THE REGULATED CONDUCT DEFENCE: TIME FOR LEGISLATIVE ACTION?

By Tim Kennish & Janet Bolton[1]

I. INTRODUCTION

When two Quebec-based broadcasters decided in late 2001 to dispute the Competition Bureau's jurisdiction over their merger in the Federal Court on the basis that review and approval of a merger among broadcasters by the Canadian Radio-television and Telecommunications Commission ("CRTC") effectively precludes concurrent review by the Commissioner of Competition ("Commissioner") under the *Competition Act* ("CA")[2], many in the private competition law bar cheered them on. Finally, it was thought, here was a case that would determine the scope of the jurisprudential doctrine known as the "regulated conduct defence" ("RCD")[3] in a merger context. Not only that, but perhaps the Federal Court would vindicate the contention frequently asserted that the CA has no application where a merger of regulated parties is subject to review and approval by a specialized industry regulator, and where regulation will prevent the merging parties from exercising market power. The case also put squarely into question the status of the 1999 "interface" agreement between the Competition Bureau ("Bureau") and the CRTC, in which it was asserted that the CRTC and the Bureau have concurrent jurisdiction to review mergers.

It is not surprising then that many of these same practitioners were disappointed when the two broadcasters, Astral Média Inc. and Télémédia Radio Inc., entered into an eleventh-hour consent agreement with the Commissioner settling their dispute in August 2002.[4] As a result, the Federal Court's decision (understood to have been written and in the process of being translated at the time settlement was reached) was never released. Thus denied this much awaited clarification of the law concerning the proper scope of the RCD, a legal doctrine which is based on jurisprudence that is both dated and difficult to reconcile, many wondered how long it would be before another opportunity might arise to set matters straight in this area.

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1 Tim Kennish is a partner of Osler, Hoskin & Harcourt LLP located in its Toronto office where he practices primarily in the competition law field. Janet Bolton is an associate lawyer at Osler, Hoskin & Harcourt LLP located in its Toronto office where she practices primarily in the competition law field. A version of this paper was presented at the 2003 Competition Law Invitational Forum held at Langdon Hall in Cambridge, Ontario on May 1-2, 2003.

2 See joined cases T-2256-01 and T-2257-01, *Astral Média Inc. v. The Commissioner of Competition* and *Télémedia Radio Inc. v. The Commissioner of Competition* (F.C.T.D.).

3 Depending on the context, the regulated conduct "defence" is sometimes better described as the regulated conduct "exemption" or "exclusion". In the interests of consistency with the language applied by the Competition Bureau in its RCD Bulletin, we use the phrase "regulated conduct defence" (RCD) throughout this paper.

4 News Release, "Competition Bureau resolves concerns in Astral-Télémédia case", September 3, 2002.

As things turned out, it was not a very long wait. In December, 2002, without prior announcement or any stakeholder consultation, the Bureau issued its *Information Bulletin on the Regulated Conduct Defence* (the "RCD Bulletin"). In just over three concise pages and in a seemingly straightforward manner, the RCD Bulletin set out the Bureau's interpretation of issues relating to enforcement of the RCD.

In this paper, we argue that the Bureau's RCD Bulletin is an overly simplistic statement of the law in this area, and that it is in many respects inconsistent with the jurisprudence that established the RCD. Moreover, we do not believe, in retrospect, that even if the *Astral / Télémedia* case had proceeded to judgment, it would have provided more than the most limited guidance on the proper scope of the RCD. Indeed, we have concluded that neither simply continuing an *ad hoc* judicial approach (e.g. the *Astral / Télémédia* case) nor pursuing an administrative / enforcement approach (e.g. the RCD Bulletin) will be sufficient to bring about needed clarification of the law in this area. In our view, given the significant difficulties involved in attempting to reconcile the existing and frequently conflicting body of case law that gave rise to the RCD with the structure and content of the modern CA nothing short of legislative action is required to clarify the scope and application of the RCD.

II. THE REGULATED CONDUCT DEFENCE

The need for clarification of the law in the area of regulated conduct is apparent when one examines the historical development of the RCD and considers the very significant questions which remain undecided under the existing case law.

A. Development of the RCD in the Jurisprudence

The RCD first arose in the context of a series of constitutional challenges to the validity of the actions of various provincial marketing boards (e.g. *R. v. Chung Chuck*[5]; *Reference re: Farm Products Marketing Act*[6]; *R.* v. *Simoneau*[7] *R.* v. *Cherry*[8]; *Ontario Boys' Wear Ltd. v. Advisory Committee*[9]) at a time when Canadian competition or anti-combines legislation was purely criminal in nature. In each of these cases, it was argued that the powers exercised by provincial marketing boards in regulating the prices and volumes of various products contravened criminal prohibitions on price fixing or cartel behaviour contained in applicable anti-combines legislation (the *Criminal Code* and, later, the *Combines Investigation Act* ("CIA")). However, in each case the court rejected that argument and ruled that compliance with valid provincial legislation could not amount to *criminal* behaviour within the meaning of federal anti-combines legislation. Among the rationales cited by the courts in these early cases were statements that conduct mandated or authorized by provincial law could not be contrary to the public interest, that such conduct could not be "voluntary" for criminal law purposes, and that adherence to a validly enacted provincial scheme could not amount to an intent to limit competition "unduly" as

5 [1929] 1 D.L.R. 756 (B.C.C.A.), aff'd [1930] 2 D.L.R. 97 (J.C.P.C.).

6 [1957] S.C.R. 198.

7 [1936] 1 D.L.R. 143, 65 C.C.C. 19 (Que. Ct. Sess).

8 [1938] 1 D.L.R. 156, 69 C.C.C. 219 (Sask. C.A.).

9 [1944] S.C.R. 349.

prohibited under the applicable anti-combines legislation. All of these early cases involved allegations of anti-competitive conduct by the regulatory body itself.

The first case to examine the conduct of private actors in a regulated industry was that of *R. v. Canadian Breweries Ltd.*[10] In this case, the accused company was charged pursuant to section 32(1) of the CIA as having been a party to the formation or operation of a combine by participating in a merger, trust or monopoly operated to the detriment of the public interest (a criminal offence at the time). Between 1930 and 1953, the accused had acquired 23 other breweries with the result that by 1958 its sales allegedly accounted for more than 60% of the total sales of beer in Canada. The Crown contended that these mergers had limited price competition. The defence argued that the fact that the Liquor Control Board of Ontario set the prices of beer and liquor shielded the beer industry from the reach of the CIA. In assessing the legality of the impugned mergers, McRuer J. of the Ontario High Court concluded that the application of the CIA was excluded to the extent that regulatory powers had been exercised to remove particular fields of activity from the competitive sphere. He relied on the "public interest" rationale for the defence, writing (at pp. 629-630):

> When a provincial legislature has conferred on a commission or board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Act with respect to the operation of a combine, I think it must be shown that the combine has operated, or is likely to operate, so as to hinder or prevent the provincial body from effectively exercising the powers given to it to protect the public interest. If the evidence shows that by reason of a merger the accused is given a substantial monopoly in the market, this onus, in my opinion, would be discharged.
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> There may, however, be areas of competition in the market that are not affected by the exercise of the powers conferred on the provincial body in which restraints on competition may render the operations of the combine illegal.

The leading "modern" case on the scope of the regulated conduct defence is *Jabour v. Law Society of British Columbia*[11] (the "*Jabour*" case), in which the Supreme Court of Canada held that the actions of a provincial law society in prohibiting advertising by lawyers, were exempt from the scrutiny of the CIA. The provincial regulatory statute did not empower the Law Society to ban advertising as such, but it did give the Law Society a broad mandate to define and to punish conduct unbecoming of a member. The Supreme Court held that this general authorization provided a sufficient basis for the advertising ban adopted by the Law Society (i.e. the Law Society had the necessary authority to take the action it did) and held that the CIA did not apply to the Law Society in the circumstances of that appeal. As with the earlier cases, the judgment in *Jabour* was specifically premised on the criminal nature of the prohibitions contained in the CIA and the idea that the actions of the Law Society acting within its authority could not be said to be contrary to the public interest and therefore could not amount to criminal acts. In this regard, the Court noted (at p. 37):

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[10] [1960] O.R. 601 (Ont. High Court of Justice). Although it was only a decision of the Ontario High Court, *Canadian Breweries* is significant because it was cited with approval by the Supreme Court of Canada in *Jabour, infra.*

[11] (1982), 137 D.L.R. (3d) 1 (S.C.C.).

> In R. v. Can. Breweries, supra (p. 605), the court proceeded on the basis that the word "unduly" in s. 32 connotes substantially the same meaning as the more general words in the same statute "operated or is likely to operate to the detriment or against the interest of the public". Even the 1975 amendments to s. 32, by the addition of s-s. 1.1, did not remove "unduly" from the operative provision, s-s. (1) of s. 32. So long as the CIA, 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 scheme.

The judgment of the Federal Court, Trial Division in *Industrial Milk Producers Association et al. v. Milk Board et al.*[12] (the "*Milk"* case), also provides a useful review of the scope of the regulated conduct defence. In that case, the Court struck out as disclosing no reasonable cause of action a civil claim under what is now section 36 of the CA brought by a group of milk producers contesting federal and provincial restrictions on milk marketing in British Columbia. The civil claim alleged a conspiracy by the British Columbia Milk Board and the Canadian Dairy Commission to restrict competition unduly in the supply of milk by, *inter alia*, fixing and allocating milk quotas in the exercise of its regulatory powers under applicable federal and provincial legislation.

In her judgment, Reed J. noted that in fixing quotas the Milk Board was exercising authority specifically granted to it, and concluded that the regulated conduct defence applied on the facts. She also stipulated the following important caveat with respect to the scope of the defence (at p. 726):

> It is not the various industries as a whole which are exempt from the application of the *Competition Act* but merely activities which are required *or authorized* by the federal or provincial legislation as the case may be. If individuals involved in the regulation of a market situation use their statutory authority as a springboard (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statutes then such individuals will be in breach of the *Competition Act.*
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> [emphasis in original]

Interestingly, this is the first case where any reference was made to the possibility of applying the RCD in the context of a *federal* regulatory regime. However, it is not strong authority for the application of the RCD in the federal sphere as the judgment focussed on the actions of the provincial Milk Board and did not address the constitutional law/division of powers issues of the earlier cases.

One further case that is frequently cited as important in this area is the decision of the Quebec Court of Appeal in *Alex Couture Inc. v. Canada (Attorney-General).*[13] This case involved an application in the Competition Tribunal made by the Director of Investigation and Research (now the Commissioner) challenging a series of mergers in the animal meat rendering business. The respondents countered by asserting that the CA did not apply to the rendering industry since it was regulated under the Quebec *Agricultural Products, Marine Products and Food Act* and the

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[12] (1988) 47 D.L.R. (4th) 710 (F.C.T.D.).

[13] (1991), 38 C.P.R. (3d) 293 (Que. C.A.), leave to appeal to the Supreme Court denied [1992] 2 S.C.R. at page v.

federal *Farm Products Marketing Act*. The Court (per Rousseau-Houle J.) emphasized that the RCD did not create an exemption from the CA for regulated industries as a whole, and outlined the basis upon which of the regulated conduct defence may properly be applied to resolve conflicts between regulatory legislation and the CA, writing (at p. 328):

> In the absence of express or implicit exemptions, the regulated industry exemption may, none the less, be advanced by a person charged under the Competition Act where the provincial legislation relied on authorizes the action for which he is charged. The actual legal basis of this exemption is the rule of interpretation resulting from the division of powers proper to a federal system; the rule is that 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.

The Court went on to state that it was unnecessary to determine whether the defence applied in that case, since there was no incompatibility between the CA and the provincial legislation, which only incidentally affected competition. Interestingly, the Court did not discuss the question of whether the RCD applied to the civil reviewable practices provisions of the CA, or to the merger provisions in particular, even though these were unresolved issues at the time (and remain so today, as discussed below).

Since the decision in *Couture*, only a handful of cases have dealt with the RCD, with the majority of them being decided by provincial superior courts, and none at the Supreme Court of Canada level. These cases have applied varying incarnations of the RCD in different fact situations. For example:

- In *Law Society of Upper Canada v. Canada (Attorney General)*[14] (the *"LSUC"* case), the Ontario Court (General Division) held that the RCD applies to civil reviewable practices under the CA, and that the Director of Investigation and Research (now the Commissioner) had no jurisdiction to conduct an inquiry into allegations that the Law Society's mandatory insurance scheme for lawyers contravened the abuse of dominance provisions (ss. 78, 79) or the tied selling / exclusive dealing provision (s. 77).

- The Ontario High Court in *Waterloo Law Association v. Attorney General of Canada*[15] concluded that members of the Waterloo Law Association who had acted in accordance with a voluntary minimum fee schedule adopted by the association could not rely on the RCD, stating that the provincial Law Society would have had to exercise its authority to require or at least authorize reliance on the fee schedule in order for the defence to apply.

- In *R. v. British Columbia Fruit Growers' Association*[16] the British Columbia Supreme Court refused to apply the RCD to an agreement among fruit growers, packers and a central selling agency, where the regulator had not exercised its powers to control the operation of fruit packing houses.

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14 (1996), 67 C.P.R. (3d) 48 (Ont. Ct. Gen. Div.).

15 (1986) 35 D.L.R. (4th) 751 (Ont. High Ct.).

16 (1985), 11 C.P.R. 183 (B.C.S.C.).

- In *R. v. Charles*[17], the Saskatchewan Provincial Court noted that the exclusive marketing rights given to an administrative marketing board under the *Canadian Wheat Board Act* were not inconsistent with the CA, "which has always exempted 'regulated conduct' from its application" (at p. 10).

- In *Garland v. Consumers' Gas*[18], the Ontario Court of Appeal affirmed the view that the RCD did not apply outside the competition law context, specifically in regard to an order by a provincial regulator leading to private action in conflict with the *Criminal Code*.

In addition, the Competition Bureau has applied the defence in at least one recent case involving the issuance and administration of taxi licenses in the City of Toronto. In its May 2000 press release respecting this case, the Bureau noted that the City of Toronto is authorized to control the number of taxi licenses being issued, and wrote:

> The regulated conduct defence applies when a specific activity is authorized or carried out in keeping with valid regulation; such activity is deemed to be in the public interest and cannot be found to be in violation of the *Competition Act*. The defence applies as long as the regulator has exercised its authority and has not been frustrated in its operations by the conduct or activity in question.[19]

B. What the case law tells us about the proper scope of the RCD

The jurisprudential basis for the RCD consists of approximately two dozen cases spanning more than 70 years which have considered various iterations of competition legislation up to and including the current CA. This jurisprudence has dealt with the application of federal competition legislation in the context of a variety of provincial regulatory regimes, in cases dealing with conduct of both the regulators and of private parties. Many of these cases – and most significantly the *Jabour* case, which is the only Supreme Court of Canada case to have applied the RCD in almost 50 years – have premised the very existence of the RCD on the fact that the applicable competition law was criminal in nature. Accordingly, it is not surprising that this body of cases leaves many important questions unanswered. For example:

1. *We do not know if the RCD applies in the face of a federal regulatory regime*

There is no strong jurisprudential authority for applying the RCD in the context of a federal regulatory regime. As noted above, in the *Milk* case the RCD was applied where the conduct of both a provincial and federal regulator was at issue; however, the focus of the judgment was on the provincial regulator's actions and the court did not address the rationale for expanding the defence into the federal sphere. In the more recent case of *Society of Composers, Authors and Publishers*[20], the Federal Court found that the RCD applied to shield the actions of the federal Copyright Board from Competition Act scrutiny; however, the Court did not address the scope of the defence or the prior jurisprudence in its ruling.

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17 [1999] S.J. No. 763 (Sask. Prov. Ct.).

18 (2001), 57 O.R. (3d) 127 (Ont. C.A.), leave to appeal to the Supreme Court granted October 17, 2002.

19 News Release, "Regulated Conduct Defence Applies to Issuance of Taxi Licenses – Allegations of Conspiracy Unsubstantiated" (May 2, 2000).

20 (1992), 45 C.P.R. 346 (F.C.T.D.).

When one examines the jurisprudential history of the RCD, it is clear that the doctrine was developed in order to resolve or avoid conflicts between the federal competition laws and *provincial* regulatory legislation. This view is reinforced by a reading of the 2002 judgment of the Ontario Court of Appeal in *Garland v. Consumers' Gas*, the most recent appellate court decision to examine the RCD. In describing the defence, the Court wrote:

> The cases applying the "regulated industries defence" have determined that there is essentially no conflict between the operation of *federal* anti-combines legislation, which encourages general competition, and *provincial* legislation regulating a particular industry. The operation of each of the legislative regimes has been held to be clearly in the public interest. The regulated industries cases do not deal with a situation where a *provincial* regulatory authority made an order which results in a private company acting in a way that violates the *Criminal Code.*
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> [emphasis added]

Under ordinary principles of statutory interpretation, where there is a conflict or inconsistency between a federal and a provincial law, the federal law is paramount to the extent of the inconsistency.[21] The line of cases establishing the RCD has carved out a somewhat anomalous and limited exception to the normal principle of federal paramountcy by interpreting federal competition laws as implicitly permitting anti-competitive practices that are authorized by provincial law.[22] In effect, the Canadian courts in these cases have created a set of principles to "read down" the scope of the CA so as to prevent clashes with otherwise valid provincial regulatory schemes.

By contrast, where there is conflicting or inconsistent legislation passed by the same level of government, the rules of federal paramountcy are irrelevant. If the inconsistency cannot be resolved and the two laws cannot stand together under any reasonable interpretation, the doctrine of implied repeal applies with the result the later in time legislation is deemed to repeal the earlier legislation.[23] Where the issue is not inconsistent laws but rather inconsistent administrative action by tribunals empowered by the same level of government, the Supreme Court of Canada has developed a specific approach to resolving such conflicts. In *Shaw Cable Systems (B.C.) Ltd. et al. v. British Columbia Telephone Co. et al.*[24] (the "*Shaw Cable"* case), the Supreme Court was called upon to resolve a direct conflict between the decisions of two administrative tribunals: a federal labour arbitration decision interpreting a collective agreement as requiring a union to install cables on support structures of the British Columbia Telephone Company ("BCTel"), and a decision by the CRTC permitting cable licensees to install such cables on BCTel's support structures.

The approach adopted by the Supreme Court of Canada in *Shaw Cable* involved determining first whether a true "operational conflict" existed between the two administrative decisions. An operational conflict exists where compliance with the decision of one tribunal would necessarily

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21 P. Hogg, *Constitutional Law of Canada* (Toronto, Carswell: 1997, 2002 – Rel. 1), chapter 16, "Paramountcy".

22 P. Hogg, *supra.* at 16-6, note 24.

23 P. Hogg, *supra.* at 16-1 to 16-2.

24 (1995), 125 D.L.R. (4th) 443 (S.C.C.).

involve a violation of the other tribunal's decision. The Court stated that once a true operational conflict is found to exist, judicial intervention to resolve the conflict is justified, and that such resolution should be based upon a consideration of a number of factors including: (1) the legislative purpose of each administrative tribunal (some tribunals trump others by their very nature); (2) whether each tribunal's decision is central to its purpose (the more central the decision, the more reason for it to prevail); and (3) the degree to which each tribunal fulfils a policy-making role (policy-making tribunals trump other decision-makers). On the facts, the majority of the Supreme Court found that the CRTC's decision should take precedence due to its broad policy-making mandate.

The decision of the Supreme Court of Canada in *Shaw Cable* provides insight into how Canadian courts are likely to address potential conflicts between the CA and other *federal* legislation. An operational conflict of the nature discussed in *Shaw Cable* might exist where compliance with a regulatory scheme necessitated a violation of the CA (for example, if a federal regulator prohibited parties from supplying products to a particular customer, it would be inappropriate for compliance with such prohibition to be the basis for an action under the refusal to deal provisions of the CA). However, it is not clear that the *Shaw Cable* case has any impact on the approach to resolving conflicts between federal and provincial legislation, since the majority of Supreme Court explicitly approved the application of the traditional doctrine of federal paramountcy to federal/provincial conflicts involving administrative tribunals (see p. 462, per L'Heureux-Dubé J.).

The RCD will continue to represent a narrow exception to the paramountcy doctrine in the federal / provincial context. Although as a matter of policy we believe that the RCD should also apply to shield federal regulatory action from CA scrutiny, the current case law does not provide authority for the application of the doctrine in such a context and for this reason, we believe that legislative action is necessary to ensure that there is protection for federal regulators and entities subject to federal regulation.

2. *We do not know with certainty that the RCD applies to civil reviewable practices under the CA, including mergers*

The case that is widely cited as establishing the principle that the RCD is available where the conduct at issue is a reviewable practice, rather than a criminal matter, is the 1996 *LSUC* case. This was a decision of the Ontario Court (General Division), and the judgment was not appealed. Prior to that case, the Director (now the Commissioner) had taken the position on a number of occasions that he did not accept that the RCD applied to civil matters.[25] However, by the time of the hearing the Director had apparently altered his view, since the Court noted that all parties had agreed that the RCD was available in the civil reviewable practices context "notwithstanding that the defence developed with respect to the Combines Investigation Act, whose quasi-criminal provisions have largely been replaced by civil proceedings for the enforcement of the *Competition Act*" (at p. 58). As such, the Ontario Court did not examine the scope of the RCD or its case history in any detail. By contrast, in *Jabour* the Supreme Court explicitly noted that the rationale underlying the application of the RCD in that case lay in the fact that the relevant CIA provision in that appeal was styled as a criminal prohibition. In particular, the Supreme Court in

[25] D. Mercer, Paper presented to the 1995 Canadian Bar Association Annual Conference on Competition Law at 5, citing the Yellow Pages and NBTel inquiries made by the Competition Bureau.

Jabour noted that while conduct authorized or mandated by provincial legislation cannot be contrary to the public interest, criminal law only punishes conduct which is contrary to the public interest. The criminal origins of the defence were also emphasized by the trial judge in the recent *Garland v. Consumers' Gas* case (see para 29 and the reference to *Jabour* in the trial judge's decision).

While one might argue that a contravention of one of the CA's reviewable practice provisions is also contrary to the public interest, it is not clear that this is "public interest" in the criminal law sense of the term; *i.e.*, public peace, order, security, health, morality.[26] As well, the term "unduly", which the Supreme Court in *Jabour*[27] equated with the term "public interest", does not appear in the CA's reviewable practices provisions. Since the constitutional basis for our modern CA is the federal government's trade and commerce power[28] (whereas the criminal law power formed the basis for earlier legislation) and since criminal penalties are at issue only in some cases, it is more difficult to justify a doctrine that provincial regulatory legislation overrides otherwise paramount federal law in the context of the modern CA. Moreover, some of the other rationales given in the early cases establishing the RCD – in particular the notion of lack of *mens rea* or lack of voluntariness where there is regulatory compulsion – do not fit quite so neatly with the civil reviewable practices provisions of the CA as they do with the criminal law framework. At a minimum, there is less than compelling judicial authority for the proposition that the RCD applies to such reviewable practices.

Similarly, the RCD has been successfully applied in the merger review context only once[29] – in the 1960 *Canadian Breweries* case[30] -- and does not easily fit within the framework of a merger review under the modern CA. In particular, while it is very common for industry regulators to possess a power to review and approve a merger, it is not very often that the regulator actually compels or mandates a merger. As such, to the extent that the case law underlying the RCD requires a degree of regulatory compulsion, that compulsion is generally absent in the merger review context.[31]

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26 *Magazine Reference* case, [1949] S.C.R. 1 at 50.

27 Interestingly, to the extent that proposed reforms to the CA could see the creation of a *per se* conspiracy offence for certain types of anti-competitive agreements (e.g. price fixing agreements), pursuant to which there would be no requirement to show an undue lessening of competition, it may be argued that the RCD would not be available to persons accused of committing such an offence, in light of the importance given to the term "unduly" in *Jabour*.

28 *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641.

29 *Alex Couture* also involved a merger; however, in that case the Court found that it was not necessary to apply the RCD.

30 The *Canadian Breweries* case involved a merger. However, that case pre-dated the modern administrative review mechanisms in Parts VIII and IX of the CA and arose at a time where mergers were subject to criminal sanction under the CIA. We do not regard this case as standing for the principle that the RCD applies to mergers under the modern CA.

31 But where a merger has been certified to be in the public interest by the Minister of Finance (mergers of federally-regulated financial institutions) or by the Minister of Transport (mergers of air transportation undertakings), the Competition Tribunal has no jurisdiction to make an order under section 92 of the CA in respect of the merger: CA, s. 94.

3. *We do not know what degree of regulatory authorization is required to trigger the RCD*

Where cases have involved the potential application of the CA to actions of the regulatory body itself, the jurisprudence indicates that conduct of the regulator which is required or authorized by valid provincial regulatory legislation enjoys the protection of the RCD. However, the extent of "authorization" required is not entirely clear. In *Jabour*, the Supreme Court of Canada found that the Law Society's general mandate to set standards for the legal profession gave it sufficient authority to regulate advertising and the RCD applied to exempt from the application of the CA its actions in regulating (in that case actually prohibiting) advertising by lawyers. By contrast, in *Milk*, the Federal Court noted that the Milk Board had "explicit authority" to engage in the conduct under review and implied that the RCD would not apply absent such explicit authority.

Where cases have involved the potential application of the CA to actions by the persons subject to regulation (in the Bureau's terms, "regulatees"), the applicable standard is again not clear from the case law. In *Canadian Breweries*, the Court held that the RCD applied because there was price regulation in place which meant that a voluntary merger of private parties would not result in a lessening of price competition. There was no determination that conduct (i.e. the merger) had to be coerced or mandated under the legislation. In *Alex Couture*, another case where the conduct of a "regulatee" was at issue, the Court considered that it was not necessary to determine whether the RCD applied. Therefore, although it is frequently assumed that regulation must require or mandate activity in question if it is to enjoy the protection of the RCD, there is not clear judicial authority on that point.

4. *We do not know if the RCD is an exemption or a defence*

The courts in a number of cases (e.g., *Milk, Alex Couture*) have been at pains to emphasize that the RCD does not create a general exemption from the CA for industries subject to regulation. For this reason, and because most of the litigated cases have involved a defence to allegations of anti-competitive conduct, the RCD is described by many commentators, and by the Competition Bureau in the RCD Bulletin, as a "defence". However, as noted previously, the RCD is at its heart a rule of legislative interpretation that "reads down" the CA so that it does not prohibit, or implicitly permits, anti-competitive actions or practices that are authorized by provincial law. In this context, it may be more appropriate to refer to the RCD as a regulated conduct exemption or exclusion.[32]

While this may seem to be merely a question of semantics, the distinction between regulated conduct being seen as an exemption and being considered merely as a defence is material in the context of pleading a case. If the RCD is an exemption, then there is no need for an accused or respondent to defend on the merits of the case; it may be pleaded as a jurisdictional issue from the outset and, if successfully invoked at that stage avoids any need otherwise to put in a defence. In most of the decided cases, the RCD was in fact pleaded as a preliminary matter before trial of the substantive issues.

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[32] On this point see G. Murphy, "Is it Time to Rebrand Canada's Regulated Conduct Defence?" [2001] E.C.L.R. 208.

C. Astral / Télémédia

Would the *Astral / Télémédia* case have resolved any of the open questions respecting the scope of the RCD? We can never be certain of the answer to this question; however, we can perhaps make an educated guess as to what the probable result would have been in that case. In doing so, we assume that the judges of the Federal Court would avoid the jurisprudential morass underlying the RCD if there was an opportunity to decide this case without referring to this jurisprudence. And quite conveniently for the Federal Court, the 1995 judgment of the Supreme Court in *Shaw Cable* might have provided just such an opportunity.

As noted above, *Astral / Télémédia* involved a merger of two media companies that was subject to concurrent review and approval by the CRTC, a federal body. The transaction was approved by the CRTC in April 2002, with certain conditions. The *Broadcasting Act*, pursuant to which the CRTC derived its power to approve the merger transaction, fosters a number of public policy goals (e.g. fostering Canadian ownership and control, promoting Canadian content and Canadian cultural diversity) that can be at odds with market-driven competition law principles. By virtue of its licensing powers, the CRTC has and exercises the authority to regulate competition by determining how many and which competitors should be permitted to compete in providing a particular service and in establishing license terms which determine aspects of the conduct of approved competitors. The CRTC has also taken the view that:

> Concentration of ownership within the broadcasting system is not itself necessarily of concern, provided that there continues to be an effective degree of diversity of ownership and of programming sources to ensure that the objectives of the [Broadcasting] *Act* are met. Today's highly competitive communications environment in every market as well as the high costs and risks involve dictate that the ownership structure must undoubtedly be composed of broadcasting holdings of various sizes, including larger entities with larger pools of resources, which are strong enough to compete with foreign competition and have the capacity to produce Canadian programming of competitive quality.[33]

Arguably, to the extent that the CRTC approved the Astral / Télémédia merger as part of its mandate to regulate and shape the broadcasting industry, any decision by the Competition Tribunal to block the merger or require divestitures would be in conflict with the decision of the CRTC.

Where there is a potential for "operational conflict" between the decisions of two federal administrative bodies (the CRTC and the Competition Tribunal), *Shaw Cable* (a case which did *not* involve a conflict with the CA) sets out a framework for resolving the inconsistency. Arguably, on the application of the *Shaw Cable* criteria, the more specific policy-making mandate of the CRTC would prevail over the Bureau's more general mandate respecting competition law. Moreover, even if the operational conflict test was not met (e.g., it would be possible to comply with the decision of both the CRTC and the Tribunal by not merging), recourse to other principles of interpretation for resolving inconsistent or apparently conflicting actions by tribunals at the same level of government could be made. In any event, regardless of the result, it would not strictly speaking be necessary for the Federal Court to have recourse to the jurisprudence respecting the RCD in order to resolve the dispute in *Astral / Télémédia.*

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[33] CRTC Public Notice 1992-42, Assessment of the impact of the benefits test at the time of transfers of ownership or control of broadcasting undertakings (15 June 1992).

III. THE RCD BULLETIN

As should be apparent from the prior discussion, the case law underlying the RCD is not only not entirely consistent but it also leaves many key questions respecting the scope of the RCD unanswered. Against this backdrop, the Bureau took on what can only be described as a highly challenging task in attempting to craft an Information Bulletin that would set forth a coherent enforcement approach to the RCD. Although the RCD Bulletin does not, in our view, do that (we would tend to characterize it as being more in the nature of a regulatory "wish list" than a statement of the existing law), in undertaking this task the Bureau has effectively highlighted the difficulty of enforcing a doctrine whose margins are not clear to regulators, practitioners, "regulatees" or even judges!

At first blush, the RCD Bulletin is deceptively simple. The Bureau refers to the case law underlying the RCD and notes that the courts have found that "conduct that is specifically authorized by a regulatory body exercising its authority under validly enacted legislation cannot be found in contravention of the [CA]". It then describes how it applies the RCD in practice, noting that the first step is to determine whether there is a "clear operational conflict" between the CA and the regulatory legislation, meaning that obeying one statute means disobeying another. Where such a conflict exists, the Bureau will consider whether the party whose conduct is at issue under the CA is a regulator (in which case it will be given a degree of deference) or a regulatee (in which case the Bureau will find that the RCD applies only if the conduct at issue was mandated or required by the regulator). The Bureau then sets out its enforcement approach to several specific issues. Among other things, the Bureau is of the view that the RCD applies to federal and provincial regulators, and to the criminal and civil provisions of the CA. The RCD Bulletin states that the activities of self-regulatory bodies are subject to greater scrutiny (and by implication are less likely to enjoy protection under the RCD) than other regulators. It is also noted that the RCD can only be invoked if the conduct complained of is "grounded in" a statute or regulations.

As we said, the RCD Bulletin is commendably succinct. However, peel back its layers to examine the Bureau's approach in light of the jurisprudence underlying the RCD, and we start to encounter difficulties. First and foremost, the "operational conflict" standard adopted by the Bureau seems to be misplaced. None of the cases where the RCD has been applied[34] have required that there be an operational conflict between the CA (or its precursors) and the regulatory legislation in order for the doctrine to apply. Indeed, as noted above the RCD is a principle of statutory interpretation pursuant to which the CA has been "read down" so that it does not apply to conduct that is the subject of provincial regulation, in order to *avoid* conflicts between federal and provincial laws. The "operational conflict" standard appears to derive from the *Shaw Cable* case, which dealt with conflicts between decisions by two federal regulators (and did not involve the potential application of the CA) and does not clearly fit with the RCD in the context of resolving inconsistencies between federal and provincial legislation. At the very least, even if it does no harm, the use of a "clear operational conflict" standard will further complicate

[34] The notion of conflict was referred to in *Alex Couture*; however in that case the Court stated that there was no conflict and no need to look at whether the RCD applied as both the federal and provincial laws could stand together.

the enforcement of a doctrine that is already very difficult to apply. Moreover, it is significant that in previous public statements respecting the scope of the RCD[35], the Bureau made no reference to a preliminary "conflicts" test for application of the RCD. In those prior statements, the Bureau has generally described "four necessary elements or factors that must be met before the RCD [regulated conduct defence] will be accepted by the courts", as follows:

> These [the factors] are: (i) the relevant legislation must be validly enacted; (ii) the activity or conduct in question must not only fall within the scope of the relevant legislation but must be specifically authorised; (iii) the authority of the regulator is exercised (not mere tacit approval or acquiescence); and (iv) the activity or conduct in question has not frustrated the exercise of authority by the regulatory body.[36]
>
> [emphasis added]

It is significant that the Bureau in the RCD Bulletin does not enumerate these same factors, which arguably more accurately reflect the jurisprudence in this area, than the criteria it now appears to be relying on.

The RCD Bulletin is also, in our view, unduly narrow in regard to the approach it appears to be taking towards self-regulatory bodies. The *Jabour* case, which is the only (relatively) recent Supreme Court of Canada case respecting the scope of the RCD, the Court exercised substantial deference in determining that the Law Society of British Columbia had sufficient authority to regulate advertising based on its general mandate to establish standards for the legal profession and punish conduct unbecoming of a member. Estey J. in that case emphasized that there were a number of reasons why self-regulation made sense for lawyers and that the mode of regulation (i.e. self-regulation vs. provincially controlled regulation) was in the discretion of the provincial legislature. We believe that a similar degree of deference to self-regulatory bodies should be applied by the Bureau in its enforcement activities.

The RCD Bulletin also takes a narrow view to the issue of the scope of regulation – it states that regulatory action must be "grounded in" a statute or regulation in order for the RCD to apply. It is not clear whether this means that governmental executive action – e.g. an order-in-council – could not be the subject of the defence. Similarly, is the order of an administrative tribunal with a degree of discretionary power "grounded in" a statute, or regulation?

On the other hand, the Bureau has taken a very broad view of the RCD in other respects. First, it accepts without question that the RCD may be relied upon by *federal* regulators or "regulatees". As noted previously, it is not clear that the RCD applies in the federal / federal context. It is more likely that the criteria for resolving inconsistencies between federal legislation/ regulatory action and the CA (e.g., implied repeal, or the criteria set out by the Supreme Court in *Shaw Cable*) apply in the federal / federal context.

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[35] The RCD Bulletin explicitly supersedes any and all prior statements by the Bureau respecting the scope of the RCD.

[36] D. Mercer, Paper presented to the 1995 Canadian Bar Association Annual Conference on Competition Law, pp. 1-2. These same factors were reiterated in an address given by Gilles Ménard, then Deputy Director of Investigation and Research (Civil Matters), to the Canadian Institute 1997 Canadian Resale/IXC Industry Congress (17 February 1997).

In addition, the RCD Bulletin provides that the RCD applies to civil reviewable practices. As noted previously, this proposition is not strongly supported in the case law. The Bureau's acknowledgement in the RCD Bulletin that the RCD applies to mergers appears to vindicate arguments that practitioners have been making for years in merger cases. However, when we examine the RCD Bulletin more closely, it would appear that the circumstances where parties are able successfully to invoke the RCD in the merger context will be few and far between. In particular:

- It is difficult to conceive of a merger case in which there would be a "clear operational conflict" between regulatory legislation and the CA such as is required in the RCD Bulletin in order to rely on the defence. In the merger context, such a conflict would exist only if a regulator *mandated* a merger and it would otherwise be prohibited under the CA. Very few, if any, mergers are actually *mandated* by legislation or regulation (even where the industry regulator has the power to approve a merger). However, most (if not all) mergers arise from a private decision to combine operations, so it is hard to see much scope for the application of the "clear operational conflict" standard in regard to mergers.

- In the same vein, the RCD Bulletin indicates that the RCD does not apply where the conduct of a "regulatee" is voluntary; i.e. not mandated or required by regulation/ legislation. Here again, because the decision to merge is almost always a voluntary one, there is little practical scope for the application of the RCD.

- Regulation in an industry is relevant in that it may prevent the exercise of market power post-merger. The only case that has ever applied the RCD in the merger context – the *Canadian Breweries* case – took this type of industry regulation into account (albeit the merger provision in the CIA at that time was criminal). The RCD Bulletin is completely silent on this point.

Given the importance of the RCD and the number of unanswered questions respecting its scope, it is both surprising and regrettable that the Bureau did not consult with stakeholders before finalizing this document. The Bureau has consulted with stakeholders before adopting significant policy guidelines in other areas (including guidance documents which purport to state the Bureau's enforcement policy) -- e.g. the Merger Enforcement Guidelines, Abuse of Dominance Guidelines, Intellectual Property Enforcement Guidelines, and Predatory Pricing Enforcement Guidelines. The Bureau has characterized the RCD Bulletin as an Information Bulletin that merely sets out its enforcement approach to the RCD and is not meant to be a statement of the law. This explanation is cold comfort given that the Bureau's guidelines on various issues are also not legally binding documents. The fact that the enforcement approach outlined in the RCD Bulletin appears to be largely at odds with the jurisprudence is of concern to practitioners since the Bureau's administrative guidance -- whether characterized as "Guidelines" or "Information Bulletins" -- serves as a statement of law for all practical purposes. This is because there is a strong disincentive to litigate competition law cases, particularly in the merger context where the parties need the approval of the very regulator against whom a case might be litigated.

A further point to be clarified relates to the status of the Bureau's 1999 agreement reached with the CRTC outlining the respective jurisdictions of the Bureau and the CRTC and the interface between them (see the CRTC/Competition Bureau Interface of October 8, 1999

(http://strategis.ic.gc.ca/SSG/ct01544e.html)). On the question of merger review, the *Backgrounder* states that the Competition Bureau and the CRTC have parallel jurisdiction, and that merging parties must comply with both: (1) The requirement for review and approval by the CRTC under the *Broadcasting Act* or the *Telecommunications Act*; and (2) the rules respecting pre-merger notification and the requirement that a merger not prevent or lessen competition substantially under the CA. We assume that, although the RCD Bulletin replaces and supersedes other "policy papers" published by the Bureau (see RCD Bulletin, note 1), it does not replace the CRTC interface agreement or fetter the Bureau's discretion to enter into similar agreements with other regulators.

IV. MOVING FORWARD

Despite its deficiencies, the Competition Bureau's RCD Bulletin does advance the debate respecting the RCD by underlining the practical difficulties of enforcing the RCD in light of the lack of clear jurisprudential guidance. The existing jurisprudence simply cannot guide us in many instances because the CA of today is a very different statute from the CIA under which many of the cases by which the RCD was developed. This is an area where, for various reasons (including the circumstance that competition litigation in this country is relatively infrequent), the jurisprudence has simply has not kept pace with statutory change.

When the CIA was being reformed in the 1970s, the drafters recognized that there was a need to deal with the issue of regulation and regulated industries through legislative action. Recommendations respecting the relationship between competition law and regulation were set out in the *Skeoch/Macdonald Report* in 1976.[37] In that report it was recommended that regulated industries generally be deemed to be subject to anti-combines legislation, and be exempted only where (1) the restrictive conduct is specifically imposed by the regulatory legislation; (2) the restrictive conduct is actively supervised by an independent regulator; and (3) the restraint on competition is necessary to the effective accomplishment of the regulatory goal and is the least restrictive means possible to achieve that goal. Several Bills which would have enshrined these principles in legislation were introduced in the mid-1970s but none became law. Copies of these proposed enactments are attached as Appendix A to this paper.

We believe that the time has come to revisit the question of a legislated RCD. In our experience, the Commissioner has been extremely reluctant to cede jurisdiction to another regulator by acknowledging that the RCD applies, and has given very little weight to the effects of a regulatory regime in preserving or excluding competition. The RCD Bulletin will compound these difficulties faced in individual cases by setting up a generalized enforcement policy of entertaining RCD arguments only in the narrowest of circumstances. The RCD Bulletin is not a satisfactory response to the real uncertainty which exists in this area. In addition, there is a strong disincentive to litigate competition cases, particularly in the merger context where guidance on the RCD is sorely missing. Rather than a non-binding Information Bulletin that outlines a narrowly-based enforcement approach to the existing law, we need a legislative policy debate and decision about the relative hierarchy of competition law and industry-specific regulation in this country.

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[37] Minister of Consumer and Corporate Affairs, *Dynamic Change and Accountability in a Canadian Market Economy* by L.A. Skeoch and B.C. McDonald (Ottawa: Queen's Printer, 1976) at 151-152.

The Bureau has unique expertise in the competition law area and has extensive powers to intervene in proceedings before regulators at all levels of government. Where there is industry-specific regulation, however, we believe that the Bureau should defer to valid exercises of regulatory power rather than categorically assert concurrent jurisdiction as is its current practice. The extent of the Bureau's role, if any, in approving mergers in regulated industries, and in litigating cases involving regulated parties, are matters that should and must be debated in the context of legislative reform.

While we make no claim to any expertise in legislative drafting, we believe that a number of key principles should be respected in drafting a legislated RCD. In particular, we believe that mergers need to be treated separately from other forms of regulated conduct since, in the merger context it is the industry regulatory environment and not a regulatory requirement to merge that is generally at issue. In the merger context, regulation is relevant in two respects. First, to the extent that regulation ensures that competition will not be lessened as a result of a merger (e.g. price competition cannot be lessened where prices are set by regulation) it is relevant to the assessment of competitive effects. Secondly, where there is a specialized industry regulator with concurrent jurisdiction to review a merger and where the goals of the regulatory regime are not necessarily consistent with free competition and efficiency (e.g. aspects of the broadcasting-related mandate of the CRTC), then it is arguable that the CA should "defer" to the more specialized regime.

We also believe that the regulated conduct principle, as applied to the balance of the Act (i.e. everything other than mergers), should be a uniform principle. Therefore, as a starting point for reform and debate, we would suggest legislative amendments along the following lines:

- **Add the following definitions to Section 2 - "Definitions" -**

  "regulated conduct" means conduct that is authorized, mandated or required by an Act of Parliament or the legislature of a province or any regulation, by-law, municipal or otherwise, ordinance, order, rule or other instrument issued, made or established pursuant to any such enactment or by a regulatory body acting pursuant to any such enactment and includes, without limitation, conduct that is authorized, mandated or required by a Minister of the Crown in right of Canada or of a province, or the Governor in Council of Canada or the Lieutenant Governor in Council of a province;

  "regulatory body" means a federal board, commission or other tribunal referred to in section 125(2), or a provincial board, commission or other tribunal referred to in section 126(2) and includes, without limitation, self-regulatory bodies;

Alternatively, one could define regulatory body as those bodies listed in a schedule, as is done, for example, in the *Access to Information Act*. This approach would have the advantage of allowing for policy debate respecting the mandate and role of the CA in particular sectors. However, it would have the disadvantage of prolonging debate and the relevant Schedule would have to be updated frequently.

One might also consider possibly adding a requirement that federal regulatory bodies act within their mandates in a manner which, to the extent possible, is least restrictive of competition as was proposed in the various Bills debated in the 1970s.

- **Add the following general provisions -**

  Section 4.2 - No person shall be convicted of an offence in Part VI or VII of this Act where the conduct which would otherwise form the basis for the conviction is regulated conduct.

  Section 4.3 - No person shall be the object of an order under Part VII.1 of this Act, or under sections 75, 76, 77, 79 or 81 of this Act, where the conduct that is the object of the order is regulated conduct.

- **Add the following merger-specific provisions -**

  Section 94 [The Tribunal shall not make an order under section 92(1) in respect of]

  > **(d)** a merger that will be reviewed by, and may proceed only if it is approved by, another regulatory body.

  Section 113 [The following classes of transactions are exempt from the application of this Part:]

  > **(c.1)** a proposed transaction that may proceed only if it is approved by another regulatory body.

Alternatively, one could define "regulatory approval" in more restrictive terms – e.g. it could apply only where the regulatory body has concurrent jurisdiction to consider competition matters, or the legislation could cross-reference specific regulatory approval powers (as is done currently, for example with respect to certain financial institution mergers and air transportation undertaking mergers in section 94 of the CA).

> **Section 93** [In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:]
>
> > **(g.1)** the extent to which regulation in an industry affects the price, volume or other conditions of supply of a product and any impact that the merger may have on such regulation.

Arguably, consideration of the regulatory environment is already a part of the section 93 analysis, even though it is referred to explicitly only in the context of barriers to entry (s. 93(d)(iii)). In our experience, the Bureau has sometimes been reluctant to consider regulation as part of its analysis, and an explicit provision would give more specific direction on this point.

V. CONCLUSION

We are at a turning point in the life of the RCD. It has been more than 20 years since we had a Supreme Court judgment respecting the scope of the doctrine (*Jabour*) and our competition legislation has changed significantly since that time. In our experience, regulated conduct is routinely argued but is very seldom given any weight by the Bureau. Our earlier hopes (however misplaced) for judicial clarification of the doctrine were dashed with the settlement of the *Astral / Télémédia* case.

If the Competition Bureau's RCD Bulletin is to be the last word on the subject of the RCD, we believe that the Bureau's current practice of playing lip service to the importance of regulation while simultaneously asserting unfettered jurisdiction over regulated conduct will continue. Such an approach is wholly unsatisfactory. We think not only is it time for a policy debate respecting the relative importance of regulation and of competition law in this country, but it is also, in our view, time to enshrine the regulated conduct principle in legislation.

APPENDIX A

Bill C-256, An Act to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competition Practices Tribunal and the Office of Commissioner, to repeal the Combines Investigation Act and to make consequential amendments to the Bank Act (3rd Sess., 28th Parl., 19-20 Elizabeth II, 1970-71).

92. (1) Nothing in this Act applies in respect of an agreement, arrangement or course of conduct that would, but for this section, constitute

(a) a violation of section 16, or

(b) price discrimination, a restrictive practice, delivered pricing or granting promotional allowances within the meaning of those terms for the purposes of section 37,

where the parties to the agreement or arrangement or the person or persons engaging in the course of conduct are expressly required or authorized to do so by an enactment of the Parliament of Canada or of the legislature of a province or by any regulation, by-law, whether municipal or otherwise, ordinance, order, rule or other instrument issued, made or established pursuant to any such enactment, and such agreement or arrangement or such conduct is expressly required to be supervised and regulated, on a continuing basis, by a board, commission or other public body appointed pursuant to the enactment or the instrument issued, made or established pursuant to such enactment and that is charged with the duty of protecting the public interest.

(2) Nothing in this Act applies in respect of an agreement, arrangement or course of conduct that would, but for this section, constitute

(a) a violation of section 16, or

(b) price discrimination, a restrictive practice or granting of promotional allowances within the meaning of those terms for the purposes of section 37,

where the parties to the agreement or arrangement or the person or persons engaging in the course of conduct

(c) are members of a profession or practice a trade that is designated for the purposes of this Act as a profession or trade by an enactment of the Parliament of Canada or of the legislature of a province,

(d) are not involved to a substantial extent in the supply, distribution, installation, storage, transportation, cleaning, maintenance, servicing, repairing or wrecking of goods or in the construction, demolition, cleaning, maintenance, servicing or repairing of buildings or any other form of structures or works, and

(e) are expressly required or authorized to enter into the agreement or arrangement or to engage in the course of conduct by an enactment of the Parliament of Canada or of the legislature of a province or by any regulation, by-law, whether municipal or otherwise, ordinance, order,

rule or other instrument issued, made or established pursuant to any such enactment, and such agreement or arrangement or such conduct is expressly required to be supervised and regulated, on a continuing basis, by a board, commission or other body appointed pursuant to the enactment or the instrument issued, made or established pursuant to such enactment that is charged with the duty of protecting the public interest.

Bill C-42, An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof (2nd Sess., 30th Parl., 25-26 Elizabeth II, 1976-77).

4.5 (1) Part IV.1 and sections 32, 32.2, 32.3, 33, 34, 35 and 38 do not apply in respect of regulated conduct.

(2) For the purposes of this section,

"public agency" means any person or persons who individually or as a body, whether corporate or otherwise, derive power to regulate conduct from an Act of Parliament or of the legislature of a province and includes a Minister of the Crown in right of Canada or of a province on whom such a power is conferred and the Governor in Council or Lieutenant Governor in Council of a province where such a power is conferred on him;

"regulated conduct" means conduct in respect of which the following conditions are met:

(a) the conduct has been expressly required or authorized by a public agency that is not appointed or elected by the persons, or by classes or representatives of the persons, whose conduct is subject to be regulated by such agency;

(b) the public agency mentioned in paragraph (a) is expressly empowered, by or pursuant to an Act of Parliament or of the legislature of a province, to regulate the conduct in the manner in which it is being regulated and was expressly directed its attention to the regulation of the conduct; and

(c) the application of this Act to the conduct, in the specific circumstances of the case, would seriously interfere with the attainment of the primary regulatory objectives of an Act referred to in paragraph (b).

4.6(1) A board, commission or other agency or person that is empowered by or pursuant to an Act of Parliament to regulate a trade, industry or profession by

(a) fixing, approving or controlling prices, fees or rates charged by persons carrying on the trade, industry or profession,

(b) fixing, approving or controlling conditions of entry into the trade, industry or profession,

(c) regulating, approving or controlling mergers therein, or

(d) fixing, approving or controlling the quantity or quality of products supplied by persons carrying on the trade, industry or profession

shall exercise its powers in such a way as to achieve the objectives of the enactment from which it derives those powers and, if those objectives can be achieved by the exercise of its powers in more than one manner, shall exercise its powers to achieve those objectives in whichever of those manners is least restrictive of competition.

(2) A decision or order of a board, commission or other agency or person referred to in subsection (1) may not be appealed and is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with on the ground that the decision or order does not represent an exercise of the powers of the board, commission or other agency or person in a manner such as to achieve the objectives of the enactment from which it derives those powers in the manner that is least restrictive of competition except at the instance of the Competition Policy Advocate in a case where, pursuant to section 27.1, the Competition Policy Advocate has intervened in the matter."

Bill C-13, An act to amend the Combines Investigation Act (3rd Sess., 30th Parl., 26 Elizabeth II, 1977).

4.5 (1) Part IV.1 and sections 32, 32.2, 32.3, 33, 34, 35, 38 and 38.1 do not apply in respect of regulated conduct.

(2) For the purposes of this section, "regulated conduct" means conduct in respect of which the following conditions are met:

(a) the conduct has been expressly required or authorized by a regulating agency that

(i) is not appointed or elected by the persons, or by classes or representatives of the persons, whose conduct is subject to be regulated by such agency, or

(ii) is subject to supervision, in the case of a regulating agency that is an agricultural products marketing board, by a supervising agency that is not appointed or elected by the persons, or by classes or representatives of the persons, whose conduct is subject to be regulated by such regulating agency, and

(b) the regulating agency is expressly empowered, by or pursuant to an Act of Parliament or of the legislature of a province, to regulate the conduct in the manner in which it is being regulated and has expressly directed its attention to the regulation of the conduct,

and includes the conduct of a regulating agency or supervising agency acting within a power referred to in the definition "regulating agency" or "supervising agency", whichever is applicable;

"regulating agency" means any person or persons who individually or as a body, whether corporate or otherwise, derive power to regulate conduct from an Act of Parliament or of the legislature of a province and includes a Minister of the Crown in right of Canada or of a province on whom such a power is conferred and the Governor in

Council or Lieutenant Governor in Council of a province where such a power is conferred on him;

"supervising agency" means any person or persons who individually or as a body, whether corporate or otherwise, derive from an Act of Parliament or of the legislature of a province, power to supervise the regulation of conduct by a regulating agency, and includes a Minister of the Crown in right of Canada or of a province on whom such a power is conferred and the Governor in Council or Lieutenant Governor in Council of a province where such a power is conferred on him.

4.6 (1) A board, commission or other agency or person that is empowered by or pursuant to an Act of Parliament to regulate a trade, industry or profession by

(a) fixing, approving or controlling prices, fees or rates charged by persons carrying on the trade, industry or profession,

(b) fixing, approving or controlling conditions of entry into the trade, industry or profession,

(c) regulating, approving or controlling mergers therein, or

(d) fixing, approving or controlling the quantity or quality of products supplied by persons carrying on the trade, industry or profession shall exercise its powers in such a way as to achieve the objectives of the enactment from which it derives those powers and, if those objectives can be achieved by the exercise of its powers in more than one manner, shall exercise its powers to achieve those objectives in whichever of those manners is least restrictive of competition.

(2) Where a decision or order of a board, commission or other agency or person referred to in subsection (1) is subject to an appeal or review or to be restrained, prohibited, removed, set aside or otherwise dealt with on any ground pursuant to any other enactment, the Competition Policy Advocate and he only and only where he has intervened in the matter pursuant to section 27.1, may appeal, or apply for a review of, the decision or order, or apply to have it restrained, prohibited, removed, set aside or otherwise dealt with on the ground that the decision or order does not represent an exercise of the powers of the board, commission or other agency or person in such a manner as to achieve the objectives of the enactment from which it derives those powers in the manner that is least restrictive of competition.

(3) An appeal, review or application to have a decision or order restrained, prohibited, removed, set aside or otherwise dealt with pursuant to subsection (2) shall be brought, applied for or made within

(a) thirty days from the date on which the Competition Policy Advocate was notified of the decision or order by the board, commission or other agency or person by whom the decision or order was made or from the date on which it first came to the attention of the Competition Policy Advocate, whichever is the earlier, or

(b) the time limited by the enactment referred to in subsection (2) for the bringing of an appeal or the making of an application for a review or other relief referred to in that subsection whichever first expires."