COMPETITION BUREAU CONSULTATION ON THE INFORMATION BULLETIN ON THE REGULATED CONDUCT DEFENCE

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SUBMISSION OF THE CANADIAN FEDERATION OF AGRICULTURE

OVERVIEW

These comments are submitted by the Canadian Federation of Agriculture (the "CFA") in response to the notice issued by the Competition Bureau (the "Bureau") on October 29, 2004, inviting interested parties to provide comments and suggestions in respect of *Information Bulletin on the Regulated Conduct Defence* issued by the Bureau in December, 2002 (the "Bulletin").

The regulated conduct defence (the "RCD") is essential to the integrity of the regulatory schemes for agricultural products that Parliament and the provincial legislatures have determined are in the public interest. If the RCD is weakened or narrowed, the ability of agricultural marketing boards to do the job that they have been created to do – a job which relates fundamentally to correcting deficiencies in an unfettered marketplace for farm products – will be compromised.

At its heart, the ascertainment of the boundaries of the RCD is an issue of legislative intent. The Courts – beginning with the decision of the British Columbia Court of Appeal in the *Chung Chuck* case in 1929 – have consistently held that Parliament cannot have intended that its competition legislation would apply to the actions of agricultural marketing boards, acting in the public interest pursuant to their statutory mandates. The cases have therefore clearly established that the activities of agricultural marketing boards fall within the RCD.

The statements in the Bulletin that the RCD extends to both the civil and criminal provisions of the *Competition Act*, and that public regulators are assumed to be acting within their mandate, are consistent with this jurisprudence.

The CFA submits, however, that the Bulletin takes an unduly narrow approach to the RCD by insisting that there be an "operational conflict" between the regulatory regime and the *Competition Act* before the RCD can apply. In the CFA's submission, this approach risks undermining the expressed intent of Parliament and the provincial legislatures and the public interest as determined by the legislatures, and is inconsistent with jurisprudence on the RCD.

THE CFA

The CFA is a farmer-funded national umbrella organization representing provincial general farm organizations and national commodity groups. Through its members, the CFA represents over 200,000 Canadian farm families across Canada. The mission of the CFA is to promote the interests of Canadian agriculture and agri-food producers, and to ensure the continued development of viable and vibrant agricultural and agri-food industries in Canada.

AGRICULTURAL REGULATION IN CANADA

Agricultural regulation in Canada is based to a large extent on a system of marketing boards. This regulatory scheme reflects longstanding recognition that producers of agricultural products are, as a result of their relatively small individual size and large numbers, at a significant disadvantage in dealing with buyers of their products.

In economic terms, buyers of agricultural products, particularly in highly concentrated markets, enjoy market power over much smaller individual producers of these products. The market power held by producers is exacerbated when the product is perishable. In this situation, buyers can dictate the terms of trade and push prices paid to agricultural producers for their products well below economically efficient levels.

Agricultural marketing boards have been created to address this marketplace failure. A number of marketing boards are authorized, by legislation, to negotiate or set the minimum price paid to producers for their product and, in some cases to establish and implement production and/or marketing quotas for the product. The powers conferred on marketing boards reflect the determinations, by the relevant legislatures, on the appropriate means of addressing failures in agricultural product markets so as to promote the public interest.

APPLICATION OF THE RCD TO MARKETING BOARDS

The manner in which the RCD works in agriculture is illustrated by the 1989 Federal Court decision - *Industrial Milk Producers Assn. v. British Columbia (Milk Board)* [1989] 1 F.C. 463 (Reed, J.) ("*Industrial Milk*) – a case applying the RCD to dairy regulation.

Before turning to this case, however, it is useful to recall briefly the determinations in a number of earlier decisions which considered the application of the RCD to agricultural marketing boards – beginning with the 1929 *Chung Chuck* decision of the British Columbia Court of Appeal, and culminating with the 1957 decision of the Supreme Court of Canada in the *Farm Products Reference*.

In *R v. Chung Chuck* [1929] 1 D.L.R. 756, the British Columbia Court of Appeal considered the relationship between the criminal conspiracy provisions that were, at the time, included in the *Criminal Code,* and provincial legislation establishing a farm products marketing board. It was argued before the Court that the provincial legislation was invalid, on grounds that the operations created by the provincial legislation constituted an offence under the *Criminal Code* provisions relating to restraints of trade. The Court held there was no conflict between the *Criminal Code* provisions and the provincial legislation, as actions

conducted pursuant to the provincial legislation could not be said to “unduly” lessen or prevent competition. Nor, the Court held, was there any intent to act in this manner. Macdonald, C.J.A., writing for the Court stated: “it cannot be said that to operate under an Act of the provincial legislature validly enacted enabling producers to market the products of the soil by orderly methods and under such restrictions as will ensure a fair return, is to commit a criminal offence within the meaning of s. 498.”

Similarly, in *R v. Simoneau*, [1936] 1 D.L.R. 143, it was held that there was no conflict between provincial legislation appointing a dairy commission to establish a minimum price for milk in Quebec on the grounds that action taken pursuant to a valid provincial statute cannot be action contrary to the public interest and that in acting in accordance with its mandate the commission could not be said to be entering into an "agreement" as the term is used in anti-combines legislation. The Saskatchewan Court of Appeal also found, in *Cherry v. The King ex rel. Wood*, [1938] 1 D.L.R. 156, that there was no conflict between provincial milk marketing legislation and federal combines legislation. Martin, J.A. for the Court held at 162-3:

> … The elements essential to a prosecution under s. 498 are not present in actions taken by the Board for the purpose of exercising the powers conferred upon it by statute. Moreover, it surely cannot be successfully argued that a board, in exercising the powers conferred upon it by the Legislature and which are designed to regulate and control the production, processing and distribution of a commodity in a Province "having regard primarily to the interests of the public and to the continuity and quality of supply" renders itself liable to a prosecution under s. 498; …
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> …
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> There is no intent in the *Milk Control Act* to limit unduly the production, processing or distribution of milk or to unreasonably enhance the price thereof; there is no intent to restrict trade in milk to the oppression of individuals or to the injury of the public generally; on the contrary the object of the statute is to improve conditions in the production and sale of an important product with regard primarily for the interests of the public. I

> can therefore see no ground for the suggestion that the Act conflicts with the *Criminal Code*.

The Supreme Court of Canada reached the same conclusion in *Reference Re Farm Products Marketing Act* (1957) 7 D.L.R. (2d) 257. In this case, the Supreme Court of Canada was asked to rule on the constitutionality of a proposed amendment to the Ontario *Farm Products Marketing Act*. The purpose of that Act was, and remains today "to provide for the control and regulation in any and all respects of the marketing within the Province of farm products including the prohibition of such marketing in whole or in part." The Court dismissed the argument that the provincial agricultural scheme was inconsistent with federal anti-combines legislation. Kerwin, C.J.C. held that "it cannot be said that any scheme otherwise within authority of the Legislature is against the public interest when the Legislature is seized of the power and, indeed, the obligation to take care of that public interest". Rand, J. underscored that the provincial legislation "contemplates coercive regulation in which both the public and private interests are taken into account." The federal legislation, in contrast, dealt with voluntary combinations *against* the public interest. Locke, J. emphasized that the provincial scheme could not be said to operate to the detriment of, or contrary to, the public interest. "Rather, it is a scheme the carrying out of which is deemed to be in the public interest". He concluded that there was no conflict between the federal and provincial legislation.

The application of the RCD to marketing boards was considered again in the *Industrial Milk* case. Industrial milk is the term used for milk that is sold for use in derivative dairy products such as cheese, butter and yogurt. Federal and provincial legislative schemes prohibit the marketing of industrial milk by industrial milk producers except in accordance with a quota issued, in the case of B.C. producers, by the British Columbia Milk Board (the "Milk Board"). The Milk Board had refused to issue quota to the plaintiff, with the result that in order to be

able to produce and market industrial milk, the plaintiff was required to purchase quota from a farmer with existing quota rights, at considerable costs.

The plaintiff brought an action for damages caused by breach of the conspiracy provision of the *Combines Investigation Act* against the Milk Board, the Canadian Dairy Commission and a B.C. cooperative of milk producers. The defendants brought motions to strike the plaintiff's statement of claim on a number of grounds, including the ground that their actions were covered by the RCD and could not, therefore, be the subject of a claim for damages resulting from breach of the conspiracy provision of the *Combines Investigation Act*.

A brief description of each of the defendants and the source and nature of their regulatory powers is instructive. The defendant Milk Board was authorized by provincial statute to regulate milk produced for and marketed in intraprovincial trade in B.C. The Milk Board had also been delegated authority, by federal legislation, to regulate milk produced for interprovincial trade and export markets, including the implementation of provincial quotas for industrial milk, as established by federal-provincial agreement. The defendant Canadian Dairy Commission was established by federal legislation that authorized it to operate a federal subsidy scheme for milk and purchase excess milk product for export. The third defendant in the case was a cooperative of milk producers regulated by the Milk Board.

In holding that the motion to strike on the basis of the RCD was well-founded, Madam Justice Reed began by noting that in a series of previous cases, the Courts "have held that provincial marketing boards, when exercising authority conferred on them by provincial or federal legislation, cannot, in exercising that authority, be said to be committing an offence under section 32 of the *Combines Act*." Madam Justice Reed also noted that in the more recent decision, *Jabour v. Law Society of B.C.*, [1982] 2 S.C.R 307 ("*Jabour*"), the Supreme Court of Canada had held that a rule established by the Law Society

prohibiting advertising by lawyers was protected by the RCD, notwithstanding that the Benchers were not required to prohibit advertising by lawyers and, indeed, were not even expressly authorized to regulate advertising. Rather, the Benchers were simply empowered "to make rules that they deemed to be in the public interest". Madam Justice Reed concluded:

> In my view, the present case falls even more clearly within the established jurisprudence than the fact situation with which the courts had to deal in *Jabour*. In the present case, the Milk Board is authorized to appoint a committee composed of producers to advise it. In implementing an allocation system the Board is exercising authority specifically granted to it. It has explicit authority to allocate quotas and to prevent the marketing of milk by individuals who do not hold such quotas. There was no specific or explicit authority to prohibit advertising [in *Jabour*]. Thus, in that case, there was much more scope than in this, for argument that the *Combines Investigation Act* (now the *Competition Act*) might apply.

Madam Justice Reed also rejected the argument by the Plaintiff that the case could be distinguished from earlier decisions on the ground that the RCD applies only when the regulatory agency operates in the public interest stating:

> … I do not read the jurisprudence as giving the courts a mandate to review a provincial marketing board's decision in order to determine whether it is, as a matter of fact, really acting in the public interest. Rather, the jurisprudence, in my view, indicates that when such a Board is acting within its statutory mandate it is deemed to be acting in the public interest. Whether it is in fact doing so is a matter for the federal and provincial members of the respective legislatures, who have given the Boards the relevant authority. It is not a matter for the courts.

In the result, Reed, J. found that regulatory activities of the defendants did not establish a reasonable cause of action.

The *Industrial Milk* decision underscores two very important principles. First, public regulators acting within their statutory authority are deemed to act in the public interest. Second, in accordance with the decision of the Supreme Court of Canada in *Jabour*, general statutory authority to regulate in the manner in issue is sufficient to trigger the RCD; it is not necessary that the regulator be

required to regulate in the manner that it has chosen, or even be specifically authorized to so regulate.

These conclusions are not altered by and, indeed, are arguably reinforced by, the recent comments by the Supreme Court of Canada on the RCD in *Garland v Consumer's Gas Co.*, [2004] 1 S.C.R. 629. Although the Court held that the RCD could not be invoked in respect of a *Criminal Code* provision that did not include language that could be interpreted as exempting, from its scope, acts taken pursuant to provincial legislation, Iacobucci, J. writing for the Court, endorsed a broad application of the non-interference principle previously enunciated by Estey, J. in *Jabour.* In this regard, Iacobucci, J. wrote:

> Winkler, J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, 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. If there were *any* such indication, I would say it *should be interpreted*, in keeping with the above principle, *not to interfere with the provincial regulatory scheme.* … (emphasis added)

As the jurisprudence on agricultural marketing boards and the RCD amply demonstrates, the *Competition Act* provisions clearly permit such an interpretation. Agricultural marketing boards, acting in the public interest pursuant to their legislative mandate, cannot, for example, be said to be "agreeing" or "conspiring" to "unduly" lessening competition, to intend to injure competition, or to intend to engage in anti-competitive conduct.

The Supreme Court of Canada's support, in *Garland*, for a non-interference approach is not conditional on the existence of an "operational conflict". In particular Garland does not require that, for the RCD to apply, compliance with the regulatory regime must entail breach of the other law. Rather, it is a question of non-interference of the *Competition Act* with actions authorized, expressly or by implication, in regulatory schemes enacted in the public interest.

SPECIFIC COMMENTS ON THE BULLETIN

The Bureau's current approach to the RCD is summarized in the Bulletin as follows:

> Broadly speaking, the RCD is an interpretative tool developed by the courts to resolve apparent conflicts between two different laws. The Bureau's approach to the RCD is to determine where the Act and a statutory regulatory regime are in conflict. The RCD applies, and the Act becomes inoperative, *only where there is a clear operational conflict between the regulatory regime and the Act, such that obedience to the regime means contravention of the Act*. (emphasis added)

An operational conflict is further defined as a situation "where obeying one statute means disobeying the other." The Bulletin indicates that in assessing whether a conflict exists, the Bureau grants more deference to regulators than regulatees, because regulators are deemed to act in the public interest. Nevertheless, the Bulletin affirms that "an operational conflict between the regulatory regime and the Act must be demonstrated before the RCD will supplant the Act."

The Bureau also indicates in the Bulletin that it considers that the RCD extends to both the civil and criminal provisions of the Act.

The CFA agrees with the Bureau that the RCD applies to both civil as well as criminal matters.

The CFA also agrees with the view expressed in the Bulletin that public regulators, like marketing boards, are deemed to act in the public interest. Consistent with this, the CFA submits that the Bureau should presume that marketing boards are acting within their mandate unless determined otherwise by a court. The Bureau has no authority to determine that another regulatory

agency has exceeded its statutory mandate, or to second-guess the conclusions of the legislatures on the public interest.

The CFA is concerned, though, that the Bulletin takes an unduly narrow approach to the RCD by insisting that there be an operational conflict in order to invoke the doctrine. The requirement for an operational conflict is not consistent with the jurisprudence. As Reed, J. emphasized in the *Industrial Milk* case, the Supreme Court of Canada clearly held in *Jabour* that the RCD applied, notwithstanding that the regulator was not required to expressly engage in the conduct in issue. There was thus no "operational conflict" in the sense that the Benchers could have refrained from prohibiting advertising by Jabour, had they determined that such an approach was in the public interest. Any finding that the actions of the Benchers contravened the *Competition Act* would, however, clearly interfere with the regulatory regime and the associated determination of the Benchers, pursuant to their statutory mandate, that a prohibition on advertising by lawyers was in the public interest. Accordingly, the RCD applied.

As noted above, nothing in *Garland* alters the approach in *Jabour* and *Industrial Milk*. To the contrary, *Garland* supports a *non-interference* approach, where possible. Under this approach, the RCD is to be applied to achieve non-interference with a valid regulatory scheme unless the terms of the *Competition Act* and their constituent elements preclude such an approach.

In the circumstances, the CFA submits that the insistence, in the Bulletin, on the existence of operational conflict as a pre-condition to invoking the RCD, is inappropriate.

CONCLUSION

In conclusion, the CFA submits that it is essential that the Bureau give full weight to the RCD, as expressed in the jurisprudence, and not carve back its

reach through narrow interpretations. At its heart, the ascertainment of the boundaries of the RCD is an issue of legislative intent. Limiting the application of the RCD solely to “operational conflicts” is not consistent with legislative intent or the jurisprudence and threatens the ability of public regulators, such as agricultural marketing boards, to do the job they have been created to do.

The CFA thanks the Bureau for the opportunity to comment on this important matter.