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Via E-mail and Courier

Ms Martine Dagenais
Senior Advisor to the Commissioner
of Competition
Competition Bureau
Place du Portage 1
50 Victoria Street
Gatineau, Quebec K1A 0C9

Dear Ms Dagenais:

Comments on Technical Bulletin on "Regulated" Conduct

We applaud the Commissioner of Competition for her decision to publicly circulate for consultation the Technical Bulletin on "Regulated" Conduct ("Bulletin") and welcome the opportunity to express our comments on the Bulletin.

We appreciate the fact that the Competition Bureau has considered and adopted some of the previously expressed opinions and submissions of our colleagues, Tim Kennish and Janet Bolton. We are of the view that the Bulletin represents a tremendous improvement over the existing *2002 Information Bulletin on the Regulated Conduct Defence*.

This is a complex and important subject where well-articulated enforcement guidance is necessary and where legislation may be necessary to clarify uncertainties in the law.

We have identified certain areas where, in our view, the Bulletin would benefit from elaboration and examples to illustrate the principles expressed. We have also identified areas where we continue to have important concerns about the statements and views expressed in the Bulletin and we have suggested that appropriate revisions be made resolve such concerns or provide further clarity as to the Commissioner's position on the particular issue.

1. Explicitly Articulate the General Principle

In the introductory section, we suggest that Bulletin explicitly articulate the principle that it is inappropriate to penalize conduct which is either mandated or authorized by validly enacted legislation or regulation regardless of whether the regulation in question is federal or provincial and whether the penalizing provision of the *Competition Act* is criminal or civil.

We do not understand the reasons why the Bulletin emphasizes that ordinarily the Bureau will approach federal and provincial regulation differently and cases involving the civil

provisions of the *Competition Act* differently from those which involve its criminal provisions. There are no convincing reasons advanced as to why this should be the case and, accordingly, we suggest such emphasis is misplaced.

2. Elaborate on the Treatment of Regulated Conduct Generally

We welcome the discussion in the Bulletin about the importance of doctrines, defences and other interpretive tools in addition to the regulated conduct doctrine ("RCD") which may affect the application of the *Competition Act* in particular circumstances. We view this as an important point deserving of more emphasis in the Bulletin. Specifically the Bulletin should describe the other doctrines, defences and interpretive tools and, as necessary, illustrate their application through examples.

In this regard, set forth below for your consideration is a description of the principal interpretive tools, doctrines and defences other than RCD which we suggest be included in the text of the Bulletin itself. This list is not exhaustive.

- *Absence of mens rea* – An accused who is compelled or authorized by regulation to commit a criminal act may lack the mens rea which is necessary in order to be convicted of a crime because the accused's action was not voluntary.[1]

- *Official inducement of error* – Under this doctrine, where an individual relied upon a government official for legal advice and that advice led him/her to commit an unlawful act, the individual is excused from punishment/liability.

- *Statutory justification* – Statutory justification is a defence to an alleged wrong in circumstances where an alleged wrongdoer is able to claim that he/she was authorized to commit the alleged wrongful act by a specific statutory provision.

- *Crown immunity* – Where a party that is an agent of the State has transgressed a law while operating in furtherance of its statutorily assigned purpose it is immune from liability.

- *Issue estoppel* – This doctrine is a branch of *res judicata* (the other branch being cause of action estoppel) which precludes the relitigation of issues previously decided in court in another proceeding.

- *Abuse of process* – This is a flexible doctrine which applies where the proceedings are oppressive or vexatious; and violate the fundamental principles of justice underlying the community's sense of fair play and decency.

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[1] The Bulletin suggests that there is an "absence of mens rea" rationale for the RCD. Consider whether "absence of mens rea" is in fact, synonymous with RCD.

- *Collateral attack* - The rule against collateral attack bars proceedings to overturn orders when those proceedings are taken in the wrong forum, i.e. in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment (such as, for example, appeal or judicial review proceedings).

3. The Unusual Use of Endnotes

Endnotes or footnotes are generally used to provide the source of facts or opinions which the author has obtained from outside sources or to illustrate or elaborate on a point in the main document. Endnotes allow readers to confirm an author's facts for accuracy, make sure a quotation has not been taken out of context, and, in general, know where an author obtained his/her information. There should not be significant (or controversial) commentary buried in the footnotes which is not adequately referenced in the document. The endnotes to the Bulletin contain discussion which goes beyond providing the source of or elaborating on a statement in the main discussion. Many of the endnotes set forth the Bureau's interpretation of case law and comment on the Bureau's interpretation of the application of such case law to the issues central to the Bulletin itself. Of particular concern are those endnotes which actually qualify or limit the statements in the Bulletin. For example, refer to footnote 8 which contains the qualification: "to the extent of the conflict" and footnote 31 which adds the phrase " whether federal or provincial." Such information should be integrated into the main text of the Bulletin rather than buried in the endnotes.

In addition, we take issue with some of the commentary in the endnotes. For example, Footnote 7, which is intended to relate to the Bureau's introductory section of the Bulletin, reviews the US state action doctrine. The endnote itself seems irrelevant to the issue at hand and moreover, in our view, erroneously suggests that US state action doctrine is analogous to Canadian RCD. The US state action doctrine is not analogous to Canadian RCD and the differences between the doctrines reflect the differences in the federal systems of the United States and Canada.[2] We suggest that, at a minimum, the discussion of US state action doctrine and related case law be deleted as it is irrelevant to the Canadian context.

We continue to have concerns about the discussion of the "operational conflict" as noted in footnote 27 and whether the Bureau is suggesting that an operational conflict should become a prerequisite to the consideration of regulatory conduct. While we acknowledge the operational conflict doctrine, it should be recognized that the RCD provides a method of avoiding a finding of inconsistency in the first place; that is, it applies before one finds

[2] For example, refer to the discussion of the state action doctrine in *Freedom Holdings Inc. et al.* v. *Eliot Spitzer Attorney General of the State of New York* 357 F. 3d 205 (2d Cir. 2004); 363 F. 3d 149 (2d Cir. 204).

an operational conflict not after such an operational conflict is found. Accordingly, it would be helpful if the Bureau clarified its position in this regard.

4. Balance the Treatment of *Garland* - General

We acknowledge that the Bureau has considered the Kennish / Bolton submission of June 6, 2005 which articulated concerns about overstating the importance of *Garland*.[3] However, we note that some of the statements that were of concern while removed from the text of the Bulletin remain in the footnotes.

In our view, it is important that it be explicitly reflected in the Bulletin that *Garland* did not in any way limit the application of the RCD or any other regulation-based defence. It should be recognized in the Bulletin that *Garland* did not involve the *Competition Act* and, in fact, involved the question of whether the RCD should be broadened to cases outside the area of competition law. Further, unlike the language of any of the provisions in the *Competition Act*, the *Criminal Code* provision at issue in *Garland* commenced with the language "[n]otwithstanding any Act of Parliament". Given this explicit expression of Parliamentary intent that Section 347 prevail over any other legislation, it is not surprising that in this particular context the Court took a narrow view of the application of the RCD.

Moreover, competition law is quite distinct from pure criminal law in this regard. The *Competition Act* is fundamentally a law which regulates the economy by encouraging competition, and its criminal and reviewable practice provisions are in aid of this objective. In the context of a general statute that "embodies a complex scheme of economic regulation", it is quite understandable that Parliament and the provinces (within their respective spheres of authority) may decide to adopt a different economic model in appropriate circumstances and in particular where a purely competitive market would not operate in the public interest.

Parliament was well aware of the existence and importance of regulated industries when it passed the *Competition Act*. Indeed, it gave the Commissioner explicit authority in sections 125 and 126 of the *Competition Act* to appear before federal and provincial boards that supervise such regulated industries in order to make representations in respect of competition. In granting these powers to *advocate for* rather than to *impose* competition, Parliament recognized that wholesale application of the *Competition Act* would undermine the public interest goals in certain sectors of the economy.

We believe that there exists in the *Competition Act* an implicit intention not to override valid regulation – federal or provincial. This contrasts from the *Criminal Code* sphere

[3] *Garland* v. *Consumers Gas Co.*, [2004] 1 S.C.R. 629 ("*Garland*").

where it would be very difficult indeed to find that Parliament intended that criminal conduct should be excused by reason of the actions of a regulator.

Accordingly, *Garland* simply is not determinative of the scope of the RCD in the competition law sphere. The statement on page 1 of the Bulletin that *Garland* "directs a cautious application of the RCD" should be deleted and similarly references to *Garland* in the Bulletin (main text and endnotes) to *Garland* as a basis for denying the application of the RCD should be deleted. If anything, *Garland* provided an additional basis (based on the concept of "leeway") for arguing that the *Competition Act* does not apply to regulated conduct.

5. Application of RCD to *Per Se* Offences

The Bureau's discussion in this area is, in our view, a significant improvement over the previous bulletin. However, we would urge the Bureau to further clarify its position.

In this regard, we suggest that the fourth paragraph of Part II of the Bulletin which begins: "In compliance with the Supreme Court in *Jabour*, the Bureau…" a specific statement (similar to that which is currently in footnote 19) be added to clarify that "for greater certainty, *Garland* does not eliminate or undermine any regulation-based defences in the context of the *per se* provisions of the *Competition Act*." Furthermore, we encourage the Bureau to include an example either in the text or in a footnote to illustrate this point. In this regard, consider the following example:

> A provincial liquor control board regulates the sale of alcoholic spirits in the public interest, and sells those spirits to consumers at retail. Suppliers must obtain approval to list their products and the supplier's list price must also be approved by the board. If the supplier wants to put its product on sale, it must apply to the liquor control board for permission to make a "limited time offer" (LTO) at a lower price. The liquor control board allows only one LTO per product per year. An aggrieved spirits supplier complains to the Competition Bureau, alleging that, in refusing to grant it permission to make an LTO for a particular product, the liquor control board has "by agreement, threat, promise or .. like means, attempt[ed] to influence upward" the price of its product. The supplier alleges that this conduct is per se illegal under section 61(1)(a) of the *Competition Act*. The Commissioner concludes that the RCD is not available in light of the Garland case. Will the Commissioner pursue the provincial liquor board, or are there other principles of law or enforcement policy that would cause her to set aside the complaint?

We believe that Parliament could not have intended persons acting pursuant to regulation should be faced with the possibility of being subject to criminal penalties for doing so.

Accordingly, we believe that a defence based on lack of *mens rea* (i.e., the accused did not act voluntarily or intentionally as the action was mandated by regulation) or an argument that regulation is not an "agreement, threat, promise or…. like means" could be successfully mounted in this case. In any event, to penalize the regulator in this case would be manifestly unfair given the fact that it acted within the scope of its legislative mandate and presumptively in the public interest in doing what it did. Accordingly, we believe it is important that the Bulletin include a specific statement to the effect that the Bureau will not seek to prosecute conduct authorized or mandated under another law (whether federal or provincial).

6. The Reviewable Practice Provisions of the *Competition Act* are Replete with "Leeway Language"

The Bulletin states in Part II that: "Moreover the "leeway language" referenced in *Garland* does not appear in the reviewable practice provisions of the Act" and in footnote 20 it states: "Indeed, a number of provisions of the Act, such as s. 74 contain no language that is even, arguably, analogous to that identified in Garland". We do not understand the basis of these statements at all and, in our view, these statements are wholly incorrect.

Garland creates a clearer basis (which builds on existing, albeit weak, authority in the area) for invoking the RCD under the civil provisions of the *Competition Act*, by introducing the concept of leeway into the RCD equation. The term "leeway" is a flexible term capable of broad application. "Leeway" is defined in the *Canadian Oxford Dictionary* as an "allowable deviation or freedom of action", and in the *Webster's New Collegiate Dictionary* as "an allowable margin of freedom or variation." In particular, following *Garland*, it is open to argue that the RCD applies to any provision of the *Competition Act* which: (a) has a normative element such as "unduly", "substantial" or "adverse" in sections 75, 77, 79 or 92 which itself is inherently imprecise, uncertain and encompasses complex economic consideration; and/or (b) which contains a discretionary element such as the language incorporated in every provision of Part VIII of the *Competition Act* "the Tribunal may order". The negative attitude expressed in the Bulletin regarding the potential scope of application of the RCD where the civil provisions of the *Competition Act* are involved is effectively perverse in that the civil provisions are intended to be more flexible (and are less a strong statement of policy) than the criminal provisions.

The reviewable practice provisions have been specifically designed to incorporate "leeway" into the Tribunal's decision-making process. For example, a refusal to deal which satisfies the five criteria of section 75 of the *Competition Act* will not be subject to a remedial order unless and until the Tribunal is persuaded to and does exercise its discretion to order relief. The structure of the reviewable practice provisions enables

these provisions of the *Competition Act* to cooperate with, and certainly not to interfere with, the regulatory statute.

Consider the following example:

> An agricultural marketing board comprised of or advised by producer representatives, acting pursuant to valid provincial legislation, sets a minimum price for milk, and directs milk producers not to price below that minimum price. A consumers' association complains to the Bureau that the producers are jointly dominant, have engaged in a practice of anti-competitive acts by fixing the prices for milk, and that the conduct has resulted in a substantial lessening and prevention of competition in the retail and wholesale markets for the sale of milk. It would clearly be a miscarriage of justice for the marketing board and/or the producers to be held to be in violation of section 79 (abuse of dominant position) for complying with provincial legislation in this regard.

We do not believe that the Tribunal would exercise its discretion under section 79 to make an order against the board or the producers on these facts.

Accordingly, in our view, contrary to that expressed in the Bulletin, *Garland* supports the application of the RCD to the reviewable practice provisions of the *Competition Act*. Therefore, the Bulletin ought to explicitly recognize that there is no real impediment to applying the RCD to the reviewable practices provisions of the *Competition Act* and the Bureau clearly articulate its position respecting the availability of the RCD to the reviewable practice provisions of the *Competition Act.*

7. Differentiating between Federally and Provincially Regulated Conduct

We acknowledge the changes the Bureau has made in this area and, in particular, the guidance the Bureau has given on the application of the *Competition Act* where there is a comprehensive federal or provincial regulatory regime[4]. It would be helpful if the Bureau outlined its approach to merger review in the context of regulated industries, particularly where both the Bureau and the industry-specific regular are reviewing the same merger (i.e. how will the two review processes be co-ordinated?).

On the more general issue of the availability and scope of the RCD in the federal sphere, the Bulletin indicates that where Parliament has expressed the intention to displace competition law enforcement by establishing a comprehensive regulatory regime, the Bureau "will not pursue a matter under *any* provision of the Act" (p. 4). This broad

[4] As discussed above, footnote 31 which is composed solely of the phrase "whether federal or provincial" should be incorporated directly into the text of the Bulletin.

statement is consistent with the jurisprudence which suggests that the RCD is available in the federal sphere[5]. Indeed, since "*any* provision" includes all of the reviewable practices provisions and all of the criminal provisions (including the *per se* criminal provisions), it appears that the Bureau will give wider reign to federal regulators than to provincial regulators (a reversal of the Bureau's previous position as we understand it). While we strongly endorse the Bureau's conclusion that federally regulated conduct should be exempt, we believe that the Bureau is being overly cautious in treating provincially regulated conduct far more narrowly than federally regulated conduct. We would suggest that the Bulletin be less qualified on this point. While we acknowledge that there are different constitutional underpinnings for the RCD in the federal vs. provincial sphere, certainly one would not expect different conclusions on identical facts by virtue of the regulatory action being taken at the federal as opposed to the provincial level. We believe, at a minimum, the Bulletin should explicitly state that the Commissioner will accord similar treatment to federally and provincially regulated conduct as there is no principled basis for distinguishing between the two types of conduct for purposes of applying the RCD.

The qualifications outlined in the Bulletin respecting application of the RCD or its federal analogue in the federal sphere– specifically the need for an "accountable" regulator and a "comprehensive" regulatory regime, and the need for the Bureau to be able to "confidently determine" Parliamentary intent – should also be removed.

The first two paragraphs of the Bulletin would, in our view, benefit from discussing the principles upheld by the federal Court of Appeal in the Eli Lilly case[6] and providing one or more specific examples. Below is our suggestion in this regard.

> Where the specific federal law neither compels nor authorises conduct or behaviour that the *Competition Act* (being a general law) may forbid, both laws can operate harmoniously without interfering with one other. For example, Section 50 of the *Patent Act* provides that patent is assignable in law and Section 45 of the *Competition Act* prohibits agreements which unduly lessen competition. Section 50 does not authorize or compel or purport to exempt patent assignments which are forbidden by Section 45. The assignment of a patent may unduly lessen competition in

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5 In this connection we note that the courts have recognized the application of the RCD in the federal sphere in several cases, namely *Industrial Milk* (1988), 47 D.L.R. (4th) 710 (which involved joint federal-provincial regulation), *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas* (1992), 45 C.P.R. (3d) 346 (F.C.T.D.) (RCD exempts activities of the Copyright Board regulated under the federal *Copyright Act*) and *R* v. *Charles*, [1999] S.J. No. 763 (Sask. Prov. Ct.) (RCD applies to *Canadian Wheat Board Act*).

6 *Apotex* v. *Eli Lilly*, 2005 Federal Court of Appeal 361 (November 5, 2005).

> contravention of Section 45 of the *Competition Act* and Section 50 of the *Patent Act* does not immunize it from challenge under Section 45 of the *Competition Act*. On the other hand, the CRTC as part of its rate regulation scheme under the *Telecommunications Act* has mandated a policy of below-cost retail pricing in remote and rural areas. Compliance with this scheme, which is both authorized and compelled by the regulator, would, absent the application of RCD, be vulnerable to prosecution under section 50(1)(c) of the *Competition Act* or to challenge under section 79 of the *Competition Act*. In this case, the RCD applies to shield those complying with the rate regulation regime from challenge under the *Competition Act*.

8. No Basis for Distinguishing between Regulators and Regulatees

The Bureau itself in Part II of the Bulletin acknowledges that there is no jurisprudential basis for distinguishing between the application of the RCD as between regulators and regulatees yet surprisingly it then states that the activities of regulatees may be subject to greater scrutiny by the Bureau than the activities of regulators "in recognition of this caselaw". This conclusion is not supported by any case law. We do not see any logical basis for distinguishing between regulators and regulatees when applying the RCD. On what basis would one conclude that conduct of a regulator might be exempt from the *Competition Act*, but that a private party that was compelled to act by virtue of the regulator's conduct, would be subject to prosecution or liability under the *Competition Act*? Accordingly, we suggest that the reference to distinguishing between regulators and regulatees be removed from the Bulletin.

9. The Need for Legislative Clarity

We agree with the Bureau's conclusions in the Bulletin that the "status of regulated conduct under the Act requires greater clarity". This is a complex and important area of the law where clear guidance is necessary. We support legislative action to resolve some of the uncertainties and conflicting interpretations of the jurisprudence.

We would be pleased to discuss any of the issues raised in this letter with you in further detail at your convenience. Again we appreciate being provided with the opportunity to comment on the Bulletin.

Yours very truly,