

CANADIAN COMPETITION RECORD

**CANADIAN COMPETITION LAW AND
POLICY DEVELOPMENTS****REGULATED CONDUCT DEFENCE POST-*GARLAND* v. *CONSUMERS' GAS CO.*¹**

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Introduction

Since the Competition Bureau released its controversial *Information Bulletin on the Regulated Conduct Defence* (the "Bulletin"),² much has been written on the topic of the regulated conduct defence (the "RCD")³ in Canadian competition law.⁴ With the recent decision of the Supreme Court of Canada in *Garland*, the parameters of the RCD have been redefined, making it more difficult to invoke. Given the plethora of comprehensive commentaries on the subject of the RCD to date, much of which was published in this journal, we will not delve in great detail into the history of the RCD. Rather, we propose to build on such work and provide the following:

- (1) a brief synopsis of the outstanding issues with respect to the RCD prior to *Garland*;
- (2) a summary of *Garland*; and
- (3) an analysis of the impact of *Garland* on the RCD.

RCD Pre-*Garland* – Remaining Issues

Prior to *Garland*, it was difficult to make an unqualified statement as to the scope of the RCD. Generally speaking, the effect of the RCD is that certain provisions of the *Competition Act* do not apply to conduct that is mandated, required or authorized by other validly enacted legislation. However, as noted by various commentators and discussed briefly below, many questions remained with respect to the scope of the RCD.

Defence, Exemption or Rule of Statutory Construction

It is not settled whether the RCD is a defence, an exemption or a rule of statutory construction.⁵ There is caselaw which suggests that the RCD is to be treated as a "defence".⁶ However, there is caselaw suggesting that the RCD operated as an exemption.⁷ The distinction between a defence and an exemption is important in that if the RCD is considered an exemption, then the provision in respect of which the RCD is invoked has no application and the proceedings must cease, without the accused or respondent having to defend on the merits of the case. If, on the other hand, the RCD is characterized as a "defence," then evidence establishing an infraction must be placed before the trier of fact before the RCD can be pleaded.⁸

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A third approach favoured by Palmer and Trebilcock,⁹ is to treat the RCD as a principle or rule of statutory construction. On this basis, it is argued that the RCD can be used to avoid a conflict between federal and provincial legislation that would otherwise result in the *Competition Act* overriding provincial legislation due to the paramountcy doctrine. In order to avoid conflicts between the Act and provincial regulatory schemes, Palmer points out that the courts have found that action taken pursuant to the requirements of a provincial regulator cannot be “undue” under the Act.¹⁰ Both Palmer and Trebilcock recognize, however, that the degree of authorization must exceed mere permission in order for the RCD to apply as a method of statutory construction and that this is at odds with the holdings in *Jabour* and *LSUC*.

Degree of Authorization Required by the Regulating Legislation

The RCD has been described to apply to shield conduct that would otherwise be contrary to certain provisions of the Act when such “conduct is mandated, required or authorized by validly enacted legislation”.¹¹ In *Jabour*, there was no express authorization for the conduct of the Law Society in banning certain advertisements by lawyers. The Supreme Court instead “read in” the ability to ban advertising as part of the Law Society’s mandate to regulate and discipline “conduct unbecoming a member of the society”, which was authorized by a valid provincial statute. The question remains, however: how far can *Jabour* be taken? For instance, can the benchers of the Law Society, in the name of regulating “conduct unbecoming a member of the society,” agree to impose uniform fees to be charged by all of its members? Also, does the degree of authorization required to invoke the RCD change depending on whether the party seeking to invoke it is a regulator or a regulatee, as suggested in the Bulletin?

Operational Conflict

Operational conflict is the third requirement endorsed generally by the Bureau and those commentators who support the RCD as a tool of statutory construction.¹² Operational conflict occurs “where obeying the statutory regulatory regime requires disobeying the Act.”¹³ *Jabour* is often cited as authority to refute the proposition that an operational conflict is required to invoke the RCD. The benchers’ public interest mandate in *Jabour* provided substantial leeway to the Law Society to consider less competitively-restrictive methods of regulating advertising than a total ban and, therefore, the benchers were not compelled to violate the Act. Nevertheless, the Supreme Court held that the RCD was applicable to shield the benchers’ conduct.

Notwithstanding *Jabour*, however, the Bureau is of the view that operational conflict is a precondition to the application of the RCD:¹⁴

Only where such conflict exists can the RCD come into play and cause the specific statute (the regulatory regime) to prevail over the general legislation (the Act). If there is no conflict, both pieces of legislation can exist in harmony.

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Similarly, Palmer is of the view that:

... “conflict” or “inconsistency” is critical to the application of the RCD. Without it, the RCD has no meaning. If there is no conflict, it means there has been no compelled behaviour requiring an anticompetitive activity.¹⁵

Competition Act Provisions in Respect of which the RCD May Be Invoked

It was unclear whether the civil provisions of the Act (including the merger provisions) could be shielded by the RCD. The Bureau has acknowledged in the Bulletin that the RCD may apply to the civil provisions, however, the basis in the caselaw for extending the RCD to the civil provisions has been less than explicit. The case most often cited for extending the RCD to the civil provisions is the *LSUC* case in which the Director of Investigation and Research (now the Commissioner of Competition) agreed in the context of his investigation that the RCD applied to the civil provisions of the Act.¹⁶ It is therefore open to question whether the RCD would apply to all reviewable conduct under the Act.

Federally Regulated Conduct

The Bureau’s challenge of the Astral acquisition of certain radio businesses from Telemedia Radio Inc. brought to light the possibility of conflict between the Act and the actions of a federal regulatory body.¹⁷ In *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd. et al*¹⁸ the Court struck out a plea that the Copyright Board’s actions violated the conspiracy provisions of the Act on the basis of the RCD. The reasons did not, however, analyze the issue of how the RCD applied to shield the Copyright Board’s actions from the provisions of the Act.

Commentators have generally favoured applying the RCD to federally regulated industries and have proposed several approaches for resolving conflicts between other federal legislation and the Act.¹⁹ Also, the Bureau appears to accept that the RCD may be applicable in respect of federally regulated industries.²⁰

Supreme Court of Canada’s Pronouncement in *Garland*

Garland was a class action involving over 500,000 customers of Consumer’s Gas. The representative plaintiff claimed that the late payment penalty (“LPP”) charged by Consumer’s Gas violated section 347 of the *Criminal Code* (the “Code”), which prohibited the charging of interest at a criminal rate (i.e., effective annual interest rate in excess of 60%).²¹ The LPP, which is authorized by the Ontario Energy Board (“OEB”), is a one-time penalty that is equal to 5% of the unpaid charges for any given month. The Supreme Court of Canada had previously held that the receipt of the LPP by the defendant constituted receipt of payments of interest at a criminal rate contrary to paragraph 347(1)(b) of the Code.²² Accordingly, the plaintiff sought restitution on behalf of all customers of Consumer’s Gas on the basis of the doctrine of unjust enrichment.

On motion for summary judgment, Justice Winkler of the Ontario Superior Court dismissed the action on the basis that, *inter alia*, the plaintiff’s lawsuit was an impermissible collateral attack on the validity of the OEB

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orders authorizing the LPP.²³ With respect to the “regulated industries defence”, Justice Winkler held that it was not a complete defence to the plaintiff’s claim because the language of section 347 of the Code does not afford a degree of flexibility to provincial regulators such as the OEB. He stated:

The fine point is whether the statutory language of section 347 permits an application of the “regulated industries” defence. The plaintiff submits that the “regulated industries” defence can only be relied upon where, by express statutory language, Parliament permits provincial bodies to give exemptions and protections from criminal provisions. The defendant can point to no case which allows the defence unless the federal statute in question uses the word “unduly” or the phrase “in the public interest”. In fact, in *Law Society of British Columbia*, Justice Estey explains that the word “unduly” in a federal prohibition connotes substantially the same meaning as the words “in the public interest”. An element of the “public interest” must be explicitly present in the federal statute in order to recognize that there is the potential leeway for a provincial exception. The plaintiff contends that there is nothing in section 347 of the Criminal Code upon which the defendant could possibly rely to support its “regulated industries” defence. Section 347 does not provide for the “public interest”, nor does it suggest that the offence is created only by “unduly” charging interest in excess of the approved amount.

I conclude that the “regulated industries” defence does not provide a complete defence for Consumers’ Gas in the present circumstances. However, I do not wish to be understood as accepting the plaintiff’s contention that the “regulated industries” defence is only applicable in competition law cases. As I read the applicable cases, the dominant consideration is whether or not the express statutory language affords a degree of flexibility to provincial regulators. In this case, however, the federal government has not provided the province or this court with a statute that explicitly, or by necessary implication, exempts the gas distributors regulated by the OEB from s. 347 of the Code.²⁴

The plaintiff’s appeal to the Ontario Court of Appeal was dismissed on the basis that the plaintiff had not satisfied the test for unjust enrichment.²⁵ With respect to the “regulated industries defence”, Chief Justice McMurtry, writing for the majority, held that such a defence was not available to the defendant:

The cases applying the “regulated industries defence” have determined that there is essentially no conflict between the operation of federal anti-combines legislation, which encourages general competition, and provincial legislation regulating a particular industry. The operation of each of the legislative regimes has been held to be clearly in the public interest. The regulated industries cases do not deal with a situation where a provincial regulatory authority made an order which results in a private company acting in a way that violates the Criminal Code.²⁶

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On further appeal, the Supreme Court of Canada allowed the plaintiff's appeal, holding that the plaintiff had satisfied the test for unjust enrichment in the circumstances. The defendant was ordered to repay LPPs collected from the plaintiff in excess of the interest limit set out in section 347 of the Code after the date on which the plaintiff's action was commenced in 1994 in an amount to be determined by the trial judge. On the issue of the "regulated industries defence", Justice Iacobucci cited the following passage by Justice Estey, in *Jabour*, for the principle underlying the application of such a defence:

When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.²⁷

Justice Iacobucci was of the view that there is no principled reason why the defence should not be broadened to apply to cases outside of the area of competition law, although such application should be based on the above principle. Writing for the Court, he agreed with Justice Winkler's reasoning in respect of the regulated industries defence, holding that:

Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the Criminal Code granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

...

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.²⁸

Justice Iacobucci noted that in the previous cases involving the regulated industries defence, the terms "in the public interest" and "unduly" limiting competition have always been present, and that the absence of such language from section 347 of the Code precludes the application of the defence.²⁹

It is interesting to note, however, that *R. v. Independent Order of Foresters*³⁰ involved allegations of misleading advertising contrary to section 52 of the *Combines Investigation Act* (now section 52 of the Act), the language of which did not include "unduly" or "in the public interest". While the Ontario Court of Appeal held that the RCD was not applicable, it did so on the basis that there was no legislative direction, nor even authorization, for the alleged conduct, and not on the basis that section 52 did not include language akin to "unduly" or "in the public interest". Also, in *LSUC* the Ontario Court (General Division) held that the RCD was applicable in

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respect of the exclusive dealing and tied selling provision (section 77) and the abuse of dominance provisions (sections 78 and 79), which employ the concept of substantial lessening or prevention of competition, as opposed to “unduly” or “in the public interest”.

RCD Post-Garland

Garland does not provide full answer to all of the above-noted issues in respect of the RCD, although it does, however, significantly reduce the scope of application of the RCD. Of all the questions discussed above, the Supreme Court only addressed the outstanding question of the provisions of the Act in respect of which the RCD can be invoked.

The Supreme Court does not clearly articulate whether the RCD is a defence, an exemption or a rule of statutory construction. In the passages cited above, the court refers to a “regulated industries defence”, but also speaks of an “exemption from criminal law” and cites a rule of statutory construction as the principle underlying the RCD. The issues of the degree of authorization required by the regulating legislation to trigger the RCD and federally regulated conduct were not before the Court and remain unaddressed. Similarly, the issue of whether or not the existence of an operational conflict is a prerequisite to the RCD was not before the Court and, as such, was not specifically dealt with by the Court.³¹

The Supreme Court’s holding in *Garland* suggests that the RCD may only be invoked in respect of provisions of the Act which contain language indicating Parliament’s intention of shielding regulated conduct from their purview (e.g., “unduly” and “in the public interest”). It is interesting that prior to *Garland*, it was assumed by most commentators that the RCD could be invoked in respect of all criminal provisions of the Act, with much of the debate revolving around whether or not the RCD could be invoked in respect of the civil provisions of the Act, including the merger provisions. Post-*Garland*, it appears that the applicability of the RCD turns not on the nature of the provision (i.e., whether it is criminal or civil), but rather on the specific language of the provision.³² Applying *Garland*, it is clear that the RCD can be invoked to shield regulated conduct that is otherwise contrary to the paragraphs of section 45 which employ the term “unduly”³³ (i.e., section 45, except for paragraph 45(1)(b)).

With respect to paragraph 45(1)(b), it employs the phrase “to enhance unreasonably the price”, as opposed to “unduly” limiting, lessening or preventing competition. It should be noted that the previous Commissioner of Competition, Konrad von Finckenstein, had suggested that the term “enhance unreasonably” as used in paragraph 45(1)(b) is to be interpreted differently from “unduly” as used in other parts of section 45. More importantly, the Commissioner further suggested that “reasonableness” in the context of paragraph 45(1)(b) requires a consideration of the business necessities of the parties to an agreement, as well as the interests of consumers.³⁴ While the validity of this position with respect to the interpretation of paragraph 45(1)(b) is outside the scope of this paper, if such a position were correct in law, it may impact the availability of the RCD in respect of paragraph 45(1)(b) to the extent that private interests of the parties to the agreement are also considered in determining “reasonableness”. In *R. v. Nova Scotia Pharmaceutical Society*,³⁵ the Supreme Court expressed the following view:

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The statute [the Act] proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.

Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore outside of the inquiry under s. 32(1)(c) [the predecessor to paragraph 45(1)(c), which also employed the term “unduly”]. Competition is presumed by the Act to be in the public benefit. [emphasis added]

To the extent that private interests of the parties to an agreement or arrangement are brought to bear on an analysis of “enhance unreasonably”, it may be argued that it is not akin to “unduly” or “in the public interest” so as to permit the application of the RCD.³⁶

In addition, it is arguable the RCD is applicable in respect of provisions of the Act which employ language along the lines of “substantial lessening or prevention of competition”, such as the merger provision (section 92), the exclusive dealing and tied selling provision (section 77) and the abuse of dominance provisions (sections 78 and 79). Similar to the analysis of unduly limiting, lessening or restricting competition under section 45, the substantial lessening or prevention of competition analysis under these other provisions revolves around the impact of competition generally and employs the concept of market power.³⁷

On the other hand, it would also appear, based on *Garland*, that the RCD cannot be invoked in respect of the *per se* offences of the Act, such as bid-rigging (section 47), conspiracy involving federal financial institutions (section 49), price discrimination (paragraph 50(1)(a)) and price maintenance (section 61), none of which contain language akin to “unduly” or “in the public interest”. In practice, the inapplicability of the RCD to bid-rigging and price discrimination may not have a significant impact. Notwithstanding *Garland*, no legislative regime comes to mind that would mandate, require or authorize bid-rigging,³⁸ collusion among federal financial institutions or price discrimination.³⁹ However, *Garland* will have a significant impact with respect to price maintenance given the existence of various supply management systems that have been put in place by provincial and federal legislation, particularly in respect of agricultural products. Under such supply management systems, the price for certain products is fixed or capped by marketing boards pursuant to valid legislation. Without recourse to the RCD, these systems may be open to challenge under section 61 of the Act.

In addition, it is arguable that the RCD could not be invoked in respect of the marketing provisions of the Act (e.g., misleading advertising, telemarketing, multi-level marketing and pyramid selling), which similarly do not contain language akin to “unduly” or “in the public interest”⁴⁰ While these provisions are inherently in the public interest, the same can be said of the prohibition against criminal interest rates in section 347 of the Code, in respect of which the Supreme Court has said the RCD cannot be invoked.

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Conclusion

Given its facts and the specific issues before it, the Supreme Court in *Garland* did not clarify all of the previously outstanding issues in respect of the RCD. *Garland* has, however, transformed the debate regarding the scope of the RCD. No longer can general statements be made that the Act, or even just the criminal provisions of the Act, may be rendered inapplicable by virtue of the RCD. The particular language of each provision will need to be examined and analyzed in light of *Garland*.

Notes

¹ *Garland v. Consumers' Gas Co.*, [2004] S.C.C. 25, rev'g (2001), 208 D.L.R. (4th) 494 (O.C.A.), aff'g (2000), 185 D.L.R. (4th) 536 (O.S.C.J.) [hereinafter *Garland*].

² Competition Bureau, December 17, 2002, found on-line at <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02486e.html>.

³ Note, however, that as discussed below there is some debate as to whether the RCD is a "defence", an "exemption" or a rule of statutory construction.

⁴ See e.g., Y. Bériault, "Interface Between Competition Law and Regulation" (Paper presented at Northwood Professional Institute 2004 Competition Law and Policy Forum); D.J. Brown, "The Competition Bureau's Information Bulletin on the Regulated Conduct Defence: Observations from the *Astral Telemedia* Case" (2003) 21:3 Can. Comp. Rec. 43; T. Kennish & J. Bolton "The Regulated Conduct Defence: Time for Legislative Action?" (2003) 21:3 Can. Comp. Rec. 52; P. Palmer, "The Regulated Conduct Defence: a Review of Some Outstanding Issues" (Paper presented at 2003 Competition Law Forum, Langdon Hall, Cambridge); M. Trebilcock, "The Regulated Conduct Defence in Canadian Competition Law" (Paper presented at Northwood Professional Institute 2004 Competition Law and Policy Forum); B. Zalmanowitz, "Competition Bureau Releases Information Bulletin on the Regulated Conduct Defence" (2003) 21:3 Can. Comp. Rec. 39.

⁵ Kennish & Bolton, *ibid.* at 60; and Palmer, *ibid.* at 4-5.

⁶ See *Waterloo Law Association et al. v. Attorney-General of Canada* (1986), 14 C.P.R. (3d) 413 (O.H.C.J.) at 420 wherein Justice Eberle stated: "[t]he regulated industries' exemption to the combines legislation has been traditionally dealt with as a 'defence' to a charge".

⁷ *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 [hereinafter *Jabour*]; *Industrial Milk Producers Association et al. v. British Columbia (Milk Board)* (1988), 21 C.P.R. (3d) 33 (F.C.T.D.); *Law Society of Upper Canada v. Canada (Attorney General)* (1996), 28 O.R. (3d) 460 (Gen. Div.) [hereinafter *LSUC*].

⁸ See Kennish & Bolton, *supra* note 4 at 60.

⁹ Palmer and Trebilcock, *supra* note 4.

¹⁰ See Palmer, *ibid.* at 2.

¹¹ *LSUC*, *supra* note 7 at 467.

¹² See the Bulletin, *supra* note 2 at 3 and Trebilcock, *supra* note 4 at 5.

¹³ See the Bulletin, *ibid.* at 3.

¹⁴ See the Bulletin, *ibid.* at 1-2; and Palmer, *supra* note 4 at 8.

¹⁵ Palmer, *ibid.*

¹⁶ This is also the position taken by the Bureau with qualifications in the Bulletin.

¹⁷ The *Astral* matter was settled before the RCD was adjudicated. See Brown, *supra* note 4 for a full discussion of the RCD in the context of the *Astral* case.

¹⁸ 45 C.P.R. (3d) 346 (F.C.T.D.).

¹⁹ See Kennish & Bolton, *supra* note 4 at 64-67.

²⁰ See the Bulletin, *supra* note 2 at 1.

²¹ The offence is punishable: (a) by imprisonment for up to five years on indictment; and (b) by a fine up to \$25,000 and/or imprisonment for up to six months on summary conviction.

²² *Garland v. Consumers' Gas Co.* [1998] 3 S.C.R. 112.

²³ Justice Winkler noted that: (1) interested parties were welcome to participate in OEB hearings; (2) OEB orders were reviewable; and (3) the plaintiff did not avail himself of any of these opportunities. As a result, Justice Winkler held that, unless attacked directly, OEB orders are valid and binding upon the defendant and its customers.

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²⁴ *Garland*, *supra* note 1, (O.S.C.J.) at 553.

²⁵ The majority of the Ontario Court of Appeal disagreed with Justice Winkler's holding that the plaintiff's lawsuit constituted an impermissible collateral attack. Nevertheless, the Court of Appeal dismissed the appeal on the basis that there was no enrichment of the defendant capable of giving rise to a restitutionary claim.

²⁶ *Garland*, *supra* note 1, (O.C.A.) at para. 57.

²⁷ See *Jabour*, *supra* note 7 at 356.

²⁸ *Garland*, *supra* note 1, (S.C.C.) at paras. 77 and 78.

²⁹ *Ibid.* at para. 79. Note that this need to examine the language of the criminal prohibition stands in contrast with the following comments of Justice Estey in *Jabour*, which presumes all criminal prohibitions to be in the public interest:

So long as the CIA [*Combines Investigation Act*], or at least Part V, is styled as a criminal prohibition, proceedings in its implementation and enforcement will require a demonstration of some conduct contrary to the public interest. It is this element of the federal legislation that these cases all conclude, can be negated by the authority extended by a valid provincial regulatory statute.

³⁰ (1989), 26 C.P.R. (3d) 229.

³¹ However, the Court's reference to the principle underlying the RCD (i.e., to avoid interpretations that would lead to conflicting legislation), would lend some support to the argument that such conflict be a pre-condition. Otherwise, there would be nothing for the RCD to resolve.

³² *Garland* involved the application of the RCD in respect of a criminal provision. However, the principle cited by the Supreme Court as underlying the RCD (i.e., to avoid interpretations that would result in conflicting legislation) does not distinguish criminal legislation from non-criminal legislation for purposes of the RCD.

³³ In this context, it should be noted that amendments to section 45 are currently being studied and considered by the Competition Bureau. See Competition Bureau, "Options for Amending the Competition Act: Fostering a Competitive Marketplace" (June 23, 2003) found on-line at: <http://strategis.ic.gc.ca/pics/ct/ct02584e.pdf> and Public Policy Forum, "National Consultation on the Competition Act – Final Report" (April 8, 2004) found on-line at: http://www.ppforum.ca/competitionact/final_report.pdf. Such amendments would create a *per se* offence by removing the "unduly" requirement for hard-core cartels. If such amendments were to come to fruition, the RCD would not be available in respect of such *per se* prohibitions.

³⁴ See Konrad von Finckenstein, Commissioner of Competition, "Remarks to 2001 Invitational Forum on Competition Law – Section 45 at the Crossroads" (October 12, 2001) at 6.

³⁵ [1992] 2 S.C.R. 606 [hereinafter *PINS*] at 649.

³⁶ A similar situation arises in the context of section 75 (refusal to deal) which requires, *inter alia*, proof that "a person is substantially affected" in addition to "an adverse effect on competition."

³⁷ See *PINS*, *supra* note 35; and *Canada (Director of Investigation & Research) v. Southam Inc.*, [1995] 3 F.C. 557.

³⁸ Even if, for instance, a legislative scheme required or authorized bidders to collaborate on certain bids for government contracts, absent the RCD, such conduct would still not be caught by section 47 to the extent that the party calling for the bids (i.e., the government) knew such collaboration was taking place.

³⁹ However, given the low threshold set in *Jabour* for "authorization", there may be instances where a regulatory regime may permit such conduct.

⁴⁰ Arguably, the RCD is also not available in respect of section 48 (conspiracy relating to professional sports). Section 48 prohibits agreements or arrangements to: (a) "limit unreasonably" the opportunity for any other person to participate in professional sport or otherwise impose "unreasonable" terms or conditions on such person; or (b) "limit unreasonably" the opportunity for any person to negotiate with and play for the team or club of his or her choice in a professional league. As the unreasonable limitations relate to private persons and not competition generally, it could be argued that the language of section 48 does not reflect Parliament's intention to shield regulated conduct from the purview of section 48 based on the RCD.

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ONTARIO COURT CLARIFIES BID-RIGGING PROVISION

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The Ontario Superior Court of Justice has recently released an important decision clarifying the scope of section 47 of the *Competition Act*. In *R. v. Rowe*², two corporations and two executives were charged with bid-rigging, in that they allegedly reached an agreement whereby one of the bidders would withdraw its bid for the City of Toronto's chlorine tender for 1992. The defendants were committed for trial at the preliminary inquiry. On application by the defendants for an order of *certiorari* quashing the committal, German J. of the Superior Court reversed the committal on the grounds that section 47 of the Act does not prohibit bid withdrawals.

Section 47 of the *Competition Act* provides an explicit, statutory definition of the bid-rigging offence:

47. (1) In this section, "bid-rigging" means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, or

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

Penalties on conviction may include an unlimited fine and/or prison sentences of up to five years.

In *Rowe*, Welland Chemical Ltd. ("Welland") and Van, Waters & Rogers Ltd. ("VWR"), along with a third company that was not a party to the proceedings, submitted bids in response to the City of Toronto's Request for Quotations for chlorine for the 1992 supply year. Almost two months after the closing date for submission of bids, but before the City had accepted any of the offers, VWR withdrew its bid in writing, indicating that it was no longer able to supply the City with chlorine. The City accepted the withdrawal, either expressly or by implication,³ and ultimately split the contract award between the other two bidders. (All three companies had quoted the same price for this commodity product.) More than nine years later, in May of 2002,⁴ Welland and VWR, along with an employee of each company, were charged with bid-rigging under section 47(1)(a) of the Act, based on the Competition Bureau's allegation that the parties had reached an agreement that VWR would withdraw its bid. In June of 2003, the defendants were committed for trial at a preliminary inquiry.⁵

The defence brought an application for *certiorari* to quash the committal, arguing that the preliminary inquiry justice exceeded his authority by committing the defendants for trial on an offence not known to Canadian law.⁶ The Superior Court accepted the defence argument that section 47 exhaustively defined bid-rigging, by use of

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the introductory clause “[i]n this section, ‘bid-rigging’ means”, without reference to bid withdrawals.⁷ The precise meaning of the scope and definition of the term “bid-rigging” had been previously considered by Canadian courts in the *Charterways*⁸ and *Coastal Glass*⁹ cases and, in *Rowe*, Justice German adopted similar reasoning, noting that:

I find as fact that s. 47 is clear and unambiguous on its face. I rely on the decision of Mr. Justice Dupont in *R. v. Charterways Transportation* [citation omitted] that the *Competition Act* should be determined by looking at the Act. Withdrawing a bid is not included as prohibited conduct in s. 47.¹⁰ [emphasis added]

Having found the scope of section 47 to be clear and unambiguous, it was unnecessary for Justice German to consider the alternative arguments raised by the defence (i.e. that, as a penal provision, any ambiguity in section 47 must be construed strictly in favour of accused, and that it would be impossible to satisfy the “made known” element in the final paragraph of the section 47 if the offence applied to the withdrawal of bids after the tendering deadline). The defence also argued that there is no need for Canadian law to prevent agreements among bidders reached after the opening of bids, since withdrawal of a bid after the tendering deadline is only possible with the express or implied consent of the party calling for tenders (since that party could refuse the request to withdraw, accept the tender and bind the tenderer to supply in accordance with the terms of the Request for Quotations). The authors also raised one additional argument which, as it may be of future interest to competition practitioners, is discussed in greater detail below.

In argument over whether or not section 47 could be interpreted as extending to bid withdrawals, the defence pointed out that bid withdrawal is already an offence under another statute. Section 121(1)(f) of the *Criminal Code*¹¹ prohibits the withdrawal of bids or tenders to a “government” authority in return for any reward or consideration. Importantly, the term “government” is defined in section 118 of the Code to mean only the federal or provincial governments – thus, section 121(1)(f) would not have applied in *Rowe* as the alleged agreement between the defendants related to a bid to a municipal government. Still, in addition to the arguments raised above concerning the limited scope of section 47, section 121(1)(f) shows that Parliament has addressed the issue of bid withdrawals elsewhere.

In reaching its decision, the court rejected the Crown’s submission that section 47 proscribes “all collusive conduct to manipulate the bidding and tendering process in Canada”. Such an expansive approach would clearly have exceeded the language of the statute and potentially raised fairness concerns about the predictability of the law – for, as Justice German noted, “there are serious consequences for a finding of guilt including fines and prison terms” and “[p]ersons are entitled to plan their conduct so that they are not in breach of s. 47”.¹²

Contested cases under Part VI of the *Competition Act* are very rare. Bid-rigging cases are even more uncommon – prior to *Rowe*, there had not been a litigated case for more than six years. The *Rowe* decision provides essential clarity to marketplace participants about the scope of section 47 and the Competition Bureau’s expansive interpretation of it. While this decision may result in the Crown attempting to prosecute bid withdrawal agreements

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under other provisions of the *Competition Act* (for example, the general conspiracy provision),¹³ or under section 121 of the Code, the law is clear for the moment – bid withdrawal does not constitute “bid-rigging” in Canada.

Notes

¹ The authors are members of the Competition Group at McMillan Binch LLP in Toronto, and represented two of the defendants throughout all stages of this case. The other defendants were represented by Scott K. Fenton of Fenton Smith (Toronto) and John L. Finnigan of Thornton, Grout, Finnigan (Toronto).

² (2004), 29 C.P.R. (4th) 525 [hereinafter *Rowe*].

³ *Ibid.* at 527.

⁴ There is no limitations period for the prosecution of indictable offences under the *Competition Act*.

⁵ *R. v. Rowe et al.*, Reasons for Judgment of Cavion J., June 24, 2003 (unpublished). At the preliminary inquiry, the Crown also sought committal on a second charge involving a mutually exclusive theory of liability which alleged that the parties agreed to submit identical bids, contrary to section 47(1)(b) of the Act. That charge was dismissed for lack of evidence.

⁶ See, e.g., *R. v. Bolduc* (1981), 60 C.C.C. (2d) 357 (Que. C.A.), aff'd [1982] 1 S.C.R. 573.

⁷ The use of the word “means” (instead of, for instance, “includes”) indicates a clear Parliamentary intention to exhaustively define the term “bid-rigging” and limit the scope of section 47 to the conduct described therein. For further authorities on this point, see: *Yellow Cab v. Board of Ind. Relations*, [1980] 2 S.C.R. 761 at 768-69, and R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 51.

⁸ *R. v. Charterways Transportation Ltd. et al.* (1981), 57 C.P.R. (3d) 230 at 240 per Dupont J. (Ont. H.C.J.), aff'd [sub. nom. *R. v. Lorne Wilson Transportation Ltd. and Travelways School Transit Ltd.*] (1982), 67 C.P.R. (2d) 188 (Ont. C.A.).

⁹ *R. v. Coastal Glass and Aluminum Ltd. et. al* (1985), 8 C.P.R. (3d) 46 (B.C.S.C.), aff'd (1986), 11 C.P.R. (3d) 391 (B.C.C.A.).

¹⁰ *Rowe*, supra note 2 at 529.

¹¹ R.S.C. 1985, c. C-46 (the “Code”).

¹² *Rowe*, supra note 2 at 529.

¹³ Of course, unlike bid-rigging, section 45 cases are tested under a quasi-“rule of reason” analysis that requires the Crown to prove that the conspirators had market power and that the conspiratorial conduct had an “undue” effect on competition, which imposes a greater prosecutorial burden.

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RECENT DEVELOPMENTS IN MARKETING PRACTICES

By: John F. Blakney and Amy B. McKinnon
Fraser Milner Casgrain LLP

Competition Tribunal Ruling on Misleading Gas Saving Device Upheld - A Commentary

Coincidentally, as the price of gasoline rose to new levels in May, the Federal Court of Appeal in *P.V.I. International Inc. v. Canada (Commissioner of Competition)*¹, upheld a 2002 order by the Competition Tribunal that prohibited PVI International Inc. from making certain performance representations in the promotion of a gas saving device known as the Platinum Vapour Injector (PVI).

The PVI's manufacturer had claimed that the product was designed to reduce fuel costs and lower emissions by injecting platinum into a vehicle's fuel line. In its advertisements, which appeared on the radio, in newspapers and on the Internet, the Edmonton based company claimed that the product could increase fuel efficiency by as much as 22%.

Following an application by the Commissioner of Competition, the Competition Tribunal considered allegations that PVI International Inc. and its two owners, Michael Golka and Darren Golka, were making false and misleading representations in the promotion of the PVI, which was sold to consumers at a cost of up to \$300.

In a May 19, 2002 decision, the Competition Tribunal determined that the PVI did not perform as claimed. It found that the representations about emission reduction and fuel savings were false and misleading in a material way and that the company did not have adequate and proper tests to support the claims that were made, contrary to paragraphs 74.01(1)(a) and (b) and section 74.02 of the *Competition Act*. The onus to demonstrate that representations about the performance, efficacy or length of life of a product are based on adequate and proper tests is on the company making such representations.

The Competition Tribunal also determined that, contrary to previous claims by PVI International Inc., the U.S. government had not endorsed the product, and any claims alluding to such an endorsement were also false and misleading.

Accordingly, the Tribunal ordered the company to pay an administrative penalty of \$75,000 and to cease making the false and misleading representations in connection with the PVI and any similar product for 10 years. The Competition Tribunal did not ignore the involvement of the company's two owners in the offending representations and concluded that the Golkas had failed to exercise due diligence. For this wrongdoing, the owners were each fined \$25,000.

PVI International Inc. and the company's two owners, appealed the Tribunal's decision claiming that the evidence available to the Competition Tribunal did not support its ruling and that the procedure before the Tribunal had been unfair.

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The Federal Court did not agree, and in dismissing the appeal, the Court elaborated the test for appeals from the Competition Bureau in misleading advertising cases. The Court noted that, in appeals of this nature, its role is to determine whether the decision of the Tribunal was unreasonable or otherwise erroneous in law, and not to reweigh the evidence that was before the Tribunal. The Court stressed that the Tribunal had considerable discretion with respect to procedure, which merited judicial deference, and expressed its reluctance to interfere with the deference due to the Tribunal on procedural issues.

While the Federal Court was not persuaded by the arguments submitted by the company or its owners, who were self-represented, it did, in part, allow a cross-appeal by the Commissioner of Competition. The Commissioner did not appeal the decision of the Tribunal, but rather sought clarification on the issues of corrective notices and monetary penalties.

The Commissioner argued that the Tribunal had erred in not requiring the company to publish corrective notices which would have informed the general public that the product did not work as claimed. The Tribunal based its decision not to require public notices on the fact that the U.S. Federal Trade Commission only made such orders in a small number of extreme cases, and that, due to the complexity of the evidence in this case, consumers may be confused by corrective notices, and may not understand why the claims were false and misleading.

The Federal Court of Appeal found that the Competition Tribunal had erred in two ways. First, the Court concluded that, if the Competition Tribunal had proposed to take official judicial notice of U.S. regulatory practice regarding limiting corrective notices to a minority of cases, it had erred by not making it clear that it was taking judicial notice of the practice and by not giving the parties an opportunity to respond. Second, the Federal Court of Appeal concluded that there was no authority in the *Competition Act* for requiring extensive detail and explanation in corrective notices. The Tribunal had therefore erred in concluding that a corrective notice was inappropriate where the facts of the case were complex.

Although the Court found that the Competition Tribunal had erred in these respects, it elected not to order the publication of corrective notices, nor did it refer the matter back to the Competition Tribunal to reconsider. The Court noted that sufficient time had elapsed since the claims were made such that any such reconsideration would be of little practical value.

The Commissioner also challenged the Tribunal's decision not to impose administrative monetary penalties with respect to the diesel model PVI, arguing that the Tribunal had based its decision on the irrelevant consideration that the company had undertaken not to repeat misleading representations about the diesel model. The Court declined to interfere with the Tribunal's decision on this issue, finding instead that the Tribunal had properly based its decision on all the facts of the case, and not on a single consideration as argued by the Commissioner.

Despite the fact that the Federal Court found that the Competition Tribunal had erred in law in the exercise of its discretion with respect to corrective notices, it did not order PVI International Inc. to issue a notice, nor did it remit the matter to the Tribunal. PVI International Inc., and its owners, were still subject to the Tribunal's

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original order requiring them to pay administrative fines and to cease making the misleading statements about their product.

This case illustrates the deference of the Federal Court towards remedial orders made by the Competition Tribunal in the case of false or misleading advertising, and, in particular, indicates a reluctance on the part of the Federal Court to interfere with a specific element of a larger package of remedies designed by the Competition Tribunal, absent a clear jurisdictional problem.

Given the existence of a larger package of remedies, the length of time that elapsed since the misrepresentations were made, and the fact that the Federal Court made it clear that the Tribunal had erred in not requiring the publication of a corrective notice, the Federal Court found that interfering with the Tribunal's original order would not be appropriate.

National Sporting Goods Retailer Pays \$1.7 Million for Misleading Pricing Practices

As a result of an investigation by the Competition Bureau into claims of misleading advertising and improper pricing practices, Canada's largest sporting goods retailer consented to an agreement to pay a record \$1.7 million in administrative penalties and costs.

The consent agreement, which was filed with the Competition Tribunal on July 6, 2004, was the result of an investigation by the Commissioner of Competition into whether the Forzani Group Ltd., a Calgary-based retailer operating under multiple banners including Sport Check and Sport Mart, was violating the ordinary pricing provisions of the *Competition Act*.

The Commissioner contended that the company was engaging in reviewable conduct when the company used the term "compare at" in making reference to ordinary prices offered by suppliers generally in its advertisements and promotional material, when these prices were in fact inflated. The Commissioner also concluded that the company was misusing the term "Original Price" in reference to its own ordinary prices when promoting products at a reduced price. In both cases, the Commissioner submitted that, as a result, the savings to consumers that were represented in newspaper advertisements, company flyers, websites, in-store displays and price tags were overstated.

Pursuant to subsections 74.01(2) and (3) of the *Competition Act*, a business that makes representations to the public concerning the price at which a product or a similar product has been, is, or will be ordinarily offered by suppliers in the same geographical market or by the company itself as the case may be, must be able to establish that a substantial volume of the product had been sold at that price or a higher price within a reasonable period of time before or after the making of the representation. The business must also ensure that the products had in good faith been offered at that price or a higher price for a substantial period of time recently before or immediately after the making of the representation.

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The Forzani Group did not admit to any of the allegations made against it by the Commissioner of Competition, but did agree to pay the administrative penalty of \$1.2 million and the Competition Bureau's costs of \$500,000. In addition, the Forzani Group agreed to stop making the representations in its advertisements and to publish corrective notices in newspapers, flyers, and retail stores, and on the company's website. The company also agreed to establish and maintain a Corporate Compliance Program designed to ensure conformity with the *Competition Act* in general, and the misleading advertising provisions of the Act in particular.

The consent agreement will most likely not be the final chapter in this story. On the same day that the consent agreement was filed, The Forzani Group issued a press release that disputed the Competition Bureau's characterization of the settlement that was reached. The Forzani Group took issue with the Competition Bureau's statement in a national news release that the company had "agreed to stop misleading consumers" when the consent agreement clearly states that The Forzani Group admitted no wrongdoing. The company advised that it would take all steps necessary to protect its reputation and goodwill, and stated that it was actively considering all legal remedies available to it with respect to the Competition Bureau's characterization of the settlement.

Sentences Handed Down in Deceptive Invoice Scams

Sentences were recently handed down in two separate but similar deceptive invoice scams involving direct mail solicitations that targeted thousands of Canadian businesses and organizations. In both cases, charges had been laid in 2002 against individuals for their roles in the scams. Those charged were accused of violating subsection 52(1) of the *Competition Act*, for knowingly or recklessly making false or misleading representations to the public by sending the deceptive mail-outs.

Internet Registry of Canada

On June 30, 2004, Daniel Klemann, the director of an Ontario company carrying on business as the Internet Registry of Canada ("IROC"), was sentenced for his role in a phoney invoice scam. The Toronto area man pleaded guilty to one count of violating subsection 52(1) of the *Competition Act*, and was sentenced to a \$40,000 fine and a five year prohibition order.

In July 2001, the Competition Bureau issued a warning to Canadians after it had received numerous complaints regarding a deceptive mail-out that targeted 73,000 businesses and non-profit organizations across the country. The mail-out was designed to look like bills or invoices for payments that came from the Government of Canada or an agency associated with or sanctioned by the Government. The mail-out informed website owners that their domain name registrations were about to expire, and gave recipients several ways to renew their registrations. It gave the impression that the recipients were existing customers of the IROC's domain name registry, which was in no way associated with the body officially sanctioned with registering ".ca" domain names.

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In October 2002, IROC and its principals, Klemann and James Tetaka, were charged with violating subsection 52(1) of the *Competition Act*, for knowingly or recklessly making false or misleading representations to the public in the mail-outs. All charges were subsequently withdrawn against Tetaka, who was also charged the same year for his role in a similar deceptive mail-out scheme run by a company called Yellowbusiness.ca (see below).

Klemann's prohibition order prevents him from engaging or participating in, or assisting others who are engaging or participating in, any activity involving the making of representations, by any means, for the purpose of soliciting business, without first obtaining a positive Written Opinion with respect to those representations from the Commissioner of Competition.

Yellowbusiness.ca

On May 21, 2004, James Tetaka was sentenced to a \$60,000 fine and a five year prohibition order for his role in an Internet directory scam. Following an investigation by the Competition Bureau into the activities of 1473253 Ontario Incorporated, which was carrying on business as Yellowbusiness.ca, Mr. Tetaka was charged in May 2003 with two counts of knowingly or recklessly making false or misleading representations contrary to subsection 52(1) of the *Competition Act*. Tetaka pleaded guilty in February 2004 to one count of violating subsection 52(1) and had the other count against him withdrawn.

Yellowbusiness.ca had sent out a deceptive mail-out during May 2001 to over 40,000 Canadian businesses and non-profit organizations. The mail-outs contained invoices for payment in the amount of \$85.55, in order to appear in an Internet business directory, when in fact recipients had never ordered this service. The mail-outs were made to resemble invoices designed to mislead recipients into believing that they were existing customers of the directory.

Tetaka was not the only person implicated in this scam. In May 2002, the director of the company, Peter Kuryliw, pleaded guilty to similar charges and was sentenced to a fine of \$30,000. Kuryliw was also ordered to dissolve his company within 90 days. Four other men were convicted in April 2004 for their roles in earlier business directory scams involving similar phoney Internet directories, and are expected to be sentenced in the near future. In Tetaka's prohibition order, he is ordered not to associate with Kuryliw or the other four men for a period of five years.

Notes

¹ [2004] F.C.J. No. 876.

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COMPETITION TRIBUNAL REJECTS CHANGE IN CIRCUMSTANCES APPLICATION AS NOT *BONA FIDE* - *Canadian Waste Services v. Commissioner of Competition*¹

By: Michael Osborne*, Affleck Greene Orr LLP

Overview

On November 4, 2004, the Federal Court of Appeal dismissed Canadian Waste Services' ("CWS")² appeal of the latest Competition Tribunal decision in its long-running merger case.

On June 28, 2004, the Tribunal rejected CWS' section 106 "change of circumstances" application that sought to rescind the Tribunal's October 2001 order that it sell the Ridge landfill. The Tribunal made that order after concluding that CWS' acquisition of the Ridge would substantially lessen and prevent competition for disposal of industrial, commercial and institutional ("ICI") waste from the Greater Toronto Area ("GTA") and Chatham-Kent.³

In rejecting CWS' change of circumstances application, the Tribunal held that none of the changes in circumstances urged by CWS were *bona fide* changes in circumstances, because, in each case, CWS had information about these circumstances before the original hearing that it chose not to put before the Tribunal.

The Tribunal's decision left CWS with only two months to sell the Ridge. CWS has appealed and obtained a stay of its obligation to divest the Ridge.⁴

CWS Acquires the Ridge

The case began in May 1999, when Canada's largest waste management company, CWS, announced that it intended to acquire its largest competitor, Browning Ferris Industries ("BFI"). The Commissioner of Competition had numerous competition concerns. CWS responded to these concerns by restructuring the transaction so as not to acquire a number of assets from BFI. CWS and BFI closed the deal in the spring of 2000.

One issue, however, remained: the Ridge landfill, located in southwestern Ontario near Chatham. CWS and the Commissioner agreed to submit CWS' acquisition of the Ridge to the Tribunal in what was supposed to be an expeditious proceeding. CWS acquired the Ridge under a hold separate order as part of the transaction.

The Section 92 Application

The Commissioner commenced an application under section 92 of the *Competition Act* in the spring of 2000, seeking divestiture of the Ridge.

On March 28, 2001, the Tribunal held that CWS' acquisition of the Ridge would substantially lessen and prevent competition for the disposal of ICI waste from the Greater Toronto Area and Chatham-Kent. On October 3, 2001, it ordered CWS to sell the Ridge within six months.

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The Commissioner's case – and the Tribunal's findings – were premised on the economic theory of spatial competition. Because of the high cost of transporting waste, landfills closer to a customer can price up to that customer's next best option for waste disposal. A shortage of capacity in southwestern Ontario for ICI waste from the GTA⁵ led to waste being exported to landfills in Michigan. The result was that Ontario landfills were pricing up to take account of the costs to their customers of using Michigan landfills. The Tribunal held that the market for the disposal of ICI waste in southwestern Ontario was not competitive, and that CWS enjoyed market power.

However, CWS was applying to expand two landfills, and the Tribunal found these applications were likely to succeed. The additional capacity provided by these expansions would lead to a surplus of capacity for ICI waste. This surplus capacity would in turn lead to price competition among Ontario landfills as they competed to attract waste. Were CWS allowed to keep the Ridge, this competition would be thwarted, because of CWS' very high market share. CWS' acquisition of the Ridge would thus substantially prevent competition, the Tribunal held. The Tribunal also found that CWS' acquisition of the Ridge would substantially lessen competition.

CWS appealed. The Federal Court of Appeal heard – and dismissed – CWS' appeal on March 12, 2003.⁶ CWS then sought leave to appeal to the Supreme Court of Canada. The Supreme Court denied leave on January 8, 2004.

The Section 106 Application

In May 2003, CWS brought an application under section 106 of the *Competition Act* claiming that the divestiture order should be rescinded or stayed as a result of several alleged changes in circumstances since the 2001 decision in the merger application.

CWS' alleged changed circumstances revolved around the fact that the Tribunal's prediction that an excess of capacity for ICI waste would emerge in Ontario following CWS' expansions of the two landfills, had not (yet) come true.

CWS advanced a number of alleged changes that focussed on three aspects of its applications to expand the landfills: the status of the Terms of Reference for the environmental assessments, host municipality support for the expansions, and CWS' own expectations about when the expansions would occur.

Section 106

Section 106 allows the Tribunal to rescind or vary one of its orders if a two part test is met (or on consent). First, the circumstances that led to the making of the order must have changed. Second, in the circumstances that exist at the time of the section 106 application, either the order would not have been made in the first place, or it would have been ineffective.⁷

In past cases, the Tribunal has held that facts that were known or anticipated at the time of the original application cannot be a "change in circumstances" for the purposes of section 106.⁸ As will be seen below, the Tribunal's decision in CWS' section 106 application is largely an application of this principle.

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The Tribunal's Decision

Meaning of "Circumstances" under Section 106

On September 4, 2003, the Tribunal issued a decision on a motion by CWS for production from third parties.⁹ In the course of her reasons, Tribunal Chair Simpson J. discussed the meaning of "circumstances" in section 106.

Simpson J. held that a "circumstance is a demonstrable fact which exists at the time an order is made. The predictions and assumptions which flow from that fact are not circumstances as that term is used in subsection 106(1)(a) of the Act".¹⁰

Excess Capacity a Significant Basis for the Substantial Lessening Finding

The Tribunal first dealt with the Commissioner's argument that the Tribunal's finding in the section 92 application that CWS' acquisition would lead to a substantial lessening of competition did not depend on the emergence of excess capacity. The Commissioner pointed to a number of other findings that supported the substantial lessening finding independently of whether there would be excess capacity. CWS' alleged changed circumstances all related to the issue of excess capacity. Consequently, the Commissioner argued, the substantial lessening finding would stand, even if circumstances surrounding the Tribunal's prediction of excess capacity had changed.

The Tribunal held that its prediction about the emergence of excess capacity was "a significant basis for its conclusion about the likelihood of" a substantial lessening of competition and that it should, accordingly, consider the changes alleged by CWS. The Tribunal relied on a passage from the reasons in the section 92 application that linked the Tribunal's findings on geographic market definition to both the evidence of price discrimination and the likely decline in price following the emergence of excess capacity.

Judicial Review of Approval of the Terms of Reference: Not Bona Fide

The Tribunal then turned to CWS' alleged changes in circumstances. The first related to the status of CWS' environmental assessments for its landfill expansion applications. At the time of the section 92 hearing, CWS had obtained approval from the Ministry of the Environment for the "Terms of Reference" for the environmental assessments. This was among the facts that led the Tribunal to conclude that these expansions would be approved.

CWS alleged that this fact had changed because opponents of the expansions had applied for judicial review of the approvals. Indeed, shortly after CWS filed its section 106 application, the Divisional Court quashed ministerial approval of the Terms of Reference.¹¹

Nevertheless, the Tribunal rejected this alleged changed circumstance as not *bona fide*. The judicial review applications were filed two months before the section 92 hearing in November 2000. CWS did not bring them to the attention of the Tribunal because it thought they were without merit. This was not a proper basis for not

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telling the Tribunal about the applications; CWS' "silence about the existence of the applications for judicial review had the effect of misleading the Tribunal about the likelihood" of approval of the expansions.

Moreover, the Tribunal held that there was in fact no change in circumstances. CWS had appealed the Divisional Court's finding. As a result, "At the time of the Section 92 Hearing, the [Terms of Reference] approvals were caught in the uncertainty of litigation. They remain in that state today".

On August 25, 2004, the Ontario Court of Appeal reversed the Divisional Court's ruling and reinstated ministerial approval of the Terms of Reference.¹²

Host Municipality Support: Not Bona Fide

In its decision on the section 92 application, the Tribunal found that the expansions enjoyed host municipality support. In the section 106 application, CWS argued that this fact had changed. CWS also argued that this finding was made without evidence.

The Tribunal first reviewed the record from the section 92 hearing and found that it was reasonable for the Tribunal to have reached this conclusion.

The Tribunal then found that there had been no change in circumstances: the landfill expansions did not enjoy host municipality support before the section 92 hearing. CWS knew this at the time, but did not make any submissions or call any evidence about this. The Tribunal concluded that these "changes" were not *bona fide*; rather, they "exist only because CWS did not inform the Tribunal about the true state of affairs". Such changes, the Tribunal held, are not acceptable under section 106.

CWS' Expectations

CWS documents filed during the section 92 hearing showed that CWS expected to have the landfill expansions operational by the summer of 2002. CWS claimed that its expectations about when the expansions would be operational had changed, and that this constituted a change in circumstances.

The Tribunal rejected this argument. It noted that CWS still believed that its expansions would proceed; the only change was to its expectations about timing.

But, the Tribunal found, facts which could reasonably have been expected to impact the timing of the expansions were known to CWS, but not presented to the Tribunal, at the time of the section 92 hearing. Hence it was not open to CWS to raise these revised expectations about timing in a section 106 application.

Federal Court Dismisses CWS' Appeal

CWS appealed the Tribunal's decision to the Federal Court of Appeal and obtained a stay of its obligation to divest the Ridge pending the appeal (which the Commissioner unsuccessfully opposed).¹³

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The Federal Court of Appeal heard and dismissed CWS' appeal on November 4, 2004, holding simply that the Tribunal had not made any reviewable error of law or of mixed law and fact, that would warrant its intervention.

The Tribunal's decision, and other materials relevant to the case, can be found on the Tribunal's website: <http://www.ct-tc.gc.ca/english/cases/ct-2003-005/waste.html>.

Notes

* Michael Osborne practises competition law and commercial litigation with Affleck Greene Orr LLP. He was one of the counsel for the Commissioner of Competition in this case.

¹ 2004 Comp. Trib. 10.

² CWS has recently changed its name to Waste Management of Canada Corporation, but will be referred to by its old name in this article.

³ *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* (2001), 11 C.P.R. (4th) 425 (Comp. Trib.) (merits); *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* (2001), 15 C.P.R. (4th) 5 (Comp. Trib.) (remedy).

⁴ *Canadian Waste Services Holdings Inc. v. Canada (Commissioner of Competition)*, 2004 FCA 273.

⁵ Landfills are heavily regulated in Ontario (and other jurisdictions). A landfill's licence typically specifies the kind of waste it can accept, and where it can accept it from.

⁶ *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* (2003) 24 C.P.R. (4th) 178 (F.C.A.).

⁷ Section 106 provides as follows:

Rescission or variation of consent agreement or order

106. (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal. R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14

⁸ *Canada (Director of Investigation and Research) v. Imperial Oil Limited*, [1990] C.C.T.D. No.1; *Canada (Director of Investigation and Research) v. Imperial Oil Limited* (1990) 31 C.P.R. (3d) 277 (Comp. Trib.); *Southam Inc. v. Canada (Director of Investigation and Research)* (1998), 78 C.P.R. (3d) 341 at 351 (Comp. Trib.).

⁹ 2003 Comp. Trib. 16.

¹⁰ *Ibid.*, at ¶15-16.

¹¹ *Sutcliffe v. Ontario (Minister of the Environment)* (2003), 65 O.R. (3d) 457 (Div. Ct.).

¹² *Sutcliffe v. Ontario (Minister of the Environment)*, [2004] O.J. No. 3473 (C.A.).

¹³ *Supra* note 4.

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INFORMATION NOTICES AND NEWS RELEASES ISSUED BY THE COMPETITION BUREAU DURING THE PERIOD APRIL 1, 2004 - OCTOBER 31, 2004

The following Information Notices and News Releases are available on the Bureau's website at <http://cb-bc.gc.ca>.

April 1, 2004

NEWS RELEASE: Bureau Resolves Competition Issues in Forestry Merger

April 13, 2004

INFORMATION: Consultations Report Published on Proposed Changes to the *Competition Act*

April 21, 2004

INFORMATION: Acquisition of John Hancock Subsidiary Maritime Life by Manulife Financial Corporation Receives Government Approval

April 22, 2004

NEWS RELEASE: Commissioner Scott Named Vice-Chair of International Competition Network

April 26, 2004

NEWS RELEASE: Competition Bureau Investigation Leads to Convictions in Business Directory Scam

April 29, 2004

INFORMATION: Competition Bureau Develops Closer International Ties in the Fight Against Cross-Border Fraud and Deception

May 13, 2004

INFORMATION: Work-At-Home Business Opportunities: Do Your Homework Before Working from Home

May 21, 2004

NEWS RELEASE: Competition Bureau Investigation Results in Sentencing for Phoney Invoice Scam

May 26, 2004

NEWS RELEASE: Misleading Gas-Saving Device Ruling Upheld

May 28, 2004

NEWS RELEASE: Crompton Corporation Fined \$9 Million for Role in Rubber Chemicals Cartel

June 2, 2004

INFORMATION: Competition Bureau, Vancouver Police Department and Federal Trade Commission Create Vancouver Strategic Alliance to Combat Deceptive Marketing Practices

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June 2, 2004

INFORMATION: Court Upholds Renewed Competition for Jarred Baby Food

June 29, 2004

NEWS RELEASE: Telemarketers Plead Guilty to Operating Office Supplies Scam

June 30, 2004

NEWS RELEASE: Internet Registry Director Fined for Bogus Invoice Scam

July 2, 2004

INFORMATION: Divestiture of Ridge Landfill Resumes

July 2, 2004

NEWS RELEASE: Competition Bureau Obtains Remedies in BC Rail Merger

July 6, 2004

NEWS RELEASE: Canada's Largest Sporting Goods Retailer Pays \$1.7-Million for Misleading Consumers

July 9, 2004

NEWS RELEASE: Competition Bureau Charges St. John's Taxi Companies with Conspiracy

July 16, 2004

NEWS RELEASE: Morgan Companies Fined \$1 Million for Obstruction and Price-Fixing

July 22, 2004

NEWS RELEASE: AB Energizer Removed from Market Following Competition Bureau Investigation

July 28, 2004

NEWS RELEASE: PetNet Pleads Guilty and Pays \$150,000 Fine for Misleading Mailings

July 29, 2004

INFORMATION: Competition Bureau will not Challenge Sony-BMG Joint Venture

August 27, 2004

INFORMATION: Competition Bureau Responds to Complaints Over Insurance Premiums

September 15, 2004

INFORMATION: Special Constable Status Granted to Competition Law Officers

September 21, 2004

INFORMATION: Competition Bureau Issues Revised Merger Enforcement Guidelines

September 22, 2004

NEWS RELEASE: VAW Carbon Fined \$500,000 for Role in International Price-Fixing Conspiracy

CANADIAN COMPETITION RECORD

September 23, 2004

INFORMATION: Competition Bureau Clarifies Enforcement Approach in the Airline Industry

September 24, 2004

INFORMATION: Consultations on the Treatment of Efficiencies under the *Competition Act*

September 29, 2004

INFORMATION: Professor Zhiqi Chen Returns as T.D. MacDonald Chair

October 1, 2004

NEWS RELEASE: Competition Bureau Investigation Leads to Jail Time for Phoney Invoice Scam

October 5, 2004

INFORMATION: Canada and the U.S. Sign Cooperation Agreement on Competition Law Enforcement

October 19, 2004

NEWS RELEASE: Consumers to be Reimbursed by John Deere Limited

October 29, 2004

INFORMATION: Consultations on the Information Bulletin on the Regulated Conduct Defence

October 29, 2004

NEWS RELEASE: Competition Bureau Settles Case with Air Canada
