Submission to the Telecommunications Policy Review Panel

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 34,000 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 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 to the Telecommunications Policy Review Panel

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on the Telecommunications Policy Review - Consultation Paper (Consultation Paper). Telecommunications is important to the functioning of many aspects of the economy and we believe that a comprehensive review of the telecommunications regulatory framework is warranted.

In the twelve years since the enactment of the *Telecommunications Act*, developments including to the Internet and wireless technology have changed the way Canadians communicate. Canadian businesses rely on telecommunications networks to monitor and coordinate their activities. Consumers have grown accustomed to innovations that have enhanced their ability to share information over long distances.

The CBA Section believes that it should not be assumed that telecommunications markets continue to require the current system of *ex ante* regulation of myriad aspects of marketplace behaviour. This is a matter that merits specific review. Barriers to entry, at least in some segments, appear to have declined, and conditions for competition in telecommunications appear to be improving. To require market participants, such as service or equipment providers, to seek pre-approval for their actions and reactions in markets that have become competitive risks reducing innovation or hindering the market's responsiveness to consumer demand.

The Canadian economy owes much of its success to the degree to which market forces have been permitted to operate to achieve efficient outcomes. Generally speaking, once conditions for effective ongoing competition exist, markets work best when governments exercise restraint in regulation. Under the *Competition Act*, federal authorities generally intervene only when competition is actually threatened.

In this submission, we argue that the presumption should be in favour of competition, rather than regulatory approaches. In certain areas, technological change has brought us to the point where market forces, even if sometimes imperfect, will more reliably lead to a dynamic and efficient telecommunications industry than will government regulation. While there are aspects of telecommunications that are specific to that marketplace, in other respects telecommunications does not appear to be dramatically different from many other industries, and most market conduct issues that may arise in the telecommunications sector can be addressed by the *Competition Act*. Those few issues that cannot may require continued policing by an industry specific regulator, but its role should be clearly defined. In any event, where the government decides that industry specific regulation continues to be necessary, it would be helpful to clearly explain the rationale for such regulation and why government regulation is preferable to market outcomes, and to limit the continued industry specific regulation to measures that are reasonably necessary to achieve such objectives.

The agenda for this telecommunications policy review is extremely broad. Economic, social and technical policies are all up for discussion. While we recognize the significance of all the policy goals listed in section 7 of the *Telecommunications Act*, we have focused our comments on only two of those goals: economic regulation and institutional structures. The CBA Section has also not attempted to respond in detail to all the questions the Consultation Paper

poses. Rather, our comments are more directional in nature, although we do respond to some of the specific questions raised in the Consultation Paper.

At the time the *Telecommunications Act* came into effect, Canada's telecommunications industry was typically characterized by large incumbents and a single technology; conventional wisdom dictated a high degree of regulation. Since then market structure, technology and regulatory approaches have evolved and measures were put in place to encourage competitive entry. In 2005, the market has evolved to the point where long-distance service, wireless telephones, and Internet services are delivered through highly competitive markets.[1] Local telephone service appears also to be developing a greater degree of competition, and cable companies have emerged as significant, multi-market competitors to the incumbent phone companies (in addition to other competitors) in a number of markets. In light of the degree of competition that has emerged and is still emerging, the presumption should be in favour of allowing market forces, rather than regulators, to determine the direction of the market where that competition appears to be sustainable.

II. ECONOMIC REGULATION

As the Consultation Paper notes, the CRTC has been charged with regulating the economics of the telecommunications sector. As part of its efforts to protect retail customers from artificially high prices, the CRTC has deployed an array of *ex ante* measures such as price floors and price caps. It has used the principles of "just and reasonable rates" and "no unjust discrimination" to police the activities of service providers *ex ante*. The CRTC, and not market forces, has determined that all consumers in a given area should pay the same for their local telephone

1 See, for example, the Competition Bureau's finding that the wireless market is likely to continue to have vigorous and effective competition even following the merger of Rogers and Microcell: Competition Bureau, "Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc.", Technical Backgrounder, April 12, 2005.

services, for example, and has examined incumbent costs in considerable detail to ensure that customers do not pay "too much" for such services.

There is a significant risk that such detailed forms of economic regulation will be counter-productive where markets are conducive to competition. A competitive market is normally better placed to protect consumers and to foster innovation. The starting point of telecommunications regulation should be reversed so that there is a *presumption* that markets will eventually reach a sustainable competitive state, at which time the regulatory framework will no longer be appropriate. Regulation should be the exception, not the rule, in the economy and the remedies fashioned strategically to give markets as wide a scope as possible within which to operate. In short, market conduct regulation should be focused – where shown to be necessary – on ensuring that barriers to entry are not artificially high. In competitive markets, competitive market forces ought to be allowed to determine the product mix and prices appropriate for Canadians in a dynamic, evolving world.

B.3 What should be the overall objectives of economic regulation?

In response to question B.3, economic policy in the telecommunications sector (as in any sector) should encourage the availability of high-quality, useful products to consumers at the lowest possible prices. At the same time, it should provide a market environment that strives to foster innovation and ensures that consumers can choose from a variety of products.

B.4 Are the two main principles of economic regulation set out in the *Telecommunications Act*, namely "just and reasonable rates" and "no unjust discrimination", still appropriate? If yes, should they be further clarified in legislation or in other statements of regulatory policy? If not, how should they be modified or replaced?

In response to question B.4, economic theory postulates that competitive markets are normally the best way to achieve these goals. Discrimination among customers can often be pro-competitive and actually lead to lower prices for those

who are less able or willing to pay, and ought not to be presumed to be "unjust". In competitive markets, the principles of "unjust discrimination" and "just and reasonable rates" should be replaced by the principle of competitive prices: in a competitive market, prices will accurately reflect the lowest cost at which suppliers are able to meet consumer demand. Producers and consumers will normally achieve the appropriate balance between supply and demand, and the pricing that flows from that balance.

As the Consultation Paper points out, markets can fail to deliver optimal prices when a dominant supplier abuses its market power. However, it is important to note that the competitiveness of a market depends on several factors. A large market share does not necessarily signal dominance, let alone an "abuse of dominance". So long as barriers to entry are low, one supplier may account for a large share of the market while the market remains highly competitive.[2]

Under the *Competition Act*, government intervention for abuse of dominance is triggered only when a dominant supplier engages in a practice of anti-competitive acts that have, or are likely to have the effect of substantially preventing or lessening competition in a market. The largest competitors in a great many markets in Canada have very high market shares, but are not subject to the degree of scrutiny and control currently mandated by the *Telecommunications Act*. Once a market is sustainably competitive, the legal regime that applies should be the same, whether the market involves telecommunications or any other product.

While a degree of regulation may still be required for reasons of technical compatibility and access to essential facilities (in the economic sense), in those

2 See, for example, the discussion of barriers to entry in the Enforcement Guidelines on the Abuse of Dominance Provisions issued by the Competition Bureau in July 2001. Section 3.2.1 says: "Without barriers to entry, any attempt by a firm with high market share to exercise market power is likely to be met with entry or expansion by existing firms such that the firm with the high market share loses enough customers to its rivals that it is not profitable to attempt to raise prices above competitive levels."

areas of the telecommunications sector where barriers to entry or expansion are low, competitive market forces should determine the efficient price for services. Retail customers will not need extra protection, price differentials are not by definition "undue", and consumers can decide the quality and availability of service for which they are willing and able to pay. If segments of the Canadian public will be underserved or cannot afford to pay an efficient price for basic services, a more efficient solution may lie in subsidies directly to those segments of the population. Prevention of anti-competitive practices can be left to the purview of the Competition Bureau under the *Competition Act*, as they are in other industries.

B.6 Should economic regulation ever be re-imposed on carriers or services that have been deregulated? If so, what principles, and tests should be used to come to such a determination?

In response to question B.6, the CBA Section is of the view that regulation such as that currently mandated by the *Telecommunications Act* should not automatically be re-imposed. If a deregulated market turns out to be insufficiently competitive because of a practice of anti-competitive acts undertaken by a dominant player, this could be addressed by employing the civil and criminal remedies available under the *Competition Act*. In some cases, this may be more appropriate than a return to regulation. If a market is insufficiently competitive due to systemic barriers to entry, continued sector specific regulation might be required. But such regulation should address the cause of the problem, and not be designed only to perpetually cure the symptoms alone. If the government desires to intervene in a competitive market in order to pursue other policy goals, it should do so through focused incentive-based instruments, such as subsidies, using the least intrusive means possible rather than broad coercive rules.

Economic policy should also be premised on the principle of a level playing field as the desired outcome. Another advantage of the *Competition Act* is that it

conforms to this model. All suppliers are held to the same standards. This has not always been the case under the *Telecommunications Act*. For example, the CRTC exercised its discretion to forbear from regulating long distance-services except those offered by the dominant telephone companies.[3] It was thought that asymmetrical regulation was necessary during the transition from a regulated monopoly to a competitive industry. However, as we shall argue with respect to Technical Regulation, below, this is not always the case. The general principles of the *Competition Act* could address some of the same issues without stifling the dynamism of the market.

III. TECHNICAL REGULATION

Some technical issues do carry implications for competition in the industry. Government intervention may sometimes be necessary to allocate public goods. However, we believe that a dynamic market will function better if there is a presumption in favour of negotiated solutions for issues affecting private property rights, and if government intervention is restricted to an *ex post*, complaints-driven process in that regard.

B.14 Should section 43 of the *Telecommunications Act* be amended to provide the CRTC with greater jurisdiction over access to rights-of-way and support structures by Canadian carriers?

B.15 Should the CRTC be granted powers to order access to multi-unit buildings for the purpose of installing or providing access to in-building wire? If so, please describe the nature and extent of such a power, including proposed legislative wording. If not, please explain whether the current situation is acceptable or whether an alternative approach would be preferable.

B.16 Should any other changes be made to the regulatory framework governing access to rights-of-way and support structures?

B.17 Should any changes be made to the regulatory framework for interconnection?

3 Telecom Decision CRTC 95-19.

In response to questions B.14 to B.17, many forms of infrastructure and networks are essential to the proper functioning of telecommunications services. In economic terms, some of these resources can be understood as "bottleneck" facilities. If one supplier is able to control access to such facilities, competition may be impaired. Suppliers must have equal access to such facilities on reasonable terms. However, we see no reason why such terms must always be dictated *ex ante* by the CRTC rather than negotiated between private parties, subject to supervision, if necessary. One must, on an ongoing basis, question the *ex ante* assumption that any one technology is "essential"[4] when competitive services are often delivered by a variety of means and as technologies develop, formerly essential networks are bypassed by alternate means. Further, artificial suppression of prices for services presumed to be "essential" can be self-fulfilling by creating economic disincentives for third parties to enter the market.

The government has a primary role to play in certain technical policy decisions and in setting ground rules for the field on which the competitive game is played. Spectrum and numbering are scarce public resources, which are best allocated, at least in the first instance, by a neutral authority. From the point of view of competition, it is important that such decisions be made according to clear and transparent rules and through the least intrusive means possible. However, markets may devise their own solutions with respect to terms of access for rights of way, support structures and in-building wires, terms of network interconnection, access to facilities of dominant carriers, and setting standards for and certifying equipment and devices. As is the case with oil facilities subject to potential AEUB or NEB regulation, the market should be permitted to determine the solution at first instance, with provision for complaint and the threat of an imposed solution only if parties are not able to agree.

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4 In American competition law, access to bottleneck facilities is governed by the "essential facilities doctrine." This principle, which had originally developed for railway terminal facilities, has been applied to telecommunications in the U.S. since the 1983 case of *MCI Communications Corp. v. AT&T*, 708 F. 2d 1081 (7th Cir.) (1983). If a facility is vital for competition and it would be extraordinarily difficult for a competitor to create alternative facilities, the company that controls the facility must grant access to others.

IV. SOCIAL REGULATION

The CBA Section believes that a vigorously competitive market is the best way to ensure universal provision of the widest array of services at the lowest cost. Fully competitive markets might well obviate the need for government intervention to achieve technical and social goals.

If the market fails to adequately serve certain groups or individuals who, for social policy reasons, ought to be better served, we believe that such issues would be best addressed through targeted subsidies rather than market conduct regulation that risks stultifying innovation in the entire industry. For example, consumers in remote communities could receive subsidies that would allow them to compensate suppliers for the high costs of serving their communities. This would give suppliers an incentive to innovate to find more efficient ways of serving these communities. For example, it might be questioned whether land lines are necessary if wireless service or Internet connections can deliver similar services at lower cost.

B.29 Are other measures required to protect consumers in light of technology and industry changes to deal with quality of service, fair contract conditions, effective redress and access to accurate and comparable marketplace information?

In response to question B.29 regarding consumer protection measures, we note that federal and provincial/territorial laws of general application already contain numerous provisions designed to address such problems. The *Competition Act* addresses deceptive marketing practices, and all provinces and territories have consumer protection legislation. We are not aware of unique features of telecommunications services that necessitate special consumer protection measures.

V. REGULATORY INSTITUTIONS

A. Jurisdictional Confusion: Forbearance and the Regulated Conduct Defence

As the Consultation Paper notes, the Canadian telecommunications sector is subject to intervention by a variety of government institutions. As a result of this proliferation, multiple institutions may claim jurisdiction over the same issue. This can lead to duplication of effort among companies being regulated; at the very least, it can lead to costly uncertainty as to which rules apply.

Indeed, the current system is marred by uncertainty over the boundaries between general and sector specific regulation. According to the *Memorandum of Understanding* on the CRTC/Competition Bureau Interface[5] (MOU), both the *Telecommunications Act* and the *Competition Act* apply to certain behaviour of telecommunications companies. The CRTC has the discretion to forbear from regulating markets that are sufficiently competitive, and companies can potentially use the "regulated conduct" defence to shield themselves from liability (or perhaps even scrutiny) for certain actions under the *Competition Act*.

The recent controversy surrounding the scope of the regulated conduct defence, moreover, demonstrates that the doctrine suffers from a degree of ambiguity. The Commissioner of Competition felt it appropriate to withdraw the Competition Bureau's *Information Bulletin* on regulated conduct.[6] The Supreme Court of Canada's decision in the *Garland* case[7] has raised questions as to whether the

5 Industry Canada and CRTC, CRTC/Competition Bureau Interface (Oct. 8, 1999), available at www.competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01544e.html.

6 Competition Bureau, *Information Bulletin on the Regulated Conduct Defence*, December 17, 2002.

7 *Garland v. Consumers' Gas Company*, [2004] 1 S.C.R. 629.

regulated conduct defence can apply to civil or to *per se* criminal offences under the *Competition Act*. [8]

The boundary between the regulatory schemes under the *Telecommunications Act* and the *Competition Act* as applied to telecommunications markets is arguably now less certain. If sector-specific regulation is to be retained, we believe that Parliament should clarify the jurisdictional boundaries in this area.

B. Excessive Concentration

Where markets are subject to viable, sustainable competitive forces, the telecommunications sector should be subjected to competition laws of general application, rather than to sector specific *ex ante* economic regulation. We believe that the institutional structure mandated by the *Competition Act* should be presumed sufficient to ensure a fair and productive marketplace. Economic and social policy-making and rule making should be the domain of Parliament or its delegates, such as Cabinet and government departments. Investigation and enforcement of marketplace conduct should be the responsibility of the Commissioner of Competition. Dispute resolution and appeals can be left to the Competition Tribunal.

As the Consultation Paper notes, Australia has shifted economic regulation to general competition authorities while retaining a sector specific regulator for technical matters. New Zealand did away with a sector specific regulator altogether for a time. We acknowledge that a sector specific regulator may be required to oversee technical standards, but see no reason for a sector specific economic or market conduct regulator once markets are sustainably competitive.

8 See letter from the Chair, National Competition Law Section, Canadian Bar Association to Competition Bureau dated June 13, 2005, a copy of which is attached as appendix A.

VI. CONCLUSION

The Consultation Paper notes that the economic regulation of the telecommunications sector has aimed to balance "the needs for capital investment, investor return, and operational funding of the service provider, with the public goals of universality and affordability." While this is a laudable list of goals, a sector subjected to extensive regulatory oversight is unlikely to achieve them efficiently. Such a regulated sector is also unable to respond efficiently to technological innovation and changes in consumer demand, or to encourage innovation. Once markets are sustainably competitive, these decisions are better left to private individuals and companies. Free to compete with each other in the marketplace, they will be the best judges of where to set prices and how to allocate resources.

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
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June 13, 2005

Ms. Martine Dagenais
Competition Bureau
Place du Portage
150 Victoria Street
Gatineau QC K1A 0C9

Dear Ms. Dagenais:

Re: CBA Competition Law Section Response to Competition Bureau Proposal to Amend the Regulated Conduct Defence Bulletin

The Canadian Bar Association's National Competition Law Section (CBA Section) is pleased to provide its comments to the Competition Bureau on its May 16, 2005 proposal (Proposal) to amend the Regulated Conduct Defence Bulletin (Bulletin).

While the Bureau did not invite public comment on the Bulletin prior to its release in December 2002, the CBA Section submitted comments on the Bulletin to the Bureau in October 2003. The CBA Section also responded, in January 2005, to the Bureau's October 2004 call for comments on the Bulletin, following its re-designation as "draft" in light of the Supreme Court of Canada's decision in *Garland v. Consumers' Gas Company*.[1] The comments contained in these prior submissions (the October 2003 and January 2005 submissions) remain relevant and we attach copies of the submissions.

The CBA Section notes that, in contrast to the Bureau's usual practice of soliciting comments on actual draft documents, the Proposal merely describes changes that it proposes to make to the Bulletin. In the CBA Section's view, the Proposal is not a substitute for an actual revised draft Bulletin showing specifically how the Bureau would integrate its proposed changes into the Bulletin. This is particularly true in the case of the Bulletin, given the very substantial change in enforcement policy in relation to the Regulated Conduct Defence (RCD) set out in the Proposal.[2] Since the Bureau has stated its intention to issue a revised Bulletin by June 20, 2005, we expect that a revised Bulletin has already been substantially drafted, with the result that there is unlikely any significant practical impediment to the Bureau soliciting comments on

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1 [2004] 1 S.C.R. 629 [*Garland*].

2 The substantial nature of the proposed changes, combined with the general nature of the Bureau's October 2004 call for comments and the small number of stakeholders asked to comment on the Proposal (the Bureau having circulated the Proposal only to those stakeholders who took up the Bureau's previous call for comments), also supports a more broad-based consultation on the Proposal prior to finalizing of the Bulletin.

500 - 865 Carling, Ottawa, ONTARIO Canada K1S 5S8
Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185
Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

an actual revised draft Bulletin. Nevertheless, the CBA Section remains of the view (expressed in the January 2005 submission) that, in light of the numerous issues about the RCD raised by *Garland*, it would be preferable for the Bureau to rescind the Bulletin in order to allow for further study of the RCD, as well as of other tools of statutory interpretation of similar effect.

The CBA Section's Prior Submissions

The January 2005 submission was made in response to the Bureau's October 2004 call for comments and the CBA Section's views respecting the impact of *Garland* on the RCD are set out in that submission. The CBA Section highlights the following from the January 2005 submission.

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.* The statements of Iacobucci J. regarding the inapplicability of the RCD to that case could be interpreted 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." In this context, the *Garland* decision raises the following issues:

1. The cases 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 Supreme Court of Canada'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 decision on the meaning of "unduly"[3]. 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*.

Despite the Proposal's suggestions to the contrary, the above issues remain. Informed responses to these issues are essential to a sound understanding of the RCD, the interpretation of which may have profound implications for the ability of regulatory bodies to fulfill their mandates. Therefore, the CBA Section re-iterates its view that further study is required before revising the Bulletin. Indeed, the combination of the Proposal's purported narrowing of the RCD and its recognition that other statutory interpretation tools may be used to resolve potential conflicts between the *Competition Act* and other (federal or provincial) statutory schemes demonstrate that such further study, and any revised Bulletin, should extend to these other statutory tools, as well. By focusing exclusively on the RCD, the future role of which would be significantly diminished relative to that of other statutory tools under the Proposal, the Bulletin's ability to provide meaningful guidance would be seriously compromised.

Supplemental Views on the Proposal

While the Bulletin was criticized for its lack of discussion on the RCD jurisprudence,[4] the Proposal appears to focus on *Garland* to the exclusion of other RCD cases. This narrow focus on *Garland* raises significant concerns since, as noted in the January 2005 submission, the Supreme Court's discussion of the RCD in that case is arguably *obiter dictum*. It is unclear, for example, whether the Court was aware of the significant implications that its decision would have in relation to the *Competition Act* since the *Competition Act* was not at issue in the case before it. Rather, *Garland* dealt with regulated conduct that allegedly violated the Criminal Code's criminal interest provision (section 347(1)).

The question must be asked, whether a comparison of the RCD as applied in *Garland* to its application to the *Competition Act* is an appropriate one. Given that *Garland* is not a competition law case at all, the answer, in the CBA Section's view, may well be "no". As such, an interpretation of *Garland* that would see it overturn prior RCD cases – including the Supreme Court of Canada's decision in *Canada (Attorney General) v. Law Society of B.C.*[5] and

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

4 See: the October 2003 submission, at 2-3; Barry Zalmanowitz, Q.C., "Competition Bureau Releases Information Bulletin on the Regulated Conduct Defence, "*Canadian Competition Record* (Summer 2003), at 39; and D. Jeffrey Brown, "The Competition Bureau's Information Bulletin on the Regulated Conduct Defence: Observations from the *Astral*/*Telemedia* Case", *Canadian Competition Record* (Summer 2003), at 43.

5 [1982] 2 S.C.R. 307 (commonly referred to as *Jabour*).

subsequent cases, such as 2*903113 Canada Inc. v. Quebec* (*Régie des marches agricoles et alimentaires*)[6] – that specifically addressed the issue under the *Competition Act* seems open to doubt.

The CBA Section is also concerned that the Proposal's application of *Garland* simplifies *Garland*'s impact on the RCD in a manner that, without prior consideration of the issue or consultation with potentially affected regulatory bodies, could result in serious disruption to regulatory regimes in Canada. Such disruption could occur as a result of the Bureau's position that, in light of *Garland*, the RCD does not apply to either the *Competition Act*'s *per se* provisions or to its non-*per se* provisions that provide "leeway" through language other than an "undueness" type of requirement. In respect of federal regulatory regimes, disruption could also occur as a result of the Bureau's position that the RCD does not apply to apparent conflicts between the *Competition Act* and federal regulatory regimes. The CBA Section has doubts about the correctness of both of these positions as a matter of law.

As noted in the January 2005 submission, restricting the RCD to non-*per se* offences ignores the significance of *mens rea* in the RCD jurisprudence. Nor is it clear that there is a significant distinction between the leeway afforded by an "undue" lessening of competition as opposed to a "substantial" lessening of or an "adverse impact" on competition. Such concepts differing principally in the degree to which competition may be affected. At a minimum, *Garland*'s "leeway" approach could easily extend the RCD to the *Competition Act*'s reviewable practices, in respect of which the *Competition Act* provides that the Competition Tribunal "may" order relief. The discretionary nature of remedies for reviewable practices would seem to constitute an expression of leeway at least as broad, if not broader, than that which is available in respect of criminal provisions subject to an undueness standard.

On the purported non-application of the RCD to federal regulatory regimes, it is true that most RCD cases have involved provincial regulation. However, some RCD cases involved either federal regulatory regimes[7] or combinations of provincial and federal regulatory regimes.[8] Since *Garland* involved a "provincial-federal" conflict, it did not address the issue of the RCD's application in a federal context. In the absence of judicial authority contradicting these

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6 (1997), 79 C.P.R. (3d) 403 (Que. C.A.), leave to appeal to the S.C.C. refused April 30, 1998.

7 See *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.*, [1992] F.C.J. No. 1034, (1992), 45 C.P.R. (3d) 346 (F.C.T.D.) ("As argued by counsel for the plaintiff, the activities of the plaintiff and the Copyright Board within the framework of s. 67 of the *Copyright Act* are expressly sanctioned by federal legislation and therefore exempt from the operation of s. 32 of the *Competition Act* under the 'Regulated Industry Defence'.").

8 See *Re Farm Products Marketing* [1957] S.C.R. 199, per Fauteux J. at 258 ("The object of Parliament in legislating with respect to private agreements involving monopolies is to protect the public interest in free competition. The adoption by Parliament of an 'Act to assist and encourage co-operative marketing of agricultural products', 3 Geo. VI, c. 28, now R.S.C. 1952, c. 5, does not suggest that marketing schemes devised by Parliament or a Legislature within their respective fields, are *prima facie* to be held to come within the scope of the anti-monopoly legislation") and *Industrial Milk Producers Association et al. v. British Columbia (Milk Board*), [1988] F.C.J. No. 7, (1988), 21 C.P.R. (3d) 33 (F.C.T.D.), at 41 (see also at 49) ("provincial marketing boards, when exercising authority conferred on them by provincial *or federal legislation*, cannot in exercising that authority, be said to be committing an offence under s. 32 [now s. 45] of the *Combines Act*").

earlier RCD cases, it is far from certain that the Proposal accurately states the law on this point. It is unlikely that a court would hold the RCD inapplicable to, for example, a federal marketing board.

The Bureau's approach could also give rise to peculiar policy implications. As noted in the January 2005 submission, 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. The activities of such boards might also be susceptible to challenge under section 79, as a unilateral or joint abuse of dominance, particularly if the *Competition Act* is amended to make available administrative monetary penalties for abuses of dominance, thereby increasing incentives for parties to seek enforcement action under section 79.

Thus, the Bureau must ask itself this question: "*How will we respond to complaints seeking enforcement action against provincial marketing boards (or other regulatory bodies) and regulated parties under section 61 or section 79 of the Competition Act?*" More specifically, is the Bureau prepared to use sections 61 and 79 to challenge such bodies and, if no, how will the Bureau justify a decision not to pursue such complaints in light of what it proposes to include in the Bulletin?[9]

The CBA Section also has doubts about the legal basis of the Proposal's distinction between whether the RCD is invoked by regulators or regulatees, which distinction, to the CBA Section's knowledge, has no basis in the RCD jurisprudence and no justification as a matter of policy. The same is true of the proposed retention of the "operational conflict" standard for certain applications of the RCD.

Finally, we are concerned that the Proposal may signal a potentially overbroad interpretation by the Bureau of *Garland*'s requirement of "clear Parliamentary intent" in support of the RCD's application. It is difficult to reconcile a narrow interpretation of the phrase "clear Parliamentary intent" with RCD jurisprudence in the competition law context. The presence of the word "undue" or the phrase "public interest" in a competition statute, in the CBA Section's view, cannot be said to be have evidenced a "clear" intention (whether "expressly" or by "necessary implication", as the Court put it in *Garland*) on Parliament's part that competition legislation should defer to potentially conflicting provincial regulatory statutes. Rather, it is more likely that Courts seized on the presence of such "leeway" in order to reach conclusions that, on the facts before them, seemed to appropriately address balance between the two statutes in question.

A review of the RCD jurisprudence reveals that application of the RCD has always been dictated by the applicable context. *Garland* is no exception. For example, the criminal interest rate provision at issue in that case commences with the words "*[n]otwithstanding any other Act of Parliament*" (emphasis added). That a court would interpret the RCD narrowly in such a context is not surprising. However, as previously noted, it does not follow that a similarly narrow approach should apply in the *Competition Act* context.

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[9] In answering this question, the Bureau should be mindful of the controversy that arose in the *Superior Propane* case following the Bureau's decision to depart from the enforcement policy set out in the *Merger Enforcement Guidelines* (1991) in relation to the so-called efficiencies defence contained in section 96 of the *Competition Act*.

Conclusion

The CBA Section re-iterates its view that it would be preferable for the Bureau to rescind the Bulletin in order to allow for further study of the RCD and the implications of *Garland*. Given, as noted in the Proposal, the potential relevance of other statutory tools for resolving conflicts between the *Competition Act* and provincial or federal regulatory regimes, such study, as well as any revised Bulletin, should extend beyond the RCD to these other tools. The CBA Section recognizes that such study requires time. However, to the CBA Section's knowledge, there is no compelling need to rush finalization of the Bulletin. On the contrary, since the Bulletin has already been re-designated "draft" once, priority should be given to developing a fuller understanding of the RCD and *Garland* prior to finalizing the Bulletin.

The CBA Section is willing 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 Affleck*)

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

Encls.

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

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.).

500 - 865 Carling, Ottawa, ONTARIO Canada K1S 5S8
Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185
Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

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 C*ompetition 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 cases[3] 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

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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.

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

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*

3 *R.* v. *Canadian Breweries*, [1960] O.R. 601 (Ont. High Court of Justice).

> *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/Télémédia 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 RCD[4] 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]

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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

9 (1982), 137 D.L.R. (3d) 1 (S.C.C.).

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 CRTC[10] 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.