REGULATED CONDUCT DEFENCE

PIAC'S COMMENTS ON THE COMPETITION BUREAU'S INFORMATION BULLETIN

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The Public Interest Advocacy Centre (hereinafter PIAC) welcomes this opportunity to comment on the Regulated Conduct Defence and its future application in Canada, as set out in the Competition Bureau's Information Bulletin.

PIAC is a non-profit organization that provides legal and research services on behalf of consumers. It has many years' experience representing consumers' interests in a variety of forums, including appearances before regulatory agencies and other governmental bodies. It has been particularly active in the areas of telecommunications, energy utilities, privacy, banking and financial services, and transportation.

The Consumer Interest

PIAC has come to appreciate the importance of competition in defending consumer interests. In the vast majority of cases, competitive market forces will lead to lower prices, better quality of service, and a wider range of products.

There may be some situations where competition may not be the best instrument to pursue consumer interests. For example, where a market is characterized by economies of scale so great as to lead to a natural monopoly, efficiency may be increased by having only one supplier. In such a case, prices to consumers may be minimized through a regulated monopoly, rather than competitive provision. In this context, PIAC notes that the introduction of competition into markets that were previously monopolies has yielded mixed results.

In other cases, consumer interests may lie beyond costs and prices. For example, privacy considerations may impose limitations on sharing of information that would otherwise encourage competition. In such cases, competition objectives cannot merely be set aside. Rather, they must be

weighed against other objectives, and a proper balance found - one that impairs competition to the least extent possible.

In general, the first step in any balancing of objectives is to examine the circumstances to ascertain whether market forces alone will resolve matters in a way that is harmonious with public objectives. If market failure, or conflict with public objectives might occur, then intervention of some kind may be required.

Conflicting Statutes and Objectives

Various statutes of the federal Parliament and provincial legislatures set out a variety of specific objectives. Despite efforts to harmonize these, overlaps and conflicts will inevitably occur. Indeed, a single statute may expressly state a number of objectives, which turn out to be inconsistent in certain circumstances.

For example, the *Competition Act* itself has as objectives the following:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

But pursuing efficiency in the Canadian economy, especially in an era of increasing economies to scale, may be inconsistent with promoting the participation of small and medium-size businesses, which may not be able to reach the minimum size necessary to enjoy those economies of scale. Similarly, emphasizing exports may come in conflict with competitive prices and product choices domestically.

When conflicting objectives are contained in one statute, or in different statutes that are applied by the same regulatory body, it is up to that entity to weigh the trade-offs and balance the interests, so as to set priorities according to the circumstances of each case. When several administrative tribunals are involved, however, and they arrive at conflicting conclusions, some way must be found to resolve the conflict.

From a policy perspective, PIAC believes that there is no “magic formula” applicable to resolve such conflicts. Ideally, each case should be considered on its own merits. Where possible, the joint jurisdiction of multiple regulators should be recognized explicitly, and formal arrangements should be made for joint decisions, or for consultations before decisions are taken. An example can be found in

the case of airline mergers: s. 56.2 of the *Canada Transportation Act* provides a detailed procedure by which the Minister of Transport consults extensively with the Commissioner of Competition before approving such a merger.

Where legislation does not provide for such consultations, agreements between administrative bodies may provide some coordination, or at least delineation of responsibilities. Examples are agreements between the Competition Bureau and the CRTC, and with the Ontario Energy Board and the Independent Market Operator for Electricity. Ideally, there should be some degree of transparency associated with the operation of any agreement, so that the merits of any balancing of objectives can be publicly evaluated.

Despite such measures, conflicts will arise. Instances will occur where various agencies, pursuing different objectives, or implementing the same objective differently, will require persons under their parallel jurisdictions to undertake inconsistent courses of action. Such a result is in nobody's interest.

Resolving Conflicts

Historically, one way to resolve such conflicts is the Regulated Conduct Defence (hereinafter RCD).

This doctrine was originally developed by case law under the *Combines Investigation Act*, the predecessor to the present *Competition Act*. Many offences under the earlier *Act* were criminal in nature, and the RCD was in large part a defence against criminal liability, available if an industry-specific regulatory agency had authorized the conduct in question. The requirements for the application of the RCD were enunciated many times by the Competition Bureau and its predecessor agency, and were as follows:

(1) The relevant regulatory legislation must be validly enacted.
(2) The activity or conduct in question must fall within the scope of the regulatory legislation and must be specifically authorized by the relevant body
(3) The regulator's authority must be exercised; passive acquiescence or tacit approval is not enough.
(4) The activity that has raised concern must not frustrate the exercise of authority by the regulatory body.

The new *Competition Act* has decriminalized many of the offences under the old Act, now regarding them as reviewable matters with civil liability. Some observers, and the Competition Bureau itself, question to what extent the traditional approach to the RCD, developed for criminal offences, can be extended to these civil matters.

Perhaps as a result, in its Information Bulletin on the RCD, the Competition Bureau has set out more

stringent its requirements for the RCD to apply to a regulated entity. Now, its conduct must have been mandated or required by the regulator, instead of merely authorized by it. In particular, conduct that is voluntary, and that receives regulatory approval, would no longer benefit from the RCD.

The Bulletin's approach assigns priority to the *Competition Act* objectives, when there is conflict and discretion on the part of the regulated entity. In PIAC's view, while guarding against anti-competitive practices and mergers is a very important consumer objective, it is not the only one. Thus, automatically assigning priority to it is not appropriate. Rather, it is important to balance various objectives and resolve conflicts in the context of the case at hand.

Balancing objectives of various statutes, when these give rise to conflicting regulatory decisions, has been addressed by the Supreme Court's decision in *British Columbia Telephone Co*. v. *Shaw Cable Systems*. That case involved a contradiction between decisions issued by two different federal regulatory bodies, operating under two different federal statutes. Mme. Justice L'Heureux-Dubé, writing for the Court, found that in such cases the courts should employ a "pragmatic and functional" approach:

> Effectively, the courts must determine, in the light of the policy scheme surrounding each of the administrative tribunals and the nature of each of the conflicting decisions, which of the decisions the legislature would have intended to take precedence.

According to L'Heureux-Dubé J., when applied to the resolution of conflicts between administrative tribunals, the pragmatic and functional approach should consider several factors:

(1) The legislative purpose behind the establishment of each administrative tribunal. The more important a tribunal's purpose, the more likely the government would have intended that tribunal's decision to take precedence.
(2) The extent to which an administrative tribunal's decision is central to the purpose of that tribunal. The more central a decision is to the purpose of the administrative tribunal, the more likely it should take precedence
(3) The degree to which an administrative tribunal, in reaching a decision, is fulfilling a policy-making or policy implementation role. The greater the connection between a decision and a tribunal's policy-making or policy implementation role, the more likely that decision should take precedence.

This is a difficult analysis, and one that should not be undertaken lightly. Accordingly, this route to resolution of conflicts between decisions should only be undertaken when absolutely necessary - in particular, where the conflict is real, and not merely apparent. This leads us to the recent Supreme Court decision in *Garland* v. *Consumers' Gas Co*.

The Importance of *Garland*

As stated above, before trying to resolve a conflict between statutes by inferring what the legislature intended, it is necessary that the conflict be real and not merely apparent. As stated by the Supreme Court:

> 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.

In *Garland*, the Supreme Court applied this principle in the context of the RCD. Here, the RCD arose in the context of a conflict between the *Criminal Code*, on one hand, and authorization of a course of action by a provincial regulatory agency, on the other. Mr. Justice Iacobucci, writing for the Court, indicated that the principle was grounded in conflicts involving competition law, but that it should apply more broadly, and in particular to the issue at hand.

Essentially, where decisions by two different administrative tribunals are in conflict, but where one of the two enabling statutes allows discretion or flexibility in its application, that statute should be "read down" or interpreted to avoid conflict, where possible. Examples cited by Iacobucci J. were the inclusion in the statute of language such as "unduly" or "in the public interest".

On the other hand, if the statute does not contain any dispensation or discretion, it is to be taken as a sign that the legislator intended a strict interpretation for that statute.

In PIAC's view, the principle enunciated in *Law Society of British Columbia* and applied to the RCD in *Garland* will help eliminate conflicts that are apparent, rather than real. Where a statute does not contain permissive or discretionary language, the objectives contained in it should be assigned a very high priority. By contrast, where the language is permissive, a relatively lower priority should be assigned.

This principle was designed to be applied by the courts. However, PIAC believes, it is also useful in providing guidance to regulatory and administrative bodies, in deciding when they will assert jurisdiction, given that another administrative tribunal is already considering a particular matter. In particular, tribunals should not automatically assume that they should exercise their jurisdiction. Rather, to the extent that they have discretion in interpreting their governing statutes, they should exercise that discretion to avoid conflict. In so doing, they should be guided by the manner in which courts would apply the pragmatic and functional approach to the situation.

Conclusion

Based on PIAC's experience, competition is a very important safeguard of consumer interests. However, occasions will arise where competition policy will come in conflict with the objectives of other statutes. In such cases, a cooperative approach between the administrative tribunals involved would seem to be the best approach.

If such cooperation is not possible, the various tribunals should, on their own initiative, look to their enabling statutes to see whether there is flexibility to interpret the provisions, so as to eliminate the conflict. If neither side has sufficient flexibility, and the conflict is real, rather than apparent, then the issue may have to be resolved by the courts, using the "pragmatic and functional" approach enunciated in *British Columbia Telephones* v. *Shaw*. The case law would then provide guidance to the tribunals for resolution of future conflicts