



3 February 2006

Ms. Martine Dagenais
Senior Advisor to the Commissioner
Competition Bureau
Place du Portage I
50 Victoria Street
Gatineau, Québec
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Dear Ms. Dagenais:

Subject: Consultation on the Technical Bulletin on "Regulated" Conduct

Mirko Bibic
Chief, Regulatory
Affairs

1. Bell Canada is pleased to provide comments on the Competition Bureau's (the "Bureau") draft Technical Bulletin on "Regulated" Conduct (the "Draft Bulletin") dated November 2005.
2. Bell Canada (with its affiliates) is Canada's largest communications company, providing the most comprehensive and innovative suite of communication services to residential and business customers in Canada. Under the Bell brand, consumers find simple solutions to all their communications needs, including telephone services, wireless, high-speed Internet, digital television and voice over IP. Bell Canada offers comprehensive information and communications technology solutions to Canada's leading large enterprises, small and medium businesses and public sector organizations in Canada and abroad.
3. Bell Canada commends the Bureau's perseverance in providing guidance on the interplay of the Competition Act (the "Act") with provincial and federal statutes, as demonstrated by the Bureau's issuance of the *Information Bulletin on the Regulated Conduct Defence* in 2002 (the "2002 Bulletin"), followed by a proposed revised version subject to consultations in 2004 and earlier in 2005, and the Draft Bulletin commented herein today. Bell Canada welcomes the Bureau's efforts to clarify its approach and its willingness to seek and incorporate the views of stakeholders.
4. In that respect, Bell Canada appreciates particularly that the Draft Bulletin now identifies the jurisprudence upon which the Bureau relies in its approach to regulated conduct and that the Bureau recognizes the availability of other defences to impugned conduct, such as lack of *mens rea*, official inducement of error, statutory justification or Crown immunity, in addition to what has been traditionally termed the Regulated Conduct Defence (the "RCD").

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5. At the same time, Bell Canada is concerned that the Bureau is espousing an overly restrictive interpretation of the recent Supreme Court of Canada decision *Garland v. Consumers Gas Co.* [2004] 1 S.C.R. 629 ("*Garland*"), and consequently of the RCD.

6. Accordingly, Bell Canada wishes to submit the following comments. Failure to address any specific element in the Draft Bulletin should not be taken as agreement or concurrence with such element, where such agreement or concurrence would be contrary to Bell Canada's interest.

Timing of Change of Enforcement Approach

7. In its announcement of the issuance of the Draft Bulletin and the associated consultation process¹, the Bureau wrote that it was seeking public comment on a draft Technical Bulletin on "Regulated" Conduct that sets out how "it would approach the enforcement of the Competition Act in situations where conduct is regulated by other laws enacted by various levels of government." However, the announcement also notified the public that the Draft Bulletin "replaces the Bureau's 2002 Information Bulletin on the RCD in light of recent case law and consultations."

8. As Bell Canada understands this announcement, the Bureau has already rejected the enforcement approach articulated in the 2002 Bulletin and adopted that which is presented in the Draft Bulletin². Bell Canada recognizes that the Bureau is entitled to modify its enforcement policy as it deems appropriate, within the bounds of the law, but Bell Canada is concerned that the Bureau is apparently modifying its approach to regulated conduct while a consultation on the very issue is taking place. While Bell Canada expects that the current consultation process will result in the adoption of a revised, final Bulletin which will replace the 2002 Bulletin, Bell Canada reasonably anticipated that the Bureau would await the end of the consultation process before changing its enforcement approach.

9. This is particularly worrisome in light of significant differences between the Draft Bulletin and the 2002 version. For instance, the Draft Bulletin retreats from the interpretation taken in the 2002 Bulletin that the RCD is clearly applicable to conduct specifically authorized by valid federal legislation and to civil matters, including mergers. Bell Canada hopes that it is simply misunderstanding the Bureau's announcement and that the Bureau has, in fact, not modified its enforcement practice on this key issue before having received the benefit of the stakeholders' input it is seeking through the consultation process.

Applicability of RCD to Federally-Regulated Conduct

10. As mentioned above, the Draft Bulletin no longer states that the RCD applies to federally-regulated conduct. Rather, the Draft Bulletin indicates that, "faced with conduct that may be regulated by a valid federal law(s) other than the Act, the Bureau will, applying ordinary principles of statutory interpretation,

¹ As found on the Bureau's website at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1992&lg=e>

² A fact supported by the absence of the 2002 Bulletin from the Bureau's website.

attempt to determine whether Parliament intended that the particular provision(s) of the Act, or conceivably the entire Act, applies to the particular conduct.”

11. In Bell Canada’s view, the Bureau should not be reticent to acknowledge that the case law supports the applicability of the RCD to federally-regulated conduct. The Federal Court, in at least two instances³, has referred to or even directly relied on the RCD to exempt federally-regulated conduct from the application of provisions of the Act. These precedents were not overturned by *Garland*. That recent decision was concerned with provincially-regulated conduct conflicting with a provision of the *Criminal Code*. It did not address, much less disavow, the RCD in the context of federally-regulated conduct and the enforcement approach to take under the Act in relation to that conduct. Nothing in *Garland* restricts the RCD to provincially-regulated conduct only.

12. Accordingly, Bell Canada suggests that the Draft Bulletin eliminate the distinction between conduct regulated pursuant to provincial authority and conduct regulated pursuant to federal authority. Whenever an entity engages in conduct that is either mandated or authorized pursuant to a validly enacted statute, whether provincial or federal, Bell Canada submits there is an equal lack of rationale, in law and on policy grounds, to initiate enforcement actions based on the Act.

13. Bell Canada also notes that the Draft Bulletin states that “the Bureau will not pursue a matter under any provision of the Act where Parliament has articulated an intention to displace competition law enforcement by establishing a comprehensive regulatory regime and giving an accountable regulator an authority to itself take, or to authorize another to take, action inconsistent with the Act...” [Emphasis added].

14. Not only is Bell Canada unaware of a justification for the qualifiers underlined above, but their broad and undefined nature raises more questions than answers, and will be a source of confusion for businesses and practitioners. Bell Canada recommends that the Bureau remove these references.

Applicability of RCD to the Civilly Reviewable Provisions of the Competition Act

15. Where the 2002 Bulletin clearly stated that the RCD was available both for the criminal and the civil provisions of the Act, the Draft Bulletin indicates that the Bureau’s approach to regulated conduct under the reviewable practices “will be informed, but not governed, by the RCD caselaw”, apparently because RCD caselaw in respect of the reviewable provisions is limited, and because the reviewable provisions of the Act do not feature the “leeway language” referenced in *Garland*. Bell Canada believes that Bureau’s approach here is mistaken for two reasons.

16. First, as a matter of principle, the Bureau’s enforcement approach ought to be governed, not just informed, by the caselaw and the Act. While it is true that most of the RCD jurisprudence involved cases where it was the application of the Act’s criminal provisions that was challenged, there are precedents, such

³ *Industrial Milk Producers Association et al. v. Milk Board et al.* (1988) 47 D.L.R. (4th) 710 (F.C.T.D.) and *Society of Composers, Authors and Publishers of Canada v. Landmark Cinemas of Canada et al.* (1992) 45 C.P.R. (3rd) 346 (F.C.T.D.).

as *Society of Composers, Authors and Publishers of Canada v. Landmark Cinemas of Canada et al*, referred to above, which extend the RCD to the Act's civil provisions. This caselaw remains valid; it has not been overturned by *Garland* or other subsequent decisions from higher courts.

17. Second, *Garland* was only concerned with the applicability of the RCD to a particular provision of the Criminal Code. It did not address the applicability of the RCD in civil settings. It is therefore inappropriate to extrapolate such a conclusion from the decision.

18. Furthermore, if anything can be borrowed from *Garland* in a civil setting, it is its reference to "leeway" language as an indication of Parliament's intention to immunize regulated conduct. Bell Canada submits that the reviewable provisions of the Act contain sufficient "leeway" to allow regulated conduct to be exempted from their application. For instance, the majority of the Act's reviewable provisions require the demonstration that competition is substantially harmed or adversely affected by a commercial practice. In Bell Canada's view, the words "adverse" and "substantially" provide the Competition Tribunal with sufficient leeway to exempt regulated conduct from the reviewable sections, in a manner similar to the "unduly" concept in the criminal context. This is consistent with the Supreme Court of Canada's discussion of "unduly" in *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606. There the Court found that "unduly" "expresses a notion of seriousness or significance"⁴ and that "unduly" refers to something less than "substantially"⁵. Given that "unduly" provides sufficient "leeway" for the RCD to apply, Bell Canada submits that "substantially" therefore must do so as well. Accordingly, there is no rational basis for the Bureau to conclude that only the "unduly" language of section 45 meets the "leeway" test set out in *Garland*.

19. Bell Canada finds additional leeway in the language of the Act's civilly reviewable provisions through the repeated use of the words "the Tribunal⁶ may make an order..." even where all the elements of a given civil provision are met. Bell Canada submits that the fact that an impugned conduct was undertaken pursuant to a valid statutory authority could reasonably lead the Tribunal not to order relief under the Act so as not to interfere with the regulatory statute. In Bell Canada's view, the discretion that the Act grants the Tribunal is a clear indication of Parliament's intent to allow for the exemption of regulated conduct from the application of the Act's reviewable provisions.

20. Bell Canada suggests that the Draft Bulletin should recognize that the statutory language of the reviewable provisions of the Act allows for the application of the RCD to civil matters.

⁴ At paragraph 79.

⁵ Paragraphs 101-102: "The level of market power necessary to trigger the application of s. 32(1)(c) is not necessarily the same as for other sections of the Act. For instance, s. 51 of the Act (now s. 79), prohibiting abuses of dominant position, contemplates at subs. (1)(a) that the holders of the dominant position "substantially or completely control, throughout Canada or any area thereof, a class or species of business". The required degree of market power under s. 51 of the Act comprises "control", and not simply the ability to behave independently of the market. The application of s. 32(1)(c) of the Act does not presuppose such a degree of market power, as s. 32(1.1) clearly enunciates. Parties to the agreement need not have the capacity to influence the market. What is more relevant is the capacity to behave independently of the market, in a passive way. A moderate amount of market power is required to achieve this..."

⁶ Or the "court" rather than the Tribunal in Part VII.1 of the Act.

Conclusion

21. Bell Canada appreciates the Bureau's efforts to clarify its enforcement approach and thanks the Bureau for the opportunity to submit these Comments on the Draft Bulletin. The Bureau's approach to regulated conduct is an important consideration for Bell Canada and its affiliated companies, since many of their operations are subject to the *Broadcasting Act*, the *Radiocommunication Act* and the *Telecommunications Act*. Accordingly, it is imperative that the Draft Bulletin, and the Bureau's enforcement approach, correctly reflect the law. While the Draft Bulletin features numerous improvements over prior versions, such as the inclusion of judicial references and a more detailed explanation of the Bureau's interpretative approach, it still proposes an overly restrictive interpretation of the RCD. Bell Canada trusts that the Bureau will take into due consideration the comments submitted by interested stakeholders in order to improve the clarity and the accuracy of the Draft Bulletin.

Yours truly,



for

Mirko Bibic