Regulated Conduct Doctrine Brews Defence for Competition Class Action Against the Beer Store

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In a decision using metaphors ranging from the sinking of the Bismarck to a baseball game and a tennis match, the Ontario Superior Court of Justice recently granted summary judgment to the defendants in a $1.4 billion competition class action lawsuit against Ontario's privately-held but government-authorized beer store monopoly, Brewers Retail Inc. ("Beer Store"), its multi-national beer company owners, and the province's government-owned liquor store monopoly, the Liquor Control Board of Ontario ("LCBO") (collectively, the "Defendants").[1]

The decision is important because it reaffirms the strength and breadth of the Regulated Conduct Defence ("RCD") to the criminal conspiracy provisions of the *Competition Act*, and confirmed that the RCD can be relied on by defendants in defence of civil claims for damages alleged to result from conduct that violates these criminal conspiracy provisions. The RCD provides that conduct will be exempt from application of the criminal conspiracy provisions under the *Competition Act* when it is permitted, authorized or mandated by another validly enacted federal or provincial law. It has long existed at common law, and was explicitly codified in the *Competition Act* in 2010.

The plaintiffs claimed that the Defendants conspired to "fix, raise, maintain or stabilize prices of beer in Ontario," contrary to section 45 of the *Competition Act*. The action stemmed from the 2014 public revelation of a "Beer Framework Agreement" between the LCBO and the Beer Store (the "Agreement"), signed in 2000, under which the LCBO, ordered by the provincial Cabinet minister with responsibility for its affairs under provincial law, agreed not to sell various beer products, including packages of more than six bottles or cans of beer.

The Defendants brought a motion for summary judgment, arguing that the RCD applied because the Agreement was an authorized activity of a regulated industry, and that it thereby could not violate section 45 of the *Competition Act*. The plaintiffs argued that the RCD did not apply, both because the *Competition Act* does not specifically provide that the RCD applies to civil claims for damages resulting from violations of the criminal conspiracy provisions, and because the Agreement was a commercial contract that was not entered under the authority of a provincial law.

Justice Paul Perell noted in his judgment that in order for the RCD to be available, the impugned conduct must be required, directed or authorized by the claimed provincial or federal legislation. In addition, Justice Perell stated that the person relying on the RCD must identify in the legislation governing its industry or profession a specific provision that expressly or by necessary implication directs or authorizes the person to engage in the impugned conduct.

On this basis, Justice Perell ruled for the Defendants, finding that although the Agreement was a contract, because it was entered directly under the authority conferred on the LCBO and Beer Store under the provincial *Liquor Control Act*, it was fell squarely "in the wheelhouse" of the RCD. Furthermore, the Ontario government had made amendments to the *Liquor Control Act* in 2015 specifically authorizing the Agreement, with retroactive effect. Justice Perell found that such retroactive authorization was sufficient to ground reliance on the RCD, and that therefore if he was wrong in finding that the initial Agreement was saved from the criminal conspiracy provisions by the RCD, the retroactive amendment to the *Liquor Control Act* would lead to the same result.

Also significantly, Justice Perell confirmed that the RCD equally applies in defence of civil claims that rely on apparent violations of the criminal conspiracy provisions of the *Competition Act*, stating that allowing the defence to apply only in criminal actions and not civil would lead "to the absurd result that Crown agencies and private entities authorized by both provincial law and the applicable regulator to act would be protected from criminal sanctions but be civilly liable for conduct expressly authorized, or even required, by valid provincial law." Therefore, if a business is operating under express provincial legislation which authorizes their conduct, they would be able to rely on the RCD to defend against both criminal penalties, as well as any potential class actions filed against their conduct.

[1] *Hughes v Liquor Control Board of Ontario*, 2018 ONSC 1723.

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