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4 January 2005

Ms. Annie Galipeau
Competition Law Officer
Competition Bureau
Place du Portage I
50 Victoria Street
Gatineau, Quebec K1A 0C9

Dear Ms. Galipeau:

Re: Consultations on the Information Bulletin on the Regulated Conduct Defence

1. TELUS Communications Inc. (“TELUS” or the “Company”) is in receipt of a Competition Bureau (the “Bureau”) information notice entitled *Consultations on the Information Bulletin on the Regulated Conduct Defence*, dated 29 October 2004.
2. The information notice raises two issues for commentary:
 - (1) Whether the Supreme Court of Canada’s 2004 decision in *Garland v. Consumers’ Gas Co.*¹ (“*Garland*”) may affect the application of the regulated conduct defence? and;
 - (2) Means by which the *Information Bulletin on the Regulated Conduct Defence* (the “Bulletin”) can be improved and clarified.

TELUS responds, below, to these two issues.

¹ [2004] 1 S.C.R. 629

3. A failure by TELUS to address any specific statements in the *Garland* case or in the Bulletin should not be construed as acceptance or denial of such statements where such acceptance or denial would be inconsistent with the Company's interests.

Issue One: Whether the Supreme Court of Canada's 2004 decision in *Garland* may affect the application of the regulated conduct defence?

4. The Supreme Court of Canada ("SCC")'s recent ruling in the *Garland* case arises out of a class action proceeding involving a claim, by customers of a regulated utility (Consumers' Gas Company Limited – now Enbridge Gas Distribution Inc.), for restitution for unjust enrichment arising from late payment penalties ("LPPs") levied by the respondent utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Criminal Code*"). The specific issues raised for determination by the SCC included the necessary ingredients for a claim of unjust enrichment and whether various defences could be mounted to resist such a claim, including a regulated conduct defence ("RCD").²
5. The respondent utility submitted that it could avail itself of the RCD

to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders issued by the OEB [Ontario Energy Board] cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.³

² In *Garland*, the SCC uses the term "regulated industries defence": [2004] 1 S.C.R. 629, at paragraph 74. The Court also uses the terms "dispensation" and "exemption": [2004] 1 S.C.R. 629, at paragraph 78. For the sake of consistency with the language of the Bulletin, and without denying or nullifying the legal distinctions inherent in the various terms invoked by the SCC, TELUS uses the term "regulated conduct defence" in the context of this submission.

³ [2004] 1 S.C.R. 629, at paragraph 74.

6. The SCC held that the RCD was not available to the respondent utility in the specific circumstances of the case. Iacobucci J. stated that:

...in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.⁴

7. Iacobucci J. also referred to the case of *R. v. Jorgensen*, [1995] 4 S.C.R. 55 (“*Jorgensen*”) for additional support to this view. In *Jorgensen*, the SCC considered whether approval by a provincial body could displace a charge under the *Criminal Code*. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue:

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.⁵

8. The proposition that emerges from Iacobucci J.’s discussion of the RCD, in *Garland*, is that an otherwise valid provincial regulatory scheme cannot displace the application of the *Criminal Code* unless Parliament indicates, either expressly or by necessary implication, that the relevant section of the *Criminal Code* grants leeway to those acting pursuant to a valid provincial regulatory scheme.

⁴ [2004] 1 S.C.R. 629, at paragraph 77.

⁵ *R. v. Jorgensen*, [1995] 4 S.C.R. 55, at paragraph 118 (quoted in *Garland*, [2004] 1 S.C.R. 629, at paragraph 78.)

9. If *Garland* represents any change, at all, to the law in the area of the RCD, its impact will be confined to parties subject to provincial regulatory schemes where such schemes are potentially in conflict with provisions of the *Criminal Code*. *Garland* provides that an otherwise valid provincial regulatory scheme cannot displace the application of the *Criminal Code* unless Parliament indicates, either expressly or by necessary implication, that the relevant provision of the *Criminal Code* grants leeway to those acting pursuant to a valid provincial regulatory scheme. As a result, reliance on the RCD in such circumstances will require an examination of the specific statutory language used by Parliament if a party is seeking to displace the application of a provision of the *Criminal Code* on the basis that it is acting pursuant to a valid provincial regulatory scheme. Of course, the *Garland* case deals only with a conflict between the federal *Criminal Code* and an otherwise valid provincial regulatory scheme and, therefore, it has no relevance to the manner in which potential conflicts between two or more federal statutes would be resolved by the courts.

Issue Two: Means by which the Information *Bulletin on the Regulated Conduct Defence* can be improved and clarified

10. TELUS will limit its submissions on this issue to two points.
11. First, and most obviously, the Bulletin must be updated to clearly and accurately incorporate the *Garland* decision to the extent that this decision represents a departure from the existing RCD jurisprudence.
12. Second, the Bulletin could be significantly improved and clarified if the Bureau were to specify the jurisprudence underpinning each proposition contained in the Bulletin. The Bulletin should also be updated to reflect any jurisprudential developments (including *Garland*) since the initial release of the Bulletin in 2002. These simple steps would be of great assistance to all parties including regulators, regulated firms, and their professional advisors who must rely on the RCD. Such

simple steps would also contribute significantly to the Bulletin's stated goal of outlining and clarifying "the Bureau's position with regard to the jurisprudence on the Regulated Conduct Defence (RCD) outlined in that document."⁶ An express identification of, and engagement with, all the relevant jurisprudence is a condition precedent to the achievement of this goal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF JANUARY
2005.

Yours truly,

{Original signed by Willie Grieve}

Willie Grieve
Vice President
Telecom Policy & Regulatory Affairs

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⁶ *Information Bulletin on the Regulated Conduct Defence*, Section I (Introduction), paragraph 1.