
The Regulated Conduct Doctrine:
Canadian Competition Law and the Politics of Undueness

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

~ Per Kellock J. *Howard Smith Paper Mills et al v. The Queen* ~

(i) Introduction

It is not uncommon for political ideals to pervade even the most carefully crafted statutory language. Nowhere is such influence more deeply entrenched than in the politically charged spheres of criminal law and economic policy. The former, concerned with the most coercive side of state action, naturally elicits heated political debates about the moral dimensions of fault and the rationales of punishment. The latter revisits the age old question of government’s role in the economy and the desirability of free markets as tools of social engineering. It comes as no surprise, then, that competition policy, a field that enforces laissez faire economics with criminal prohibitions, is rife with political influences. Indeed, the origins of competition legislation lie in a populist revolt over the industrial concentration that spread across Canada and the United States in the late 19th century.¹ Instituting laws to curb market power was not a novel idea. The common law was used for centuries in England as a way of regulating both domestic and international monopolies incorporated under the Royal Charter.² Historically, anti-trust laws have vacillated between active support for monopolies in the mercantilist age to an outright revolt against them in the post enlightenment era. This illustrates how the process of economic regulation generally and competition law specifically is the result of changing political ideologies that influence the way governments develop policy and how courts interpret legislation.

¹ Thomas W. Ross, “Viewpoint: Canadian Competition Policy: Progress and Prospects” (2004) 37 The Canadian Journal of Economics 243 at 247. [Competition Policy: Progress and Prospects].

² William L. Letwin, “The English Common Law Concerning Monopolies” (1954) 21 The University of Chicago Law Review 355.

The political dimension of competition law has important implications for the way it operates in Canada and for its viability as an instrument of economic policy. For the discussion in this paper, competition policy will be defined as a set of laws and enforcement mechanisms designed to enhance the competitiveness of markets and provide for greater efficiency and generation of wealth.³ The federal nature of the Canadian state poses unique challenges to the application of competition policy. In particular, the political influences that have shifted English and American policies from active endorsement to criminalization of monopolies have largely been reproduced in Canadian jurisprudence where courts continue to grapple with the separation of powers under the Constitution Act.

It is this uncertain constitutional background that influences the tension between the federal government's interest in securing a competitive economy and the provinces' desires to protect certain industries. The Regulated Conduct Doctrine ("RCD") is the most prominent expression of this tension. The RCD was developed in response to conflicts between federal competition legislation and provincial regulatory regimes.⁴ This paper will discuss the legal and policy implications of the RCD in two stages. First it will review the RCD from a policy based perspective. This will include an economic analysis of regulation and a review of the jurisprudence in which the doctrine developed. The analysis will show that the RCD defence suffers from a number of difficulties, many of which are rooted in unresolved constitutional problems relating to jurisdiction. These problems stem from the way in which this doctrine was developed—as a tool of statutory interpretation—which conflicts with most basic objectives of competition policy, including: (i) the prevention of abuses of economic power; (ii) maintaining free competition; and (iii) economic efficiency.⁵

³ Competition Policy: Progress and Prospects, *supra* note 1 at 244.

⁴ Janet Bolton & Lorne Salzman, "The Regulated Conduct Doctrine and the Competition Bureau's 2006 Technical Bulletin: Retrospective and Prospective", online: McCarthy Tétrault <<http://www.mccarthy.ca/pubs/salzmanbolton.pdf>> [Bolton & Salzman].

⁵ Paul K. Gorecki & William T. Stanbury, *The Objectives of Canadian Competition Policy 1888-1983* (Montreal: The Institute for Research on Public Policy, 1984) [*Objectives of Canadian Competition Policy*].

In light of the RCD's deleterious effects on competition policy, a second aim of this paper will be to discuss methods of reconciling federal competition law with provincial regulation. It is indisputable that most modern economies rely on at least some legal or constitutional limits to competitive markets. The important debates center on how best to make such limits legally perspicuous and adaptable to changing economic conditions. Wilson and Wydrzynski recognized that "the free competition value will clash with the value of regulation, both on a federal-provincial basis as well as intra-federally. Yet, in all of these conflicts, some constitutional interpretive doctrine must be found to respect the competing sovereign will(s)."⁶ In this paper's submission, the common law has made little headway towards clarifying the separation of federal and provincial jurisdictions in the context of the RCD defence. A proposed reform advanced here is to integrate the RCD into the statute in a more comprehensive way that goes beyond the recent amendments to the *Competition Act*.⁷

(ii) Outline

This paper is divided into sections that examine the RCD from the perspective of the economic theory of regulation and the substantive law supporting the doctrine. Section 1 will proceed with a discussion of the economic theory of regulated conduct and how it applies to the legal and policy issues raised by the RCD. Section 2 will provide an overview of the foundations of the doctrine and a critical examination of the early jurisprudence. Section 3 will assess the modern application of the RCD since the Supreme Court's seminal decision in *Jabour v. Law Society of British Columbia*.⁸ Finally, section 4 will discuss the important questions left unanswered by the jurisprudence and section 5 will conclude with some remarks on the relationship between competition and regulation.

⁶ John D. Wilson & Christopher J. Wydrzynski, "Competition in the Market for Legal Services after *Jabour*" (1984) 22 U.W.O. L. Rev. 95 [Wilson & Wydrzynski].

⁷ Bill C-10 Amendments to *Competition Act*, R.S.C. 1985, c. C-34 [Bill C-10].

⁸ *Jabour v. Law Society of British Columbia*, [1982] S.C.J. No. 70 [*Jabour*].

[1] The Economics of Regulated Conduct

[1.1] Stigler's Theory of Regulation

The classical statement on the economics of regulation was articulated by Nobel Laureate George Stigler in "The Theory of Economic Regulation".⁹ Stigler developed what is known as the capture theory which predicts that interest groups and other political participants will seek to harness the coercive powers of the state by advocating for regulations designed principally for their benefit.¹⁰ The empirical predictions of Stigler's theory are well known to public choice economists—regulation will predominate in industries where participants are well organized, share closely aligned interests, and have accumulated substantial political capital. Moreover, smaller groups tend to face lower mobilization costs and have an easier time lobbying for political support by obviating the 'free rider' problem which tends to increase in proportion to the size of a group.¹¹ In the Stiglerian tradition, regulation acts as "a fulcrum upon which contending interests seek to exercise leverage in their pursuit of wealth."¹²

The theory of regulation provides a basis for understanding the political clout mirroring the application of the RCD. From an economic perspective, the question is twofold: what does it mean for an industry to be regulated, and which industries are most likely to become insulated from competition in this way? An answer to these questions can be found in both Stigler's and Sam Peltzman's contributions to the economic theory of regulation. For Stigler, government's coercive ability to tax, dispose of property, and institute regulations represents an opportunity for groups to secure their economic interests by acquiring state support for their trades. An industry becomes regulated in four

⁹ George J. Stigler, "The Theory of Economic Regulation" (1971) 2 *Bell Journal of Economics and Management Science* 3 [Stigler].

¹⁰ *Ibid.*

¹¹ See: Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1971).

¹² Sam Peltzman, "Toward a More General Theory of Regulation" (1976) 19 *Journal of Law and Economics* 211 [Peltzman].

major ways:¹³ (i) direct subsidization of its business activities through, for example, government remittances; (ii) control over the entry of new rivals through pricing policies, vertical integration, and licencing; (iii) protective tariffs and related trade barriers; and (iv) direct price fixing.

The second question, and the more interesting one for the purposes of this paper, is the question of which industries are most likely to benefit from the four methods of regulation identified by Stigler. Peltzman's analysis provides a partial answer that helps elucidate one of the principal difficulties with the RCD. For the purposes of this analysis we can assume that domestic regulation involves price restrictions and entry barriers. A look at most regulated professions or marketing boards confirms that these methods of regulation (or variants thereof) predominate.¹⁴ Working with the assumption that politicians are rational actors, we can apply Peltzman's model to determine the type of industry that is more likely to become regulated. The following will reproduce Peltzman's model in an abbreviated form.¹⁵

[1.2] The Peltzman Model

The politician's objective is to maximize their political support function represented as:

$$M = M(p, \pi)$$

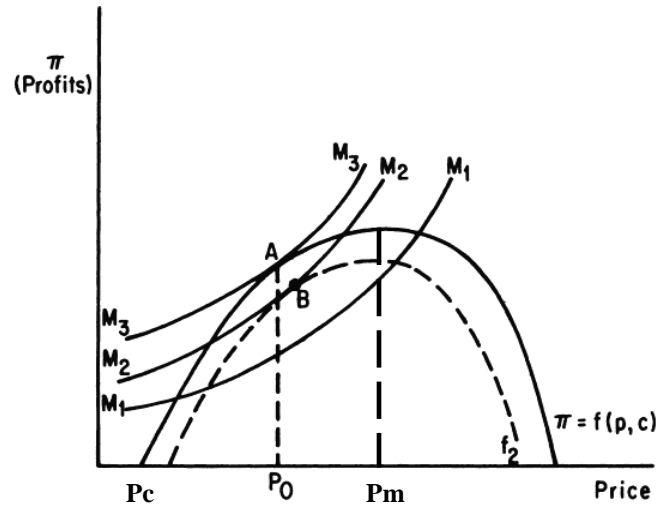
Where p represents the price of a good and π represents industry profit. $M(p, \pi)$ is assumed to be decreasing in price because consumers increase their opposition when the price is raised via regulation and it increases in industry profit because firms respond with greater support as profits increase. The profit function denoted as $\pi(p)$ is increasing over the range p_c (competitive price) and p_m (monopolistic price) and decreases thereafter as indicated in Figure 1 below:¹⁶

¹³ Stigler, *supra* note 9 at 5-6.

¹⁴ Ontario's agricultural sector reveals that most (if not all) marketing boards restrict output in these ways. Facilitating legislation includes: *Milk Act* R.S.O. 1990, c. M.12; *Farm Products Marketing Act*, R.S.O. 1990, c. F.9 and accompanying regulations.

¹⁵ Peltzman, *supra* note 12 at 222-224.

¹⁶ This diagram is borrowed directly from Peltzman's paper with some modifications: see Peltzman, *supra* note 12 at 224.



The crux of Peltzman's model is that the political support function $M(p, \pi)$ represents a tradeoff between consumer and producer support based on price and profit. $M(p, \pi)$ decreases in price because consumers withdraw their political support when the price is higher whereas it increases with industry profit since firms respond to higher prices with greater political support up to the level of price P_m . Profit depends on price where $\pi = f(p, c)$ and $c = c(Q)$ production costs are a function of quantity. The price that maximizes the political support function can be found by superimposing a politician's indifference curves onto the profit function. The curve M_1 reflects all combination of price and profit that generate M_1 level of political support. The slope of curves M_1 to M_3 is positive, reflecting the fact that political support increases when profit is high and prices are low, with $M_3 > M_2 > M_1$. The optimum at P_0 indicates that politicians will neither settle for a perfectly competitive market (at P_c) nor a monopolistic one (P_m) because at either extrema they could increase their political support by increasing or decreasing the regulated price.

Peltzman's model has important implications for the RCD as a doctrine that straddles the boundary between policy making and statutory interpretation. First, the optimal solution with equilibrium price P_0 implies that the industries most likely to be regulated are those that are either highly monopolistic (as is the case with many natural monopolies such as railroads, gas utilities, telephones, etc.) or have

the potential to be very competitive in the absence of regulation.¹⁷ Examples of the latter include agriculture, trucking, taxi cabs, crude oil and securities.¹⁸ In the case of natural monopolies, the reasons for government intervention are clear: a broad base of the electorate will be affected by higher prices and this creates significant political pressure for price caps and revenue controls. With competitive industries, the explanation for selective regulation is not as obvious. The reason why certain competitive industries manifest price controls and entry regulation while others do not is a highly contextual socio-historical question. In terms of the RCD, however, Peltzman's analysis is important because it illustrates the struggle between competitive and regulatory pricing faced by legislators who must weigh the interests of consumers against those of producers in their effort to maximize votes. The basic conclusion of the model—that there is an incentive for legislators to regulate the prices of even highly competitive sectors—goes to the heart of the political problem affecting the RCD. The drive towards protective regulation frequently conflicts with the goal of preserving competition. The Peltzman model encapsulates this policy dilemma. If legislators have an incentive to regulate competitive industries the RCD runs the risk of becoming a judicial proxy for contentious policy decisions. By allowing judges to selectively immunize industries from the provisions of the *Competition Act* the RCD constructs a judicial veneer over highly politicized questions that are not suited to the confines of *stare decisis*. In what follows we will focus on the RCD in its role as a legal fiction assisting in the protection of industries that are potentially competitive yet continue to benefit from judicially protected regulation.

¹⁷ Kip Viscusi, John M. Vernon, & Joseph E. Harrington Jr., *Economics of Regulation and Anti-Trust* 3rd ed. (Cambridge: MIT Press, 2000) [*Economics of Regulation*] at 323.

¹⁸ *Ibid* at 323.

[2] History of the RCD

[2.1] Constitutional Difficulties

The RCD emerged as a by-product to the constitutional difficulties facing original anti-combines legislation in Canada. The early competition law went through three distinct phases.¹⁹ The initial statute suffered from poor legislative drafting and the subsequent 1919 legislation was held to be *ultra vires* of the Parliament of Canada by the Privy Council.²⁰ Viscount Haldane viewed the legislation's purported justification under the criminal law power in s. 91(13) of the British North America Act to be going beyond the natural "domain of criminal jurisprudence."²¹ The final draft of legislation, and modern predecessor to the *Competition Act* (the "Act")²², was the *Combines Investigation Act* (the "CIA") enacted in 1923 and constitutionally upheld in a 1929 reference²³ along with s.498 of the Criminal Code which was substantively similar to the current anti-conspiracy provision.²⁴ In the 1929 reference, the Supreme Court allowed for a more expansive interpretation of the federal government's criminal law powers but nevertheless urged for continued deference to areas of provincial competence, which, since *Citizens Insurance Co. v. Parsons* implied more deference to the provincial jurisdiction over civil rights and property.²⁵

[2.2] Birth of the Doctrine

From its inception the first valid legislation again encountered a jurisdictional dilemma. In 1929, only a few months after the constitutional reference was heard by the Supreme Court, a case came before the British Columbia Court of Appeal in which the accused, Chung Chuck, challenged the validity of

¹⁹ *An Act for the Prevention and Suppression of Combines Formed in Restraint of Trade* S.C. 1889, c. 41.; *Combines and Fair Prices Act* S.C. 1919, c. 45; and the *Combines Investigation Act* S.C. 1923, c. 9.

²⁰ *Re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191 Per Viscount Haldane [*Re Board of Commerce Act*].

²¹ *Ibid.*

²² *Competition Act*, R.S.C. 1985, c. C-34 [*Competition Act*].

²³ *Reference Re Combines Investigation Act*, [1929] S.C.R. 409.

²⁴ Bruce C. McDonald, "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" (1969) 47 *Can. Bar Rev.* 161 at 175 [*Constitutional Aspects of Anti-Combines Law*].

²⁵ *Citizen Insurance Co. v. Parsons*, (1881), 7 App. Cas. 96.

the Produce Marketing Act under which he was convicted of marketing potatoes without the permission of the provincial marketing board.²⁶ The defendant relied upon the claim that the legislation was contrary to s. 498 of the Criminal Code because its provisions restrained trade. MacDonald J.A. dismissed this argument by appealing to the intent of the anti-conspiracy provision:²⁷

There is no intent [in the Produce Marketing Act] to “unduly” limit the facilities for producing an article of commerce even though it may lead to under-production. There is no intent to restrict or injure trade in relation to farm produce. The purpose of the Act is to better conditions in an important industry. The object of traders in every line of industry is to secure as large a share of that trade as possible at remunerative returns. That is not unlawful.

MacDonald J.A.’s judgment involved reading down the conspiracy provisions in relation to the provincially sanctioned conduct so that the orders of the provincial marketer were not interpreted as “undue” restraints on trade. The result was the birth of a common law doctrine that immunized certain industries from prosecution under the anti-conspiracy laws.²⁸

The RCD represented a legal compromise to the politically charged issue of federalism. Combines legislation, after being denied the opportunity to operate under trade and commerce²⁹ had struggled to establish itself under the federal government’s criminal law power via the inclusion of s. 498 in the Criminal Code. Indeed its validity had been challenged twice before, and in the earlier decision by Viscount Haldane in the Privy Council it was held that the power to legislate a board of inquiry that could monitor the contracts of particular businesses or trades fell outside the jurisdiction of the federal government.³⁰ Following the 1929 reference when the Privy Council reversed its earlier views³¹ the same problem resurfaced in *Chung Chuck*. The solution of interpreting “undue” so as to preclude application of the conspiracy provisions to provincial regulators was inconsistent with earlier judgments, particularly those of Mr. Justice Duff in *Weidman v. Shragge* where he declared:

²⁶ *R. v. Chung Chuck*, [1929] 1 D.L.R. 756 at para. 9 [*Chung Chuck*].

²⁷ *Ibid.* at para. 9.

²⁸ Bolton & Saltzman, *supra* note 4 at 2.

²⁹ Constitutional Aspects of Anti-Combines Law, *supra* note 22 at 189.

³⁰ *Board of Commerce Act*, *supra* note 18.

³¹ *P.A.T.A. v. Attorney General of Canada*, [1931] A.C. 310, at 325-326 [*P.A.T.A.*].

I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing all competition in that trade comes under the ban of the enactment.³²

Weidman, which was a case predating the Privy Council's decision in 1922,³³ pointed towards the rule that any trade restriction was *prima facie* grounds for triggering the application of the anti-combines legislation. What then motivated the court in *Chung Chuck* to interpret away the application of s. 498 of the Criminal Code? One view is that the use of the word "unduly" in the section was enough to support the conclusion that Parliament did not intend to restrict *all* monopolistic activities but only those that were contrary to the public interest.³⁴ From the legislative history, it is clear that not all combines were to be targeted, but it is also true that a central purpose of the legislation was to curb the inflationary effects of monopolizing industries.³⁵ The Parliamentarian to spearhead the first combines law in Canada, N. Clarke Wallace, made it clear from the outset that a key rationale for the legislation was to guard against unwarranted price increases and the transfer of income from consumers to producers.³⁶ Mr. Wallace had tried in 1891 to remove "unduly" and "unreasonably" from the Act in order to facilitate prosecution of combines, many of which were previously able to immunize their conduct by reference to these words. Other MPs at the time were of the view that the central rationale behind anti-combines legislation was to curb the rapid price increases that had spread across many concentrated industries.³⁷

Normal rules of statutory interpretation require reading the words of an Act in their entire context and in their grammatical and ordinary sense and, where necessary, interpreting the purposes of the Act

³² *Weidman v. Shragge*, (1912) 46 S.C.R. 1 at 36-37 [*Weidman*].

³³ *Re Board of Commerce Act*, *supra* note 18.

³⁴ See generally: *Objectives of Canadian Competition Policy* *supra* note 5.

³⁵ Michael Bliss "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910" (1973) 47 *The Business History Review* 177 at 184.

³⁶ *Objectives of Canadian Competition Policy*, *supra* note 5 at 15-16.

³⁷ Mr. Davies, from P.E.I, saw the legislation as being aimed at "punish[ing] combinations which had for their object the intent of withdrawing enormous and improper sums from people's pockets, of forming corners and making people pay double the price." *Objectives of Canadian Competition Policy*, *supra* note 5 at 18.

and the intentions of Parliament in order to ascribe meaning.³⁸ In combines legislation the legislative history is of particular importance and this was recognized as early as the *P.A.T.A* decision in 1931 where Lord Atkin held that:³⁹

Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

The ruling in *Chung Chuck* is difficult to reconcile with the rationales of combines legislation and the importance of its history in determining parliamentary intent and the question of jurisdiction.

MacDonald J.A. simply dismissed the jurisdictional challenge by creating a defence premised on statutory interpretation.

[2.3] Expanding the RCD

Chung Chuck was followed by a number of decisions using statutory interpretation to protect the activities of marketing boards. The first of these cases was *R. v. Simoneau* where the orders of the Quebec Dairy Commission were challenged on the grounds that they contravened either the Criminal Code or the *CIA*.⁴⁰ The court in that case decided that the actions of the Commission did not amount to an ‘agreement’ within the meaning of the Criminal Code, and further, that there was no intent on the part of the Board to limit unduly the production or processing of milk products.⁴¹ The importance of *Simoneau* was that it connected the language of undueness in s. 498 with “public interest”.⁴² The court thus added a further interpretive layer to the approach taken in *Chung Chuck* by ruling that certain kinds of combines were not contrary to the public interest: “[A]ll combines are not prohibited,

³⁸ Ruth Sullivan, *Driedger on the Construction of Statutes*, (3d) (Toronto: Butterworths Canada, 2008).

³⁹ *P.A.T.A.*, *supra* note 29 at 317.

⁴⁰ *R. v. Simoneau*, (1936), 1 D.L.R. 143 (Que. Ct. Sess.) [*Simoneau*].

⁴¹ *Ibid.*

⁴² *Ibid.*

but only those which are to the detriment and against the interest of the public. Combines which are in the interest of the public or for its benefit or advantage are not prohibited.”⁴³

[2.4] Voluntary Conduct and the Presumption of Public Interest

The rulings in *Chung Chuck* and *Simoneau* were consolidated in the Supreme Court reference *Re Farm Products Marketing Act*.⁴⁴ In that case, the Court distinguished between voluntary and compelled conduct under a provincial statutory scheme. It held that voluntary conduct related to the actions of individuals or corporations who were conspiring to fix prices or limit supply whereas compelled conduct referred to activity that was required under a provincial scheme and therefore was lawful:

The provisions of the Combines Investigation Act and the Criminal Code envisage voluntary combinations or agreement by individuals against the public interest that violate their prohibitions. The public interest in trade regulation is not within the purview of Parliament as an object against which its enactments are directed.⁴⁵

The 1957 reference case was advanced by the leading authority on the RCD in the pre-*Jabour* era: *R. v. Canadian Breweries Ltd.*⁴⁶ This case was the first to deal with the actions of regulatees (brewing magnates) rather than a challenge to the authority of a regulator. Interestingly *Canadian Breweries* was not a case involving the conspiracy provisions that were previously the focus of RCD case law. Instead, the RCD was applied as a defence to a prosecution under the merger provisions of the Act.⁴⁷ *Canadian Breweries* established a proposition, frequently cited in the modern jurisprudence, that provincial regulatory regimes, as long as they are *intra vires*, are assumed to have been legislated in the public interest. McRuer C.J.H.C. discussed this principle:

⁴³ *Ibid.* at 152.

⁴⁴ *Reference Re: Farm Products Marketing Act*, [1957] S.C.R. 198 [*Farm Products Marketing Act*].

⁴⁵ *Ibid.*

⁴⁶ *R. v. Canadian Breweries Ltd.*, [1960] O.R. 601 [*Canadian Breweries*].

⁴⁷ *Wilson & Wydrzynsky*, *supra* note 6.

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.⁴⁸

An important aspect of Justice McRuer's judgment is that he clarified the RCD's application to private actors or regulatees engaged in potentially anti-competitive mergers where provincial regulation exists.⁴⁹

[2.5] Critique of the Early Doctrine

The history of the RCD illustrates several recurring themes. First, courts have been careful not to delve into constitutional debates over the separation of powers when provincial legislation is challenged, notwithstanding the existence of an operational conflict.⁵⁰ Second, the decision in *Canadian Breweries Ltd.* added a protective layer to provincially sanctioned restraints on trade by establishing the presumption that such legislation is made in the public interest. Third, *Canadian Breweries* also recognized that the RCD applies to regulatees (commercial businesses) as well as regulators (marketing boards). Finally, the history of the RCD before 1989 points to the constitutional uncertainty that results when courts use it to avoid the jurisdictional problem. Absent statutory interpretation, judges have not clarified how the conflict between competition legislation and provincial regulation will be resolved. The decision in *Canadian Breweries* has especially been susceptible to criticism on the basis that the court in that case appeared to strengthen the jurisdiction of the provinces over the federal government by reference to the statutory language even though a conspiracy case was not before it. Wilson and Wydrzynsky argue that such a method of interpretation was overreaching, commenting on the impact of *Canadian Breweries* in later Supreme Court jurisprudence:

⁴⁸ *Canadian Breweries*, *supra* note 44 at 629-630.

⁴⁹ Bolton & Salzman, *supra* note 4 at 4.

⁵⁰ *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R 188 [*Rothmans*].

It must be emphasized that the interpretation of section 32 was not before the Court in *Canadian Breweries*, the section being used merely as a reference point. For the Supreme Court to employ this case as authority for its finding that public detriment is an element of section 32 is a novel and unsupported application of *stare decisis*. Beyond the case law under section 32, the legislative history of the section clearly reveals that public detriment was not intended by Parliament to be an element of the offence of conspiracy.⁵¹

Wilson and Wydrzynsky's critique of *Canadian Breweries* resonates given that the Supreme Court continues to rely on this principle even in the absence of authority outside the jurisprudence on the RCD. Indeed, as discussed in section 3.7 *infra*, the Supreme Court decision in *Howard Smith Paper Mills v. The Queen* clearly militated against an approach based on 'public interest' or 'public detriment'.⁵²

[2.6] Historical Summary

The importance of the RCD's history is that it sheds light on the constitutional problems facing competition policy that have largely been ignored until the challenge to s. 31.1 in *General Motors v. City National Leasing*.⁵³ In that case Chief Justice Dickson clarified the portions of the Act that were justified under trade and commerce, but did little to resolve conflicts that arise in the application of the RCD such as direct operational conflicts as opposed to necessarily incidental incursions into provincial jurisdiction. If there is a challenge to provincial legislation on the grounds that it infringes sections of the Act the courts may have to take another look at the interaction between trade and commerce and civil rights and property. This could become more of an issue in light of the new amendments to s. 45 of the Act that lack the dampening language of 'unduly'.⁵⁴

⁵¹ Wilson & Wydrzynsky, *supra* note 6.

⁵² *Howard Smith Paper Mills Ltd. et al v. The Queen*, [1957] S.C.R. 403 [*Howard Smith*].

⁵³ *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641 [*City National*].

⁵⁴ *Competition Act*, *supra* note 20, s. 45(1).

[3] The Modern Landscape

[3.1] Specific versus General Authorization

The modern approach to the RCD was articulated by Grange J.A. in *R. v. Independent Order of Foresters*:⁵⁵

The doctrine simply means that a person obeying a valid provincial statute may, in certain circumstances, be exempted from the provisions of a valid federal statute. But there can be no exemption unless there is a direction or at least an authorization to perform the prohibited act.

Mr. Justice Grange's summary is important because it illuminates an aspect of the RCD that has gained controversy in recent years. This is the question of the degree of statutory authorization required in order for the doctrine to apply. The answer depends partly on how one interprets the seminal ruling in *Jabour v. Law Society of British Columbia*.⁵⁶ *Jabour* was a case that involved a lawyer disciplined by the Law Society of British Columbia for "conduct unbecoming" a solicitor. He was accused of advertising his practice in a manner contrary to the regulations of the Law Society.⁵⁷ The court in *Jabour* facilitated the application of the RCD in situations where conduct was generally rather than specifically authorized by a provincial statute granting discretion to a regulator or professional organization. It is important to note that in *Jabour* the Benchers had no authorization to regulate advertising beyond a general mandate to control many aspects of the legal profession. Section 1 of the *Legal Professions Act* defined "conduct unbecoming a member of the society" as:

Any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession.⁵⁸

⁵⁵ 32 O.A.C. 278 at para. 8.

⁵⁶ *Jabour*, *supra* note 8.

⁵⁷ *Ibid.*

⁵⁸ *Legal Professions Act*, R.S.B.C. 1960, c. 214, s. 1.

This indicates that the court's decision in *Jabour* was highly deferential to the B.C. Law Society's regulatory power in regards to conduct that it deemed to be contrary to either the public interest or the legal profession.

[3.2] Leeway Language

More recently, in *Garland v. Consumers' Gas Co.*⁵⁹, a case involving a conflict between Criminal Code provisions and rate orders made by the Ontario Energy Board, the Supreme Court held that in order for the RCD to apply the federal law must contain "leeway language" that would permit the court to override the general principle that Parliament is "not presumed to depart from the general system of law without expressing its intention to do so with irresistible clearness."⁶⁰ The importance of *Garland* is that it re-affirms the view that the RCD is essentially a doctrine of statutory interpretation, gaining its force from facilitative language in a federal statute. Indeed the Bureau recognized the impact of *Garland* on the RCD in its 2006 Bulletin where it adopted a 'cautious approach' to the doctrine.⁶¹ The Bulletin recognized that the specific wording in the Act is essential for determining Parliament's intent to make the defence available.

[3.3] Reviewable Conduct and the RCD

Another important aspect of modern case law on the RCD is its application to reviewable matters under Part VIII of the Act. As discussed in section 2.2 the early cases on the RCD were based on criminal provisions in the *CIA*, and, prior to that on s. 498 of the Criminal Code.⁶² Hence, post *Jabour* it was uncertain whether the defence could apply to conduct which did not fall under the Competition Bureau's criminal jurisdiction. This uncertainty has eroded to a certain extent with the decision of the B.C. Court of Appeal in *Industrial Milk Producers' Association v. British Columbia (Milk Board)*

⁵⁹ [2004] 1 S.C.R. 629 [*Garland*].

⁶⁰ *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 at 614 [*Goodyear Tire*].

⁶¹ Competition Bureau Canada, "Technical Bulletin on 'Regulated' Conduct" (June 29, 2006), online: <<http://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/eng/02141.html>> [Technical Bulletin 2006].

⁶² Constitutional Aspects of Anti-Combines Law, *supra* note 22 at 246.

(“*Industrial Milk*”).⁶³ In that case, Mr. Justice Reed held that the RCD could apply to s. 31.1 of the Act which allowed for a civil cause of action. This position gained further support in *Law Society of Upper Canada v. Canada (Attorney General)* (“*LSUC*”)⁶⁴ where the court ruled that s. 61 of the *Law Society Act* which provided for a mandatory insurance scheme did not contravene the provisions of the Act prohibiting tied selling, exclusive dealing, and abuse of dominance.⁶⁵ It should be cautioned, however, that neither *Industrial Milk* nor *LSUC* contained a comprehensive discussion of the RCD and its relation to the civil provisions of the Act. In *Industrial Milk* there was simply reliance on a civil cause of action rather than a civil offence such as abuse of dominance. In *LSUC* the court merely followed the submissions of counsel who agreed that the RCD was applicable to civil provisions.⁶⁶ Consequently there has been no comprehensive discussion on the applicability of the RCD to civil reviewable matters or what the legal basis for such applicability would be.⁶⁷ Nevertheless the two cases are supportive of the view that the RCD can at least in theory apply to civil reviewable matters.

[3.4] The RCD and Federal Legislation

Since the RCD emerged as a product of conflicts between federal and provincial law there is some uncertainty over how it might apply with respect to a federal regulatory regime and competition law. The modern jurisprudence on the doctrine sheds some light on this problem, and it appears that courts are willing to take the statutory interpretation route when deciding whether Parliament intended to displace the Act with another comprehensive federal regulatory scheme.⁶⁸ Absent any guidance in the legislation, the case of *British Columbia Telephone Co. v. Shaw Cable System (B.C.) Ltd.* provides some judicial direction on the test for resolving concurrencies of jurisdiction.⁶⁹ *Shaw Cable* dealt with contradictory orders by the CRTC and a federal Labour Arbitrator in regards to a collective

⁶³ (1988), 47 D.L.R. (4th) 710 [*Industrial Milk*].

⁶⁴ [1996] O.J. No. 995 [*LSUC*].

⁶⁵ *Competition Act*, *supra* note 20, ss.77, 78, and 79.

⁶⁶ *LSUC*, *supra* note 65 at para. 27.

⁶⁷ Technical Bulletin 2006, *supra* note 60.

⁶⁸ See: *Society of Composers, Authors, and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.*, [1992] F.C.J. No. 1034; *R. v. Charles*, [1999] S.J. No. 763.

⁶⁹ 125 D.L.R. (4th) 443. [*Shaw Cable*].

bargaining unit. The Supreme Court in that case developed a test for deciding which legislation prevails when there is an “operational conflict.”⁷⁰ The Court set out a three step test for resolving such conflict: (1) First, an inquiry must be made into the legislative purposes behind the two administrative regimes; (2) Second, the decisions of the tribunals should be assessed to see if they are central to the purpose(s) behind their respective acts; (3) Third, the degree to which each tribunal fulfills a policy making role is an important factor determining which legislation should take precedence.

[3.5] Federal Paramourncy and the RCD

The modern case law on the RCD continues to exhibit the same problems of constitutional uncertainty that plagued the doctrine in its early days. In particular, the RCD is inconsistent with the doctrine of federal paramourncy articulated by the Supreme Court in *Multiple Access v. McCutcheon*.⁷¹ Paramourncy dictates that where a provincial law conflicts with a federal law to the extent that there is an impossibility of dual compliance the federal law will displace the provincial law to the extent of that conflict.⁷² This principle has recently been extended to situations where provincial law, by its effects, displaces or frustrates the purpose of federal legislation, in which case paramourncy also operates.⁷³ The trend in the last 30 years at the Supreme Court, from *Multiple Access* to *Rothmans, Benson & Hedges v. Saskatchewan*, appears to be in the direction of federal primacy over provincial legislation in situations of conflict.⁷⁴ This is particularly the case where there appears to be an exclusive domain of federal competence such as the *Competition Act*.⁷⁵ The RCD works opposite to the paramourncy doctrine by giving precedence to the provincial legislation (or more technically dispelling conflict through statutory interpretation). It can thus be seen that the RCD

⁷⁰ *Ibid.* at paras. 56-58.

⁷¹ [1982] 2 S.C.R. 161 [*Multiple Access*].

⁷² *British Columbia (Attorney General) v. LaFarge Canada Inc.*, [2007] S.C.J. No. 23.

⁷³ *Rothmans*, *supra* note 48.

⁷⁴ *Multiple Access*, *supra* note 69; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *City National*, *supra* note 52.

⁷⁵ Technical Bulletin 2006, *supra* note 60.

still suffers from uncertain legal foundations due to its incompatibility with the well established doctrine of federal paramountcy.

[3.6] Public Detriment and the Criminal Law

The RCD's incompatibility with paramountcy raises questions as to why courts continue applying an interpretive approach that is at odds with the constitutional jurisprudence. One possibility is that statutory interpretation offers a more expedient resolution to the problem of conflicting legislation. By using an interpretation of the statute that avoids conflict the courts are able to reach a seemingly harmonious solution that provides appropriate deference to provincial protectionist interests. The question from a competition policy perspective is whether this harmony is real or illusory in terms of its effects on the operations of competition law, particularly in regards to its purposes. It has frequently been stated that the purpose of competition legislation is to protect the public interest in competition and that prevention of competition is *prima facie* unlawful since it operates *ipso facto* to the detriment of the public.⁷⁶ The court in *Chung Chuck*, however, concluded that provincial regulatory activity did not represent a restraint on trade notwithstanding that it had the effect of limiting competition. The exact words used by MacDonald J.A. in *Chung Chuck* are confusing when viewed in light of the purposes of competition policy:⁷⁷

There is no intent to restrict or injure trade in relation to farm produce. The purpose of the Act is to better conditions in an important industry. *The object of traders in every line of industry is to secure as large a share of that trade as possible at remunerative rates. That is not unlawful* [emphasis added].

These comments illustrate that as early as 1929 courts were willing to form an interpretive sphere of protection around regulated sectors such as agriculture. It is no doubt true that the object of traders in every industry is to secure as large a share of trade as possible. This however, is exactly the reason why combines formed in the first place and a legislative backlash was exacted against them. Why

⁷⁶ Weidman, *supra* note 30.

⁷⁷ *Chung Chuck*, *supra* note 24 at para. 9.

should such conduct be shielded simply because it falls under the umbrella of provincial legislation? A deep operational conflict in an area of economic policy that is of national importance demands greater constitutional clarity and legislative certainty than a solution grounded in a vague interpretation of a word like “unduly”. Moreover, there is a large body of case law which suggests that considering public detriment as the courts have done since *Canadian Breweries* is inappropriate given the plenary scope of the criminal law jurisdiction.⁷⁸ Wilson and Wydrzynsky discussed the jurisprudence on this point, referring to the key Supreme Court decisions on criminal law powers:⁷⁹

If *Morgentaler* and the *Margarine Reference* are considered together, the rule which evolves is as follows: if the challenged section meets the test of the *Margarine Reference* in that there is an evil or undesirable effect upon the public, then, applying *Morgentaler*, the Courts must take the proscription of Parliament as given. There is no room for the Courts to alter the content of otherwise valid criminal law, nor is there jurisdiction to add elements to specific offences. This, however, is precisely what the Supreme Court has done in *Jabour*, adding an element of public detriment to the conspiracy provision.

Wilson and Wydrzynsky point towards a central problems with the RCD. The courts have used it as a device for importing extra-legal considerations into the definition of an offence that Parliament has deemed to be criminal. In this way they have encroached upon the federal government’s exclusive right to proscribe criminal conduct. If Parliament had decided in the early 1920s that provincial regulatory bodies were to be exempt from the application of the *CIA* they would have stated so explicitly in the wording of the conspiracy provisions. Absent such specific direction, the development of the RCD conflicts with the longstanding approach to interpreting criminal legislation. Wilson and Wydrzynsky provide an informative analogy in this respect:

The Court [in *Jabour*] reasoned that *since* Part V of the Combines Investigation Act was criminal *then* there was an implied element of public detriment. On this basis, an argument is open in respect of any criminal offence in which public benefit can be demonstrated, that an acquittal must be entered. This argument, valid as it may seem, given the decision in *Jabour*, leads to absurdity. For example, if an accused charged with trafficking in cocaine were able to demonstrate that the drug actually benefited the public’s health, would he then be entitled to an acquittal? This question need not be answered in detail. If the

⁷⁸ See: *Ref Re Dairy Industry Act (Canada) s. 5(a)*, [1949] S.C.R. 1.

⁷⁹ Wilson & Wydrzynsky, *supra* note 6 at 107.

elements of the offence as written in the statute are met, then the Courts must convict. [emphasis in original].⁸⁰

In short, Canadian jurisprudence has clearly established that ‘public detriment’ is not an element of a criminal offence. If such considerations are to find their way into judicial decision making there needs to be express statutory direction to that effect. Alternatively the offence should be redefined as civil which would indicate Parliament’s intention to grant judge’s greater latitude for interpretation with respect to conduct that has not been criminalized.

[3.7] ‘Undue’ Distinctions in Statutory Interpretation

If courts continue raising the specter of public detriment a separate but related issue emerges in terms of the inconsistent application of such a doctrine. This involves the problem of distinguishing between anti-competitive conduct that is legislated and purportedly ‘benefits’ the public and conduct that does not fall under a legislative regime but might nevertheless be shown to be beneficial. If the courts are willing to accept that regulators or regulatees are acting in the public interest why should they preclude similar arguments from private citizens who can present evidence that their actions were taken in the public interest?⁸¹ From a legal standpoint it is clear that when prosecuting criminal offences we do not inquire into the accused’s perceived morality of their actions. Only affirmative defences are available in law. But if this is the case how can courts rely on a standard as ambiguous as the “public interest” and “public detriment” for defining a substantive defence to a conspiracy charge? Such a question should, where possible, be excluded from judicial discretion because it is an inherently political issue that involves balancing a multiplicity of interests.⁸² This is especially true in the context of competition law where convictions carry substantial terms of imprisonment, hefty fines and associated stigma. Turning ‘public interest’ into a question of statutory interpretation allows courts to determine by fiat conduct that is in the public interest without first addressing the

⁸⁰ *Ibid* at 108.

⁸¹ See: *Howard Smith*, *supra* note 50.

⁸² For a discussion on polycentrism in the context of judicial review see: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982 at para 36.

constitutional question of jurisdiction in order to clarify or at least delimit the definition of ‘public interest’. In other words, the interpretive solution to conflicting legislation leaves serious gaps in our understanding of the scope of criminal legislation. If particular conduct is defined as criminal yet state actors and those sanctioned by the state are able to evade prosecution the law does not apply equally to its subjects and the rule of law is thrown into question.

The possibility of an inequitable application of the statutory interpretation approach was illustrated in *R. v. Howard Smith Paper Mills et al.* (“*Howard Smith*”) which involved an agreement by several manufacturers and wholesalers to fix the price of ‘fine papers’.⁸³ The defendants argued that their agreement did not unduly lessen competition because it helped to stabilize the paper mill industry during the Great Depression by allowing each firm to maintain some market share and continue operating at least part time. The court neglected to hear the defence that the price fixing agreement was in the public interest and ruled that any such evidence would be irrelevant. Taschereau J. upheld this ruling by appealing to principles developed in *Weidman v. Shragge* discussed in section 2.2 :⁸⁴

The public is entitled to the benefit of free competition, and the prohibitions of the Act cannot be evaded by good motives. Whether they be innocent and even commendable, they cannot alter the true character of the combine which the law forbids, and the wish to accomplish desirable purposes constitutes no defense and will not condone the undue restraint, which is the elimination of free domestic markets.

There is a marked contrast between the court’s interpretation and application of ‘unduly’ in *Howard Smith* and *Canadian Breweries*. In the latter, there were several private brewers merging that had portions of their business regulated by the Liquor Control Board. In *Howard Smith* there was no such regulatory framework. From the perspective of “public interest” the discrepancy between the two decisions is questionable. Why allow for one set of companies to benefit from the RCD simply because a portion of their activities were regulated by a provincial Board while denying the same benefit to companies that had combined out of necessity in difficult economic times?

⁸³ *Howard Smith*, *supra* note 50.

⁸⁴ *Ibid.* per Taschereau J.

[3.8] Policy & Legal Perspectives

From a policy standpoint, resorting to leeway language as a way of providing exclusive protection for certain industries represents a departure from the spirit of competition legislation as a framework law and raises legal concerns about the inequitable application of a criminal law. Leaving aside the equity concerns there are compelling economic reasons why such an interpretation is unwarranted. As described in the Peltzman model in section 1.2, politicians appear to have the incentive to regulate both monopolistic industries and highly competitive ones. This theoretical prediction is supported by casual observation which reveals that many potentially competitive industries frequently benefit from regulation (including trades as diverse as taxiing, peanut farming and advertising).⁸⁵ Agriculture in Canada has been the target of criticism due its archaic and inflexible quota system supported constitutionally by the decisions of the Supreme Court on marketing schemes in the 1970s.⁸⁶ This layer of provincial and federal regulation obviously conflicts with the aims of competition law and recent reviews have found that it may be damaging not only to the public in general but to the long term prospects of the industry.⁸⁷ William Robson and Colin Busby of the C.D. Howe Institute have documented the effects of the cartelization of Canada's agricultural sector:⁸⁸

Government control of entry has blunted competition, hampered innovation, and slowed entrepreneurship. Premium prices for production quotas make entry costs punishingly high for new farmers. Supply management may be doing more harm than good to a new generation of farmers, casting doubt on the system's sustainability....From a fairness point of view, supply management privileges a few insiders by imposing costs on a larger number of consumers who are deprived of a wider selection of products and price competition.

⁸⁵ *Economics of Regulation*, *supra* note 18 at 318-324.

⁸⁶ The so called "chicken and egg war" was an important chapter in the consolidation of provincial as well as federal control over agricultural marketing. See: *Attorney General of Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 680; *Reference re: Agricultural Products Marketing Act, 1970*, [1978] S.C.J. No. 58.

⁸⁷ C.D. Howe Institute, *Freeing up Food: The Ongoing Cost, and Potential Reform, of Supply Management* by William B.P. Robson and Colin Busby (Toronto, Ontario: Canadian Publication Mail Sales 2010).

⁸⁸ *Ibid.* at 1.

The economic concerns with regulatory agencies such as marketing boards are aggravated by the legal difficulties of maintaining such complex administrative regimes. In this respect the interpretive approach of the RCD results in a poorly defined scope of powers for regulators and uncertain limits on the activities of regulatees. This is evident in *Jabour* where the Supreme Court gave wide licence to the B.C. Law Society to determine conduct that it considered to be contrary to the ‘public interest’.

The expansion of the RCD to broadly styled regulatory legislation raises questions about the limits of the interpretive approach as well as its future application in light of the new amendments to the Act that came into force in March, 2010.⁸⁹ What limitations are there to conduct that restrains trade but has some connection, however tenuous, to a regulatory regime? The case of *Waterloo Law Association* (“*Waterloo Law*”) points to the uncertainty hovering over this question.⁹⁰ In *Waterloo Law* a group of lawyers formed a county law association that established a fixed fee schedule for its members. Search warrants were issued pursuant to the Act as part of an investigation into unfair trade practices. The lawyers relied on the RCD and argued that s. 32(1) of the *Competition Act* was inapplicable to them because they were a ‘regulated industry’ operating under the Law Society. Mr. Justice Eberle held that the Law Association was not immune from prosecution simply by virtue of the fact that lawyers are regulated professionals:⁹¹

The fact that governance of the legal profession and of its members is within the provincial legislative domain, under property and civil rights, does not remove lawyers from the reach of a valid criminal law. For example, a lawyer is subject to criminal prosecution if he commits murder or theft, or any other crime. This remains the case even where, as here, the province has delegated governing powers over the legal profession to a provincial law society.

These comments suggest a stricter interpretation of the RCD, and support the view that the doctrine does not apply simply because members of a professional organization have their activities regulated in other respects. The prosecution in *Waterloo Law* was abandoned however, and so no proposition

⁸⁹ Bill C-10, *supra* note 7.

⁹⁰ *Waterloo Law Association et al. v. Attorney General of Canada* 58 O.R. (2d) 275 [*Waterloo Law*].

⁹¹ *Ibid* at para. 20.

came out of the case on exactly how the interpretive approach delineates between regulatee conduct that unduly restrains trade and that which does not.

[3.9] Summary of the Modern Jurisprudence

To summarize, the modern approach to the RCD has been characterized by three main developments. First, the landmark decision in *Jabour* expanded the doctrine to include generally authorized conduct. Second, the courts seem to have accepted the application of the RCD to civil reviewable conduct albeit without providing much direction on the legal basis for the application. Third, there are a number of cases which support the application of the RCD to federal in addition to provincial regulatory regimes. Finally the jurisprudence on the paramountcy doctrine as well as the recent decision in *Garland* seem to support the primacy of federal legislation and the view that Parliament “is not presumed to depart from the general system of law without expressing its intention to do so with irresistible clearness”⁹² Many of these developments have interfered with the economic objectives of competition policy and have judicialized highly political issues embedded in the public choice tradeoffs described by the Peltzman model. These problems, along with other important jurisprudential questions will be discussed in the next section.

[4] Essential Questions

[4.1] RCD: The Essential Features

The application of the RCD both in terms of the law and competition policy leaves many unanswered questions. Although the Bureau itself views the case law on the RCD as underdeveloped⁹³ there is some degree of consensus on its essential features. First, it is clear from a constitutional perspective that the provincial (or federal) regulatory statute must be *intra vires* as a standalone piece of

⁹² *Goodyear Tire*, *supra* note 59.

⁹³ Technical Bulletin 2006, *supra* note 60.

legislation. As discussed, the RCD rests on indeterminate constitutional foundations, being directly opposed to recognized doctrines of federalism such as paramountcy. There is however, at least in theory, a prerequisite to its application, namely that the legislation has a semblance of being *intra vires* and does not encroach overtly upon the federal government's exclusive jurisdiction over inter-provincial trade.⁹⁴ Second, the party relying on the RCD must be engaging in conduct that is within the scope of the regulatory legislation, although its activities need not be specifically authorized. This requirement exists in order to prevent individuals or organizations whose conduct falls under a regulatory regime in certain respects to rely on this fact alone as immunity from prosecution.⁹⁵ Third, the regulatory power must not only be authorized but actually exercised.⁹⁶ This is an important and often overlooked point in the RCD jurisprudence. The requirement that regulatory power is 'exercised' simply means that where a regulatory agency has forborne from exercising its powers over regulatees there is some authority to suggest that the RCD cannot be relied upon.⁹⁷ Finally, the conduct must not serve to frustrate the purposes of the regulatory legislation which is corollary to the principle that the trade restraints must be authorized.⁹⁸

[4.2] The Key Questions

Based on the aforementioned features, the following questions are geared towards some of the more interesting and contentious areas of the RCD jurisprudence:

- (1) How do we reconcile the aims of competition policy, particularly the maintenance of free competition and economic efficiency, with provincial regulation that tends to oppose these objectives?

⁹⁴ See generally: *Manitoba (Attorney General) v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689.

⁹⁵ *Waterloo Law*, *supra* note 87.

⁹⁶ *Canadian Breweries*, *supra* note 44 at para. 120.

⁹⁷ See *R. v. Canadian Breweries*, *supra* note 44 at para. 120 where McRuer C.J.H.C. ruled that "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 has been exercised in the public interest (*italics added*).

⁹⁸ *R. v. Charterways Transportation Ltd. et al*, [1981] 32 O.R. (2d) 719.

(2) What extent of regulation is required to trigger the application of the RCD? Does the principle of general authorization found in *Jabour* apply only to the criminal prohibitions in the Act or does it also extend to the civil provisions? Is there a link between the level of statutory authorization and the application of the RCD as a defence to conduct prohibited by the Act?

(3) Given the requirement in *Canadian Breweries* that the regulatory power must be exercised, what is the status of the RCD in relation to conduct which a regulator has forborne from regulating? In other words, does the Bureau have the jurisdiction to investigate and prosecute activity that a regulator has the power to regulate but has omitted from regulation?

(4) Are courts being more deferential to the regulatory decisions of professional organizations, particularly self-regulated professions such as law societies?

(5) What is the status of the new *per se* offences in the *Competition Act* in relation to the RCD? Is it possible to reconcile the decision in *Garland* which reaffirmed the interpretive approach to the RCD with the absence of leeway language in the new s. 45(1) of the Act? Does s. 45(7), which supports a continuation of the doctrine, provide enough direction for judges to continue applying the RCD as before?

(6) Finally, and perhaps most importantly, is there a resolution to the constitutional uncertainties in the RCD by statutorily integrating the defence?

A discussion of these problems and proposed solutions is contained in the following sections.

[4.3] Reconciling Divergent Policies

Competition policy is said to be “concerned with making the best use of competition as a means of allocating resources efficiently in the economy.”⁹⁹ As a doctrine that supports certain monopolistic practices, the RCD frustrates this goal of allocative efficiency and contributes towards a more protectionist vision of federalism. Although laws of general application such as the *Competition Act* are necessary for achieving national economic objectives it is important to keep in mind that competition policy does not operate in a vacuum. The demands of a mixed market system necessitate some government intervention for the protection of industries from harsh or highly inequitable

⁹⁹ William T. Stanbury “Competition Policy in Canada: Evolution, Effectiveness, and the Changing Context of Competition” (October 1997) Policy Options.

conditions. Former Bureau Commissioner Sheridan Scott discussed this in a speech to the C.D. Howe Institute:¹⁰⁰

Effective competition itself can only take place in a healthy society, and healthy societies are not anarchies, but are built on social laws and regulations that develop and support our all too human aspirations. And even our markets depend on certain economic regulations – think of the importance of contract and intellectual property laws.

Ms. Scott’s comments speak to the realities of the Canadian economic landscape. Aside from the common law which ‘regulates’ activities like contract formation and tort liability, an abundance of industries including public utilities and telecommunications have long operated as government supported natural monopolies. Economies of scale typically dominate in these industries and consequently regulated monopolies are usually a more favourable (and arguably a more efficient) solution than price competition. This indicates that the substantive aims of competition policy can never realistically be segregated from the political and economic landscape in which they operate. Regulation will frequently encumber if not outright oppose the basic economic philosophy of price competition. The question is whether it is possible for regulation to act as a *complement* rather than a *contradiction* to competition policy in order for a desirable equilibrium to be struck between free markets and regulatory controls.

The courts in Canada have been of little assistance in helping to achieve this balance. As Gorecki and Stanbury argue, the Supreme Court has lost sight of the key objective of maintaining free competition:¹⁰¹

As the *Aetna Insurance* (1977), *Atlantic Sugar* (1980), and *Jabour* (1982) decisions of the Supreme Court of Canada indicate, the majority of Canada’s court of last resort appears to have lost sight of the substantive meaning of the public’s interest in curbing restraints of trade. The majority has totally ignored the rhetoric of free competition, although the few dissenters have maintained the

¹⁰⁰ S. Scott Commissioner of Competition “Regulation and Competition: Moving to a More Productive Future” (C.D. Howe Institute Policy Conference Competition Policy in Regulated Industries: Principles and Exceptions.) (November 6, 2006) [Regulation and Competition].

¹⁰¹ *Objectives of Canadian Competition Policy*, *supra* note 5 at 72.

tradition. The majority might well re-read the analysis of Mr. Justice Idington in *Weidman v. Shragge*, written some seventy years ago.

The case of *Weidman*, as one of the earliest statements of competition policy, suggested that courts should accept the promotion of free competition as an important purpose underlying combines legislation. Instead however, many judges have adopted a much more regulation friendly approach, refusing as Mr. Justice O’Sullivan did, to interpret the legislation through a free market lens:¹⁰²

With respect to those who hold the contrary view, I think that the *Combines Investigation Act*, even considered as a whole, is not designed to protect a system of free competition, but rather to restrict “undue” interference with competition.

In regards to the interpretation of ‘undue’ and whether the common law would protect free competition, Justice O’Sullivan had the following to say:¹⁰³

Capitalism and the free market have, however, never been enshrined in the common law. From the earliest times down to the present day of wage, price, and rent controls, the law has shown a determination to prevent capitalism and free competition from injuring the public good as conceived by Parliaments and Legislatures.

These comments illustrate how political inclinations have shaped the interpretation of the Act and have done little to address the related problems of competition law and federalism. Whether the common law protects free competition or not is a political question and one that cannot be answered with much clarity by judges. Accordingly, statutory reform could greatly assist courts, regulators, and market participants by providing a more precise benchmark on the purposes of the Act and its relationship to provincial regulation. The current purpose clause provides a mixed message that has been criticized for advocating irreconcilable objectives and little direction on the political nature of the problems being addressed:¹⁰⁴ A solution would be to draft a narrower purpose clause that can

¹⁰² (1976) 25 C.P.R. cited in *Objectives in Canadian Competition Policy supra* note 5 at 68.

¹⁰³ *Ibid.* at 69.

¹⁰⁴ Section 1.1 of the Act contains the following purpose clause: “The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to

better articulate the three most basic objectives of competition policy as defined in the literature.¹⁰⁵

This would represent one way of better synthesizing competition with regulation so that the Bureau's "new approach" discussed by former Commissioner Scott could be legislatively supported.¹⁰⁶

[4.4] The Extent of Regulation

A purpose clause that grapples with the problems of federalism would represent an important step forward in clarifying the application of the RCD. A much narrower problem, however, is the specific versus general authorization debate that emerged in the wake of the *Jabour* decision.¹⁰⁷ If we take the basic principle from that case—that general authorization in the form of discretion to regulate is sufficient to trigger the RCD—the main issue for competition policy is whether this is limited to a potential conflict between the criminal provisions of the Act and provincial legislation or if the doctrine can also apply to a prosecution made pursuant to any section of the Act including civil reviewable conduct. In this paper's submission the case law supports the latter view. The Bureau's position is that there has been no definitive ruling on the issue and therefore it refuses to recognize the general application of the RCD to civil matters.¹⁰⁸ Based on the decision in *Jabour* and its interpretation in cases such as *LSUC*, however, there appears to be sufficient authority for the view that the doctrine could indeed apply more generally to other sections of the Act. In *Jabour*, s. 1 of the *Legal Professions Act* allowed the Benchers to determine what constitutes "conduct unbecoming a member of the society".¹⁰⁹ The Supreme Court held that because the legislature had styled the power of the Benchers in such broad terms it was within their power to limit the advertising of members in the public interest. This is a very broad proposition and one that can easily be extended to reviewable

ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choice" *Competition Act*, supra note 20, s. 1.1

¹⁰⁵ *Objectives in Canadian Competition Policy*, supra note 5.

¹⁰⁶ Regulation and Competition, supra note 97.

¹⁰⁷ See generally: Mark Katz & Charles Tingley "The Regulated Conduct Defence in Canada" (2006) 11 *Competition Law* 730.

¹⁰⁸ Technical Bulletin 2006, supra note 60 at 5.

¹⁰⁹ *Jabour*, supra note 8 at 316.

matters. Part VIII of the Act reveals little substantive differences between the civil reviewable conduct and the criminal provisions aside from penalties.¹¹⁰ The Competition Bureau's position is that the RCD has traditionally been applied to shield provincial legislation from being labeled as criminal. To cite this as a reason for not applying the doctrine to civil provisions, however, represents a much narrower view of the doctrine than that supported by the jurisprudence. Historically competition legislation was grounded in the federal government's criminal law power. Gradually, as economic liberalization expanded the scope of competition law, many of the criminal provisions became quasi-criminal and or were replaced with civil provisions. Consequently, in *GM v. City National Leasing* Dickson C.J. upheld the civil cause of action in the *CIA* under the federal trade and commerce power.¹¹¹ In deciding that the RCD does not apply to the civil provisions, the Bureau appears to have concluded that when the criminal 'stigma' is not present federal paramountcy should apply and the civil provisions of the Act take precedence over any provincial regulations that contravene them or frustrate their purpose.¹¹² The question since *Jabour* is: why make the distinction? If courts are willing to permit law societies to restrict market activity in the public interest it appears unlikely that they will take a more restrictive approach simply on the grounds that some provisions do not attract a criminal stigma. Indeed, a key principle emerging out of the 1957 Farm Products reference is the principle that *any* scheme otherwise within the authority of the legislature is not against the public interest when the legislature is seized of the power and obligation to take care of that interest.¹¹³ This implies that the criminal/civil distinctions are not really that consequential to the application of the RCD unless it can be shown that there is a critical nexus between the "public interest" and criminality. The discussion in section 3.6 emphasized that outside of the RCD jurisprudence the Supreme Court has firmly opposed any such nexus and has frequently held that the only element of public interest in a defence is that specifically articulated by the legislature.¹¹⁴ Accordingly, it should make no difference whether the conduct is civil or criminal because the 'public

¹¹⁰ *Competition Act*, *supra* note 20.

¹¹¹ *City National*, *supra* note 52.

¹¹² Technical Bulletin 2006, *supra* note 60.

¹¹³ *Farm Products Marketing Act*, *supra* note 42.

¹¹⁴ See *R. v. Morgentaler*, [1988] 1 S.C.R. 30 especially paras 48, 61, and 62.

interest' has not been firmly entrenched in criminal law generally nor is it necessarily linked to criminal conduct under the Act outside of the RCD jurisprudence.

[4.5] Forbearance

An issue that is related to the scope of a regulator's statutory authorization is whether the Bureau has jurisdiction to investigate in situations where conduct falls under a regulatory regime but the regulator has forbore from exercising its powers. Some studies have dealt with this issue, particularly in regards to the CRTC and its forbearance from regulation in the telecommunications industry.¹¹⁵

Various provincial regulatory bodies have statutorily mandated forbearance provisions. For example, s. 29(1) of the *Ontario Energy Board Act, 1998* allows the Board to refrain from regulation if it finds that substantial competition already exists:¹¹⁶

On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

Provisions of this kind may allow regulatees to claim immunity through the RCD on the grounds that the Bureau has no jurisdiction to embark on an investigation or prosecution (overlapping jurisdiction argument) or simply because their conduct is tacitly consented to by the regulators on the basis that it chose not to intervene (implicit consent argument). The rule applicable to forbearance was stated as obiter dicta by Mr. Justice Davies in the case of *R. v. British Columbia Fruit Growers Association*.¹¹⁷ That case dealt with the trial of an accused charged with unduly limiting the facilities for storing tree fruit. The tree fruit industry in B.C was regulated and sold its produce centrally, however independent growers were permitted to operate outside the scheme. In 1976 the accused entered into an agreement that had the effect of preventing independents from using storage facilities for their fruit. They were

¹¹⁵ Don Mercer "The Regulated Conduct Defence and the Telecommunications Industry" (1995), online: <<http://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/eng/00986.html>>.

¹¹⁶ *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B., s. 29(1).

¹¹⁷ 11 C.P.R. (3d) 183.

charged with contravening s. 32(1) (a) of the *CIA*. One of the defences relied upon was that there was authorization for this agreement under the regulations of the *Natural Products Marketing Act* which allowed the Board to control the operation of packing houses.¹¹⁸ Mr. Justice Davies rejected this argument on the grounds that the act authorized the Board to control these operations but it did not do so.¹¹⁹ This decision followed *Canadian Breweries* in that it required the regulator to exercise their power in order for the RCD to apply. *B.C. Fruit Growers* turned on an interpretation of “unduly” and so no further guidance was given on the Bureau’s jurisdiction to commence an inquiry. Mr. Justice Davies’ rejection of the defendant’s claim that they were regulated, however, represents an implicit acceptance of the Crown’s ability to commence a prosecution where regulatory power exists but has not been exercised. In conjunction with *Canadian Breweries* this provides some authority for rejecting the implicit consent argument.

The overlapping jurisdiction argument presents a different problem. It amounts to a claim that the Bureau should be precluded from making incursions upon the jurisdiction of provincial or federal regulatory bodies. Any such incursion would be *ultra vires* the powers of the Bureau. One possible solution to this problem is the application of *Shaw Cable* discussed in section 3.4. Although that case dealt with conflicting decisions made by a Labour Arbitrator and the CRTC, the test developed by the Court is instructive on which administrative regime takes precedence in situations of jurisdictional overlap. The three factors discussed by L’Heureux Dubé J. point to some of the main issues that courts are likely to consider when deciding on the issue of forbearance and overlapping jurisdiction. In determining whether forbearance by a regulatory agency allows the Bureau to conduct an investigation the courts should consider (i) the jurisdiction issue (separation of powers); (ii) the purposes behind the Act and the regulatory legislation; (iii) the degree to which the Bureau is fulfilling its policy mandate when embarking on an investigation or prosecution of a regulatee and whether the regulatory agency has established, through its forbearance, objectives compatible with

¹¹⁸ *Ibid.* at para. 9.

¹¹⁹ *Ibid.* at para. 41.

competition policy. In short, the test in *Shaw Cable* provides guidance for the problem of forbearance and the Bureau's jurisdiction. If the Bureau can establish that the powers of a regulator are not being exercised and that its incursion into the regulator's jurisdiction is in support of one of its policy objectives it may legitimately investigate and prosecute in areas that would otherwise be protected by the RCD.

[4.6] The RCD and the Professions

In 1976, the *CIA* was amended to include application of its provisions to professional organizations.¹²⁰ Professions in Canada make up approximately 20% of the service economy and 7% of total hours worked in the business sector.¹²¹ The main professions both regulated and self-regulated include doctors, lawyers, dentists, architects, engineers, paralegals, real estate agents, and property appraisers.¹²²

The Bureau's approach to the professions is highlighted by four main areas of concern, two of which are of particular importance to the RCD: (i) suggested fee schedules and (ii) advertising prohibitions.¹²³ With respect to fee schedules, the *Waterloo Law* case dealt with mandatory fees set up by an executive representing regional lawyers.¹²⁴ In this case the RCD was shown to be inapplicable on the basis that lawyers, although regulated by the Law Society, were not authorized by the statute to impose any mandatory fee schedules.¹²⁵ The decision in *Waterloo Law* seemed to support a stricter approach to authorization but this has largely been eroded by the prevailing judgment in *Jabour* with respect to advertising. Advertising is especially important for fulfilling many of the objectives of competition policy because it increases awareness of prevailing prices,

¹²⁰ Peter W. Hogg and Warren Grover, "The Constitutionality of the Competition Bill" (1976) 1 Can. Bus. L.J. 197.

¹²¹ Competition Bureau of Canada *Self Regulated Professions: Balancing Competition and Regulation* (Gatineau: The Competition Bureau, 2007) at v.

¹²² Calvin S. Goldman "The Competition Act and the Professions" (Notes for an Address to the Canadian Bar Association Ontario, Program on the Professions, April 25, 1989, pp. 8-9).(Unpublished). [Competition Act and the Professions].

¹²³ *Ibid.*

¹²⁴ *Waterloo Law*, *supra* note 87.

¹²⁵ *Ibid.*

leads to more informed purchases for consumers, and ultimately encourages greater competition and downward pressure on prices. Indeed in *Jabour* it was argued that restrictions on advertising impeded the operation of high volume, low cost legal clinics whose success was based on their ability to reach out to laypeople through extensive advertising.¹²⁶ Given that advertising is closely linked to the promotion of free competition and economic efficiency, the ruling in *Jabour* is especially difficult to reconcile with the aims of competition policy. Discretion under statutory authority is limited by principles such as the rule of law as well as the purposes laid out in the statute. It is difficult to see how a provision in the *Legal Professions Act* that allows benchers the right to restrict conduct contrary to the public interest could be given such a broad liberal construction. Other cases, notably *Mortimer v. Corp. of Land Surveyors of the Province of British Columbia*, developed the principle that statutes are to be strictly construed when there is ambiguity as to whether they give rise to the RCD defence.¹²⁷ *Mortimer* is of particular interest as a comparison to *Jabour* because it also dealt with a self-governing profession, namely land surveyors. It raised questions not only about the Supreme Court's liberal approach to interpretation in *Jabour* but the general deference seen in all cases involving law societies except for *Waterloo Law*. Dohm J. had the following to say about professional organizations and the interpretation of monopolistic statutes:¹²⁸

The interpretation of section 4(g) of the Act and whether it allows the Corporation to pass a bylaw prescribing a minimum tariff of fees is affected by the monopolistic nature of the legislation and also the general (as opposed to specific) description of the tariff. There is no quarrel that the legislation as a whole creates a professional monopoly comprising 300 members in an overall population of 3 million people.

He went on to discuss the principle of strict construction:¹²⁹

Not to be overlooked too, is the realization that Parliament through the Competition Act makes it plain that the nation should be protected from those who would join together to control the market by fixing prices. As was indicated earlier, there is much to be gained in giving professional bodies the power to

¹²⁶ Competition Act and the Professions, *supra* note 120.

¹²⁷ *Mortimer v. Corp. of Land Surveyors of the Province of British Columbia*, 37 Admin. L.R. 87, 58 D.L.R. (4th) 172.

¹²⁸ *Ibid.* at para. 18.

¹²⁹ *Ibid.* at para. 20.

regulate themselves. I do wonder though, if the common good is served by providing to a professional body (monopolistic in nature) through legislative authority and without limitations, the power to engage in activities which would be illegal if carried out by anyone else. Surely in these circumstances, a strict construction of the legislation is a reasonable approach.

The approach taken by Mr. Justice Dohm was supported by case law predating *Jabour* which dealt with professional architects. In *Pauze v. Gauvin*, Taschereau J. had the following to say about the interpretation of monopolistic statutes governing the professions:¹³⁰

The statutes creating these professional monopolies, sanctioned by law, access to which is controlled and which protect their members in good standing who meet the required conditions against any competition, must however be strictly applied. Anything which is not clearly prohibited may be done with impunity by anyone not a member of these close associations.

The marked contrast between Taschereau J's approach to statutory interpretation and that adopted by the Court in *Jabour* is salient. Recall that the provision at issue in *Jabour* was styled very broadly. What can explain the very generous approach taken by the Court in construing the *Legal Professions Act*? Could Parliament have intended the Benchers to have such broad reaching discretion that they could prohibit activity shown to be essential to Mr. Jabour's type of practice? The cases on strict construction suggest that some conformance to competition principles is desirable when interpreting broadly styled regulatory powers. Nevertheless the Court in *Jabour* was willing to take a more generous interpretation, hinting at some pattern of deference to law societies that was later echoed in the *LSUC* case when the RCD was ostensibly expanded to civil reviewable conduct.

[4.7] Statutory Amendments and the RCD

The new amendment to s. 45(1) of the Act and its impact on the RCD was briefly discussed in section 3.8. The most recent case on the RCD is undoubtedly *Garland*. In that case, it was held that the RCD will apply only where Parliament expressly or by necessary implication provides leeway in a criminal

¹³⁰[1954] S.C.R. 15.

provision for those acting pursuant to valid provincial legislation.¹³¹ The new section 45(1) now contains the following wording:¹³²

Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product

The absence of “unduly” makes the offence *per se* for the first time in its history. The lack of leeway language has not eliminated the RCD, however, as *Garland* might predict. Instead the drafters have declared the continuation of the doctrine through section 45(7) of the Act which provides that:¹³³

The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Section 45(7) raises an interesting problem for the RCD because it allows for the jurisprudence of ‘unduly’ to continue in force despite the absence of the critical language that hitherto supported the interpretive approach. This “ghost” section is thus problematic because it is premised on the assumption that the common law has produced determinable and consistent rules on the RCD, a view that has hopefully been dispelled by the analysis in this paper. The section states that the “rules and principles of the common law” continue in force. Given the discussion in this paper we may legitimately wonder what those rules are. From the RCD’s history it is clear that they are no more than selective judicial interpretations on the statutory wording: “undue”, “agreement”, “public interest”, etc. From this perspective, the most plausible view of s. 45(7) is that it directs judges to consider the previous legislation as described through the common law. The problem with this approach is that it provides such an unclear standard. Not only will judges be interpreting the sections

¹³¹ *Garland*, *supra* note 58 at para 77.

¹³² *Competition Act*, *supra* note 20, s. 45(1).

¹³³ *Ibid.* s. 45(7).

of past legislation that is now amended, they will also be interpreting the interpretations of previous judges on that very same legislation. Such layers of interpretation create the risk of inconsistent judgments resulting from judges' different views of the RCD case law.

[4.8] The Legislative Solution

The final question addressed in this paper is the issue of statutory integration as a proposed solution to the constitutional problems raised by the RCD. Any statutory solution will of necessity have to wrestle with the underlying constitutional issues that the courts have evaded for nearly a century. In this paper's submission, the RCD's essential problem lies in jurisdiction. One approach recommended in 1977 as Bill C-13 proposed the general rule that all regulated industries be subject to competition legislation unless:¹³⁴

- (a) The restrictive conduct is specifically imposed by legislation
- (b) The restrictive conduct is actively supervised by independent officials
- (c) The restraint is necessary for the effective accomplishment of the regulatory legislation's goals and is the least restrictive means of achieving those goals.

Such "narrow tailoring" of provincial legislation is commendable because it would constrict the application of the RCD to those cases where it is specifically warranted. Further, proposal (c) would help shape regulated conduct so that it interferes as little as possible with competition policy objectives. The general rule that regulated industries are subject to competition law is also important because it gives primacy to the federal law, affirming paramountcy and the status of the Act as a framework law. Unfortunately the proposed amendments were never adopted and the most definitive statement that Parliament has been able to make to date remains section 45(7). This section, representing a perpetuation of the common law approach based on statutory interpretation has done nothing to clarify the jurisdictional issue. Legislation that could identify the specific areas of regulation where the defence applies and the degree of provincial authorization required would

¹³⁴ Calvin S. Goldman and John D. Bodrug ed. *Competition Law of Canada* (New York: Juris Publishing, 2008) at 11.02.

establish much clearer spheres of jurisdiction that would make the judicial task of interpreting the doctrine simpler.

[5] Conclusion

The federal system in Canada has produced a unique and challenging landscape for competition law and policy. Regulation in its many guises fosters monopolistic activity that has been shown to cause the same negative economic outcomes as secret collusion. Although certain protections are warranted in a mixed market society the central rationales of competition policy, including the promotion of free markets and economic efficiency, clearly stand opposed to marketing schemes, monopolistic professional organizations, and other regulated industries that have the effect of restricting trade, inflating prices, and limiting consumer choice in the marketplace. The RCD has served to protect the influence of these (mostly) provincial regulators and regulatees. What can be done to limit the effect of this legal doctrine that confounds the Bureau's mandate? Edmund Burke's inspiring adage "laws like houses lean on one another" comes to mind as an apt metaphor for a juristic solution. If we want regulation to be "competition friendly" and competition policy to respect the economic autonomy of provinces it is time to develop a more exacting statutory integration of the RCD. The approach taken by the courts has been wrought with uncertainties, constitutional quandaries, and political influence marked by judicial deference to provincial authority. Furthermore, the doctrine has seen an uneven application and development across industries, particularly with respect to professional organizations such as law societies. If the purposes of competition policy are to be seen as being more than mere pretenses a statutory solution to the RCD would represent the best method for clarifying the doctrine, shielding competition policy from excessive political influence, and strengthening its inter-provincial application.

[7] Appendix

[7. 1] Table of Cases

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