# GOODMANS UPDATE

**Competition Law • What You Need To Know • Fall/Winter 2002**


## Superior Propane: When Efficiencies Prevail But Overwhelm the System

**by William P. Rosenfeld**

When Superior Propane Inc. sought to merge with ICG Propane Inc. the Commissioner of the Competition Bureau sought to prevent that merger and took the matter to the Competition Tribunal. The Tribunal allowed the merger, relying on the efficiencies which the merger produced. The Commissioner appealed the Tribunal's judgment to the Court of Appeal, which returned the matter to the Tribunal for rehearing. When the Tribunal again allowed the merger, the Commissioner again appealed. A most unusual chain of events. The case has turned on one fascinating provision of the *Competition Act* which has given rise to unending discussion among lawyers and economists. S.96(1) of the Act elevates efficiencies derived from a merger to the point that if gains in efficiency "will be greater than, and will offset, the effects of any prevention or lessening of competition that will result" from a merger, then the merger must be allowed.

The history of the provision is dense, marking as it does an obvious departure from accepted standards in the United States where efficiency has long been treated as a minor factor in merger analysis. Nor is it easily understood, for there are real difficulties in determining what the arithmetic manifestation of the provisions might be. Initially it would appear necessary to quantify the efficiencies involved. Then s.96(1) would require the determination with precision, of the arithmetic sum of the "effects of any prevention or lessening of competition". Finally, the statute requires that an assessment be made of whether the gains in efficiency "will be greater than, and will offset" the anti-competitive effects of the merger. Somewhere in the process, qualitative concerns will inevitably arise.

A feast for experts and economists, but very hard material for mere mortals to digest. Even if efficiencies can be identified with some accuracy, the determination of the financial impact must be made prospectively. Corporate managements have been known to make claims for efficiencies in mergers which prove difficult to attain. The quantification of the effects of the prevention or lessening of competition is also far from easily achieved. Add to this rather daunting combination the need to determine whether the gains in efficiency will "be greater than, and will offset" the negative effects on competition. It might appear that a gain is "greater" when it is arithmetically larger, but that in order to "offset" a negative effect it might have to undergo qualitative analysis.

The Competition Bureau bravely approached these matters in its Merger Enforcement Guidelines. While these are no longer followed, they were the relevant guidance in the transaction under review. Not surprisingly, the Guidelines state that "The calculation of the likely anti-competitive effects of mergers is generally very difficult to make." But in grappling with the difficulty, the Guidelines suggested that efficiencies should be measured

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by the "total surplus standard" and that "when a dollar is transferred from a buyer to a seller, it cannot be determined a priori who is more deserving, or in whose hands it has a greater value".

When Superior sought to merge with ICG to form an essentially monopolistic position in propane distribution in Canada, the issues became far from academic. The Commissioner, in reviewing his position and in opposing the merger, wished to reconsider the Merger Enforcement Guidelines' preference for the total surplus standard. Indeed, that question became central to the initial determination by the Competition Tribunal.

Following the original hearing, the Competition Tribunal determined, in August 2000, that the merger of Superior and ICG would substantially prevent and lessen competition but that the merger was saved from divestiture by reason of the efficiencies resulting from the merger. Section 96 of the *Competition Act* received extensive consideration and the total surplus standard was adopted by the Tribunal as the appropriate measure of efficiencies.

Notwithstanding monopolistic elements of the merger, and in the face of significant costs to consumers, the projected efficiencies thus rescued the merger. Not surprisingly, the Commissioner appealed the determination of the Competition Tribunal to the Federal Court of Appeal. That Court set aside the decision of the Tribunal and remitted the matter to the Tribunal for re-determination. Central to the judgement of the Court of Appeal was its conclusion that the Tribunal had erred in law by adopting the "total surplus standard" and by failing to ensure that all of the objectives of the Act were considered in balancing the interests of producers and consumers.

It is the re-determination by the Tribunal, in which reasons for judgement were delivered on April 4, 2002, that one finds the unusual current situation. Effectively the Tribunal adamantly and persistently refused to accept the direction of the Court of Appeal to abandon the total surplus standard and, in so doing, the Tribunal confirmed its original judgement.

The Court of Appeal had directed the Tribunal to balance competing objectives in order to determine where the public interest lies in a given case and, in doing so, to exercise its discretion. The Tribunal simply refused to accept that it had a responsibility to be involved in any public interest consideration.

The Court of Appeal had further very clearly stated that the Tribunal ought to take a broad view in defining the effects to be considered:

> "[92] Thus, although section 96 requires the approval of an anti-competitive merger where the efficiencies generated are greater than, and offset, its anti-competitive effects, the ultimate preference for the objective of efficiency in no way restricts the countervailing "effects" to deadweight loss. Instead, the word, "effects" should be interpreted to include *all* the anti-competitive effects to which a merger found to fall within section 92 in fact gives rise, having regard to all of the statutory purposes set out in section 1.1."

The Tribunal was not persuaded. It rejected any suggestion that the merger provisions of the Act be driven by consumer interest. In what might, in another context, be characterized as insubordination, "The Tribunal concludes that adopting an approach that prevents efficiencies — enhancing mergers in all but rare circumstances must be wrong in law." One simply wonders where the Tribunal is provided the mandate to instruct the Court upon points of law.

In a similar vein, the Court cited with approval American commentators who referred positively to the U.S. position which articulates consumer protection as one of the primary objectives of anti-trust law.

Once again, the Tribunal felt it appropriate to instruct the Court on the proper interpretation of law:

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> "[159] In the Tribunal's view, the prevailing hostile approach to efficiencies in American antitrust law derives from the primary focus of that regime on consumer protection. The adoption of the American approach to efficiencies under the Act would, without question, introduce the hostility that characterizes that approach. As noted above, the amendments in 1986 to the merger provisions of the *Combines Investigation Act* were primarily focussed on economic efficiency."

The Tribunal, having firmly determined that it was the correct arbiter of law then proceeded to conclude that the Consumer Surplus Standard, "which requires that the full amount of the transfer be added to the dead weight lose in establishing effects of an anti-competitive merger, is so limiting that its adoption …would be contrary to the conclusion of the Court…and generally makes the efficiency defence unavailable under the Act, and so cannot be correct in law because it vitiates the statutory provision in subsection 96(1)."

Not fully content, the Tribunal proceeded again to castigate the Court of Appeal. This time, the issue is whether the efficiency defence should be available when mergers lead to structural monopolies. The Tribunal states quite simply:

> "if, as it appears, Le Tourneau J.A. is suggesting that the efficiency defence should not be available when mergers lead to structural monopolies then, with respect, he must be wrong."

And this was not the last instance in the Tribunal judgement where the direction of the Court of Appeal was not followed. Quite where this approach by the Tribunal may lead is, at best, unclear.

The dissenting opinion of Ms. Lloyd did provide a more focussed light on the standard to observe. In the "fact that the merger will likely result in a transfer estimated at $40.5 million per annum due to Superior's ability to exercise its market power in the form of higher prices …" and "given the appeal judgement and the language of the purpose clause of the Act" she concluded that the entire transfer of income from shareholders to consumers ought to be included in the trade-off analysis and therefore that efficiencies did not overcome the negative impact of the substantial lessening of competition.

After reading the dizzying recitation of economic doctrine contained in the majority judgement, a further observation of Ms. Lloyd is refreshing. She pointed out that "relying on estimates and calculations to arrive at what appears to be a precise number provides a false sense of security …". She recognized that the Court "accepts that the results derived from any merger analysis may be imprecise and subject to margin of error (but) a quality of analysis and learned judgement is therefore essential."

But Ms. Lloyd's was a dissenting view. The majority, having confirmed its own earlier position, has invited an agonizing prolongation of the process. In taking exception with the Court of Appeal, which over-ruled its earlier judgement, the Tribunal has also brought into question the effectiveness of the entire relationship between the Tribunal and the Courts.

**The Competition Tribunal's exception with the Court of Appeal has brought into question the effectiveness of the relationship between the Tribunal and the Courts.**

The Commissioner predictably has again appealed, reciting as grounds of appeal those respects in which the Tribunal has rejected the directions of the Court of Appeal.

The Commissioner (speech of May 9, 2002) has further confirmed the determination with which he will pursue the matter:

> "The Competition Bureau is appealing the April 4, 2002 decision because it raises fundamental questions about the purpose of the Competition Act and how it is interpreted by the Competition Tribunal.
>
> First, the Federal Court of Appeal stated in its decision that the Tribunal is charged with the responsibility of protecting the public interest, which it does by striking a balance among conflicting interests and objectives in a manner that respects the text and purposes of the

legislation. However, in its most recent decision involving the Superior Propane/ICG Propane merger, the Tribunal specifically rejected this view.

Second, we believe that the majority of the Tribunal misinterpreted the Federal Court of Appeal's direction with respect to the anti-competitive effects of this merger. We cannot accept the Tribunal's interpretation that efficiencies are the paramount objective of the mergers provisions of the Act. In our view, the Federal Court directed the Tribunal to consider other objectives listed in section 1.1 of the Act. An increase in prices to consumers, for example, is an important, relevant consideration.

A possible implication of the position taken by the Tribunal is that legislation might well be introduced to determine the standard by which efficiencies are, in future, to be gauged. It is obvious that those who might seek to merge to monopoly will, in Canada, meet a determined level of resistance from the Competition Bureau.

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# Bureau Issues Draft *Unreasonably Low Pricing Guidelines*

**by Daniel J. Gormley**

Sections 50(1)(b) and 50(1)(c) of the *Competition Act* provide that everyone engaged in a business who...

> (b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or
>
> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition, or eliminating a competitor, or designed to have that effect,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Predatory pricing laws are generally considered to be an essential component of a competition law regime. Particularly in markets characterized by high entry barriers, it is critical that dominant market participants not be allowed to sell products at below cost for the sake of driving or keeping out competitors. Yet Sections 50(1)(b) and 50(1)(c) have had a problematic history. Both the courts and the Competition Bureau have had difficulty in distinguishing between aggressively low pricing policies, which are presumably the result of intense competition, and predatory pricing, which can eliminate competition. To date, there has been only one conviction obtained by the Bureau under Section 50(1)(c).

In March, the Bureau issued for comment draft *Unreasonably Low Pricing Guidelines*. These Guidelines are intended to replace the *Predatory Pricing Enforcement Guidelines*, which were issued by the Bureau in 1992 in an attempt to ensure that the public understood when low pricing might result in an investigation under the *Competition Act*. One might view the issuance of the new guidelines as an implicit admission that the original guidelines failed to meet their stated purpose, although the Bureau asserts that it is developments in economic thinking and in the economy at large which have prompted the Bureau to articulate a new enforcement policy.

The 1992 guidelines evaluated predatory pricing using a two stage approach. The first stage evaluated an alleged predator's ability to exercise market power and recoup losses incurred as a result of a policy of predatory pricing. The second stage involved an assessment of whether the prices in question were below average variable cost, and therefore "unreasonably low". In the new guidelines, the Bureau declares that the ability to recoup losses will no longer be considered as the primary screening criteria.

Rather, it is properly to be considered as only one of many factors for determining whether or not anti-competitive pricing policies are in place.

In determining whether a seller's prices are "unreasonably low", meanwhile, the Bureau proposes to replace the average variable cost test used in the previous guidelines with the test of "avoidable cost". The Bureau defines "avoidable cost" as being all costs that could have been avoided by a firm had it chosen not to sell a given product.

Regrettably, the changes in the Bureau's approach do not simplify things for a businessperson who is uncertain as to whether his pricing policies will run afoul of Sections 50(1)(b) and 50(1)(c). The fundamental but complex question of whether an "unreasonably low" pricing policy will be considered by the Bureau or a court to have had the effect or tendency of substantially lessening competition, or the effect or tendency of eliminating a competitor, will remain. To answer this question, one must assess whether the pricing policy will create, preserve or enhance the seller's market power", i.e., the seller's ability to unilaterally influence price or other competitive factors. Assessing market power in turn involves determining the dimensions of the relevant market(s), and the market shares and levels of concentration in, and barriers to entry to, those markets.

These are all familiar concepts to competition lawyers. They are all dealt with in some detail in the Bureau's Merger Enforcement Guidelines. The concepts are decidedly less familiar to businesspeople, and it is unlikely that the new guidelines will make them more so.

In fact, the new guidelines (presumably unintentionally) once again highlight the difficulty of applying complex economic concepts in a criminal law context. Ironically, the Bureau has on several occasions (most recently in a speech delivered by a Deputy Commissioner of Competition in May of this year) explicitly acknowledged this difficulty with respect to Section 45, the *Competition Act*'s conspiracy provisions. Those provisions make illegal agreements which lessen competition "unduly". Section 45's broad language requires the same analysis of relevant market(s), market power, barriers to entry, etc., that is required under Sections 50(1)(b) and 50(1)(c). The Bureau has publicly acknowledged that the inability of businesspeople and the lawyers who advise them to determine quickly and definitively whether a given course of conduct will or will not run afoul of Section 45 has probably deterred entry into arrangements that cause no harm to consumers, or that are, in fact, pro-competitive. At the same time, the difficulty of applying a complex market-effects test in a criminal context has resulted in there being few convictions in contested conspiracy cases. The Bureau is therefore proposing that the *Competition Act* be amended to deal with most putatively anti-competitive agreements in a civil context, leaving only hard core cartels to be dealt with criminally.

The Bureau's analysis of the problems associated with Section 45 can and should be applied to Sections 50(1)(b) and 50(1)(c). Unreasonably low pricing should be dealt with under the *Competition Act*'s civil provisions. Doing so will make it more likely that harmful pricing conduct will actually be acted upon.

# Who's On First?

**by Robert Malcolmson and Michael Koch**

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## Introduction

A recent jurisdictional tussle pitted the Bureau of Competition Policy's general mandate under the *Competition Act* against the specific mandate of the Canadian Radio-television and Telecommunications Commission ("CRTC" or the "Commission") under the *Broadcasting Act*.

The Federal Court of Canada had been asked to rule on the respective jurisdictions of the CRTC, and the Competition Tribunal in the context of a proposed sale of media assets. The matter was recently settled by way of a consent order that saw the purchaser agree to the divestiture of certain assets. If the matter had not been resolved consensually, the Federal Court's decision could well have had far reaching implications for future mergers of media

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companies that are regulated both under the Broadcasting Act and the Competition Act.

The dispute began on December 21, 2001 when the Commissioner of Competition Policy (the "Commissioner") filed an Application with the Competition Tribunal seeking an order prohibiting Astral Media Inc. ("Astral") from acquiring certain radio stations owned by Telemedia Radio Inc. The request for an order of prohibition flowed from the Commissioner's determination that the proposed transaction would result in a substantial lessening of competition in certain French-language radio markets in the Province of Québec. The Commissioner concluded that the radio advertising market in question was a separate and distinct market from other forms of advertising media such as print (including newspapers, periodicals and outdoor advertising) and television. Consequently, these other forms of media were not viewed as effective substitutes.

In response to the Commissioner's request for an order of prohibition from the Competition Tribunal, Astral Media asked the Federal Court of Canada to issue a declaration stating that the *Competition Act* did not apply to the proposed transaction and that the Commissioner did not have jurisdiction under the Act to conduct an inquiry in respect of this transaction.

Five months after the Commissioner sought to block the merger, the CRTC issued Decision 2002-90 approving Astral's acquisition of the Telemedia radio stations. In approving the transaction, the Commission determined that the acquisition was in furtherance of the statutory objectives of the *Broadcasting Act*, consistent with the Commission's Commercial Radio Policy and would "improve the competitive position of private French-language radio in Québec" (CRTC Decision 2002-90, paragraph 3).

The CRTC's Decision stands in stark contrast to the conclusions of the Commissioner of Competition Policy. In its Decision, the CRTC took the view that the radio advertising market is not a separate and distinct market but rather a subset of a larger advertising market that includes television and print media. To this end, the CRTC accepted evidence led by Astral that in recent years both AM and FM radio stations in Québec have lost considerable market share to television and daily and weekly newspapers. Second, the Commission accepted Astral's argument that a greater concentration of radio and the establishment of strong radio networks with Québec-wide coverage were essential for radio to compete with other highly concentrated media mega-companies in the Province of Québec, notably Québecor/Vidéotron. Third, the Commission noted in its Decision that save and except for one limited exception, Astral's proposed acquisition was consistent with the Commission's Commercial Radio Policy which permits an entity to own or control as many as two AM and two FM stations in a single language in markets with eight commercial radio stations or more, and to own or control as many as three stations (with a maximum of two stations in any one frequency band), in markets with fewer than eight commercial radio stations.

In its Decision, the Commission held that the various daily newspaper, television and other media operating in each of the markets in question, while not "perfect substitutes" for radio, did serve as "effective alternatives" and that the evidence demonstrated that television offered local advertisers inventories and costs that are competitive with those offered by radio in certain of the markets in question. Moreover, the Commission made these findings of fact while also recognizing that the transaction "will position Astral Media as the largest player in Quebec's radio industry, whether measured by the number of radio stations owned, audience share or revenues".

Traditionally, the CRTC and the Competition Bureau have peacefully co-existed by asserting parallel jurisdiction with respect to merger reviews. Both bodies have taken the view that any transaction must comply with the *Competition Act* and the *Broadcasting Act*, as administered by the Commissioner of Competition Policy and the CRTC respectively. Based on the CRTC's findings and the findings of the Commissioner of Competition Policy following its merger review, the concept of parallel jurisdiction threatened to be tested to its fullest extent. Specifically, the Astral case raised some key questions:

1. Was there a true operational conflict between the exercise of the CRTC's jurisdiction under the *Broadcasting Act* and the exercise of jurisdiction by the Commissioner of Competition Policy pursuant to the *Competition Act*? If so, how will the Federal Court of Canada resolve this operational conflict?

2. In a proceeding before the Competition Tribunal, was Astral entitled to avail itself of the "regulated conduct" defence by relying on the CRTC's findings in its Decision?

3. Did the CRTC exceed its jurisdiction under the *Broadcasting Act* by making findings of fact and applying economic tests typically associated with merger reviews under the *Competition Act*?

## Operational Conflict?

Traditionally, the Courts have found that an operational conflict exists where two administrative tribunals reach decisions that are truly in conflict, meaning compliance with one necessitates the violation of the other. In this particular case, the CRTC decided that the acquisition by Astral of the Telemedia radio stations was in furtherance of the statutory objectives of the *Broadcasting Act* and as such could proceed. By way of contrast, the Commissioner of Competition Policy referred the transaction to the Competition Tribunal on the basis that if it were to proceed, it would result in a substantial lessening of competition in the relevant market. The Court might have found that there is no true operational conflict. Rather, the Court may have found the Astral acquisition, while permissible under the *Broadcasting Act*, simply was not compliant with the provisions of the *Competition Act*. As a result, Astral would have been required as it ultimately did, to address the Commissioner of Competition Policy's concerns (i.e. through conditions such as the divestiture of certain stations in certain markets) in order to be able to proceed with the transaction. A restructuring of the transaction of course necessitates another round of regulatory filings and approvals by the CRTC pursuant to the *Broadcasting Act* to deal with regulated assets being reallocated or otherwise spun-off.

If the actions of the Commissioner of Competition Policy and the CRTC were viewed as true operational conflicts, the question would have been how does the conflict get resolved? In the leading case of *British Columbia Telephone Co. v. Shaw Cable Systems (BC) Ltd.* the Supreme Court of Canada held that the court should employ a pragmatic and functional approach and decide in light of the policy schemes surrounding each of the administrative tribunals and the nature of the conflicting decisions which the legislature would have intended to take precedence.

Factors taken into account include the legislative purpose behind the establishment of each administrative tribunal, the extent to which an administrative tribunal's decision is central to the purpose of that tribunal and the degree to which an administrative tribunal in reaching a decision is fulfilling a policy-making or policy implementation role. It is this last criterion which might very well have been determinative in the case at hand. The Courts have consistently recognized the CRTC's broad policy-making role pursuant to the *Broadcasting Act*. In the Astral case, the high level of curial deference traditionally accorded to the CRTC would have been tested.

## Regulated Conduct

The regulated conduct defence generally provides that activity specifically required or authorized pursuant to a valid scheme of regulation is deemed to be in the public interest. In its submissions to the Federal Court of Canada, Astral Media asserted that the regulated conduct defence or exemption applied to its acquisition of the Telemedia radio stations. By way of contrast, the Commissioner of Competition Policy took the position that the regulated conduct defence or exemption was inapplicable. It would certainly appear that the applicable criteria established by the Supreme Court of Canada in *R. v. Canadian Breweries Ltd.* and *Canada (A.G.) v. Law Society (British Columbia)* to establish the regulated conduct defence were present. To

**The Astral case raised some key questions:**

- **Was there a conflict between the CRTC's exercise of jurisdiction and that of the Commissioner of Competition Policy?**
- **Was Astral entitled to use the "regulated conduct" defence?**
- **Did the CRTC exceed its jurisdiction under the *Broadcasting Act*?**

summarize, in order for the regulated conduct defence to apply the following key factors must be present:

1. An industry must be subject to regulation pursuant to validly enacted legislation.

2. The defence is limited to those activities or types of conduct specifically subject to regulation.

3. It is not enough for the regulatory body merely to possess the authority to control the activity or conduct in question, the regulatory authority must be exercised in order for the defence to apply.

**Since the *Broadcasting Act* was first introduced in 1968, the CRTC has imposed a significant degree of competitive regulation on the Canadian broadcasting system.**

Each of these factors was present in the Astral case. The radio stations acquired by Astral were all licensed radio programming undertakings pursuant to the *Broadcasting Act* and ownership transfers require the CRTC's prior approval pursuant to the Radio Regulations made under the *Broadcasting Act*. Finally, in this case the CRTC rendered a Decision approving the acquisition. Accordingly, it would appear that all of the constituent elements of the regulated conduct defence were operative.

Prior to Astral's settlement with the Commissioner, The Federal Court of Canada had an opportunity to clarify the scope of the regulated conduct defence in the Astral case. Uncertainty has traditionally surrounded the scope of the regulated conduct defence. Most of the cases involving the application of the regulated conduct defence have involved a potential conflict between the Federal competition law and a Provincial regulatory regime. Moreover, most of the cases have dealt with a potential conflict between the criminal provisions of the *Competition Act* and specialized regulation. Accordingly, criminal justice concerns have weighed heavily in some Courts' decisions to restrict the scope of the *Competition Act*.

None of the above factors were present in Astral. In Astral, we had two Federal laws and hence no constitutional issue. The provisions of the *Competition Act* in issue were the civil provisions surrounding merger reviews rather than the criminal components of the *Competition Act*. Accordingly there was no criminal justice overhang in Astral. As a result, the Court would have had an opportunity to apply the regulated conduct defence in its purest form.

## Did The CRTC Exceed Its Jurisdiction Under The *Broadcasting Act*?

This is another interesting question raised by Astral. Pursuant to the *Broadcasting Act* the Commission has the broad jurisdiction to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policies set out in subsection 3(1)". Section 3 of the *Broadcasting Act* contains an extensive list of statutory objectives described therein as the "Broadcasting Policy" for Canada. This policy generally pertains to the development of a broadcasting system that is effectively owned and controlled by Canadians, that promotes the primacy of Canadian programming and ensures a diversity of voices in both official languages. While this statutory mandate does not explicitly empower it to regulate competition issues *per se*, the CRTC has, since the legislation was first introduced in 1968, imposed a significant degree of competitive regulation on the Canadian broadcasting system through policies on ownership concentration, restrictions on cross-media ownership and most recently in policing anti-competitive behaviour between regulated entities pursuant to an overall prohibition on undue preference. Moreover, the Director of Competition Policy has traditionally acknowledged that the CRTC's merger review process necessarily involves competition issues such as the impact of mergers on advertising markets.

Consequently, it could be that the Court would have concluded that the CRTC's assessment of the competitive state of the Quebec radio market was nothing more than a necessary adjunct to the exercise of its jurisdiction under the *Broadcasting Act*. However, a contrary view can also be taken. For example, in Astral, the Commission made a determination that radio was part of a larger advertising market and that other components of that larger market functioned as effective substitutes for any lessening of competition that would result from the position Astral would occupy in the market. These conclusions led in part to the Commission's decision to approve the merger.

With the settlement of this case, we will have to wait and see how the Federal Court addresses this issue of jurisdiction.

# Bill C-23 Receives Royal Assent

**by Daniel J. Gormley**

On June 4, 2002, Bill C-23, an act to amend the *Competition Act* and the *Competition Tribunal Act*, became law. The Bill introduces some very significant changes to Canadian competition law, some of which are highlighted below:

### Private Right of Access to Competition Tribunal

Until now, only the Commissioner of Competition has been permitted to bring applications before the Competition Tribunal in respect of reviewable practices such as mergers, tied selling, refusals to deal, etc. As a result of Bill C-23, private individuals will have the right to seek relief directly from the Competition Tribunal. The right is quite limited insofar as:

- it will only be available with respect to the practices described in Sections 75 and 77 of the *Competition Act* (i.e., exclusive dealing, tied selling, market restriction and refusal to deal and not, significantly, mergers);
- a prospective applicant will be required, as a first step, to obtain "leave" of the Tribunal to bring a case;
- in granting leave, the Tribunal must believe that the applicant's business is directly and substantially affected by the relevant anti-competitive practice; and
- the Tribunal will not grant leave if the Commissioner of Competition has started an inquiry or settled the matter.

The Competition Tribunal will thus act as the "gatekeeper" and try to weed out cases which have no merit, or which have been commenced for other than bona fide reasons.

### Expanded Availability of Injunctive Relief

The circumstances under which the Commissioner can obtain an interim order prohibiting anti-competitive conduct in advance of obtaining a final order on the merits have until now been quite limited. The new Section 103.3(2) now specifies the circumstances under which an interim order will be available to prevent the continuation of certain types of conduct, such as refusal to deal, consignment selling, exclusive dealing, tied selling, market restriction and abuse of dominant position. The Commissioner will be able to obtain the interim order if:

- injury to competition will occur that cannot adequately be remedied by the Tribunal through a final order;
- a person is likely to be eliminated as a competitor;
- a person is likely to suffer:
  - a significant loss of market share;
  - a significant loss of revenue; or
  - other harm that cannot be adequately remedied by the Tribunal.

An interim order will be effective for ten days. The Commissioner will have the right to apply, on 48 hours notice to the affected parties, to extend the interim order for two periods of up to 35 days each. A person against whom an interim order is made will have ten days to apply to the Tribunal to have the order set aside or varied.

### Deceptive Notice of Winning a Prize

Bill C-23's "deceptive notice of winning a prize" provision creates a new criminal offence that

**Bill C-23 gives private individuals the right to seek relief from the Competition Bureau. Previously, only the Commissioner of Competition was permitted to bring applications before the Competition Bureau.**

prohibits the sending of a notice that gives the recipient the general impression that he or she has won a "prize" and gives the recipient the option to pay money or incur a cost in order to obtain the prize.

**Amendments made enable the Commissioner to ask for assistance from foreign states in obtaining and forwarding evidence located abroad in non-competition matters.**

### Mutual Legal Assistance in Civil Competition Matters

The amendments create a new framework to facilitate co-operation between the world's competition authorities. These provisions will enable the Commissioner to request formal assistance from foreign states in obtaining and transmitting evidence located abroad in non-criminal competition matters such as abuse of dominant position.

These are just some of the more significant amendments to the *Competition Act* made by Bill C-23. For more information contact any member of the Goodmans Competition Law Group.

*If you have any comments about Goodmans Competition Law Update or wish to discuss industry-related issues or recent developments and trends, please contact a member of our Competition Law Group. The group advises a wide variety of clients including those in the private and public sectors on competition law matters, with a particular emphasis on mergers and trade practices.*

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