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Ontario Court Applies Regulated Conduct Defence on Summary Motion to Dismiss Class Action Alleging Market Allocation Conspiracy

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On March 15, 2018, Justice Perell of the Ontario Superior Court of Justice dismissed a proposed class action (*Hughes v. Liquor Control Board of Ontario*) concerning a document (Framework) signed by the Liquor Control Board of Ontario (LCBO) and the owner and operator of The Beer Store, Brewers Retail Inc. (BRI) in 2000. The plaintiffs alleged, among other things, that provisions in the Framework constituted an agreement between the LCBO and BRI to allocate the market for the sale of beer in Ontario contrary to the conspiracy offence in section 45 of the Canadian *Competition Act*. The Framework allegedly restricted the LCBO's ability to sell beer in packages of more than six containers or to sell beer carried by BRI to holders of liquor licences such as bars and restaurants. (The LCBO operates stores that carry a wide range of liquor products, including beer. BRI sells all package sizes at its beer stores in Ontario.)

Following extensive affidavit evidence and cross-examinations, Justice Perell granted summary judgment and dismissed the claim in its entirety without a trial. In doing so, Justice Perell applied the regulated conduct defence (RCD), holding that even if the challenged conduct might otherwise have violated the conspiracy offence, the conduct was authorized in a manner consistent with provincial legislation.

Summary Judgment in Civil Litigation

The *Hughes* decision is the latest example of an increasingly important trend in civil litigation following the Supreme Court of Canada's 2014 decision in *Hryniak v. Mauldin*. That decision expanded the scope of summary judgment, directing courts hearing motions for summary judgment to determine whether there is a genuine issue requiring trial in respect of each issue based on the evidence in the motion record, and if not, granting summary judgment and avoiding the unnecessary expense and delay of a trial. If the court finds no genuine issue requiring trial and the evidence in the motion record will permit the court to "fairly and justly adjudicate the dispute," a binding decision can be made on the record. As this case and others before it have demonstrated, summary judgment is also available in the context of class actions, even before the certification stage.

If the material facts are not disputed, summary judgment can be an effective tool in class actions and other proceedings to achieve a relatively early resolution and minimize costs.

RCD as a Complete Defence

As the *Hughes* decision explains, the RCD originally evolved to address potential conflicts between federal competition legislation and provincial statutes, particularly in the context of regulated industries and self-governing professions. The RCD recognizes that, as a matter of interpretation, under certain conditions regulated activities do not constitute criminal offences.

After a review of RCD case law, Justice Perell set out four general principles concerning the doctrine, all of which were well-established under the case law:

- i. The RCD is a principle of statutory interpretation that determines the scope or reach of a criminal offence, including contraventions of the *Competition Act*.

- ii. For the RCD to be available, it is necessary but not sufficient that the person whose conduct is impugned is regulated by provincial or federal legislation.
- iii. For the RCD to be available, it is necessary that the impugned conduct be required, directed or authorized by provincial or federal legislation.
- iv. The person relying on the RCD must identify in the legislation governing its industry or profession a provision that expressly or by necessary implication directs or authorizes the person to engage in the impugned conduct.

Consistent with these principles, Justice Perell determined that “the alleged wrongdoings associated with [the Framework] are not wrongdoings” because regulatory authorization sanctioned the conduct. Accordingly, the Framework did not constitute an offence under the *Competition Act*. The RCD was a complete response to the plaintiffs’ claims, and the action was dismissed in its entirety. Justice Perell also held that even if the RCD had not been a complete defence in 2000, amendments in 2015 to the Ontario *Liquor Control Act* confirmed that the impugned conduct had at all times been validly authorized by provincial legislation.

Consistent with prior decisions of the Supreme Court of Canada and other courts, Justice Perell did not accept the plaintiffs’ attempts to restrict the application of the RCD to situations in which the impugned conduct was authorized by a higher degree of formality than existed with respect to the Framework or to restrict the RCD to criminal prosecutions.

Justice Perell found that the Framework “was in the wheelhouse” of the powers and rights conferred on the LCBO and BRI by provincial liquor legislation. He noted that the LCBO had the authority to enter into contracts such as the Framework as a way of implementing its regulatory authority without any additional specific authorization, and no new legislative instrument or other directive was required for it to sign and implement the Framework. Accordingly, no further specific authorization was required for the RCD to apply to the Framework. Although he found that a 2015 amendment to the *Liquor Control Act* explicitly providing retroactive authorization of the Framework would have been sufficient to engage the RCD, it was not necessary for the RCD to apply in this case.

Justice Perell also rejected the plaintiffs’ position that 2010 amendments to the *Competition Act*, which removed the word “unduly” as an element of the conspiracy offence, limited the application of the RCD to only criminal prosecutions. The plaintiffs argued that the RCD was no longer available as a defence to private actions for damages. On the contrary, Justice Perell found that, in adding the new subsection 45(7) to the statute at that time, Parliament intended to preserve the effect of the RCD in civil claims. He commented that the plaintiffs’ interpretation would lead to the “absurd result” that both Crown agents and private entities would be civilly liable for conduct expressly authorized, or even required, by valid provincial law. This decision was again consistent with existing case law on the subject.

Implications

The *Hughes* decision confirms that defendants whose challenged conduct is authorized by statute may be able to resolve litigation at an early stage, before a full trial. The RCD does not apply to all conduct in regulated industries, but the *Hughes* case is an indication that courts are willing to apply the RCD in a practical and reasonable manner in a summary motion application.

Davies represented the LCBO in defending the proposed class action in the *Hughes* case.

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