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# Ontario Court of Appeal Upholds Application of Regulated Conduct Defence to Dismiss Class Action Alleging Conspiracy in Beer Industry

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On April 17, 2019, the Ontario Court of Appeal affirmed a lower court decision to dismiss a proposed class action (*Hughes v. Liquor Control Board of Ontario*) concerning a document (the “**Framework**”) signed by the Liquor Control Board of Ontario (**LCBO**) and the owner and operator of The Beer Store, Brewers Retail Inc. (**BRI**) in 2000. This article summarizes the decisions of the courts and further explains the current state of the law relating to summary judgements in civil litigation as well as the regulated conduct defence (**RCD**), which was successfully argued by the defendants in this case.

## **Background**

Section 45 of the Canadian *Competition Act* (the “**Act**”) prohibits agreements between competitors or potential competitors to fix prices, allocate markets or restrict output. Section 45 is a *per se* criminal offence, meaning that the prosecution is not required to prove a negative impact on competition resulting from the conduct; the offence is in the conduct itself, subject to certain specified defences, including the RCD. Corporations and individuals found guilty of violating section 45 may be punished by fines of up to CDN\$25 million per count. Individuals also face the prospect of a maximum prison sentence of 14 years.

In legalizing alcohol beginning in the late 1920s, the Ontario government put in place certain controls to ensure responsible consumption of alcohol. In particular, the LCBO was authorized to exclusively handle spirits, while an organization of brewers would manage beer sales through BRI. This arrangement was codified in 2000, when the LCBO and BRI entered into the Framework.

The plaintiffs alleged, among other things, that provisions in the Framework constituted an agreement between competitors (including the LCBO in its capacity as a retailer of beer) to allocate the market for the sale of beer in Ontario contrary to the conspiracy offence in section 45 of the Act. The Framework allegedly restricted the LCBO’s ability to sell beer in packages of more than six containers or to sell beer carried by BRI to holders of liquor licences such as bars and restaurants. (The LCBO operates stores that carry a wide range of liquor products, including beer. BRI sells all package sizes at its beer stores in Ontario.) As such, the plaintiff claimed that the Framework effectively divided the beer market between the LCBO and BRI in violation of section 45 and caused harm to both individual beer drinkers and operators in the food and beverage industry by inflating the price of beer.

## **The Hughes Decisions**

On March 15, 2018, following extensive affidavit evidence and cross-examinations, the Ontario Superior Court of Justice (the “**Lower Court**”) granted summary judgment and dismissed the plaintiffs’ claim in its entirety without a trial. In doing so, the Lower Court applied

the RCD, holding that, even if the challenged conduct might otherwise have violated the conspiracy offence, the conduct was authorized in a manner consistent with provincial legislation.

In affirming the Lower Court's decision, the Court of Appeal noted that the relevant legislation expressly allowed the LCBO to (i) approve LCBO stores and BRI outlets for the sale of liquor (including beer), (ii) determine the classes, varieties and brands of liquor to be sold at LCBO stores (thereby enabling the LCBO to determine product allocation between LCBO stores and BRI outlets); and (iii) determine capacity of all packages to be used for containing liquor. The Court of Appeal further emphasized that the relevant legislation effectively authorized the LCBO to allocate sales of beer as between LCBO stores and BRI outlets.

The decisions by the courts confirm that the RCD, while typically raised to defend against criminal prosecution under the Act, can also be used to defend against a civil action based on allegations of a breach of section 45 of the Act. Further, the decisions confirm that the RCD is likely to apply to an entity's conduct so long as such conduct falls within the ambit of powers and rights conferred to that entity by the legislature.

### **Summary Judgment in Civil Litigation**

The *Hughes* decisions are the latest example of an increasingly important trend in civil litigation following the Supreme Court of Canada's 2014 decision in *Hryniak v. Mauldin*. That decision expanded the scope of summary judgment, directing courts hearing motions for summary judgment to determine whether there is a genuine issue requiring trial in respect of each issue based on the evidence in the motion record, and if not, granting summary judgment and avoiding the unnecessary expense and delay of a trial. If the court finds no genuine issue requiring trial and the evidence in the motion record will permit the court to "fairly and justly adjudicate the dispute", a binding decision can be made on the record. As this case and others before it have demonstrated, summary judgment is also available in the context of class actions, even before the certification stage.

If the material facts are not disputed, summary judgment can be an effective tool in class actions and other proceedings to achieve a relatively early resolution and minimize costs.

### **RCD as a Complete Defence**

As the *Hughes* decisions explain, the RCD originally evolved to address potential conflicts between federal competition legislation and provincial statutes, particularly in the context of regulated industries and self-governing professions. The RCD recognizes that, as a matter of interpretation, under certain conditions regulated activities cannot constitute criminal offences.

After a review of RCD case law, the Lower Court set out four general principles concerning the doctrine, all of which were well-established under the case law:

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

Consistent with these principles, the Lower Court determined that “the alleged wrongdoings associated with [the Framework] are not wrongdoings” because regulatory authorization sanctioned the conduct. Accordingly, the Framework did not constitute an offence under the Act. The RCD was a complete defence to the plaintiffs’ claims and the action was dismissed in its entirety. The Lower Court also held that, even if the RCD had not been a complete defence in 2000, amendments in 2015 to the Ontario *Liquor Control Act* confirmed that the impugned conduct had at all times been validly authorized by provincial legislation. The Court of Appeal agreed with the Lower Court’s findings.

Consistent with prior decisions of the Supreme Court of Canada and other courts, both the Lower Court and Court of Appeal did not accept the plaintiffs’ attempts to restrict the application of the RCD to situations in which the impugned conduct was authorized by a higher degree of formality than existed with respect to the Framework, or to restrict the RCD to criminal prosecutions. Interestingly, the Court of Appeal also commented in *obiter* that, while the leading case on RCD and the *Hughes* case involved the conduct of a regulator, arguably more specific authority might be required to immunize conduct of a “regulatee”.

Both Courts found that the Framework “was in the wheelhouse” of the powers and rights conferred on the LCBO and BRI by provincial liquor legislation. In particular, the Lower Court noted that the LCBO had the authority to enter into contracts such as the Framework as a way of implementing its regulatory authority without any additional specific authorization, and no new legislative instrument or other directive was required for it to sign and implement the Framework. Accordingly, no further specific authorization was required for the RCD to apply to the Framework. Although the Lower Court found that a 2015 amendment to the Ontario *Liquor*

*Control Act* explicitly providing retroactive authorization of the Framework would have been sufficient to engage the RCD, it was not necessary for the RCD to apply in this case. The Court of Appeal confirmed the Lower Court's finding noting that the 2015 amendment was "expressly indicated to have retroactive effect".

Of note, the Lower Court also rejected the plaintiffs' position that 2010 amendments to the *Competition Act*, which removed the word "unduly" as an element of the conspiracy offence, limited the application of the RCD to only criminal prosecutions. The plaintiffs argued that the RCD was no longer available as a defence to private actions for damages. On the contrary, the Lower Court found that, in adding the new subsection 45(7) to the statute at that time, Parliament intended to preserve the effect of the RCD in civil claims. The Lower Court commented that the plaintiffs' interpretation would lead to the "absurd result" that both Crown agents and private entities would be civilly liable for conduct expressly authorized, or even required, by valid provincial law. This decision was again consistent with existing case law on the subject.

Separately, in August 2018, the Lower Court ordered the plaintiffs to pay \$2.35 million of the defendants' costs in responding to the proceeding, noting among other things that, given the nature of the allegations, it was entirely reasonable for the defendants to mount a vigorous defence. The cost award was also upheld by the Court of Appeal.

## Implications

The *Hughes* decisions confirm that defendants whose challenged conduct is authorized by statute may be able to resolve litigation at an early stage, before a full trial. The RCD does not apply to all conduct in regulated industries, but the *Hughes* case is an indication that courts are willing to apply the RCD in a practical and reasonable manner in a summary judgment motion, so long as the relevant entity is exercising the powers and rights conferred on it. Further, the RCD may be used to defend against civil actions brought on the basis of an alleged violation of the cartel provisions of the Act.

Davies represented the LCBO in defending the proposed class action in the *Hughes* case.

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