

Broadcasting, Telecommuni- cations & New Media

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Who's On First?

Introduction

A number of recent media stories have reported on a jurisdictional tussle that pits the Bureau of Competition Policy's general mandate under the *Competition Act* against the specific mandate of the Canadian Radio-television and Telecommunications Commission ("CRTC" or the "Commission") under the *Broadcasting Act*.

The Federal Court of Canada has been asked to rule on the respective jurisdictions of the CRTC, and the Competition Tribunal in the context of a proposed sale of media assets. The Federal Court's Decision could well have far reaching implications for future mergers of media companies that are regulated both under the *Broadcasting Act* and the *Competition Act*.

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

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

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

The CRTC's Decision stands in stark contrast to the conclusions of the Commissioner of Competition Policy. In its Decision, the CRTC took the view that the radio advertising market is not a separate and distinct market but rather a subset of a larger advertising market that includes television and print media. To this end, the CRTC accepted evidence led by Astral that in recent years both AM and FM radio stations in 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 television offered local advertisers inventories and costs that are competitive with those offered by radio in certain of the markets in question (paragraph 39 of the Decision). 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” (paragraph 29 of the Decision).

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

1. Is there a true operational conflict between the exercise of the CRTC’s jurisdiction under the *Broadcasting Act* and the exercise of jurisdiction by the Commissioner of Competition Policy pursuant to the *Competition Act*? If so, how will the Federal Court of Canada resolve this operational conflict?
2. In a proceeding before the Competition Tribunal, is Astral entitled to avail itself of the “regulated conduct” defence by relying on the CRTC’s findings in its Decision?
3. Did the CRTC exceed its jurisdiction under the *Broadcasting Act* by making findings of fact and applying economic tests typically

associated with merger reviews under the *Competition Act*?

Operational Conflict?

Traditionally, the Courts have found that an operational conflict exists where two administrative tribunals reach decisions that are truly in conflict, meaning compliance with one necessitates the violation of the other. In this particular case, the CRTC has decided that the acquisition by Astral of the Telemedia radio stations is in furtherance of the statutory objectives of the *Broadcasting Act* and as such can proceed. By way of contrast, the Commissioner of Competition Policy has 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. It may be that the Court finds there is no true operational conflict. Rather, the Court may find 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 may be required to address the Commissioner of Competition Policy’s concerns (i.e. through conditions such as the divestiture of certain stations in certain markets) in order to be able to proceed with the transaction. A restructuring of the transaction would of course necessitate another round of regulatory filings and approvals by the CRTC pursuant to the *Broadcasting Act* in the event that regulated assets are reallocated or otherwise spun-off.

If the actions of the Commissioner of Competition Policy and the CRTC are viewed as true operational conflicts, the question is how does the conflict get resolved? In the leading case of *British Columbia Telephone Co. v. Shaw Cable Systems (BC) Ltd.*¹ the Supreme Court of Canada held that the court should employ a pragmatic and functional approach and decide in light of the policy schemes surrounding each of the administrative tribunals and the nature of the conflicting decisions which the legislature would have intended to take precedence.

Factors taken into account include the legislative purpose behind the establishment of each administrative tribunal, the extent to which an administrative tribunal’s decision is central to the purpose of that tribunal and the degree to which an administrative tribunal in reaching a decision is fulfilling a policy-making or

¹ [1995] 2 S.C.R. 739

policy implementation role. It is this last criterion which may very well be determinative in the case at hand. The Courts have consistently recognized the CRTC's broad policy-making role pursuant to the *Broadcasting Act*. In the Astral case the high level of curial deference traditionally accorded to the CRTC will be tested.

Regulated Conduct

The regulated conduct defence generally provides that activity specifically required or authorized pursuant to a valid scheme of regulation is deemed to be in the public interest. In its submissions to the Federal Court of Canada, Astral Media has asserted that the regulated conduct defence or exemption applies to its acquisition of the Telemedia radio stations. By way of contrast, the Commissioner of Competition Policy has taken the position that the regulated conduct defence or exemption is inapplicable. It would certainly appear that the applicable criteria established by the Supreme Court of Canada in *R. v. Canadian Breweries Ltd.*² and *Canada (A.G.) v. Law Society (British Columbia)*³ to establish the regulated conduct defence are present. To summarize, in order for the regulated conduct defence to apply the following key factors must be present:

1. An industry must be subject to regulation pursuant to validly enacted legislation.
2. The defence is limited to those activities or types of conduct specifically subject to regulation.
3. It is not enough for the regulatory body merely to possess the authority to control the activity or conduct in question, the regulatory authority must be exercised in order for the defence to apply.

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

The Federal Court of Canada will also have an opportunity to clarify the scope of the regulated con-

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

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

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

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

² [1960] O.R. 601

³ [1982] 2 S.C.R. 307

acknowledged that the CRTC's merger review process necessarily involves competition issues such as the impact of mergers on advertising markets⁴.

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

We will publish a follow-up article on *Astral* when the Federal Court's Decision is released. For further

information and legal advice regarding this case, please contact Robert Malcolmson or Michael Koch. For further information or advice on regulatory, copyright, competition and other legal issues affecting the broadcasting, telecommunications and new media industries, please contact any member of our Broadcasting, Telecommunications and New Media Group:

Kathryn Robinson 416.597.4143
krobinson@goodmans.ca

Michael Koch 416.597.5156
mkoch@goodmans.ca

Robert Malcolmson 416.597.6286
rmalcolmson@goodmans.ca

Monique McAlister 416.597.4255
mmcalister@goodmans.ca

Alex Johnston 416.597.4282
ajohnston@goodmans.ca

⁴ CRTC/Competition Bureau Interface: Backgrounder, November 22, 1999.

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