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## CRTC's Blow to Certainty

By Anthony Davis

With its decision last month to deny media giant BCE's friendly, \$3-billion takeover of Astral Media, the Canadian Radio-television and Telecommunications Commission (CRTC) delivered a right uppercut to future domestic broadcasting sector deals, catching everyone off guard. Now, clearing their heads after that sharp blow, lawyers practising in the telecom sector are puzzling over just what the ruling means for clients.

BCE is Canada's largest telecom company. On the content side, its holdings include CTV and a host of specialty channels. On the infrastructure side, it owns the dominant Bell brand. Had the Astral deal gone through, BCE would have controlled between 35 and 45 per cent of the total Canadian television audience, according to an analysis by Fasken Martineau DuMoulin LLP.

In the end, the CRTC ruled that BCE had failed to prove the Astral takeover would provide "significant and unequivocal benefits to the Canadian broadcasting system and to Canadians sufficient to outweigh the concerns related to competition, ownership concentration in television and radio, vertical integration and exercise of market power."

For Michael Koch, partner at Goodmans LLP in Toronto, the CRTC ruling added to a slew of recent federal regulatory decisions concerning deals -- including blocking the initial takeover attempt of Progress Energy by Malaysia's state-owned Petronas -- that could discourage domestic and foreign investment in not only the telecom industry, but other sectors as well. "I think Canada's economy is attractive, but markets don't like unpredictability," says Koch, who served as counsel with the CRTC in the 1990s and helped establish the Canadian telecommunications industry's competitive framework.

The BCE's decision cuts across so large a swath across the sector that finding lawyers able to speak freely on the ruling (without irking affected clients) proved a challenge. Nevertheless it's clear for lawyers that, under new Chair Jean-Pierre Blais, the CRTC has signaled that "public interests" and consumer protection against monopolization will underscore its future approach to rulings, especially on the broadcast side of its mandate.

Many factors affect investment in Canada's broadcast sector, says Koch: market size, penetration, foreign-ownership restrictions, availability of spectrum, and of course the increasingly irksome presence of content streaming into Canadian computers and smart phones from unregulated providers such as Netflix. All of the above can have an impact on expansion decisions, as will the shockwave emanating from the BCE decision.

"It does make it more challenging for lawyers advising clients in this space as to what the regulator is thinking," agrees Stephen Zolf, a partner at Heenan Blaikie LLP in Toronto. Zolf practises regulatory and business law in broadcasting and telecommunications and has argued transfer of ownership and control applications before the CRTC.

He's being careful about the assumption held by industry watchers that the BCE ruling foretells a more restrictive environment for foreign media companies entering the Canadian market, or domestic ones expanding through acquisitions. "That may be the message, but I would submit that one decision does not make a statistically relevant sample size. Moreover, a regulator has discretion depending on the facts in each case before it to make a decision. ... So much depends on who is before it."

Zolf adds that it's too early to view the BCE decision as a welcome mat for smaller broadcasters or start-ups hoping the CRTC will help break up the telecommunications oligopoly held by BCE, Rogers, Quebecor and Telus.

As for the spin about CRTC now being more consumer driven? "We have to be careful about saying it's the new sheriff in town who is all about consumers," says Zolf. "You can try and read between those tea leaves, but I wouldn't definitively conclude that."

*Anthony Davis is a legal-affairs writer and regular contributor to Lexpert.*