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Highlights

REGULATED CONDUCT

the regulated conduct defence in Canada

Mark Katz and Charles Tingley discuss the scope of the "regulated conduct defence" ("RCD") in Canada. The RCD is a common law doctrine that – when applicable – provides a form of immunity from enforcement action under the *Competition Act* to persons engaged in conduct that is directed or authorized by other validly enacted legislation. The defence has been relied upon by parties to argue that the activities of various industries, trades and professions subject to government regulation are exempt from review under the Act. The scope and applicability of the RCD has been the subject of renewed discussion in Canada, with the Competition Bureau issuing a "Technical Bulletin" on the RCD in late June 2006. The Technical Bulletin describes the Bureau's enforcement position on the RCD and is intended to replace an Information Bulletin that the Bureau published in December 2002. The authors provide an overview of the RCD and the manner in which it has been applied by the courts in Canada. Further, they consider the implications of the Bureau's Technical Bulletin for the application of the RCD in Canada. 730

DECEPTIVE MARKETING

consent agreements and deceptive marketing

Martha Healey considers consent agreements in deceptive marketing cases under the *Competition Act*. In 1999, the Act was amended to create a dual track for enforcement action to address misleading advertising and deceptive marketing allegations by way of criminal prosecution or an administrative (civil) proceeding. The criminal prohibition deals with the most egregious matters. The civil regime under the Act addresses most instances of misleading representations and deceptive marketing practices. An increasing number of deceptive marketing cases in Canada are now resolved on the basis of a consent agreement between the Commissioner and the company or individuals allegedly involved in the reviewable conduct. Section 74.12 sets out the basis for the resolution of certain matters on the consent of the Commissioner and the party against whom the Commissioner either has launched, or may launch, proceedings. The author discusses cases that dealt with consent agreements, arguing that while such agreements are made with the consent of the party subject to the agreement, given recent consent agreements, it is clear that returning judicial oversight, impartiality and balance to the remedial process in deceptive marketing cases would be more in keeping with the legal and policy implications behind the 1999 amendments to the Act and the creation of a dual track regime under which such cases could be addressed. 735

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REGULATED CONDUCT

The "Regulated Conduct Defence" in Canada

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Introduction

With the trend in many jurisdictions towards continued deregulation and the development or strengthening of competition laws, the appropriate scope for competition law immunity accorded to regulated conduct has come up for renewed debate. The importance and multi-jurisdictional nature of this debate is reflected, for example, in studies conducted by the OECD[1] and more recently the International Competition Network into the limits and constraints on antitrust enforcement in regulated sectors.[2] The issue has also been the subject of a U.S. Federal Trade Commission report issued in 2003[3] and hearings this past year before the U.S. Antitrust Modernization Commission.[4]

The interface between competition law and regulation in Canada is governed by the so-called "regulated conduct defence" ("RCD"). The RCD is a common law doctrine that – when applicable – provides a form of immunity from enforcement action under the *Competition Act*[5] to persons engaged in conduct that is directed or authorized by other validly enacted legislation. The RCD has been relied upon by parties to argue that the activities of various industries, trades and professions subject to government regulation are exempt from review under the Act.

The scope and applicability of the RCD has been the subject of renewed discussion in Canada, with the Competition Bureau (the "Bureau") issuing a Technical Bulletin on the RCD (the "Technical Bulletin") in late June 2006.[6] The Technical Bulletin describes the Bureau's enforcement position on the RCD and is intended to replace an Information Bulletin which the Bureau published in December 2002 (without prior consultation) and which was criticized for being inconsistent with existing case law on the subject.[7]

Overview of the RCD

Origin

The Act does not contain a specific exemption to shield "regulated conduct" (i.e., activity governed by a legislative scheme) from the application of Canadian competition law. Rather, the RCD developed at common law, based on several early 20th century decisions where the constitutional validity of provincially legislated marketing schemes was challenged on the basis of the alleged inconsistency of these schemes with federal criminal competition legislation.

Under Canada's federal system, the provincial and federal levels of government are each granted distinct powers to legislate within their own sovereign jurisdiction.

[1] See, e.g., OECD Joint Global Forum on Trade and Competition, *Coverage of Competition Laws: Illustrative Examples of Exclusions* (April 30, 2003), http://webdomino1.oecd.org/comnet/ech/ tradecomp.nsf/viewHtml/index/$FILE/Ccnm-17-e.pdf.

[2] See, e.g., Antitrust Enforcement in Regulated Sectors Working Group (ICN), *Report to the Third* ICN Annual *Conference* (Seoul, April 2004), http://www.internationalcompetitionnetwork.org/annualconferences.html.

[3] FTC Office of Policy Planning, *Report of the State Action Task Force* (September 2003), http://www.ftc.gov/reports/index.htm.

[4] Antitrust Modernization Commission, *Initial Slate of Issues Selected for Study*, January 13, 2005, http://www.amc.gov/commission_documents.htm. Hearings were held on September 29, 2005. A final report from the Commission is expected in 2007.

[5] R.S.C. 1985, c. C-34, as amended, hereinafter referred to as the "Act."

[6] Competition Bureau, *Technical Bulletin on "Regulated" Conduct* (June 29, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2141&lg=e. On November 1, 2005, the Bureau released a draft version of the Technical Bulletin for consultation. See Competition Bureau, *Technical Bulletin on "Regulated" Conduct,* Draft for Consultation (November 2005), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1993&lg=e.

[7] Competition Bureau, *Information Bulletin on the Regulated Conduct Defence* (December 2002), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=431&lg=e.

Despite these distinct legislative powers, federal and provincial laws often overlap in their application and can lead to situations of direct conflict. To address situations of operational conflict, Canadian courts developed the doctrine of "paramountcy" according to which a provincial law will be of no force or effect to the extent of its inconsistency with a (paramount) federal law. The RCD effectively emerged as an exception to the doctrine of paramountcy, applicable in those specific cases where a provincial regulatory scheme came into conflict with federal competition law. In the event of such a conflict, Canadian courts held that the provincial regulatory scheme ought to remain operative and provide a defence to an alleged breach of the Act. The rationale offered was that acts taken pursuant to valid provincial legislation could not be considered contrary to the "public interest," which was the test under Canadian competition legislation at the time.

Principles

Summarized briefly, the courts have held that the RCD will apply to immunize "regulated" conduct from scrutiny under the Act when four main criteria are satisfied: (1) there is validly enacted legislation regulating the conduct at issue; (2) the conduct is directed or authorized by that legislation (although it is still unsettled as to the degree of authorization that must exist); (3) the authority to regulate has been exercised; and (4) the regulatory scheme has not been hindered or frustrated by the conduct. Conversely, the RCD will not apply where: (1) the conduct at issue has not been directed or authorized by valid legislation; (2) the regulator has forborne from exercising its statutory authority; or (3) the conduct hinders or frustrates the legislative scheme or is used as a "shield" to engage in unauthorized anti-competitive conduct.

Valid Legislation

The first condition for the operation of the RCD is that there must be validly enacted provincial or federal legislation. This is based on the principle that persons should not, for example, be found guilty under the criminal provisions of the Act when they have been directed or authorized to act under other validly enacted legislation. While the RCD was initially developed in the context of provincial regulatory schemes, at least one court has applied the RCD in the context of federal regulation.[8]

Directed or Authorized

The second condition for invoking the RCD is that the conduct must be directed or authorized by the legislation in question. In *Industrial Milk Producers Association v. British Columbia (Milk Board)*, for example, it was held that "it is not the various [regulated] industries as a whole which are exempt from the application of the *Competition Act* but merely activities which are required or authorized by the federal or provincial legislation."[9] Thus, the RCD has been held to not apply to a county law association that had not been delegated the authority to enforce a minimum fee schedule,[10] while a Quebec notaries association pleaded guilty to conspiring to fix the prices of real estate services where the Quebec government was no longer regulating notarial fees.[11]

Although the cases hold that the conduct at issue need only be legislatively authorized, as opposed to mandated or required, there remains a question as to the degree of authorization required for the RCD to apply. The decision of the Supreme Court of Canada in *Jabour* represents the "high water mark" for a more permissive approach to the "authorization" issue.[12] In *Jabour*, Benchers of the Law Society of British Columbia imposed restrictions on advertising pursuant to a general discretion conferred on them to identify and regulate "conduct unbecoming" of a lawyer. The Supreme Court of Canada held that this "broadly styled" mandate to determine what constituted "conduct unbecoming" was sufficient authority to invoke the RCD even though the statutory mandate did not specifically address advertising.[13] In coming to

[8] *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.* (1992), 45 C.P.R. (3d) 346 (F.C.T.D.).
[9] (1988), 47 D.L.R. (4th) 710 (F.C.T.D.) at 726.
[10] *Waterloo Law Association v. Attorney-General of Canada* (1987) 58 O.R. (2d) 275 (H.C.).
[11] Competition Bureau, "Notaries' Association Pleads Guilty to Price Fixing" (April 26, 2000), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=556&lg=e.
[12] *Canada (Attorney General) v. Law Society of British Columbia (Jabour)*, [1982] 2 S.C.R. 307.
[13] *Jabour*, ibid.

this conclusion, however, the Court noted the special nature of the Law Society and its role as an independent governing body for lawyers.

Some later cases, however, have taken a more restrictive approach to this issue than did *Jabour*. In *Mortimer*, a bylaw enacted by the Corporation of Land Surveyors establishing mandatory minimum tariffs for services was challenged under the Act.[14] It was held that the RCD did not apply because, although the association's enabling legislation gave it tariff-making powers, it was not clear that the legislation included the power to set minimum tariffs or fees. The enabling statute was construed strictly by the Court, which held that if the legislature had intended to give the association the power to set mandatory minimum tariffs, it would have done so in clear language.

Exercise of Regulatory Authority

The third requirement for invoking the RCD is that the regulatory power conferred by legislation must be exercised. Thus, the RCD will not apply where a regulator has forborne from regulating. In *R. v. British Columbia Fruit Growers Association*, for example, the applicability of the RCD was rejected because, although the wording of the statute permitted the control and operation of packing houses, the relevant board had not exercised its authority in this manner.[15]

Regulatory Authority Not Frustrated

Finally, the RCD will only apply where the exercise of regulatory authority has not been frustrated by the conduct being regulated. For example, in *R. v. Canadian Breweries Ltd.*, it was held that if the regulation of an industry is hindered by the behaviour of those subject to the regulation, the RCD will not apply to protect them.[16]

Conversely, the RCD also cannot be used by a regulatory body as a shield for anti-competitive conduct outside the purview of the statutory regime. For example, in *Industrial Milk*, it was held that if "individuals involved in the regulation of a market situation use their statutory authority as a springboard (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statutes, then such individuals will be in breach of the *Competition Act*."[17]

Garland v. Consumers' Gas Co.

The Supreme Court of Canada had occasion to discuss the RCD again in its 2004 judgment in *Garland v. Consumers' Gas Co.*[18]

Unlike previous cases to consider the RCD, the *Garland* case did not arise in the context of a competition law matter. Instead, *Garland* involved a consumer class action for restitution of late payment penalties levied by Consumers' Gas Co. ("CGC") pursuant to a rate order of the Ontario Energy Board (the "OEB"), the provincial statutory body responsible for regulating the energy sector in Ontario. CGC applied for, and was granted, an order by the OEB authorizing it to charge customers who failed to meet payment deadlines a late payment penalty in the amount of 5% of the unpaid charges for the monthly billing period. In related proceedings, it had been held that the late payment penalties levied by CGC under this formula amounted to charging a criminal rate of interest contrary to section 347 of the Criminal Code, a federal statute. On the basis of that finding, the class plaintiff moved for summary judgment on its restitution claim. CGC then brought its own motion for summary judgment, in which, among other points raised, it argued by analogy to the RCD that the Criminal Code did not apply because the late payment penalties had been authorized by the OEB. The case made its way to the Supreme Court of Canada, where summary judgment was granted ultimately in favour of the class plaintiff.

The Court agreed with CGC that the RCD is not limited to the competition law context. However, the Court held that the RCD was not available to CGC in the circumstances of the case. The Court interpreted the RCD as applying only where the federal law in question either expressly or by necessary implication contemplates that there will be exceptions to its application. Thus, in the competition law cases considering the RCD, for example, the Court held that the RCD was properly applied

[14] *Mortimer v. Corporation of Land Surveyors* (1989), 25 C.P.R. (3d) 233 (B.C.S.C.).
[15] (1985), 11 C.P.R. (3d) 183 (B.C.S.C.).
[16] [1960] O.R. 601 (H.C.) at 629.
[17] *Industrial Milk*, supra note 9 at 726.
[18] [2004] 1 S.C.R. 629.

because the provisions at issue did not involve a *per se* type of offence; rather, an offence only arose if the impugned activity was found to be contrary to the "public interest" or to result in an "undue lessening of competition." This made it possible to avoid conflict between the federal competition legislation and the various provincial regimes by holding that the operation of the provincial laws could not be contrary to the public interest or create an undue impact on competition. In *Garland*, however, the Court held that the RCD did not apply because section 347 of the Criminal Code contains no indication that a provincial scheme could be exempted from the strict application of the prohibition against charging a criminal rate of interest.

The Supreme Court of Canada's decision in *Garland* appears to limit the RCD's application to instances where the relevant provision of the Act contains some "leeway language" that contemplates the contrary operation of a regulatory scheme or conduct pursuant to such a scheme. In the competition law context, this requirement would effectively rule out application of the RCD to shield conduct from the Act's *per se* criminal prohibitions, including the offences of bid-rigging and price maintenance. By way of contrast, conduct offending the Act's conspiracy provision could still be subject to the RCD pursuant to *Garland*, because the offence only arises if there is an "undue" lessening or prevention of competition.[19]

The Technical Bulletin

The Bureau's Technical Bulletin is a complete rewrite of its previous Information Bulletin on the subject. As noted above, this Information Bulletin was criticized for ignoring the body of case law that formed the basis for the RCD.

For example, the Bureau had stated in its Information Bulletin that the RCD should only apply in the limited circumstances when there is a clear "operational conflict" between the Act and the regulatory regime in question. This was a novel formulation that appeared to be inconsistent with the traditional rationale underlying the RCD, namely that a provincial legislative scheme should be given its proper scope precisely because there can be no conflict between the Act and other validly enacted legislation operating in the public interest.

Another discrepancy between the cases and the Information Bulletin was the Bureau's position that the conduct of "regulated parties" (or "regulatees") should be protected only if that conduct is mandated or required by the regulator (rather than simply authorized). This was at odds with the case law in two respects. First, as noted previously, a number of cases (including the Supreme Court of Canada's decision in *Jabour*) held that the RCD applies to conduct that is merely authorized, not required, by the applicable regulatory regime. Second, the courts have not singled out "regulatees" for special (and more restrictive) treatment under the RCD.

The Technical Bulletin clearly represents an attempt by the Bureau to address these criticisms. For one, the "operational conflict" concept has been eliminated. That said, the Technical Bulletin continues to share a common perspective with the previous Information Bulletin, namely that the RCD should be applied in a limited fashion. The Bureau also expresses its view that "RCD case law is underdeveloped" and indicates that it will "explore the potential for a legislative resolution of this long-standing issue" if case law clarifying the RCD is not forthcoming.

Some of the key points made in the Technical Bulletin are as follows:

- Absent further judicial guidance, cautious application of the RCD is warranted.
- In the case of validly enacted federal legislation, the Bureau will apply the Act unless the Bureau can confidently determine that Parliament intended that the other legislation prevail over the Act – either by clear language in the Act or by the other federal law authorizing or requiring the particular conduct or, more generally, by providing an exhaustive statement of the law concerning a matter. For example, the Bureau will not pursue a matter where Parliament has articulated an

[19] It should be noted, however, that the Bureau has proposed in the past to replace the Act's existing conspiracy offence with a *per se* offence for particularly egregious cartel behaviour such as price fixing and market allocation. Under *Garland*, a conspiracy provision amended in this fashion likely would not contain the requisite leeway for exempting a regulatory scheme from its purview.

intention to displace competition law enforcement by establishing a comprehensive regulatory regime that: (i) gives a regulator the authority to take action inconsistent with the Act; and (ii) the regulator has exercised its regulatory authority in respect of the conduct in question. Where the regulator has forborne from regulation, the Bureau will continue to apply the Act to such unregulated conduct.

- In the case of validly enacted provincial legislation, the Bureau will not pursue a case under the criminal provisions of the Act in respect of conduct that is authorized or required by a valid law where those criminal provisions contain "leeway language" (such as, "against the interests of the public" or "unduly limiting competition"). For example, the Bureau will refrain from investigating and prosecuting conspiracies under section 45 of the Act in appropriate circumstances because conduct authorized or required by provincial legislation cannot be "undue." With respect to other criminal provisions in the Act, the Bureau will attempt to determine whether Parliament intended that the particular provision(s) of the Act apply to the impugned conduct.
- With respect to the reviewable matters provisions of the Act, the Bureau considers that there is simply not enough case law to justify limiting its statutory mandate without further judicial guidance. Accordingly, the Bureau will not refrain from pursuing regulated conduct under the reviewable matters provisions simply because the provincial law may be interpreted as authorizing the conduct or is more specific than the Act.
- The Bureau acknowledges that no court has expressly held that the RCD should be applied differently as between regulators and regulatees. However, the Bureau nevertheless considers that greater scrutiny of the activities of regulatees, whether acting in their private capacity or as self-regulators, may be warranted.
- Even if the Bureau decides that the RCD does not apply, it will consider the public interest in pursuing the matter.

Since the Bureau's issuance of the Technical Bulletin, the Commissioner has clearly signalled that the Bureau is actively looking for opportunities to test its positions in the Technical Bulletin before the courts or the Competition Tribunal. For example, the Commissioner has said that the Bureau will not hesitate to bring cases under the Act's civil provisions against provincially regulated entities.[20]

In particular, the Bureau is focusing on the conduct of self-regulating professions, such as accountants, lawyers, optometrists, opticians, pharmacists and real estate agents.[21] Recently, the Bureau has intervened (albeit in an advocacy, not litigation, mode) to secure changes to the conduct of real estate brokers and dental hygienists.[22]

Conclusion

The Bureau's Technical Bulletin clearly illustrates a more robust enforcement position by the Competition Bureau with respect to regulated conduct. The Bureau's apparent willingness to test the boundaries of the RCD means that individuals and entities operating in regulated industries in Canada should assess their conduct very carefully before deciding that they might benefit from the RCD's protection.

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[20] Sheridan Scott, Commissioner of Competition, *Abuse of Dominance under the Competition Act*, speaking notes to the Federal Trade Commission/Department of Justice Hearings on Single-Firm Conduct (Washington D.C.: September 12, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2179&lg=e.

[21] Sheridan Scott, Commissioner of Competition, *Commissioner's Panel: Antitrust in the Self-regulated Professions: an International Perspective*, speaking notes to the 2006 Annual Fall Conference on Competition Law (Gatineau, Quebec: September 29, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2202&lg=e.

[22] Sheridan Scott, Commissioner of Competition, *Speaking Notes for an Address to the Canadian Bar Association Annual Fall Conference on Competition Law* (Gatineau, Quebec: September 28, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2201&lg=e.