THE CANADIAN CHAMBER OF COMMERCE

LA CHAMBRE DE COMMERCE DU CANADA

# Submission to the Competition Bureau

# Re: Technical Bulletin on “Regulated” Conduct

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*The Voice of Canadian Business* ™

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**SUBMISSION CONCERNING THE BUREAU OF COMPETITION'S DRAFT TECHNICAL BULLETIN ON "REGULATED" CONDUCT OF NOVEMBER, 2005**

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## I. Introduction

On behalf of the Canadian Chamber of Commerce (the "Canadian Chamber"), we are pleased to provide comments on the Competition Bureau's (herein sometimes called the "Bureau") Draft Technical Bulletin dated November, 2005 on "Regulated" Conduct (the "Technical Bulletin"). The Canadian Chamber is Canada's largest and most representative business association, speaking for 170,000 members in over 350 local chambers. The Canadian Chamber's mission is to foster a strong, competitive, and profitable economic environment that benefits business and all Canadians.

The Canadian Chamber appreciates the opportunity to present its views on the Technical Bulletin particularly in light of the fact that an earlier version had previously been published for public comment. In this connection, we applaud the Bureau not only for the revisions made in the present draft to give effect to comments received on the earlier version but also for inviting further public comment on such draft.

Further, the Canadian Chamber acknowledges that the subject of regulated conduct is both complex and difficult, particularly as the existing case law has not been fully developed, in terms of its application in each and every situation. However, that complexity and difficulty, and the uncertainty which it gives rise to, underscore the need to provide guidance to the public in this area and for the Bureau to take an enlightened enforcement approach in circumstances where the jurisprudence has not yet been fully developed.

That said, the Canadian Chamber continues to have a number of significant reservations about the Technical Bulletin in its current form, notwithstanding it is a marked improvement over the earlier draft.

## II. General Reservations Concerning the Technical Bulletin

In this section, the Canadian Chamber sets forth some general observations concerning the Technical Bulletin for the purposes of summarizing its principal concerns. More specific discussion of particular points listed below appears in the text following this section.

1. In the view of the Canadian Chamber, the Technical Bulletin does not fully accept the principle that it is inappropriate to penalize, under the provisions of the *Competition Act* (the "CA"), conduct which is either mandated or authorized by validly-enacted legislation or regulation. In the Canadian Chamber's view, that principle should apply whether the legislation or regulation in question is federal or provincial and whether the relevant penalizing provision of the CA is civil or criminal.

2. In this regard, it is emphasized on page one of the Technical Bulletin that ordinarily the Bureau will take a different approach to conflicts between the CA and provincial regulation on the one hand and cases where the conflict is between the CA and some other federal legislation or regulation, on the other. Similarly, it is indicated that a different enforcement approach will be taken by the Bureau in regard to such conflicts where the provisions of the CA are civil, as contrasted to those which involve the CA's criminal provisions. For reasons detailed below, the Canadian Chamber does not agree that different approaches are required in either of these cases.

3. In the view of the Canadian Chamber, the *Garland*[1] case should not be read as limiting the scope of the Regulated Conduct Doctrine ("RCD") as it was not a case which involved the CA, but, rather, the *Criminal Code*. Not only did the *Criminal Code* provision which was in issue in the case set forth a very strong and unequivocal statement of government policy, it also contained explicit "notwithstanding any other (legislation)" language which has not ordinarily been found in other RCD cases.

4. If one were to accept the conclusions of the Technical Bulletin in regard to the CA's *per se* criminal offences and its civil remedies, it would not be too difficult to imagine, should the conspiracy provisions of section 45 of the CA be transformed into a *per se* offence and virtually all other provisions of the CA moved to the civil side (i.e., all the pricing practices, etc.), a situation where there could be virtually no scope for the operation of the RCD under the CA going forward.

5. It would appear to be counter-intuitive that there should be reduced scope for the application of the RCD in the case of a conflict involving the civil provisions of the CA than where the CA's criminal provisions are in issue, in light of the fact that the CA's civil provisions are clearly intended to be more flexible in their application than the criminal provisions.

6. Similarly, the Bureau's reluctance in the Technical Bulletin to recognize the extension of the RCD principle (which was largely developed in the context of conflicts between the CA and provincial legislation) to situations involving the conflicts between the CA and federal legislation, seems particularly anomalous given the fact that in the federal-to-federal situation, there is not the additional hurdle to cope with that there is in federal-to-provincial situations in regard to the federal paramountcy doctrine, which ordinarily dictates the pre-eminence of federal law in the case of such conflicts.

7. It is not clear why regulatees should be more limited than regulators in their ability to invoke the protection of the RCD in regard to regulations which expressly authorize or mandate the actions taken.

8. As well, the notion that there ought to be greater reticence about applying the RCD in the case of self-regulation, seems to ignore the decision of the Supreme Court of Canada in the *Jabour*[2] case, which arguably constitutes the highest authority in the field of RCD

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

[2] *Canada (Attorney-General)* v *Law Society of British Columbia* (1982), 127 D.L.R. (3d) 1 (S.C.C.) ("*Jabour*").

jurisprudence and was a case involving self-regulation where the court upheld the validity of rules promulgated by a self-regulator (the Law Society of British Columbia) in the face of a challenge that such rules contravened what is now section 45 of the CA. The Technical Bulletin itself acknowledges the absence of any jurisprudential basis for such a distinction, which is also in direct conflict with the Supreme Court's observations in *Jabour* about the legitimate role for self-regulation.

9. It appears throughout the Technical Bulletin that the Bureau has sought to confine the application of the RCD principle to those specific instances in which the RCD has been officially recognized by the courts and has largely assumed it has no scope of operation outside the limited areas where the courts have already positively opined upon it. This is surprising in light of the fact that not only has there been no adverse comment by the courts regarding its possible application or non-application in these other areas, but also because the RCD is acknowledged to be an evolving principle whose full dimensions have not yet been completely delineated by the courts.

10. The Canadian Chamber has a concern about the scope and content of the endnotes which form part of the overall Technical Bulletin which clearly go beyond simply supporting or clarifying statements contained in the main text of the Technical Bulletin. Moreover, in a number of instances, such endnotes appear to go well beyond statements in the Technical Bulletin itself, setting forth qualifications on statements made in the body of the Technical Bulletin. Also, some of the endnotes appear to be of questionable relevance, as for example, the discussion of cases based on the U.S. state "action doctrine", which has been developed on a constitutionally different principle. The Supreme Court in *Jabour* wrote that while there may be some loose parallels with the U.S. jurisprudence, "beyond that, the United States discussions are of little application here".

## III. RCD'S APPLICATION TO FEDERALLY REGULATED CONDUCT

Part III of the Technical Bulletin indicates that where Parliament has articulated an intention to displace competition law by establishing a comprehensive regulatory regime, regulatory action will not be considered to contravene the CA.

While this statement, which is made in the Technical Bulletin in the context of federally regulated conduct, would appear to move us in the direction of finding that the RCD applies in the federal sphere, the Technical Bulletin stops short of expressly accepting its operation in regard to such conduct. Great emphasis is given in the Technical Bulletin to Parliamentary intent and mention is made of other legal doctrines or defences (such as absence of *mens rea*, official inducement of error, statutory justification and Crown immunity) but, significantly, there appears to be real reticence in the Technical Bulletin to accept that the RCD as such could operate in relation to federally regulated conduct.

In the view of the Canadian Chamber, this is both unfortunate and unnecessary. While accepting that the preponderance of RCD case law has been developed in relation to provincially regulated

conduct, there are, in fact, existing unreversed judicial precedents which explicitly support its application in regard to federally regulated conduct.[3]

Moreover, it seems anomalous to suggest that the RCD does not have potential application in regard to federally regulated conduct when in fact there is no presumption (as there is in regard to provincial statutes) of federal legislative paramountcy to overcome.

In addition, in terms of Parliamentary intent, section 125 and 126 of the CA strongly suggest that it was never intended by Parliament to override federal or provincial legislation. Under those provisions, the Commissioner of Competition (the "Commissioner") is authorized to appear before federal and provincial regulators for the purpose of making representations in regard to competition. If the CA simply pre-empted such regulation in every instance, there would be no need for the Commissioner to be accorded these advocacy powers.

## IV. RCD'S APPLICATION IN REGARD TO THE CA'S CIVIL PROVISIONS

Similarly, it seems anomalous to suggest that the RCD should not have any application where the CA's civil provisions are involved, whether the conflict is with a provincial or federal regulatory scheme.

Much of the Technical Bulletin's discussion of this subject seems to revolve around three subjects, namely: (i) the assertion that the CA's civil provisions do not contain appropriate "leeway" language to invoke the doctrine in accordance with the pronouncements in that regard in the *Garland* case; (ii) the supposed absence in the case of these provisions (as contrasted with earlier RCD case authorities) of any "public interest" and "*mens rea*" rationales to support invocation of the RCD; and (iii) the absence of jurisprudence supporting its application in this area.

However, a number of points may be made in response to these contentions. The first is that it is equally intolerable for persons who act in compliance with validly-enacted regulations directing or authorizing their actions, for them to then be penalized under the CA's civil provisions (which, if the amendments proposed by Bill C-19 were to become law, could involve up to $15 million in maximum penalties for transgressions of certain of the CA's civil provision) as it is where the CA's criminal provisions are involved. In other words, exactly the same rationale for relieving against the imposition of penalty consequences exists under the CA's civil provisions as in the case of its criminal provisions.

Secondly, while the wording of the civil provisions is different, in that such terms as "unduly" and "contrary to the public interest" are not used in the language of the civil provisions, almost all of the civil provisions, and, most importantly, all its major sections (such as those dealing with abuse of dominance, exclusive dealing, tied selling, market restriction and refusal to deal) contain similar qualifiers requiring a showing either of a "substantial prevention or lessening of competition" or of an "adverse effect on competition" which, it is submitted, represent civil

[3] *Industrial Milk Producers Association et al* v *Milk Board et al* (1988), 47 D.L.R. (4th) 710 [F.C.T.D.]; *Society of Companies, Authors and Music Publishers of Canada* v *Landmark Cinemas* (1992), 45 C.P.R. (3d) 346 [F.C.T.D.]; *R* v *Charles* [1999] S.J. No. 763 (Sask. Prov. Court).

analogues to those contained in the CA's criminal sections which have been pointed to as evidencing an intention to provide "leeway".

Moreover, all of the civil provisions are effectively further qualified, and thereby arguably provide a further dimension of "leeway", in that the application of each is expressly dependent upon the Competition Tribunal (the "Tribunal") actually exercising its discretion to issue a remedial order in regard to any specific practice. If the Tribunal chooses not to do so, then there is no contravention of the CA's civil provisions. This discretion on the part of the Tribunal not to take enforcement action in any given civil case has to be considered to constitute "leeway" in the sense discussed in *Garland* because it means that the CA's civil provisions contemplate that they may not be applied in any particular case where the Tribunal does not consider it appropriate.

In the only case which actually involved the CA's civil provisions, namely *The Law Society of Upper Canada* case[4], all parties (including the Commissioner) conceded that the RCD did have application there. In that case, a valid provincial regulation authorized a mandatory insurance scheme for lawyers in Ontario and it was concluded that it displaced the potential application of the CA's abuse of dominance provisions. While it may be argued how extensively the appropriateness of the RCD's application in such case was considered, it clearly represents another instance where, if the doctrine had not applied and the Law Society had been held to be in contravention of the CA's civil provisions, this would have been manifestly inequitable, given that the Law Society was authorized by its governing legislation to set up the insurance regime which was under attack.

Even assuming the *Law Society* case is not a strong authority in this area due to the fact that the RCD's application in that instance was not extensively debated or considered, there are not any other cases involving the civil provisions of the CA in which the courts have opined that the RCD should not apply in the case of the CA's civil provision or where they have even commented on the possibility of its non-application in this area.

Finally, it just seems wrong to think that there should be any greater doubt about the potential application of the RCD in regard to the CA's civil provisions than its criminal sections in that it has been clearly acknowledged since the civil provisions were first introduced to the CA (1976) that they were intended to be more flexible in their application than the criminal provisions. Accordingly, they represent a less strong statement of government policy than the CA's criminal provisions.

## V. THE *GARLAND* CASE

On page 1 of the Technical Bulletin, it is stated that *Garland* directs a "cautious application of the RCD". The Canadian Chamber does not agree that this is the case and indeed is concerned about the Technical Bulletin's overstatement of *Garland*'s importance in this context. There are several reasons for this. First, *Garland* did not involve the application of the RCD in a case involving the CA but, rather, was a case in which the court considered whether the doctrine ought to be extended to a situation outside the area of competition law. Accordingly, it is

[4] (1996, 67 C.P.R. (3d) 48 (Ont.Ct.Gen.Div.) (the "*Law Society"* case).

submitted that *Garland* is not a case authority which is required to be followed in conflict situations involving the CA. Secondly, in contrast to the CA, which does not contain any explicit claim of legislative pre-eminence, the *Criminal Code* provision which was in issue in *Garland* (section 347) did contain language expressly excluding the operation of any other conflicting federal enactment. While that pre-eminence language did not extend to provincial legislation (which, in any event, is normally subordinate to federal law in cases of conflict), the inclusion of such a provision in that section of the *Criminal Code* made it very clear that Parliament intended that that provision should have legislative pre-eminence over other laws which might be potentially applicable. Moreover, the *Criminal Code* reflects a more definitive statement of public policy, in contrast with the CA whose provisions are intended to regulate the economy by encouraging competition. Given that it is effectively intolerable for parties which act in obedience to validly-enacted legislation or regulations directing or authorizing their conduct then to find themselves exposed to penalty consequences under the CA for doing so, it is not to be readily supposed that a law of general application such as the CA must necessarily prevail over such other laws. Indeed, the whole development of the RCD is reflective of the strong desire of the courts over the years to relieve against such consequences by developing and applying this principle (the RCD), even to the point of overcoming the normally applicable federal paramountcy doctrine.

## VI. THE RCD AND *PER SE* OFFENCES

While it is encouraging to note the broad statement contained at pages 4 and 5 of the Technical Bulletin (made in the context of its discussion of federally regulated conduct) that the Bureau will not pursue a matter under any provision of the Act in the face of a comprehensive federal regulatory scheme, even if that statement can be taken to apply to the CA's offence provisions which are of a criminal *per se* character (where there is a conflict with a federal regulation), it is by no means clear that it takes a similar view in regard to provincial regulation. Moreover, the absence of an explicit acknowledgement that even federally regulated conduct may be protected by the RCD from the application of such *per se* criminal provisions is a cause for concern, more particularly in light of the apparent acceptance by the Bureau of the need to demonstrate appropriate "leeway" by express language or implication in order for the RCD to apply.

In regard to *per se* offences, there typically is no such "leeway" language, which is in the nature of *per se* provisions. Accordingly, the Canadian Chamber wishes to have the Technical Bulletin rewritten to clarify that it can apply to the CA's criminal *per se* provisions and that is so whether the regulated conduct is directed or authorized under a federal or a provincial regulatory power.

If specific legal support for this view is required, it should be noted that where a party is acting pursuant to a validly-passed statute or regulation, it can hardly be considered to form the necessary *mens rea* to commit the crime by engaging in the conduct so mandated or directed. Similarly, it is surely not to be considered to be in the public interest to permit enforcement of the CA where the action taken is authorized by a sovereign government, whether the federal or provincial government (which itself must be taken to have been in the public interest).

This is critical because if section 45 were to be transformed, as has been suggested, into a provision creating a *per se* offence and it is not clear that the RCD has application in such a case, the activities of a host of regulated industry members could find themselves in the unenviable

position of possibly being prosecuted simply for complying with validly-enacted federal or provincial legislation.

## VII. APPLICATION OF RCD TO REGULATORS AND REGULATEES

One of the more curious statements contained in the Technical Bulletin (in Part II on page 4), but which is now of significant concern since a similar statement was made in the earlier draft, is that the application of the RCD can differ as between regulators and regulatees. This is particularly the case since there appears to be no logical basis for, or jurisprudence supporting, such statement (and, indeed, there is at least one case[5] in which the RCD was applied for the benefit of regulated persons). As a matter of logic, it is difficult to understand how the acts of regulators in passing and/or administering regulations should have their conduct protected by the RCD while those they are regulating are fully exposed to prosecution under the CA. Surely there can be no sustainable logical basis for distinguishing between its availability to regulators and regulatees. Accordingly, we suggest this entire discussion be omitted from the finalized Technical Bulletin.

## VIII. THE RCD AND SELF-REGULATED BODIES

Arguably, an even more surprising statement in the Technical Bulletin is the one which appears in endnote 23 suggesting that self-regulatory bodies should be subject to greater scrutiny than other types of regulators. Even if we overlook the inconsistent logic of that suggestion, there is the problem that the Supreme Court of Canada in its only decision involving the application of the RCD in the context of a competition case (*Jabour*) specifically applied the doctrine to a self-regulatory body, the Law Society of British Columbia. In that case, the court concluded that it was wholly within the authority of the provincial government to choose self-regulation as its preferred method of regulating a given industry or profession and that its decision cannot be called into question in that regard. Accordingly, we would again urge that these statements be omitted from the finalized version of the Technical Bulletin.

## IX. THE USE OF ENDNOTES

Finally, we find the highly extensive use of endnotes (comprising approximately two-thirds of the type-space of the main text of the Technical Bulletin, notwithstanding that the endnotes are in a considerably reduced font as compared with the main text) to be both inappropriate and at times confusing as to the messages being communicated in the main text.

Ordinarily, endnotes or footnotes are limited to providing a reference to an authority for some statement made in the main text or to clarify or provide further detail amplifying such a statement. However, in the case of the Technical Bulletin, the content of the endnotes in many instances goes significantly beyond this to the point where there are new issues raised therein or there is some qualification engrafted on to a more general statement contained in the Technical Bulletin. In some instances, the discussion contained in certain of the endnotes seems to be quite irrelevant to the whole subject. This is most certainly the case with the very lengthy discussion at endnote 6 of the cases decided under the U.S. "state action" doctrine, which so far as we are

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[5] *2903113 Canada Inc.* v *Quebec (Regie des marché agricoles et alimentaries)* (1997), 79 C.P.R. (3d) 403 (Q.CA.)

aware was developed in a wholly unrelated context of United States constitutional law. Again, in endnote 27, there is commentary included in regard to the supposed need to identify an "operational conflict" between the provisions of the regulation in issue and those of the CA. We do not agree that there is any requirement to demonstrate the existence of an operational conflict as a pre-requisite to the application of the RCD. Indeed, the RCD itself operates to avoid such conflicts.

Accordingly, we suggest that the endnotes be confined to references to supporting authorities of the inclusion of clarifying detail and that if there was any significant points of substance in the endnotes which are sought to be retained, they be incorporated in the main text of the Technical Bulletin itself.

All of which is respectfully submitted by

THE CANADIAN CHAMBER OF COMMERCE

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