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January 6, 2005

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

Dear Ms. Galipeau:

Re: Request for Comments on the Regulated Conduct Doctrine

The Canadian Bar Association's National Competition Law Section (CBA Section) is pleased to provide its comments to the Competition Bureau on the December 2002 *Information Bulletin on the Regulated Conduct Defence* (Bulletin) and we also enclose our previous submission of October 2003. The Bureau had not invited public comment on this issue prior to the issuance of the Bulletin. The CBA Section is pleased that consultations are now taking place, as we suggested in our original comments.

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

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

Garland was not a *Competition Act* case and the Supreme Court of Canada's comments regarding the application of the RCD to competition cases could be taken to be *obiter dicta.* That said, the statements of Iacobucci J. regarding the inapplicability of the RCD to that case could be interpreted to support an argument that the RCD does not apply to *per se* criminal offences under the

[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

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.