The Evolving Role of *Competition Act* Merger Review in the Transport and Broadcasting Sectors in Canada

Richard Elliott
relliott@dwpv.com

PROVEN ▪ INNOVATIVE ▪ FOCUSED ▪ PROVEN ▪ INNOVATIVE ▪ FOCUSED ▪ PROVEN ▪ INNOVATIVE ▪ FOCUSED ▪ PROVEN ▪ INNOVATIVE ▪ FOCUSED ▪ PROVEN ▪ INNO

A superior line of thought

DAVIES

THE EVOLVING ROLE OF *COMPETITION ACT* MERGER REVIEW IN THE TRANSPORT AND BROADCASTING SECTORS IN CANADA

Richard Elliott*

I. Introduction

The *Competition Act*[1] is a law of general application which applies, for the most part, equally across diverse sectors of the Canadian economy. In the area of merger review, the Commissioner of the Competition ("Commissioner") and her staff the Competition Bureau ("Bureau") have traditionally reviewed all mergers under the common analytical framework established in the *Merger Enforcement Guidelines* ("MEGs").[2] This same framework has been applied irrespective of whether a merger was also subject to concurrent merger review by another regulator.

This paper looks at recent developments regarding regulatory review of mergers in the transport and broadcasting sectors in Canada and discusses whether they are likely to have any impact on the Bureau's role in respect of such mergers. The principal development in the transport area has been the extension in June 2007 of the *Canada Transportation Act* ("CTA") merger review regime from airlines to all transport sectors.[3] This provides for the possibility that the Minister of Transport and Cabinet, not the Competition Tribunal ("Tribunal") or the courts, will have the ultimate decision making authority over mergers, including competition aspects, in the transport sector.

In the broadcast sector, recent Canadian Radio-Television and Telecommunications Commission ("CRTC") enforcement decisions and policy developments point to a focus on market concentration issues in a manner that may overlap with, although also diverge from, the reviewing role of the Bureau. For example, the 2007 CRTC

---

* Partner, Davies Ward Phillips & Vineberg LLP. The author thanks Ashley Weber for her helpful assistance in preparing this article.

1 R.S.C. 1985, c. C-34.

2 The terms "Commissioner" and "Bureau" are used interchangeably in this paper. The *Merger Enforcement Guidelines* were issued originally in 1991 (*Merger Enforcement Guidelines*, Info. Bulletin No. 5, Hull, Quebec, 1991) and revised in 2004 (*Merger Enforcement Guidelines*, Ottawa: Industry Canada, 2004, online: www.competitionbureau.gc.ca). In this paper, references to the "MEGs" refer to the 2004 MEGs for events after September 2004 and to the 1991 MEGs for prior events.

3 S.C. 1996, c.-10, sections 53.1-53.6.

decision regarding the CTVgm/CHUM merger required divestitures of TV stations due to concentration of ownership concerns even though the Bureau cleared the same merger as not raising competition issues.[4] An opposite divergence of views occurred in 2002 when the Bureau required divestitures of French-language radio stations in the Astral/Telemedia transaction at the same time that the CRTC concluded that the transaction was pro-competitive.[5] More recently, the CRTC's focus on market concentration issues has been even more apparent in its new policy, issued in January 2008, on media cross-ownership, television ownership and broadcast distribution undertaking ownership.[6] In particular, the market share thresholds for analysis of television ownership are expressly based on those employed by the Competition Bureau in its review of bank mergers.

Part II of this paper discusses the new CTA merger review regime applicable to transport mergers and considers what, if any, impact it is likely to have on the Bureau's review of mergers in the transport sector. Part III examines the developments noted above regarding the CRTC review of broadcasting mergers and considers whether the CRTC's concurrent role in reviewing such mergers has any implications for Bureau merger review in that sector. Part IV offers some concluding observations.

II. Transport Mergers

Effective June 2007, the authority of the Minister of Transport, and ultimately Cabinet, to review airline mergers was extended to cover mergers in all transport sectors. The original authority in respect of airline mergers was itself modelled in part on the jurisdiction of the Minister of Finance over certain mergers in the financial services sector. Therefore, to help understand the new CTA merger review provisions, it is instructive to trace briefly the history of the merger review regimes in the financial services and airline sectors.

---

4 *Transfer of Effective Control of CHUM Limited to CTVglobemedia Inc.*, Broadcasting Decision CRTC 2007-165 (June 8, 2007), online: http://www.crtc.gc.ca/archive/ENG/Decisions/2007/db2007-165.htm; and *CTVgm/CHUM Technical Backgrounder* (November 28, 2007), Competition Bureau, online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02521e.html.

5 *Astral Media Inc., on behalf of 3903206 Canada Inc., Telemedia Radio Atlantic Inc. and Radiomedia Inc.* (April 19, 2002), Broadcasting Decision CRTC 2002-90, online: http://www.crtc.gc.ca/archive/ENG/Decisions/2002/db2002-90.htm; and L*e commissaire de la concurrence c. Astral Média inc., Télémédia Radio inc., Radiomédia inc.*, Competition Tribunal (December 21, 2001), online: http://www.ct-tc.gc.ca/CMFiles/CT-2001-010_0001a_38IYP-472004-3760.pdf.

6 *Regulatory Policy Diversity of Voices*, Broadcasting Public Notice CRTC 2008-4, online: http://www.crtc.gc.ca/archive/ENG/Notices/2008/pb2008-4.htm.

A. Background

Financial Services Mergers

For many years following adoption of the *Competition Act* in 1986, the only provision in the Act dealing with concurrent merger review under other legislation was paragraph 94(b), which removed the Tribunal's jurisdiction to issue a remedial order against a bank merger or other merger governed by certain federal financial services legislation where the Minister of Finance had certified the merger to be in the public interest. Until certification by the Minister, the Bureau's role under the *Competition Act* was in theory unchanged. However, where the approval decision would be made by the Minister, the Bureau's competition assessment culminated in formulating recommendations to the Minister, rather than deciding whether to bring a matter to the Tribunal.

In practice, even where the decision ultimately resided with the Minister of Finance, the Bureau has continued to apply the MEGs' approach in developing its competition recommendations. Indeed, when the Bureau reviewed the proposed 1998 mergers involving the Royal Bank and Bank of Montreal[7] and the Canadian Imperial Bank of Commerce and Toronto Dominion Bank,[8] it specifically issued *Bank Merger Enforcement Guidelines* that reinforced and amplified on the application of the MEGs principles to bank mergers.[9] These guidelines were also used in the Bureau's subsequent review of the TD-Canada Trust merger.[10] Moreover, the Bureau, not the Minister of Finance, oversaw compliance with the divestiture orders in TD-Canada Trust to address competition concerns.

From 1999-2003, the Department of Finance issued several policy statements and guidelines discussing the interplay between the Bureau and the Minister of Finance. Although the details have varied slightly over the years, in essence the Bureau is responsible for reviewing the transaction from a competition perspective, the Office of the Superintendent of Financial Institutions is responsible for reviewing the transaction with respect to prudential considerations, and these two reviews feed into an overarching public interest decision of the Minister of Finance.

---

7 *The Competition Bureau's Letter to the Royal Bank and Bank of Montreal* (December 11, 1998), online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01612e.html.

8 *The Competition Bureau's Letter to the CIBC and TD Bank* (December 11, 1998), online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01601e.html.

9 *Merger Enforcement Guidelines as Applied to a Bank Merger* (Hull, Quebec, 1998), online: strategis.ic.gc.ca/pics/ct/mege.pdf.

10 *The Competition Bureau's Letter to the Toronto-Dominion Bank and Canada Trust* (January 28, 2000), online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01649e.html.

Both the Bureau's experience to date reviewing bank mergers and the policy statements from the Department of Finance reflect that the Bureau's role in reviewing mergers in the financial services sector has been analytically the same as Bureau merger review in other sectors.

Airline Mergers

The model of providing for Ministerial approval, rather than Competition Tribunal jurisdiction, over mergers in a particular sector was extended in 2000 to airline mergers and used by Cabinet, on recommendation of the Minister of Transport, to approve (retroactively) Air Canada's acquisition of Canadian Airlines as being in the public interest.[11] The approval was provisionally announced in December 1999 and included incorporating the terms of settlement reached between the Commissioner and Air Canada in December 1999, which imposed remedies to address competition concerns.[12] The Cabinet approval also included public interest measures beyond the scope of the Bureau's competition mandate, notably regarding employment guarantees and maintaining service to remote communities.

Notwithstanding the ultimate authority of Cabinet (on recommendation of the Minister of Transport) to approve the merger, the Bureau's role in identifying competition concerns, negotiating divestitures and other remedies, and subsequently monitoring compliance with remedies in the Air Canada/Canadian Airlines merger was analogous to that performed with respect to mergers in other industries. Also, pending introduction of legislative amendments to the CTA to formally approve the merger, the settlement between the Commissioner and Air Canada provided that the competition remedies could be, if necessary, filed as a consent order with the Competition Tribunal.

Thus, as with bank mergers, the Bureau's role in reviewing the Air Canada-Canadian Airlines merger did not prove to be analytically different from its role in reviewing mergers in other sectors.

B. CTA Merger Review Regime for Transport Mergers

In June 2007, the CTA merger review regime for airline mergers was extended beyond airlines to apply to any merger that is subject to pre-merger notification under the *Competition Act* and involves a transportation undertaking. This new regime is described in detail below; however, as a threshold observation, it is worth noting that

---

11 *News Release*, Transport Canada, "Minister of Transport Prepared to Approve the Air Canada Transaction to Purchase Canadian Airlines – Secures Commitments to Protect Public Interest", December 21, 1999, online: http://www.tc.gc.ca/mediaroom/releases/nat/1999/99_h113e.htm.

12 *Letter from Commissioner of Competition to Air Canada and Accompanying Undertakings*, December 21, 1999, online: strategis.ic.gc.ca/pics/ct/ac2199e.pdf.

the review process (as well as the predecessor CTA airline merger review process) differs from the review of mergers by the Minister of Finance in at least two notable respects.

First, whereas the Minister of Finance has an independent role under the *Bank Act* and other financial services legislation to review and approve certain transactions, the Minister of Transport's authority to review mergers is dependent on there being a notifiable transaction under the *Competition Act*. Moreover, as described below, a review only occurs under the CTA where the Minister determines (following consideration of a notification filing) that public interest issues relating to national transportation issues are at stake, which is expected to happen rarely. To date, there has been no public interest review under the new CTA merger review provisions.

Second, the Commissioner's role in providing competition recommendations to the Minister of Finance has developed as a matter of Department of Finance policy and guidelines, but is not set out in legislation. By contrast, the Commissioner's role in respect of a public interest review by the Minister of Transport is extensively set out in the CTA, as discussed below.

CTA Merger Review Regime

The new CTA merger review regime contemplates two potential steps with respect to transport mergers: (i) notification to the Minister of Transport ("Minister"); and (ii) if applicable, public interest review by the Minister and Cabinet.

Notification to the Minister is required for any proposed transaction that is required to be notified under the pre-merger notification provisions of the *Competition Act* and which "involves a transportation undertaking".[13] The Minister then has 42 days to determine whether the proposed transaction "raises issues with respect to the public interest as it relates to national transportation".[14] If it does not, there is no further review under the CTA and the application of the *Competition Act* to the transaction is unaffected.

Conversely, if the Minister determines that such public interest issues are raised, then a public interest review ensues and the transaction cannot be completed unless approved, potentially subject to modifications or conditions, by Cabinet. Approval under the CTA exempts the possibility of a remedial order under the merger provisions of the *Competition Act*.[15]

---

13 CTA, section 53.1

14 *Ibid*.

15 *Competition Act*, paragraph 94(c).

Where a public interest review occurs, the CTA specifies a clear role for the Commissioner. The Commissioner shall "report to the Minister and the parties to the transaction on any concerns regarding potential prevention or lessening of competition that may occur as a result of the transaction".[16] The Commissioner's report is made public.[17] The merging parties then confer with the Commissioner and propose measures to address competition concerns.[18] Cabinet ultimately decides whether to approve (with conditions as necessary) the transaction as being in the public interest, taking into account the Commissioner's views and competition concerns and the adequacy of proposed remedies.[19] Ongoing monitoring of compliance with competition conditions is performed by the Commissioner. Moreover, if a person contravenes a term or condition relating to competition, it is the Commissioner, not the Minister, that would apply to a superior court for an order that the person to cease the contravention or do any thing that is required to be done, including divestiture of assets, to address the concerns.[20]

C. Draft Guidelines

On July 28, 2008, Canada's Department of Transport ("Transport Canada") released for public comment draft *Guidelines for Mergers & Acquisitions involving Transportation Undertakings* (the "draft Guidelines") regarding the new CTA merger review provisions.[21] The draft Guidelines, which were prepared in consultation with the Competition Bureau, set out an extensive list of economic, environmental, social and safety "public interest factors" relevant to determining whether a proposed transaction raises public interest issues relating to national transportation. In light of the potential breadth of these considerations, it is hoped that the ultimate guidelines will provide greater clarity on which issues are most likely to be of relevance to the Minister's public interest determination, particularly since few transactions are expected to give rise to a public interest review.

Moreover, given that many of these factors are economic in nature and overlap issues dealt with under the *Competition Act* (e.g., impact on prices, service quality and Canadian competitiveness), it would assist if the ultimate guidelines could clarify that the Minister will not review a proposed merger where the public interest issues only

---

16 CTA, subsection 53.2(2).

17 CTA, subsection 53.2(3).

18 CTA, subsections 53.2(4) and (5).

19 CTA, subsection 53.2(7).

20 CTA, subsection 53.4(2).

21 *Guidelines for Mergers & Acquisitions involving Transportation Undertakings* (June 2008 Draft) online: http://www.tc.gc.ca/pol/en/acg/acgb/mergers/guidelines-draft.htm; and accompanying notice, online: http://www.tc.gc.ca/pol/en/acg/acgb/mergers/guidelines-draft.htm.

relate to competition. Similarly, where the public interest issues concern foreign ownership in a foreign takeover, the Guidelines should clarify what role the CTA public interest review will play where there is already a net benefit to Canada determination under the *Investment Canada Act*.

D. Exempted Transactions

As part of the draft Guidelines exercise, Transport Canada has also invited comments on whether certain classes of mergers should be exempted from the application of the CTA merger review provisions. While this invitation is welcome, the issue of exempting transactions would be most effectively addressed by providing guidance on the threshold question of determining when a transaction "involves a transportation undertaking". Constitutionally, this is understood to apply to federal transportation undertakings, but otherwise no guidance is provided.

Whether through guidance on the meaning of "involves a transportation undertaking" or by way of express exemption, possible candidates for classes of transactions not subject to the CTA merger review provisions could include transactions where: (i) the transportation component is merely ancillary to the main non-transportation business of a party or the parties; (ii) the transportation activities are internal to the merging parties (i.e., no transport for third parties); and (iii) only the acquirer, and not the target, carries on a transportation undertaking. More fundamentally, the original public interest concern arose in the airline sector and the subsequent potential concerns were voiced in the rail sector. Leaving aside whether such public interest concerns justify ultimately displacing the *Competition Act* in those sectors, at a minimum, it is unclear why the CTA merger review regime would need to extend to other transport sectors. In particular, it is difficult to conceive how transactions involving trucking, buses or taxis could raise public interest issues relating to national transportation. Clear exemptions with respect to such sectors would be welcome.

E. Impact on Bureau Review of Transport Mergers

What will likely be the impact of the CTA merger review provisions on the Bureau's review of mergers in the transport sector? Although the provisions have only been in place just over a year, a few observations seem warranted.

First, the CTA merger review provisions will not impact the Bureau's review of the vast majority of transport mergers, since for most such mergers there is no prospect of a CTA public interest review. To date, there has been no public interest review under the CTA merger review provisions and only one (Air Canada's acquisition of Canadian Airlines) under the predecessor airline-specific provisions. Unless and until the Minister opts for a public interest review, the application of the *Competition Act* is unaltered. In cases where the Minister seriously considers, but does not ultimately conduct, a public interest review, there may be some substantive interplay between the

Minister and the Bureau on competition issues, but the Bureau still retains its normal role under the *Competition Act*.

Second, even where a public interest review occurs, the Bureau's role is for the most part unaltered. The CTA provisions clearly affirm the Bureau's normal functions of analyzing markets, identifying competition concerns (in a public report), determining appropriate remedies and ensuring compliance with remedies. Although the Minister could trump the Bureau's desired competition outcome on the basis of broader public interest considerations, that does not detract from the Bureau's role as the government entity responsible for promoting the public interest in competition.

The only public interest review to date under the CTA or predecessor airline-specific merger review provisions was Air Canada's acquisition of Canadian Airlines; however, it is worth bearing in mind that the transaction was actually examined by the Bureau under the *Competition Act* prior to (but with a view to) the enactment of the CTA airline merger review provisions. Of more importance, the transaction was allowed by the Bureau under normal *Competition Act* merger review principles on the basis that Canadian Airlines was a failing firm and the merger conditioned by the consent settlement terms was, in light of foreign ownership constraints on other restructuring scenarios, competitively preferable to the likely alternative of the liquidation of Canadian Airlines. This *Competition Act* outcome would have resulted irrespective of public interest review under the CTA. The one practical difference was that the consent settlement was not filed with the Tribunal, but rather the terms ultimately became part of the conditions of Cabinet approval under the CTA (although even in that regard, pending enactment of the CTA provisions, Air Canada agreed, if necessary, that the settlement could become a consent order before the Tribunal). Compliance with the terms between Air Canada and the Commissioner was monitored by the Competition Bureau, as normally occurs in consent agreements.[22]

Third, even within the small subset of transport mergers that could conceivably give rise to a public interest review, the prospects for the Minister and the Bureau endorsing different substantive outcomes appear small. If the experience with the proposed bank mergers and the Air Canada-Canadian Airlines transaction are any indication, the presence of Ministerial decision-making did not, at least in those cases, materially alter what would have been the Bureau outcome acting under the *Competition Act* alone.

A divergence between the competition and public interest outcomes could in theory arise in two opposite directions. On the one hand, the Bureau could oppose a transaction that the Minister wanted to allow. The prospect of such a situation was the

---

[22] Prior to 2002, Competition Tribunal merger consent settlements took the form of "consent orders". A new "consent agreement" regime was put in place in 2002. The differences between the two processes are not material for purposes of this paper.

Minister's concern regarding the fate of Air Canada and Canadian Airlines.[23] However, as noted above, ultimately the Bureau's conclusion to allow the merger, with conditions, because Canadian was a failing firm was consistent with the Minister's desired outcome. On the other hand, the Bureau could, at least in theory, favour a transaction that the Minister opposed. For example, an anticompetitive merger allowed on the basis of efficiencies under *Competition Act* analysis might produce job losses such that the Minister considered that the transaction was not in the public interest. (The analysis would be even more complicated if the Minister were to impose job guarantees as a condition of approving the merger – potentially reducing efficiencies to the point that they no longer offset anticompetitive effects in the *Competition Act* analysis.)

Fourth, notwithstanding the preceding observations that the Bureau's analytical framework is likely to remain unchanged, in the rare case where a public interest review occurs, one tangible consequence might be to alter the negotiating interplay between parties and the Bureau. The evidentiary threshold for the Bureau is greater before the Tribunal than in front of the Minister. Parties who disagree with the Bureau's opposition to a transaction have scope to challenge that conclusion before the Tribunal – recourse that does not exist for the most part with a Minister, particularly where the Minister is also inclined to oppose the transaction. For example, the parties to the rejected bank mergers in 1998 did not have access to the Tribunal to advance their competition arguments.

Finally, irrespective of how the CTA merger review process evolves, it is worth noting that transportation has been one of the most important sectors for Bureau merger review. Several of the most significant merger matters to come before the Tribunal, either on a contested or consent basis, have involved some transportation component, although most would clearly not have raised public interest issues relating to national transportation. Examples of Tribunal merger cases with some transportation aspect include: the two most recent contested mergers, *Canadian Waste* (waste collection and disposal) and *Superior Propane* (propane supply and delivery);[24] the *CP/Cast* merger (containerized shipping), which was originally contested and subsequently abandoned

---

[23] In fact, for 90 days (from August 13, 1999 to November 11, 1999) in the period leading up to the Bureau's ultimate decision on December 21, 1999 regarding the Air Canada/Canadian Airlines transaction, the Minister of Transport had actually suspended application of the *Competition Act* to facilitate restructuring between Air Canada and Canadian Airlines.

[24] *Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, Reasons and Order, Competition Tribunal (March 28, 2000), online: http://www.ct-tc.gc.ca/CMFiles/CT-2000-002_0059a_49PXE-982004-5523.pdf; *Commissioner of Competition v. Superior Propane Inc.*, Final Reasons, Competition Tribunal (April 4, 2002), online: http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_0238a_45QDJ-5222007-3468.pdf.

by the Commissioner,[25] the *Seaspan* merger (ship berthing and barging),[26] which was originally contested but ultimately resolved by consent order; the *Gemini* merger (airline computer reservation systems) which was originally a consent order, but subsequently the subject of extensive contested litigation involving, among others, Air Canada and Canadian Airlines,[27] and the *CN/BC Railway* consent agreement (railways).[28]

III. Broadcasting Mergers

A. CRTC/Competition Bureau Interface

Unlike in the case of financial and transport sector mergers, nothing in the *Competition Act* provides for exempting the jurisdiction of the Tribunal over transactions that might also be reviewed by the CRTC. Indeed, the official position of the Bureau and the CRTC, as reflected in their joint 1999 "CRTC/Competition Bureau Interface" document ("Interface Document"), is that the two agencies have "parallel jurisdiction" in respect of mergers in the telecommunications and broadcasting sectors.[29] The Interface Document describes the relative roles of the CRTC (Commission) and the Bureau regarding broadcasting mergers as follows:

> Under the *Broadcasting Act*, prior approval of the Commission is required for changes of control or ownership of licensed undertakings. Whereas the Bureau's examination of mergers relates exclusively to competitive effects, the Commission's consideration involves a broader set of objectives under the *[Broadcasting] Act*. This may encompass consideration of competition issues in order to further the objectives of the *[Broadcasting] Act*. The Bureau's concern in radio and television

---

25 *Director of Investigation and Research v. Canadian Pacific Limited*, Notice of Application, Competition Tribunal (December 20, 1996) online: www.ct-tc.gc.ca/CMFiles/CT-1996-002_001_45QON-4132004-7151.pdf; (proceedings stayed September 17, 1997).

26 *Director of Investigation and Research v. Dennis Washington*, Reasons for Consent Order, Competition Tribunal (January 29, 1997), online: http://www.ct-tc.gc.ca/CMFiles/CT-1996-001_0224_45NJW-4162004-7575.pdf.

27 *Director of Investigation and Research v. Air Canada*, Consent Order, (July 7, 1989), online: http://www.ct-tc.gc.ca/CMFiles/CT-1988-001_0577a_45OQT-4272004-1900.pdf; see also *Director of Investigation and Research v. Air Canada*, Reasons for Order Varying Consent Order dated July 7, 1989, Competition Tribunal (December 1, 1993) online: http://www.ct-tc.gc.ca/CMFiles/CT-1988-001_0873a_45QDY-4292004-3247.pdf.

28 *The Commissioner of Competition v. British Columbia Railway Company and Canadian National Railway Company*, Registered Consent Agreement, Competition Tribunal (July 2, 2004), online: http://www.ct-tc.gc.ca/CMFiles/CT-2004-008_0001a_53PXD-3142005-99.pdf.

29 *CRTC/Competition Bureau Interface* (October 8, 1999), CRTC and Competition Bureau, online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01598e.html.

> broadcast markets relates primarily to the impact on advertising markets and, with respect to broadcast distribution undertakings, to the choices and prices available to consumers. The Commission's concerns include those of the Bureau except that its consideration of advertising markets relates to the broadcasters' ability to fulfill the objectives of the *[Broadcasting] Act.*[30]

Thus, while a relatively peaceful co-existence is contemplated, there is potential for both overlap and divergence between the agencies' roles in assessing competitive effects of broadcasting mergers. The ensuing discussion focuses on two cases that have highlighted the scope for divergence: (i) the 2002 Astral/Telemedia merger; and (ii) the 2007 CTVgm-CHUM merger.

B. Astral/Telemedia

1. CRTC review

In July 2001, Astral Media Inc. ("Astral") filed applications with the CRTC for authority to acquire eight French language radio stations owned and operated by Télémédia Radio Inc. ("Telemedia") in the Province of Quebec and a 50% interest in Radiomédia Inc. held by Telemedia. CRTC approval was required in accordance with the *Radio Regulations*, 1986[31] enacted pursuant to the *Broadcasting Act*.[32] The CRTC held public hearings in November 2001 and approved the acquisition, with conditions, in April 2002.[33]

The CRTC's jurisdiction to review the merger was based on the *Broadcasting Act*, which gives it the mandate to regulate and supervise all aspects of the Canadian broadcasting system in order to implement broadcasting policy in Canada. In its notice announcing the hearing, the CRTC indicated that it wished to examine various questions "including, in particular, the diversity of voices in Quebec, the potential market dominance resulting from the transaction, and cross media ownership".[34] In conducting its investigation, the CRTC examined several issues, notably the position of Astral in the French-language radio sector, common ownership, advertising issues, local programming requirements, diversity of programming and access to the airwaves, and tangible benefits packages.

---

30 *Ibid.*

31 S.O.R./86-982.

32 S.C. 1991, c.11.

33 *Astral Media Inc., on behalf of 3903206 Canada Inc., Telemedia Radio Atlantic Inc. and Radiomedia Inc.* (April 19, 2002), Broadcasting Decision CRTC 2002-90, online: http://www.crtc.gc.ca/archive/ENG/Decisions/2002/db2002-90.htm.

34 *Ibid.*, paragraph 17.

The CRTC's analysis was guided particularly by whether the transaction would be consistent with the CRTC's *Commercial Radio Policy*, which focused on a number of market considerations, including determining "whether the position of dominance held by an applicant could affect the level of true competition available in the market".[35] The *Commercial Radio Policy* also stated that increased consolidation of ownership within the radio industry would enable the industry to strengthen its overall performance, attract new investment, and compete more effectively with other forms of media.

As a pre-condition to CRTC approval, Astral was required to divest a radio station in Quebec City to satisfy the Common Ownership Policy limits on the number of radio stations that can be owned in the same market.[36] Otherwise, the CRTC required no divestitures and concluded overall that the transaction would "improve the competitive position of private French-language radio in Quebec", among other benefits.[37] Consistent with the *Commercial Radio Policy*, the CRTC found that although newspaper, television and other media "do not substitute perfectly for radio as advertising outlets, they do serve as effective alternatives."[38] The approval decision was not devoid of concern over Astral's "increasing prominence within Quebec's French-language radio market following this transaction"; however, the CRTC concluded that approving the transaction along with certain safeguards and monitoring mechanisms, such as filing annual reports on diversity of programming, would best satisfy the objectives of the *Broadcasting Act* and the *Commercial Radio Policy*.

2. Bureau review

In December 2001, while the CRTC process was in course, the Commissioner filed an application with the Tribunal challenging the proposed transaction on the basis that it would likely prevent or lessen competition substantially in six local markets for advertising on French-language radio stations: a near monopoly over French-language radio advertising markets in Hull/Ottawa, Sherbrooke, Trois-Rivières and Chicoutimi-

---

35 *Commercial Radio Policy 1998* (April 30, 1998), Public Notice CRTC 1998-41, online: http://www.crtc.gc.ca/archive/ENg/Notices/1998/PB98-41.htm; see *Supra*., note 33, paragraph 23.

36 The Common Ownership Policy in the *Commercial Radio Policy* states that in markets with less than eight commercial stations operating in a given language, a person may be permitted to own or control as many as three stations operating in that language, with a maximum of two stations in any one frequency band. In markets with eight commercial stations or more operating in a given language, a person may be permitted to own or control as many as two AM and two FM stations in that language.

37 *Supra* note 33, paragraph 74.

38 *Supra* note 33, paragraph 39.

Jonquière; and substantial control over French-language radio advertising markets in Montreal and Quebec City.[39]

Astral and Telemedia then commenced their own legal proceedings before the Federal Court challenging the Tribunal's jurisdiction over the merger given the extent of CRTC oversight under the *Broadcasting Act*.[40] The case was argued before the Court in May 2002. However, a decision was never rendered because Astral and Telemedia discontinued the proceedings after they and the Commissioner resolved the Commissioner's competition concerns and registered a consent agreement before the Tribunal on September 3, 2002.[41]

The consent agreement called for the sale of the parties' AM radio stations in all six relevant markets. Furthermore, in the four markets where the Bureau had the greatest competition concerns (Gatineau-Ottawa, Sherbrooke, Trois-Rivières and Chicoutimi-Jonquière) pending new entry, the Télémédia FM stations would continue to compete for local advertising against the Astral FM stations for up to 42 months. The Commissioner commented that the settlement "preserves competition in French language radio advertising" and that "[d]ivestitures and the expected entry of new radio stations will maintain competition in all markets where we had initially found concerns."[42] On October 28, 2002, Astral completed its acquisition of the Télémedia radio stations.

3. Diverging Competition Analyses

The Bureau and the CRTC arrived at different conclusions regarding the impact of the transaction on competition. The Bureau sought divestitures in order to address a perceived negative impact of the transaction on competition for advertising on French language Quebec radio stations. By contrast, the CRTC concluded that the transaction would improve the competitive position of private French-language radio in Quebec and enhance the quality of programming. In addition, the CRTC highlighted synergies

---

39 *Le commissaire de la concurrence c. Astral Média inc., Télémédia Radio inc., Radiomédia inc.*, Competition Tribunal (December 21, 2001), online: http://www.ct-tc.gc.ca/CMFiles/CT-2001-010_0001a_38IYP-472004-3760.pdf.

40 *Astra Média inc. c. Le commissaire de la concurrence et al. and Télémédia inc. c. Le commissaire de la concurrence et al.*, Federal Court – Trial Division, Court File Nos. T-2256-01 and T-2256-02.

41 *Le commissaire de la concurrence c. Astral Média inc., Télémédia Radio inc., Radiomédia inc.*, Registered Consent Agreement, Competition Tribunal (September 3, 2002), online: http://www.ct-tc.gc.ca/CMFiles/CT-2001-010_0024b_38JVR-472004-7594.pdf.

42 *News Release*: "Competition Bureau Resolves Concerns in Astral-Télémedia Radio Merger" (September 3, 2002), Competition Bureau, online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00445e.html.

as a benefit of the transaction, whereas efficiency considerations were not similarly apparent in the Bureau review.

This divergence of outcomes resulted foremost from differing views on market definition. The Bureau defined the relevant product market as French language radio advertising and identified six affected local geographic markets in Quebec. By contrast, the CRTC viewed radio advertising not as a separate and distinct market, but rather as part of a larger advertising market that included different forms of media, notably television and newspapers.[43]

Differing policy approaches and decision making frameworks may account for some of this divergence. In terms of enforcement policy, the "hypothetical monopolist" test for market definition set out in the Bureau's MEGs seeks to identify the smallest potential market within which anticompetitive effects can arise. By comparison, a central premise of the CRTC's more broadly oriented *Commercial Radio Policy* is that increased consolidation of ownership will enable the radio industry to be stronger and compete more effectively with other media. Regarding the decision making frameworks, merger review under the *Competition Act* is largely a discrete, one-shot exercise, whereas the CRTC retains ongoing jurisdiction through licensing oversight. Nonetheless, while these policy and process considerations may explain some of the divergence, it is evident that the Bureau and CRTC have fundamentally different views on the nature of competition in the radio industry.

As a postscript to the *Astral* case, in 2006 the Commissioner submitted a response to the CRTC's request for information in its review of the *Commercial Radio Policy*. In its comments, the Bureau again emphasized its belief that radio advertising should form a separate relevant market from other media. Justifying the approach it took in *Astral*, the Bureau criticized the CRTC and stated that "[i]t is not apparent from an examination of the Commission's [CRTC's] decision in the area of radio broadcasting that the Commission conducts the detailed analysis the Bureau would employ."[44] The Bureau made it clear that it believes the CRTC got it wrong in *Astral*, and encouraged the CRTC to review how it conducts competitive market analyses to more accurately reflect the approach used by the Bureau.[45] Meanwhile, the CRTC's recent expansion of the Common Ownership Policy to include limits on cross-media ownership (discussed below) may be an indication of the CRTC's continuing preference to expand the definition of relevant markets to include diverse media.

---

43 *Supra* note 33, paragraphs 23-32.

44 *Comments of the Commissioner of Competition, Review of the Commercial Radio Policy* (15 March 2006), Broadcasting Notice of Public Hearing CRTC 2006-1, online: support.crtc.gc.ca/applicant/docs.aspx?pn_ph_no=2006-1&call_id=29678&lang=E&defaultname=; paragraph 28.

45 *Ibid*., paragraphs 29-30.

4. Regulated Conduct Defence

A key issue left unresolved from the *Astral* case is whether broadcasting mergers are shielded from *Competition Act* merger review, given the extent of regulatory oversight under the *Broadcasting Act*.

Astral and Telemedia advanced two related arguments in this regard: the "regulated conduct defence" ("RCD") and the "principle of exclusivity". The parties argued essentially that the transaction had been authorized by the CRTC and that the *Broadcasting Act* effectively mandated that the CRTC would have sole regulatory oversight over such transactions. They relied in particular on the fact that subsection 3(2) of the *Broadcasting Act* provided that the objectives of Canadian broadcasting policy "can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority."[46]

The Commissioner raised several arguments in response, including: that the *Competition Act* is a law of general application with no exemption for broadcasting mergers; there is no conflict between the *Competition Act* and the *Broadcasting Act*, which pursue different objectives as evidenced by the Interface Document; and the CRTC's decision merely authorized the transfer of licenses – it did not compel the parties to complete the transaction or infringe the *Competition Act*.

There is little doubt that the Bureau's approach to the RCD, both in the *Astral* case and as subsequently reflected in policy statements, is overly narrow.[47] It is also apparent that the regulatory oversight of the CRTC is extensive in the broadcasting sector. Nonetheless, while the presence of CRTC oversight may be relevant in assessing the likelihood of anticompetitive effects, it is less obvious that Parliament intended to exclude broadcasting mergers entirely from the reach of Bureau merger review, particularly if broadcasting mergers are subject to the pre-merger notification provisions in the *Competition Act*. In any event, given the Bureau's narrow view of regulated conduct, as well as the fact that parties are unlikely to decline to notify a proposed transaction under the *Competition Act* solely because it involves broadcasting, assertions of regulated conduct are most likely to surface if and when the Bureau decides to oppose a particular broadcasting merger. Until the Bureau has reached that conclusion, parties are likely to focus their efforts on convincing the Bureau that substantive competition concerns do not exist. In that regard, there is no

---

46 See also Jeffrey D. Brown, "The Competition Bureau's Information Bulletin on the Regulated Conduct Defence: Observations from the Astral/Télémedia Case", *Canadian Competition Record*, Summer 2003.

47 See, in particular, *Technical Bulletin and "Regulated Conduct"* (June 2006), Competition Bureau, online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/final_rcdbulletin_e.pdf/$FILE/final_rcdbulletin_e.pdf.

indication that regulated conduct considerations played a material role in the Bureau's subsequent review of the CTVgm/CHUM transaction discussed below.

C. CTVglobemedia/CHUM

1. Bureau review

In July 2006, CTVglobemedia Inc. ("CTVgm") (formerly Bell Globemedia Inc.), a multimedia company whose assets included CTV Inc. (Canada's largest private TV broadcaster) and The Globe and Mail, announced its intention to acquire CHUM Limited ("CHUM"), a multimedia company whose assets included numerous radio stations, television stations (including five "Citytv" stations) and specialty television channels. Following expiration of the *Competition Act* waiting period, the parties closed the transaction on September 1, 2006 into a voting trust arrangement approved by the CRTC pending consideration of CTVgm's application for CRTC approval of the acquisition of control of CHUM.[48]

In late 2006 and early 2007, the Bureau conducted an extensive investigation under the *Competition Act* to determine whether CTVgm's proposed acquisition of CHUM was likely to lead to a substantial lessening or prevention of competition.[49] In February 2007, prior to the CRTC hearing on this matter, the Bureau completed its review of the proposed transaction and concluded that no enforcement action was warranted because the proposed acquisition was unlikely to result in a substantial lessening or prevention of competition.

The Bureau's analysis focussed primarily on whether the merger would adversely impact the sale of English language, conventional-channel television advertising in certain local markets.[50] The Bureau considered television advertising to be a distinct product relative to advertising through other media because of the superior reach and multiple sense experience (sight and sound) of television. In terms of geographic markets, the Bureau's investigation concentrated on the five local/regional markets where Citytv was present: Vancouver, Edmonton, Calgary, Winnipeg and Toronto/Ontario.

---

48 *News Release*: "Bell Globemedia Completes Takeover Bid for CHUM Limited" (September 12, 2006), online: http://www.bce.ca/en/news/releases/bg/2006/09/12/73856.html.

49 For a description of the Bureau's review, see *BGM/CHUM Technical Backgrounder* (November 28, 2007), Competition Bureau, online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02521e.html.

50 The Bureau also examined whether the merged entity would have market power in the acquisition of programming rights; however, it dismissed this potential concern in the absence of any supporting evidence.

Despite a post-merger market share that would have exceeded the MEGs' 35% safe harbour threshold in four of the five markets, the Bureau ruled out competition concerns by taking into consideration a number of factors, most notably that the merging parties did not directly compete at the higher end of the market. The status of CTV as a "must-buy" for television advertisers with high-reach objectives would not change as a result of the transaction. Whereas CTV was strong in the highest rated programs, CHUM was not and tended to meet a complementary need for advertisers. With respect to the acquisition of television advertising where exposure to top-rated shows was not critical (such that both CTV and CHUM were options), the Bureau found that there was sufficient effective remaining competition. The Bureau also concluded that the transaction would not facilitate coordinated behaviour among networks, particularly given industry characteristics such as programming variation and lack of pricing transparency.

2. CRTC review

In April 2007, following the Bureau's determination that it did not have competition concerns, the CRTC held a public hearing regarding the transfer of effective control of CHUM to CTVgm. In June 2007, the CRTC approved the transaction, but subject to the divestiture of the five Citytv stations.[51] Two commissioners dissented regarding the requirement to divest the Citytv stations. A comparison of the majority and dissenting opinions sheds light on the differing perspectives about the relative roles of the CRTC and Bureau regarding competition aspects of broadcasting mergers.

Majority Opinion

The majority decision to require divestiture of the Citytv stations reflects adherence to the CRTC's Common Ownership Policy. With respect to television, that policy generally permits ownership, by one party, of no more than one conventional television station in one language in a given market.[52] The CRTC re-iterated in this case that the policy is designed to ensure that a diversity of voices exists and that competition is maintained in each market.[53] The CRTC noted that exceptions have been granted to this policy by the CRTC in the past based on: (a) the need to sustain strong, locally focused programming for smaller communities located adjacent to large

---

51 *CTVglobemedia Inc. (formerly Bell Globemedia Inc.), on behalf of CHUM Limited* (June 8, 2007), Broadcasting Decision CRTC 2007-165, online: http://www.crtc.gc.ca/archive/ENG/Decisions/2007/db2007-165.htm. The five Citytv stations were CKVU-TV Vancouver; CKAL-TV Calgary; CKEM-TV Edmonton; CHMI-TV Portage La Prairie/Winnipeg; and CITY-TV and CITY-DT Toronto.

52 *Building on Success – A Policy Framework for Canadian Television* (June 11, 1999), Public Notice CRTC 1999-97, online: http://www.crtc.gc.ca/Archive/ENG/Notices/1999/PB99-97.htm; paragraph 17.

53 *Supra* note 51, paragraph 11.

urban centres and (b) the financial ability of the licensee to provide such local programming, and thus contribute to the diversity of voices, while maintaining a viable enterprise.[54]

Though CTVgm indicated that it would divest a number of channels across the country, it intended to acquire and retain the Citytv group of conventional television stations. This ultimately would have given CTVgm two English-language television stations in five markets,[55] placing it above the acceptable general ownership threshold. In determining that the proposed acquisition did not conform to either of the stated exceptions, the majority noted that none of the Citytv stations was located in smaller communities located adjacent to large urban centres, and, while facing some decline in revenues since 2003, it was not convinced that the decline was indicative of a failing position. The majority held that neither of the elements required for the exceptions were satisfied, nor did CTVgm provide any persuasive rationale as to why the CRTC should allow the acquisition of the Citytv stations on any other basis.[56] Of note, the majority opinion did not mention the Bureau's conclusion that the transaction did not raise competition concerns.

Dissenting Opinions

Commissioners Duncan and Langford criticized the majority's decision to compel divestiture of the Citytv stations as an overly rigid application of the CRTC's Common Ownership Policy. They pointed out that the language of the Common Ownership Policy contemplated exceptions, that there were significant efficiency benefits from the transaction and that the Bureau had not found competition concerns.

Regarding potential concerns about market concentration, Commissioner Duncan raised a number of mitigating considerations, including clearance by the Bureau:

> "As pointed out in CTVgm's reply of May 2, the Competition Bureau issued a no-action letter following its assessment of this application.
>
> While I do have a concern about concentration of market power with respect to program buying and advertising, I believe that this concern is more than offset by the fact that consumers would benefit from increased choice in the form of truly unique CityTV service and that at this point in time it is difficult, if not impossible to identify a buyer better positioned to take on the challenge. I am comforted by the Competition Bureau's assessment, the fact the Commission is able to

---

54 *Ibid*., at paragraph 12.

55 Vancouver/Victoria, Edmonton, Calgary, Portage La Prairie/Winnipeg, and Toronto/Hamilton.

56 *Supra* note 51 at paragraph 25.

> impose conditions of licence and the extensive conditions of licence proposed by CTVgm."[57]

Similarly, Commissioner Stuart Langford criticized the majority for, among other things, apparently second guessing the Bureau on competition matters:

> "[The majority decision] has raised the spectre of unfair competition despite the fact that after a thorough six-month long investigation, the Competition Bureau found no grounds for such a conclusion."[58]

The presence of these dissenting opinions reflects uncertainty within the CRTC itself regarding the extent to which the CRTC should ignore or sidestep the Bureau's voice in assessing competition aspects of broadcasting mergers.

D. New CRTC Policy on Cross-Media, Television and BDU Ownership

In the wake of recent consolidation in the media sector, the CRTC issued in January 2008 a new policy on cross-media, television and broadcast distribution undertaking ("BDU") ownership.[59] The policy contains three sets of rules designed to preserve the "diversity of voices" in the Canadian broadcasting system:

(i) The cross-media ownership policy provides that a person will be permitted to control undertakings in only two of three media types that serve the same market: a local radio station, a local television station or a local newspaper. Previously, the CRTC had no policies or regulations that limited the number of different types of media that could be owned or controlled by a single person in a market. This policy reflects the CRTC's view, consistent with its approach in the *Astral* case, that various forms of media may compete to reach audiences. The policy may also be perceived by some as the CRTC extending beyond its reach into the realm of newspapers, although enforcement of the policy would be based on jurisdiction in respect of renewal of radio or television licences.

(ii) The television ownership policy provides that the CRTC will not approve applications for transfers of effective control that would result in common ownership of television undertakings (conventional, specialty and pay) with a total national audience share (across all types) greater than 45%, will carefully examine applications that would result in a share between 35%-45%, and will expeditiously review applications resulting in a share less than 35%. It should be noted that these market

---

57 *Supra note 51*, Commissioner Duncan, dissenting.

58 *Supra note 51*, Commissioner Langford, dissenting.

59 *Regulatory Policy Diversity of Voices* (January 15, 2008), Broadcasting Public Notice CRTC 2008-4, online: http://www.crtc.gc.ca/archive/ENG/Notices/2008/pb2008-4.htm.

share thresholds for assessing "the impact on diversity of voices" are based expressly on the same thresholds that have been employed by the Competition Bureau to assess competitive effects in bank mergers.[60]

(iii) The BDU ownership policy provides that the CRTC will not approve applications for transfers of effective control of BDUs that would allow one person to control all BDUs in any given market.

These new policies regarding media consolidation point to an increasingly competition oriented approach to assessing the effects of concentration of media ownership. Perhaps this is not surprising given that the Chair of the CRTC was formerly the Commissioner under the *Competition Act*. Although the "diversity of voices" focus of the CRTC is not identical to the competitive effects focus of the Bureau, both analyses are rooted in common concerns about concentration of media ownership. In addition, the Bureau's traditional focus in media mergers on impacts on advertising rates[61] (largely to the exclusion of consideration of effects on product choice) may also partly account for the CRTC's willingness to play a prominent role in scrutinizing the effects of market concentration in the media sector.

IV. Conclusion

Recent developments regarding merger review in the transport and broadcasting sectors may suggest that the Bureau's pre-eminent position as champion of the public interest in competition is becoming less exclusive. The two sectors present interesting comparisons regarding how the Bureau's role is evolving in the face of industry-specific regulatory oversights.

The prospect of a public interest review under the new CTA merger review provisions presents a tangible limit on the Bureau's previously unfettered discretion to determine whether to challenge certain mergers in the transport sector before the Tribunal. This loss of Bureau independence can be lamented from a competition enforcement perspective.[62] At the same time, even where a public interest review occurs, it is less clear that the Bureau's functions in promoting the public interest in competition have been materially diminished. The Minister of Transport relies on the Bureau for identifying competition concerns (which are made public), proposing and negotiating competition remedies and ensuring compliance with such remedies. Although broader

---

60 *Ibid*., paragraphs 82-83.

61 See, for example, *Director of Investigation and Research v. Southam Inc.*, Reasons and Order, Competition Tribunal (June 2, 1992), online: http://www.ct-tc.gc.ca/CMFiles/CT-1990-001_0229a_38OVN-4142004-7168.pdf.

62 See M. Sanderson and M. Trebilcock, "Merger Review in Regulated Industries", *The Canadian Business Law Journal*, Volume 42, No.2 (September 2005), 157-197.

public interest concerns may ultimately trump an outcome based on the Bureau's competition analysis, it does not appear that the Bureau's status as the expert on competition matters is being called into question.

In the broadcasting sector, there has been no equivalent statutory carve-out of the Bureau's discretion to challenge mergers before the Tribunal. Indeed, the CRTC-Bureau Interface Document contemplates that the Bureau will retain its normal review functions in broadcasting mergers. That said, the Bureau's pre-eminent status as the expert on analysing market concentration issues may appear less absolute, given the CRTC's willingness to reach conclusions different from the Bureau on appropriate levels of market concentration. It remains to be seen whether this reflects the CRTC second-guessing the Bureau's competition analysis (as suggested by Commissioner Langford in dissent in *CTVgm/CHUM*) or mere adherence to the existing common ownership policies (the number of divestitures the CRTC required in the *Astral/Telemedia* and *CTVgm/CHUM* transactions was the number contemplated by such policies; no more, no less). Nonetheless, the CRTC's new policies on media cross-media ownership and television ownership suggest a clear willingness of the CRTC to inform its decisions regarding market concentration with principles imported from competition analysis. Although none of this need directly impact the Bureau's review of broadcasting mergers, there is no doubt that the Bureau is mindful of the CRTC's treatment of competition related issues arising from consolidation in the broadcasting sector. In that regard, the Bureau's 2006 submission regarding the CRTC's *Commercial Radio Policy* is indicative of the importance the Bureau attaches to defending its role as champion of the public interest in competition, including in respect of broadcasting mergers.