THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
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Draft Technical Bulletin on "Regulated" Conduct

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

February 2006

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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.

Draft Technical Bulletin on "Regulated" Conduct

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide its comments on the Competition Bureau's November 2005 *Draft Technical Bulletin on "Regulated" Conduct* (the Draft Bulletin). In the Section's view, the Draft Bulletin more accurately reflects the state of the law than the predecessor *Information Bulletin on the Regulated Conduct Defence* issued in 2002. The CBA Section appreciates the willingness of the Competition Bureau to reopen and revise the 2002 Bulletin, and is pleased to see that many of its previous submissions on the regulated conduct doctrine ("RCD") have been taken into account[1].

The CBA Section supports the Commissioner's desire to have market forces dictate market outcomes, and expects that as Canada's economy evolves there will and should be less regulatory displacement of the *Competition Act* (CA). It is nonetheless important that, as long as areas of the Canadian economy continue to be regulated, those who act pursuant to a valid federal or provincial legislative scheme should enjoy the benefit of the RCD. In this regard, the CBA Section welcomes many of the statements in the Draft Bulletin, for example: (1) the Bureau will not pursue a matter under the CA where Parliament has articulated an intent to displace competition law enforcement by establishing a comprehensive regulatory regime and giving an accountable regulator (federal or provincial, according to the endnote) authority to take or authorize action inconsistent with the Act (pp. 4-5)[2]; (2) the clear articulation of the principles applicable to regulatory

1 These prior views were set out in the CBA Section's October 2003 Submission on the Competition Bureau's 2002 *Information Bulletin on the Regulated Conduct Defence*, its January 2005 response to the Competition Bureau's request for comments on the Regulated Conduct Doctrine, and the CBA Section's June 2005 submission respecting the Competition Bureau's May 2005 proposal to amend its *Information Bulletin on the Regulated Conduct Defence*.

2 All page and paragraph references in this Submission are to the PDF version of the Bulletin.

forbearance (p. 5); (3) even where the RCD in the narrow sense may not apply, a party may benefit from other doctrines or defences (p. 2 and endnote 19); (4) the Bureau will in any event consider the regulatory context in which conduct is engaged, including the extent to which an applicable regulatory regime already limits or constrains the exercise of market power (p. 4); and explicit acknowledgement that the Bureau will consider, in addition to any legal doctrines or defences, the public interest in pursuing conduct based on good faith reliance on a law and whether it is appropriate in the circumstances to exercise its discretion to pursue an inquiry (pp. 2 and 3).

In general, the CBA Section believes these statements to be a more accurate and appropriate reflection of the existing law than many statements in the 2002 Bulletin.

There remain, however, a number of areas where, in the view of the CBA Section, the Draft Bulletin could and should be revised. In some of these areas, the Bureau has been overly cautious in its language, with the result that the Draft Bulletin fails to provide appropriate guidance. In other areas, the language is overly general and could be improved through more examples or illustrations of the concepts it describes. Additionally, as a general observation, much of the content (particularly the more controversial content) is in endnotes. The Draft Bulletin would be more accessible if a significant portion of the endnote text was integrated into the body of the document, particularly in circumstances where the endnotes limit or qualify more general statements contained in the text.

Our specific comments are set out below. Appendix A lists suggested textual amendments (to correct grammar, typographic errors, etc.) that supplement these comments.

II. THE NEED FOR CAUTION IN INTERPRETING *GARLAND*

The Draft Bulletin states that the *Garland*[3] case "directs a cautious application of the RCD" (p. 1). The Bureau uses this to justify a cautious approach to presenting the scope of the RCD. While we recognize that the limited judicial guidance on the RCD suggests taking care in describing the RCD under Canadian law, *Garland* itself must be viewed with some caution lest an overly conservative view of the RCD be portrayed.

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

Garland was not a competition law case, but a criminal law case. The Supreme Court of Canada declined to extend the RCD to the criminal interest rate provision of the *Criminal Code* (section 347). Given the history of the RCD, which developed primarily in the specific and narrow context of competition law, this result is not surprising. It is all the more expected in that Parliament expressed its intent as to the legislative importance of section 347 in very clear terms, prefacing it with "[n]otwithstanding any Act of Parliament".

The narrow issue in *Garland* was whether Parliament expressed any intent that provincial law should prevail over section 347 of the *Criminal Code*. The Court observed that Parliamentary intent to grant leeway for provincial action could be communicated expressly or "by necessary implication" (para 76). The Court found that section 347 did not provide such leeway. However, the CA is framework legislation that sets out Canada's competition policy. A competition policy is one of many government social and economic policies, quite distinct from a provision such as section 347 of the *Criminal Code*. Parliament and provincial legislatures (within their respective spheres of authority) should not be precluded from adopting different economic or social policies where they determine it in the public interest. Broadcasting and the marketing of agricultural products are examples of this.

Parliament is well aware of the existence and importance of regulated industries. Indeed, it gave the Commissioner explicit authority in sections 125 and 126 of the CA to appear before federal and provincial boards that supervise regulated industries in order to make representations in respect of competition. In granting powers to *advocate for* rather than to *impose* competition, Parliament recognized that wholesale application of the CA would undermine the public interest goals in certain sectors of the economy.

In sum, there exists in the CA an implicit intention not to override valid regulation – federal or provincial. This contrasts with provisions such as section 347 of the *Criminal Code* where the Court could find no Parliamentary intent that the criminal prohibition against excessive interest rates could be overridden by a provincial regulator.

It follows that *Garland* does not tell us much about the scope of the RCD in the competition law sphere. In particular, *Garland* is not determinative of: (1) the extent to which the RCD applies to federally regulated conduct; (2) the extent to which the RCD applies to civilly reviewable conduct; or (3) the application of the RCD to *per se* criminal conduct. Our specific concerns in this regard are outlined below.

III. APPLICATION OF THE RCD TO FEDERALLY VS. PROVINCIALLY REGULATED CONDUCT

Part III of the Draft Bulletin, "Conduct That May be Regulated by Other Federal Laws," is generally helpful. It states that, where Parliament has articulated its intent to displace competition law enforcement by establishing a comprehensive regulatory regime, regulatory action pursuant to that regime will be shielded from the application of the CA. It also states that other expressions (including implicit expressions) of Parliamentary intent may be sufficient to displace application of the CA in the federally regulated sphere. Moreover, in the federal sphere, the Bureau "will not pursue a matter under *any* provision of the Act" (p. 4, emphasis added) where it finds sufficient Parliamentary intent by establishment of an appropriate regulatory regime. The CBA Section understands this statement to mean that such federally regulated conduct will be exempt from the application of the entire CA, including the civil and criminal provisions (*per se* and other offences).

The CBA Section has some concern about the different "tests" described to determine whether the RCD applies (or other principles which lead to an exemption for regulated conduct) in the provincial sphere. Part II of the Draft Bulletin, "Conduct that may be regulated by provincial laws", describes at length how the RCD developed. The Draft Bulletin also suggests (correctly) that *Jabour* is the leading case on the RCD. As for the elements a party must establish to invoke the RCD, the Draft Bulletin states only that the Bureau will "focus on" whether a validly enacted provincial law authorizes or requires the impugned conduct (p. 3). Other elements of the "test" for invoking the RCD in the provincial sphere are in endnote 18. The CBA Section recommends that the Bureau include in the body of the final Bulletin a clearer articulation of all the elements that must be present for a party to successfully invoke the RCD in the provincial sphere.

In the federal sphere, by contrast, Part III of the Draft Bulletin clearly sets out the test:

> Accordingly, the Bureau will not pursue a matter under any provision of the Act where Parliament has articulated an intention to displace competition law enforcement by establishing a comprehensive regulatory regime and giving an accountable regulator an authority to itself take, or to authorize another to take, action inconsistent with the Act, provided the regulator has exercised its regulatory mandate in respect of the conduct in question.

Interestingly, the section of the draft Bulletin on federally regulated conduct makes no mention of *Jabour* or *Garland* but rather focusses entirely on Parliamentary intent.

Although we welcome this succinct statement of the Bureau's position, the CBA Section is concerned that some of the language employed suggests an unjustifiably higher standard for determining whether federally regulated conduct is shielded from the application of the CA. For example, the Draft Bulletin states that the Bureau must be able to "confidently determine" that Parliament intended another law to prevail over the CA, which may be the case where there is a "comprehensive" regulatory regime in place with an "accountable" regulator. The CBA Section stresses that the comprehensiveness (or lack thereof) of a regime should not be determinative of Parliamentary intent, that the level of confidence required to apply the RCD (or an equivalent doctrine) in the federal sphere should not be higher than that required in the provincial sphere, and that the "accountability" of a regulator is an imprecise and unworkable concept not feasible to measure. `

The CBA Section also questions the Bureau's hesitation at using the term "RCD" to describe the exemption for federally regulated conduct. While the CBA Section acknowledges that there is not a great deal of case law on this point, to the extent that the courts have dealt with cases involving federally regulated conduct, their decisions consistently point in the direction of the RCD being available in the federal sphere[4], and the

4 Courts have recognized the application of the RCD in the federal sphere in several cases, namely *Industrial Milk* (1988), 47 D.L.R. (4th) 710 (which involved joint federal-provincial regulation), *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas* (1992), 45 C.P.R. (3d) 346 (F.C.T.D.) (RCD exempts activities of the Copyright Board regulated under the federal I) and *R v. Charles*, [1999] S.J. No. 763 (Sask. Prov. Ct.) (RCD applies to *Canadian Wheat Board Act*).

courts have not hesitated to use the term "regulated conduct defence" or "regulated industries defence" in their judgments[5].

IV. APPLICABILITY OF THE RCD TO REVIEWABLE PRACTICES PROVISIONS

In Part II of the Draft Bulletin, dealing with provincial law, the Bureau states that the RCD is not available where the conduct at issue is being examined under the reviewable practices provisions of the CA (even though the Bureau acknowledges that other doctrines and defences might apply) (p. 3). The CBA Section understands that the Bureau is of the view that the RCD is available for reviewable conduct in the federal sphere, based on assertions at page 4 of the Draft Bulletin. If we are incorrect in this view, then the comments below apply with equal force to federally regulated conduct.

The Bureau gives three reasons for its conclusions about the civil provisions which, along with the CBA Section's observations, are set out below:

- *The mens rea rationale for the RCD does not apply in the civil sphere.*

The CBA Section agrees, since *mens rea* is a doctrine unique to the criminal law.

- *The "public interest" rationale for the RCD does not apply.*

This rationale is rooted in case law, as noted in the draft Bulletin. Conduct engaged in pursuant to a regulatory requirement cannot be contrary to the public interest.[6] Since the actions of a regulator within the scope of its jurisdiction are deemed to be in the public interest, a person engaging in regulated conduct could not be convicted under the CA[7].

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5 In this regard, the CBA Section acknowledges that in the most recent appellate decision on point -- *Apotex v. Eli Lilly*, 2005 FCA 361 (November 5, 2005, F.C.A.) – the Federal Court of Appeal did not use the term "RCD" in its judgment. In that case, the Court examined Parliament's intent in relation to section 45 of the CA and section 50 of the *Patent Act*, and concluded on the facts that there was no need to exempt patents from the scope of section 45 (by virtue of the RCD or a similar doctrine) because section 50 of the *Patent Act* did not compel or authorize an anti-competitive assignment of patents. The Court found no conflict or potential conflict with the CA, and thus no need to apply or even mention the RCD. Yet the Court's language – in particular its suggestion that its interpretation of section 50 "avoids the need to imply limiting words into section 45 exempting the assignment of patents from its scope" (para. 22) – suggests that in cases where it is not possible to interpret a regulatory statute narrowly to avoid a conflict, there might be a need to imply such "limiting words"; i.e., the RCD might apply.

6 See, e.g., *Canada (Attorney-General) v. Law Society of British Columbia* (1982), 127 D.L.R. (3d) 1 (S.C.C.) ("*Jabour*").

7 *Ibid*, see also *R. v. Canadian Breweries,* [1960] O.R. 601 (Ont. High Court of Justice).

The CBA Section does not believe the public interest rationale is unique to the criminal provisions of the CA. The civil provisions were also enacted to protect the public interest, and nothing in the CA or the case law suggests otherwise. Consequently, a regulator acting in the public interest should not be treated differently because the conduct at issue is contrary to a civil rather than a criminal provision of the CA.

Indeed, the notion that the civil provisions are not subject to the RCD is counter-intuitive, as it would bestow on the civil provision a greater legal enforceability than the criminal provisions. The criminal provisions address the most egregious anti-competitive activities specified in the CA. With that in mind, it makes no sense that the public interest, as expressed by regulator-approved conduct, can trump a criminal provision of the CA but not the civil provision.

- *"The 'leeway language' referenced in Garland does not appear in the reviewable practices provisions of the Act."* (Draft Bulletin, p. 3).

The CBA Section disagrees with this basis for finding that the RCD does not extend to the reviewable practices provisions. Somewhat confusingly, the Draft Bulletin cites only section 74 of the CA (the deceptive marketing provision) in endnote 20. The Draft Bulletin ignores the fact that language very similar to the examples of "leeway language" cited in *Garland* appears in the key reviewable practices provisions. In particular, a number of provisions (e.g. sections 77, 79 and 92) state that conduct is reviewable only if it "substantially" lessens or prevents competition, and section 75 states that a refusal to deal is reviewable if there is an "adverse" effect on competition. Section 82(2) (and, by importing the test from section 82, section 83 as well) refers to "adversely affecting" competition. Section 74 itself refers to "materially" misleading representations.

The Supreme Court in *Garland* found that because section 347 of the *Criminal Code* did not include "leeway language" similar to that in the CA (it cited the examples of "unduly", which it equated with the former legislative language "in the public interest"), the RCD could not be invoked to foreclose its application. The Supreme Court endorsed the trial judge's view that, in order for the RCD to apply (para. 77, emphasis added):

> Parliament needed to have indicated, *either expressly or by necessary implication*, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme.

The Court observed that in previous cases involving the RCD, the language of "the public interest" and "unduly" limiting competition has always been present, and concluded that the absence of such language from s. 347 precluded the application of this defence in this case.

The CBA Section makes three observations about the language chosen by the Court in *Garland* in describing the notion of leeway. First, the Court stated that Parliamentary intent could be indicated expressly or "by necessary implication". By definition, *implicit* intent means that there need not be any particular words in a section of the CA for RCD purposes – all that is necessary is that leeway in the ordinary sense of the word be present. Second, in referring to the RCD line of cases and the terms "unduly" and "in the public interest," the Court observed that "such language" (as opposed to "this language" or "these specific terms") was not present in section 347. Finally, in selecting the term "leeway", the Court chose a relatively soft term capable of broad application. Leeway is defined in the *Canadian Oxford Dictionary* as an "allowable deviation or freedom of action", and in the *Webster's New Collegiate Dictionary* as "an allowable margin of freedom or variation."

In the CBA Section's view, it is clear that the terms "substantially", "adverse" and "materially" grant "leeway" for regulatory action in like manner as "unduly". Given that "unduly" has been interpreted by the Supreme Court[8] to encompass only economic considerations, the differences among "substantially", "adverse", "materially" and "unduly" are only matters of degree, and all of these terms confer leeway[9]. While this, on its own, is sufficient to extend the Supreme Court's notion of "leeway" to the CA's civil provisions, it is also significant that in each reviewable practices provision, the Tribunal "may" order relief when the statutory prerequisites are met. Discretion not to grant relief in a particular case is yet another example of leeway (and one that extends not only to the Tribunal under those provisions which incorporate a "substantial" prevention or lessening of competition

8 *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 ("PANS").

9 As such, the *PANS* case precludes the possibility that there is a qualitative distinction between "substantially", "unduly" and "adverse"; they differ only quantitatively in terms of their degree.

or other effect on competition test, but also to the Tribunal or a court under the deceptive marketing provisions in section 74).

The CBA Section strongly believes that the RCD, as a matter of law, would be available under the reviewable practices provisions of the CA for both federally and provincially regulated conduct. The CBA Section believes that the Bureau should include a statement in the Draft Bulletin to this effect, and that in any event it should clearly articulate its position on the availability of the RCD not only with respect to section 74, but also sections 75, 77, 79, 82, 83 and 84 of the CA.

V. APPLICABILITY OF THE RCD TO *PER SE* OFFENCES

At page 4 of the Draft Bulletin, the Bureau indicates that it will not pursue a matter under any provision of the Act in the face of a comprehensive federal regulatory regime. The CBA Section understands that this applies to all the criminal provisions of the CA. At page 3 of the Draft Bulletin, the Bureau acknowledges that the RCD is available in relation to provincially regulated conduct examined under section 45 of the CA. With respect to the other criminal provisions of Part VI, however, Part II of the Draft Bulletin (on provincially regulated conduct) goes on to state that, "in compliance with *Garland*, the Bureau will strive to determine whether Parliament intended that the particular provision(s) of the Act apply to the impugned conduct and may not pursue the case by application of the RCD."

The CBA Section is pleased that the Bureau did not adopt a blanket conclusion that *Garland* precludes application of the RCD to the CA's "*per se*" criminal provisions – i.e., the provisions describing conduct that is *per se* illegal in that there is no requirement that competition be substantially prevented or lessened "unduly" (or other "leeway" language). Nonetheless, the language used by the Bureau leaves it open for it to take the position that the RCD is not available for a *per se* offence where the conduct is provincially regulated.

The CBA Section submits that, notwithstanding *Garland*, regulation-based defences (including, for reasons noted below, the RCD) continue to be available in relation to *per se* offences and it believes that the Draft Bulletin should explicitly acknowledge this. We have several reasons for taking this position.

First, there are precedent cases in which the courts have accepted at least the possibility of applying the RCD to criminal matters that did not involve the terms "unduly" or "in the public interest"[10]. Although these are not particularly strong precedents, they are at least some judicial recognition of this point.

Second, and more fundamentally, we do not believe that Parliament could have intended that persons acting pursuant to regulation, whether provincial or federal in origin, should be faced with the prospect of criminal penalties under the CA. The CA should be read in its entirety as a statute that "embodies a complex scheme of economic regulation", to use the words of the Supreme Court in *General Motors of Canada v. City National Leasing*[11]. It is a complex scheme that accommodates different legislative visions as to how a sector of the economy should be allowed to develop. The Bureau acknowledges that within this complex scheme certain regulated conduct overrides the CA (pursuant to the RCD), including *per se* conduct under federal regulation. With this in mind, it would not make sense that *per se* criminal provisions of the CA be enforced against conduct required or permitted under provincial regulation. *Garland* stated that the leeway for the application of the RCD could also be provided "by necessary implication". The consistent line of jurisprudence (including, most significantly, *Jabour*) supports the position that Parliament *by necessary implication* did not intend that persons acting pursuant to a valid regulatory scheme should be threatened with imprisonment or other sanctions in competition matters.

As a last point, we note the existence of numerous other regulation-based defences to the *per se* provisions of the CA, whether or not they are characterized with specific reference to "leeway" or the RCD. For example, where price maintenance was alleged in an industry where prices were regulated, an accused might argue that its prices were required or authorized by law so that the accused did not act voluntarily or intentionally and therefore lacked the *mens rea* for the crime. An accused might also argue that the term "by agreement, threat, promise or like means" imply a form of *improper* coercion or persuasion.

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10 See e.g., R. v. Charterways Transportation Limited (1981), 32 O.R. (2d) 719 (Ont. H.C.), where the court considered whether the RCD applied in relation to bid-rigging (now section 47). On the facts, the Court found that the rigged bids had prevented the provincial school bus rate regulator from effectively exercising its powers to protect the public interest and therefore the RCD did not apply.

11 [1989] 1 S.C.R. 641.

Clearly, there is no improper coercion when government regulations motivated by public interest considerations are the basis for action.

In short, regulation-based defences should continue, as a matter of policy, to be available, even in the context of a *per se* provision of the CA and regardless of whether provincial or federal regulation is at stake. The CBA Section sees nothing in the discussion of leeway in *Garland* that would remove these defences as a matter of law. Rather, where a CA provision explicitly provides some leeway, as in the case of the term "undue", there is simply an additional basis for arguing that the CA does not apply.

The CBA Section therefore recommends that the Draft Bulletin include a clear statement that the Bureau will not prosecute conduct required or authorized by valid regulation, under any criminal provision of the CA. It is not sufficient to state that "other doctrines or defences may apply" or that the Bureau may use discretion not to pursue a matter.

VI. APPLICABILITY OF "OTHER LEGAL DOCTRINES" TO CASES INVOLVING REGULATED CONDUCT

The CBA Section endorses inclusion of the statement, at page 2, that in circumstances where the RCD does not apply, a party may still benefit from other doctrines or defences. The Draft Bulletin goes on to list the following doctrines or defences: absence of *mens rea*; official inducement of error; statutory justification; and Crown immunity. Given that many readers of the Draft Bulletin will not be familiar with these doctrines, it would be useful to include a brief explanation of each, with a statement of the Bureau's enforcement position on the circumstances where these doctrines may apply, particularly since the Draft Bulletin purports to deal with regulated conduct generally and not just the RCD. Examples of the circumstances in which the other legal doctrines would apply would also be helpful.

With this in mind, the CBA Section's understanding of the listed doctrines is as follows:

- *Absence of mens rea* – An accused compelled or authorized by regulation to commit a criminal act may lack the *mens rea* necessary to be convicted of a crime because the actions were not voluntary.

The Draft Bulletin indicates, at p. 3, that lack of *mens rea* (the "*mens rea* rationale") is one of the original rationales for development of the RCD. The CBA Section therefore believes that, where a basis exists to conclude that regulation negates the *mens rea* for a crime (including in relation to a *per se* offence under the CA), the Bureau should apply the RCD.

- *Official inducement of error* – Under this doctrine, where an individual relied on a government official for advice on the appropriate course of action and that advice led to the unlawful act, the individual is excused from punishment or liability. This doctrine was recognized by Chief Justice Lamer in *R. v. Jorgensen*, [1995] 4 S.C.R. 55 and is currently before the Supreme Court in *City of Lévis v. Tétreault* (S.C.C. Case 30380) and *City of Lévis v. 2629-4470 Québec Inc*. (S.C.C. Case 30381), which were heard by the Court in October 2005 (judgments reserved).
- *Statutory justification* – Statutory justification is a defence in circumstances where the alleged wrongdoers can claim that they were required or authorized to commit the alleged wrongful act by a specific statutory provision. This doctrine was described in *Eldorado Nuclear Ltd. v. Uranium Canada Ltd*[12], where it was contrasted with the doctrine of Crown immunity (at 22):

  > Statutory authority to commit an act that would otherwise be illegal, does not, it seems to me, invoke Crown immunity. It gives rise to a defence of statutory justification. A defence of statutory justification can be raised by any person, whether or not a Crown agent. This is conceptually and analytically distant from Crown immunity.

- *Crown immunity* – Where a party that is an agent of the state has transgressed a law while operating in furtherance of its statutorily assigned purpose, it is immune from liability. Note however, that under section 2.1 of the CA, immunity from the application of the CA by virtue of Crown immunity does not extend to commercial activities by federal or provincial crown corporations that compete, actually or potentially, with other persons.

It should also be made clear in the Draft Bulletin that the list of "other legal doctrines" is not exhaustive. For example, where parties brought similar complaints respecting the conduct of a private actor to the Bureau and to an industry-specific regulator, in some circumstances (in particular where the industry-specific regulator had determined some or all of the issues) the Bureau might be estopped from exercising jurisdiction by virtue of the doctrines of issue estoppel, collateral attack or abuse of process. There may be other relevant doctrines as well, depending upon the particular circumstances.

12 (1983), 77 C.P.R. 1 (S.C.C.).

VII. DISTINCTION BETWEEN REGULATORS AND "REGULATEES"

In Part II of the Draft Bulletin (p. 4), the Bureau acknowledges that no Canadian court has expressly indicated that the application of the RCD differs between regulators and "regulatees" (a term we suggest should be changed to "regulated persons"). The Draft Bulletin goes on to indicate, however, that regulatees have not typically benefited from an application of the RCD by Canadian courts. However, courts have been open to extending the RCD to regulatees. This occurred, for example, in *2903113 Canada Inc. v. Quebec (Régie des marchés agricoles et alimentaires)*[13], where the Quebec Court of Appeal found that marketing agreements between processors and an association of pork producers (who were clearly regulatees) were exempt from the application of section 45 of the CA since the conclusion of the agreements was authorized by statute. In any event, it seems incongruent to conclude that a private party who acts pursuant to, e.g., the order of a regulator, would be subject to prosecution or liability under the CA, while the regulator itself would be exempt. In other cases involving private conduct, the courts have also found that private conduct enjoyed some level of protection by virtue of the existence of regulation in an industry[14]. As we have noted in prior submissions, the CBA Section does not believe there is any legal basis for distinguishing between regulators and regulated persons and would suggest that any reference to such a difference be dropped from the Draft Bulletin.

VIII. SELF-REGULATORY BODIES

Buried in endnote 23 is the suggestion – retained from the 2002 Bulletin – that self-regulatory bodies should be subject to greater scrutiny than other types of regulators. The CBA Section believes that this suggestion is contrary to the Supreme Court's ruling in *Jabour*. In *Jabour*, Estey J. emphasized a number of reasons why self-regulation might be justified, and that the mode of regulation (self-regulation vs. provincially-controlled regulation) was in the discretion of the provincial legislature. The Supreme Court's message was clearly that the Bureau has no authority or jurisdiction to question a province's determination that self-regulation is the most appropriate means to serve the

13 (1997), 79 C.P.R. (3d) 403 at 428-429.

14 See *R. v. Canadian Breweries, supra* note 7.

public interest. Thus, there is no legal basis for distinguishing between self-regulation and other forms of regulation for purposes of the RCD.

The CBA Section recommends that the suggestion that self-regulatory bodies be treated differently must be dropped from the Draft Bulletin altogether (and if it is retained, which would in our view be contrary to *Jabour*, the position should not be set forth in an endnote).

IX. MERGERS

The Draft Bulletin stresses that, regardless of whether the RCD or some other doctrine or defence immunizes a party from application of the CA, the Bureau will consider the regulatory context in which the conduct is engaged, where relevant (p. 4). The CBA Section endorses this view and recommends that the Bureau provide additional guidance on how regulation might be relevant in this context. In particular, it would be helpful for the Bureau to explain its approach to mergers in regulated industries. In this connection, the Bureau should consider the extent to which regulation in an industry eliminates or reduces the likelihood that a substantial lessening or prevention of competition would result from a merger, *e.g*, by preventing a material post-merger price increase or reduction in non-price competition. Where another regulator must approve a merger, the Bureau should take into account the regulatory goals motivating such approval, as well as Parliament's intent in setting up these goals (which may be geared to permitting mergers that allow a Canadian industry to survive notwithstanding negative effects on competition), in determining whether to exercise its enforcement discretion to challenge a merger.

X. REFERENCES TO U.S. CASE LAW

While the Draft Bulletin makes no reference to foreign law, endnotes 6 and 22 contain an extensive discussion of U.S. law. The U.S. law on implied immunity and state action developed in a different constitutional system and is not particularly helpful for the interpretation or application of the RCD in Canada. None of the leading RCD cases (e.g. *Jabour*) rely on U.S. law, and Canada's RCD developed in the unique context of the Canadian federal system. The CBA Section therefore recommends that all references to U.S. law be deleted from the Draft Bulletin.

XI. CONCLUSION

The CBA Section appreciates the opportunity to comment on the Draft Bulletin and continues to encourage the Bureau in its practice of issuing information bulletins and interpretation guidelines to increase the transparency and predictability of the Bureau's enforcement of the Act. We applaud the changes made since the Bureau first published guidance on the issue of regulated conduct in 2002, and we are hopeful that the views expressed in this submission will be taken into account in finalizing the Bulletin. Representatives of the CBA Section would be pleased to meet with Bureau officials to discuss these comments at greater length.

APPENDIX A

Page 2, endnote 7	This endnote should be moved into the text of the Draft Bulletin as part of the substantive discussion of the reviewable practices provisions.
Page 3, 1st para, 3rd sentence	Replace "The RCD effectively negates" with "The RCD effectively avoids".
Page 3, 1st para, last sentence	Replace "can only immunize conduct" with "can only immunize provincially – regulated conduct", consistent with *Garland*.
Page 3, 4th para, 3rd sentence	"otherise" should be "otherwise".
Page 3, 4th para, last sentence	"In light of above" should be "In light of the above".
Page 4, endnote 25	This endnote should be moved into the text of the Draft Bulletin as it contains an important addition to the text.
Page 4, endnote 28	It is not clear what this endnote adds. It should be deleted.
Page 4, endnote 31	The sentence fragment in this endnote should be moved into the text of the Draft Bulletin. Is "provincial" in the statement "whether federal or provincial" a reference to provincially regulated conduct, or to situations where Parliament delegates or shares regulatory jurisdiction to or /with a province? If it is the latter, this should be made explicit. Otherwise, it is confusing to refer to provincial law in a section of the Draft Bulletin dealing with federal law.
Page 5, 1st para under heading "Conclusion", 1st sentence	"applies" should be "apply"; "immunizes" should be "immunize".
Page 6, endnote 12, 11th line	Delete "in" in the phrase "it was only applied in to".
Page 7, endnote 15	There is a comma missing from the quote, after "Part V".