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Counsel on Public Policy

December 23, 2004

Ms. Annie Galipeau
Competition Bureau
Place du Portage I
50 Victoria Street
Gatineau, Québec
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By Fax: (819) 994-0998

Dear Ms. Galipeau:

RE: CONSULTATIONS ON THE INFORMATION BULLETIN ON THE REGULATED CONDUCT DEFENCE

On behalf of our client, the Canadian Restaurant and Foodservices Association (the "CRFA"), I am writing in response to your Notice dated October 29, 2004, in which you invited interested parties to comment on the Regulated Conduct Defence (the "RCD").

The CRFA represents the interests of its 17,500 members who operate restaurants and foodservice establishments across Canada.

In light of the recent Supreme Court of Canada *Garland v. Consumers Gas* decision, we believe the Bureau's **Information Bulletin on the Regulated Conduct Defence** dated December, 2002 (the "Bulletin"), must be revised.

Since the purpose of the Bulletin is to outline the Bureau's position with regard to the jurisprudence on the RCD, we believe that the Bulletin must incorporate the more restrictive

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interpretation of the RCD adopted by the Supreme Court of Canada.

Our submissions are presented under the following headings:

1. The RCD is inapplicable unless Parliament has included unequivocal exemption language in the *Competition Act*;

2. An Act of Parliament cannot be trumped by a "statutory regulatory regime";

3. The Bureau must subject "Self-Regulators" to close scrutiny; and

4. Conclusion.

1. THE RCD IS INAPPLICABLE UNLESS PARLIAMENT HAS INCLUDED UNEQUIVOCAL EXEMPTION LANGUAGE IN THE *COMPETITION ACT*

The second paragraph of the Bulletin describes the RCD as follows:

> *In a number of cases dating back to the early 1900's, most of them criminal, Canadian courts have addressed the issue of the applicability of the Act to activity which, on the one hand, contravenes the [Competition] Act, and on the other, is authorized by a statutory regulatory regime. In these situations the courts applying what is commonly referred to as the RCD, have concluded that conduct that is specifically authorized by a regulatory body exercising its authority under validly enacted legislation cannot be found in contravention of the Act.*

However, in *Garland*, the Supreme Court of Canada was not prepared to allow activity "authorized by a statutory regulatory regime" to trump the Criminal Code unless Parliament had enacted express and unequivocal language in the Criminal Code exempting such activity.

With respect to the Bureau, we submit that, unless Parliament has unequivocally stated in the *Competition Act* (the "*Act*") that the *Act* does not apply to specific activity, then that activity is covered by the *Act*, particularly in the case of activity authorized by a federal regulatory regime.

The Bulletin should therefore make it clear that the existence of a "statutory regulatory regime" does not give rise to a presumption that activity "authorized" by a regulatory body operating under such a regime falls outside the scope of the *Act* – unless Parliament has unequivocally created an exemption in the *Act*. As Iaccobucci, J, stated for the Court in Paragraphs 78 and 79 of the *Garland* decision:

> *While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.*
>
> *The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the Criminal Code can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the Criminal Code precludes the application of this defence in this case.*

For example, Parliament has included no unequivocal exemption language in the illegal trade practice provisions of Paragraph 50(1)(a) of the *Act*. As a result, the RCD is inapplicable to price discrimination activity.

2 AN ACT OF PARLIAMENT CANNOT BE TRUMPED BY A "STATUTORY REGULATORY REGIME"

Under the heading "Analytical Approach", the top of Page 2 of the Bulletin speaks of "the specific statute (the regulatory regime) to prevail over the general legislation".

We submit that, to determine whether statutory conflict exists, a statute must be compared to another statute. As a result, an Act of Parliament should not be compared to a regulation created by a regulatory body exercising general powers delegated to it by another statute. Since the Supreme Court of Canada requires Parliament to use clear statutory language in a federal statute to exempt certain regulated activity from that federal statute, any statute that authorizes conflicting regulated activity must clearly and expressly mandate (and not merely generally authorize) that conflicting activity.

The Bureau cannot assume that the *Act* is trumped whenever Parliament or a provincial legislature creates a regulated regime in which general powers are delegated to a regulated body and that body purports to exercise such powers.

For example, a federal statute that authorizes an agriculture marketing board to make certain regulations does not exempt these regulations from the *Act* unless the underlying statute expressly mandates the activity covered by the regulations. We agree with the Bulletin's distinction between "mandated"

activity and "authorized" or voluntary activity and submit that the RCD should only apply to activity that a clearly worded statute (and not an internal regulation) requires a self-interested regulatory body to undertake.

The regulations of a regulatory body cannot trump an *Act* of Parliament unless these regulations are clearly anchored in a statute duly passed by the elected representatives of the federal Parliament or a provincial Legislature.

For example, regulations passed by the Chicken Farmers of Canada cannot trump the *Act* unless the statute that authorizes such regulations, the federal *Farm Products Agencies Act*, specifically mandates the regulations and activity in question.

This is particularly true regarding regulations passed by regulatory bodies with direct pecuniary interests in the activity in question. No deference should be shown to regulations passed by self-interested parties, particularly when such regulations are not subject to any legislative or parliamentary committee oversight or scrutiny.

The Bureau cannot assume that self-interested regulatory bodies only pass regulations that are in the public interest and squarely within their statutory authority.

The second paragraph on Page 3 of the Bulletin speaks of the need for enabling legislation, but uses vague language by merely requiring that "the conduct complained of is grounded in a statute or regulations". This language should be amended to specify that the conduct must be clearly mandated by a statute enacted by Parliament or a provincial legislature acting within its jurisdiction.

3. THE BUREAU MUST SUBJECT "SELF-REGULATORS" TO CLOSE SCRUTINY

Under the heading "Self-Governing Regulators (Professions/Other Organizations", Page 3 of the Bulletin makes a distinction between regulators who make decisions on matters which have a direct impact on themselves, and those who do not. For example, certain federal agriculture marketing boards and related agencies make decisions that affect the prices paid for their members' products. The Bulletin also states:

> *...the activities of self-regulators may be subject to greater scrutiny as to whether the agency is acting within its scope of authority due to the Bureau's concern that they may be regulating in their own interest.*
>
> (emphasis added)

In the last sentence of the first paragraph on Page 3 of the Bulletin, the term "may" should be changed to "shall" to reflect the fact that the Bureau administers general framework legislation in the public interest. Accordingly, the Bureau should show no deference to self-interested parties who may, or may not be, acting in the public interest and within their limited statutory authority.

4. CONCLUSION

By reason of the foregoing, we submit that the Bureau should make the following three changes to the Bulletin.

1. The Bulletin should make it clear that the existence of a "statutory regulatory regime" does not give rise to a presumption that activity

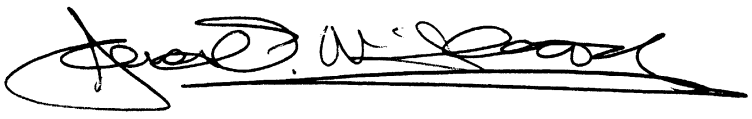
"authorized" by a regulatory body operating under such a regime falls outside the scope of the *Act* – unless Parliament has unequivocally created an exemption in the *Act*.

2. The second paragraph on Page 3 of the Bulletin speaks of the need for enabling legislation, but uses vague language by merely requiring that "the conduct complained of is grounded in a statute or regulations". This language should be amended to specify that the conduct must be clearly mandated by a statute enacted by Parliament or a provincial legislature acting within its jurisdiction.

3. In the last sentence of the first paragraph on Page 3 of the Bulletin, the term "may" should be changed to "shall" to reflect the fact that the Bureau administers general framework legislation in the public interest, and that the Bureau should show no deference to self-interested parties who may, or may not be, acting in the public interest and within their limited statutory authority.

The CRFA appreciates this opportunity to comment on the Bulletin and would welcome the opportunity to meet with you to further discuss the above.

Yours sincerely,



James McIlroy