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The regulated conduct defence: weâ€™ll drink to that

It says something about Canada that many famous cases throughout Canadian legal history relate to the regulation of alcohol. Through the early 20th century, the regulation of alcohol was a fertile domain for disputes about Canadian federalism. Now, in the 21st century, the complicated regulatory scheme of governing alcohol sales in Ontario is once again making new law. This time, however, the dispute is not over arcane principles of federalism, but rather over the scope of the regulated conduct defence to conspiracies under the *Competition Act*. While early 20th century federalism cases may be of interest to only a select few, the decision of the Ontario Superior Court of Justice in *Hughes v Liquor Control Board of Ontario* is likely to attract significantly broader interest, particularly among companies operating in regulated industries.

Hughes v Liquor Control Board of Ontario was a proposed class action against the Liquor Control Board of Ontario (the “LCBO”), Brewers Retail Inc. (the company that carries on business as The Beer Store), and the owners of Brewers Retail. In brief, the plaintiffs alleged that what was called the “2000 Beer Framework Agreement”—an agreement entered into between LCBO and Brewers Retail regarding sales of beer in their respective stores—was an unlawful conspiracy. Among other things, the 2000 Beer Framework Agreement precluded the LCBO from selling 12 or 24 packs of beer in LCBO stores. The plaintiffs alleged that this agreement was entered into unlawfully, and that it had the effect of increasing beer prices. The plaintiffs also alleged that the LCBO had no authority to enter into the agreement.

Interestingly, after the class proceeding was started, but before the summary judgment motion was heard, the government of Ontario passed an amendment to the *Liquor Control Act* which declared that the LCBO was deemed to have been directed, and Brewers Retail was deemed to have been authorized, to enter into the 2000 Beer Framework Agreement.

The defendants brought summary judgment motions to dismiss the plaintiffs' claims in their entirety. The summary judgment motions were heard in early February 2018. Justice Perell subsequently released his decision just over a month later, on March 15, 2018, granting summary judgment in favour of the defendants and dismissing the action.

While Justice Perell gave a number of reasons for dismissing the plaintiffs' claims, his primary reason for so doing was that all of the alleged conduct was protected from civil liability from the regulated conduct defence.

The regulated conduct defence is a doctrine that provides parties with an exemption from criminal law statutes for conduct that is authorized by valid provincial legislation. While not confined exclusively to the *Competition Act*, most applications of the regulated conduct defence have been to exempt public inquiry bodies acting pursuant to provincial law from liability under that statute.

In reviewing the case law, Justice Perell identified four governing principles for the regulated conduct defence:

- The regulated conduct defence is a principle of statutory interpretation that determines the scope or reach of a criminal offence including contraventions of the *Competition Act*;
- For the regulated conduct defence to be available, it is necessary but not sufficient that the person whose conduct is impugned is regulated by provincial or federal legislation;
- For the regulated conduct defence to be available, it is necessary that the impugned conduct be required, directed or authorized by provincial or federal legislation; and
- The person relying on the regulated conduct defence must identify in the legislation governing its industry or profession a provision that expressly or by necessary implication directs or authorizes the person engaged in the impugned conduct.

The plaintiffs argued that the regulated conduct defence was limited to criminal prosecutions and that it provided no defence to a civil claim under s. 36 of the *Competition Act*. Justice Perell rejected this argument. He noted that the regulated conduct defence was explicitly codified in s. 45(7) of the *Competition Act*, and that there was no intention the defence would apply only to criminal proceedings.

The plaintiffs also argued that even if the regulated conduct

defence was available to civil claims, it did not apply on the facts of this case. In substance, the plaintiffs argued that the 2000 Beer Framework Agreement was outside the authority conferred by the *Liquor Control Act* on the LCBO as regulator. Justice Perell disagreed with these arguments.

Justice Perell found that the 2000 Beer Framework Agreement was within the LCBO's regulatory authority. He held that this authority existed even under the old version of the *Liquor Control Act*, as the LCBO had the authority to enter into contracts as a way of implementing its regulatory authority. However, he also held that any doubt about the LCBO's authority to enter into the contract was removed with the authorization of s. 10(3) of the *Liquor Control Act*.

The court's decision in *Hughes v Liquor Control Board of Ontario* confirms that both regulators and regulated parties acting pursuant to valid legislation need not be concerned about antitrust liability.

Justice Perell's decision is based on sound policy considerations. The broad prohibition against conspiracies in the *Competition Act* is an imprecise tool. While the *Competition Act* sensibly creates a *per se* offence for horizontal conspiracies in light of the presumptive harm caused by those conspiracies, there will undoubtedly be myriad of cases where countervailing policy considerations should exempt what would otherwise be unlawful agreements from liability. One appropriate marker for when such conduct should be exempt from liability is that it should be free from *Competition Act* scrutiny where another democratically elected level of government has specifically authorized the conduct. In those cases, such conduct is authorized for any other legitimate purpose and reasonably falls outside of the scope of antitrust law.