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Bureau de la concurrence Canada

Bulletin

"Regulated" Conduct

Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

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1. INTRODUCTION

This Bulletin[1] outlines the Competition Bureau's ("Bureau"'s) general approach to the enforcement of the *Competition Act* ("Act") with respect to conduct which may be regulated by another federal, provincial or municipal law or legislative regime ("law"), including the Bureau's approach to the "Regulated Conduct Doctrine" ("RCD").[2] This approach is based on the Bureau's recognition that it is charged with the administration and enforcement of the Act, that the Act is a framework law of general application, and that Parliament"… is not presumed to depart from the general system of law without expressing its intention to do so with irresistible clearness…".[3] It is the Bureau's position that the RCD is an exception to this and other important principles of statutory interpretation and that RCD caselaw is underdeveloped. Consequently, absent further judicial guidance, it is the Bureau's view that a cautious application of the RCD is warranted.[4]

Generally, in determining whether conduct regulated by another law will be pursued under the Act, the Bureau will carefully consider the purpose of the Act and any other law said to be applicable to the conduct, the interests sought to be protected by both laws, the impugned conduct, the potentially applicable provision(s) of the Act and of the other law, the parties involved, and the principles of statutory interpretation applicable to the case.[5] The Bureau will not necessarily approach conduct regulated by provincial laws in the same manner as conduct regulated by federal laws.[6] Similarly, the Bureau will not necessarily approach the application

1 This Bulletin is not intended to be a substitute for the advice of counsel and is intended solely to provide information. It is not a binding statement of how discretion will be exercised in a particular situation. Final interpretation of the law is the responsibility of the courts and the Competition Tribunal. The Bulletin replaces and supercedes any other publications of the Bureau in this area.

2 The RCD has been described by a number of terms, such as regulated conduct defence, regulated conduct exemption, regulated industries exemption, regulated industries defence and regulated industries doctrine; it is not limited to matters involving the Act.

3 *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co*., [1956] S.C.R. 610 at 614.

4 Recognized principles of statutory interpretation, such as *expressio unius est exclusio alterius* (see Sullivan, *Driedger on the Construction of Statutes*, 4th ed. at 179 ff), and the recent Supreme Court decision in *Garland v. Consumers Gas Co*, [2004] 1 S.C.R. 629 ("*Garland*") at 665, suggest that the Bureau, in particular, should refrain from immunizing conduct from the Act absent confidence that Parliament intended such immunity.

5 A requirement that a party comply with more than one law, for example, does not, of itself, raise a conflict requiring resolution (See, for example, *Smith v. Queen*, [1960] S.C.R. 776 at 800, hereafter "*Smith*").

6 The "federal paramountcy" concern identified in the RCD cases (which resulted in, effectively, the application of a reverse paramountcy rule until *Garland*) is not present where the Act is alleged to conflict with another federal law. In addition, provincial and federal laws need not be presumed to be coherent as they emanate from different legislators (see, for example, *Garland*). It is noteworthy that two distinct doctrines exist in the United States: the "state action" doctrine applies to claimed conflicts between state law and federal antitrust law and the "implied antitrust immunity" doctrine applies to claimed conflicts between federal antitrust law and other federal laws. Under the "state action" doctrine, only actions "required" or "compelled" by the state or actions undertaken pursuant to a "clearly articulated and affirmatively expressed state policy" to displace antitrust laws

of the reviewable matters provisions in the Act to conduct regulated by another law in the same manner as it will approach the application of the criminal provisions of the Act to such conduct.[7]

If particular conduct is not immune from the application of the Act by virtue of one doctrine or defence, such as the RCD, a party may still benefit from other defences or doctrines, such as a lack of requisite *mens rea*, official inducement of error, statutory justification, issue estoppel or Crown immunity. Even absent any such defence or doctrine, the Bureau will consider the public interest in pursuing conduct undertaken in good faith in reliance on a law or in exercise of fundamental freedoms. While each case will be considered on its individual merits in accordance with its particular facts, it is unlikely that the Bureau will pursue a case under any criminal (Part VI) provision(s) of the Act in respect of conduct that is authorized or required by a valid law.

Regardless of whether the RCD or some other doctrine or defence immunizes an impugned conduct from a provision(s) of the Act, the Bureau will always consider the regulatory context in which the conduct is engaged where it is relevant to the application of the provision(s) of the Act in question; for example, the extent to which a regulatory regime already limits or constrains the exercise of market power in certain areas of competition but not others.[8]

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enjoy a "regulated industries" exemption (See *Parker v. Brown* 317 U.S. 341 (1943); *Goldfarb v. Virginia State Bar* 421 U.S. 773 (1975); *California Retail Liquor Dealers Association v. Midcal Aluminum* 445 U.S. 97 (1986)). Under the "implied immunity" doctrine, "only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system" is immunity from antitrust laws available (See *National Gerimedical Hospital v. Blue Cross of Kansas City* 452 U.S. 378, 388 (1981) and *Silver v. NYSE* 373 U.S. 341).

7 There is no concern with the imposition of criminal liability nor the need for criminal intent in respect of parties arguably engaged in "regulated" conduct under the reviewable matters provisions of the Act. Moreover, there is no presumption that reviewable conduct is contrary to the "public interest" or unlawful (see *Proctor and Gamble Co. v. Kimberley Clark of Canada* (1991), 40 C.P.R. (1st) 1 (F.C.T.D.)).

8 See, for example, *R. v. Canadian Breweries Ltd.*, (1960) O.R. 601 ("*Canadian Breweries*").

2. CONDUCT THAT MAY BE REGULATED BY PROVINCIAL LAWS

The Supreme Court of Canada has traditionally concluded that a valid federal law will override a valid provincial law where the operation of the provincial law conflicts with the operation of the federal law ("federal paramountcy" rule); a conflict occurs where a party cannot comply with both laws (so-called "impossibility of dual compliance" test).[9] More recently, the Supreme Court has held that even absent such a conflict "[p]rovincial legislation that displaces or frustrates Parliament's legislative purpose" can also be overridden by a valid federal law.[10]

Under any interpretation of the existing caselaw, it is clear that the RCD constitutes an exception to the standard rules calling for the application of a general law in accordance with its plain meaning (absent clear Parliamentary intent to the contrary) and for the paramountcy of validly enacted federal law, such as the Act.

In a number of cases,[11] Canadian courts developed a principle of interpretation, the RCD, which immunized a regulatory body, exercising its authority under a validly enacted law, from the criminal conspiracy provisions[12] of the prevailing competition law by, effectively, reading down the conspiracy provision.[13] Notwithstanding "federal paramountcy" caselaw, a number

9 See, for example, *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 191.

10 *Rothman, Benson & Hedges v. Saskatchewan*, [2005] 1 S.C.R. 188 at para. 12ff.

11 In the earliest cases, persons convicted of an offence under a provincial regulatory regime attempted to escape liability on the grounds that the provincial regime was unconstitutional because it, or the actions of the provincial regulator, contravened the criminal conspiracy provisions of the anti-combines law in existence at that time. Thus, the question was whether the provincial act in question was *intra vires* the provincial legislature so as to sustain the conviction not whether the Act applies to the conduct in question. (See: *R. v. Chung Chuck et al*. (1929), 1 D.L.R. 756 (B.C.C.A.); *R. v. Simoneau* (1936), 1 D.L.R. 143 (Que. Ct. Sess.); and *Cherry v. R.* (1938), 1 D.L.R. 156 (Sask. C.A.)).

12 With the exceptions listed below, Canadian courts have applied the RCD to immunize the conduct of provincial regulatory bodies (claimed to be) authorized or required by a provincial law from the criminal conspiracy provisions of the prevailing competition law. In *Society of Composer, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd. et al.* (1992), 45 C.P.R. (3d) 346 (F.C.T.D.), Noel, J. applied the RCD to conduct authorized solely by a federal law, without any consideration of the caselaw. In *Industrial Milk Producers Association et al. v. Milk Board et al.* (1988), 47 D.L.R. (4th) 710 (F.C.T.D.), Reed, J. applied the RCD to the same conduct of the federal and provincial regulators in issue. While the application of the RCD to the (current) reviewable matters provisions of the Act was discussed in *Canadian Breweries*, *supra*; *Alex Couture v. Canada* (1991), 38 C.P.R. (3d) 293; *R. v. Independent Order of Foresters* (1989), 26 C.P.R. (3d) 229 and *Law Society of Upper Canada v. Canada* (1996), 67 C.P.R. (3d) 48 (Ont. Ct. Gen. Div.) ("*ReL.S.U.C.*"), it was only applied to the reviewable matters provisions in Re L.S.U.C., in express reliance on the agreement of the parties, including the (then) Director's counsel, that the RCD, if engaged, applied to reviewable matters, *i.e.* without analysis in the Court's reasons.

13 In its most recent decision in *Garland*, *supra* at 644, the Supreme Court described the foundation of the RCD

of these courts, including the Supreme Court in *Jabour*, applied the RCD to conduct that was simply authorized – not compelled – by a provincial law;[14] they did not require "impossibility of dual compliance" nor did they consider whether the provincial law frustrated the purpose of the Act in applying the RCD. Instead, the courts focused on the criminal nature of the competition law provision at issue, indicating that conduct engaged in pursuant to valid provincial legislation cannot be contrary to the "public interest" or "undue" ("public interest rationale") nor can it involve the criminal intent or volenti required by the criminal law ("*mens rea* rationale").[15] In its most recent pronouncement on the RCD, in *Garland*, the Supreme Court held that the RCD can only immunize conduct from the *Criminal Code* where the *Criminal Code* clearly allows for the application of the RCD, for example, by "leeway language" such as "against the interests of the public" or "unduly [limiting competition]" found in the competition law provisions at issue in previous RCD caselaw.[16]

As of March 12, 2010, section 45 no longer requires proof[17] that an agreement or arrangement prevents or lessens competition "unduly". It contains a per se criminal prohibition against agreements between or among competitors to fix prices, allocate sales, territories, customers or markets, or control the production or supply of a product. Subsection 45(7) explicitly provides that the RCD as it applied to section 45 prior to the 2009 amendments will continue to apply to the amended section 45.

In compliance with the decision of the Supreme Court in *Jabour*, the Bureau will always consider whether the RCD applies to conduct that may be regulated by provincial law. It will do so by focusing on the question of whether a validly enacted provincial law authorizes (expressly or impliedly) or requires the impugned conduct.[18] Where this occurs, the Bureau will not pursue a case under section 45 of the Act in reliance on the RCD.

With respect to the other provisions of Part VI of the Act, in compliance with *Garland*, the Bureau will first attempt to determine whether Parliament intended that the particular provision(s) of the Act apply to the impugned conduct. If the Bureau concludes that the *Competition Act* provision is intended to apply to the impugned conduct, the Bureau may still refrain from

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as follows : "When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes." See also *Jabour v. Law Society of B.C.*, [1982] 2 S.C.R. 307 ("*Jabour*").

14 See, for example, *Reference Re Farm Products Marketing Act*, [1957] S.C.R. 198 and *Jabour*, *supra*.

15 See for example, *Canadian Breweries*, *supra*, and *Jabour*, *supra*.

16 *Garland*, *supra*, at 665.

17 Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures, 2009*, 40th Parliament, 2nd Session, Canada, 2009, c.2 (s. 410).

18 A regulator's conduct is not "authorized" where it is not contemplated by its governing legislation: *Jabour*, *supra*. A regulatee's conduct is not "authorized" where it undermines or frustrates the regulatory regime: *R. v. Charterways* (1981), 32 O.R. (2nd) 719 (H.C.J.), affirmed on appeal (1982), 69 C.C.C. (2d) 94 (Ont. C.A.).

pursuing the case in reliance on the RCD, on other doctrines or defences,[19] or the Bureau's discretion to pursue an inquiry.

RCD caselaw is extremely limited in respect of the reviewable matters provisions of the Act.[20] While the jurisprudential preference for avoiding (where possible) an application of the federal paramountcy rule supports the application of the RCD to the reviewable practice provisions of the Act, neither the "public interest" nor the "*mens rea*" rationales relied upon by the courts in RCD cases support the application of the RCD to the reviewable matters provisions of the Act. Moreover, in *Garland*, the Supreme Court applied a federal law resulting in penal sanctions to conduct expressly authorized by a provincial regulatory body because there was no clear Parliamentary intent to do otherwise.[21] In this context, and absent further judicial guidance, the Bureau cannot responsibly limit its statutory mandate by the general application of the RCD to the reviewable matters provisions of the Act.[22]

Accordingly, until RCD caselaw is further developed in respect of the reviewable matters provisions of the Act, the Bureau will consider RCD caselaw in its examination of reviewable matters but will not consider RCD caselaw to be dispositive of such matters. Consistent with *Garland*, the Bureau will strive to determine Parliament's intention with respect to the application of the relevant *Competition Act* provision(s) to the impugned conduct. Unlike Part III of this Bulletin, however, the Bureau will not refrain from pursuing regulated conduct under the reviewable matters provision(s) simply because the provincial law may be interpreted as authorizing the conduct or is more specific than the Act given that the Bureau's mandate is to enforce the law as directed by Parliament[23] not a provincial legislature or its delegate.

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19 As indicated above, the Bureau does not view *Garland* as eliminating any regulation based - defences (e.g. an action authorized by a validly enacted provincial law may satisfy an (implied) due diligence requirement) to a prosecution under a provision of Part VI of the Act. The Bureau's view is simply that the RCD, *stricti juris*, may not immunize conduct from every provision(s) of Part VI of the Act. Other doctrines or defences that may be available include official inducement of error, statutory justification, issue estoppel and Crown immunity.

20 See footnote 12, *supra*.

21 While some commentators have suggested that words such as "substantially" or "may" in reviewable matters provisions provide the "leeway" required by the Supreme Court in *Garland*, a number of provisions of the Act, such as s. 74, contain no language that is even, arguably, analogous to the "leeway language" required by the Supreme Court in *Garland*.

22 While the Bureau recognizes that *Re L.S.U.C.* supports the proposition that the RCD is available for reviewable matters, the lower court, in that case, did not expressly consider the issue; it merely accepted the agreement of all parties (including the then Director) that the RCD, if engaged, was applicable to all provisions of the Act.

23 The constitutionality of the reviewable matters provisions of the Act has been upheld under Article 91(2) of the *Constitution Act*, 1867 in *General Motors of Canada Ltd. v. City National Leasing Ltd.* [1989] 1 S.C.R. 641; *Alex Couture Inc. v. Canada* (Attorney General) (1991), 83 D.L.R. (4th) 577, 38 C.P.R. (3rd) 293, [1991] R.J.Q. 2534 (Que. C.A.), leave to appeal to S.C.C. refused (1992), 91 D.L.R. (4th) vii (note), 42 C.P.R. (3rd) v (note), 141 N.R. 396 (note); and *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission*), [1990] 1 S.C.R. 425.

The RCD may be invoked by those who regulate ("regulators") and/or those they regulate ("regulatees"). Indeed, regulators may, depending on the legislative regime, also be regulatees. Although no Canadian court has expressly indicated that the application of the RCD differs as between regulators and regulatees, regulatees have not typically benefited from an application of the RCD by Canadian courts.[24] Therefore, greater scrutiny of the activities of regulatees, whether acting in their private capacity or as self-regulators, may be warranted.

24 See, for example, *Waterloo Law Association v. A.G. Canada* (1986), 58 O.R. (2d) 275; *R. v. Charterways Transportation Ltd.* (1981), 32 O.R. (2d) 86 (Ont.C.A.) and R. v. B.C. Fruit Growers Assoc. et al . (1985), 11 C.P.R. (3d) 183 (B.C.S.C.). It is noteworthy that the U.S. "state action doctrine" only immunizes the conduct of regulatees where their conduct is authorized by state law and is subject to active state supervision (see *Town of Hallie v. City of Eau Claire* 471 U.S. 34 (1985)). Similarly, the U.S. "implied immunity" doctrine does not apply to conduct voluntarily initiated by regulatees save where undertaken in the context of a detailed scheme of administrative oversight and where the refusal to accord such immunity would subject the regulatees to conflicting and potentially irreconcilable liability (See *Otter Tail Power Co. v. U.S.* 410 U.S. 366 at 374).

3. CONDUCT THAT MAY BE REGULATED BY OTHER FEDERAL LAWS

When faced with conduct that may be regulated by a valid federal law(s) other than the Act, the Bureau will, applying ordinary principles of statutory interpretation, attempt to determine whether Parliament intended that the particular provision(s) of the Act, or conceivably the entire *Competition Act*, apply to the particular conduct. In undertaking this analysis, the Bureau will consider existing RCD caselaw but does not consider the RCD caselaw to be dispositive of the analysis.

The Bureau will read the Act and the other federal law(s) in their ordinary sense harmoniously with the scheme and objects of the statutes in which they appear. As Parliament is presumed to enact legislation that is coherent,[25] the Bureau will, of course, consider whether the provisions can stand together and both operate without either interfering with the other,[26] *i.e.* whether a party may reasonably comply with both the Act and the other federal law(s).[27] The Bureau will apply the Act as it reads unless it can confidently determine that Parliament intended that the other federal law prevail, either by clear language in the Act or by the other federal law authorizing or requiring the particular conduct or, more generally, providing an exhaustive statement of the law concerning a matter.[28] Parliament's intention in the other federal law may be express or implied; in the latter situation, the Bureau will generally conclude that the enactment by Parliament of specific provisions to address the conduct in question is intended to take precedence over a law of general application such as the Act.[29]

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 providing a regulator the authority to itself take, or to authorize another to take, action inconsistent with the Act, provided the regulator has exercised its regulatory authority in respect of the conduct in question. Where such a regulator has forborne from regulation, the Bureau will apply the Act to the unregulated conduct until such time as the regulator exercises its authority to vary or rescind such forbearance; where such a regulator has forborne conditionally, the Bureau will apply the Act to all conduct conditionally forborne from regulation.[30]

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25 Described in Sullivan, *Driedger on the Construction of Statutes*, 4th ed. at 17, as a presumption that is "virtually irrebuttable".

26 Consistent with the decision of the Federal Court of Appeal in *Eli Lilly et al. v Apotex Inc.*, [2005] F.C.J. Nº. 1808.

27 In the context of allegedly "conflicting" laws, the Supreme Court has, repeatedly, stated that an actual – often coined an "operational" – conflict must be apparent before a court should resort to any mechanisms for resolving a conflict arising from a plain reading of the legislation, e.g. "reading in" or "reading down" language in a statute. See, for example, *Smith*, *supra*, at 800 and *Multiple Access*, *supra*, at 191.

28 See, for example, *Toronto Railway Co. v. Paget*, [1909] S.C.R. 488 at 499 (per Anglin J.); *Friends of Oldman River Society v. Canada (Min. of Transport)*, [1992] 1 S.C.R. 3 at 38; *Rothmans, Benson & Hedges Inc.*, *supra*; Sullivan, *Driedger on the Construction of Statutes*, 4th ed. at 1, 154, 168, 198, 236 and 262-67; and P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (2000), at 307, 343, 351-52, 450 and 459.

29 *i.e.* application of the *generalia specialibus non derogant maxim*.

30 See, for example, *R. v. B.C. Fruit Growers Association et al.*, *supra*.

4. CONCLUSION

In order to responsibly fulfill its mandate under the Act, the Bureau will, using all applicable statutory interpretation tools and considering the particular facts of the case, attempt to determine whether Parliament intended that the relevant provision(s) of the *Competition Act* apply to the conduct in question and, if so, whether any defence(s) or doctrine(s) immunizes that conduct. Even if the Bureau concludes that the Act applies, it will proceed to consider whether it is, nonetheless, in the public interest to pursue the conduct under the *Competition Act* in the circumstances.

5. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act,* the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

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