February 3, 2006

Ms. Martine Dagenais
Competition Bureau
Place du Portage I
50 Victoria Street
Gatineau, Québec
K1A 0C9

By Fax: (819) 997-5222

Dear Ms. Dagenais:

RE: CONSULTATIONS ON THE DRAFT TECHNICAL BULLETIN ON "REGULATED" CONDUCT DATED NOVEMBER 2005

On behalf of our client, the Canadian Restaurant and Foodservices Association (the "CRFA"), I am writing in response to your Notice dated November 1, 2005, in which you invited interested parties to comment on the ***Draft Technical Bulletin on "Regulated" Conduct*** dated November 2005 (the "Draft Bulletin").

The CRFA is one of the largest business associations in Canada. Since it was founded in 1944, CRFA has grown to more than 25,000 members, representing restaurants, bars, cafeterias and social and contract caterers, as well as accommodation, entertainment and institutional foodservice.

As stated in our Submission dated December 23, 2004, we believe that the ***Information Bulletin on the Regulated Conduct Defence*** dated December 2002 must be revised in order to be consistent with the April, 2004 Supreme Court of

Canada *Garland v. Consumers Gas* decision. Since the purpose of the Bulletin was to outline the Bureau's position with regard to the jurisprudence on the Regulated Conduct Doctrine ("RCD"), the Bulletin must be updated so that it incorporates the more restrictive interpretation of the RCD recently adopted by the Supreme Court of Canada in *Garland*.

We have reviewed the Responses to Consultations the Bureau received on the RCD, and we do not agree with some submissions' attempts to rely on case law that predates *Garland*. We submit that *Garland* cannot be distinguished or ignored as *obiter*. As the Draft Bulletin states, the most recent Supreme Court of Canada decision to address the RCD directs a cautious application of the RCD and cites with approval Sopinka J. in Paragraph 78, which explicitly states:

> *…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.*

We believe that the Draft Bulletin is a step in the right direction. However, the following points should be clearly specified to ensure that the limited scope of the RCD is more precisely demarcated.

Our submissions are presented under the following headings:

1. The RCD is inapplicable unless Parliament has enacted an unequivocal statutory exemption;

2. The RCD is inapplicable unless the conduct is "regulated" – i.e. mandated rather than merely authorized;

3. The Bureau must subject “Self-Regulators” and “Regulatees” to close scrutiny;

4. The RCD can only apply to specific conduct or actions; and

5. Conclusion.

1. THE RCD IS INAPPLICABLE UNLESS PARLIAMENT HAS ENACTED AN UNEQUIVOCAL STATUTORY EXEMPTION

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*”) or another federal statute that the *Act* does not apply to specific activity, then that activity is covered by the *Act*.

The Draft Bulletin should therefore make it clear that the mere 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.

In some cases, Parliament has used express language in other federal statutes to limit the application of the *Act*. As footnote 3 of the Draft Bulletin notes, Section 32 of the *Farm Product Agencies Act* defines some conduct of certain agricultural marketing agencies which is excluded from the *Act*. Section 32 states:

> *Nothing in the Competition Act applies to any contract, agreement or other arrangement between an agency and any person or persons engaged in the production or marketing of a regulated product where the agency has authority under this or any other Act, under a proclamation issued under this Act or under an agreement entered into pursuant to section 31 of this Act to enter into such an arrangement.*

On the other hand, another federal statute, the *Canadian Dairy Commission Act,* contains no such language. We agree with footnote 3 of the Draft Bulletin, which states:

> *…Recognized principles of statutory interpretation, such as expressio unius est exclusio alterius (see Sullivan, Driedger on the Construction of Statutes, 4th ed. at 179 ff), and the recent Supreme Court decision in Garland v. Consumers Gas Co, [2004] 1 S.C.R. 629 ("Garland") suggest that the Bureau, in particular, should refrain from immunizing conduct from the Act absent Parliamentary intent to that effect.*

Furthermore, 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.

We therefore submit that the body of the Draft Bulletin should clearly specify that the RCD is inapplicable unless Parliament has enacted an unequivocal statutory exemption, and that there are no presumptions in favour of the RCD in the absence of such statutory language.

2 THE RCD IS INAPPLICABLE UNLESS THE CONDUCT IS "REGULATED" – I.E. MANDATED RATHER THAN MERELY AUTHORIZED

As Footnote 27 of the Draft Bulletin notes, a statutory conflict does not arise unless "compliance" with one statute requires the breach of another statute. If a statute merely authorizes (and does not expressly compel) certain conduct, that conduct is not required in order to comply with the statute.

There is a fundamental difference between voluntary conduct within a regulatory scheme and conduct that is compulsory. As Footnote 22 of the Draft Bulletin recognizes, one cannot ignore the critical distinction between decisions governed by business judgment and decisions required by regulatory coercion.

Therefore, 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 compels the activity covered by the regulations.

We therefore submit that the Draft Bulletin must clearly make the distinction between activity that is required, on the one hand, and activity that is merely "authorized" or voluntary activity, on the other hand. The former activity may be exempted by the RCD, the latter cannot.

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

Page 3 of the Draft Bulletin describes the critical distinction between those who regulate, and those who are regulated:

> *The RCD is either invoked by those who regulate ("regulators") or those they regulate ("regulatees"). Although no Canadian court has expressly indicated that the application of the RCD differs as between regulators and regulatees, regulatees have not typically benefited from an application of the RCD by Canadian courts. Therefore, while the Bureau's basic RCD analysis will remain the same, the activities of regulatees may be subject to greater scrutiny by the Bureau than the activities of regulators in recognition of this case law.*

In addition to the key distinction between *regulators* and *regulatees*, we submit that the body of the Draft Bulletin should

recognize that not all regulators are the same. Footnote 23 states:

> *Self-regulatory bodies may warrant greater scrutiny than public regulators because these bodies may have a broad statutory mandate but may otherwise make decisions on matters in which they themselves have a direct interest.*

For example, certain federal agriculture marketing boards and related agencies have a direct pecuniary interest in their decisions which affect the prices consumers must pay for their members' products.

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. There are no irrebuttable presumptions in this regard.

Likewise, no deference should be shown to rules or regulations passed by self-interested parties, particularly when such regulations are not subject to any legislative or parliamentary committee oversight or scrutiny.

We submit that the body of the Draft Bulletin should recognize the self interest of certain self-regulatory bodies and reflect the fact that the Bureau administers general framework legislation in the public interest, by clearly stating:

> *Self-regulatory bodies will warrant greater scrutiny than public regulators because these bodies may have a broad statutory mandate but may otherwise make decisions on matters in which they themselves have a direct interest.*

4. THE RCD CAN ONLY APPLY TO SPECIFIC CONDUCT OR ACTIONS

The Draft Bulletin should specify that the RCD cannot broadly exempt from the *Act* entire regulatory schemes, regulators or regulatees. Instead, the *Regulated Conduct Doctrine* can only exempt specific conduct or actions.

There is no binding case law to support the notion that the RCD provides *carte blanche* to schemes, entities or individuals.

5. CONCLUSION

By reason of the foregoing, we submit that the Bureau should make the following four changes to the Draft Bulletin:

1. The body of the Draft Bulletin should clearly specify that the RCD is inapplicable unless Parliament has enacted an unequivocal statutory exemption, and that there are no presumptions in favour of the RCD in the absence of such statutory language.

2. The Draft Bulletin must clearly make the distinction between activity that is *required*, on the one hand, and activity that is merely authorized or voluntary activity, on the other hand. The former activity may be exempted by the RCD, the latter cannot.

3. The Draft Bulletin should specify that the Bureau will subject "Self-Regulators" and "Regulatees" to close scrutiny.

4. The Draft Bulletin should specify that the RCD cannot broadly exempt from the *Act* entire regulatory schemes, regulators or regulatees.

Instead, the *Regulated Conduct Doctrine* can only exempt specific conduct or actions.

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

Yours sincerely,

James McIlroy