LAW SOCIETY OF UPPER CANADA

15th BIENNIAL NATIONAL CONFERENCE

NEW DEVELOPMENTS IN COMMUNICATIONS LAW AND POLICY

April 23-24, 2010

DOUBLE OR TRIPLE JEOPARDY: SATISFYING THREE POTENTIAL MASTERS IN OWNERSHIP AND MERGER REVIEWS

Monique McAlister

Goodmans LLP

TABLE OF CONTENTS

DOUBLE OR TRIPLE JEOPARDY: SATISFYING THREE POTENTIAL MASTERS IN OWNERSHIP AND MERGER REVIEWS

by Monique McAlister*
Goodmans LLP

The recent controversy over the conflicting ownership reviews of Globalive conducted by Industry Canada and the CRTC has likely influenced the federal government's future review of the foreign ownership restrictions for satellite undertakings, telecommunications common carriers and possibly, broadcasting undertakings.[1] *It has also cast a sharp light on the conflicts that can arise when two or more authorities with parallel jurisdiction over a regulated company issue conflicting decisions affecting the same matter.*

A. INTRODUCTION

Under Canadian law, more than one government agency may have jurisdiction to review the ownership or merger of communications undertakings: the Canadian Radio-television and Telecommunications Commission (the "CRTC" or the "Commission"), the Ministry of Industry ("Industry Canada"), the Commissioner of Competition (the "Competition Bureau" or the "Bureau") and potentially, the Minister of Heritage

---

* The views expressed in this paper are those of the author and do not necessarily reflect the views of Goodmans LLP or any of its clients. I would like to thank my colleagues, Michael Koch and Rob Malcolmson, for their thoughtful suggestions and articling student, Ryan Hornby, for his research assistance.

[1] The indications from the Government that it will be reviewing the foreign ownership restrictions are described briefly in Part E of this paper. This paper will not otherwise comment on or address the review of the foreign ownership rules.

(“Heritage Canada”). These dual-track, and sometimes, even triple-track, reviews can give rise to significant issues related to procedure, fairness and potential inconsistency for the companies subject to the reviews.

Part B of this paper provides some background on the legal concept of parallel jurisdiction and summarizes how the courts have dealt with conflicting decisions arising from regulators with parallel jurisdiction. Part C describes the different types of ownership reviews that may be conducted for broadcasting and telecommunications undertakings. Part D describes cases in the communications sphere where parallel reviews of ownership transactions by two or more regulatory authorities have co-existed and where they have resulted in inconsistent, and sometimes diametrically opposing, decisions. Finally, Part E provides a brief discussion of the potential for change in multiple ownership reviews of broadcasting and telecommunications companies.

This paper will not critique the validity of the ownership reviews described herein, but will examine the issues raised and the impact of having a fragmented process with reviews of a single transaction conducted by two or even three regulatory bodies. There are numerous concerns raised by these multiple reviews, with the most obvious impacts associated with the economic cost of multiple compliance and the opportunity costs resulting from transaction delays. However, multiple ownership reviews also give rise to several legal issues regarding jurisdiction, procedural fairness and how a regulated entity can reconcile and comply with conflicting regulatory decisions.

B. PARALLEL TRACKS: THE LEGAL REGIME

1. Defining Parallel Jurisdiction

Parallel jurisdiction exists where multiple decision makers are asserting authority over a single case. Conflicts between administrative tribunals, however, do not necessarily arise in every case where different tribunals share parallel jurisdiction over a single matter.[2]

As recognized by the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*[3], situations may arise where tribunals, even specialized tribunals, have "concurrent" or "overlapping" authority.[4] The Supreme Court defined "concurrent jurisdiction" as a situation where an issue may be brought before either of the concurrent tribunals[5] and "overlapping authority" as a scenario where one authority may take jurisdiction over an issue that falls within the context of another tribunal but is outside its traditional scope.[6] These terms were defined in the context of the labour relations regime and in a situation where an issue is to be heard by only one decision maker.

---

[2] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General),* [2004] 2 S.C.R 185.

[3] *Ibid.*

[4] *Ibid.* at paras. 8-10.

[5] *Ibid.*

[6] *Ibid.*

In contrast to concurrent and overlapping jurisdiction, as noted above, parallel jurisdiction exists where multiple decision makers are asserting authority over a single case. Similar to concurrent and overlapping jurisdiction, although it may create regulatory complexities, parallel jurisdiction does not necessarily create unmanageable conflicts and typically, the parallel regulatory regimes operate harmoniously.[7] However, when the regulatory bodies with parallel jurisdictions render conflicting decisions, it places the regulated party in an untenable situation – as compliance with one order would necessitate violation of the other. That is where the courts must step in to resolve the conflict.

2. Existence of an Operational Conflict

Typically, where there is a conflict or inconsistency between a federal law and a provincial law, the federal law takes paramountcy to the extent of the inconsistency.[8] However, the rules of federal paramountcy have no application where there is conflicting or inconsistent legislation passed by the same level of government, although the courts have adapted a form of this principle in adjudicating operational conflicts that result from two federal tribunals sharing parallel jurisdiction.

When faced with the premise of potentially conflicting jurisdiction between two federal regulatory regimes, as in the case with conflicting statutory provisions, the courts will

---

[7] Ruth Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law Inc., 2007) at 304; David Mullan, *Administrative Law* (Toronto: Irwin Law Inc., 2001) at 88.

[8] Peter Hogg, *Constitutional Law of Canada*, 5th Ed supplemented, loose-leaf (Toronto: Thomson Carswell, 2007) at 16-2.

attempt to interpret provisions in a manner to avoid conflict.[9] It is only where the decisions are truly in "operational conflict" that the courts will attempt to reconcile the differences, applying the principle of "presumption of legislative coherence", which provides that an interpretation which fosters inconsistency or repugnancy between provisions in different statutes is to be avoided.

This principle is illustrated in the leading Supreme Court of Canada case, *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd*.[10] The jurisdictional dispute in *BCTel* first arose when a union grievance was filed after Shaw employees installed cables on some of BCTel's supporting structures. An arbitration decision then found that BCTel's union had the exclusive authority over any work done with regard to BCTel support structures. Following this decision, BCTel provided the CRTC with a revised support structure agreement indicating it would no longer allow cable companies to install cables on its support structures. In response, Shaw applied to the CRTC for a decision allowing it to continue with installations. The CRTC ruled in favour of Shaw by directing BCTel to continue to allow the installations on its supporting structures. On appeal to the Federal Court of Appeal, the CRTC decision was set aside after the court found that BCTel could not comply with the decisions of both the labour arbitrator and the CRTC and ultimately determined that defining the scope of work within a collective agreement was an issue of labour relations and beyond the jurisdiction of the CRTC. That decision was eventually overruled by the Supreme Court of Canada, where a

---

[9] *Ibid.*

[10] *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, hereinafter referred to as *BCTel*.

majority of that court held that the CRTC decision should take precedence due to its policy-making mandate:

> where two equally valid decisions of administrative tribunals are in operational conflict, precedence must be given to the decision which represents an expression of one tribunal's policy-making function in circumstances where the other decision is a purely adjudicative decision concerning the interpretation of a private contract.[11]

In *BCTel*, the Supreme Court describes the role of the courts where an operational conflict arises from decisions reached by two tribunals with parallel jurisdiction as follows:

> In my view, the constitutional doctrine of paramountcy can be adapted to the administrative law context and applied in situations where administrative tribunals reach operationally conflicting decisions. Thus, just as the courts can declare inoperative provincial legislation, validly enacted and within provincial jurisdiction, to the extent that such legislation conflicts with equally valid federal legislation, <u>the courts should be able to declare inoperative decisions or orders, validly reached, of administrative tribunals to the extent that they are in operational conflict with decisions or orders, also validly reached, of other administrative tribunals</u>. Such judicial action is, in my view, not only necessary, but consistent with legislative intent. ...
>
> <u>Thus, where a legislature enacts two statutes whose provisions appear to be in operational conflict (i.e., where compliance with one necessitates violation of the other), the courts will attempt to interpret the statutes so as to eliminate the operational conflict.</u> Similarly, it is my view that <u>where the legislature creates two administrative tribunals which reach decisions that are in operational conflict, the "presumption of legislative coherence" requires the courts to abandon policies of curial deference and attempt to reconcile the conflict.</u>[12] (emphasis added)

---

[11] *Ibid.*, at para. 60.

[12] *Ibid.*, at paras. 51-52.

As noted in the above excerpt, it is only when an operational conflict arises that parallel or any type of shared jurisdiction becomes unworkable. In this event, the courts must reconcile the conflict and identify which authority will prevail.

In *BCTel,* Supreme Court Justice L'Heureux-Dubé defined an "operational conflict" as occurring where compliance with the decision of one regulatory body necessitates violation of the decision of the other regulatory body:

> The most serious type of conflict arises where administrative tribunals reach operationally irreconcilable decisions (hereinafter referred to as an "operational conflict"). This will occur where compliance with the decision of one tribunal necessitates violation of the other tribunal's decision. Such a result places a person in an intolerable situation. He or she has no choice but to ignore one of the operationally conflicting orders. In such circumstances, it is, in my view, the responsibility of the courts, exercising their inherent jurisdiction, to determine which of the two conflicting decisions should take precedence.[13] (emphasis added)

Then Supreme Court Justice McLachlin (now Chief Justice), developed a somewhat broader definition of operational conflict in her concurring reasons of this same case, as existing whenever two decisions create a conflict which makes it impossible for a person to simultaneously fulfil its legal obligations as defined by both regulators:

> Although in substantial agreement with the reasons of Justice L'Heureux-Dubé, I differ from her on one point. She suggests that a court may intervene to determine priorities between competing orders of different administrative tribunals, only where the result is that the claimant would be in the position of breaching a mandatory order. I would define operational conflict more broadly. I see operational conflict existing whenever two decisions create a conflict which makes it impossible for a claimant to fulfil simultaneously its legal obligations, as defined by the respective boards. Claimants should be able to turn to the courts for

[13] *Ibid.* at para. 47.

> clarification whenever conflicting decisions impose different legal obligations.[14] (emphasis added)

Under this broader definition of operational conflict, compliance with one order does not necessarily have to violate the other order, but it must be impossible for the person to fulfil its legal obligations under both orders.

Where a potential conflict exists between two administrative schemes under federal jurisdiction, the court does not determine or presuppose authority unless a true operational conflict is found. Under such circumstances, the courts will use a "pragmatic and functional approach" to determine which of the regulatory schemes and tribunals the legislature intended to maintain authority.[15]

3. Determination of Authority: Pragmatic and Functional Approach

In *BCTel*, Madame Justice L'Heureux-Dubé identified a non-exhaustive list of three factors that must be considered in the "pragmatic and functional" approach to resolving operational conflicts between two regulatory bodies:

1. What is the legislative purpose of the regulatory or administrative scheme?

2. To what extent is the decision central to the purpose of the tribunal? The more central the decision, the more reason for it to prevail.

---

[14] *Ibid.* at para. 78.

[15] *Ibid.*; Mullan, *supra* note 7 at 89.

3. To what degree is the decision fulfilling a policy making or implementation role? The greater the policy significance, the greater deference owed to that tribunal.[16]

Although not mentioned by the court in *BCTel*, there are other common law principles of statutory interpretation that may be used to resolve conflicts between statutes and the resulting jurisdictional questions. One such doctrine is that of "implied exceptions" (*specialia generalibus non derogant)*, which provides that in the event of conflict, specific provisions will take priority over general provisions.[17] This doctrine may be useful to identity the intent of the legislature within the above factors identified by the court. For instance, courts have used the implied exceptions doctrine with regard to statutes conflicting with human rights legislation in the provincial sphere and have determined that the specific nature of human rights legislation provides human rights commissions with authority over other regulatory schemes in many instances.[18] The implied exceptions doctrine is also the basis for the regulated conduct defence (described below), which generally provides for immunity from the general provisions of the *Competition Act* where the entity in question is directly regulated by another statute of specific application.

Each of the tests and doctrines identified above are helpful to determine how the courts may evaluate parallel jurisdiction and a conflicting decision between two tribunals on the same issue. To date, however, the courts have not ruled on an operational conflict

---

[16] *BCTel, supra* note 10, at paras. 55-59.

[17] Sullivan, *supra* note 7, at 310.

[18] *Ibid.* at 313; Mullan, *supra* note 7 at 88.

resulting from ownership reviews by two regulatory bodies in the broadcasting or telecommunications sphere. Thus, it remains to be seen how such a conflict would be addressed by the courts or by legislation and which of the regulatory schemes described in Part C of this paper would prevail.

4. The Regulated Conduct Defence

A potential but limited exception to compliance with a merger review by the Competition Bureau (as described below) and that of another regulatory body is the common law doctrine of regulated conduct.[19]

The regulated conduct defence provides for immunity from enforcement of certain general provisions of the *Competition Act* when the activities in question are directly authorized or regulated by another valid statute,[20] as such activity is deemed to be in the public interest. The doctrine is designed to protect from conflicting legislation. If a statute explicitly allows and regulates an activity, a secondary statute of general application should not prevent the activity.

The Supreme Court of Canada has established that in order for the regulated conduct defence to apply the following key factors must be present:[21]

---

[19] The regulated conduct doctrine is sometimes referred to as the regulated conduct defence but may also be described as the regulated conduct exemption or exclusion.

[20] Mark Katz and Charles Tingley, "The 'Regulated Conduct Defence' in Canada" (2006) Vol. XI, No. 2 Competition Law (Federated Press) at 730.

[21] *R. v. Canadian Breweries Ltd* [1960] O.R. 601 and *Canada (A.G.) v. Law Society (British Columbia)* [1982] 2 S.C.R. 307. For the most recent pronouncement of the Supreme Court of Canada on the regulated conduct defence, see *Garland v. Consumers Gas Co*., [2004] 1 S.C.R. 629.

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.

However, the applicability of the regulated conduct defence in the context of a federal regulatory regime is questionable, as is its applicability in the context of reviewable transactions under the *Competition Act*.

In its Technical Bulletin issued in June of 2006, the Competition Bureau recognized that the regulated conduct defence may be applicable in limited circumstances, but also recognized that the legal jurisprudence is insufficient to provide clear direction.[22] The Bureau indicated that with the ordinary statutory interpretive approach, including the assumption that the legislation is coherent and that dual compliance is possible, it means that the application of the regulated conduct doctrine is limited.[23] Moreover, the Bureau indicated that it will not necessarily approach the application of the reviewable matters provisions in the *Competition Act* (including merger reviews) to conduct regulated by another law in the same manner as it will approach the application of the criminal provisions of the *Competition Act* to such conduct.

---

[22] Competition Bureau, Technical Bulletin, "Technical Bulletin on "Regulated" Conduct", June 29, 2006 (online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02141.html).

[23] *Ibid.*

As discussed in the context of the Astral-Télémedia merger review set out below, the courts have yet to rule on the applicability of the regulated conduct defence to conflicting merger reviews issued by the Competition Bureau and the CRTC.

C. ANSWERING TO TWO OR THREE MASTERS: THE REGULATORY REGIMES

Ownership reviews of communications undertakings can fall under the jurisdiction of the CRTC pursuant to the *Broadcasting Act*[24] or the *Telecommunications Act*[25], Industry Canada pursuant to the *Radiocommunication Act*[26], the Competition Bureau pursuant to the *Competition Act*[27], and Industry Canada or Heritage Canada pursuant to the *Investment Canada Act*[28]. As described below, these statues all provide the respective regulatory bodies with the jurisdiction to review ownership transactions for broadcasting and/or telecommunications undertakings under certain circumstances.

It is not uncommon for a change in ownership or the start-up of a new broadcasting or telecommunications undertaking to fall within the purview of two or more of these regulatory bodies. For instance, an acquisition of a broadcasting distribution undertaking ("BDU") that is also a common carrier by an existing Canadian BDU and a foreign investor may result in:

---

[24] *Broadcasting Act*, 1991, c. 11.

[25] *Telecommunications Act*, S.C. 1993, c. 38.

[26] *Radiocommunication Act*, R.S.C. 1985, c.R-2.

[27] *Competition Act,* R.S., 1985, c. C-34.

[28] *Investment Canada Act*, 1985, c. 28 (1st Supp.).

(1) a requirement for prior approval of the CRTC under the Broadcasting Regulations (as defined below) to determine whether the acquisition would result in an unacceptable reduction in the diversity of voices and an undue concentration of ownership in the affected markets and to ensure that the transfer of the BDU licences will be in accordance with the Canadian ownership and control rules. In addition, the CRTC may exercise its power to review the telecommunications aspect of the acquisition to ensure it complies with the Telecommunications Regulations (as defined below);

(2) a review by Industry Canada under the *Radiocommunication Act* to ensure that the spectrum licences that will be transferred to the acquirer will be in accordance with the very same Canadian ownership and control rules applied by the CRTC in its telecommunications ownership review; and

(3) a merger review by the Competition Bureau under the *Competition Act* to determine whether the acquisition would result in the prevention, or a substantial lessening, of competition in the affected markets.

These reviews will often overlap to some degree, with the regulatory bodies requiring the same or similar evidence from the parties, although the evidentiary burdens and tests being applied may differ. Oftentimes, the regulatory bodies will, by mutual agreement, share the evidence submitted to them under their respective ownership reviews.[29] Sometimes, it is apparent that one regulatory body has deferred to the expertise of another, as in the case of the Competition Bureau's review of CTV's 2000 acquisition of NetStar, described below. Other times, it is evident that one regulatory body has reached a conclusion, notwithstanding its knowledge of the existence of a conflicting conclusion reached by another regulatory body, as occurred with respect to Astral's 2001 acquisition of Télémedia and the licensing of Globalive in 2009, both discussed in detail in Part D of this paper. However, more often than not, because one or more of these reviews may be completed in a confidential manner with no public disclosure of either the evidence reviewed or the reasons for the decision issued, it is difficult to determine to what extent, if any, the decision of one regulatory body may have influenced (positively or negatively) the decision of another.

1. CRTC Ownership Review

In order to remain eligible to operate in Canada as a broadcasting undertaking, the shareholding structure of the licensee company and any holding corporation must be in compliance at all times with the Canadian ownership and control requirements. In addition, the CRTC also reviews broadcasting ownership transactions that trigger prior approval shareholding thresholds to determine whether such transactions will give rise to issues related to diversity of voices or concentration of ownership. While this aspect of the CRTC ownership review has cultural policy objectives as its base (i.e., to ensure that Canadian consumers are exposed to a multiplicity of news and information

[29] This could give rise to confidentiality concerns for the parties in question, where such evidence is submitted as part of a confidential review of one regulatory body but is shared with a regulator that is conducting its review on a public basis.

sources), it does involve a competition analysis to determine the potential impact of the transaction on competitors and consumers. Where the transaction does give rise to an unacceptable reduction in the diversity of voices or increase in the concentration of ownership in the affected markets, the CRTC has the discretion to either deny the transaction or to require the parties to address the anti-competitive effects, for example, by divesting certain broadcasting undertakings.

Restrictions on the level of foreign ownership of Canadian broadcasting undertakings are regulated by the CRTC pursuant to the *Broadcasting Act* and the Cabinet *Direction to the CRTC (Ineligibility of Non-Canadians)* (the "Direction"). Subsection 3(1)(a) of the *Broadcasting Act* states that as part of the broadcasting policy for Canada, the Canadian broadcasting system shall be effectively owned and controlled by Canadians. As such, the Direction prohibits the CRTC from issuing, amending or renewing a broadcasting licence to a non-Canadian.

In the telecommunications sector, in order to be eligible to operate as a telecommunications common carrier, an entity must be a Canadian owned and controlled corporation.[30] Restrictions on foreign ownership or control of telecommunications networks are contained in the *Telecommunications Act* and the *Canadian Telecommunications Common Carrier Ownership and Control Regulations* (the "Telecommunications Regulations"). The *Telecommunications Act* creates an

---

[30] Telecommunications common carriers are carriers owning or operating their own transmission equipment (as opposed to switching and routing equipment), including local exchange carriers, Internet service providers and long distance providers owning their own wires. The restrictions apply equally to wireless carriers providing terrestrial and satellite-based fixed and mobile, cellular and PCS services. However, the restrictions do not apply to resellers, including resellers that own their own switches.

important distinction between telecommunications common carriers, i.e., facilities-based providers, which are classified as “Canadian carriers”, and all other providers of telecommunications services. It is only in respect of Canadian carriers that restrictions on foreign ownership are imposed by the *Telecommunications Act*. Canadian carriers are also subject to direct regulation by the CRTC under the *Telecommunications Act*.

(a) Quantitative Assessment: Shareholdings

For both broadcasting undertakings and Canadian carriers, in the case of a corporation with share capital, in order to qualify as a “Canadian” under the Direction or the Telecommunications Regulations respectively, the corporation must adhere to the restrictions on foreign ownership at both the licensee level and at the holding company level, as set out below.

In the case of broadcasting licensees, the regulations enacted under the *Broadcasting Act*[31] (the “Broadcasting Regulations”) require the prior approval of the CRTC for transactions and agreements that would result directly or indirectly in: (a) a change in effective control[32] of the licensee by whatever means, or (b) changes in control that

---

[31] Section 14 of the *Television Broadcasting Regulations, 1987*, Section 10 of the *Specialty Services Regulations, 1990* and Section 4 of the *Broadcasting Distribution Regulations*.

[32] “Effective control” is defined in the Broadcasting Regulations as follows:

> Effective control of a licensee or its undertaking includes situations in which
>
> (a) a person controls, directly or indirectly, other than by way of security only, a majority of the voting interests of the licensee;
>
> (b) a person has the ability to cause the licensee or its board of directors to undertake a course of action; or
>
> (c) the Commission, after a public hearing of an application for a licence, or in respect of an existing licence, determines that a person has such effective control and sets out that determination in a decision or public notice.

cross prescribed thresholds. These thresholds are triggered where a person alone or together with an associate crosses thresholds of 30% of the voting securities or 50% of the issued common shares of a licensee, or in a corporation with effective control over the licensee. The Broadcasting Regulations also impose notification requirements on the licensee in the case of transactions and agreements that cross thresholds of 20% or 40% of the voting securities of a licensee, or in a corporation with effective control over the licensee.

In the case of telecommunications carriers, there is no requirement for prior approval of changes in effective control contained in the *Telecommunications Act* or the Telecommunications Regulations. However, the CRTC retains the jurisdiction to review all telecommunications ownership transactions for compliance with the foreign ownership restrictions, as will be seen below in the description of the Globalive case.

The foreign ownership restrictions applicable to broadcasting licensees and telecommunications undertakings are broadly similar. The licensee or undertaking must be incorporated pursuant to the laws of Canada or one of its provinces and must meet the following requirements:

- not less than 80% of the corporation's board of directors (and in the case of broadcasting licensees, the chief executive officer or equivalent) are individual Canadians; and
- Canadians beneficially own and control, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80% of

all of the issued and outstanding voting shares (and in the case of broadcasting licensees, the votes) of the corporation.

A higher level of foreign investment is permitted in the parent company of the broadcasting licensee or telecommunications carrier. Such a parent must similarly be incorporated pursuant to the laws of Canada or one of its provinces, and Canadians must beneficially own and control, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 66⅔% of all of the issued and outstanding voting shares (and in the case of broadcasting licensees, the votes) of the corporation.

In the case of broadcasting licensees, if non-Canadians take advantage of the lower threshold applicable at the parent corporation level, then that parent corporation may not exercise control or influence over any programming decisions of the licensee subsidiary. In such cases, the CRTC has historically required the licensee to establish an "independent programming committee" to ensure that the parent company or its directors do not exercise control or influence over any programming decisions of the subsidiary licensee.

(b) Qualitative Assessment: Control in Fact

Regardless of whether a corporation meets the above quantitative restrictions on foreign ownership, where the CRTC determines that a broadcasting undertaking is in fact controlled by a non-Canadian, the applicant is deemed to be a non-Canadian and ineligible for a broadcasting licence. Similarly, where a telecommunications common carrier has failed to meet its onus to prove that it is not otherwise controlled by non-Canadians, it will be ineligible to operate as a Canadian carrier. Therefore, in addition to the requirements outlined above, both the operating company and its parent company must not be "otherwise controlled" by non-Canadians. The application of the "control in fact" test is, by its very nature, a very qualitative or subjective test.

"Control" is defined in both the Direction and the *Telecommunications Act* as follows:

> "control" means control in any manner that results in control in fact, whether directly through the ownership of securities or indirectly through a trust, agreement or arrangement, the ownership of any body corporate or otherwise.

As indicated in the definition, the issue of control is a question of fact to be determined in the circumstances of each case. Control is determined on the basis of personal, financial, contractual or business relations or any other considerations relevant to determining control.

The control in fact test applied by the CRTC is the test set out by the National Transportation Agency in the *Canadian Airlines* case as follows:

> There is no one standard definition of control in fact but generally, it can be viewed as the on-going power or ability, whether exercised or not, to determine or decide the strategic decision-making activities of an enterprise. It also can be viewed as the ability to manage the day-to-day operations of an enterprise. Minority shareholders and their designated directors normally have the ability to influence a company as do others such as bankers and employees. The influence, which can be exercised either positively or negatively by way of veto rights, needs to be dominant or determining, however, for it to translate into control in fact.[33]

[33] Decision No. 297-A-1993 (*In the Matter of the review by the National Transportation Agency of the proposed acquisition of an interest in Canadian Airlines International Ltd. carrying on business under the*

This test is meant to ensure that non-Canadians do not exercise control in fact over a Canadian broadcasting licensee or telecommunications common carrier, whether through control over their day-to-day operations or over their strategic direction.

In determining whether the corporation is "controlled in fact" by non-Canadians, the CRTC will evaluate the relevant circumstances, including, but not limited to, the following factors:

- the composition of the Board of Directors and committees, their quorum requirements, the process for electing members of the Board of Directors, the scope of the Board's authority, the process for selecting officers and members of senior management and the scope of their authority;
- an analysis of the type of shares involved in the equity structure, who owns them, and the rights and privileges attached thereto;
- relationships between investors, including an assessment of the relative strength and experience of the shareholders, their financial independence, and their motivation in acquiring an equity position in the corporation;
- the question of corporate governance as it arises from the corporate bylaws, unanimous shareholders agreements, other shareholder understandings, and voting trusts; and

---

firm name and style of Canadian Airlines International or Canadian by Aurora Investments, Inc., a wholly-owned subsidiary of AMR Corporation), 27 May 1993, at 17.

- any other matter which may be potentially relevant to control, including an examination of key contracts and understandings, both written and oral, and whether formal or not.

In addition to express powers granted to non-Canadians, the CRTC will scrutinize factual situations if they appear to create a situation of material dependency. In particular, the CRTC will examine service, consulting or non-competition agreements, as well as arrangements put into place for equity and debt financing.

(c) Nature of Procedure: Confidential or Public

CRTC ownership reviews of broadcasting undertakings are typically conducted in an open public forum, where the majority of substantive ownership reviews are conducted via written or oral public hearings and administrative reviews are reserved for only the most non-controversial ownership transactions (e.g., intra-corporate transfers). This provides interested parties with the opportunity to review and comment on the proposed ownership transaction and to determine the CRTC's reasons for its ownership decisions. In contrast, prior to July 2009, where the Commission undertook a telecommunications ownership and control review, it did so on a confidential, bilateral basis (i.e., between the carrier under review and the Commission, with no third-party input or release of information on the public record). Therefore, there are very little available CRTC precedents with respect to telecommunications ownership and control reviews.

The Commission's 2009 review of its telecommunications ownership and control framework was prompted by requests by Shaw Communications Inc. and TELUS

Corporation that the Commission publicly consider Globalive Wireless Management Corporation's ("Globalive") compliance with the ownership and control requirements. As described in more detail below, Globalive, a successful bidder in Industry Canada's Advanced Wireless Services spectrum auction, was at the time a potential new entrant in the wireless telecommunications industry.

As a result of that review, the CRTC determined that where a telecommunications ownership and control review involves complex or novel ownership or governance structures, particularly those involving complex or novel financing arrangements, the public interest may be served in some instances by conducting that review via a public, multi-party process or a process that results in a public record and public decision. While it is under no legal obligation to conduct such public reviews, the Commission stated that such reviews may provide substantive precedents and a level of certainty to all industry players.[34] This determination represented a significant departure from the Commission's historical treatment of telecommunications ownership reviews, where its position had previously been that public proceedings with third-party participation and disclosure of evidence on the public record are not required by law and would not serve the public interest.[35]

Effective July 20, 2009 the CRTC adopted a new four-type framework with respect to telecommunications ownership and control reviews for common carriers. The four types

---

[34] Telecom Regulatory Policy CRTC 2009-428: *Canadian ownership and control review policy*, 20 July 2009, at para. 11.

[35] CRTC Letter Decision: *In the matter of Unitel's eligibility to operate in Canada as a telecommunications common carrier pursuant to Section 16 of the Telecommunications Act*, 16 October 1996 (the "Unitel Decision").

of telecommunications ownership reviews adopted by the Commission now range from Type 1 – a confidential, bilateral review (i.e., the *status quo*); to Type 2 – a written, bilateral review, resulting in the release of a public record and decision; to Type 3 – a written, public, multi-party proceeding, where documentation filed by the carrier under review will be available for public comment and at the conclusion of the review process, a public decision will be issued; to Type 4 – an oral, public, multi-party proceeding to be undertaken in exceptional circumstances, where documentary evidence filed by the carrier under review will be available for public inspection and third parties will have an opportunity to file written submissions and request to provide oral submissions on such evidence and at the conclusion of the process, a public decision will be issued. The adoption of this new policy by the CRTC brings its telecommunications ownership and control reviews more in line with its mandatory broadcasting ownership and control reviews. The Globalive case was the first telecommunications ownership review where the Commission utilized its Type 4 review process.

2. Industry Canada Ownership Review

Depending on the nature of a particular broadcasting or telecommunications undertaking, it may also be regulated and hold licences issued by Industry Canada in accordance with the *Radiocommunication Act* with respect to its management of radio frequency spectrum.

For instance, wireless carriers (referred to as "radiocommunication carriers"), which fall under the jurisdiction of Industry Canada as well as that of the CRTC, are generally subject to licence conditions, which generally require prior notice be given to Industry

Canada of a transaction that would have a material effect on the compliance of the carrier to meet with foreign ownership restrictions.

The *Radiocommunication Regulations* adopt the foreign ownership and control requirements applied to Canadian carriers under the *Telecommunications Act* and the Telecommunications Regulations, as set out above. However, as previously noted, the application of the “control in fact” test, is by its very nature, a very subjective test and it is the application of this aspect of the foreign ownership review where individual regulators and regulatory bodies are most likely to differ, as was the case in Globalive, described below.

Like CRTC Type 1 telecommunication ownership reviews, Industry Canada conducts its ownership reviews on a confidential, bilateral basis (i.e., between the parties under review and Industry Canada, with no third-party input or release of information on the public record). Therefore, there are no publicly available Industry Canada precedents with respect to ownership and control reviews and interested parties may only glean the nature of any changes required by Industry Canada by closely examining any limited information placed on the public record by the applicant or Industry Canada or ownership documentation or agreements that may be released in another public forum (for example, to comply with securities law filing requirements).

3. Competition Bureau Merger Review

Under the *Competition Act*, all mergers are subject to review by the Competition Bureau in order to determine whether they have, or are likely to have, the effect of preventing or lessening substantially competition in a definable market. Unlike the CRTC’s ownership review, a merger review under the *Competition Act* is restricted solely to the potential or actual anti-competitive impact of the transaction and does not venture into policy or social concerns raised by transaction.

Those mergers which exceed prescribed economic thresholds must be formally pre-notified to the Competition Bureau. These economic thresholds relate to size of parties and size of target thresholds, both of which must be met for the provisions to apply.[36] In addition, the acquisition of voting shares triggers merger notification if the economic thresholds are also crossed.[37] The parties must file information relating to the parties and wait a period of time before closing the proposed transaction.[38] Failure to comply with the merger notification provisions is a criminal offence.

As an alternative to merger notification, a party to the proposed transaction can apply for an advance-ruling certificate (an "ARC"), where a transaction does not raise any substantive competition issues. If an ARC is issued, notification is not required and, if the transaction is completed within one year after the ARC was issued, the

---

[36] The current economic thresholds are as follows. First, the parties to the proposed transaction, together with their respective affiliates: have assets in Canada that exceed $400 million in aggregate value; or have gross revenues from sales in, from or into Canada that exceed $400 million in aggregate value. And second, with respect to the business being acquired and its subsidiaries: the aggregate value of the assets in Canada being acquired exceeds $70 million; or the gross revenues from sales in or from Canada generated from those assets exceeds $70 million.

[37] The current voting thresholds are if more than 20% of the voting shares of a public company or more than 35% of the voting shares of a private company are acquired.

[38] If a proposed transaction is notifiable, the parties have a legal obligation to file a merger notification and wait 30 days before closing, unless the Commissioner of Competition terminates the waiting period earlier or before expiry of the 30 day period, the Commissioner issues a supplementary information request. If a supplementary information request is issued, the waiting period is extended to 30 days after compliance with the supplementary information request. Once the mandatory waiting period has been completed, the parties may close the transaction unless the Commissioner has obtained from the Competition Tribunal an order to prevent closing.

Commissioner of Competition is precluded from challenging the transaction before the Competition Tribunal solely on the basis of information that is the same or substantially the same as the information that formed the basis for issuing the ARC. If the ARC is denied, but the case does not raise significant competition issues, it is normal practice for the Commissioner of Competition to issue a “no action” letter and waive the obligation to notify because substantially similar information was received with the application for the ARC.

In cases where the parties have filed a merger notification, the Commissioner of Competition will normally issue a “no action” letter if it has concluded that there are no competition issues to be pursued. Generally, a “no-action” letter provides that the Commissioner has concluded that sufficient grounds do not exist at that time to initiate proceedings before the Competition Tribunal under the merger provisions of the *Competition Act* with respect to the proposed transaction and that the Commissioner of Competition does not intend to make an application to challenge the merger under the merger provisions but reserves the statutory right to do so within a one year period following the substantial completion of the proposed transaction.

The Commissioner of Competition has no authority on its own to block a proposed merger, but must apply to the Competition Tribunal for remedial relief. The Competition Tribunal is composed of federal court judges and economic and business experts. If the Competition Tribunal finds that a merger lessens or prevents, or is likely to lessen or prevent competition substantially, it can block all or part of a proposed merger, order the dissolution of a completed merger, or order the divestiture of assets or shares as are necessary to remedy the competition problem. Other remedial orders are possible, but only with the consent of parties against whom the order is directed and the Commissioner.

In cases where the Commissioner of Competition has identified serious competition concerns, it is frequently the case that the parties to the transaction and the Commissioner come to an agreement as to the remedies required to resolve those concerns and then register a consent agreement with the Competition Tribunal which sets out the terms of the agreement. The consent agreement has the same force and effect as an order of the Competition Tribunal.

(a) CRTC/Competition Bureau Interface

The CRTC and the Competition Bureau have mutually recognized they share authority to review mergers in some instances. In an October 8, 1999 document entitled "CRTC/Competition Bureau Interface", the two regulatory bodies identify areas of exclusive jurisdiction while summarizing that they share parallel jurisdiction to review mergers and that any transaction must comply with the legislation administered by both organizations.[39]

The CRTC/Competition Bureau Interface was issued in light of "the complementary roles of the two organizations" and was prompted by the fact that the CRTC was at that time moving beyond opening markets to competition and was exercising its powers to

---

[39] "CRTC/Competition Bureau Interface", October 8, 1999
(online: http://www.crtc.gc.ca/eng/publications/reports/crtc_com.htm and http://www.bureaudelaconcurrence.gc.ca/eic.site.cb-bc.nsf/eng/01598.html).

forbear from regulation in the area of telecommunications". The CRTC and the Competition Bureau saw the Interface as providing industry stakeholders, including the general public, with "greater clarity and certainty as to the overall regulatory and legal framework in which telecommunications and broadcasting firms must conduct their affairs".[40]

The CRTC/Competition Bureau Interface acknowledges that the CRTC and Competition Bureau have parallel jurisdiction with respect to mergers of broadcasting and telecommunications companies and describes the differences and overlap between the CRTC and the Competition Bureau merger reviews as follows:

> Under the *Telecommunications Act*, prior approval of telecommunications mergers is not required. However, the CRTC has specific responsibility under the *Telecommunications Act* for ensuring compliance with foreign ownership and control rules and has broad regulatory authority over the Canadian telecommunications system. Under the *Competition Act*, all mergers are subject to review and those which exceed proscribed economic thresholds must be formally prenotified to the Bureau.
>
> Under the *Broadcasting Act*, prior approval of the Commission is required for changes of control or ownership of licensed undertakings. <u>Whereas the Bureau's examination of mergers relates exclusively to competitive effects, the Commission's consideration involves a broader set of objectives under the Act. This may encompass consideration of competition issues in order to further the objectives of the Act. The Bureau's concern in radio and television 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 Act.</u>
>
> It is generally Government and Commission policy to encourage competition in broadcasting, particularly in the distribution of broadcasting services.

[40] *Ibid.*

> **Modus Operandi:**
>
> Consequently, with respect to merger review:
>
> - there is parallel jurisdiction.
> - any transaction must comply with the legislation administered by both organizations.
> - the merger and related pre-notification requirements of the *Competition Act* apply to telecommunications and broadcasting mergers.
> - review by the Commission under the *Telecommunications Act* deals with ensuring compliance with foreign ownership and control limitations and may include other regulatory issues that may arise as a result of the transaction - prior approval, *per se*, is not required.
> - review by the Commission under the *Broadcasting Act* applies to changes in ownership or control of licensees under the Act. (emphasis added)

Approximately one year prior to the issuance of the CRTC/Competition Bureau Interface, on September 15, 1998, Konrad von Finckenstein (who is currently the Chairman of the CRTC but at the time was the Director of Investigation and Research of the Competition Bureau and later, the Commissioner of Competition and head of the Competition Bureau), delivered a speech to the International Bar Association Conference in which he noted that the timing of the CRTC and Competition Bureau ownership review processes has "caused some uncertainty" and their parallel jurisdiction "has resource implications for both the Bureau and the CRTC" in that "[a] "no" decision by one could very well preclude the need for review by the other". To deal with these issues, Mr. von Finckenstein suggested that:

> ...it would seem appropriate that the Bureau and the CRTC would exercise their authority concurrently for:
>
> - telecommunications mergers, where there are foreign ownership issues; and
> - for broadcasting mergers.

> However, for telecommunications mergers, where there are no foreign ownership issues it would seem appropriate for the Bureau to review such mergers *first*.
>
> The way we see it, these principles will ensure that the Bureau and the CRTC are not working at cross purposes and that approval by one cannot be used by parties to pressure the other. By understanding each other, the Bureau and the CRTC will be able to continue the efficiency of our current approval process.[41]

These words would later prove a harbinger of the Astral case, described below.

4. Investment Canada Act Ownership Review

The review and approval of foreign investments that could result in the ownership and control of Canadian "cultural businesses"[42] by foreign investors falls under the authority of Industry Canada or the Minister of Canadian Heritage in the case of cultural businesses[43] under the *Investment Canada Act*.

---

[41] Remarks by Konrad von Finckenstein, Director of Investigation and Research, Competition Bureau, International Bar Association Conference, Vancouver, British Columbia, September 15, 1998 (online: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00911.html)

[42] Subsection 14.1(6) of the *Investment Canada Act* defines a "cultural business" to include a Canadian business that carries on in Canada, among other things, the following activities:

a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers,
b) the production, distribution, sale or exhibition of film or video recordings,
c) the production, distribution, sale or exhibition of audio or video music recordings,
d) the publication, distribution or sale of music in print or machine readable form, or
e) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

[43] The Minister is assisted in the review of non-Canadian investments in cultural businesses by the Cultural Sector Investment Review Directorate of Heritage Canada.

The purpose of the *Investment Canada Act* is to "provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities ...".[44]

In practice, because the *Investment Canada Act* applies to the acquisition of the assets or the shares of a target by a non-Canadian that results in the direct or indirect acquisition of control of a Canadian business, and because acquisitions of control by non-Canadians of broadcasting and telecommunications companies are prohibited under the Canadian ownership rules administered by the CRTC as described above, such transactions generally do not fall within the scope of reviews under the *Investment Canada Act*.[45] In the event the foreign ownership rules are amended, ownership reviews of broadcasting and/or telecommunications companies under the *Investment Canada Act* may become yet another step for parties attempting to complete an acquisition or start-up of a communications company.

---

[44] *Investment Canada Act*, section 2.

[45] The *Investment Canada Act* contains a number of presumptions relating to the determination of whether control has been acquired. For example, where a majority of the voting interests of an entity are acquired, the acquisition is deemed to result in an acquisition of control of the entity. Where less than a majority but one-third or more of the voting shares of a corporation are acquired, there is a rebuttable presumption that control has been acquired. This presumption can be rebutted if it can be established that the corporation is not controlled in fact by the acquirer through the ownership of voting shares. An acquisition of less than one-third of the shares of a corporation is deemed not to be an acquisition of control of the corporation. Since under the Canadian ownership and control rules administered by the CRTC, a broadcasting or telecommunications corporation cannot be controlled in fact by a non-Canadian, and non-Canadians are restricted to a maximum of 33⅓% of the voting shares of a parent company and 20% of the voting shares of a licensee company, in practice, the *Investments Canada Act* does not apply to broadcasting and telecommunications ownership transactions.

Under the *Investment Canada Act*, the acquisition of control of a Canadian business by a non-Canadian[46] is subject to either notification or an extensive "net benefit" review process. The procedure required depends on the asset value of the Canadian business, the manner in which the acquisition is effected and the type of business carried on by the Canadian business. It should be noted that unlike other businesses, the Minister of Canadian Heritage may recommend a review of an investment in a cultural business where an investment would not otherwise be reviewable and where an entity would otherwise qualify as Canadian-controlled in law, and the Minister may make a determination as to whether or not a business is controlled in fact by a Canadian or non-Canadian.[47]

D. CO-EXISTENCE OR COLLISION COURSE?

Given the broad authority granted to each of the regulatory bodies described above, situations can and do arise where more than one body conducts an ownership review of the same transaction. Each authority may be operating within their delegated jurisdiction; however, such multiple regulatory reviews may give rise to issues regarding procedural fairness and conflicting regulatory decisions.[48]

---

[46] A "non-Canadian" is defined in section 3 of the *Investment Canada Act* as "an individual, a government or an agency thereof or an entity that is not a Canadian". Generally, a "Canadian" is an individual who is or is controlled by, as the case may be, a citizen or certain permanent residents of Canada, or part of the federal, provincial or local government of Canada, or an entity that is controlled by a group of the foregoing.

[47] *Investment Canada Act*, subsection 26(2.1).

[48] Margaret Sanderson and Michael Trebilock, "Merger Review in Regulated Industries" (2005) Vol. 50, No. 2 Can. Bus. L.J. at 168.

The first two cases described below, the BCE Privatization and CTV's acquisition of NetStar, are examples where parallel merger reviews by two or more regulatory bodies have harmoniously co-existed or even aided one another. In the third case, CTVglobemedia's acquisition of CHUM, the Competition Bureau and the CRTC reached very different conclusions on the potential competitive impact of the proposed acquisition, as a result of their very different statutory mandates. The last two cases, Astral and Globalive, are examples where two regulatory bodies have very publicly reached inconsistent results in ownership reviews. Given the significance of these two cases to the issue of parallel jurisdiction, they are described and analyzed in detail.

1. BCE Privatization - Competition Review and Foreign Ownership Review: The Competition Bureau, Industry Canada and the CRTC

On June 30, 2007, BCE Inc. announced it had entered into an agreement to be purchased by a consortium of investors, led by the private investment arm of the Ontario Teachers' Pension Plan ("Teachers'") and including several U.S. private equity firms. The transaction was valued at $51.7 billion and had it closed, would have been the largest corporate take-over in Canadian history. Although not ultimately completed for financial reasons, the transaction was required to seek and was, in fact, approved by various regulatory regimes, including the Competition Bureau, the CRTC and Industry Canada.

On September 21, 2007, the Competition Bureau announced that it did not have any competition concerns and would not challenge the acquisition before the Competition

Tribunal.[49] Several months later, on March 27, 2008, the CRTC conditionally approved the transaction.[50] This was followed by the conditional approval of Industry Canada on April 8, 2008.[51] On June 20, 2008, the CRTC issued its final letter of approval of the transaction, followed immediately that same day by the final letter of approval of Industry Canada.

As with all reviews conducted by the Competition Bureau and Industry Canada, their reviews of the BCE transaction were conducted in a confidential manner and without the public release of detailed reasons, while the CRTC review was done in a public forum.

In its press release on the transaction, the Competition Bureau indicated that its review had focused primarily on the holdings of Teachers' in Manitoba Telecom Services Inc., a competitor of BCE, and concluded that the proposed transaction was unlikely to lead to a substantial lessening or prevention of competition.[52]

Industry Canada's review and, in large part, the CRTC's review of the transaction was focused on compliance with the Canadian ownership and control requirements for, respectively, the transfer of the spectrum licences and the broadcasting licences held by

---

[49] Competition Bureau, News Release, "Competition Bureau Clears Teachers – BCE Transaction", 3 September 2007, (online: http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02458.html).

[50] Broadcasting Decision CRTC 2008-69: *Transfer of effective control of BCE Inc. to a corporation to be incorporated and a consequential change in ownership of CTVglobemedia Inc.*, 27 March 2008.

[51] CBC News, "BCE Takeover get Industry Canada Approval", 9 April 2008) (online: http://www.cbc.ca/money/story/2008/04/09/bceprentice.html?ref=rss).

[52] Competition Bureau News Release, *supra* note 49. The Bureau indicated this conclusion was based, in part, on the fact that Teachers' has no right to appoint directors to the Board of MTS.

BCE.[53] It is evident from a review of the public documents that these two regulatory bodies were largely in agreement in their assessment of the transaction, for instance, with both requiring that the quorum requirements be comprised of a majority of Canadians who are independent from the non-Canadian shareholders, and requiring increases to certain veto thresholds.

Thus, although the approval of three Canadian regulatory bodies was required for the BCE transaction, only two of those dealt with the foreign ownership aspects of the transaction, with the Competition Bureau's review being confined to a very discreet competition element. The CRTC and Industry Canada applied the very same foreign ownership requirements to the transaction, their reviews were conducted in a harmonious fashion and both regulatory bodies ultimately reached similar conclusions.

2. CTV Acquisition of NetStar Communications – Competition Review and Foreign Ownership Review: Competition Bureau and the CRTC

On 10 February 1999, CTV Inc. ("CTV") announced that it had reached an agreement with the Canadian shareholders of NetStar Communications Inc. ("NetStar") to purchase 68.46% of NetStar's issued and outstanding voting shares, with the remaining voting shares continuing to be held by a subsidiary of the U.S. company, ESPN Inc. The CRTC's prior approval of the transaction was required for the change in effective control of the NetStar broadcasting undertakings, which included TSN, RDS and the Discovery Channel. A request for an ARC was also filed with the Competition Bureau.

---

[53] Unlike the Bureau, the CRTC's review of the BCE transaction dealt with its prior approval for the change in effective control of the broadcasting undertakings held by BCE and did not deal with BCE's telecommunications undertakings, as the CRTC's prior approval is not required for their transfer.

The Competition Bureau's review was focused on the competitive implications of the transaction on three distinct product markets: the distribution of programming through cable or other distribution channels, the supply of advertising space/time to advertisers, and the acquisition of premier sports broadcast rights. On December 3, 1999, the Bureau issued a preliminary determination in which it indicated that it had "not identified any significant competition issues to date in the first two markets that would cause us to challenge the proposed transaction before the Competition Tribunal". With respect to the acquisition of premier sports broadcast rights, the Bureau indicated that it was unable to determine the extent to which TSN and SportsNet compete with each other for these rights. This was because "the CRTC has licensed these services as complementary and it is not clear to what extent the competition between these two channels for premier sports rights respects underlying CRTC policy". The Bureau also noted that "[t]he extent of permissible and actual competition between TSN and Sportsnet may be an issue that is raised for consideration before the CRTC at the impending hearing". In addition, the Bureau noted that the Commission was reviewing a licence amendment application by Sportscope Television Network Ltd. (now The Score), "possibly resulting in another potential purchaser for live sports broadcast rights." In light of these considerations, the Bureau stated that "it would await the outcome of these proceedings before making a final decision".[54]

---

[54] As cited by the CRTC in Decision CRTC 2000-86: *CTV Inc. on behalf of The Sports Network Inc. (TSN), Le Réseau des Sports (RDS) Inc. (RDS), and 2953285 Canada Inc. operating as The Discovery Channel*, 24 March 2000 ("Decision 2000-86").

The CRTC's review focused on concerns about concentration of ownership of sports broadcasting services, as well as the level of influence that could potentially be exercised by NetStar's non-Canadian partner, ESPN. Three months after the Bureau issued its preliminary determination, on March 24, 2000, the CRTC issued its decision, approving the transaction on the condition (among others) that CTV divest its existing regional sports specialty service, SportsNet, within one year of the date of the decision and make certain revisions to its agreements with ESPN to address certain Canadian ownership and control requirements. The CRTC's requirement for divestiture of SportsNet was based on its findings that: (1) the separate ownership of national and regional sports specialty services (i.e., TSN and SportsNet) remains in the public interest; and (2) its concerns relating to CTV's potential ability to dominate in the field of sports programming and its potential unfavourable consequences for other broadcasters was not alleviated by the Commission's approval that same day of The Score to broadcast limited amounts of live sports event coverage[55], or by any of the commitments made by CTV.

Approximately three months after the CRTC issued its decision, the Competition Bureau issued its final letter of approval, stating that there were not sufficient grounds to initiate proceedings before the Competition Tribunal under the merger provisions of the *Competition Act* at that time. The Bureau stressed that "a critical factor in our decision on this matter was the CRTC decision ... with a condition of approval being the sale by CTV within one year of the date of the decision, of all of its interests in the Sportsnet

---

[55] Decision CRTC 2000-85: *Sportscope Television Network Ltd.*, 24 March 2000.

sports specialty service". The Bureau also indicated that should this condition not be satisfied, it would re-examine the matter. The condition was ultimately satisfied with the sale of Sportsnet to Rogers Broadcasting Limited.[56]

Thus, the CTV-NetStar case is one in which the Competition Bureau recognized that its determination on the impact of the transaction on the acquisition of premier sports broadcast rights was inextricably linked to the CRTC's determination on this matter, including any restrictions it placed on the two specialty services at issue on the competitive bidding for premier sports broadcast rights and whether it permitted another sports specialty service to become partially competitive in this area. Therefore, the Bureau chose to reserve its determination on this matter until the CRTC issued its decision. Moreover, the Bureau explicitly tied its determination to the parties' adherence to the conditions of approval imposed by the CRTC. In so doing, the two regulatory bodies worked co-operatively with each other.

3. CTVglobemedia Acquisition of CHUM Limited - Competition Review: Competition Bureau and the CRTC

In July 2006, CTVglobemedia Inc.[57] ("CTVgm") announced an intended merger with CHUM Ltd. ("CHUM"). This merger involved two significant companies in the Canadian communications industry.[58] The proposed merger would ultimately require approval of

---

[56] Decision CRTC 2001-621: *Request to acquire control and ownership of CTV SportsNet Inc. Licensee of SportsNet, a national specialty service*, 1 October 2001.

[57] Formerly Bell Globemedia Inc.

[58] CTVgm owned CTV and the Globe and Mail, respectively Canada's largest private broadcaster and largest daily newspaper, in addition to interests in 17 specialty television channels. CHUM owned and operated 34 radio stations, 12 local television stations and 21 specialty television channels.

both the Competition Bureau and the CRTC. In recognition of the fact that a wholesale merger would likely not be approved, the proposed transaction included the divestiture of certain television assets, including the A-Channel stations owned by CHUM, while CTVgm proposed to retain CHUM's Citytv group of stations.

Shortly after the transaction was announced, the parties filed the necessary pre-merger notification documents with the Competition Bureau. A formal inquiry was commenced under section 10 of the *Competition Act* since, based on the available information, the Commissioner of Competition had reason to believe that grounds existed for the Competition Tribunal to conclude that the proposed merger was likely to lead to a substantial lessening or prevention of competition.[59] The Competition Bureau review was completed in February 2007, with the Bureau concluding that the proposed transaction was unlikely to result in a substantial lessening or prevention of competition, and that no action by the Commissioner of Competition was warranted.[60] The Bureau also indicated that its review examined the transaction without presuming any proposed divestitures, and found that the assets that were proposed to be divested were not relevant to the likely competitive impact of the proposed transaction.[61]

---

[59] Competition Bureau Canada, Technical Backgrounder, "BGM/CHUM Technical Backgrounder", 28 November 2007 (online: http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02521.html).

[60] *Ibid.*

[61] *Ibid.*

In contrast to the Bureau's decision, the CRTC's decision, released approximately four months later on June 8, 2007[62], found that CTVgm's acquisition of the Citytv stations would be inconsistent with its policy restricting ownership of conventional television stations to a single station operating in the same language in the same market (the "common ownership policy"). The CRTC approved the transaction, subject (among other things) to CTVgm divesting the Citytv stations. The Commission also indicated that the assets which had been proposed to be divested under the original transaction did not cause any concerns and could be retained at the discretion of CTVgm.[63] This approval was given, notwithstanding that CTVgm's retention of certain A-Channel stations would also not be in compliance with the common ownership policy, on the basis that they were consistent with prior exemptions made to the common ownership policy. Ultimately, CTVgm ended up selling the Citytv stations to Rogers Communications Inc. and retaining the A-Channel stations.[64]

In response to, "expressions of interest about how it approached", the transaction, the Competition Bureau released a Technical Backgrounder on November 28, 2007, to identify the competition issues it considered in its decision.[65] This Technical Background is very instructive on how the Bureau conducts what is typically a "behind closed doors" merger review.

---

[62] Broadcasting Decision CRTC 2007-165: *Transfer of effective control of CHUM Limited to CTVglobemedia Inc.*, 8 June 2007 ("Decision 2007-165").

[63] *Ibid* at para. 34.

[64] Broadcasting Decision CRTC 2007-360: *Transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media Inc.*, 28 September 2007.

[65] Competition Bureau Technical Backgrounder, *supra* note 59.

The Technical Backgrounder also makes it clear that the Bureau's review was restricted to the impact of the transaction on CTVgm's market power in the sale of advertising in the defined markets. The Bureau's conclusion was based on its finding that CTVgm's market power "would not be enhanced by acquiring the CHUM assets, owing largely to the marginal degree of overlap between top-rated and lower-rated programming that characterized the respective CTV and CHUM broadcast schedules. As to the acquisition by CTV of additional advertising space where top-rated exposure is not critical, the Bureau concluded that the remaining competition would be sufficient to ensure that there was no reasonable prospect that CTV could effect a material price increase and, therefore, any lessening of competition would not be substantial".[66]

In contrast, the CRTC's review was not restricted to competitive concerns, but was based on the policy objective in the *Broadcasting Act* which requires that programming provided by the Canadian broadcasting system should "provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern".[67] This objective is the basis for the common ownership policy, which is designed to ensure that a diversity of voices exists in a given market. The common ownership policy also serves to maintain competition in each market.[68] The CRTC's decision was based on its view that CTVgm's acquisition of the Citytv stations would

---

[66] *Ibid.*

[67] Paragraph 3(1)(i)(iv) of the *Broadcasting Act*.

[68] Decision 2007-165, *supra* note 62, at para. 11.

have resulted in concentration of ownership that would have had an unacceptable impact on the plurality and diversity of voices in the English-language market.[69]

Therefore, although the CRTC and the Competition Bureau reached very different conclusions in the CTVgm-CHUM case, it is also clear that the regulatory bodies were examining the transaction from the perspective of very different statutory mandates. The CRTC focused on whether the transaction would result in an unacceptable impact on the plurality and diversity of voices in the English-language market. The Competition Bureau focused on whether the merger would result in substantial lessening or prevention of competition in the sale of advertising by conventional television stations in the English-language market.

4. Astral Media Acquisition of Télémedia Radio – Competition Review: Competition Bureau and the CRTC

Traditionally, the CRTC and the Competition Bureau have co-existed by asserting parallel jurisdiction with respect to merger reviews of broadcasting and telecommunication undertakings. As noted above, in the CRTC/Competition Bureau Interface, both bodies have taken the view that applicable broadcasting ownership transactions must comply with the *Competition Act* and the *Broadcasting Act*, as administered by the Commissioner of Competition Policy and the CRTC, respectively.

[69] *Ibid.*, at para. 23.

The first case that brought attention to the clashes between regulators with parallel jurisdiction over ownership reviews of communications companies was Astral Media Inc.'s ("Astral") acquisition of Télémedia Radio Inc. ("Télémedia") in 2001.

The conflict between the Competition Bureau's general mandate under the *Competition Act* and the specific mandate of the CRTC under the *Broadcasting Act* ended up before the Federal Court of Canada. The Court's decision in that case might have shed some light on the respective jurisdictions of the CRTC and the Competition Tribunal in the context of a proposed sale of media assets. However, before the Court could deal with the matter, it was settled by way of a Consent Agreement between Astral, Télémedia and the Competition Bureau that saw Astral agree to the divestiture of certain assets, including AM radio stations.

(a) The Competition Bureau's Decision

In 2001, Astral announced its intention to acquire eight radio stations and other radio ownership interests from Télémedia in the province of Quebec. The dispute began on December 21, 2001 when the Commissioner of Competition Policy (now the Commissioner of Competition) filed an application with the Competition Tribunal seeking an order prohibiting Astral from acquiring certain radio stations owned by Télémedia. 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 Quebec. The Commissioner of Competition 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 of Competition'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* does not apply to the proposed transaction and that the Competition Bureau does not have jurisdiction under the Act to conduct an inquiry in respect of this transaction.

(a) The CRTC's Decision

Five months after the Commissioner of Competition sought to block the merger, the CRTC issued Decision CRTC 2002-90[70] approving Astral's acquisition of the Télémedia radio stations, subject to (among other things), the transfer of station CFOM-FM Lévis to a third party unaffiliated with Astral. In its decision, the CRTC noted the Competition Bureau's decision and the appeal to the Federal Court of Canada and stated, "These actions do not affect the Commission's jurisdiction under the *Broadcasting Act* to issue decisions on the present application".[71] In approving the transaction, the Commission determined that the acquisition was in furtherance of the statutory objectives of the

---

[70] Broadcasting Decision CRTC 2002-90: *Transfer of control of 3903206 Canada Inc., of Télémedia Radio Atlantic Inc. and of 50% of Radiomedia Inc. to Astral Radio Inc.*, 19 April 2002 ("Decision 2002-90").

[71] *Ibid.*, at para. 20.

Broadcasting Act, consistent with the Commission's Commercial Radio Policy and would "improve the competitive position of private French-language radio in Quebec".[72]

The CRTC's decision stands in stark contrast to the conclusions of the Competition Bureau. 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 Quebec 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 Quebec-wide coverage were essential for radio to compete with other highly concentrated media mega-companies in the Province of Quebec, notably Quebecor/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

[72] *Ibid.*, at para. 3.

television offered local advertisers inventories and costs that are competitive with those offered by radio in certain of the markets in question.[73] 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".[74]

(b) Reconciling the Two Decisions

As previously noted, on August 7, 2002, Astral, Télémedia and the Competition Bureau entered into a Consent Agreement requiring Astral to sell certain of its AM radio stations in Quebec. The Consent Agreement was registered with the Competition Tribunal on September 3, 2002, and terminated the application filed by the Commissioner of Competition with the Competition Tribunal. However, the saga did not end there.

On July 2, 2003, the CRTC denied approval of a transaction proposed between Astral and TVA Group Inc. and Radio Nord Communications Inc. that, in part, involved stations that were part of the Consent Agreement, on the basis that it was not convinced that the recovery strategy for AM radio in Quebec proposed by the applicant and its eventual benefits would significantly outweigh the concerns about concentration of ownership and media cross-ownership.[75] The radio stations were eventually transferred to Corus Entertainment Inc. in an exchange of radio assets in Quebec, approved by the CRTC on

---

[73] *Ibid.*, at para. 39.

[74] *Ibid.*, at para. 29.

[75] Decision CRTC 2003-205: *Acquisition of radio assets in Quebec,* 2 July 2003, at para. 38.

January 21, 2005[76], over four years after the transaction was first denied by the Competition Bureau. This transaction constituted the third attempt by Astral to satisfy the terms of the Consent Agreement.[77]

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 companies that are regulated both under the *Broadcasting Act* and the *Competition Act*. As it currently stands, the questions raised by the Astral case remain unanswered (as discussed below).

5. Globalive Wireless Management Corporation - Foreign Ownership Review: Industry Canada and the CRTC

Nine years after the Astral case, the Globalive case has again raised questions as to the soundness and efficacy of parallel ownership reviews in the communications industry.

(a) Industry Canada's Decision

During May to July 2008, Industry Canada conducted an auction of advanced wireless services ("AWS") spectrum licences and other spectrum in the 2 GHz range. The

---

[76] Broadcasting Decision CRTC 2005-15: *Exchange of radio assets in Quebec between Astral Media Radio inc. and Corus Entertainment Inc.*, 21 January 2005 ("Decision 2005-15").

[77] As described by the CRTC in para. 5 of Decision 2005-15, following the denial of the TVA/Radio Nord transaction, applications were filed by Astral Radio inc. and by Paul-Émile Beaulne, on behalf of 2964-2097 Québec Inc. and various companies to be incorporated (the Morin-Chamberland group), for authority to acquire the assets of certain AM radio undertakings and radio networks held by Astral Radio inc., which included, among others things, the assets of CFOM-FM and the AM radio stations that were the subject of the Consent Agreement. At the applicant's request, given the withdrawal of the Morin-Chamberland group, the Commission withdrew these applications from the agenda of the public hearing of 16 February 2004.

issuance of the new AWS licences was designed to foster new wireless telecommunications companies' entry into the existing marketplace and thereby promote competition in favour of consumers. Accordingly, specific spectrum was reserved for new wireless entrants. Globalive was a successful bidder and shortly after completing the auction process, in accordance with the process adopted by Industry Canada, it submitted ownership and control documentation to Industry Canada in order to demonstrate compliance with the Canadian ownership and control requirements under the *Radiocommunication Regulations.*

Prior to Industry Canada awarding Globalive its AWS licences, on December 22, 2008, the CRTC gave notice to Globalive that in order to utilize the spectrum to operate as a Canadian carrier, it would need to demonstrate to the CRTC that it meets the eligibility requirements under the *Telecommunications Act*.[78] On March 13, 2009, Industry Canada issued spectrum licences to Globalive, having completed its ownership review and determined that Globalive was Canadian-owned and controlled within the meaning of the *Radiocommunication Act*. As previously noted, because Industry Canada's review is conducted on a confidential basis with no reasons provided for its determination, we do not know the basis on which this decision was made. Thereafter, on April 3, 2009, Globalive submitted its corporate documentation to the CRTC for its determination as to whether it was eligible to operate as a telecommunications common carrier in accordance with the *Telecommunications Act.*

---

[78] Letter dated December 22, 2008 from John Keogh, Senior General Counsel, CRTC to Simon David Lockie, Chief Legal Officer and Secretary, Globalive Wireless LP.

As noted above, given that the Canadian ownership and control requirements applied by Industry Canada and the CRTC are identical, one would have assumed that the two regulatory bodies would have reached the same or similar conclusions, but that was not to be the case.

(b) The CRTC's Decision

In its decision released on October 29, 2009[79], after conducting a Type 4 ownership review and oral public hearing, the CRTC determined that Globalive did not meet the Canadian ownership requirements set out in the *Telecommunications Act*. As noted earlier, the CRTC's public review of Globalive's ownership structure was a novel aspect of this case, as was the inconsistency between the CRTC's and Industry Canada's conclusions reached under identical rules.

The CRTC found that Globalive's non-Canadian shareholder, Orascom Telecom Holdings ("Orascom"), an Egyptian owner of mobile ventures in several countries, had the ongoing ability to determine Globalive's strategic decision-making activities and that Globalive was therefore controlled in fact by Orascom, rather than by its majority Canadian shareholder, AAL Holdings Corporation ("AAL"). Accordingly, the Commission found that Globalive was not eligible to operate as a telecommunications common carrier.

---

[79] Telecom Decision CRTC 2009-678: *Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, 29 October 2009 ("Decision 2009-678").

As noted above, in order for the CRTC to find that Orascom had control in fact, it had to determine that Orascom's influence was dominant or determining. In particular, the CRTC found that Orascom would have had the ongoing power or ability, whether exercised or not, to dominate or determine the strategic decision-making activities of Globalive or to manage and run its day-to-day operations.

Despite the fact that Globalive made significant changes to the legal arrangements among shareholders in order to address concerns expressed by the CRTC and incumbent wireless operators, ultimately it was other factors, largely relating to the identity of Orascom as an operator and Globalive's capital structure, that, taken together, led the Commission to conclude that Globalive did not meet the control in fact test.

The Commission determined that notwithstanding the changes made by Globalive to address some of its concerns, significant concerns remained with respect to the control in fact of Globalive by Orascom, given that Orascom:

- holds 65.1% of Globalive's equity;
- is the principal source of technical expertise and has entered into a strategic technical arrangement with Globalive;
- provides Globalive with access to an established wireless trademark, the "WIND" brand, under which Globalive will operate; and
- holds the overwhelming majority (99%) of the outstanding debt.

The CRTC considered that each of the factors addressed in its decision provided Orascom with an avenue for influence over Globalive and that "[w]hile disparate points of influence may not individually result in control, when combined they can translate into the ability to control in fact".[80]

The Commission's decision appeared to turn largely on the level of debt held by Orascom in combination with its 65% equity interest, as evidenced from the following quote:

> It is the Commission's view that such a significant concentration of debt in the hands of Orascom, representing the vast majority of Globalive's enterprise value, serves to provide Orascom with leverage over Globalive. Given Orascom's equity interest in Globalive, such a high level of debt in the hands of a non-Canadian is unacceptable.[81]

Certain key elements of the CRTC's decision on Globalive are summarized below:

Shareholdings: The combination of Orascom's voting and non-voting shares translated into 65.1% of Globalive's total equity. The CRTC acknowledged that Orascom's equity participation of 65.1% is consistent with levels of non-Canadian investment previously approved by the Commission. The CRTC also noted that, while in the circumstances of this case the level of equity participation provides an avenue for influence, it is not sufficient on its own to convert that influence into control.

---

[80] *Ibid.*, at para. 113.

[81] *Ibid.*, at para. 112.

Debt: Orascom is the source of approximately 99% of Globalive's debt, for a total commitment of $508.4 million. While the CRTC noted that there are no statutory restrictions on the amount of debt that a non-Canadian can provide to a telecommunications common carrier, in circumstances such as the present, where a company is heavily debt financed, the Commission noted that this can translate into significant influence over the venture by the debt holder.

The CRTC noted that the magnitude of the debt provided by Orascom, the relative debt to equity financing, and the fact that the debt is concentrated in the hands of a single entity all cause the Commission concern. Modifications to the covenants and terms of the loans volunteered by Globalive did little to reduce this concern. Furthermore, the CRTC noted that covenants similar to those deleted from the Orascom loan agreements are still contained in the veto rights in the Shareholders' Agreement.

In addition, the Commission considered that Globalive's dependence upon Orascom for financing may well increase in the near term, given its inability to date to attract substantial third-party financing. The Commission noted that a company's inability to obtain financing from third-party sources may also be relevant to the issue of control in fact. The Commission reiterated its finding in the 1996 Unitel decision that "In certain circumstances it may be possible to conclude that a non-Canadian shareholder or lender may have a considerable amount of leverage, and even control, over a cash-strapped telecommunications common carrier."[82]

Governance: Notwithstanding the structure of the equity, the CRTC required that the board of director nominees of the Canadian shareholder outnumber those of Orascom, in order to offset the influence of the latter. In order to address this point, Globalive would have to amend its board structure so that the Canadian shareholder nominates five directors, Orascom nominates four directors, and each nominate one Independent Director.

Liquidity: The CRTC originally expressed concerns regarding the influence represented by the liquidity rights granted to Orascom as minority voting shareholder; in particular, the Commission felt that unilateral drag-along rights were inconsistent with the position of the Canadian shareholder as the majority voting shareholder. While Globalive amended the original liquidity rights to provide for a mutual right, the provision of a guaranteed floor price for the Canadian shareholder should it elect to sell within a certain period concerned the Commission. The CRTC found in the decision that the liquidity rights, even in their revised form, provide an indication of Orascom's influence over the venture, given that it is traditionally the minority voting shareholder which is granted an exit provision at a guaranteed price, not the controlling shareholder. It therefore held that the specification of a floor price and the imposition of a cap on the

[82] Unitel Decision, *supra* note 35 at p.30.

proceeds generated in the event that the Canadian shareholder sells its shares are inconsistent with the relative voting interests of the shareholders.

The Globalive agreements limit a sale of shares to an "Eligible Purchaser" (i.e., the purchaser cannot be a Strategic Competitor, defined as a person which operates or provides telecommunications business services, whether fixed line or wireless). Notwithstanding that all sale provisions are subject to extensive rights of first refusal in favour of the non-selling shareholder, the CRTC considered that a significant issue with regard to liquidity is the ability of the exiting investor to find a suitable purchaser. The Commission was concerned that the Eligible Purchaser definition limits the pool of potential purchasers to financial investors and restricts the ability of the majority voting shareholder to sell all or some of its shares. Accordingly, the Commission ruled that Globalive should amend the definition of Strategic Competitor to include only entities which, taken together with their affiliates, hold more than a 10% share of the Canadian wireless market on a per-subscriber basis.[83]

Vetoes: In response to CRTC and intervener concerns, Globalive increased the monetary thresholds of particular veto rights to 5% of the value of the spectrum it held, but the CRTC held that the value of the spectrum is not an appropriate foundation on which to base the 5% veto threshold. Accordingly, the CRTC held that monetary threshold for vetoes should be set at 5% of Globalive's enterprise

[83] The 10% limit was to accord with Industry Canada's requirement for the AWS spectrum set aside for new entrants under which Globalive was licensed.

value as determined by its board every two years, based on a third-party valuation.

Commercial Arrangements: The CRTC found that the Technical Services Agreement ("TSA") between Globalive and Orascom raises concerns with respect to control in fact as a result of the strategic nature of the services provided and the fact that they are provided by the major non-Canadian shareholder and primary lender to Globalive, Orascom. The Commission found that the TSA provides Globalive with benefits that operate as key determinants of its success and that it is this reliance by Globalive on Orascom that defines their relationship and allows Orascom the opportunity to influence a wide range of operating and strategic decisions. Given the significant benefits Globalive derives from the TSA, the Commission found that Globalive will maintain the TSA for the foreseeable future and that Orascom will continue to have influence over operating and strategic decisions related to Globalive's network.

Under the Trademark Agreement, Globalive is provided with a licence to use the trademark WIND in association with its services in Canada. The WIND trademark is used by Orascom affiliates in Greece and Italy. The CRTC found that Globalive's adoption and use of a trademark belonging to an Orascom affiliate provide Orascom (or its controlling shareholder) with influence over Globalive because Orascom has the power to limit how the brand can be used.

Many of the same arrangements that concerned the CRTC in the Globalive decision are present in the structures of other communications undertakings in Canada; however, as noted above, it was the cumulative effect of these arrangements that led to the Commission's decision in this instance.

(c) Cabinet's Response

The disparate decisions issued by Industry Canada and the CRTC on whether Globalive met the very same Canadian ownership and control requirements resulted in much uproar, political lobbying and speculation as to the soundness of having two regulatory bodies exercise parallel jurisdiction over foreign ownership reviews of broadcasting and telecommunications undertakings.

On December 10, 2009, the federal Cabinet, led by Minister of Industry Tony Clement, issued an Order in Council[84] announcing that it had varied the CRTC's decision on Globalive effective immediately[85], leaving Globalive free to enter the wireless telecommunications market, without any additional changes required by the CRTC to the company's structure and shareholder arrangements, including its debt and equity financing and the composition of its board of directors.

The key elements of the Order in Council are as follows:

- The Canadian ownership and control requirements for telecommunications carriers do not impose limits on foreign investment (other than the ownership of voting shares) in telecommunications common carriers and should be interpreted

---

[84] P.C. 2009-2008, December 10, 2009.

[85] Subsection 12(1) of the *Telecommunications Act* provides that within one year after a decision by the CRTC, the Governor in Council may on its own motion by order, vary or rescind the decision or refer it back to the CRTC for reconsideration of all or a portion of it.

in a way that ensures that access to foreign capital, technology and experience is encouraged in a manner that supports all of the Canadian telecommunications policy objectives, including enhancing competition.

- It is significant that when assessing control in fact, the *Telecommunications Act* does not require the CRTC to determine that a telecommunications common carrier <u>is</u> controlled by Canadians but rather that it is <u>not</u> controlled by non-Canadians.

- The Government recognizes that multiple levers of influence can, when combined, amount to control but considers that is not the case with Globalive.

- The CRTC decision deprives Canadians of the possibility for a more competitive wireless telecommunications market by preventing the roll-out of service by a Canadian-owned and controlled company.

The key reasons given for the Order in Council were as follows:

Composition of the Board: The revised board structure presented to the CRTC (four nominees each for AAL and Orascom and three Independent Directors, one appointed by AAL and two appointed collectively) ensures that Orascom's nominees are insufficient in number to control the strategic or operational decisions of Globalive. AAL's nominees and the Independent Directors are sufficient in number to offset Orascom's influence. No further changes are needed. It is sufficient that the board cannot be controlled by the non-Canadians or their nominees.

Quorum: The revised quorum provisions ensure the number of AAL nominees and the Independent Directors jointly selected are sufficient to ensure that Orascom cannot control the boards. AAL has a dominant voice on the selection committee for the Independent Directors, since two of the members are nominated by AAL and one by Orascom.

Liquidity Rights: The liquidity provisions operate in a balanced way in regards to both AAL and Orascom, with the exception of the specified floor price and the cap on the proceeds generated if AAL sells its shares. The cap on proceeds is consistent with the relative equity investment of the shareholders. The specified floor price reflects the investment of an established business in a high-risk venture and has little bearing on control.

Eligible Purchaser: The restriction on eligible purchasers does not provide Orascom with an avenue for influence over day-to-day operations or strategic decision-making activities of Globalive. It is an acceptable means of protecting remaining shareholders from being forced into a relationship with a competitor. There is a discretion to waive this restriction, the provisions apply equally to all shareholders and all sale provisions are subject to extensive rights of first refusal.

Veto Rights: The addition of an ordinary course of business exception allays concerns that the vetoes grant Orascom influence over the operation of the business. A percentage of the value of the spectrum is an acceptable basis for the threshold at start-up. In the long-term, Globalive's enterprise value would be a more appropriate measure and the thresholds should be revised by the end of the first year of operation and subsequently, every two years, so that it is set at 5% of the enterprise value as determined by the Board based on a third-party evaluation.

Technical Services Agreement: Globalive is free to accept or reject the advice provided by Orascom. It can terminate the TSA at any time without penalty (subject to certain events). The TSA provides Globalive with benefits that may operate as key determinants of its potential success. It is likely that the TSA will continue to provide Orascom with an avenue for influence but it is not dominant and determining, in and of itself.

Trademark Agreement: The Trademark Agreement does not provide Orascom with a significant avenue for influence.

Financing Arrangements: There are no statutory restrictions on the amount of debt a non-Canadian can provide to a telecommunications common carrier. The concentration of debt and equity in the hands of a single entity is not determinative of control, in and of itself, but it can create an opportunity for influence. The terms and conditions attached to the debt and equity financing are of utmost relevance. The elimination of the positive and negative covenants, the lack of conversion rights, the lengthening of the term of the loan and the renewal rights, the right of Globalive to retire or replace the debt without penalty and the modifications to the default provisions minimize these concerns and significantly diminish the levels of influence.

The Governor in Council found that Globalive had voluntarily made significant changes. While it noted that there are still certain avenues for influence by Orascom, it found that it was reasonable to conclude, in the circumstances of this case that these elements taken together do not amount to influence that is either dominant or determining. Therefore, the Governor in Council concluded that Orascom does not have the ability to determine Globalive's strategic decision-making activities or to manage day-to-day operations.

(d) Public Mobile's Appeal

Reminiscent of the Astral case, the Globalive saga continues. On January 8, 2010, Public Mobile Inc., another successful AWS spectrum licensee and potential new entrant into the wireless telecommunications market, filed an application with the Federal Court of Canada for judicial review of the Governor in Council's decision on Globalive. The Public Mobile application seeks an order declaring that "the decision of the Governor in Council ... was made without jurisdiction or was beyond the jurisdiction of the Governor in Council; that the Governor in Council erred in law in making that decision; and that the decision was contrary to law". Public Mobile is also seeking an order quashing the Governor in Council's decision.[86]

---

[86] Application dated January 8, 2010 under s. 18 and s. 18.1 of the *Federal Courts Act* between Public Mobile Inc. and Attorney General of Canada, Globalive Wireless Management Corp., Bell Canada, Rogers Communications Inc., Shaw Communications Inc. and TELUS Communications Company, at p.1.

The grounds for judicial review set out in Public Mobile's application are as follows:

> 6. Section 12 of the *Telecommunications Act* does not confer power on the Governor in Council to vary or rescind the CRTC's findings of fact.[87] The Governor in Council therefore acted without jurisdiction or beyond its jurisdiction in the decision.
>
> 7. The Governor in Council reached its conclusion that Globalive is not controlled in fact by non-Canadians in a perverse and capricious manner and without regard for the material before it.
>
> 8. The finding of the CRTC that Globalive was not controlled in fact by Canadians was correct, and, in any event reasonable, and the Governor in Council acted contrary to law by failing to defer to that finding.
>
> 9. The Governor in Council erred in law in holding that section 16(3) of the *[Telecommunications] Act* should be interpreted to encourage access to foreign capital, technology and experience for the purpose of promoting competition.[88]
>
> 10. The Governor in Council erred in law by applying section 16(3) of the *Act* for an improper purpose, namely to enhance competition.
>
> 11. The Governor in Council erred in law by basing its application of section 16(3) of the *Act* on an irrelevant consideration, namely on the efficacy and competitiveness of Canadian telecommunications at the national and international levels.
>
> 12. The Governor in Council erred in law by failing to exercise its powers in a manner consistent with the objectives defined in section 7 of the *Act*[89], and in particular by failing to promote the ownership and control of Canadian carriers by Canadians.[90]

---

[87] As previously noted, subsection 12(1) of the *Telecommunications Act* provides that within one year after a decision by the CRTC, the Governor in Council may on its own motion by order, vary or rescind the decision or refer it back to the CRTC for reconsideration of all or a portion of it. This subsection does not explicitly either include or exclude findings of fact.

[88] Section 16(3) of the *Telecommunications Act* sets out the Canadian ownership and control requirements for carriers.

[89] Section 7 of the *Telecommunications Act* sets out the Canadian Telecommunications Policy objectives.

[90] Public Mobile Application, *supra* note 86, at paras. 6-12.

It should be noted that these grounds allege that the decision of the Governor in Council was *ultra vires* of its jurisdiction and an improper use of its review and vary power under the *Telecommunications Act*; not that there was an operational conflict between the decision of Industry Canada and the CRTC *per se*.

In the latest salvo, Public Mobile's request that the Privy Council Office file with the Federal Court documents related to the Governor in Council's decision on the Globalive matter has been denied.[91] The Public Mobile judicial review application will be keenly observed by participants in the both the telecommunications and broadcasting industries to see how the Federal Court of Canada will interpret Cabinet's power to vary CRTC decisions in general, and ownership decisions in particular.

Thus, the final impact of the Globalive case remains to be seen. In a press release issued on the day of its decision, the Governor in Council stressed:

> In varying the CRTC decision, the Government is not removing, reducing, bending or creating an exception to Canadian ownership and control requirements in the telecommunications and broadcasting industries. The Government's decision to vary is specific to the facts of this case.[92]

However, as discussed in Section E of this paper, the Globalive case has contributed to the federal government calling for a review of the Canadian ownership and control

---

[91] I. Marlow, "Ottawa refuses to release Globalive decision documents", Globe and Mail (8 February 2010).

[92] Industry Canada, News Release, "Government of Canada Varies CRTC Decision on Globalive", 11 December 2009 (online: http://www.ic.gc.ca/eic/site/ic1.nsf/eng/05211.html).

requirements for satellite undertakings and telecommunications common carriers and possibly, broadcasting undertakings.

6. Analysis of the Astral and Globalive Cases

Given the directly conflicting decisions of two regulatory bodies in the Astral and Globalive cases, these cases test the concept of parallel jurisdiction to its fullest extent. Specifically, the Astral and Globalive cases raise some key questions:

1. Were there true operational conflicts between the decisions of the two regulatory bodies in question? If so, how would have the Federal Court of Canada resolved this operational conflict?

2. Did either regulatory body exceed its jurisdiction?

3. And with respect to the Astral case, in a proceeding before the Competition Bureau, was Astral entitled to avail itself of the “regulated conduct” defence by relying on the CRTC’s findings in its decision?

(a) Was There an Operational Conflict?

As noted above, 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, or makes it impossible for a person to simultaneously fulfil its legal obligations as defined by both regulators.

In the Astral case, the CRTC had decided that the acquisition by Astral of the Télémedia radio stations was in furtherance of the statutory objectives of the *Broadcasting Act* and as such could proceed. In contrast, the Competition Bureau had 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.

Had the Federal Court rendered its decision in this case, it might have found there was no true operational conflict. Rather, the Court may have found the Astral acquisition while permissible under the *Broadcasting Act*, simply may not be compliant with the provisions of the *Competition Act*. As a result, Astral would have been required, as it ultimately did, to address the Competition Bureau'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. Such divestitures did indeed take place and did necessitate another round of regulatory filings and approvals by the CRTC pursuant to the *Broadcasting Act*.

If the actions of the Competition Bureau and the CRTC were viewed as true operational conflicts, the question would have arisen as to how the conflict should be resolved. As set out above, in the *BCTel* case, the Supreme Court of Canada held that the courts 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 Astral case. 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.

The Globalive case also raises many legal questions. Was it a case of parallel jurisdiction requiring dual compliance? Or, was it a situation of conflicting jurisdiction and operational conflict?

Some may argue that there was no operational conflict: had Globalive refused to comply with the CRTC decision, Industry Canada's decision would have remained intact, as would have Globalive's status as a licensee of AWS spectrum. However, this ignores the fact that Globalive was ready to launch its wireless phone service, and therefore the inability to utilize the AWS licences to operate as a wireless carrier would have rendered the spectrum licences virtually meaningless to Globalive (putting aside any economic gain it may have realized by selling the licences to another new entrant).

Another argument in support of no operational conflict is that if Globalive had restructured its ownership in accordance with the CRTC's findings and submitted its revised ownership structure to the CRTC to determine its eligibility as a carrier, it would not have jeopardized, but in fact, would have enhanced, its Canadian ownership and control status under the *Radiocommunication Act.* Again, this argument ignores Globalive's position that it could not comply with the CRTC's findings because it could not secure Canadian financing to replace the debt provided by Orascom.

If one takes the position that the CRTC and Industry Canada decisions did result in an operational conflict, which of the Industry Canada or CRTC decisions would have prevailed before the courts?

It is significant to note that the ownership and governance structure that the Governor in Council ultimately approved was not the original structure approved by Industry Canada, but a revised structure, with significant changes prompted by concerns expressed by the CRTC and interveners. We will never know if the Governor in Council would have been able to reach the same conclusion, had those changes not been made to Globalive's structure.

Given the high economic stakes at hand, this is a case that would have likely resulted in court review and clarification of many of the issues identified. However, like Astral, the Globalive case was dealt with outside the courts and these questions remain unanswered.

(b) Did Either Regulatory Body Exceed its Jurisdiction?

With respect to the review conducted by the CRTC in the Astral case, 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 in policing anti-competitive behaviour between regulated entities pursuant to an overall prohibition on undue preference. Moreover, the Competition Bureau has traditionally acknowledged that the CRTC's merger review process necessarily involves competition issues such as the impact of mergers on advertising markets.[93]

Consequently, it could be that the Federal 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, i.e., that the CRTC ventured into more competition analysis than was required under its mandate. For example, in Astral, the CRTC 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 CRTC's decision to approve the merger.

The Globalive case was precisely one of a dual review by different authoritative bodies of a single transaction, applying the identical test, in accordance with their statutory mandates; where they differed was with respect to the application of the inherently

[93] CRTC/Competition Bureau Interface, *supra* note 39.

subjective “control in fact” review. Therefore, it can be argued that neither the CRTC nor Industry Canada exceeded their jurisdiction with respect to Globalive.[94]

This gives rise to a significant procedural issue. Given that two regulatory bodies applying the same test reached vastly different conclusions on the subjective control in fact aspect of the test, should this assessment be formally standardized, such as the “Control in Fact Advisory” issued by the Office of the Superintendent of Financial Institutions Canada?[95] Even with a standardized approach, can it be guaranteed that two regulatory bodies will reach the same conclusion with respect to control in fact? If not, do such multiple ownership reviews represent good policy?

Another significant policy question raised by the Globalive case is whether it is appropriate for the Minister of Industry to have the ability to compel Cabinet to vary a CRTC decision that conflicts with a decision issued by Industry Canada. It is difficult under these circumstances to avoid allegations of bias and abuse of power, as alleged in the Public Mobile judicial review application.

We will have to wait and see how either the courts or Parliament address these issues of jurisdiction in the future.

---

[94] As described earlier, the Public Mobile judicial review application takes the position that the Governor in Council (not Industry Canada) exceeded its jurisdiction in varying the CRTC’s decision on Globalive.

[95] The Office of the Superintendent of Financial Institutions Canada (“OSFI”) administers the *Bank Act*, the *Insurance Companies Act*, the *Trust and Loan Companies Act* and the *Cooperative Credit Associations Act*. The issue of whether a person controls an entity is relevant in various circumstances throughout these federally regulated financial institution statutes. See Advisory 2007-02 – Control in Fact, issued October 2007
(online: http://www.osfi-bsif.gc.ca/app/DocRepository/1/eng/guidelines/regulatory/adv_cnt_fct_e.pdf)

(c) Did the Regulated Conduct Defence Apply in the Astral Case?

As noted above, 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 asserted that the regulated conduct defence or exemption applied to its acquisition of the Télémedia radio stations. By way of contrast, the Commissioner of Competition took the position that the regulated conduct defence or exemption was inapplicable.

It could be argued that the applicable criteria established by the Supreme Court of Canada to establish the regulated conduct defence (as described above) were 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, the CRTC had 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. As previously noted, 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, there were two federal laws at issue, 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. As it currently stands, the applicability of the regulated conduct defence to mergers of broadcasting and telecommunications companies remains uncertain.

E. IS CHANGE ON THE HORIZON?

The examples discussed have identified just a few of the many cases where multiple reviews have been conducted. In instances of multiple reviews where regulatory bodies have issued consistent rulings, parties have continued through the process and accepted the rigorous requirement of two or more reviews. However, in instances where there are conflicting decisions, it gives rise to the question of whether only one regulatory body should have the authority to decide the issues. As in the case of any statutory regime, change will only occur with a decision from the legislature or direction from the courts.

The Astral case sparked a flurry of responses, with certain commentators taking the position that either the CRTC or the Competition Bureau, but not both, should be given exclusive jurisdiction over merger reviews of telecommunications and broadcasting companies.

Call for change is not only limited to commentators or stakeholders but the regulators themselves, in recognition of the awkward nature of the parallel jurisdiction system. In a presentation by Konrad von Finckenstein, then Commissioner of Competition of the Competition Bureau, to the Standing Committee on Canadian Heritage on the Study of the State of the Canadian Broadcasting System on April 3, 2002, Mr. von Finckenstein advocated that the mandate of the CRTC should be clarified in order to focus the CRTC's review of broadcasting mergers solely on the impact that the mergers would have on core cultural values and diversity of voices. This, in essence, would leave the assessment of a transaction's potential impacts on competition solely to the Competition Bureau:

> ... **clarify the mandate of the CRTC to:**
>
> a) specify that the CRTC has a responsibility to preserve a diversity of voices within the broadcasting system; and
>
> b) focus, at the same time, the CRTC review of broadcasting transactions solely on the impact that the mergers would have on core cultural values and diversity of voices.
>
> - ... Currently, both the CRTC and the Bureau possess the power to review and approve certain broadcasting transactions. We are in favour of a clear division of responsibilities and jurisdictions.
>
> - The *Competition Act* provides certain criteria for analysis that the Bureau applies in all merger reviews, including those which involve media companies. We would continue to review the commercial implications of broadcasting transactions and their competitive effects on market power.
>
> - The CRTC should not review broadcasting transactions from the perspective of commercial viability. The CRTC's review should be focussed solely on the impact the proposed merger

> would have on the attainment of core cultural objectives: the production and distribution of Canadian content and according to us, its logical corollary, the maintenance of a diversity of voices.[96]

Ironically, six years later, with Mr. von Finckenstein at its helm, the CRTC emphasized that cultural objectives, including diversity of voices, cannot be wholly divorced from the question of market dominance, since issues of dominance also have social and cultural dimensions:

> With respect to market dominance, the Commission recognizes that, while this concern is largely an economic issue relating to questions of competition, issues of dominance also have social and cultural dimensions. The gate keeping powers that can result from market dominance may affect the diversity of programming within the Canadian broadcasting system. What is carried, what is commissioned, what is broadcast - these are all issues that intersect with the question of market dominance.[97]

Accordingly, in its 2008 submission to the Competition Policy Review Board, the CRTC advocated that a merger review process for communications entities should be implemented in which the roles of the Competition Bureau and the CRTC are clearly defined, in which decisions are made openly and transparently, and in which the CRTC, in the public interest, will have "ultimate responsibility" for approval:

> For the reason that they have a unique role in Canadian society, communications companies should be regulated by a single body that has a broad mandate to consider a public interest test in supervising the industry. The Competition Bureau, expert as it is in its domain, has no such public interest test within its economic

---

[96] Statement by Konrad von Finckenstein, Q.C., Commissioner of Competition, Competition Bureau, to the Standing Committee on Canadian Heritage on the Study of the State of the Canadian Broadcasting System, May 7, 2002, at pp. 9-12 (online: http://strategis.ic.gc.ca/pics/ct/broadcasting_e.pdf).

[97] Broadcasting Public Notice CRTC 2008-4: *Diversity of Voices*, 15 January 2008, at para. 37.

> framework. The Commission must be guided in its decisions by transparently provided input from the Competition Bureau, but a broader view of the public interest should hold sway. In the case of mergers, a review process for communications entities should be implemented in which the roles of the Commission and the Competition Bureau are clearly defined. The Competition Bureau and the Commission should co-operate in the review of proposed mergers. The Competition Bureau should present its conclusion, in an open and transparent manner, to the Commission. In the event that the Commission disagrees, the views of the Commission should prevail and the Commission would be required to publish its reasons for its position.[98]

The CRTC also advocated that "[s]pectrum licensing for telecommunications and broadcasting are one element in a coherent system and should therefore be the responsibility of the Commission".[99]

Such calls have yet to give way to any legislative change, with the CRTC and the Competition Bureau continuing to share parallel jurisdiction over merger reviews of broadcasting and telecommunications companies. However, the Globalive case has somewhat revived the debate, albeit in a different form: whether the CRTC and Industry Canada should continue to have parallel jurisdiction over foreign ownership reviews of broadcasting and telecommunications companies or whether, as recommended by the CRTC, the CRTC should have responsibility for spectrum licensing.

In addition, as noted at the outset of this paper, the Globalive case has resulted in the federal government signalling its intent to remove the foreign ownership restrictions

---

[98] *A Competitive Balance for the Communications Industry*: Submission of the Canadian Radio-Television and Telecommunications Commission to the Competition Policy Review Panel, 11 January 2008, at pp. 1 and 10
(online: http://www.crtc.gc.ca/Eng/publications/reports/cprp.htm).

[99] *Ibid.*, at pp. 1 and 7.

applicable to satellite undertakings and to review the foreign ownership rules applicable to telecommunications and possibly, broadcasting undertakings.

Following the recommendations of the Competition Policy Review Panel's final report, "Compete to Win"[100], in its Speech from the Throne, delivered on March 5, 2010, the federal government indicated that:

> Our Government will open Canada's doors further to venture capital and to foreign investment in key sectors, including the satellite and telecommunications industries, giving Canadian firms access to the funds and expertise they need.[101]

The federal budget delivered the next day on March 6, 2010, indicated that the government will "remove the existing restrictions on foreign ownership of Canadian satellites"[102], remaining silent on the telecommunications and broadcasting industries.

However, the minutes of the March 9, 2010 meeting of the Standing Committee on Industry, Science and Technology[103], indicated "That given the recent cabinet decision on Globalive Communications Corporation", the Committee has agreed to "begin a review of Canada's foreign ownership rules and regulations under the

---

[100] Competition Policy Review Panel, "Compete to Win" (Ottawa: Public Works and Government Services Canada, 2008*)* at pg 28.

[101] Speech from the Throne "A Stronger Canada. A Stronger Economy. Now and for the Future", March 3, 2010, at p. 7 (online: http://www.speech.gc.ca/grfx/docs/sft-ddt-2010_e.pdf).

[102] Canada's Economic Action Plan Year 2, Budget 2010: Leading the Way on Jobs and Growth, tabled in the House of Commons by the Honourable James M. Flaherty, P.C., M.P., Minister of Finance, March 4, 2010, at pp. 93 and 97 (online: http://www.budget.gc.ca/2010/pdf/budget-planbudgetaire-eng.pdf).

[103] Standing Committee on Industry, Science and Technology, Minutes of Proceedings, Meeting No. 1, Tuesday, March 9, 2010 (online: http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4336405&Language=E&Mode=1&Parl=40&Ses=3)

Telecommunications Act, the *Radiocommunication Act*, the *Broadcasting Act* and any other legislation deemed appropriate", leaving open the possibility of a wholesale revamp of the foreign ownership policies currently applicable to broadcasting and telecommunications undertakings.

The nature and extent of those reviews is not yet known at the time of writing this paper, including whether they will extend to restrict foreign ownership reviews of broadcasting and telecommunications companies to a single regulatory body.

From this, it can be easily argued that change of this nature would require legislative changes to the empowering statutes and that a complete change to the ownership review regime for broadcasting and telecommunications companies should eliminate all instances of parallel jurisdiction and potential for operational conflicts. On the other hand, the change need not be so extensive and could involve co-operation between regulatory bodies with each body applying its expertise in areas that it is best equipped to address. Either way, significant change in ownership and merger reviews of broadcasting and telecommunications companies appears to be on the horizon.

\5825463