assume that if conduct required, mandated or authorized by valid legislation or regulation was at issue, the Bureau would be

10 CRTC/Competition Bureau Interface, October 8, 1999.

bound to follow the RCD jurisprudence and to decline to intervene, regardless of any statement to the contrary in the inter-agency agreements or the RCD Bulletin.

IV. CONCLUSION

The CBA Section recommends that the Bureau revise the RCD Bulletin in light of these comments and that it seek input from stakeholders on the RCD Bulletin generally.