

## CANADIAN COMPETITION RECORD

# CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

## COMMISSIONER WINS PHASE I OF AIR CANADA ABUSE CASE

On July 22, 2003, the Competition Tribunal issued its long-awaited decision on Phase I of the abuse of dominance case brought by the Commissioner of Competition against Air Canada. The Commissioner alleged that in 2000 and 2001, Air Canada responded to the entry of discount carriers CanJet and WestJet into Atlantic Canada by adding capacity and reducing fares on its competing flights such that it was operating these flights below its "avoidable costs". The Commissioner alleged that in so doing, Air Canada committed anti-competitive acts and thereby abused its position as the dominant domestic airline in Canada. Air Canada denied the allegations.

At the request of the Commissioner and Air Canada, the Tribunal agreed to hear the case in two phases: Phase I to determine whether Air Canada operated below its "avoidable costs" on specific routes, and to develop principles for assessing avoidable cost issues; and Phase II to determine the competitive effects of Air Canada's actions. In its Phase I decision, the Tribunal concluded that Air Canada did operate below its "avoidable costs" during the relevant time period, and in so doing engaged in anti-competitive acts within the meaning of Section 79 of the *Competition Act*. Still to be determined in Phase II is whether Air Canada's actions were part of a "practice" of anti-competitive acts, and whether they resulted in a substantial lessening or prevention of competition.

In light of the CCAA Order issued in regard to Air Canada on April 1, 2003, the Tribunal stayed its Phase I decision for the duration of that Order.

Commentary on the Tribunal's Phase I decision will appear in a future issue of the *Record*.

Staff

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## **CHADHA v. BAYER INC.: THE FINAL VERDICT**

By: Chris Hersh  
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The case of *Chadha v. Bayer Inc.* was recently concluded. Further to the article "*Chadha v. Bayer Inc.: The Illinois Brick of Canada?*" published in the Winter 2001-2002 issue of the *Record*, the Ontario Court of Appeal upheld, on January 14, 2003, the Ontario Divisional Court's<sup>1</sup> denial of certification of the first Canadian indirect purchaser class action in a competition law case<sup>2</sup>. On July 17, 2003, the Plaintiff's application for leave to appeal to the Supreme Court of Canada was dismissed without reasons.<sup>3</sup>

*Chadha* involved a claim for damages on behalf of new home buyers and other indirect purchasers of building materials containing iron oxide pigment alleged to have been the subject of a price-fixing conspiracy by the defendants. In denying certification, the Court of Appeal concluded that as the plaintiffs could not prove damages on a class-wide basis, a class action was not the preferable procedure to resolve the claims

## CANADIAN COMPETITION RECORD

of the class members. Specifically, the Court held that the following factors precluded certification: (i) the distribution chain was a long and complex one; (ii) the pigment accounted for only 5% of the cost of the building materials; and (iii) the “multitude of variables” that affected the actual price paid by individual class members.

While *Chadha* is not a categorical statement that indirect purchasers cannot bring claims arising from alleged price fixing conspiracies by way of class action, it does significantly raise the bar. As the first Canadian case addressing this issue, *Chadha* identifies the numerous factual and evidentiary issues that indirect purchaser classes must overcome in order to obtain certification. In this regard, *Chadha* indicates that indirect purchasers will need to file detailed evidence that substantiates that some or all of the alleged overcharge was passed on to all class members. In short, simply proving the existence of a conspiracy will not be a sufficient basis upon which a court will grant certification.

The Court denied certification for many of the same practical and evidentiary reasons identified by the U.S. Supreme Court in its decision *Illinois Brick*. However, unlike the situation in the U.S., while it appears that indirect purchaser class actions will only be certified in very limited cases, it still remains open for Canadian defendants to argue that the claims of direct purchasers should be reduced to the extent that it can be demonstrated that a portion of the overcharge was passed on to consumers.

#### Notes

<sup>1</sup> (2001) 200 D.L.R. (4<sup>th</sup>) 309 (Ont. Div Ct.).

<sup>2</sup> (2003) 223 D.L.R. (4<sup>th</sup>) 15E (Ont. C.A.).

<sup>3</sup> [2003] S.C.C.A. No. 106.

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# CANADIAN COMPETITION RECORD

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## INTRODUCTION TO SECTION 45 AMENDMENTS TASK FORCE REPORT

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Early in 2002, the Executive of the Canadian Bar Association Competition Law Section (the "Section") struck a Task Force to consider and respond to proposals for reform of Section 45 of the *Competition Act*. The Task Force was co-Chaired by John Clifford (who at the time was Chair of the Section's Reviewable Matters and Private Actions Committee) and Rob Patton (who at the time was Chair of the Section's Criminal Matters Committee). Members of the Section's Reviewable Matters and Private Actions Committee and Criminal Matters Committee were canvassed for participation on the Task Force. Ultimately, a group of 23 formed; it had several conference call meetings and reported back to the Section Executive.

The final report of the Task Force is re-produced below. The Task Force concluded that: (a) available evidence does not support reform of Section 45 as proposed by the Commissioner and others; (b) a "dual track" approach focuses attention on whether an arrangement is *per se* unlawful or not, a distinction for which there is no bright line; (c) the resulting uncertainty is not better, and perhaps worse than, perceived uncertainty in determining "undue" effects of horizontal arrangements; (d) the specific proposals for reform made by the Commissioner of Competition's consultants are fraught with uncertainty and ambiguity; and (e) the laws of Canada's major trading partners do not present consistent approaches to regulation of cartels that could be emulated easily by Canada.

The Task Force report was given to the Section Executive in December 2002, and was used as a starting point to develop the Section's submission to the Commissioner of Competition on Section 45 reform. Reflecting the wide diversity of views within the Section, the submission outlined the rationale for and against reform and put forward a number of recommendations in the event that reform proposals proceed to legislation. The submission was made in February 2003, and is available on the CBA's website at [http://www.cba.org/CBA/Sections/Competition/Section\\_Submissions.asp](http://www.cba.org/CBA/Sections/Competition/Section_Submissions.asp).

Because of their length, the appendices to the Section 45 Task Force Report are not reproduced below. For the interested reader, the appendices (revised, although in substance unchanged) are attached to the Section's submission.

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## CANADIAN COMPETITION RECORD

**CBA COMPETITION LAW SECTION  
SECTION 45 AMENDMENTS TASK FORCE REPORT**

	<b>Page</b>
Introduction	28
A. Stated Rationales for Change	28
1. Section 45 is Under-Inclusive	28
2. Section 45 is Over-Inclusive	29
3. International Harmonization	30
B. Proposals for Reform	31
1. <i>Per Se</i> Criminal Offence	32
(i) Not all Conduct Should be Criminally Sanctioned on a <i>Per Se</i> Basis	32
(ii) “ <i>Per Se</i> ” Conduct Defies Definition with Legislative Clarity	32
(iii) No Consensus on what Conduct Should be <i>Per Se</i> Unlawful	33
2. Proposed Exemptions	33
(i) Inappropriate Cure of Over-Reach	33
(ii) Inappropriate in Canadian Context	34
3. The Civil Track	35
C. Other Issues	35
1. The Criminal Law Should not Include an Efficiency Defence	36
2. Trends in Canada's Trading Partners	36
3. Limitation Period	36
Conclusions	37

Appendix A - Recent Proposals for Change\* [not reproduced below]

Appendix B - Laws of Major Trading Partners\* [not reproduced below]

Appendix C Limitation Periods\* [not reproduced below]

\* Available at [http://www.cba.org/CBA/Sections/Competition/Section\\_Submissions.asp](http://www.cba.org/CBA/Sections/Competition/Section_Submissions.asp).

## CANADIAN COMPETITION RECORD

### Introduction

This is a report of the Section 45 Task Force of the CBA Competition Law Section.<sup>1</sup> The report has three sections: Section 1 considers the stated rationales for amending Section 45 of the Competition Act<sup>2</sup>; Section 2 identifies and comments on proposals for reform that have been made to date; and Section 3 considers issues such as trends in the laws of Canada's major trading partners and the use of limitation periods. It is the conclusion of this report that:

- Available evidence does not support reform of Section 45 as proposed by the Commissioner of Competition ("Commissioner") and others.
- A "dual track" approach focuses attention on whether an arrangement is *per se* unlawful or not, a distinction for which there is no bright line. The resulting uncertainty is not better, and perhaps worse than, perceived uncertainty in determining "undue" effects of horizontal arrangements.
- The specific proposals for reform made by the Commissioner's consultants are fraught with uncertainty and ambiguity.
- The laws of Canada's major trading partners do not present consistent approaches to regulation of cartels that could be emulated easily by Canada.

#### A. Stated Rationales for Change

Several commentators since the early 1990's and more recently the Commissioner have advocated amendment of Section 45.<sup>3</sup> Proponents of change assert the "undueness" standard in Section 45 is uncertain, with several effects:

- **The law is "under-inclusive"**, because it does not adequately capture "hardcore" cartels; there are too many acquittals of contested cases.

- **The law is "over-inclusive"**, because it criminalizes agreements between competitors that could have pro-competitive effects. This has created a "**chill**" on pro-competitive business arrangements.

It is also argued that Section 45 should be amended to harmonize Canada's conspiracy laws with similar laws of its major trading partners. The merits of each argument are discussed below.

#### 1. Section 45 is Under-Inclusive

It has been argued that one of the principal failings of Section 45 is that it is "under-inclusive", i.e., that because of the difficulties of enforcing the provision in a criminal context, otherwise illegal cartel activity is not being prosecuted and deterred effectively.<sup>4</sup> This is seen as justification for introducing a *per se* element to the offence and eliminating the need to define markets and prove an undue lessening or prevention of competition.

However, there is no persuasive evidence to support this contention. Neither the Commissioner nor any commentator has provided empirical data indicating that the Canadian economy is presently beset by horizontal restraints (naked or otherwise) which either have been improperly acquitted or not pursued by the authorities due to the inadequacies of the current law.<sup>5</sup> Instead, the Commissioner and others rely principally on the Competition Bureau's allegedly "undistinguished prosecutorial track record in contested cases" as the basis for this concern.<sup>6</sup> The Bureau's lack of success in this regard is said to stem from the need to satisfy the criminal burden of proof in demonstrating the requisite degree of market impact demanded by Section 45.<sup>7</sup>

As has been pointed out by more than a few critics, however, the Bureau's win/loss record in contested

## CANADIAN COMPETITION RECORD

proceedings does not shed much if any light on the under-inclusiveness issue.<sup>8</sup> For example:

- it is to be expected that the Bureau's record of success in contested cases will be low, because these cases by necessity involve situations that are "closest to the line", where the evidence will be ambiguous or difficult to obtain. Litigated cases often are ones in which defendants believe the Commissioner's case is not justified, and the fact that an accused is acquitted seems to support that position (to say nothing about how the performance of any particular witness or counsel might affect the outcome). Indeed, the track record of the U.S. Antitrust Division is similarly "mixed", notwithstanding the presence of a *per se* standard.<sup>9</sup>
- More than one-third of the Bureau's losses were due to the Crown's inability to prove the existence of an "agreement", not because the Bureau was unable to prove an "undue" lessening of competition in the relevant market.<sup>10</sup> Even under the current reform proposals, the Crown would still be required to prove the "agreement" element of the offence.
- When guilty pleas and other forms of uncontested resolution are included, the Bureau's overall success rate climbs to a more than respectable 60%. Moreover, it is clear from the data that so-called hardcore cartel activity is being caught in the prosecutorial net.<sup>11</sup>

The last point is critical. Complaints about the ineffectiveness of Section 45 are belied by the Bureau's continued success in securing guilty pleas and significant fines, particularly with respect to international cartel activity which typically involves so-called "hardcore" arrangements.<sup>12</sup> As Facey and Assaf have remarked: "If defendants thought they had a chance of acquittal, because of a weak law, one would not expect to see firms consistently entering guilty pleas."<sup>13</sup> The Bureau's

Immunity Program has only increased the pressure on cartel participants to come forward, given the potential risks involved in failing to be the "first in".<sup>14</sup> And, the Immunity Program had made available to the Bureau powerful evidence from co-conspirators, which was not available during the period when the Commissioner and others claim the Bureau was unable to win cases. The reality is that, notwithstanding that Section 45 contains an undueness standard, most firms behave as if there was a *per se* standard in Section 45 for "hardcore" offences: Price fixing and other naked restraints are avoided in almost any circumstance.<sup>15</sup>

The most relevant fact is whether the Commissioner has been unable to bring cases against accused who clearly were involved in "hardcore" behaviour because the Commissioner or the Attorney General did not think the behaviour was caught by Section 45. The Commissioner has presented no evidence to support such a proposition. Obviously, if price-fixing or market allocation arrangements are made but cannot be enforced because of the breadth of the current law, then there would be a rational reason for amending Section 45. But, this does not appear to be the case.

To summarize, it is by no means clear that the Bureau's record under Section 45 is as woeful as some would contend it to be or that the Attorney General lacks the tools necessary under Section 45 to prosecute "hardcore" offences. Moreover, it is even less clear that the Bureau ought to have prevailed in those cases that it did lose or abandon, or that the Bureau's lack of success has unleashed a wave of pernicious cartel type behaviour in Canada.

## 2. *Section 45 is Over-Inclusive*

The other criticism levelled against Section 45 in its current incarnation is that the provision is "over-inclusive", i.e., that it encompasses within its criminal prohibition forms of agreements that may be pro-

## CANADIAN COMPETITION RECORD

competitive in effect. This is said to have an unwanted "chilling effect" on such pro-competitive agreements.

There is even less empirical support for the concern about over-inclusiveness or that the current law has created a "chilling effect" than there is for the arguments that Section 45 is under-inclusive.<sup>16</sup> Concerns about chilling effects seem to be anecdotal at best.

It is good business practice to consult legal counsel about most any arrangement involving horizontal competitors for advice on whether the arrangement might give rise to anti-competitive effects that could lead to liability under the Competition Act. Such advice would be sought whether the matter raises issues under the conspiracy law or the proposed new civil regime. Indeed, counsel would still be consulted under any new regime and uncertainty, if it exists, would continue in respect of any matter within or close-to any newly defined *per se* offence. The fact that counsel is consulted and that counsel may question applicability of Section 45 to any particular arrangement does not necessarily mean the law is so uncertain that it must be amended.

If counsel or parties to an arrangement such as a strategic alliance cannot form a certain view about potential criminal liability, an advisory opinion about the arrangement could be sought under the Commissioner's Advisory Opinion Program. This Program has been in place for many years. It would be interesting for the Commissioner to provide empirical evidence regarding the extent to which the Program has been called upon to provide certainty about application of Section 45 to strategic alliances. If there were material uncertainty in the law, one would expect that the Bureau would receive many requests for clarity of its view under the Program.

The veracity of opinions under the Program will only be improved by recent amendments to the Competition Act, which make advisory opinions binding on the Commissioner. This should go a long way to alleviate any uncertainty in the law and any resulting "chill" (if it exists).

And, it cannot go unnoticed that in all the years that reform of Section 45 has been discussed, there has not been a call for reform from the business community by reason of the law being perceived as uncertain or creating a disincentive to enter into horizontal arrangements. Presumably, if uncertainty in the law had created a chill, corporate Canada would have been advocates for change. They have not.

### 3. *International Harmonization*

We fully support the notion that it is desirable to promote greater convergence between Canadian competition law and the comparable laws of other jurisdictions that are consistent with Canadian public policy objectives.

As a starting proposition, however, it must be recognized that while increased harmonization may be a desirable objective, it does not require that Canadian competition law be made uniform with that of other jurisdictions. Rather, the goal should be to ensure that those respective legal structures and processes are compatible with each other, rather than identical, and that mechanisms are in place to deal with potential divergences should they arise.<sup>17</sup>

Viewed in that light, it is unclear why the reform proposals advanced by the Commissioner and his consultants<sup>18</sup> are necessary to achieve greater harmonization, or whether they would even have a positive effect at all.

## CANADIAN COMPETITION RECORD

The underlying objective of greater harmonization in anti-cartel enforcement has been to persuade more jurisdictions to take the cartel issue seriously. In that respect, however, Canada has been recognized as one of the leaders in anti-cartel enforcement, rather than as being a jurisdiction that is "too soft" on cartels. Indeed, this is a key reason why the Bureau has been able to develop such a particularly close enforcement relationship with U.S. antitrust authorities on cartel issues, as described by former Assistant Attorney General James in the following comments:

Because the U.S. and Canada have similar views on the criminality of cartel behaviour, and now, an effective mechanism for co-ordinating investigations, both countries have become more effective in attacking conspiracies that straddle the border.

The U.S. and Canada have co-operated in a wide range of criminal investigations, including the plastic dinnerware, graphite electrodes, and vitamins investigations which resulted in U.S. fines exceeding US\$1.3 billion and commensurate Canadian fines of more than CDN\$115 million. Our co-operation has included simultaneously executed search warrants, as well as searches by one authority on behalf of the other. In many of these investigations, our Canadian counterparts and we would have found it far more difficult, if not impossible, to conclude our investigations successfully without the other's assistance. I think it is safe to say that both nations, and especially the consumers of both countries, have benefited enormously from our efforts.<sup>19</sup>

Dramatic changes to Section 45 are not required in order to demonstrate that Canada is vigilant against

cartel activity. In contrast to some of the jurisdictions cited by the Commissioner's consultants that are in the process of reforming their conspiracy laws, Canada is already regarded as a "serious player" in this area.

In addition, many of the proposed reforms are actually at odds with developments in our key trading partners. For example, as discussed more fully below, U.S. law has been steadily moving towards a greater "rule of reason" approach to horizontal agreements and away from a strict *per se* rule, i.e., towards the current Canadian position.<sup>20</sup> Similarly, the E.U. is planning to radically alter its notification system, based on the conclusion that this system "does not serve to safeguard competition."<sup>21</sup> It would be ironic if Canada were to adopt radical measures to change Section 45 with a view to promoting harmonization, only to find that these measures would in fact have the effect of moving Canadian law in a direction opposite to that of other key jurisdictions.

#### B. Proposals for Reform

Several commentators have made specific proposals for reform of Section 45, most recently by competition law specialists retained as consultants by the Commissioner.<sup>22</sup> Each of the Borden Ladner Gervais Report, the McCarthy Tétrault Report and the Macleod Dixon Report support the creation of a "dual track" regime that would include a criminal *per se* prohibition against "hardcore" cartel behaviour and a civil track for "non-hardcore" arrangements that result in an adverse effect (e.g. substantial lessening) on competition. W.T. Stanbury made similar proposals in 2000.<sup>23</sup>

A detailed critique of the proposals contained in each Report and the proposals made by Professor Stanbury is provided in Appendix A to this Report. We are of the view that the proposals are not well-

## CANADIAN COMPETITION RECORD

grounded and that each advocates a regime which will be no clearer, and in fact could be more uncertain, than the perceived uncertainties of Section 45. In particular:

- None of the authors present compelling, empirical evidence that there is a need for change.
- None of the proposals clearly de-mark the bounds between a *per se* offence and matters subject to review on a civil standard. The proposed *per se* offences are dramatically over-inclusive and, if enacted, could deter legitimate, pro-competitive business arrangements.
- The proposals would make criminal many arrangements that have no effect on competition.
- The notification/exemption regimes proposed are impractical and would not likely be used.

In addition to the specific comments provided in Appendix A, we have the following general comments on the “dual track” approach advocated by authors of the Reports.

#### 1. *Per Se Criminal Offence*

##### (i) Not all Conduct Should be Criminally Sanctioned on a *Per Se* Basis

The necessary implication of a *per se* offence is that certain arrangements will be unlawful (with the potential result of significant fines and/or imprisonment) without regard to the effect (if any) of the arrangement on competition. Thus, a fundamental question that first needs to be addressed is whether the objective of conspiracy law is to prohibit (and therefore punish) certain types of agreements and arrangements regardless of their effect on competition or whether the goal is to ensure that competition is not adversely affected by certain types of agreements and arrangements? Some commentators have suggested

that “[w]here agreements do not reduce economic welfare, there is no strong policy reason for pursuing enforcement, particularly in light of limited enforcement resources”.<sup>24</sup>

Another important policy consideration that appears not to have been considered is whether a *per se* offence is ever appropriate in respect of commercial agreements. It could be argued that the criminal law should be used only to create *per se* offences in respect of conduct that is so dangerous to the public peace that the conduct should be prohibited without regard to whether it might cause harm. Even in a worst-case scenario, if an arrangement among horizontal competitors limits competition unduly, is that so dangerous so as to make it necessary to create a *per se* offence?

##### (ii) “*Per Se*” Conduct Defies Definition with Legislative Clarity

Leaving aside the issue of whether a criminal *per se* offence would meet broader policy objectives, there is also the practical issue of whether a *per se* offence could be drafted clearly. All of the Reports stressed the need to ensure that the criminal sanctions be proscribed with as much clarity and certainty as possible. However, all of the Reports acknowledge the inherent difficulty in doing just that. We question whether it is possible to proscribe *per se* conspiracy prohibitions with sufficient clarity and precision so as to target only truly hardcore criminal behaviour.

In the U.S., the *per se* rule was developed in jurisprudence respecting the broadly worded Section 1 of the *Sherman Act*, which makes unlawful every “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”. Presumptive rules of *per se* illegality of certain arrangements were developed by the judiciary in response to the breadth of the

## CANADIAN COMPETITION RECORD

prohibition, and to distinguish between arrangements that would be treated as unlawful because of their very nature and other arrangements that would not be found unlawful in the absence of further inquiry into the competitive effects of the arrangement. However, the jurisprudence under Section 1 of the *Sherman Act* produced considerable uncertainty as the courts added to and then removed various practices from the list of matters that are subject to *per se* criminal prohibition. And, the trend in the U.S. today is away from presumptions of *per se* illegality toward a more broadly applied rule of reason approach.<sup>25</sup>

It is a fallacy to assert that a *per se* standard would necessarily reduce uncertainty or that it would bring about more uncertainty than the “unduly” standard. Many commentators have noted that the U.S. approach of identifying certain types of agreements as *per se* illegal – a characterization made largely for procedural reasons rather than substantive distinction – has not always been successful.<sup>26</sup> And, in the view of another commentator, “[t]he *per se* rule presumption of unlawfulness has resulted in serious judicial errors over the history of U.S. antitrust law enforcement.”<sup>27</sup>

(iii) No Consensus on what Conduct Should be *Per Se* Unlawful

As demonstrated by the Reports and other proposals on Section 45 reform, there is no clear consensus on what type of behaviour should constitute a *per se* prohibition. For example, the Macleod Dixon Report would include price fixing, market allocation, agreements to limit production and impede entry and group boycotts in the *per se* category. In contrast, the McCarthy Tétrault Report would include price fixing, market allocation and agreements to limit production while the Borden Ladner Gervais Report

recommends prohibiting hardcore behaviour “such as price fixing and market allocation.”<sup>28</sup>

Other arguments against a statutory *per se* approach stem from its inflexibility. As noted by Facey and Assaf, “the economics of competition policy changes over time and the industries to which the law applies are changing even more rapidly today, and so what may be perceived to be harmful today may turn out to be beneficial in light of changed economic factors and new learning.”<sup>29</sup> And, it cannot be overlooked that any attempt to reduce uncertainty in a *per se* rule very likely will create a conspiracy law that is more over-inclusive than the current law is perceived today. Bill C-472, which was given first reading in April 2001, is an example of this. The Bill made it a criminal offence for a person to agree with competitors on certain subject matters if the person knew or ought reasonably to have known that the effect of the agreement would be to fix, establish, control, or maintain the minimum price of a product. It is readily apparent that literally read, the provision would have prohibited sales transactions between competitors. Another provision would have made it a criminal offence for competitors to agree to lessen the production or supply of a product. Again, the language would have created criminal offences of numerous restrictive or exclusivity arrangements commonly found in franchise agreements, sales of businesses and other common inter-competitor agreements.

2. Proposed Exemptions

(i) Inappropriate Cure of Over-Reach

All three Reports recognise that regardless of how clearly the proscribed *per se* offence is drafted, some pro-competitive arrangements (and, indeed, competitively neutral and other less significant arrangements too) are likely to include an element

## CANADIAN COMPETITION RECORD

that falls within the scope of the criminal *per se* prohibition. To address this problem, all three Reports recommend some form of exemption mechanism to remove from the *per se* offence certain types of ancillary agreements arising from transactions that are not aimed at harming competition and which could not reasonably be foreseen to harm competition.

The real difficulty is that any attempt to create a substantive legislative distinction between a *per se* offence and other reviewable matters creates an "unintentional over-reach". The Bureau has recognized this.<sup>30</sup> We do not believe it appropriate that the over-reach be corrected through a patchwork of defences and exceptions to the offence. Moreover, in our view the issues raised by adopting a *per se* approach coupled with the difficulties in defining and implementing an exemption system do little to reduce uncertainty and any resulting chilling effect.

(ii) Inappropriate in Canadian Context

The Task Force also notes that there is no clear authority that the Commissioner can properly "exempt" potentially criminal matters from prosecution. The determination of whether a particular agreement provides a basis for a prosecution under a criminal provision of the Competition Act is in the hands of the Attorney General of Canada, with the Commissioner's role being that of initiating and conducting an inquiry. That division of authority is predicated on the overriding importance of preserving and promoting the objectivity and impartiality of the exercise of prosecutorial discretion. The decision to prosecute involves the gravest consequences for the subject and the administration of justice. As such, in our system of criminal law, it is confined exclusively to

the Attorney General and Crown prosecutors accountable to the Attorney General. Great care is taken to preclude the influence of any interests – including those inherent in the investigative process – on the independence of the decision to lay charges.

In that context, there are two criminal law policy dimensions to be taken into account. The first is that, as a matter of law, a law enforcement body has no authority to exempt from prosecution either a class of offences or a class of offenders.<sup>31</sup> The second is the exclusivity of the prosecutorial authority of the Attorney General.

While a "clearance" procedure likely would be individualised in its administration, there is a strong possibility that creating such an authority might precipitate a significant number of applications from parties seeking reassurance about their business agreements with competitors. That is the case with the E.U. notification procedure. If the decisions are strictly individualised, the carefully defined *investigative* role of the Commissioner in the enforcement scheme of the Act raises other policy issues. The exclusive prosecutorial authority of the Attorney General (and representatives of the Attorney General) under Section 23 of the Competition Act means that the Commissioner has no role to play in the exercise of prosecutorial discretion. When the Commissioner refers a matter to the Attorney General, it is for *consideration*. The referral does not even include a recommendation, out of deference to the need for the objective and impartial exercise of the Attorney General's discretion. It is difficult to see how the Commissioner could lawfully provide any formal assurance of non-prosecution, without statutory authority that would impact on the very long standing concepts of prosecutorial independence and objectivity.

## CANADIAN COMPETITION RECORD

At present, the Commissioner could provide a binding opinion as to the application of the criminal provisions of the Act to any factual situation. An opinion would, in law, bind the Commissioner, though not the Attorney General, whose prosecutorial discretion is non-delegable in the circumstances under consideration. Alternatively, the Commissioner at best could commit that, following his examination of an agreement, he would not refer any matter based on the agreement and the surrounding circumstances to the Attorney General under Section 23 of the Act. However, it is no guarantee. If seized of the matter in some other manner, the Attorney General could not be bound to accept the Commissioner's view of the agreement, though it would undoubtedly receive considerable weight.

Perhaps more significantly, however, without statutory amendment the Commissioner could not block action by third parties. While there does not appear to have been a private prosecution for an offence under Section 45 of the Act, there is no legal reason why a third party could not initiate criminal charges, or even class action proceedings, based on an agreement by competitors. Thus, any exemption scheme ostensibly designed to create more certainty in the definition of a *per se* criminal offence is unlikely to meet that objective since the Attorney General could initiate criminal proceedings or a private litigant could commence a civil proceeding in respect of a matter "cleared" by the Commissioner.

### 3. *The Civil Track*

Each Report proposes that agreements and arrangements falling short of *per se* criminal behaviour would be subject to a civil reviewable regime that would enable the Commissioner to take action against all agreements having a substantially adverse affect on competition.<sup>32</sup> We question whether the addition of further civil provisions to the Act is necessary.

As noted by other commentators, the Act's merger and abuse of dominance provisions are sufficient to address joint ventures and other forms of pro-competitive competitor collaborations.<sup>33</sup> As noted above, with the recent amendments to the Act, parties who wish to reduce the risk that their collaboration will be scrutinized by the Bureau under Section 45 of the Act can apply for a binding advisory opinion in respect of proposed conduct.

While there has been much attention paid to the issues surrounding the proposed *per se* criminal track, there has been considerably less discussion about the proposals for a civil track. In this regard, we share Professor McFetridge's view that this is unfortunate.<sup>34</sup> Although the criminal law imposes serious penalties, we agree with Professor McFetridge that increased civil review powers could increase parties' costs and result in delays and lost opportunities. Delays in implementing commercial arrangements could result in pro-competitive transactions not being completed. If one of the goals of Section 45 reform is to reduce the so-called "chilling effect of section 45", it is difficult to see how the chilling effect will be significantly reduced if we are simply replacing the threat of a criminal investigation with the threat of a lengthy and costly civil investigation.<sup>35</sup>

### C. **Other Issues**

To round-out consideration of Section 45 reform, the Task Force reflected on the following additional issues: whether the conspiracy law should include an efficiency defence; trends of Canada's major trading partners; and whether the conspiracy law should include a limitation period. Each issue is discussed more fully below:

## CANADIAN COMPETITION RECORD

### 1. *The Criminal Law Should not Include an Efficiency Defence*

The Task Force is of the view that it is inappropriate to provide a specific efficiency-based defence to agreements subject to Section 45. As the Supreme Court has noted in Section 45 cases, the purpose of the agreement is one of the most important aspects of determining whether Section 45 has been violated. Moreover, the Court has developed fairly precise structural proxies for determining the purpose and effect of such agreements in conducting the “unduly” analysis. Implicit welfare or efficiency effects of such agreements, if any, are already incorporated into the analysis. As such, the likelihood of increasing social welfare by considering specific efficiencies as a matter of law in all cases is likely to be of limited prohibitive value when compared to the cost and complexity of undertaking such an analysis in these types of cases, particularly in the context of a criminal proceeding before a judge without economic training or expertise.<sup>36</sup>

### 2. *Trends in Canada’s Trading Partners*

A survey of trends in the laws of Canada’s major trading partners is provided in Appendix B to this Report. Of particular note:

- In the U.S., the distinction between *per se* and rule of reason offences is becoming more blurred. (This is discussed more fully above.)
- E.U. cartel laws only apply to corporate undertakings, not individuals, and cartel behaviour is not enforced under criminal laws. Any arrangement (even if “hardcore”) can be saved if it has pro-competitive benefits. The European Commission has authority to “authorize” agreements, even if they fall within the *per se* category.
- A new law in the U.K. will create a criminal offence for individuals who “dishonestly”

engage in certain “hardcore” activities. The offence will not include corporate liability or apply to vertical arrangements.

- In Australia, “hardcore” cartel behaviour is *per se* unlawful (but not a criminal offence) only if an “intention or likelihood to affect price competition” is proven. Like in the E.U., the Australian antitrust agency has authority to “authorize” agreements even if they fall within the *per se* category.

These trends are relevant to the current debate in Canada because:

- among the major developed countries, only the U.S., Canada and U.K. treat hardcore cartels as a criminal offence;
- no jurisdiction has an absolute, clear *per se* offence; and
- exemption/clearance mechanisms are common where cartels are prohibited through non-criminal regulation.

### 3. *Limitation Period*

The Task Force is of the view that the Competition Act should be amended to provide a five-year limitation period for the prosecution of offences. If the offence is of an ongoing nature (e.g. price fixing) then the limitation period should begin on the termination of the offence or its implementation. The inclusion of a limitation period will move the Act into line with U.S. and E.U. antitrust law which provide for a five year limitation period, and is in keeping with the trend in several other jurisdictions which now have limitation periods for analogous offences. In addition, limitation periods have been enacted in Canada for a variety of regulatory and quasi-criminal offences.

There are sound public policy reasons for adopting a limitation period, which explains why other major

## CANADIAN COMPETITION RECORD

antitrust jurisdictions have them. A more full discussion of these policy reasons and other factors which support the Task Force's view is provided in Appendix C to this Report.

### Conclusions

Accordingly, the Task Force concludes that:

- Available evidence does not support reform of Section 45 as proposed by the Commissioner of Competition ("Commissioner") and others.
- A "dual track" approach focuses attention on whether an arrangement is *per se* unlawful or not, a distinction for which there is no bright line. The resulting uncertainty is not better, and perhaps worse than, perceived uncertainty in determining "undue" effects of horizontal arrangements.
- The specific proposals for reform made by the Commissioner's consultants are fraught with uncertainty and ambiguity.
- The laws of Canada's major trading partners do not present consistent approaches to regulation of cartels that could be emulated easily by Canada.

### Notes

<sup>1</sup> In early 2002, all members of the Section's Criminal Matters Committee and Reviewable Matters and Private Actions Committee were invited to participate on the Task Force. Members of the Section 45 Task Force are: John Clifford and Rob Patton (Co-Chairs), Don Affleck, Dany Assaf, Anita Banicevic, John Bodrug, Lori Cornwall, Stan Elkind, Brian Facey, Denis Gascon, Randall Hofley, Susan Hutton, Mark Katz, Robin Kersey, Michele Lally, Martin Low, Francois Rioux, Andrew Roman, Benjamin Rovet, Danielle Royal, Greg Shirley, David Wolinsky and Kevin Wright.

The views of the Task Force members are their own and, with respect to members who are in-house counsel, do not necessarily represent the views of their employers.

<sup>2</sup> R.S.C., 1985, c. C-34, as amended (hereinafter, the "Competition Act" or the "Act").

<sup>3</sup> The first serious modern proposal for change was made by

Presley Warner and Michael Trebilcock in "Rethinking Price-Fixing Law", 38 McGill L.J. (1993) 679 ("Warner and Trebilcock"). Tim Kennish and Tom Ross followed with proposals that were set out in "Towards a New Approach to Agreements between Competitors" [1997], 28 *Can. Bus. L.J.* 22 ("Kennish and Ross").

The Commissioner described his concerns with Section 45 in October 2001 (See *2001 Invitational Forum on Competition Law*, "Section 45 at the Crossroads", (October 12, 2001)). In May 2002 the Deputy Commissioner of Competition, Criminal Matters, did likewise (See *2002 Competition Law Invitational Forum*, "Reform of Section 45 - The Bureau's Perspective", (May 8-10, 2002)). And, see note 18.

<sup>4</sup> See Raymond Pierce, "Reform of Section 45: The Bureau's Perspective", *2002 Competition Law Invitational Forum* (May 8-10, 2002) and Robert W. McCrone, "Reform of Section 45 of the *Competition Act*, A Bureau Review", *CBA 2002 Annual Fall Conference on Competition Law* (October 3-4, 2002).

<sup>5</sup> Professor McFetridge makes this point specifically with respect to "non-naked" horizontal restraints in his paper for the *CBA 2002 Annual Fall Conference on Competition Law*, "Horizontal Agreements as Reviewable Practices" (October 3-4, 2002).

<sup>6</sup> See, for example, Russell, Fanaki and Akman, "Implementing Canada's New Conspiracy Law", *CBA 2002 Annual Fall Conference on Competition Law* (October 3-4, 2002).

<sup>7</sup> For example, the Borden Ladner Gervais Report (below, note 18) suggests that the under-inclusiveness problem is due to the Crown's requirement to prove the undueness element in Section 45 (see page 60). The McCarthy Tétrault Report (below, note 18) argues that difficulties in securing convictions lie in the fact that "in many cases, the market is not readily definable" (see page 11).

<sup>8</sup> Calvin S. Goldman, Mark Katz and David Fruitman, "The International Experience with Cartel Enforcement", *2001 Invitational Forum on Competition Law* (October 12, 2001); Brian Facey and Dany Assaf, "Innovation, Growth and Prosperity: A Framework for Amending Canada's Conspiracy Laws" (2001) *Canadian Competition Record* 61 ("Facey and Assaf"); Omar Wakil, "Canada's Cartel Laws: Set to Change?", *ABA International Antitrust Bulletin*, Vol. 5 Issue 1, Spring 2002; Lawson A.W. Hunter and Danielle K. Royal, "Section 45 Amendments - A Cure Worse than the Disease?", *2002 Competition Law Invitational Forum* (May 8-10, 2002); Bruce M. Graham, "Reform of Section 45 Is Unnecessary", *2002 Competition Law Invitational Forum* (May 8-10, 2002); and John F. Clifford, "Canada Takes Steps Toward Conspiracy Reform", *The Antitrust Counsellor*, Issue 93 (September 15, 2002).

<sup>9</sup> Stephen Labaton, "The World Gets Tough on Price Fixers", *New York Times* (June 3, 2001, Section 3, p.1), cited in Wakil, *supra*, note 8.

<sup>10</sup> Of the 17 acquittals or discharges since 1980, six were because

## CANADIAN COMPETITION RECORD

of a failure to prove an agreement, while 11 were for reasons related to undue influence. McCrone, *supra*, note 4. See also Chandler and Jackson, "Beyond Merriment and Diversion: The Treatment of Conspiracies Under Canada's Competition Act", *Roundtable Discussion on Competition Act Amendments* (Insight Conference, May 25, 2000).

<sup>11</sup> According to McCrone, *supra*, note 4, there have been 52 conspiracy prosecutions since 1980, all of which involved hardcore anti-competitive behaviour (generally price fixing and market allocation). 32 of these 52 prosecutions resulted in convictions. Of these 32 convictions, 29 were the product of guilty pleas.

<sup>12</sup> As noted by McCrone, *supra*, note 4, the 32 convictions since 1980 have netted total fines of approximately \$158 million.

<sup>13</sup> *Supra*, note 8 at 3.

<sup>14</sup> Competition Bureau Information Bulletin, *Immunity Program Under the Competition Act* (September 2000). The number of convictions in respect of both domestic and international cartel behaviour almost doubled since the Bureau first introduced its immunity program, while the level of fines increased exponentially. See Chandler and Jackson, *supra*, note 10. See also Chandler, "Cartels and Amnesty: The State of Play in Canada", *ABA Section of Antitrust Law Spring Meeting* (April 5-7, 2000).

<sup>15</sup> This may reflect, in part, the Supreme Court of Canada's "sliding scale" approach for assessing undue influence set out in *R. v. Nova Scotia Pharmaceutical Society* (1992), 43 CPR (3d) 1 at 37. While the Court stopped short of reading a *per se* offence into Section 45, it did say that: "A particularly injurious behaviour [e.g. naked price fixing] may also trigger liability even if market power [of the accused] is not so considerable". This must mean that with respect to "hardcore" agreements that are made in a "smoky room", the market power of the cartel participants is less determinative than in cases that are not offensive on their face.

<sup>16</sup> Indeed, as some have pointed out this concern may actually defy substantiation in any concrete fashion. See: Calvin S. Goldman and Robert E. Kwinter, "International Hardcore Cartel Enforcement and Possible Reform of Section 45 of the Competition Act", *CBA 2002 Annual Fall Conference on Competition Law* (October 3-4, 2002).

<sup>17</sup> Goldman, *et al*, *supra*, note 8.

<sup>18</sup> See: R.S. Russell, A.F. Fanaki & D.D. Akman, *Legislative Framework for Amending Section 45 of the Competition Act* (April 11, 2001); McCarthy Tétrault, *Proposed Amendments to Section 45 of the Competition Act* (August 2001) and A. Gourley, *A Report on Canada's Conspiracy Law: 1889-2001 and Beyond* (August 2001). For ease of reference these Reports will hereinafter be referred to collectively as the "Reports", or individually as the "Borden Ladner Gervais Report"; the "McCarthy Tétrault Report" and the "MacLeod Dixon Report", respectively. Two of the Reports also considered, among other things, recommendations for Section 45 reform put forward by Warner and Trebilcock and by Kennish and Ross.

<sup>19</sup> Charles James, "International Antitrust in the Bush

Administration", *CBA 2001 Annual Fall Conference on Competition Law* (September 2001).

<sup>20</sup> See Graham, *supra*, note 8 in this regard.

<sup>21</sup> See "Commission proposes regulation that extensively amends system for implementing Articles 81 and 82 of the Treaty", *E.U. News Release*, September 21, 2001. For example, one of the complaints with the block exemption process is that the regulations governing this process have limited the ability of companies to innovate by forcing them to fit all of their contracts within the parameters of these regulations.

<sup>22</sup> See note 18.

<sup>23</sup> W.T. Stanbury, "Reforming the Conspiracy Provisions of the Competition Act", *Canadian Competition Record*, (Spring/Summer 2000) 63.

<sup>24</sup> See Hunter and Royal, *supra*, note 8 at 5. See also Warner and Trebilcock, *supra*, note 3 at 683: "Whether an agreement ought to attract liability under competition laws depends on the arrangement's ultimate effects on economic welfare."

<sup>25</sup> *Ibid.* See also Facey and Assaf, *supra*, note 8 at 10.

<sup>26</sup> See: Hunter and Royal, *supra*, note 8 at 5 and 6. See also Facey and Assaf *supra*, note 8 at 9.

<sup>27</sup> *Ibid.*

<sup>28</sup> Also, Bill C-472 included price fixing, market allocation, agreements to limit production and group boycotts in the category of *per se* offences; Warner and Trebilcock would restrict the *per se* category to naked and covert price fixing.

<sup>29</sup> Facey and Assaf, *supra*, note 8 at 10.

<sup>30</sup> See Deputy Commissioner's Remarks, *supra*, note 3 at 3-5.

<sup>31</sup> *R v Catagas*, (1978), 38 C.C.C. (2d) 296, 81 D.L.R. (3d) 396 (Man C.A.); *R v Metropolitan Police Commissioner, ex parte Blackburn* [1968] 1 All ER 763, [1968] 2 QB 118 (C.A.).

<sup>32</sup> For example, both the McCarthy Tétrault Report and the Borden Ladner Gervais Report propose a civil provision that would allow the Commissioner to challenge agreements before the Competition Tribunal. (The McCarthy Tétrault Report would restrict challenges to horizontal agreements and exclude vertical agreements). Both proposals would allow for a form of "efficiency exception." Similarly, the MacLeod Dixon Report proposes specific revisions to the civil provisions of the Act to enable the Commissioner to take action against all agreements or arrangements having the effect of substantially affecting competition – including agreements that might otherwise fall within the *per se* category.

<sup>33</sup> Graham, *supra*, note 8 at 4.

<sup>34</sup> McFetridge, *supra*, note 5 at 1.

<sup>35</sup> *Ibid.* at 15.

<sup>36</sup> As evidenced by the recent decisions in the Superior Propane case, determination of the appropriate measure and quantum of any specific gains in efficiency is a complex determination.

## CANADIAN COMPETITION RECORD

## COMPETITION BUREAU RELEASES INFORMATION BULLETIN ON THE REGULATED CONDUCT DEFENCE

By: Barry Zalmanowitz, Q.C.\*  
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On December 17, 2002, the Competition Bureau released an Information Bulletin on the regulated conduct defence.<sup>1</sup> The Bulletin for the sake of convenience uses the term regulated conduct defence to refer collectively to the legal principles applicable to situations where the *Competition Act* and regulatory statutes overlap. While regulated conduct may be raised as a defence in a criminal prosecution, it can also be raised as an exemption to the application of the criminal or civil provisions of the Act. These principles are also commonly referred to as the “regulated conduct exemption” or “regulated conduct doctrine”.

The stated purpose of the Bulletin is to outline and clarify the Bureau’s position with regard to the jurisprudence on regulated conduct defence issues arising under the *Competition Act*. A footnote cautions the reader that the Bulletin is for information purposes only and not a substitute for the advice of counsel and contains a statement that the Bulletin does not represent a significant change in enforcement policy or restate the law.

The Bulletin includes the following statements about the regulated conduct defence:

Simply stated, the RCD protects conduct which would otherwise be subject to the Act, if the conduct is specifically authorized by valid provincial or federal legislation. [emphasis added]

The RCD applies, and the Act becomes inoperative, only where there is clear operational conflict between the regulatory regime and the

Act, such that obedience to the regime means contravention of the Act.

Conflict is defined as a situation where obeying one statute means disobeying another. 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).

In short, the RCD will come into play only in the limited circumstances of operational conflict, that is where obeying the statutory regulatory regime requires disobeying the Act.

The Bulletin also distinguishes between “regulators” and “regulatees”, noting that regulators have generally been shown more deference than other types of entities because they are deemed to act in the public interest.

The Bulletin also states that self-governing regulators may be subject to closer scrutiny than regulators of public institutions such as marketing boards. The Bureau’s basis for the distinction is that self-governing regulators at times are called upon to make decisions on matters over which they have a direct pecuniary interest. “Self-governing regulators” are bodies that govern professions such as law, dentistry, pharmacy, medicine and engineering under provincial legislation.

### Comment

Although the Bulletin holds itself out as clarifying the Bureau’s position on the regulated conduct defence jurisprudence, it does not specifically refer to any jurisprudence and does not give any specific examples. For those reasons, it is slim on guidance and may mislead those unfamiliar with the jurisprudence. The Bulletin does, however, make it clear that the Bureau takes a narrow view of the scope of the regulated conduct defence. This writer believes that the Bureau’s view is not well supported by the jurisprudence.

## CANADIAN COMPETITION RECORD

The jurisprudence that has considered the regulated conduct defence can be placed into two categories. The first category covers situations where the actions of a statutory body purporting to exercise powers under its enabling legislation resulted in proceedings against the body under the *Competition Act* or predecessor legislation.<sup>2</sup> These are examples of cases involving “regulators”.

The second category of case, which the Bulletin refers to as the type involving regulatees, arises where firms in an industry subject to some form of regulation face proceedings under the Act.<sup>3</sup> Because this category involves the interplay between the *Competition Act* and regulatory statutes, it is commonly discussed under the heading of regulated conduct cases. However, it is conceptually different from the regulator cases and should not be confused with them.

In *Canadian Breweries*, a series of brewery mergers resulted in charges under the criminal provisions of the former *Combines Investigation Act* and one of the elements of the offence was establishing that the merger had operated or was likely to operate to the “detriment or against the interest of the public”. Unlike cases involving boards or tribunals, the breweries were not given any statutory powers but were regulated in the provinces where they operated by liquor control boards which fixed the prices at which beer could be sold and regulated advertising and other aspects of the business.

One of the allegations was that the accused joined with others in opposing the issuance of new brewery licenses. The Court rejected that argument and held that any corporation is free to make any submissions relevant to a licensing body and the licensing body has a duty to hear all relevant representations.<sup>4</sup> McRuer, C.J.H.C. stated:

When a provincial legislature has conferred on a board the power to regulate an industry and fix prices and that power has been exercised the court must assume that the power is exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Act with respect to the operation of a combine, I think it must be shown that the combine has operated, or is likely to operate, so as to hinder or prevent the provincial body from effectively exercising the powers given to it to protect the public interest. If the evidence shows that by reason of a merger the accused is given a substantial monopoly in the market, this onus, in my opinion, would be discharged.<sup>5</sup>

It is interesting and probably a good thing that the Bulletin did not pick up on this aspect of the regulated conduct defence. Using the *Competition Act* to assist ineffective tribunals in carrying out their responsibilities would not in most cases fall within the objects of competition policy. McRuer, C.J.H.C. ultimately found that the liquor boards set the prices and regulated advertising and therefore competition could not be lessened in those aspects of the industry that were regulated and that the Crown had not proved that the merger conferred sufficient power on the accused such that the liquor boards could not protect the public interest.

The Bulletin states that when the conduct of regulatees is under examination, the defence only applies “where a regulatee’s conduct is mandated or required by the regulator”. In *Canadian Breweries*, the conduct alleged to be contrary to the *Combines Investigation Act* was merging which was voluntary and not something that was compelled by the liquor boards. As such, the statement in the Bulletin that a regulatee’s conduct must be mandated by the regulator for the

## CANADIAN COMPETITION RECORD

defence to apply is not well grounded in the jurisprudence.

*Canadian Breweries* remains virtually the only case that considers in detail the application of the regulated conduct defence to "regulatees." It is a relatively old case and deals with provisions of the Act now repealed.<sup>6</sup> Notwithstanding the Bulletin, therefore, there is still considerable scope for argument as to the extent to which the civil and criminal provisions of the *Competition Act* apply to firms in industries which are regulated.<sup>7</sup>

### **Implications of Information Bulletin for Marketing Boards and Self-Governing Professions**

The Bulletin indicates that tribunals such as marketing boards would be viewed differently from self-governing regulators because public regulators generally do not make decisions on matters which have a direct impact on themselves. The basis for the distinction is debatable.

Directors of commodity marketing boards are often elected by, and consist primarily of, producers, and protecting the economic interests of producers of commodities may be their paramount concern. The jurisprudence does not imply different treatment for self-governing regulators. The authorities also do not suggest that the courts should scrutinize self-governing professions more closely than marketing boards. The courts take the position that if the conduct of a board is authorized by the statute it is deemed to be acting in the public interest.<sup>8</sup>

The Bulletin states that the regulated conduct defence protects only conduct that is "specifically authorized by valid provincial or federal legislation". [emphasis added] A body overseeing a self-governing profession may conclude from this statement that to be shielded

from investigation and proceedings under the *Competition Act*, the body's enabling legislation must contain express language authorizing them to engage in the conduct that may raise issues under the *Competition Act*. The phrase "specifically authorized" requires some clarification. In *Law Society of Upper Canada*, the Court in several places referred to the provisions of the *Law Society Act* providing specific authority to the Law Society to implement its own mandatory professional liability insurance program.<sup>9</sup> While it is clear that the *Law Society Act* expressly authorized the Law Society of Upper Canada to own shares in an insurance company and to prescribe fees for insurance, the Law Society had also argued that, based on existing jurisprudence, its broad discretion to regulate the profession was also sufficient authority for the implementation of a mandatory self insurance program. The Court did not reject that argument but simply found that there was also more specific authority for the actions of the Law Society. Indeed, the Court noted that counsel had all agreed that the regulated conduct defence applies "provided that the conduct falls within the purview of its authorizing statute".<sup>10</sup>

*Jabour*, which is a decision of the Supreme Court of Canada, and other cases make it clear that the regulated conduct defence does not require specific or express authorization for the conduct in question. A court in considering the regulated conduct defence will review the statute in question and apply the established principles of statutory interpretation to determine whether the impugned conduct is permitted.

Although at one time it was not unusual for legislatures to give professional bodies the powers to regulate fees and publish tariffs, that practice would appear to be rare these days. However, it has been recently held that the power to regulate a practice does include the power to regulate economic aspects of the profession.<sup>11</sup> If legislatures wanted to give professionals the power

## CANADIAN COMPETITION RECORD

to fix fees, or if they implicitly have those powers and exercise them, then the regulated conduct defence would apply.

### Conclusion

The writer believes that the jurisprudence on regulated conduct may be accurately and simply summarized as follows.

1. Where a statutory body has been given powers expressly or by implication to engage in conduct which may be contrary to the civil or criminal provisions of the *Competition Act*, the regulated conduct defence will apply and preclude the application of the *Competition Act*.
2. Where firms carry on business in a regulated industry, the regulated conduct defence will apply if obeying a mandatory regulatory scheme results in a violation of the *Competition Act*. Whether the approval of a merger or some other conduct by a regulator such as the CRTC exempts the application of the merger or other provisions of the *Competition Act* is an issue that has yet to be resolved and each case will turn upon the specific facts and regulatory statute in issue.
3. Although not strictly speaking a regulated conduct defence, the extent to which firms are regulated may be a factor relevant to elements of an offence or reviewable matter, such as whether their conduct results in an undue or substantial lessening or prevention of competition.

The Bulletin appears to signal an intent by the Bureau in future cases to advocate a narrower scope for the defence than is indicated by the jurisprudence. This

should not be surprising for an agency whose role is to be an advocate for competition. What is disconcerting, however, given the gap between the Bureau's position and the jurisprudence, is that the Bureau should express its views in an Information Bulletin "[i]n order to foster compliance".

### Notes

- \* The views expressed herein are those of the author alone.

<sup>1</sup> <http://strategis.ic.gc.ca/SSG/ct02485e.html>.

<sup>2</sup> *E.g. R. v. Chung Chuck*, [1929] 1 D.L.R. 756 (B.C.C.A.); *R. v. Simoneau*, [1936] 1 D.L.R. 143; *Cherry v. The King ex rel. Wood*, [1938] 1 D.L.R. 156; *Jabour v. Law Society of British Columbia et al.*, [1982] 2 S.C.R. 307 [hereinafter *Jabour*]; *Industrial Milk Producers et al v. Milk Board et al* (1988), 47 D.L.R. (4th) 710 (F.C.T.D.); *The Law Society of Upper Canada v. Attorney General of Canada et al* (1996), 134 D.L.R. (4th) 300 [hereinafter *Law Society of Upper Canada*].

<sup>3</sup> *E.g. R. v. Canadian Breweries Ltd.*, [1960] O.R. 601 (Ont.H.C.) [hereinafter *Canadian Breweries*]; *Waterloo Law Association v. A-G Canada*, 58 O.R. (2d) 275; *R. v. Independent Order of Foresters*, 26 C.P.R. (3d) 229 (Ont.C.A.)

<sup>4</sup> *Canadian Breweries, ibid.* at 625.

<sup>5</sup> *Ibid.* at 629.

<sup>6</sup> The likely relevance of *Canadian Breweries* today is that the extent to which an industry is regulated may be a relevant factor in determining whether the "regulatees" can exercise market power resulting in an undue or substantial lessening of competition. The aspect of *Canadian Breweries* which considers whether the conduct has effectively prevented a provincial body from exercising its powers has not generally been recognized as a valid objective of competition law.

<sup>7</sup> The scope of the regulated conduct defence in the broadcasting industry, in particular its application to a merger between radio broadcasting undertakings, was in issue in the Astral Media Inc. and Telemedia Radio Inc. merger case, however the matter was resolved before the Court delivered a decision. This issue is discussed in more detail in the article by D. Jeffrey Brown in this issue of the *Record*. For a discussion of the issues relating to competition law and regulation in network industries, see M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) at 704-705.

<sup>8</sup> *2903113 Canada Inc. v. Quebec (Régie des marchés agricoles et alimentaires)* (1997), 79 C.P.R. (3D) 403 (Que. C.A.) at 429-430.

<sup>9</sup> *Law Society of Upper Canada, supra* note 2 at 312.

<sup>10</sup> *Ibid.* at 306.

## CANADIAN COMPETITION RECORD

<sup>11</sup> See for example *Brown v. Alberta Dental Association*, 2002 ABCA 24 (Alta.C.A.) at para. 28 where the Court held that the power given to the Alberta Dental Association to regulate the practice of dentistry was broad enough to capture the manner in which a dentist conducts his business and the extent to which the dentist could associate with a health management organization.

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**THE COMPETITION BUREAU'S  
INFORMATION BULLETIN ON THE  
REGULATED CONDUCT DEFENCE:  
OBSERVATIONS FROM THE *ASTRAL/  
TELEMEDIA* CASE**

By: D. Jeffrey Brown\*  
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### Introduction

On December 17, 2002, the Competition Bureau released its Information Bulletin on the Regulated Conduct Defence.<sup>1</sup> As Zalmanowitz notes, while the stated purpose of the Bulletin is to "outline and clarify the Bureau's position with regard to the jurisprudence on [the] regulated conduct defence," the Bulletin does not refer to such jurisprudence.<sup>2</sup> The Bulletin, however, "makes it clear that the Bureau takes a narrow view of the scope of the regulated conduct defence", which view, according to Zalmanowitz, is (paradoxically) "not well supported by the jurisprudence."<sup>3</sup>

Viewed in this light, one may not find it surprising that the Bulletin departs from the recent Bureau approach of releasing guidelines and similar documents, including bulletins, in draft form along with a request for comments. By foreclosing an opportunity for public comment, the Bureau underscored the stated purpose of the Bulletin as being to outline and clarify its position respecting the "regulated conduct defence" (the "RCD"),<sup>4</sup> the clear message being that anyone considering reliance on the RCD should expect substantial resistance from the Bureau, at least where

the conduct in question does not fall squarely within the scope of the RCD as set out in the Bulletin.

Release of the Bulletin followed the recent settlement of litigation involving the application of the RCD<sup>5</sup> in the context of a radio broadcasting merger approved by the CRTC under the *Broadcasting Act*.<sup>6</sup> *Astral*, however, was settled before the issuance of a decision by the court, with the result that the issue concerning application of the RCD in the context of a radio broadcasting merger remains unresolved. It is useful, however, to review the Bulletin in light of *Astral*, since the position of the Commissioner of Competition<sup>7</sup> in that case may shed light on the Bureau's understanding of the RCD beyond what may be inferred from the Bulletin itself, which, as Zalmanowitz noted, is somewhat lacking in detail.

### The Bureau's Regulated Conduct Bulletin

As noted previously, the Bulletin "outlines and clarifies the Bureau's position with regard to the jurisprudence" on the RCD. Such jurisprudence, it notes, consists of a number of cases dating back to the early 1900s, "most of them criminal," dealing with the applicability of the *Competition Act*<sup>8</sup> to conduct that "on the one hand, contravenes the Act, and on the other, is authorized by a statutory regulatory regime."<sup>9</sup> In such situations, the Bulletin states:

... courts ... have concluded that conduct that is specifically authorized by a regulatory body exercising its authority under validly enacted legislation cannot be found [to be] in contravention of the Act. Simply stated, the RCD protects conduct which would otherwise be subject to the Act, if the conduct is specifically authorized by valid provincial or federal legislation.

## CANADIAN COMPETITION RECORD

The above statement of general principle, which appears at the outset of the Bulletin, is consistent with what is often regarded as being the leading RCD case, namely the decision of the Supreme Court of Canada in *Jabour*.<sup>10</sup>

Having so described the RCD, the Bulletin proceeds to discuss in greater detail the Bureau's views on specific aspects of the RCD. Among other things, the Bulletin states:

The RCD applies, and the Act becomes inoperative, only where there is clear operational conflict between the regulatory regime and the Act, such that obedience to the regime means contravention of the Act. ... If there is no conflict, both pieces of legislation can exist in harmony.

...

When there appears to be conflict, the Bureau takes into consideration the nature of the entity under examination. ... Regulators ... have generally been shown more deference by the courts than other types of entities because they are deemed to act in the public interest. ... When examining the case of regulatees ..., the Bureau considers it important to evaluate whether their conduct is voluntary. The RCD only applies to situations where a regulatee's conduct is mandated or required by the regulator, and that conduct is contrary to the Act.

... in addition to criminal matters, the RCD also applies to both regulators and regulatees in civil matters, including mergers.

... the RCD is only applicable in situations where Parliament or a provincial legislature has passed a statute setting up a regulatory regime. This means the RCD cannot be

invoked unless the conduct complained of is grounded in a statute or regulation. In other words, the RCD cannot come about due to administrative fiat or convention.

With the exception of the acknowledgement that the RCD applies to civil as well as criminal matters,<sup>11</sup> including "mergers", each of the above statements limits application of the RCD as initially described in the Bulletin (and as described in *Jabour*).<sup>12</sup> Even the acknowledgment concerning civil matters, however, is undermined owing to the subsequent assertion that "[t]he RCD only applies to situations where a regulatee's conduct is mandated or required [but not, as *Jabour* contemplated, authorized] by the regulator, and that conduct is contrary to the Act," the effect of which is to require a statute or regulation that compels a merger or other civilly reviewable conduct. Other statements in the Bulletin limiting the applicability of the RCD are questionable in light of the jurisprudence, including the requirement that there be an "operational conflict" between the statutes, which significantly narrows the scope of the RCD as set out in *Jabour* and subsequent jurisprudence.

### The *Astral* Case

#### *Overview of the Proceeding*

*Astral* involved the purchase by Astral Media Inc. ("Astral") of certain radio businesses from Telemedia Radio Inc. ("Telemedia"), including radio businesses in the province of Quebec. The transaction was subject to approval by the industry regulator, the Canadian Radio-television and Telecommunications Commission (the "CRTC"), in accordance with the *Radio Regulations, 1986*<sup>13</sup> enacted under the *Broadcasting Act*. The CRTC held public hearings to this end in November 2001 and approved the transaction, with certain conditions, in April 2002.<sup>14</sup>

## CANADIAN COMPETITION RECORD

The Commissioner, however, had filed an application with the Competition Tribunal (the "Tribunal") in December 2001 seeking to block the transaction under the merger provisions of the *Competition Act*. According to the Commissioner, the transaction would substantially lessen or prevent competition for radio advertising in each of the affected Quebec cities. Astral and Telemedia, for their part, commenced legal proceedings of their own, arguing in the Federal Court that the CRTC had exclusive jurisdiction to rule on the transaction under the *Broadcasting Act*. If successful, their application would have effectively put broadcasting mergers outside the scope of the *Competition Act's* merger provisions.

Astral and Telemedia's applications were heard in May 2002, but the Court never rendered a decision. On September 3, 2002, Astral, Telemedia and the Commissioner registered a consent agreement resolving the Commissioner's concerns and, by operation of section 105(3) of the *Competition Act*, terminating his application to the Tribunal opposing the transaction. Subsequent to registration of the consent agreement, Astral and Telemedia discontinued their Federal Court proceedings, with the result that the question of the Commissioner's jurisdiction to review broadcasting mergers remains unresolved.

#### *Arguments of the Parties*

The parties to the Astral and Telemedia Federal Court proceeding included the CRTC, but it adopted a neutral position in the proceeding. The only substantive arguments, therefore, were presented by Astral, Telemedia and the Commissioner.<sup>15</sup>

In arguing against application of the *Competition Act* to the transaction, Astral and Telemedia relied not only on the RCD but also on the provisions of the *Broadcasting Act*, which they argued established a

"principle of exclusivity" respecting the CRTC's regulation of the Canadian broadcasting system.<sup>16</sup> For the purposes of an analysis of the Bulletin, Astral and Telemedia's arguments in relation to the RCD are most relevant.<sup>17</sup> Given the particular facts of the case and RCD jurisprudence, including in particular *Jabour*, these arguments were straightforward. Since the CRTC approved the transaction, Astral and Telemedia argued that the transaction fell within the scope of the exemption to application of the *Competition Act* recognized by Canadian courts for conduct that has been required or authorized by statute or by a statutory body validly exercising its authority.<sup>18</sup>

Not surprisingly, Astral and Telemedia's characterization of the broad scope of the RCD differed from that put forward by the Commissioner, whose primary dilemma in the Federal Court case was how to respond to the broad language used in *Jabour* to describe the RCD. Rather than dealing with the issue head-on, the Commissioner's approach was to downplay the RCD, as evidenced by the fact that only three pages of his approximately 25-page factum were devoted to the issue. At the same time, reliance on arguments other than the RCD was made necessary by Astral and Telemedia's dual approach in the case, which relied both on the "principle of exclusivity" contained in the *Broadcasting Act* and the RCD.

The Commissioner's arguments in *Astral* may be briefly summarized as follows:

1. The *Competition Act* is a law of general application the only exceptions to which are contained in section 4 of the *Competition Act*. Since section 4 does not include broadcasting mergers within these exemptions, the *Competition Act* necessarily applies to such mergers.

## CANADIAN COMPETITION RECORD

2. As a matter of statutory interpretation, the provisions of the *Broadcasting Act* and the *Competition Act* should be read, if possible, in a manner that gives effect to both statutes. In the case of statutes with different objectives, they should be applied in a complementary manner insofar as each furthers a specific goal. In either case, “conflict” should be narrowly construed as “actual conflict” such that compliance with one compels defiance of the other.

3. Such an interpretation of the *Broadcasting Act* and its relationship to the *Competition Act* is supported by the “Backgrounder” published jointly by the CRTC and the Bureau in November 1999 and which describes their respective functions and powers in a number of areas. In the case of broadcasting mergers, the Backgrounder suggests that the CRTC and the Bureau have “parallel jurisdiction”.<sup>19</sup>

With specific regard to the RCD, the Commissioner’s submissions included:

4. The key cases for the purposes of the *Astral* case are *Canadian Breweries*<sup>20</sup> and *Alex Couture*,<sup>21</sup> which, according to the Commissioner,<sup>22</sup> are the only cases dealing with regulatees rather than regulators.

5. As applied to regulatees, the RCD is a “defence” that does not apply in the absence of a criminal charge.

6. The CRTC’s decision authorized the transfer of a licence, but it did not impose an obligation on the parties, who entered into the proposed transaction voluntarily. Similarly, the CRTC decision does not have as its object to compel persons to contravene the *Competition Act*,

but rather is limited in its effect to declaring that the transaction is not inconsistent with the objectives of the *Broadcasting Act*.

7. While certain jurisprudence “alludes to the possibility that it is sufficient that conduct be merely ‘authorized’ rather than required by an administrative authority, it is necessary to put such jurisprudence in its proper context.”<sup>23</sup> In particular, references to “authorization” in the jurisprudence generally refer to authorizations where there is a conflict between the *Competition Act* and the other statute of the sort referred to above, i.e. conflicts whereby a statute “specifically permits conduct otherwise prohibited by the *Competition Act*.”<sup>24</sup>

8. The mere fact that conduct is subject to approval by several administrative bodies, which is not an uncommon phenomenon, is insufficient to “automatically” place the conduct beyond the scope of the *Competition Act*. On the contrary, there exist a number of situations where conduct is subject to a plurality of regulatory approvals.<sup>25</sup>

#### **Some Observations on the Regulated Conduct Bulletin in Light of *Astral***

The Commissioner’s submissions in *Astral* reinforce a number of the statements made in the Bulletin. More significantly, they underscore the Commissioner’s view that the RCD ought to be narrowly interpreted, which approach is not surprising insofar as one would expect him to vigorously defend his jurisdiction and to promote the policies embodied in the *Competition Act*. At the same time, it is legitimate to ask whether the Commissioner’s interpretation of the RCD, as set out in the Bulletin and argued in *Astral*, is consistent with the RCD jurisprudence.

## CANADIAN COMPETITION RECORD

As previously noted, Zalmanowitz states that the Bulletin is "not well supported by the jurisprudence." There are certainly aspects of the Commissioner's approach in the Bulletin and in *Astral* that can be questioned on this basis. The most obvious of these is the contention made in *Astral* that section 4 of the *Competition Act* is exhaustive of exemptions to the *Competition Act*, which is inconsistent with the fact of the RCD's existence and, as such, was specifically addressed and rejected in *Industrial Milk*.<sup>26</sup> No doubt, however, the Commissioner did not expect such an argument to succeed but felt compelled to make it nonetheless so as to remind the court that exemptions to the *Competition Act* should not be considered lightly.

The suggestion that there should be a distinction in the treatment of regulators and regulatees, which is found both in the Bulletin and in the Commissioner's *Astral* submissions, is more problematic. According to the Commissioner, the scope of the RCD for regulatees is more limited, including that it operates only as a defence to a criminal charge and in respect of conduct that is compelled (but not authorized). While it is arguably true that the treatment of regulators in the jurisprudence has been more favourable than that of regulatees, this would seem to owe more to the origin of the RCD in cases dealing with regulators and the paucity of case law dealing with regulatees. No RCD case to date has expressly recognized such a distinction, including *Jabour* from which the modern conception of the RCD as applying to conduct that is required or authorized derives.<sup>27</sup> The Commissioner's more narrow contention that the RCD should only apply as a defence to a criminal charge is also out of step with modern RCD jurisprudence.<sup>28</sup> In light of the broad language in *Jabour*, and the trend in recent jurisprudence of broadening rather than narrowing the scope of the RCD, the correctness of the Commissioner's contention that a lesser form of the RCD applies to regulatees is open to serious doubt.

Given that success in *Astral* would depend on circumventing or narrowing the broad language of *Jabour*, as well as the broader potential for *Jabour* to limit application of the *Competition Act* generally, it is not surprising that the Commissioner has sought to downplay the significance of that decision. In *Astral*, therefore, he submitted that the "key" RCD decisions for the purposes of that case were *Canadian Breweries* and *Alex Couture* on the basis that they were the only cases that dealt with "regulatees" (although at least one other case – *IOF* – dealt also with regulatees).<sup>29</sup> *Canadian Breweries*, as noted previously, is not in fact an RCD case (at least not of the same sort as other RCD cases).<sup>30</sup> As for *Alex Couture*, it provides support for the Commissioner's attempt to limit the application of the RCD by requiring an operational conflict between statutes, but it is not determinative on this point, especially since RCD cases have used the "public interest" as the mechanism by which a conflict between statutes is avoided (i.e., conduct which is approved or authorized by statute is deemed to be in the public interest and therefore cannot contravene the *Competition Act*). Moreover, the facts of *Alex Couture* fall into a category of cases that exemplify the Commissioner's concern that the variety of regulatory approvals to which conduct, and in particular a merger, is subject (e.g., environmental approvals, municipal permits etc.) not become grounds for applying the RCD. Such situations, however, differ significantly from a case such as *Astral*, where the CRTC reviewed and approved the transaction as a whole from a broad public interest perspective, even including competition amongst its various considerations.<sup>31</sup>

While one may question the extent to which, in narrowing the scope of the RCD, the Bulletin is consistent with RCD jurisprudence, the Bulletin at least legitimizes the RCD's existence. The Commissioner's

## CANADIAN COMPETITION RECORD

submissions in *Astral*, by contrast, suggest a sense of grudging acceptance of the need to address the RCD accompanied by an underlying desire to dispense with it as a misguided judicial doctrine. Indeed, this view was subsequently made explicit in *Re/Max*,<sup>32</sup> where the Commissioner (and Attorney General) proposed a mode of analysis for situations where “a party seeks to assert that a law, either federal or provincial, does not apply to its conduct, because another law governs” that is “to be preferred to the problematic ‘regulated industries defence.’”<sup>33</sup> The Commissioner relied for this purpose on the Supreme Court’s decision in *British Columbia v. Mangat*,<sup>34</sup> where the court considered a conflict between provisions of the *Immigration Act* (Canada) permitting non-lawyers to represent persons in proceedings under that statute and provisions in British Columbia’s *Legal Profession Act*. After concluding that both provisions were *intra vires* their respective legislatures pursuant to the “double aspect doctrine”, the court considered the extent to which the provisions could co-exist without operational conflict. In the event of a conflict, the court indicated that it would – and ultimately did – hold the federal law to prevail on the basis of the paramouncy doctrine.

Whereas the RCD avoids conflict by seizing on the “public interest” aspect of the other statute to preserve its applicability, *Mangat* used the paramouncy doctrine to resolve a conflict in favour of a federal statute. *Mangat*’s reliance on the paramouncy doctrine means that it is ill-suited, on its face, to providing a substitute for the RCD in all cases. The *Mangat* approach is, in any event, inconsistent with the RCD, since its different mechanism for resolving conflicts could lead to different results. Given the longstanding acceptance in Canadian jurisprudence of the RCD, it would be unusual for a court to reject the RCD as the appropriate mechanism for resolving a dispute between a statute and the *Competition Act*. The Bulletin, therefore, falls

short of adopting *Mangat* as preferable to the “problematic” RCD, albeit incorporating its operational conflict test into the RCD.<sup>35</sup>

### Conclusion

Application of the RCD is not a black and white issue. Thus, while one can question the extent to which the Bulletin is consistent with the RCD jurisprudence, it is difficult to state unequivocally that positions set out in the Bulletin are inconsistent with the RCD jurisprudence. What can be said, however, is that there is no positive support in the jurisprudence for a number of its positions, even if it is not inconceivable that a court might narrow the broad scope of the RCD by distinguishing specific facts from those on which the jurisprudence developed. Nonetheless, the narrow interpretation of the RCD set out in the Bulletin runs contrary to generally held understandings about the RCD post-*Jabour*.

Doubts about the Bulletin’s approach in this regard are perhaps best highlighted by contrasting it with a description of the RCD put to the CRTC by the Commissioner himself in response to a call for comments on a proposal of the CRTC to begin requiring mandatory prior review and approval of “local management agreements” (“LMAs”), i.e., arrangements that allow two or more licensees of radio stations to pool “any aspect of the management, administration or operation of two or more stations that broadcast in the same market”.<sup>36</sup> Faced with prospect of such approvals, the Commissioner wrote to the CRTC to try to dissuade it from adopting such an approach. In so doing, the Commissioner described his concerns – and the RCD – in these terms:

The Bureau’s concern is that this [CRTC approval of LMAs] may effectively prevent advertisers whose rates and choices may be negatively

## CANADIAN COMPETITION RECORD

affected by LMAs from obtaining relief under the *Competition Act*. The jurisprudence under the *Competition Act* has established the principle that where specific conduct, in this case the LMAs, has been approved or authorized by a regulator exercising proper authority, the conduct in question is deemed to be in the public interest and beyond the application of the *Competition Act*. This is known as the regulated conduct doctrine.<sup>37</sup>

In contrast to the Bulletin, this definition recognizes the application of the RCD to conduct that has been “approved or authorized by a regulator exercising proper authority,” makes no distinction between regulators and regulatees, does not limit the RCD to a defence and recognizes public interest alone, without regard to a “true” operational conflict, as being the basis on which the RCD applies.

## Notes

\* Mr. Brown is a partner and Ottawa-based member of the Competition Law Group of Stikeman Elliott LLP. The views expressed in this article are those of the author alone. Stikeman Elliott LLP acted as counsel to Astral Media Inc. in respect of competition and litigation aspects of the transaction discussed in this article.

<sup>1</sup> Competition Bureau, *Information Bulletin on the Regulated Conduct Defence* (Ottawa: Industry Canada, 2003) (the “Bulletin”).

<sup>2</sup> See Barry Zalmanowitz, Q.C., “Competition Bureau Releases Information Bulletin on the Regulated Conduct Defence” in this issue of the *Record*. See also the article by Kennish & Bolton in this issue of the *Record*.

<sup>3</sup> Zalmanowitz, *ibid*.

<sup>4</sup> While the Bureau uses the language “regulated conduct defence”, it has also been referred to as the “regulated conduct exemption” and the “regulated conduct doctrine.” The connotation of the Bureau’s terminology, which suggests that the RCD is available only as a defence to a charge under the *Competition Act*, raises doubts about its appropriateness. As such, it is submitted that the neutral “regulated conduct doctrine” would be more appropriate. Use of “doctrine” (and even “exemption”) rather than “defence” is consistent with the manner in which various courts have characterized the regulated conduct jurisprudence.

See, for example, *Industrial Milk, infra*, note 10 at 49, *Waterloo Law Ass’n, infra* note 10 at 420, *IOF, infra* note 10 at 233, *Alex Couture, infra* note 10 at 613 and *LSUC, infra* note 10 at 468.

<sup>5</sup> *Astral Média Inc v. Le Commissaire de la concurrence et al. and Télémedia Radio inc. v. Le Commissaire de la concurrence et al.*, Federal Court – Trial Division, Court File Nos. T-2256-01 and T-2256-02 (the “Astral” case). The RCD was also raised in *Re Max Ontario Atlantic Canada Inc. v. The Commissioner of Competition et al.*, Ontario S.C.J. (Commercial List), Court File No. 02-CL-4621 (“*Re Max*”), which was also resolved by way of settlement and therefore did not result in a court decision.

<sup>6</sup> S.C. 1991, c. 11.

<sup>7</sup> In fact, the positions taken by the Commissioner were those of the Commissioner and the Attorney General of Canada. For ease of reference, reference is made herein only to the Commissioner.

<sup>8</sup> R.S.C. 1985, c. C-34.

<sup>9</sup> While not specifically identified in the Bulletin, early RCD cases include *Rex v. Chung Chuck*, [1929] 1 D.L.R. 756 (B.C.C.A.), *Rex v. Simoneau* (1936), 1 D.L.R. 143 (Montreal Ct. of Sess. of the Peace), *Cherry v. The King ex. rel. Wood*, [1938] 1 D.L.R. 156 (Sask. C.A.), *Ontario Boys Wear Ltd. v. Ontario (Advisory Committee, Industrial Standards Act)*, [1944] S.C.R. 349, and *Reference Re Farm Products Marketing Act*, [1957] S.C.R. 198 (“*Reference Re Farm Products*”).

<sup>10</sup> See *Jabour v. Law Society of B.C.*, [1982] 2 S.C.R. 307 (“*Jabour*”) at 366, where the Supreme Court held that a prohibition against advertising imposed by the Law Society of British Columbia on its members was exempt from the *Combines Investigation Act* because the conduct, which was undertaken pursuant to its statutory power to make rules respecting conduct unbecoming of its members, had been “authorized by the province of British Columbia.” The Bulletin does not, however, refer to *Jabour*, nor does it refer to any other RCD cases. With this in mind, other modern RCD cases include *Waterloo Law Ass’n et al. v. Canada (Attorney General)* (1986), 14 C.P.R. (3d) 413 (Ont. H.C.J.) (“*Waterloo Law Ass’n*”), *Industrial Milk Producers Association et al. v. British Columbia (Milk Board)* (1988), 21 C.P.R. (3d) 33 (F.C.T.D.) (“*Industrial Milk*”), *R. v. Independent Order of Foresters* (1989), 26 C.P.R. (3d) 229 (Ont. C.A.) (“*IOF*”), *Alex Couture Inc. v. Canada (Attorney General)* (1991), 38 C.P.R. (3d) 293 (Que. C.A.) (“*Alex Couture*”), *Law Society of Upper Canada v. Canada (Attorney General)* (1996), 28 O.R. (3d) 460 (Gen. Div.) (“*LSUC*”), *2903113 Canada Inc. v. Quebec (Régie des marchés agricoles et alimentaires)* (1997), 79 C.P.R. (3d) 403 (Que. C.A.) (“*Régie*”), leave to appeal to the S.C.C. refused April 30, 1998 and *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.) (“*SOCAN*”).

## CANADIAN COMPETITION RECORD

*R. v. Canadian Breweries Ltd.*, [1960] O.R. 601 (H.C.J.) (“*Canadian Breweries*”) is often referred to as an RCD case, but a careful reading of that case suggests that, strictly speaking, it is not. It involved a challenge under the former *Combines Investigation Act*'s criminal monopolization provision to a series of brewery acquisitions over a 23-year period that resulted in the accused having more than 60 per cent of Canadian beer sales in 1958. Whereas the RCD applies in respect of conduct that is required or authorized by statute or by a statutory body, the mergers in question were neither so mandated nor authorized. Instead, the court acquitted the accused on the basis of extensive regulation of the beer industry, the effect of which was to prevent competition on the basis of price and other dimensions of competition such that the acquisitions were precluded from having an impact of competition. As applied to today's statute, the court would not have declined to apply the *Competition Act* to the merger but rather would have held that no order should issue under section 92 on the basis that the broad scope of regulation prevented the possibility of the mergers having the effect, or likely effect, of preventing or lessening competition substantially.

<sup>11</sup> The application of the RCD to civil matters has been the matter of some debate, but it is now widely accepted that it applies to both. In *LSUC*, *supra* note 10, for example, the Attorney General's factum stated that it was “far from certain” that the RCD applied in the civil context, but this point was subsequently conceded by all parties during the hearing. *Ibid.* at 471-472. The view that the RCD applies to civil as well as criminal conduct is also supported by *Jabour*, *supra* note 10 (where it was held that the *Combines Investigation Act* as a whole – including criminal and civilly reviewable conduct – did not apply), *Alex Couture*, *supra* note 10 (which implicitly recognized the RCD's application in the context of mergers) and the fact that the same public interest concerns underlie the statute's civil provisions as is the case for its criminal provisions.

<sup>12</sup> The Bulletin is also significant in that, as noted previously, it acknowledges the RCD's application to federal as well as provincial regulatory schemes. In *Jabour*, *supra* note 10, the Supreme Court distinguished certain U.K. jurisprudence noting that constitutional division of powers issues do not arise in a unitary state, thereby lending support to an argument that the RCD applies only in respect of provincial regulatory schemes. Notwithstanding this statement, which was *obiter dictum*, there is some jurisprudential basis for concluding that the RCD applies to federal regulatory schemes. See, for example, *Reference Re Farm Products*, *supra* note 9 per Fauteux J. at 258 (“The adoption by Parliament of an ‘Act to assist and encourage co-operative marketing of agricultural products’, ... does not suggest that marketing schemes devised by Parliament or a Legislature within their respective fields, are *prima facie* to be held to come within the scope of the anti-monopoly legislation.”), *Industrial Milk*, *supra* note 10, at 41 and 49 (where the provincial scheme in question was integrated with a federal regulatory scheme, leading

the court to hold that “provincial marketing boards, when exercising authority conferred on them by provincial or federal legislation, cannot in exercising that authority, be said to be committing an offence under s. 32 [now s. 45] of the *Combines Act*”) and *SOCAN*, *supra* note 10 (striking an allegation of conspiracy from the statement of defence based on the RCD in relation to a provision of the *Copyright Act*).

<sup>13</sup> S.O.R./86-982.

<sup>14</sup> See *Astral Media Inc., on behalf of 3903206 Canada Inc., Telemedia Radio Atlantic Inc. and Radiomedia Inc.* (April 19, 2002), Broadcasting Decision CRTC 2002-90.

<sup>15</sup> Each of Astral, Telemedia and the Commissioner filed a “Mémoire” (factum) with the court. For the Federal Court – Trial Division file numbers, please see *supra* note 5.

<sup>16</sup> This “principle of exclusivity”, which has been recognized by Canadian courts, derives from sections 3(2) and 5(1) of the *Broadcasting Act*. Section 3(2) of the *Broadcasting Act* declares that the Canadian broadcasting system “constitutes a single system” and that the objectives of the Canadian broadcasting policy set out in the *Broadcasting Act* “can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority”. Section 5(1) of the *Broadcasting Act* further provides that the CRTC “shall regulate and supervise all aspects of the Canadian broadcasting system” with a view to implementing the Canadian broadcasting policy. With respect to judicial recognition of this principle of exclusivity, see *Mahar v. Rogers Cablesystems Limited* (1995), 25 O.R. (3d) 690 (Ont. Ct. Gen. Div.).

<sup>17</sup> It should be noted that the “principle of exclusivity” and RCD arguments are not conceptually dissimilar. Both are principles of statutory interpretation used by courts to resolve conflicts between statutes. In the case of *Astral*, their application would reflect the fact that governments have many policies, whether social, cultural or economic, that may occasionally conflict and that competition law is not always paramount.

<sup>18</sup> According to Astral and Telemedia, the existence of such a principle of exclusivity is not only legally correct, but also desirable as a matter of policy. Exclusivity is necessary to allow the CRTC to fulfil its functions under the *Broadcasting Act* as the body charged with regulating and supervising all aspects of the Canadian broadcasting system and ensuring that a delicate balance is struck among the social, cultural and economic objectives of the *Broadcasting Act*. If other regulatory bodies with more narrow concerns, such as the Commissioner's singular concern with competition, were permitted to exercise their powers in a manner contrary to those of the CRTC, then they could frustrate the CRTC's ability to regulate and supervise the Canadian broadcasting system as Parliament intended it to do under the *Broadcasting Act*. Moreover, as a matter of administrative efficiency, duplication of proceedings between the CRTC and competition authorities is time-consuming and expensive, especially given that section 125 of the *Competition Act* is available to the

## CANADIAN COMPETITION RECORD

Commissioner to ensure that his views on the impact of a transaction on competition may be brought to the CRTC's attention. In *Astral*, the Commissioner made no such submissions to the CRTC.

<sup>19</sup> There was no reference to the Backgrounder in the CRTC's decision approving the transaction. Interestingly, however, the CRTC briefly broke its silence during the Federal Court hearing to clarify for the court that the Backgrounder had been filed with the Court by the Commissioner – not by the CRTC.

<sup>20</sup> *Supra* note 10.

<sup>21</sup> *Ibid.*

<sup>22</sup> In fact, at least one other RCD case dealt with regulatees. See *IOF*, *supra* note 10 and the discussion at, *infra* note 27.

<sup>23</sup> Author's translation. The original text, which appears at para. 109 of the Commissioner's factum, reads as follows: "Bien qu'une certaine jurisprudence fasse allusion à la possibilité qu'il soit suffisant qu'un comportement soit simplement «autorisé» plutôt que requis par une instance administrative, il faut remettre cette jurisprudence dans son context approprié."

<sup>24</sup> Author's translation. The original text, which appears at para. 112 of the Commissioner's factum in *Astral*, *supra* note 5 reads as follows: "une législation qui permet spécifiquement un comportement autrement interdit par la *Loi sur la concurrence*."

<sup>25</sup> While not specifically pleaded by the Commissioner, counsel's response to a question from the court respecting whether the Commissioner was attacking the validity of the regulation pursuant to which the CRTC approved transfers of radio broadcasting licences is also interesting. The Commissioner's counsel skirted the issue somewhat, but stated that a regulation is not a source of jurisdiction, for which one must look to the statute. This statement could be taken to imply that the RCD is not available where a requirement or approval derives from a regulation. The Bulletin suggests otherwise, however, stating that conduct must be "grounded in a statute or regulation" rather than "administrative fiat or convention", although the meaning of these latter concepts is left unclear.

<sup>26</sup> *Supra* note 10 at 48-49.

<sup>27</sup> See also *IOF*, *supra* note 10 at 233, where the court, in a case dealing with the conduct of a regulatee, distinguished the facts before it from *Jabour*, and therefore refused to apply the RCD, because there was "no suggestion" that the "Insurance Act" authorizes, much less directs, I.O.F. to give false or misleading representations or to make any representations that might be deemed false or misleading to the public." *Ibid.* at 234. The court did not identify as a relevant consideration whether the person in respect of whom application of the RCD was being considered was a regulator or a regulatee.

<sup>28</sup> See, for example, *LSUC*, *supra* note 10, which dealt with an inquiry by the Director of Investigation and Research (as he was then called) under sections 77 and 79 of the *Competition Act*, i.e. provisions of a civil rather than criminal nature. The court, albeit in the context of a challenge to conduct by a regulator, dealt

with the issue of prematurity in response to an argument by the Director that the application to the court was premature since his inquiry was at a preliminary stage. See also *Waterloo Law Ass'n*, *supra* note 10, where the court refused to render a decision on the application of the RCD on the basis of prematurity. While the court recognized that the "'regulated industries' exemption to the combines legislation has been traditionally dealt with as a 'defence' to a charge," it kept open the possibility that in a "clear case" a charge might not be required to make such a determination. *Ibid.* at 420. In the case before it, the court held that the situation had not "matured sufficiently" to allow the court to make such a determination. In particular, it was not clear that "the Law Society [had] put into effect a scheme requiring or authorizing lawyers to adhere to uniform fee schedules" or that "county law associations ... [had] been delegated any statutory authority to enforce a minimum fee schedule."

<sup>29</sup> *Supra* note 10. See also *supra* note 27.

<sup>30</sup> *Ibid.*

<sup>31</sup> Interestingly, while the court ultimately refused to apply the RCD in *Alex Couture*, *supra* note 10 the fact that it conducted an RCD analysis demonstrates an acknowledgement on its part that the RCD may apply to mergers. Consistent with *Alex Couture*, the Bulletin also acknowledges the potential application of the RCD to civil matters (including mergers), but it then proceeds to state that such application is limited in the case of regulatees to instances where conduct is compelled, thereby effectively precluding the RCD's application to such conduct. Such a qualification to the RCD goes much further than even the most generous of interpretation of *Alex Couture*.

<sup>32</sup> *Supra* note 5.

<sup>33</sup> See *Re Max Ontario Atlantic Canada Inc. v. The Commissioner of Competition et al* (Commercial List), (November 4, 2002), Ontario 02-CL-4621 (Ont. S.C.J.) (Factum of the Respondents Commissioner of Competition and Attorney General of Canada) (the "*Re Max Factum*") at para. 84.

<sup>34</sup> [2001] 3 S.C.R. 113 ("*Mangat*").

<sup>35</sup> Another interesting aspect of the *Re Max* case, *supra* note 5, is its treatment of the RCD in the context of section 61 of the *Competition Act*, which makes price maintenance a *per se* criminal offence (i.e., the offence is made out on the commission of the conduct without the necessity of a "competitive effects" test such as the undue prevention or lessening of competition requirement in section 45). Since price maintenance, as defined in section 61, is *per se* unlawful, the Commissioner submitted, "Parliament has already deemed it to be in the public interest that the conduct described in section 61 be prohibited," in which case the RCD cannot apply. See the *Re Max Factum*, *supra* note 33 at para. 21.

<sup>36</sup> See section 11.1 of the *Radio Regulations, 1986*, *supra* note 13, for the complete definition of LMAs.

<sup>37</sup> Letter from Konrad von Finckenstein, Q.C., Commissioner

## CANADIAN COMPETITION RECORD

of Competition, to Mr. John Keogh, Acting Secretary General Canadian Radio-television and Telecommunications Commission re Public Notice CRTC 1995-55 Call for Comments on Proposed Amendments to the Radio Regulations, 1986, Regarding Local Management Agreements (available at [www.crtc.gc.ca](http://www.crtc.gc.ca)).

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### THE REGULATED CONDUCT DEFENCE: TIME FOR LEGISLATIVE ACTION?

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#### Introduction

When two Quebec-based broadcasters decided in late 2001 to dispute the Competition Bureau's jurisdiction over their merger in the Federal Court on the basis that review and approval of a merger among broadcasters by the Canadian Radio-television and Telecommunications Commission ("CRTC") effectively precludes concurrent review by the Commissioner of Competition under the *Competition Act* ("CA")<sup>2</sup>, many in the private competition law bar cheered them on. Finally, it was thought, here was a case that would determine the scope of the jurisprudential doctrine known as the "regulated conduct defence" ("RCD")<sup>3</sup> in a merger context. Not only that, but perhaps the Federal Court would vindicate the contention frequently asserted that the CA has no application where a merger of regulated parties is subject to review and approval by a specialized industry regulator, and where regulation will prevent the merging parties from exercising market power. The case also put squarely into question the status of the 1999 "interface" agreement between the Competition Bureau and the CRTC, in which it was asserted that the CRTC and the Bureau have concurrent jurisdiction to review mergers.

It is not surprising then that many of these same practitioners were disappointed when the two

broadcasters, Astral Média Inc. and Télémedia Radio Inc., entered into an eleventh-hour consent agreement with the Commissioner settling their dispute in August 2002.<sup>4</sup> As a result, the Federal Court's decision (understood to have been written and in the process of being translated at the time settlement was reached) was never released. Thus denied this much awaited clarification of the law concerning the proper scope of the RCD, a legal doctrine which is based on jurisprudence that is both dated and difficult to reconcile, many wondered how long it would be before another opportunity might arise to set matters straight in this area.

As things turned out, it was not a very long wait. In December 2002, without prior announcement or any stakeholder consultation, the Bureau issued its *Information Bulletin on the Regulated Conduct Defence* (the "RCD Bulletin"). In just over three concise pages and in a seemingly straightforward manner, the RCD Bulletin set out the Bureau's interpretation of issues relating to enforcement of the RCD.

In this paper, we argue that the Bureau's RCD Bulletin is an overly simplistic statement of the law in this area, and that it is in many respects inconsistent with the jurisprudence that established the RCD. Moreover, we do not believe, in retrospect, that even if the *Astral/Télémedia* case had proceeded to judgment, it would have provided more than the most limited guidance on the proper scope of the RCD. Indeed, we have concluded that neither simply continuing an *ad hoc* judicial approach (e.g. the *Astral/Télémedia* case) nor pursuing an administrative/enforcement approach (e.g. the RCD Bulletin) will be sufficient to bring about needed clarification of the law in this area. In our view, given the significant difficulties involved in attempting to reconcile the existing and frequently conflicting body of case law that gave rise to the RCD

## CANADIAN COMPETITION RECORD

with the structure and content of the modern CA, nothing short of legislative action is required to clarify the scope and application of the RCD.

### The Regulated Conduct Defence

The need for clarification of the law in the area of regulated conduct is apparent when one examines the historical development of the RCD and considers the very significant questions which remain undecided under the existing case law.

#### *Development of the RCD in the Jurisprudence*

The RCD first arose in the context of a series of constitutional challenges to the validity of the actions of various provincial marketing boards (e.g. *R. v. Chung Chuck*<sup>5</sup>; *Reference re: Farm Products Marketing Act*<sup>6</sup>; *R. v. Simoneau*<sup>7</sup>; *R. v. Cherry*<sup>8</sup>; *Ontario Boys' Wear Ltd. v. Advisory Committee*<sup>9</sup>) at a time when Canadian competition or anti-combines legislation was purely criminal in nature. In each of these cases, it was argued that the powers exercised by provincial marketing boards in regulating the prices and volumes of various products contravened criminal prohibitions on price fixing or cartel behaviour contained in applicable anti-combines legislation (the *Criminal Code* and, later, the *Combines Investigation Act* ("CIA")). However, in each case the court rejected that argument and ruled that compliance with valid provincial legislation could not amount to *criminal* behaviour within the meaning of federal anti-combines legislation. Among the rationales cited by the courts in these early cases were statements that conduct mandated or authorized by provincial law could not be contrary to the public interest, that such conduct could not be "voluntary" for criminal law purposes, and that adherence to a validly enacted provincial scheme could not amount to an intent to limit competition "unduly" as prohibited under the applicable anti-combines legislation. All of

these early cases involved allegations of anti-competitive conduct by the regulatory body itself.

The first case to examine the conduct of private actors in a regulated industry was that of *R. v. Canadian Breweries Ltd.*<sup>10</sup> In this case, the accused company was charged pursuant to section 32(1) of the CIA as having been a party to the formation or operation of a combine by participating in a merger, trust or monopoly operated to the detriment of the public interest (a criminal offence at the time). Between 1930 and 1953, the accused had acquired 23 other breweries with the result that by 1958 its sales allegedly accounted for more than 60% of the total sales of beer in Canada. The Crown contended that these mergers had limited price competition. The defence argued that the fact that the Liquor Control Board of Ontario set the prices of beer and liquor shielded the beer industry from the reach of the CIA. In assessing the legality of the impugned mergers, McRuer J. of the Ontario High Court concluded that the application of the CIA was excluded to the extent that regulatory powers had been exercised to remove particular fields of activity from the competitive sphere. He relied on the "public interest" rationale for the defence, writing (at 629-630):

When a provincial legislature has conferred on a commission or board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Act with respect to the operation of a combine, I think it must be shown that the combine has operated, or is likely to operate, so as to hinder or prevent the provincial body from effectively exercising the powers given to it to protect the public interest. If the evidence shows that by reason of a merger the accused is given a

## CANADIAN COMPETITION RECORD

substantial monopoly in the market, this onus, in my opinion, would be discharged.

There may, however, be areas of competition in the market that are not affected by the exercise of the powers conferred on the provincial body in which restraints on competition may render the operations of the combine illegal.

The leading "modern" case on the scope of the regulated conduct defence is *Jabour v. Law Society of British Columbia*<sup>11</sup> (the "Jabour" case), in which the Supreme Court of Canada held that the actions of a provincial law society in prohibiting advertising by lawyers, were exempt from the scrutiny of the CIA. The provincial regulatory statute did not empower the Law Society to ban advertising as such, but it did give the Law Society a broad mandate to define and to punish conduct unbecoming of a member. The Supreme Court held that this general authorization provided a sufficient basis for the advertising ban adopted by the Law Society (i.e. the Law Society had the necessary authority to take the action it did) and held that the CIA did not apply to the Law Society in the circumstances of that appeal. As with the earlier cases, the judgment in *Jabour* was specifically premised on the criminal nature of the prohibitions contained in the CIA and the idea that the actions of the Law Society acting within its authority could not be said to be contrary to the public interest and therefore could not amount to criminal acts. In this regard, the Court noted (at 37):

In *R. v. Can. Breweries*, supra (p. 605), the court proceeded on the basis that the word "unduly" in s. 32 connotes substantially the same meaning as the more general words in the same statute "operated or is likely to operate to the detriment or against the interest of the public".

Even the 1975 amendments to s. 32, by the addition of s-s. 1.1, did not remove "unduly" from the operative provision, s-s. (1) of s. 32. So long as the CIA, 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 scheme.

The judgment of the Federal Court, Trial Division in *Industrial Milk Producers Association et al. v. Milk Board et al.*<sup>12</sup> (the "Milk" case), also provides a useful review of the scope of the regulated conduct defence. In that case, the Court struck out as disclosing no reasonable cause of action a civil claim under what is now section 36 of the CA brought by a group of milk producers contesting federal and provincial restrictions on milk marketing in British Columbia. The civil claim alleged a conspiracy by the British Columbia Milk Board and the Canadian Dairy Commission to restrict competition unduly in the supply of milk by, *inter alia*, fixing and allocating milk quotas in the exercise of its regulatory powers under applicable federal and provincial legislation.

In her judgment, Reed J. noted that in fixing quotas the Milk Board was exercising authority specifically granted to it, and concluded that the regulated conduct defence applied on the facts. She also stipulated the following important caveat with respect to the scope of the defence (at 726):

It is not the various 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 as the case may

## CANADIAN COMPETITION RECORD

be. 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*. [emphasis in original]

Interestingly, this is the first case where any reference was made to the possibility of applying the RCD in the context of a federal regulatory regime. However, it is not strong authority for the application of the RCD in the federal sphere as the judgment focussed on the actions of the provincial Milk Board and did not address the constitutional law/division of powers issues of the earlier cases.

One further case that is frequently cited as important in this area is the decision of the Quebec Court of Appeal in *Alex Couture Inc. v. Canada (Attorney-General)*.<sup>13</sup> This case involved an application in the Competition Tribunal made by the Director of Investigation and Research (now the Commissioner) challenging a series of mergers in the animal meat rendering business. The respondents countered by asserting that the CA did not apply to the rendering industry since it was regulated under the Quebec *Agricultural Products, Marine Products and Food Act* and the federal *Farm Products Marketing Act*. The Court (per Rousseau-Houle J.) emphasized that the RCD did not create an exemption from the CA for regulated industries as a whole, and outlined the basis upon which the regulated conduct defence may properly be applied to resolve conflicts between regulatory legislation and the CA, writing (at 328):

In the absence of express or implicit exemptions, the regulated industry exemption may, none the less, be advanced by a person charged under

the *Competition Act* where the provincial legislation relied on authorizes the action for which he is charged. The actual legal basis of this exemption is the rule of interpretation resulting from the division of powers proper to a federal system; the rule is that 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.

The Court went on to state that it was unnecessary to determine whether the defence applied in that case, since there was no incompatibility between the CA and the provincial legislation, which only incidentally affected competition. Interestingly, the Court did not discuss the question of whether the RCD applied to the civil reviewable practices provisions of the CA, or to the merger provisions in particular, even though these were unresolved issues at the time (and remain so today, as discussed below).

Since the decision in *Couture*, only a handful of cases have dealt with the RCD, with the majority of them being decided by provincial superior courts, and none at the Supreme Court of Canada level. These cases have applied varying incarnations of the RCD in different fact situations. For example:

- In *Law Society of Upper Canada v. Canada (Attorney General)*<sup>14</sup> (the "LSUC" case), the Ontario Court (General Division) held that the RCD applies to civil reviewable practices under the CA, and that the Director of Investigation and Research (now the Commissioner) had no jurisdiction to conduct an inquiry into allegations that the Law Society's mandatory insurance scheme for lawyers contravened the abuse of dominance provisions (ss. 78, 79) or

## CANADIAN COMPETITION RECORD

the tied selling / exclusive dealing provision (s. 77).

- The Ontario High Court in *Waterloo Law Association v. Attorney General of Canada*<sup>15</sup> concluded that members of the Waterloo Law Association who had acted in accordance with a voluntary minimum fee schedule adopted by the association could not rely on the RCD, stating that the provincial Law Society would have had to exercise its authority to require or at least authorize reliance on the fee schedule in order for the defence to apply.
- In *R. v. British Columbia Fruit Growers' Association*<sup>16</sup> the British Columbia Supreme Court refused to apply the RCD to an agreement among fruit growers, packers and a central selling agency, where the regulator had not exercised its powers to control the operation of fruit packing houses.
- In *R. v. Charles*<sup>17</sup>, the Saskatchewan Provincial Court noted that the exclusive marketing rights given to an administrative marketing board under the *Canadian Wheat Board Act* were not inconsistent with the CA, "which has always exempted 'regulated conduct' from its application" (at 10).
- In *Garland v. Consumers' Gas*<sup>18</sup>, the Ontario Court of Appeal affirmed the view that the RCD did not apply outside the competition law context, specifically in regard to an order by a provincial regulator leading to private action in conflict with the *Criminal Code*.

In addition, the Competition Bureau has applied the defence in at least one recent case involving the issuance and administration of taxi licenses in the City of Toronto. In its May 2000 press release respecting this case, the Bureau noted that the City of Toronto is

authorized to control the number of taxi licenses being issued, and wrote:

The regulated conduct defence applies when a specific activity is authorized or carried out in keeping with valid regulation; such activity is deemed to be in the public interest and cannot be found to be in violation of the *Competition Act*. The defence applies as long as the regulator has exercised its authority and has not been frustrated in its operations by the conduct or activity in question.<sup>19</sup>

*What the case law tells us about the proper scope of the RCD*

The jurisprudential basis for the RCD consists of approximately two dozen cases spanning more than 70 years which have considered various iterations of competition legislation up to and including the current CA. This jurisprudence has dealt with the application of federal competition legislation in the context of a variety of provincial regulatory regimes, in cases dealing with conduct of both the regulators and of private parties. Many of these cases – and most significantly the *Jabour* case, which is the only Supreme Court of Canada case to have applied the RCD in almost 50 years – have premised the very existence of the RCD on the fact that the applicable competition law was criminal in nature. Accordingly, it is not surprising that this body of cases leaves many important questions unanswered. For example:

We do not know if the RCD applies in the face of a federal regulatory regime

There is no strong jurisprudential authority for applying the RCD in the context of a federal regulatory regime. As noted above, in the *Milk* case the RCD was applied where the conduct of both a provincial and federal regulator was at issue; however, the focus of the

## CANADIAN COMPETITION RECORD

judgment was on the provincial regulator's actions and the court did not address the rationale for expanding the defence into the federal sphere. In the more recent case of *Society of Composers, Authors and Publishers*<sup>20</sup>, the Federal Court found that the RCD applied to shield the actions of the federal Copyright Board from *Competition Act* scrutiny; however, the Court did not address the scope of the defence or the prior jurisprudence in its ruling.

When one examines the jurisprudential history of the RCD, it is clear that the doctrine was developed in order to resolve or avoid conflicts between the federal competition laws and provincial regulatory legislation. This view is reinforced by a reading of the 2002 judgment of the Ontario Court of Appeal in *Garland v. Consumers' Gas*, the most recent appellate court decision to examine the RCD. In describing the defence, the Court wrote:

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*. [emphasis added]

Under ordinary principles of statutory interpretation, where there is a conflict or inconsistency between a federal and a provincial law, the federal law is paramount to the extent of the inconsistency.<sup>21</sup> The line of cases establishing the RCD has carved out a somewhat anomalous and limited exception to the

normal principle of federal paramountcy by interpreting federal competition laws as implicitly permitting anti-competitive practices that are authorized by provincial law.<sup>22</sup> In effect, the Canadian courts in these cases have created a set of principles to "read down" the scope of the CA so as to prevent clashes with otherwise valid provincial regulatory schemes.

By contrast, where there is conflicting or inconsistent legislation passed by the same level of government, the rules of federal paramountcy are irrelevant. If the inconsistency cannot be resolved and the two laws cannot stand together under any reasonable interpretation, the doctrine of implied repeal applies with the result the later in time legislation is deemed to repeal the earlier legislation.<sup>23</sup> Where the issue is not inconsistent laws but rather inconsistent administrative action by tribunals empowered by the same level of government, the Supreme Court of Canada has developed a specific approach to resolving such conflicts. In *Shaw Cable Systems (B.C.) Ltd. et al. v. British Columbia Telephone Co. et al.*<sup>24</sup> (the "*Shaw Cable*" case), the Supreme Court was called upon to resolve a direct conflict between the decisions of two administrative tribunals: a federal labour arbitration decision interpreting a collective agreement as requiring a union to install cables on support structures of the British Columbia Telephone Company ("BCTel"), and a decision by the CRTC permitting cable licensees to install such cables on BCTel's support structures.

The approach adopted by the Supreme Court of Canada in *Shaw Cable* involved determining first whether a true "operational conflict" existed between the two administrative decisions. An operational conflict exists where compliance with the decision of one tribunal would necessarily involve a violation of the other tribunal's decision. The Court stated that once a true operational conflict is found to exist, judicial intervention to resolve the conflict is justified, and that

## CANADIAN COMPETITION RECORD

such resolution should be based upon a consideration of a number of factors including: (1) the legislative purpose of each administrative tribunal (some tribunals trump others by their very nature); (2) whether each tribunal's decision is central to its purpose (the more central the decision, the more reason for it to prevail); and (3) the degree to which each tribunal fulfils a policy-making role (policy-making tribunals trump other decision-makers). On the facts, the majority of the Supreme Court found that the CRTC's decision should take precedence due to its broad policy-making mandate.

The decision of the Supreme Court of Canada in *Shaw Cable* provides insight into how Canadian courts are likely to address potential conflicts between the CA and other federal legislation. An operational conflict of the nature discussed in *Shaw Cable* might exist where compliance with a regulatory scheme necessitated a violation of the CA (for example, if a federal regulator prohibited parties from supplying products to a particular customer, it would be inappropriate for compliance with such prohibition to be the basis for an action under the refusal to deal provisions of the CA). However, it is not clear that the *Shaw Cable* case has any impact on the approach to resolving conflicts between federal and provincial legislation, since the majority of Supreme Court explicitly approved the application of the traditional doctrine of federal paramountcy to federal/provincial conflicts involving administrative tribunals (see p. 462, per L'Heureux-Dubé J.).

The RCD will continue to represent a narrow exception to the paramountcy doctrine in the federal / provincial context. Although as a matter of policy we believe that the RCD should also apply to shield federal regulatory action from CA scrutiny, the current case law does not provide authority for the application of the doctrine in such a context and for this reason, we

believe that legislative action is necessary to ensure that there is protection for federal regulators and entities subject to federal regulation.

We do not know with certainty that the RCD applies to civil reviewable practices under the CA, including mergers

The case that is widely cited as establishing the principle that the RCD is available where the conduct at issue is a reviewable practice, rather than a criminal matter, is the 1996 *LSUC* case. This was a decision of the Ontario Court (General Division), and the judgment was not appealed. Prior to that case, the Director (now the Commissioner) had taken the position on a number of occasions that he did not accept that the RCD applied to civil matters.<sup>25</sup> However, by the time of the hearing the Director had apparently altered his view, since the Court noted that all parties had agreed that the RCD was available in the civil reviewable practices context "notwithstanding that the defence developed with respect to the Combines Investigation Act, whose quasi-criminal provisions have largely been replaced by civil proceedings for the enforcement of the *Competition Act*" (at 58). As such, the Ontario Court did not examine the scope of the RCD or its case history in any detail. By contrast, in *Jabour* the Supreme Court explicitly noted that the rationale underlying the application of the RCD in that case lay in the fact that the relevant CIA provision in that appeal was styled as a criminal prohibition. In particular, the Supreme Court in *Jabour* noted that while conduct authorized or mandated by provincial legislation cannot be contrary to the public interest, criminal law only punishes conduct which is contrary to the public interest. The criminal origins of the defence were also emphasized by the trial judge in the recent *Garland v. Consumers' Gas* case (see para. 29 and the reference to *Jabour* in the trial judge's decision).

## CANADIAN COMPETITION RECORD

While one might argue that a contravention of one of the CA's reviewable practice provisions is also contrary to the public interest, it is not clear that this is "public interest" in the criminal law sense of the term; i.e., public peace, order, security, health, morality.<sup>26</sup> As well, the term "unduly", which the Supreme Court in *Jabour*<sup>27</sup> equated with the term "public interest", does not appear in the CA's reviewable practices provisions. Since the constitutional basis for our modern CA is the federal government's trade and commerce power<sup>28</sup> (whereas the criminal law power formed the basis for earlier legislation) and since criminal penalties are at issue only in some cases, it is more difficult to justify a doctrine that provincial regulatory legislation overrides otherwise paramount federal law in the context of the modern CA. Moreover, some of the other rationales given in the early cases establishing the RCD – in particular the notion of lack of *mens rea* or lack of voluntariness where there is regulatory compulsion – do not fit quite so neatly with the civil reviewable practices provisions of the CA as they do with the criminal law framework. At a minimum, there is less than compelling judicial authority for the proposition that the RCD applies to such reviewable practices.

Similarly, the RCD has been successfully applied in the merger review context only once<sup>29</sup> – in the 1960 *Canadian Breweries* case<sup>30</sup> – and does not easily fit within the framework of a merger review under the modern CA. In particular, while it is very common for industry regulators to possess a power to review and approve a merger, it is not very often that the regulator actually compels or mandates a merger. As such, to the extent that the case law underlying the RCD requires a degree of regulatory compulsion, that compulsion is generally absent in the merger review context.<sup>31</sup>

We do not know what degree of regulatory authorization is required to trigger the RCD

Where cases have involved the potential application of the CA to actions of the regulatory body itself, the jurisprudence indicates that conduct of the regulator which is required or authorized by valid provincial regulatory legislation enjoys the protection of the RCD. However, the extent of "authorization" required is not entirely clear. In *Jabour*, the Supreme Court of Canada found that the Law Society's general mandate to set standards for the legal profession gave it sufficient authority to regulate advertising and the RCD applied to exempt from the application of the CA its actions in regulating (in that case actually prohibiting) advertising by lawyers. By contrast, in *Milk*, the Federal Court noted that the *Milk Board* had "explicit authority" to engage in the conduct under review and implied that the RCD would not apply absent such explicit authority.

Where cases have involved the potential application of the CA to actions by the persons subject to regulation (in the Bureau's terms, "regulatees"), the applicable standard is again not clear from the case law. In *Canadian Breweries*, the Court held that the RCD applied because there was price regulation in place which meant that a voluntary merger of private parties would not result in a lessening of price competition. There was no determination that conduct (i.e. the merger) had to be coerced or mandated under the legislation. In *Alex Couture*, another case where the conduct of a "regulatee" was at issue, the Court considered that it was not necessary to determine whether the RCD applied. Therefore, although it is frequently assumed that regulation must require or mandate activity in question if it is to enjoy the protection of the RCD, there is not clear judicial authority on that point.

## CANADIAN COMPETITION RECORD

We do not know if the RCD is an exemption or a defence

The courts in a number of cases (e.g., *Milk*, *Alex Couture*) have been at pains to emphasize that the RCD does not create a general exemption from the CA for industries subject to regulation. For this reason, and because most of the litigated cases have involved a defence to allegations of anti-competitive conduct, the RCD is described by many commentators, and by the Competition Bureau in the RCD Bulletin, as a “defence”. However, as noted previously, the RCD is at its heart a rule of legislative interpretation that “reads down” the CA so that it does not prohibit, or implicitly permits, anti-competitive actions or practices that are authorized by provincial law. In this context, it may be more appropriate to refer to the RCD as a regulated conduct exemption or exclusion.<sup>32</sup>

While this may seem to be merely a question of semantics, the distinction between regulated conduct being seen as an exemption and being considered merely as a defence is material in the context of pleading a case. If the RCD is an exemption, then there is no need for an accused or respondent to defend on the merits of the case; it may be pleaded as a jurisdictional issue from the outset and, if successfully invoked at that stage avoids any need otherwise to put in a defence. In most of the decided cases, the RCD was in fact pleaded as a preliminary matter before trial of the substantive issues.

*Astral/Télémedia*

Would the *Astral/Télémedia* case have resolved any of the open questions respecting the scope of the RCD? We can never be certain of the answer to this question; however, we can perhaps make an educated guess as to what the probable result would have been in that case. In doing so, we assume that the judges of the

Federal Court would avoid the jurisprudential morass underlying the RCD if there was an opportunity to decide this case without referring to this jurisprudence. And quite conveniently for the Federal Court, the 1995 judgment of the Supreme Court in *Shaw Cable* might have provided just such an opportunity.

As noted above, *Astral/Télémedia* involved a merger of two media companies that was subject to concurrent review and approval by the CRTC, a federal body. The transaction was approved by the CRTC in April 2002, with certain conditions. The *Broadcasting Act*, pursuant to which the CRTC derived its power to approve the merger transaction, fosters a number of public policy goals (e.g. fostering Canadian ownership and control, promoting Canadian content and Canadian cultural diversity) that can be at odds with market-driven competition law principles. By virtue of its licensing powers, the CRTC has and exercises the authority to regulate competition by determining how many and which competitors should be permitted to compete in providing a particular service and in establishing license terms which determine aspects of the conduct of approved competitors. The CRTC has also taken the view that:

Concentration of ownership within the broadcasting system is not itself necessarily of concern, provided that there continues to be an effective degree of diversity of ownership and of programming sources to ensure that the objectives of the [Broadcasting] Act are met. Today's highly competitive communications environment in every market as well as the high costs and risks involved dictate that the ownership structure must undoubtedly be composed of broadcasting holdings of various sizes, including larger entities with larger pools of resources, which are strong enough to compete with foreign

## CANADIAN COMPETITION RECORD

competition and have the capacity to produce Canadian programming of competitive quality.<sup>33</sup>

Arguably, to the extent that the CRTC approved the Astral/Télémedia merger as part of its mandate to regulate and shape the broadcasting industry, any decision by the Competition Tribunal to block the merger or require divestitures would be in conflict with the decision of the CRTC.

Where there is a potential for “operational conflict” between the decisions of two federal administrative bodies (the CRTC and the Competition Tribunal), *Shaw Cable* (a case which did not involve a conflict with the CA) sets out a framework for resolving the inconsistency. Arguably, on the application of the *Shaw Cable* criteria, the more specific policy-making mandate of the CRTC would prevail over the Bureau’s more general mandate respecting competition law. Moreover, even if the operational conflict test was not met (e.g., it would be possible to comply with the decision of both the CRTC and the Tribunal by not merging), recourse to other principles of interpretation for resolving inconsistent or apparently conflicting actions by tribunals at the same level of government could be made. In any event, regardless of the result, it would not strictly speaking be necessary for the Federal Court to have recourse to the jurisprudence respecting the RCD in order to resolve the dispute in *Astral/Télémedia*.

### The RCD Bulletin

As should be apparent from the prior discussion, the case law underlying the RCD is not only not entirely consistent, but it also leaves many key questions respecting the scope of the RCD unanswered. Against this backdrop, the Bureau took on what can only be described as a highly challenging task in attempting to craft an Information Bulletin that would set forth a

coherent enforcement approach to the RCD. Although the RCD Bulletin does not, in our view, do that (we would tend to characterize it as being more in the nature of a regulatory “wish list” than a statement of the existing law), in undertaking this task the Bureau has effectively highlighted the difficulty of enforcing a doctrine whose margins are not clear to regulators, practitioners, “regulatees” or even judges!

At first blush, the RCD Bulletin is deceptively simple. The Bureau refers to the case law underlying the RCD and notes that the courts have found that “conduct that is specifically authorized by a regulatory body exercising its authority under validly enacted legislation cannot be found in contravention of the [CA]”. It then describes how it applies the RCD in practice, noting that the first step is to determine whether there is a “clear operational conflict” between the CA and the regulatory legislation, meaning that obeying one statute means disobeying another. Where such a conflict exists, the Bureau will consider whether the party whose conduct is at issue under the CA is a regulator (in which case it will be given a degree of deference) or a regulatee (in which case the Bureau will find that the RCD applies only if the conduct at issue was mandated or required by the regulator). The Bureau then sets out its enforcement approach to several specific issues. Among other things, the Bureau is of the view that the RCD applies to federal and provincial regulators, and to the criminal and civil provisions of the CA. The RCD Bulletin states that the activities of self-regulatory bodies are subject to greater scrutiny (and by implication are less likely to enjoy protection under the RCD) than other regulators. It is also noted that the RCD can only be invoked if the conduct complained of is “grounded in” a statute or regulations.

As we said, the RCD Bulletin is commendably succinct. However, peel back its layers to examine

## CANADIAN COMPETITION RECORD

the Bureau's approach in light of the jurisprudence underlying the RCD, and we start to encounter difficulties. First and foremost, the "operational conflict" standard adopted by the Bureau seems to be misplaced. None of the cases where the RCD has been applied<sup>34</sup> have required that there be an operational conflict between the CA (or its precursors) and the regulatory legislation in order for the doctrine to apply. Indeed, as noted above the RCD is a principle of statutory interpretation pursuant to which the CA has been "read down" so that it does not apply to conduct that is the subject of provincial regulation, in order to avoid conflicts between federal and provincial laws. The "operational conflict" standard appears to derive from the *Shaw Cable* case, which dealt with conflicts between decisions by two federal regulators (and did not involve the potential application of the CA) and does not clearly fit with the RCD in the context of resolving inconsistencies between federal and provincial legislation. At the very least, even if it does no harm, the use of a "clear operational conflict" standard will further complicate the enforcement of a doctrine that is already very difficult to apply. Moreover, it is significant that in previous public statements respecting the scope of the RCD<sup>35</sup>, the Bureau made no reference to a preliminary "conflicts" test for application of the RCD. In those prior statements, the Bureau has generally described "four necessary elements or factors that must be met before the RCD [regulated conduct defence] will be accepted by the courts", as follows:

These [the factors] are: (i) the relevant legislation must be validly enacted; (ii) the activity or conduct in question must not only fall within the scope of the relevant legislation but must be specifically authorised; (iii) the authority of the regulator is exercised (not mere tacit approval or acquiescence); and (iv) the activity or

conduct in question has not frustrated the exercise of authority by the regulatory body.<sup>36</sup>

It is significant that the Bureau in the RCD Bulletin does not enumerate these same factors, which arguably more accurately reflect the jurisprudence in this area, than the criteria it now appears to be relying on.

The RCD Bulletin is also, in our view, unduly narrow in regard to the approach it appears to be taking towards self-regulatory bodies. In the *Jabour* case, which is the only (relatively) recent Supreme Court of Canada case respecting the scope of the RCD, the Court exercised substantial deference in determining that the Law Society of British Columbia had sufficient authority to regulate advertising based on its general mandate to establish standards for the legal profession and punish conduct unbecoming of a member. Estey J. in that case emphasized that there were a number of reasons why self-regulation made sense for lawyers and that the mode of regulation (i.e. self-regulation vs. provincially controlled regulation) was in the discretion of the provincial legislature. We believe that a similar degree of deference to self-regulatory bodies should be applied by the Bureau in its enforcement activities.

The RCD Bulletin also takes a narrow view to the issue of the scope of regulation – it states that regulatory action must be "grounded in" a statute or regulation in order for the RCD to apply. It is not clear whether this means that governmental executive action – e.g. an order-in-council – could not be the subject of the defence. Similarly, is the order of an administrative tribunal with a degree of discretionary power "grounded in" a statute, or regulation?

On the other hand, the Bureau has taken a very broad view of the RCD in other respects. First, it accepts without question that the RCD may be relied upon by federal regulators or "regulatees". As noted previously,

## CANADIAN COMPETITION RECORD

it is not clear that the RCD applies in the federal/federal context. It is more likely that the criteria for resolving inconsistencies between federal legislation/regulatory action and the CA (e.g., implied repeal, or the criteria set out by the Supreme Court in *Shaw Cable*) apply in the federal / federal context.

In addition, the RCD Bulletin provides that the RCD applies to civil reviewable practices. As noted previously, this proposition is not strongly supported in the case law. The Bureau's acknowledgement in the RCD Bulletin that the RCD applies to mergers appears to vindicate arguments that practitioners have been making for years in merger cases. However, when we examine the RCD Bulletin more closely, it would appear that the circumstances where parties are able successfully to invoke the RCD in the merger context will be few and far between. In particular:

- It is difficult to conceive of a merger case in which there would be a "clear operational conflict" between regulatory legislation and the CA such as is required in the RCD Bulletin in order to rely on the defence. In the merger context, such a conflict would exist only if a regulator mandated a merger and it would otherwise be prohibited under the CA. Very few, if any, mergers are actually mandated by legislation or regulation (even where the industry regulator has the power to approve a merger). However, most (if not all) mergers arise from a private decision to combine operations, so it is hard to see much scope for the application of the "clear operational conflict" standard in regard to mergers.
- In the same vein, the RCD Bulletin indicates that the RCD does not apply where the conduct of a "regulatee" is voluntary; i.e. not mandated or required by regulation/ legislation. Here again, because the decision to merge is

almost always a voluntary one, there is little practical scope for the application of the RCD.

- Regulation in an industry is relevant in that it may prevent the exercise of market power post-merger. The only case that has ever applied the RCD in the merger context – the *Canadian Breweries* case – took this type of industry regulation into account (albeit the merger provision in the CIA at that time was criminal). The RCD Bulletin is completely silent on this point.

Given the importance of the RCD and the number of unanswered questions respecting its scope, it is both surprising and regrettable that the Bureau did not consult with stakeholders before finalizing this document. The Bureau has consulted with stakeholders before adopting significant policy guidelines in other areas (including guidance documents which purport to state the Bureau's enforcement policy) — e.g. the *Merger Enforcement Guidelines*, *Abuse of Dominance Guidelines*, *Intellectual Property Enforcement Guidelines*, and *Predatory Pricing Enforcement Guidelines*. The Bureau has characterized the RCD Bulletin as an Information Bulletin that merely sets out its enforcement approach to the RCD and is not meant to be a statement of the law. This explanation is cold comfort given that the Bureau's guidelines on various issues are also not legally binding documents. The fact that the enforcement approach outlined in the RCD Bulletin appears to be largely at odds with the jurisprudence is of concern to practitioners since the Bureau's administrative guidance – whether characterized as "Guidelines" or "Information Bulletins" – serves as a statement of law for all practical purposes. This is because there is a strong disincentive to litigate competition law cases, particularly in the merger context where the parties need the approval of

## CANADIAN COMPETITION RECORD

the very regulator against whom a case might be litigated.

A further point to be clarified relates to the status of the inter-agency agreements that the Bureau has entered into with the CRTC (see the CRTC/Competition Bureau Interface of October 8, 1999) and with the Ontario Energy Board and Independent Market Operator for Electricity (see the Joint Statement respecting Competition Oversight of the Ontario Electricity Marketplace dated March 20, 2002). Each of these agreements purports to establish concurrent jurisdiction of the relevant regulator(s) and the Bureau over certain matters. We assume that, although the RCD Bulletin replaces and supersedes other "policy papers" published by the Bureau (see RCD Bulletin, note 1), it does not replace these agreements. Moreover, we assume that if conduct of (or authorized, mandated, or required by) these regulators was at issue and the elements of the RCD were met, the Bureau would be bound to follow the RCD jurisprudence and to decline to intervene, regardless of any statement in these inter-agency agreements, or in the RCD Bulletin, to the contrary.

### **Moving Forward**

Despite its deficiencies, the Competition Bureau's RCD Bulletin does advance the debate respecting the RCD by underlining the practical difficulties of enforcing the RCD in light of the lack of clear jurisprudential guidance. The existing jurisprudence simply cannot guide us in many instances because the CA of today is a very different statute from the CIA under which many of the cases by which the RCD was developed arose. This is an area where, for various reasons (including the circumstance that competition litigation in this country is relatively infrequent), the jurisprudence simply has not kept pace with statutory change.

When the CIA was being reformed in the 1970s, the drafters recognized that there was a need to deal with the issue of regulation and regulated industries through legislative action. Recommendations respecting the relationship between competition law and regulation were set out in the *Skeoch/Macdonald Report* in 1976.<sup>37</sup> In that report it was recommended that regulated industries generally be deemed to be subject to anti-combines legislation, and be exempted only where (1) the restrictive conduct is specifically imposed by the regulatory legislation; (2) the restrictive conduct is actively supervised by an independent regulator; and (3) the restraint on competition is necessary to the effective accomplishment of the regulatory goal and is the least restrictive means possible to achieve that goal. Several Bills which would have enshrined these principles in legislation were introduced in the mid-1970s but none became law. Copies of these proposed enactments are attached as Appendix A to this paper.

We believe that the time has come to revisit the question of a legislated RCD. In our experience, the Commissioner has been extremely reluctant to cede jurisdiction to another regulator by acknowledging that the RCD applies, and has given very little weight to the effects of a regulatory regime in preserving or excluding competition. The RCD Bulletin will compound these difficulties faced in individual cases by setting up a generalized enforcement policy of entertaining RCD arguments only in the narrowest of circumstances. The RCD Bulletin is not a satisfactory response to the real uncertainty which exists in this area. In addition, there is a strong disincentive to litigate competition cases, particularly in the merger context where guidance on the RCD is sorely missing. Rather than a non-binding Information Bulletin that outlines a narrowly-based enforcement approach to the existing law, we need a legislative policy debate and decision about the relative hierarchy of competition law and industry-specific regulation in this country.

## CANADIAN COMPETITION RECORD

The Bureau has unique expertise in the competition law area and has extensive powers to intervene in proceedings before regulators at all levels of government. Where there is industry-specific regulation, however, we believe that the Bureau should defer to valid exercises of regulatory power rather than categorically assert concurrent jurisdiction as is its current practice. The extent of the Bureau's role, if any, in approving mergers in regulated industries, and in litigating cases involving regulated parties, are matters that should and must be debated in the context of legislative reform.

While we make no claim to any expertise in legislative drafting, we believe that a number of key principles should be respected in drafting a legislated RCD. In particular, we believe that mergers need to be treated separately from other forms of regulated conduct since, in the merger context it is the industry regulatory environment and not a regulatory requirement to merge that is generally at issue. In the merger context, regulation is relevant in two respects. First, to the extent that regulation ensures that competition will not be lessened as a result of a merger (e.g. price competition cannot be lessened where prices are set by regulation) it is relevant to the assessment of competitive effects. Secondly, where there is a specialized industry regulator with concurrent jurisdiction to review a merger and where the goals of the regulatory regime are not necessarily consistent with free competition and efficiency (e.g. aspects of the broadcasting-related mandate of the CRTC), then it is arguable that the CA should "defer" to the more specialized regime.

We also believe that the regulated conduct principle, as applied to the balance of the Act (i.e. everything other than mergers), should be a uniform principle. Therefore, as a starting point for reform and debate,

we would suggest legislative amendments along the following lines:

- *Add the following definitions to Section 2 - "Definitions"*

"regulated conduct" means conduct that is authorized, mandated or required by an Act of Parliament or the legislature of a province or any regulation, by-law, municipal or otherwise, ordinance, order, rule or other instrument issued, made or established pursuant to any such enactment or by a regulatory body acting pursuant to any such enactment and includes, without limitation, conduct that is authorized, mandated or required by a Minister of the Crown in right of Canada or of a province, or the Governor in Council of Canada or the Lieutenant Governor in Council of a province;

"regulatory body" means a federal board, commission or other tribunal referred to in section 125(2), or a provincial board, commission or other tribunal referred to in section 126(2) and includes, without limitation, self-regulatory bodies;

Alternatively, one could define regulatory body as those bodies listed in a schedule, as is done, for example, in the *Access to Information Act*. This approach would have the advantage of allowing for policy debate respecting the mandate and role of the CA in particular sectors. However, it would have the disadvantage of prolonging debate and the relevant Schedule would have to be updated frequently.

One might also consider possibly adding a requirement that federal regulatory bodies act within their mandates in a manner which, to the extent possible, is least

## CANADIAN COMPETITION RECORD

restrictive of competition as was proposed in the various Bills debated in the 1970s.

- *Add the following general provisions*

**Section 4.2** - No person shall be convicted of an offence in Part VI or VII of this Act where the conduct which would otherwise form the basis for the conviction is regulated conduct.

**Section 4.3** - No person shall be the object of an order under Part VII.1 of this Act, or under sections 75, 76, 77, 79 or 81 of this Act, where the conduct that is the object of the order is regulated conduct.

- *Add the following merger-specific provisions*

**Section 94** [The Tribunal shall not make an order under section 92(1) in respect of]

(d) a merger that will be reviewed by, and may proceed only if it is approved by, another regulatory body.

**Section 113** [The following classes of transactions are exempt from the application of this Part:]

(c.1) a proposed transaction that may proceed only if it is approved by another regulatory body.

Alternatively, one could define “regulatory approval” in more restrictive terms – e.g. it could apply only where the regulatory body has concurrent jurisdiction to consider competition matters, or the legislation could cross-reference specific regulatory approval powers (as is done currently, for example with respect to certain financial institution mergers and air transportation undertaking mergers in section 94 of the CA).

**Section 93** [In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:]

(g.1) the extent to which regulation in an industry affects the price, volume or other conditions of supply of a product and any impact that the merger may have on such regulation.

Arguably, consideration of the regulatory environment is already a part of the section 93 analysis, even though it is referred to explicitly only in the context of barriers to entry (s. 93(d)(iii)). In our experience, the Bureau has sometimes been reluctant to consider regulation as part of its analysis, and an explicit provision would give more specific direction on this point.

### Conclusion

We are at a turning point in the life of the RCD. It has been more than 20 years since we had a Supreme Court judgment respecting the scope of the doctrine (*Jabour*) and our competition legislation has changed significantly since that time. In our experience, regulated conduct is routinely argued but is very seldom given any weight by the Bureau. Our earlier hopes (however misplaced) for judicial clarification of the doctrine were dashed with the settlement of the *Astral/Télémedia* case.

If the Competition Bureau’s RCD Bulletin is to be the last word on the subject of the RCD, we believe that the Bureau’s current practice of playing lip service to the importance of regulation while simultaneously asserting unfettered jurisdiction over regulated conduct will continue. Such an approach is wholly

## CANADIAN COMPETITION RECORD

unsatisfactory. We think not only is it time for a policy debate respecting the relative importance of regulation and of competition law in this country, but it is also, in our view, time to enshrine the regulated conduct principle in legislation.

### APPENDIX A

**Bill C-256, An Act to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competition Practices Tribunal and the Office of Commissioner, to repeal the Combines Investigation Act and to make consequential amendments to the Bank Act (3rd Sess., 28th Parl., 19-20 Elizabeth II, 1970-71).**

92. (1) Nothing in this Act applies in respect of an agreement, arrangement or course of conduct that would, but for this section, constitute

- (a) a violation of section 16, or
- (b) price discrimination, a restrictive practice, delivered pricing or granting promotional allowances within the meaning of those terms for the purposes of section 37,

where the parties to the agreement or arrangement or the person or persons engaging in the course of conduct are expressly required or authorized to do so by an enactment of the Parliament of Canada or of the legislature of a province or by any regulation, by-law, whether municipal or otherwise, ordinance, order, rule or other instrument issued, made or established pursuant to any such enactment, and such agreement or arrangement or such conduct is expressly required to be supervised and regulated, on a continuing basis, by a board, commission or other public body appointed pursuant to the enactment or the instrument issued, made or

established pursuant to such enactment and that is charged with the duty of protecting the public interest.

(2) Nothing in this Act applies in respect of an agreement, arrangement or course of conduct that would, but for this section, constitute

- (a) a violation of section 16, or
- (b) price discrimination, a restrictive practice or granting of promotional allowances within the meaning of those terms for the purposes of section 37,

where the parties to the agreement or arrangement or the person or persons engaging in the course of conduct

- (c) are members of a profession or practice a trade that is designated for the purposes of this Act as a profession or trade by an enactment of the Parliament of Canada or of the legislature of a province,

- (d) are not involved to a substantial extent in the supply, distribution, installation, storage, transportation, cleaning, maintenance, servicing, repairing or wrecking of goods or in the construction, demolition, cleaning, maintenance, servicing or repairing of buildings or any other form of structures or works, and

- (e) are expressly required or authorized to enter into the agreement or arrangement or to engage in the course of conduct by an enactment of the Parliament of Canada or of the legislature of a province or by any regulation, by-law, whether municipal or otherwise, ordinance, order, rule or other instrument issued, made or established pursuant to any such enactment, and such agreement or

## CANADIAN COMPETITION RECORD

arrangement or such conduct is expressly required to be supervised and regulated, on a continuing basis, by a board, commission or other body appointed pursuant to the enactment or the instrument issued, made or established pursuant to such enactment that is charged with the duty of protecting the public interest.

**Bill C-42, An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof (2nd Sess., 30th Parl., 25-26 Elizabeth II, 1976-77).**

4.5 (1) Part IV.1 and sections 32, 32.2, 32.3, 33, 34, 35 and 38 do not apply in respect of regulated conduct.

(2) For the purposes of this section,

“public agency” means any person or persons who individually or as a body, whether corporate or otherwise, derive power to regulate conduct from an Act of Parliament or of the legislature of a province and includes a Minister of the Crown in right of Canada or of a province on whom such a power is conferred and the Governor in Council or Lieutenant Governor in Council of a province where such a power is conferred on him;

“regulated conduct” means conduct in respect of which the following conditions are met:

(a) the conduct has been expressly required or authorized by a public agency that is not appointed or elected by the persons, or by classes or representatives of the persons, whose conduct is subject to be regulated by such agency;

(b) the public agency mentioned in paragraph (a) is expressly

empowered, by or pursuant to an Act of Parliament or of the legislature of a province, to regulate the conduct in the manner in which it is being regulated and was expressly directed its attention to the regulation of the conduct; and

(c) the application of this Act to the conduct, in the specific circumstances of the case, would seriously interfere with the attainment of the primary regulatory objectives of an Act referred to in paragraph (b).

4.6(1) A board, commission or other agency or person that is empowered by or pursuant to an Act of Parliament to regulate a trade, industry or profession by

(a) fixing, approving or controlling prices, fees or rates charged by persons carrying on the trade, industry or profession,

(b) fixing, approving or controlling conditions of entry into the trade, industry or profession,

(c) regulating, approving or controlling mergers therein, or

(d) fixing, approving or controlling the quantity or quality of products supplied by persons carrying on the trade, industry or profession

shall exercise its powers in such a way as to achieve the objectives of the enactment from which it derives those powers and, if those objectives can be achieved by the exercise of its powers in more than one manner, shall exercise its powers to achieve those objectives in whichever of those manners is least restrictive of competition.

(2) A decision or order of a board, commission or other agency or person

## CANADIAN COMPETITION RECORD

referred to in subsection (1) may not be appealed and is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with on the ground that the decision or order does not represent an exercise of the powers of the board, commission or other agency or person in a manner such as to achieve the objectives of the enactment from which it derives those powers in the manner that is least restrictive of competition except at the instance of the Competition Policy Advocate in a case where, pursuant to section 27.1, the Competition Policy Advocate has intervened in the matter.”

**Bill C-13, An act to amend the Combines Investigation Act (3rd Sess., 30th Parl., 26 Elizabeth II, 1977).**

4.5 (1) Part IV.1 and sections 32, 32.2, 32.3, 33, 34, 35, 38 and 38.1 do not apply in respect of regulated conduct.

(2) For the purposes of this section, “regulated conduct” means conduct in respect of which the following conditions are met:

(a) the conduct has been expressly required or authorized by a regulating agency that

(i) is not appointed or elected by the persons, or by classes or representatives of the persons, whose conduct is subject to be regulated by such agency, or

(ii) is subject to supervision, in the case of a regulating agency that is an agricultural products marketing board, by a supervising agency that is not appointed or elected by the persons, or by classes or representatives of the persons, whose conduct is subject to

be regulated by such regulating agency, and

(b) the regulating agency is expressly empowered, by or pursuant to an Act of Parliament or of the legislature of a province, to regulate the conduct in the manner in which it is being regulated and has expressly directed its attention to the regulation of the conduct,

and includes the conduct of a regulating agency or supervising agency acting within a power referred to in the definition “regulating agency” or “supervising agency”, whichever is applicable;

“regulating agency” means any person or persons who individually or as a body, whether corporate or otherwise, derive power to regulate conduct from an Act of Parliament or of the legislature of a province and includes a Minister of the Crown in right of Canada or of a province on whom such a power is conferred and the Governor in Council or Lieutenant Governor in Council of a province where such a power is conferred on him;

“supervising agency” means any person or persons who individually or as a body, whether corporate or otherwise, derive from an Act of Parliament or of the legislature of a province, power to supervise the regulation of conduct by a regulating agency, and includes a Minister of the Crown in right of Canada or of a province on whom such a power is conferred and the Governor in Council or Lieutenant Governor in Council of a province where such a power is conferred on him.

4.6 (1) A board, commission or other agency or person that is empowered

## CANADIAN COMPETITION RECORD

by or pursuant to an Act of Parliament to regulate a trade, industry or profession by

(a) fixing, approving or controlling prices, fees or rates charged by persons carrying on the trade, industry or profession,

(b) fixing, approving or controlling conditions of entry into the trade, industry or profession,

(c) regulating, approving or controlling mergers therein, or

(d) fixing, approving or controlling the quantity or quality of products supplied by persons carrying on the trade, industry or profession shall exercise its powers in such a way as to achieve the objectives of the enactment from which it derives those powers and, if those objectives can be achieved by the exercise of its powers in more than one manner, shall exercise its powers to achieve those objectives in whichever of those manners is least restrictive of competition.

(2) Where a decision or order of a board, commission or other agency or person referred to in subsection (1) is subject to an appeal or review or to be restrained, prohibited, removed, set aside or otherwise dealt with on any ground pursuant to any other enactment, the Competition Policy Advocate and he only and only where he has intervened in the matter pursuant to section 27.1, may appeal, or apply for a review of, the decision or order, or apply to have it restrained, prohibited, removed, set aside or otherwise dealt with on the ground that the decision or order does not represent an exercise of the powers of the board, commission or other agency or person in such a manner as

to achieve the objectives of the enactment from which it derives those powers in the manner that is least restrictive of competition.

(3) An appeal, review or application to have a decision or order restrained, prohibited, removed, set aside or otherwise dealt with pursuant to subsection (2) shall be brought, applied for or made within

(a) thirty days from the date on which the Competition Policy Advocate was notified of the decision or order by the board, commission or other agency or person by whom the decision or order was made or from the date on which it first came to the attention of the Competition Policy Advocate, whichever is the earlier, or

(b) the time limited by the enactment referred to in subsection (2) for the bringing of an appeal or the making of an application for a review or other relief referred to in that subsection whichever first expires.

## Notes

<sup>1</sup> Tim Kennish is a partner of Osler, Hoskin & Harcourt LLP located in its Toronto office where he practices primarily in the competition law field. Janet Bolton is an associate lawyer at Osler, Hoskin & Harcourt LLP located in its Toronto office where she practices primarily in the competition law field. A version of this paper was presented at the 2003 Competition Law Invitational Forum held at Langdon Hall in Cambridge, Ontario on May 1-2, 2003.

<sup>2</sup> See joined cases T-2256-01 and T-2257-01, *Astral Média Inc. v. The Commissioner of Competition* and *Télémedia Radio Inc. v. The Commissioner of Competition* (F.C.T.D.).

<sup>3</sup> Depending on the context, the regulated conduct "defence" is sometimes better described as the regulated conduct "exemption" or "exclusion". In the interests of consistency with the language applied by the Competition Bureau in its RCD Bulletin, we use the phrase "regulated conduct defence" (RCD) throughout this paper.

<sup>4</sup> News Release, "Competition Bureau resolves concerns in Astral-Télémedia case", September 3, 2002.

## CANADIAN COMPETITION RECORD

<sup>5</sup> [1929] 1 D.L.R. 756 (B.C.C.A.), *aff'd* [1930] 2 D.L.R. 97 (J.C.P.C.).

<sup>6</sup> [1957] S.C.R. 198.

<sup>7</sup> [1936] 1 D.L.R. 143, 65 C.C.C. 19 (Que. Ct. Sess).

<sup>8</sup> [1938] 1 D.L.R. 156, 69 C.C.C. 219 (Sask. C.A.).

<sup>9</sup> [1944] S.C.R. 349.

<sup>10</sup> [1960] O.R. 601 (Ont. High Court of Justice). Although it was only a decision of the Ontario High Court, *Canadian Breweries* is significant because it was cited with approval by the Supreme Court of Canada in *Jabour, infra*.

<sup>11</sup> (1982), 137 D.L.R. (3d) 1 (S.C.C.).

<sup>12</sup> (1988) 47 D.L.R. (4th) 710 (F.C.T.D.).

<sup>13</sup> (1991), 38 C.P.R. (3d) 293 (Que. C.A.), leave to appeal to the Supreme Court denied [1992] 2 S.C.R. at v.

<sup>14</sup> (1996), 67 C.P.R. (3d) 48 (Ont. Ct. Gen. Div.).

<sup>15</sup> (1986) 35 D.L.R. (4th) 751 (Ont. High Ct.).

<sup>16</sup> (1985), 11 C.P.R. 183 (B.C.S.C.).

<sup>17</sup> [1999] S.J. No. 763 (Sask. Prov. Ct.).

<sup>18</sup> (2001), 57 O.R. (3d) 127 (Ont. C.A.), leave to appeal to the Supreme Court granted October 17, 2002.

<sup>19</sup> News Release, "Regulated Conduct Defence Applies to Issuance of Taxi Licenses – Allegations of Conspiracy Unsubstantiated" (May 2, 2000).

<sup>20</sup> (1992), 45 C.P.R. 346 (F.C.T.D.).

<sup>21</sup> P. Hogg, *Constitutional Law of Canada* (Toronto, Carswell: 1997, 2002 – Rel. 1), chapter 16, "Paramountcy".

<sup>22</sup> Hogg, *ibid.* at 16-6, note 24.

<sup>23</sup> Hogg, *ibid.* at 16-1 to 16-2.

<sup>24</sup> (1995), 125 D.L.R. (4th) 443 (S.C.C.).

<sup>25</sup> D. Mercer, Paper presented to the 1995 Canadian Bar Association Annual Conference on Competition Law at 5, citing the Yellow Pages and NBTel inquiries made by the Competition Bureau.

<sup>26</sup> *Magazine Reference* case, [1949] S.C.R. 1 at 50.

<sup>27</sup> Interestingly, to the extent that proposed reforms to the CA could see the creation of a *per se* conspiracy offence for certain types of anti-competitive agreements (e.g. price fixing agreements), pursuant to which there would be no requirement to show an undue lessening of competition, it may be argued that the RCD would not be available to persons accused of committing such an offence, in light of the importance given to the term "unduly" in *Jabour*.

<sup>28</sup> *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641.

<sup>29</sup> *Alex Couture* also involved a merger; however, in that case the Court found that it was not necessary to apply the RCD.

<sup>30</sup> The *Canadian Breweries* case involved a merger. However, that case pre-dated the modern administrative review mechanisms in Parts VIII and IX of the CA and arose at a time where mergers were subject to criminal sanction under the CIA. We do not regard this case as standing for the principle that the RCD applies to mergers under the modern CA.

<sup>31</sup> But where a merger has been certified to be in the public interest by the Minister of Finance (mergers of federally-regulated financial institutions) or by the Minister of Transport (mergers of air transportation undertakings), the Competition Tribunal has no jurisdiction to make an order under section 92 of the CA in respect of the merger: CA, s. 94.

<sup>32</sup> On this point see G. Murphy, "Is it Time to Rebrand Canada's Regulated Conduct Defence?" [2001] E.C.L.R. 208.

<sup>33</sup> CRTC Public Notice 1992-42, Assessment of the impact of the benefits test at the time of transfers of ownership or control of broadcasting undertakings (15 June 1992).

<sup>34</sup> The notion of conflict was referred to in *Alex Couture*; however in that case the Court stated that there was no conflict and no need to look at whether the RCD applied as both the federal and provincial laws could stand together.

<sup>35</sup> The RCD Bulletin explicitly supersedes any and all prior statements by the Bureau respecting the scope of the RCD.

<sup>36</sup> D. Mercer, Paper presented to the 1995 Canadian Bar Association Annual Conference on Competition Law, pp. 1-2. These same factors were reiterated in an address given by Gilles Ménard, then Deputy Director of Investigation and Research (Civil Matters), to the Canadian Institute 1997 Canadian Resale/IXC Industry Congress (17 February 1997).

<sup>37</sup> Minister of Consumer and Corporate Affairs, *Dynamic Change and Accountability in a Canadian Market Economy* by L.A. Skeoch and B.C. McDonald (Ottawa: Queen's Printer, 1976) at 151-152.

## CANADIAN COMPETITION RECORD

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### INFORMATION NOTICES AND NEWS RELEASES ISSUED BY THE COMPETITION BUREAU DURING THE PERIOD JANUARY 1, 2003 TO AUGUST 31, 2003

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

**January 20, 2003**

NEWS RELEASE: Telemarketing Company Fined \$300,000 for Deceptive Telemarketing Practices

**January 21, 2003**

NEWS RELEASE: Competition Bureau Investigation Leads to Guilty Pleas by Deceptive Telemarketers

**January 21, 2003**

INFORMATION: Bayer AG Fulfils Competition Bureau Requirements to Divest Assets

**January 28, 2003**

NEWS RELEASE: Competition Bureau Investigation Leads to Guilty Plea and Fine

**February 17, 2003**

NEWS RELEASE: Competition Bureau Settles Real Estate Case Involving Canadian Re/Max Franchisees

**February 18, 2003**

INFORMATION: Competition Bureau Releases Information Bulletin on the Application of the *Competition Act* to Representations on the Internet

**February 19, 2003**

INFORMATION: Competition Bureau Warns Association Members to be Cautious when Renewing their Memberships

**February 20, 2003**

NEWS RELEASE: Competition Bureau Investigation Leads to Criminal Charges Against Individuals Engaged in Cross-Border Deceptive Telemarketing and Fraud

**February 26, 2003**

INFORMATION: Special Constable Status Granted to Competition Law Officers

**February 27, 2003**

NEWS RELEASE: Rhône-Poulenc Biochimie S.A. Sentenced to \$500,000 Fine Following Competition Bureau Price Fixing Investigation

**March 12, 2003**

NEWS RELEASE: Competition Bureau Investigation Leads to Additional Charges in Deceptive Mail Promotions Case

**March 13, 2003**

NEWS RELEASE: Federal Court Denies Appeal: Canadian Waste Must Divest Ridge Landfill

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## CANADIAN COMPETITION RECORD

**March 21, 2003**

INFORMATION: Competition Bureau Responds to Complaints Regarding Supply of Canadian-Based Internet Pharmacies

**March 24, 2003**

INFORMATION: Threshold and Fees for Merger Notification to Increase and Written Opinions to Become Binding on Commissioner of Competition on April 1, 2003

**March 28, 2003**

NEWS RELEASE: Competition Bureau Settles Price Maintenance and Misleading Advertising Case Regarding the Access Toyota Program

**March 31, 2003**

INFORMATION: IKO Industries Ltd. Modifies its Loyalty Program Following Competition Bureau Investigation

**March 31, 2003**

INFORMATION: Competition Bureau will not Appeal Latest Decision in Superior Propane Case

**April 9, 2003**

INFORMATION: Special Constable Status Granted to Competition Law Offices

**April 11, 2003**

NEWS RELEASE: Competition Bureau Resolves Concerns in Pfizer's Acquisition of Pharmacia

**April 11, 2003**

INFORMATION: Canada-Mexico Cooperation Agreement on Competition Law Enforcement Comes into Force

**April 15, 2003**

INFORMATION: Fording Coal Merger Passes Bureau Scrutiny

**April 15, 2003**

NEWS RELEASE: Competition Bureau Investigation Results in Guilty Plea for Price Maintenance of Isostatic Graphite

**April 24, 2003**

NEWS RELEASE: Competition Bureau Actively Preventing Deceptive "Sales Prices" in the Jewellery Industry

**April 29, 2003**

INFORMATION: The Competition Bureau Discontinues its Inquiry into the Quebec Beer Industry

**May 8, 2003**

INFORMATION: Special Constable Status Granted to Ontario Region Competition Law Officers

**May 13, 2003**

NEWS RELEASE: Competition Bureau Settles Case Involving Energy Saving Paint

## CANADIAN COMPETITION RECORD

**May 30, 2003**

INFORMATION: Release of Conference Board of Canada Report

**June 13, 2003**

NEWS RELEASE: Competition Bureau Investigation Leads to \$1-Million Settlement with Suzy Shier Inc.

**June 13, 2003**

INFORMATION: Competition Bureau Participates in Boiler-Room Takedown

**June 17, 2003**

NEWS RELEASE: Competition Bureau Supports International Guidelines for Increased Co-operation Against Cross-border Fraud and Deceptive Commercial Practices

**June 19, 2003**

INFORMATION: Bringing Down the Barriers to Effective Enforcement on Cross-Border Health Fraud

**June 23, 2003**

NEWS RELEASE: Consultations on Proposed Changes to the *Competition Act*

**June 26, 2003**

NEWS RELEASE: Canada to Lead International Competition Network for Third Straight Year

**June 27, 2003**

INFORMATION: Acquisition of Canada Life by Great-West Lifeco Inc. Receives Government Approval

**August 11, 2003**

INFORMATION: Competition Bureau Endorses Jewellery Industry Guidelines

**August 14, 2003**

INFORMATION: Konrad von Finckenstein Appointed to the Federal Court of Canada

**August 19, 2003**

NEWS RELEASE: Competition Bureau Investigation Nets \$600,000 Fine from Bioproducts Incorporated

**August 19, 2003**

NEWS RELEASE: Competition Bureau Probe Nets \$2.9 Million in Fines and Guilty Plea from Akzo Nobel Chemicals BV

**August 26, 2003**

INFORMATION: Competition Bureau Seeks Comments on Draft Guidelines: Deceptive Notice of Winning a Prize Provision (Section 53 of the *Competition Act*)

**August 29, 2003**

NEWS RELEASE: Competition Bureau Nets \$1.5 Million Fine in Polyester Staple Fibre Price Fixing Conspiracy

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