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TECHNICAL BULLETIN ON "REGULATED" CONDUCT

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I. Introduction

This Technical Bulletin[1] ("Bulletin") outlines how the Commissioner of Competition ("Bureau'") approaches 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]

The Bureau's starting point is that the Act generally applies to all conduct covered under a plain reading of the relevant provision(s) of the Act. The Bureau believes that, in the vast majority of cases, both the Act and any other law said to regulate the impugned conduct will be able to coexist, without conflict, and that the Act will apply as written. The approach outlined in this Bulletin is based on a recognition that the Bureau is obliged to apply the Act, the Act is a framework law of general application and Parliament "… is not presumed to depart from the general system of law without expressing its intention to do so with irresistible clearness…".[3] The Bureau's approach to the RCD recognizes that the RCD is an exception to these fundamental principles, that RCD caselaw is underdeveloped, and that the most recent decision of the Supreme Court of Canada to address the RCD directs a cautious application of the RCD.[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] As outlined below, 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 of the reviewable practice provisions of 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]

Even 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 doctrines or defences, such as a lack of requisite *mens rea*, official inducement of error, statutory justification, or Crown immunity. Even absent any such defence or doctrine, the Bureau will consider the public interest in pursuing conduct undertaken in good faith reliance on a law. Each case will be considered on its individual merits in accordance with its particular facts.

II. Conduct That May Be Regulated By Provincial Laws

The Supreme Court of Canada has traditionally concluded that a valid federal law, such as the Act, will override[8] a valid provincial law where the operation of the provincial law conflicts with the operation of the federal law ("federal paramountcy" rule). Such a conflict has often been said by the courts to occur where a party could not 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]

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 of the prevailing competition law by, effectively, reading down the conspiracy provision. [12] In its most recent decision in *Garland*, the Supreme Court described the foundation of the RCD 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."[13] The RCD effectively negates the federal paramountcy rule. Moreover, unlike the traditional federal paramountcy cases, a number of these courts, including the Supreme Court, applied the RCD to conduct that was simply authorized – not compelled – by a provincial law,[14] *i.e.* "impossibility of dual compliance" was not required for the RCD to apply, and did not consider whether the provincial law frustrated the purpose of the federal law, i.e. the Act. 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")[15] and conduct compelled by valid provincial legislation cannot be voluntary ("*mens rea* rationale"),[16] as required by the criminal law. Most recently, the Supreme Court, in *Garland*, held that the "regulated industries defence" (RCD) can only immunize conduct from the *Criminal Code* where the *Code* clearly allows for the application of the RCD, e.g. by "leeway language" such as "[contrary] to the public interest" or "unduly [limiting competition]".[17]

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

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, 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 apply the RCD and refrain from pursuing a case under section 45 of the Act. With respect to the other provisions of Part VI, 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. Even if the Bureau concludes that the RCD, itself, does not immunize the impugned conduct, other doctrines or defences,[19] or the Bureau's discretion to pursue an inquiry, may lead the Bureau not to pursue a case under Part VI of the Act in respect of conduct that is authorized or required by valid provincial law.

RCD caselaw is extremely limited in respect of the reviewable practice provisions of the Act. Only the desire to avoid application of the federal paramountcy rule directly supports the application of the RCD to the reviewable practice provisions of the Act. Neither the "public interest" nor the "*mens rea*" rationales, discussed above, directly support the application of the RCD to these provisions. Moreover the "leeway language" referenced in *Garland* does not appear in the reviewable practice provisions of the Act.[20] Where the Supreme Court has, in *Garland*, applied a law resulting in penal sanctions to conduct expressly authorized by a provincial regulatory body because there is no clear Parliamentary intent to do otherise, it is difficult for the Bureau to conclude that such an approach is not applicable to the reviewable practice provisions of the Act. In light of above, it is by no means certain that the RCD immunizes conduct from the reviewable practice provisions of the Act.[21]

Accordingly, until RCD caselaw is further developed in respect of the reviewable practice provisions of the Act, the Bureau's consideration of conduct under the reviewable practice provisions will be informed, but not governed, by the RCD caselaw. Consistent with *Garland*, the Bureau will strive to determine Parliament's intention with respect to the application of the relevant reviewable practice provision(s) to the impugned conduct. Unlike Part III below, however, the Bureau will not refrain from pursuing regulated conduct under the reviewable practice provision(s) simply because the provincial law authorizes the conduct or is more specific than the Act given that the Bureau's mandate is to enforce the law as directed by Parliament not a provincial legislature or its delegate.

The RCD is either invoked by those who regulate ("regulators") or those they regulate ("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.[22] Therefore, while the Bureau's basic RCD analysis will remain the same, the activities of regulatees may be subject to greater scrutiny by the Bureau than the activities of regulators in recognition of this caselaw.[23]

Regardless of whether the RCD or some other doctrine or defence immunizes a party from a provision(s) of the Act, the Bureau will 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.[24]

III. 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 Act, applies to the particular conduct.[25] 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,[26] the Bureau will first consider whether the provisions can stand together and both operate without either interfering with the other *i.e.* whether a party may reasonably comply with both the Act and the other federal law(s).[27]

In summary, the Bureau will apply the Act as it reads[28] 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.[29] Parliament's intention in the other federal law may be express, for example, by express authorization or by express reference to the Act. Parliament's intention in the other federal law may also be implied, in which case the Bureau will generally conclude that a specific law is intended to take precedence over a general law.[30]

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[31] 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.[32] 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. [33]

As with Part II above, the activities of regulatees may be subject to greater scrutiny by the Bureau than the activities of regulators and the Bureau will always consider the regulatory context in which the conduct occurs where it is relevant to the application of the provision(s) of the Act in question, regardless of whether a doctrine or defence(s) immunizes a party from a provision(s) of the Act.

IV. 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 Act applies 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 Act in the circumstances. While the Bureau believes that both the Act and any other law said to regulate the impugned conduct will generally be able to co-exist, such that the Act will apply as written, the Bureau recognizes that the status of regulated conduct under the Act requires greater clarity. As such, the Bureau will seek to benefit from caselaw that will clarify the status of regulated conduct and will explore the potential for a legislative resolution of this longstanding issue.

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[1] This Technical 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. The Bulletin replaces and supercedes any other policy papers produced by the Bureau in this area. Final interpretation of the law is the responsibility of the courts and the Competition Tribunal.

[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.

[3] *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co*., [1956] S.C.R. 610 at 614. It is noteworthy that Parliament has, in the Act, expressly excluded certain conduct from the Act as a whole or from certain provisions of the Act and has expressly provided in other federal statutes that the Act, or certain provisions of the Act, do not apply to conduct contemplated by that statute, e.g. *Copyright Act*, s. 70 (3); *Farm Product Agencies Act*, s. 32; *Shipping Conferences Exemption Act*, s. 4(1). 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*") suggest that the Bureau, in particular, should refrain from immunizing conduct from the Act absent Parliamentary intent to that effect.

[4] See *Garland, supra* at 665, where the Court states that "Parliament must unequivocally express [an] intention … to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law", in order for the RCD to apply.

[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, which applies to claimed conflicts between state law and federal antitrust law, and the "implied antitrust immunity" doctrine, which applies to claimed conflicts between federal antitrust law and other federal laws.

As for conduct regulated by state laws, U.S. "preemption standards" are analogous to Canada's "federal paramountcy" rules. In *California v. ARC America Corp*., 490 U.S. 93 at 100-01 (1989), the U.S. Supreme Court ("U.S.S.C.") explained that state laws will be preempted only by (a) an express statutory preemption provision; (b) a showing that it is "'clear and manifest'" that "Congress intends that federal law occupy a given field"; or (c) a showing that state law "actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.'" In keeping with this tradition, under the "state action" doctrine, the U.S.S.C. has held that the *Sherman Act* was not intended to "restrain a state or its officers or agents from activities directed by its legislature" however, only actions "required" or "compelled" by the state would enjoy a "regulated industries" exemption: *Parker v. Brown* 317 U.S. 341 (1943) and *Goldfarb v. Virginia State* Bar 421 U.S. 773 (1975). Later U.S.S.C. decisions, e.g. in *California Retail Liquor Dealers Association v. Midcal Aluminum* 445 U.S. 97 (1986), extended the immunity to circumstances where there is a "clearly articulated and affirmatively expressed state policy" to displace antitrust laws (compulsion is unnecessary) provided, where private conduct is at issue, there is active supervision of the conduct of the private party by the state.

As for conduct regulated by federal laws, the U.S.S.C. has said that "implied antitrust immunity is not favoured and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system": *National Gerimedical Hospital v. Blue Cross of Kansas City* 452 U.S. 378, 388 (1981); "repeal is to be regarded as implied only where necessary to make the regulatory scheme work and even then, only to the minimum extent necessary": *Silver v. NYSE* 373 U.S. 341. Consequently, U.S. courts have undertaken a detailed review of the "conflicting" federal law in issue in order to identify a Congressional intent to immunize conduct from antitrust laws. In *Northeastern Tel. Co. v. AT &T* 651 F. 2d 76 cert denied 455 US 943, the U.S. Court of Appeal asked whether the "conflicting" federal scheme is of such a nature that "Congress must be assumed to have foresworn the paradigm of competition".

[7] There is no concern with the imposition of criminal liability on parties arguably engaged in "regulated" conduct in respect of the reviewable practice provisions of the Act; no "criminal intent" is required. Moreover, there is no presumption that reviewable conduct is contrary to the "public interest" or unlawful. See, for example, *Proctor and Gamble Co. v. Kimberley Clark of Canada* (1991), 40 C.P.R. (1st) 1 (F.C.T.D.)

[8] to the extent of the conflict.

[9] See, for example, *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 191, and footnote 27, *infra*.

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

[11] In the earliest cases, private persons subject to a provincial regime attempted to escape the grasp of the regulator (a public body, quite often a marketing board) by arguing that the regime is unconstitutional as the actions of the regulator (e.g. price fixing) contravened the Act. These cases deal with the question of whether the provincial act in question is *intra vires* the provincial legislature so as to sustain a conviction under it, *i.e.* whether the impugned conduct was properly a matter of federal jurisdiction, or was properly a matter of provincial jurisdiction, not with the question of 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] In developing the RCD, Canadian courts have applied, almost exclusively, 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 (as authorized by federal and provincial laws). While the application of the RCD to the (current) reviewable practice provisions of the Act was discussed in *Re Canadian Breweries* (1960), O.R. 601; *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.) ("*Re L.S.U.C.*"), it was only applied in to the reviewable practice provisions in *Re L.S.U.C.*

[13] *Garland, supra* at 664; 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] Estey J. in *Jabour* stated: "So long as the [*Combines Investigation Act*], or at least Part V is styled as a criminal prohibition, proceedings in its implementation and enforcement will require a demonstration of some conduct contrary to the public interest. It is this element of the federal legislation that, these cases all conclude, can be negated by the authority extended by a valid provincial regulatory statute."
[16] McCruer, C.J. in *Re Canadian Breweries* stated: "There is one principle of the criminal law to be applied: where on the construction of a provincial statute, there are two reasonable constructions, one more favourable to the accused than the other, the one most favourable to the accused must be adopted…[penal statutes] must be strictly construed against the Crown".
[17] *Garland, supra*, at 665.
[18] Authorization of a regulator will not be found where the regulator acts outside its statutory jurisdiction: *Jabour, supra*. Authorization of a regulatee will not be found where the conduct engaged in 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.).
[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, simply that the RCD, *stricti juris*, may not immunize conduct from every provision(s) of Part VI of the Act. Other doctrines or defences include official inducement of error, statutory justification or Crown immunity.
[20] Indeed, a number of provisions of the Act, such as s. 74, contain no language that is even, arguably, analogous to that identified in *Garland*.
[21] While the Bureau recognizes that *Re L.S.U.C.* supports the proposition that the RCD is available for reviewable practices, 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 was applicable to all provisions of the Act.
[22] Canadian courts have, in virtually all instances, refrained from applying the RCD to immunize the conduct of regulatees. 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.S.C. requires that regulatees establish that their conduct is not only authorized by state law but is subject to active state supervision in order to qualify for immunity from federal antitrust law under the "state action doctrine": *Town of Hallie v. City of Eau Claire* 471 U.S. 34 (1985). Similarly, the U.S.S.C has stated that the "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: "[When such decisions] are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to over-ride the fundamental national policies embodied in the antitrust laws": *Otter Tail Power Co. v. U.S.* 410 U.S. 366 at 374.
[23] Self-regulatory bodies may warrant greater scrutiny than public regulators because these bodies may have a broad statutory mandate but may otherwise make decisions on matters in which they themselves have a direct interest.
[24] See, for example, *Re Canadian Breweries Ltd., supra*. Again, this is seemingly consistent with U.S. caselaw, such as *Verizon Communications Inc v. Trinko*, 540 U.S. 398 and *U.S v. Citizens & Southern Nat. Bank*, 422 U.S. 86.
[25] In undertaking this analysis the Bureau will be informed, but not governed, by the RCD caselaw.
[26] *i.e.* a rational, internally consistent framework capable of operating without coming into conflict nor resulting in "absurd" (unreasonable) consequences; this is described in Sullivan, *Driedger on the Construction of Statutes*, 4th ed. at 17, as a presumption that is "virtually irrebuttable".
[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. In a recent decision of the Ontario Court of Appeal in *R. v. Blackbird*, (2005) 192 C.C.C. (3d) 453, the Court held at 460 that "… where the court must assess whether one or both regimes can regulate an activity, the proper question is not whether one is a "comprehensive code" occupying the field and ousting the application of the other, but whether compliance with one requires breach of the other. Unless compliance with both is impossible, then the two regimes can live together".
[28] Asking whether the particular provision(s) of the Act, or the Act, suggests that Parliament did not intend that the particular conduct be subject to the particular provision(s) or the Act.
[29] 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 Coté, *The Interpretation of Legislation in Canada*, 3rd ed. (2000), at 307, 343, 351-52, 450 and 459.

[30] *i.e*. application of the *generalia specialibus non derogant* maxim.

[31] whether provincial or federal.

[32] This is consistent with the approach articulated in recent U.S.S.C. caselaw. For example, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 124 Ct. 872 (2004), the U.S.S.C. said at 882 that schemes such as the *Telecommunications Act* raise the question of whether the regulatory scheme was so pervasive that "the additional benefit to competition provided by antitrust enforcement will tend to be small and it will be less plausible that antitrust laws contemplate such additional scrutiny".

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