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The Competition Bureau's Work in Media Industries: Background for the Senate Committee on Transport and Communications

COMPETITION BUREAU

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Introduction

This report provides a detailed summary of work the Competition Bureau (the "Bureau") has done in connection with media enterprises over the past 35 years.[1] Over this period, there have been dramatic changes in competition law. Prior to 1986, the Bureau enforced the merger and monopoly provisions as set out in the *Combines Investigation Act*. Under that legislation, mergers and monopolies were criminal offences, and as such, the Bureau was required to satisfy the criminal burden of proof, that being "beyond a reasonable doubt," before it could obtain a conviction. This provision proved to be ineffective.[2]

There was one unsuccessful contested case involving media industries under the pre-1986 legislation. In the case of *R. v. Irving Ltd. et al.*, the Crown was unable to satisfy the criminal burden of proof after laying charges following a series of acquisitions that gave the Irving family control over all five English-language newspapers in the province of New Brunswick. There were also several unsuccessful investigations into newspaper markets by the Restrictive Trade Practices Commission (RTPC) under the *Combines Investigation Act*. In 1960, for example, the RTPC launched an investigation into the newspaper industry after Pacific Press was given control over all three daily newspapers in the Vancouver market. While the RTPC concluded that the formation of Pacific Press led to a public detriment, it did not seek a conviction under the *Combines Investigation Act*.[3]

In 1986, the *Competition Act* was passed. This changed the competition law regime dealing with mergers and monopolies to a non-criminal setting. This relieved the Crown of the exceptionally difficult criminal law standard. The Competition Tribunal (the "Tribunal") was also created to review mergers, monopolies (now reviewed as abuse of dominance) and other civil law provisions. Soon after the new

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[1]Consistent with the provisions of the *Competition Act*, this report deals only with information in the public domain. This consideration limits the amount of detail that can be provided in describing the Bureau's work. This document is up to date as of November, 2003.

[2]Indeed, in the 75-year history of the criminal merger law, only nine cases were brought before the courts. None of these actions was successfully prosecuted on a contested basis by the Crown. Seven cases resulted in acquittal and two cases, not contested, resulted in guilty pleas.

[3]Restrictive Trade Practices Commission, *Report Concering the Production and Supply of Newspapers in the City of Vancouver and Elsewhere in British Columbia* (Ottawa: Queen's Printer, 1960).

law was enacted, the Bureau created two new branches to deal with the civil law reviewable matters – the Mergers Branch and the Civil Matters Branch. A third new branch, Criminal Matters Branch, was created to administer the conspiracy provisions and a number of other remaining criminal law provisions.

Under the *Competition Act*, the Bureau has a specific responsibility for the maintenance and enhancement of competition in the Canadian marketplace. The Bureau has considerable expertise at assessing issues related to competition and is responsible for enforcing a modern and effective *Competition Act*. The Bureau also has a responsibility to act as an advocate of competition. The Bureau strives to ensure that Canada has a competitive marketplace and that all Canadians enjoy the benefits of competitive prices, product choice and quality service.

As a law of general application that covers all businesses in Canada, the *Competition Act* has no specific provisions regarding broadcasting, telecommunications, newspapers or other media. Also, the *Competition Act* is essentially an economic law. When it is applied to specific cases, an analytical framework common to all products and services is employed.

Section (1) of this report provides background on the Competition Bureau's experience in media industries under the merger provisions. Section (2) comments on the Bureau's experience with respect to provisions dealing with restrictive business practices such as Abuse of Dominance. Section (3) discusses experience under the conspiracy and other criminal law provisions. Section (4) comments on the experience from the perspective of the Bureau's advocacy role. Section (5) provides a summary.

The Bureau's Experience in Media Industries: Enforcement

The Merger Provisions

At the outset, subsection (i) outlines the analytical approach the Bureau takes under the current merger provisions. Subsection (ii) describes a number of particular cases that were looked at under the post-1986 civil merger provisions. Merger cases taken under the pre-1986 criminal merger provisions are discussed in the subsection of the paper dealing with the Criminal Provisions.

(i) The Analytical Approach

Under the merger provisions, the key test is whether the proposed transaction will likely substantially lessen or prevent competition. Only if that is the case can a transaction be challenged before the Competition Tribunal.[4] To satisfy this test, it must be shown that the transaction would likely enhance the market power of the merged entity sufficiently so as to provide it with the ability to increase price above competitive levels (or otherwise restrict competition in dimensions such as quality or product variety) for a sustained period of time. Similarly a substantial prevention of competition would result where a merger would enable a firm to maintain higher prices than what would exist in the absence of the merger (for a sustained period of time) by hindering or impeding increased competition. An example would be the acquisition of a poised new entrant.[5]

For a transaction to <u>enhance</u> market power, it must be the case that the products that the merging firms produce (or in the case of a prevention of competition, could produce) are in the same relevant product and geographic markets (i.e., there is an overlap). The transaction itself is likely to affect the incentive to make competitive offerings to consumers only if there is an overlap. The merger provisions are not designed to assess whether the products are being supplied at competitive prices and other terms prior to the transaction. Rather, the focus is on the effect of the transaction – i.e., does it change market structure in a manner that causes an increase in market power.

In media markets, advertisers, not the final consumer, are often the most important players from a competition policy perspective. Cases to date have stressed the important role that media markets play

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[4]In order to provide greater certainty on the manner in which the Bureau would conduct its analysis of a merger under the merger provisions, the Bureau published its *Merger Enforcement Guidelines* in 1991. Subsequently in 1997, as part of the Bureau's submission to the Task Force on the Future of the Canadian Financial Services Sector, it released an industry-specific analysis of how the merger guidelines would be applied in the case of a bank merger. The Bureau is currently reviewing the 1991 Merger Enforcement Guidelines.

[5]In general, a prevention or lessening of competition will be considered "substantial" where the price of the relevant product is likely to be materially greater, in a substantial part of the relevant market, than it would be in the absence of the merger; and where the price differential would not likely be eliminated within two years by new or increased competition from foreign or domestic firms.

in providing an audience to advertisers. Specifically, in cases where there were competitive concerns, the Bureau's investigation concluded that it was likely that the proposed transaction would adversely affect the price paid by advertisers. Just as with any other market, the examination looks at all competitive aspects of a transaction -- price, quality, product choice.

Formally speaking, the relevant market is defined as the smallest group of products and the smallest geographic area in which sellers (if acting as a single firm) could impose and sustain a significant and non-transitory price increase above levels that would likely exist in the absence of a merger.[6] Once the relevant market is defined, statistical data relating to sales or production capacity in the market is used to establish market shares. Mergers generally will not be challenged on the basis of unilateral exercise of market power if post-merger the parties have less than 35% of the relevant market. Similarly, mergers will likely not be challenged on the basis of concerns relating to the interdependent exercise of market power (i.e. firms acting in some coordinated fashion) where the largest four firms in the industry have a combined market share of less than 65% and post merger, the merging parties would have a share of less than 10%.

The *Competition Act* specifically states that high market share alone is not sufficient to establish a substantial lessening or prevention of competition. The following additional factors must be considered:

- **Foreign competition:** To the extent that access to foreign products or foreign competition is a viable alternative for customers, it would lessen a dominant firm's ability to exercise market power post-merger. Note that this factor does not address entry by a foreign based competitor through the establishment of new facilities, but rather the ability of Canadian based consumers to access foreign suppliers. Foreign companies with facilities in Canada are treated as domestic firms for analytical purposes.

- **The existence of a failing firm:** If the firm being acquired is insolvent and is in the process of exiting the market, its acquisition may not alter the competitive nature of the market post-merger, given that if the merger does not take place, the failing firm would no longer be a competitor in the market. However, when assessing this factor, consideration is given to whether or not a preferable alternate buyer exists, or whether restructuring or liquidation would lead to a better competitive result.

- **The availability of acceptable substitutes for buyers:** A post-merger price increase could be prevented in cases where customers have access to acceptable substitute products which meet their needs at competitive prices.

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[6] As a general rule of thumb, the Bureau considers a five percent increase to be significant (although this can differ based on the industry in question), and a one year period to be non-transitory.

- **Barriers to entry facing new competitors:** Low barriers to entry could effectively prevent a dominant firm from exercising market power and increasing prices due to the fact that new firms are actually entering the market or because the threat of new entry is such that it acts as a disciplining factor on the existing firms. Conversely, high barriers to entry would entrench a firm's dominant position and, in such a situation, a merger is more likely to raise issues under the *Competition Act*. The impact of any barrier to entry into a market is considered, including tariff and non-tariff barriers to international trade, interprovincial barriers to trade and regulatory control over entry.

- **The effectiveness of remaining competition:** If, post-merger, the remaining competitors are likely to be able to discipline attempts to increase price by the newly-merged firm, they may be in a position to discourage the exercise of market power.

- **Removal of a vigorous and effective competitor:** If the merger eliminates a competitor who has engaged in aggressive price competition, or has been a leader in introducing other forms of non-price competition (such as innovations in terms of product offerings, distribution, marketing, and packaging), its elimination from the market could have a more dramatic impact on competition than the case of a firm which has historically been a price follower.

- **The role of change and innovation in the market:** The exercise of market power post-merger may be more difficult in an industry which is subject to rapid change and innovation, and where market shares can change quickly, as opposed to a mature market where it is more difficult to capture new market share.

- **Any other factors relevant to competition:** In any market, there may be unique features that are relevant to an assessment of the competitive dynamics of that market. This factor is intended to capture those types of situations. As well, the Bureau has identified specific other factors which may be considered under this section. These include such matters as the level of transparency within a market and its role as a tool to facilitate interdependent behaviour, or whether the size and frequency of typical transactions occurring between seller and buyer in the relevant market has any impact on facilitating interdependent behaviour (the larger the value and the fewer the transactions, the easier it is to detect cheating by other sellers).

Even where there is a finding that a merger would likely substantially lessen or prevent competition, the *Competition Act* specifically directs that the merger be allowed to proceed if it would also likely result in gains in efficiency that are greater than and offset the effects of the lessening or preventing of competition, providing that the efficiency gains would not likely be attained if the merger was blocked.[7]

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[7]Upon completion of a merger assessment, should it be the Commissioner determined that the transaction would likely result in a substantial lessening or prevention of competition, he may apply to the Tribunal for a remedial order to address the competitive concerns. Where possible, it is the Commissioner's policy to discuss any

Given that this analysis is fact-based and that markets and business practices evolve over time, it is necessary to carefully analyse the specific markets affected by a transaction based on the market conditions at that time.

It should be noted that the *Competition Act* is not intended nor designed to deal with the important question of "diversity of voices." In certain cases, maintenance of the diversity of voices may result from the application of competition policy principles. This is an indirect effect of our primary focus, the maintenance of competition. For example, our review of the recent *Astral* transaction raised competitive concerns under the *Competition Act*. The remedy in this case, which addressed our competitive concerns, also promoted continued diversity of ownership in six radio markets as a by product.

(ii) Merger Examinations

This section provides detail on several merger examinations. A list of cases where the examination was closed because the transaction posed no issue under the *Competition Act* is contained in Appendix A.

Commissioner v. Astral Media Inc. (2001)

On December 21, 2001, the Bureau filed an application with the Tribunal to challenge the proposed acquisition by Astral Media Inc. of eight French-language radio stations owned and operated by Télémédia Radio Inc. in Quebec, and of the 50 percent interest held by Télémédia in Radiomédia. On the same day, the merging parties challenged the Bureau's jurisdiction in Federal Court.

The Bureau concluded that the proposed merger would likely prevent or substantially lessen competition in six markets. By acquiring the eight Télémédia stations, Astral would have a monopoly or near monopoly in French-language radio advertising in four markets (Gatineau-Ottawa, Sherbrooke, Trois-Rivières and Chicoutimi-Jonquière) and substantial control over French-language radio advertising markets in Montréal and Quebec City.

On September 3, 2002, the Bureau announced it reached an agreement resolving its competition concerns with the proposed acquisition. The agreement which was filed with the Tribunal contained the following key elements:

- The parties' AM radio stations, in all six relevant markets, would be sold as a network and placed under the immediate control of an operating trustee.

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concerns with the parties in order to explore ways to alleviate any negative impact on competition by means of negotiated settlement so as to avoid contested proceedings before the Tribunal.

- If the parties were unable to sell the designated assets as required, a divestiture trustee would take over and complete the process.
- A code of conduct would protect advertisers and assist new entry by prohibiting anti-competitive practices such as exclusive sales contracts or tied selling arrangements for a period of time.
- In the four markets where the Bureau had the greatest competition concerns (Gatineau-Ottawa, Sherbrooke, Trois-Rivières and Chicoutimi-Jonquière), pending new entry, the Télémédia FM stations would continue to compete for local advertising against the Astral FM stations for up to 42 months.

It was concluded that the divestitures and the expected entry of new radio stations would preserve competition in French language radio advertising in the relevant markets. A code of conduct was implemented to protect advertisers and assist the establishment of the new radio stations.

Globe and Mail/BCE Inc. (2001)

On January 9, 2001, the Bureau announced it would not challenge BCE Inc's acquisition of certain Thomson Corporation assets. The assets being acquired included The Globe and Mail and related Internet properties. BCE intended to combine these assets with its CTV broadcast interests.

The Bureau's review of the matter focussed on the economic issues associated with the acquisition, and in particular, the potential impact on advertisers. The Bureau concluded that, at the time, newspapers, Internet and television did not compete with each other for retail advertising. The Bureau concluded that the transaction would not likely lead to a substantial lessening of competition in any of the markets.

As part of its examination, the Bureau also looked at vertical issues concerning high speed Internet access. It looked closely at the ability of competing Internet Service Providers to access the network infrastructure of both BCE and the cable companies as a means to deliver high speed Internet access. The Bureau determined that high speed Internet access was not a cause for concern as competitors already had access to the telephone networks for the purpose of providing high speed Internet access. In addition, the issue of cable network access had been addressed by the Canadian Radio-Television and Telecommunications Commission (CRTC) which mandated the four largest cable companies to provide access to their networks.

Bell Globemedia Inc. /Cogeco Inc. (2001)

In January 2001, Quebecor filed a complaint with the Bureau alleging that the joint offer by Cogeco Inc. and Bell Globemedia Inc. to purchase the assets of the TQS network contravened the *Competition Act*. As a shareholder of TQS, Cogeco had a right of first refusal over any offer for TQS shares. The Bureau concluded that the joint offer by Bell Globemedia Inc, a subsidiary of BCE, and Cogeco Inc. did not contravene the *Competition Act*.

Unimedia Company/Gesca Ltee (2001)

On January 18, 2001, the Bureau announced it would not oppose the acquisition of Unimedia Company by Gesca Ltée, a subsidiary of Power Corporation Canada. At the time, Gesca held a number of newspaper dailies, such as *La Presse* (Montreal), *Le Nouvelliste* (Trois-Rivieres), *La Tribune* (Sherbrooke), *La Voix de l'Est* (Granby) and six non-daily newspapers. Unimedia operated some newspapers, notably *Le Soleil* (Quebec City), *Le Quotidien* (Chicoutimi) and *Le Droit* (Hull-Ottawa), as well as 20 non-dailies and specialty publications.

The Bureau concluded that the transaction would not likely substantially lessen or prevent competition because the newspapers involved did not circulate to any significant extent in the same towns or rural areas. There were no competition concerns or overlap in advertising in any of the markets and there was no media convergence issue.

CanWest Global Communications Corp./Hollinger Inc. (2000)

In July 2000, CanWest Global Communications Corp. announced its intention to acquire the majority of Hollinger Inc.'s Canadian media interests, including its large metropolitan daily newspapers and community newspapers, a 50 percent share of *The National Post*, and Internet assets such as Canada.com. The Bureau reviewed the proposed transaction and concluded that, since there was no evidence that newspapers, the Internet and television compete directly for retail advertising normally found in newspapers, the transaction would not substantially lessen competition in those markets for advertisers.

However, the Bureau expressed competition concerns about the impact of the resulting connection between Canada's two principal business newspapers, *The Globe and Mail* and *The National Post*, through the business-oriented specialty channel, *ROBTv*, in which both CanWest (affiliated with *The National Post*) and *The Globe and Mail* had interests.

As a result of these concerns, CanWest agreed to the Bureau's request to place its entire investment in *ROBTv* in trust, pending resolution of the partnership situation. As the undertakings took effect at the

time of the closing of CanWest's acquisition of Hollinger's assets, CanWest also agreed to ensure that Hollinger did not share confidential information with *ROBTv* and The Globe and Mail. The Bureau undertook to monitor CanWest's compliance.

Commissioner v. Quebecor Inc./Videotron Ltee, CT 2000/005, (2000)

In a public offer made on September 27, 2000, Quebecor Inc., through its subsidiary Quebecor Média Inc, proposed acquiring all the outstanding shares of Groupe Vidéotron Ltée. This would have given Quebecor control, in viewership terms, of the first and third largest French-language television networks in Quebec, TVA and TQS. As a result, Quebecor would control more than half of all the French-language television advertising revenues in the province.

The Bureau concluded that this proposed merger would likely prevent or substantially lessen competition in the sale of French-language television advertising air time in Quebec for the following reasons:

- it was unlikely that a new conventional television network would be licensed in the near future under the current regulatory framework.
- French-language specialty channels could only contest a limited share of the television advertising market.
- other media were very poor substitutes for television as far as advertisers were concerned.

On November 10, 2000, the Bureau filed an application for a consent order with the Tribunal to require Quebecor to sell TQS. The purpose of the order was to maintain competition in the sale of French-language television advertising time in Quebec.On January 15, 2001, the Tribunal issued the order, directing Quebecor to sell TQS by December 31, 2001 or via a trustee thereafter if the CRTC approved Quebecor's acquisition of TVA.On March 13, 2001, the Bureau announced, following its review of other aspects of the transaction, that competition would remain vigorous in the other markets it had examined, including access to high-speed Internet services and the supply of advertising space in magazines, on Internet sites and in other French-language media in Quebec.

The Bureau had serious concerns about the impact of this transaction on competition in the television advertising market and the sale of TQS was required to ensure that competition remained strong.

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 (2000)

The Bureau did not make any statements on this case that are in the public domain. However, in his dissenting opinion, CRTC Commissioner David McKendry publically outlined the Bureau's analysis of the CTV Inc./ NetStar transaction. He referred in particular to a December 3, 1999 letter in which the Bureau wrote to inform the parties' counsel of the Bureau's conclusions:

> "The Competition Bureau has done an extensive review of the competitive implications of this transaction, which included speaking to market participants and industry experts. Our analysis has focussed 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. We have 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"[8]

He further indicated that, with respect to the acquisition of premier sports broadcast rights, the Bureau was unable to determine the extent to which TSN and Sports Net competed with each other for these rights. This was because the CRTC: "had licensed these services as complementary and it was not clear to what extent the competition between these two channels for premier sports rights respected underlying CRTC policy. …… The extent of permissible and actual competition between TSN and Sportsnet might be an issue for consideration before the CRTC at the impending hearing.'[9] The Bureau also noted that the Commission was reviewing a license amendment application by Sportscope Television Network Ltd. (Sportscope), "possibly resulting in another potential purchaser for live sports broadcast rights."[10] In light of these considerations, the Bureau stated that it would await the outcome of these proceedings before it made a final decision.

Southam Inc. / The Financial Post (1999)

The Bureau's focus when examining proposed mergers in the print media is on preserving competition in advertising, not in editorial diversity. Following a month-long review of Southam's proposed acquisition of *The Financial Post* newspaper from Sun Media Corporation in August 1998, the Bureau decided not challenge the transaction.

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[8]Letter to Mr. Tim Kennish, Osler Hoskin & Harcourt, from Mr Raymond F Pierce, Acting Deputy Commissioner of Competition, Mergers Branch, Competition Bureau, December 3, 1999, at 1.

[9]*Ibid*., at 1-2.

[10]*Ibid*., at 2.

The Bureau concluded that combining *The Financial Post* with the new daily (now known as the *National Post*) would not prevent competition substantially in the marketplace. It was felt that the introduction of the new, merged daily newspaper would drastically alter the newspaper landscape and it could result in even more vigorous competition.

The Bureau undertook to keep an eye on future market developments to ensure that advertisers across the country would have access to a range of media alternatives. Advertisers could then continue to reach their target audiences at the best possible prices.

Sun Media Corporation/Torstar Corporation /Quebecor Inc. (1999)

From October 1998 to January 1999, the Bureau reviewed the following three transactions involving Sun Media Corporation and its assets:

- Torstar Corporation's bid for all outstanding shares of Sun Media Corporation;

- a subsequent bid by Quebecor Inc. for all outstanding shares of Sun Media Corporation; and;

- Torstar Corporation's proposed acquisition from Quebecor of *The Hamilton Spectator*, the *Cambridge Reporter*, the *Guelph Mercury* and *The Record* in Kitchener-Waterloo from Sun Media Corporation.

In the first instance, the Bureau concluded that Torstar's proposed acquisition of Sun Media would lead to a substantial lessening of competition in the Greater Toronto area. The Bureau's research found that Torstar's *The Toronto Star* and Sun Media's *The Toronto Sun* competed vigorously for retail and classified advertising.

The second case, Quebecor's acquisition of Sun Media, raised no issue under the *Competition Act*. The two companies did not have any overlapping operations, and did not compete for advertising. Quebecor's daily newspapers were located in Quebec and Manitoba, while Sun Media's were in Ontario and Alberta.

In the third proposal, the Bureau did not identify any anti-competitive effects resulting from Torstar's proposed acquisition of Sun Media's newspaper holdings just outside of Toronto. Therefore, it did not oppose Quebecor's sale to Torstar of the four Sun Media publications it had recently acquired in the Hamilton, Cambridge, Guelph and Kitchener-Waterloo markets.

Canada (Director of Investigation and Research) v. Southam Inc. (1997); and subsequent events

This case involved the acquisition of three community newspapers in Vancouver by Southam Inc. which already owned the two daily newspapers in the area, the *Vancouver Sun* and the *Province*.[11] The issues that were raised are fundamental to how the *Competition Act* applies to newspaper mergers, and in fact to mergers generally. The findings of the *Competition Tribunal* were appealed to the Federal Court of Appeal and the Supreme Court of Canada.

At the outset, it is important to note that the Competition Bureau could not challenge the pre-existing concentration in the market – i.e. the fact that Southam already controlled both the *Vancouver Sun* and *Province* through Pacific Press. This is because the review under the merger provisions of the *Competition Act* considers the likely economic impact of any increase of concentration in the relevant markets when an acquisition or merger takes place.

The key economic question that arose in this case was the degree to which the acquired community newspapers provided competition for the two Vancouver dailies. To support a merger case, the Competition Bureau must show, among other things, that there is a significant "overlap" between the operations of the acquired firm(s) and the operations of the acquiring firm. Showing such an overlap supports the theory that the merger will lead to an increase in market power.

The Bureau presented a large volume of evidence to support the claim that there was overlap, and therefore that the acquisitions eliminated competition. One key piece of evidence cited was the conclusion of a report commissioned by Southam prior to the merger to study the market and provide recommendations on future strategies. The report stated:

> "What is the reason for this substantial difference in market performance seen between Vancouver and other markets? We believe strongly that it is the large number of aggressive weeklies in Vancouver, which are siphoning revenues (logically) due to the Sun and/or Province by virtue of their readership and market presence."

Based on this and other evidence, the Bureau concluded that the weekly community newspapers were in the relevant market and Southam's acquisition would permit it to eliminate this competition.

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[11]The three community newspapers at issue in the case were the *Vancouver Courier*, the *North Shore News* and the *Real Estate* weekly.

The Tribunal took a different view and concluded that community newspapers and the dailies were very weak substitutes -- i.e. small changes in relative prices were not likely to induce a significant shift by advertisers from one type of newspaper to the other. This analysis led the Tribunal to conclude that the acquisition of the *North Shore News* and the *Courier* by Southam did not likely lead to a prevention or lessening of competition in the newspaper retail advertising services market in the city of Vancouver, on the North Shore or throughout the Lower Mainland.

At the same time, however, the Tribunal held that different economic factors were at play in the print real estate advertising market in the North Shore. The Tribunal found that the acquisition of the *Real Estate Weekly* would likely lead to a substantial lessening of competition.

On November 25, 1996, the Supreme Court of Canada heard Southam's appeal of the Federal Court of Appeal's decision in this matter. The Federal Court of Appeal on August 8, 1995, decided that the Tribunal failed to apply the proper test in determining product market. The Federal Court of Appeal ordered that the matter be remitted back to a differently constituted panel of the Tribunal to consider whether the merger prevented or lessened competition substantially.

On March 20, 1997, the Supreme Court found that the Federal Court of Appeal should not have overturned the Competition Tribunal's decision as the proper standard for appeal was not "correctness" but reasonableness. The Court decided that it owed the Tribunal considerable deference because it was a specialized Tribunal. Based on this, the Court decided in favour of Southam as it held that the Tribunal's decision on market definition was not unreasonable.

At the same time, the Supreme Court also heard Southam's appeal of the North Shore print real estate market decision. The Tribunal concluded that the merger was likely to result in a substantial lessening of competition in this market, and subsequently, in a remedy decision, found the appropriate remedy to be divestiture of either the *North Shore News* or the entire *Real Estate Weekly* chain. The Federal Court of Appeal upheld this decision and the Supreme Court dismissed Southam's appeal from the bench. As a result, Southam was required to divest itself of either the *North Shore News* or the *Real Estate Weekly* chain within a six month period from the March 20 decision of the Supreme Court of Canada. The Supreme Court's decision supported the principle that the correct remedy test in a contested merger case was curing the substantial prevention or lessening of competition, not returning the market to the pre-merger state of competition. [12]

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[12]It should be noted that, on September 11, 1998, Southam Inc. and a number of other applicants filed a request with the Competition Tribunal under section 106 (b) of the *Competition Act* and sought a variation of the original divestiture order issued by the Competition Tribunal. While the 1993 Order required the divestiture of either the North Shore News community newspaper or the entire Real Estate weekly chain, this application sought the North Shore edition of the Real Estate Weekly sold. The Bureau supported the proposal because it was an

Le Groupe Vidéotron Ltée /CFCF Inc. (1997)

On April 21, 1996, Groupe Vidéotron Ltée (Vidéotron) made a public offer to purchase all the shares of CFCF Inc. (CFCF). Upon the completion of the proposed transaction Vidéotron would become the only provider of TV cable services in the Montreal area and would own the two largest French language private TV networks in the province of Quebec.

By June 1996, Vidéotron had acquired practically all the shares of CFCF. However, these shares were put into the custody of a trustee so as to ensure that there was no transfer of control of CFCF until the CRTC had reviewed the transaction. In addition, on June 28, 1996, the acquirer gave the Bureau a written undertaking that it would not seek to acquire or use confidential information relating to Télévision Quatre Saisons ("TQS"), (a French language television network owned by CFCF) in order to ensure that the competitive dynamic of the marketplace was maintained until the Bureau's review of the transaction was completed.

The Bureau's review focused on the impact of the transaction on competition in the provision of television air time to advertisers and in the purchase of French language television programs from independent producers.

On February 27, 1997, the CRTC announced its decision to approve the transfer of effective control of the cable systems owned by CF Cable TV Inc. in Quebec and Ontario to Vidéotron, but denied Vidéotron's other applications and ordered that CFCF's television broadcasting operations be sold to third parties not related to Vidéotron. The following day, Vidéotron asked the trustee to initiate the sale of TQS as requested by the CRTC. In light of this, the Bureau closed its inquiry into the matter.

Hollinger Inc. / Southam Inc. (1996)

On May 23, 1996, the Bureau issued an Advance Ruling Certificate in respect of the then proposed acquisition by Hollinger Inc. of an additional 21.5 percent of the shares of Southam Inc. (Hollinger

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appropriate remedy. On October 16, 1998, the Tribunal issued a revised divestiture order in the case initiated by the *Canada (Director of Investigation and Research) v. Southam Inc., Lower Mainland Publishing Ltd. et al*. According to the revised divestiture order, Southam Inc. had to sell the North Shore edition of the *Real Estate Weekly*, one of its two publications containing North Shore real estate advertising, to Madison Venture Corporation. The initial Tribunal order had to be revised because, under the wording of the initial Tribunal order, Madison Venture Corporation was technically an ineligible purchaser of the publication. Madison Venture Corporation would compete with Southam Inc. for North Shore real estate advertising business.

already held a 19.5 percent interest in Southam at the time of the request). On September 18, 1996, the Council of Canadians, a public policy advocacy group, sought an application for judicial review of the Bureau's decision. Because the Council was outside the 30 day period for seeking such a review, it was compelled to apply to the Federal Court for an extension of time. The matter was heard on December 9, 1996, and on December 16, 1996, the Court ruled that the Council had not justified its delay in bringing its application. In an obiter comment, Justice Cullen added that even if it had been within the required 30 day period, the Court did not believe that the applicants had proper standing to seek a judicial review. On December 19, 1996, the Council filed a Notice of Appeal of the Federal Court Trial Division decision.

On March 9, 1997, the Federal Court of Appeal upheld the Federal Court Trial Division's decision to dismiss the application by the Council of Canadians requesting more time to prepare pleadings in which it was alleged that Hollinger's acquisition of control of Southam violated the Canadian Charter of Rights and Freedoms. These decisions affirmed that there is very limited scope for the courts to overturn administrative law decisions of the Bureau such as a decision to exercise discretion to initiate inquiries and issue Advance Ruling Certificates.

Rogers Communications Inc./MacLean Hunter Limited (1994)

In March 1994, Rogers Communications Inc. (Rogers) agreed to purchase Maclean Hunter Limited (Maclean Hunter) for a total of approximately $3.1 billion. The Competition Bureau examined the likely impact of the proposed transaction on a number of markets, including cable television distribution, radio and television broadcasting, radio paging, newspaper and magazine publishing and commercial printing.

As Rogers did not own any newspaper, magazine or commercial printing operations, it was concluded that the addition of the Maclean Hunter operations would not affect concentration in these markets. Similarly, the proposed transaction did not raise concern in radio and television markets because each firm owned broadcasting stations that did not compete in the same geographic market, with one exception. The exception concerned the Toronto market where following the transaction, Rogers would own two FM radio stations. Rogers, however, in accordance with CRTC policy prohibiting ownership of more than one FM station providing service in the same language in the same radio market, agreed to sell one of its FM stations, CFNY, to Shaw. It was also concluded there would be effective competition in radio paging remaining from Bell Mobility and from a number of other regional firms participating in the paging markets where Rogers and Maclean Hunter competed. The Bureau also concluded there would not be a substantial lessening or prevention of competition in any cable markets.

MacLean Hunter Limited/Selkirk Communications Limited (1989)

On November 23, 1988, the Bureau announced that it would not be challenging the proposed share acquisition of Selkirk Communications Limited (Selkirk) by Maclean Hunter Limited. Maclean Hunter and Selkirk were large and diversified communications companies whose holdings included radio and television broadcasting facilities in a number of markets in Canada.

The proposed transaction raised concerns about its potential impact on competition in the Calgary and Lethbridge broadcasting and advertising markets. The acquisition, as originally proposed, would provide Maclean Hunter with control of two major commercial television stations and two AM radio stations in Calgary, and two television stations in Lethbridge. These radio and television stations operated under the call signs CFCN and CFAC in both cities.

To address the Bureau's preliminary competition concerns, Maclean Hunter undertook to divest itself of an AM radio station and a television station in Calgary and one of the Lethbridge television stations. The undertakings recognized that the acquisition of the voting shares in Selkirk by Maclean Hunter, as well as these divestitures, were subject to the approval of the CRTC. These undertakings were consistent with the position taken by Maclean Hunter in its offer to purchase.

Messageries Dynamiques, division of Groupe Quebecor Inc./Benjamin News Inc. (1989)

On July 14, 1989, the parties announced a proposal to combine their distribution operations in a new company.

Benjamin News Inc. (Benjamin News) and Messageries Dynamiques, a division of Groupe Quebecor Inc. (Quebecor), were the two remaining distributors of periodicals and magazines in the province of Quebec. The majority of the shares of the merged entity were to be owned by Quebecor. Quebecor was the largest publisher of French language magazines in the province of Quebec and largest printer in Canada. Through Messageries Dynamiques, Quebecor distributed its own and other publishers' magazines and periodicals. In this latter role, it competed with Benjamin News.

During the course of the Bureau's examination of the proposed merger, extensive information was provided by Benjamin News, Quebecor, and numerous industry participants. The Bureau's staff identified serious concerns with respect to the effect of the merger on the magazine and periodical distribution business in Quebec. After extensive discussions, but prior to the Bureau reaching a final

conclusion on this matter, the parties advised the Bureau of a decision to abandon the proposed merger. Consequently, the Bureau decided to discontinue the examination.

Southam Newspaper Group/Brabant Newspapers Limited (1988)

On January 8, 1988, the Bureau announced it would not challenge the acquisition by the Southam Newspaper Group of Brabant Newspapers Limited of Hamilton, Ontario. The decision was based on a comprehensive examination of the potential effects the acquisition would have on competition in the Hamilton newspaper market.

Brabant published seven weekly community newspapers and a real estate guide in the Hamilton area. Southam published the daily *Hamilton Spectator*. While the acquisition of Brabant would enhance Southam's position in the Hamilton newspaper market, the Bureau determined that the daily *Spectator* and the Brabant weeklies served largely different markets in terms of their news and editorial content and advertising customers. The Bureau also took into account the fact that technology was reducing barriers to entry into community newspaper publishing and printing businesses. The Bureau monitored developments in the Hamilton newspaper market over the three-year limitation period provided in the *Competition Act* in order to ensure that a material change in circumstances did not alter the conclusion.

Civil Reviewable Matters

Subsection (i) outlines the analytical approach that the Bureau takes in civil reviewable matters other than mergers. Subsection (ii) discusses several cases.

(i) The Analytical Approach

The abuse of dominance provisions are found in sections 78 and 79. Section 79 sets out the three essential elements of the offence. Subsection (a) limits the application of the provisions to situations where one, or more firms can be shown to control the market(s) in question. This subsection has been interpreted by the Bureau and the Tribunal as focusing on the provisions on market power -- the concern that a firm or group of firms may be able to enhance or entrench their market power, or facilitate its exercise.[13] A dominant position from which a firm charges prices above the competitive level is not by itself grounds for an application under section 79. As a result, the abuse of dominance provisions are not intended to regulate prices. Subsection (b) further qualifies the section by specifying

[13]The Bureau considers market power to be the ability to profitably maintain prices above competitive levels (or similarly restrict non-price dimensions of competition) for a significant period of time, normally two years. The law does not imply that the mere existence of market power will give rise to grounds for a remedial order by the Competition Tribunal.

that the provisions only apply to circumstances where market power (assuming it has been shown to exist) is used in an anti-competitive way. It is the abuse of a dominant position that gives rise to scrutiny under the *Competition Act*. Finally, subsection (c) imposes a requirement of proof that the business conduct has had, is having or is likely to have, the effect of "preventing or lessening competition substantially." This places the focus squarely on adverse effects on competition, rather than individual competitors.

In addition to the Abuse of Dominance provisions, the *Competition Act* contains specific provisions on vertical agreements. There are no presumptive market share thresholds or *per se* treatment of particular types of vertical restraints. Most often, vertical agreements are addressed under the civil reviewable provisions of the *Competition Act*.[14]

(ii) Cases Involving Civil Reviewable Matters

Major Advertising Company

A major advertising company concluded an exclusive agreement with a chain of convenience stores to only carry its magazine (the name of the company in question is not in the public domain). A competitor of the magazine, who was being excluded from the convenience stores, filed a complaint. The company involved had given written undertakings to the Bureau in 1994 promising not to demand exclusivity clauses from its customers for the following 10 years. In April 1997, after discussions with the Bureau, the company agreed to comply with the original undertakings and the competitor's magazine was reintroduced into the convenience stores.

Broadcaster Communications

On October 25, 1985, the Bureau filed an application with the RTPC seeking an order prohibiting Broadcast News Limited from continuing the practice of tied selling with respect to wire, voice and cable news products and the transmission of those products to Canadian broadcasters.

The Bureau initiated an examination of this issue as a result of an application received on July 9, 1985, from 6 residents of Canada. The Bureau's application was subsequently withdrawn on March 21, 1986, following a public announcement by Broadcast News of a new policy under which the transmission of the voice news signal would not be tied to the voice news product.

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[14]Several provisions might potentially apply. Under section 61, the price maintenance provision, it is an offence for a business person to attempt, by means of a threat, promise or agreement, to influence upward, or to discourage the reduction of, the prices charged or advertised by another business person. It is also an offence to refuse to supply a product to, or discriminate against, another business person because of that person's low pricing policy. The refusal to deal (section 75) may also apply. Section 77 of the *Act* explicitly provides for the review of three types of vertical restraints: exclusive dealing, tied selling and market restriction.

BBM Bureau of Measurement - Radio and Television Rating Services

On August 21, 1979, the Bureau filed an application with the RTPC asking for an order prohibiting BBM Bureau of Measurement from continuing to engage in tied selling of its radio and television data to its advertising agency, station representatives and advertiser members.

In its application, the Bureau alleged that BBM Bureau of Measurement was engaged in tied selling and was the sole supplier of radio data and a major supplier of television data in Canada.

On December 19, 1981, the RTPC ordered that BBB Bureau of Measurement was prohibited from continuing to engage, directly or indirectly, in tied selling of radio audience measurement service and television audience measurement service.

Conspiracy and Other Criminal Matters

Subsection (i) comments on the approach under the conspiracy provisions and other criminal sections. Subsection (ii) provides a discussion of cases.

(i) *The Analytical Approach*

The rules governing horizontal agreements are mainly found in section 45 of the *Competition Act*, the cornerstone of Canadian competition policy. Broadly speaking, section 45 makes it an offence to conspire (i.e., to agree) to unduly lessen competition or to enhance unreasonably the price of a product. Under section 45 of the *Competition Act*, anyone who conspires, combines, agrees or arranges with another person to prevent or unduly lessen competition or enhances unreasonably the price of a product is guilty of a criminal offence. The enforcement of section 45 has mainly focused on horizontal restraints, particularly price-fixing and market sharing that would unduly lessen competition.[15]

As noted in the introduction, under the pre-1986 law, mergers and monopolies were criminal offences. Thus, some of the cases discussed in this subsection deal with issues that would, under the current law, be dealt with as civil law matters.

(ii) Cases Involving Criminal Matters

Toronto Maple Leafs and the Globe and Mail

[15]Section 45 applies not only to horizontal agreements but also to vertical agreements between, for example, buyers and sellers. There are several additional provisions in the *Competition Act* (sections 46, 47, 48, 49 and 61) dealing with horizontal agreements.

In January 1984, the Bureau received an application under section 7 of the *Combines Investigation Act* (application by six residents of Canada) alleging that Harold Ballard, owner of the Toronto Maple Leafs Hockey Club and others had agreed to bar reporters for the Globe and Mail from the press box at Maple Leaf Gardens during regularly scheduled National Hockey Leagues games. After review of the evidence gathered during the inquiry, the Director decided to discontinue the inquiry. While it could be argued that the actions taken caused discrimination against the Globe and Mail and their reporters, the evidence did not establish that the arrangement, if there was one, would lessen competition unduly. In March 1984, the reasons for the discontinuance were reported to the Minister of Consumer and Corporate Affairs. At about the same time, it was learned that an interim resolution of the dispute between the Globe and Mail and the Toronto Maple Leafs had been achieved.

Thompson Newspapers Limited/ F.P. Publications Limited / Southam Inc. (1984)

An inquiry was commenced following the closure of the *Ottawa Journal* in August 1980, the closing and sale of the assets of the *Winnipeg Tribune* to its competitor, and the purchase by Southam Inc. of the interest held by Thomson Newspapers Limited in the *Montreal Gazette* and Pacific Press in Vancouver in 1980. The Bureau was of the opinion that the evidence obtained during the inquiry established that the parties, Thompson and Southam, had conspired to share the market of the newspaper industry. The Bureau was also of the opinion that once carried into effect, the conspiracy would prevent or lessen competition unduly in the production, sale, transportation or supply of major English language daily newspapers in some markets in the following manner:

- depriving the public of the benefits of free competition;
- lessening or preventing competition among journalists, editors and publishers for their services;
- lessening or preventing competition in the sales of newspapers and advertising space;
- maintaining the price of newspapers and advertising at non-competitive levels; and,
- lessening and preventing competition in the transportation or supply of newspapers.

An information containing a total of seven counts under sections 32 and 33 (mergers and monopolies) of the *Combines Investigation Act* was laid. In May 1982, Thomson Newspapers Limited, F.P. Publications Limited, Southam Inc. and certain subsidiary corporations were ordered to stand trial. On June 17, 1982, the Attorney General of Canada signed an indictment setting out eight counts arising from these matters. The principal executives of Thomson, F.P. and Southam were named as parties. On October 28, 1983, the Supreme Court of Ontario acquitted the accused on five of the eight counts.

On December 9, 1983, the accused were acquitted on the remaining conspiracy and merger counts. The Court rejected the inferences drawn by the Crown from documents and oral evidence, and accepted the testimony of defence witnesses that the transactions in the four cities were independent business matters made coincident only for the purpose of full disclosure. The Winnipeg merger count failed because the lessening of competition flowed from the independent decision to close the *Tribune*,

and not from the orderly disposition of its assets. Appeals of the acquittals were abandoned on February 28, 1984.

Southam Inc., the Edmonton Journal, Alberta

The complainants alleged that the introduction of a Sunday edition of a newspaper was intended to eliminate the only other daily newspaper serving the Edmonton area market. A preliminary investigation substantiated the allegations. Accordingly, searches of the premisses were commenced under the authority of section 10 of the *Combines Investigation Act* (now the *Competition Act*).

Following the exercise of s. 10 authority at the *Edmonton Journal* in April 1982 concerning an inquiry under s. 33 (mergers and monopolies) and 34(1)(c) of the *Combines Investigation Act* relating to the production, distribution and supply of newspapers in Edmonton, an application was made for an injunction to prohibit further searching. The matter was argued before the Alberta Court of Queen's Bench in April 1982, and before the Court of Appeal. The Alberta Court of Appeal ruled that s. 10 of the *Combines Investigation Act* was contrary to the provisions of s. 8 of the Charter. On appeal, the Supreme Court upheld the decision of the Court of Appeal and declared s. 10 of the Act inconsistent with s. 8 of the Charter and therefore of no force and effect.

After reviewing the evidence obtained during the inquiry, the Bureau concluded that the evidence was insufficient to justify pursuing the inquiry and therefore discontinued the inquiry in 1986.

Newspaper - British Colombia

An inquiry was commenced in June 1979 following receipt of a complaint from a newspaper publisher in British Colombia alleging that a chain of competing newspapers was engaged in a policy of selling advertising space in its newspapers at unreasonably low prices with the effect, tendency or design of substantially lessening competition or eliminating a competitor (the names of the newspapers are not in the public domain). The evidence gathered during the inquiry did not support the allegations that a violation of section 34(1)(c) of the *Combines Investigation Act* (now section 50(1)(c) of the *Competition Act*), had occurred. The Bureau therefore discontinued the inquiry in June 1981.

Thompson Newspaper Limited - Weekly newspaper in British Colombia

An inquiry was commenced in 1977 following the receipt of a complaint from the publisher of a weekly newspaper in British Colombia alleging that a local daily newspaper was engaged in various predatory and anti-competitive practices. Searches were conducted at a number of premises in 1978 and 1980. In 1983, additional search warrants were quashed by the Supreme Court of Ontario on the grounds that s.10 of the *Combines Investigation Act* (now the *Competition Act*) was inconsistent with the *Charter of Rights and Freedoms.* In 1985, the Bureau applied for orders under section 17 requiring

the production of documents and oral examination of certain senior officials. These orders were also challenged under the *Charter* but were ultimately upheld by the Supreme Court of Canada on April 1990. However, following review of the evidence seized in the initial two searches and gathered during the inquiry, the Bureau concluded that the inquiry should be discontinued.

R. v. K.C. Irving Ltd. et al (1978)

This case involved the acquisition of all five English-language newspapers in the province of Quebec by K.C. Irving Ltd. This resulted in the laying of criminal charges under both the merger and the monopoly provisions of the *Combines Investigation Act* in 1972. During the period covered by the charges there were five English language daily newspapers in New Brunswick, two published in Saint John (Telegraph-Journal, the Evening-Times Globe), two published in Moncton (the Times and the Moncton Transcript), and one published in Fredericton (the Daily Gleaner). By 1968, through a series of transactions, K.C. Irving Limited acquired a controlling interest in all five newspapers.

The Supreme Court observed that New Brunswick was the proper market area within which to assess the existence of a prohibited merger or monopoly given that there was no significant circulation of any of the papers outside the province and there was no significant circulation within New Brunswick of newspapers published elsewhere. Indeed, the Court observed that the competitive overlap was for the most part within the cities of Saint John and Moncton, though it noted there was some circulation competition between the Saint John Telegraph-Journal and the Moncton Times, as well as in Fredericton and the surrounding area between the Daily Gleaner and the Telegraph-Journal.

The Crown was successful in showing that K.C. Irving had acquired complete control of the daily newspaper business in New Brunswick. As a matter of law, however, the Court found that a showing of complete control was not sufficient to prove a criminal offense under the *Combines Investigation Act*. Specifically, the Court held that the monopoly would be operated or likely be operated to the detriment or against the interest of the public. Characterizing the Crown's arguments as theoretical and without sufficient factual basis, the Supreme Court dismissed the appeal and set aside the convictions against the respondents.

Most commentators concluded that the Supreme Court's requirement that the Crown demonstrate public detriment under a criminal standard of proof (i.e., "beyond a reasonable doubt") made Canada's merger and monopoly law inoperable. In response, economic commentators argued for a wholesale revision of competition law. This revision was accomplished in 1986 through the enactment of the *Competition Act*.

The Bureau's Experience in Media Industries: Advocacy

The Bureau's advocacy work has also impacted media enterprises. The perspective that has been taken in advocacy often focuses on increasing the choices available to individual consumers (e.g., readers or viewers) – i.e., increasing the number of products within a given relevant geographic and product market. In this sense, the Bureau is squarely positioned in favour of increased consumer choice.

The Bureau's advocacy for competitive markets (e.g., eliminating any unnecessary barriers to new entry) does not depend on an evaluation of the contribution that a new media outlet might make to promoting a diversity of voices. In the Bureau's view, the evaluation of the merit of a particular newspaper or other media channel is best left to market forces. Thus, the role of advocacy is to maximize the number of choices available.

In general, however, one would expect that increasing the number of choices available would contribute to a diversity of voices as well. An increase in the number of owners of media outlets can increase consumer choice, especially if the various owners have different objectives. By encouraging diverse ownership forms, one can also promote a variety of objectives. Indeed, the entry of a single owner with a unique objective may sometimes contribute more to product variety than several new owners who are all driven by very similar objectives.

(i) The Competition Bureau's Advocacy Mandate

The Bureau's advocacy role is set out explicitly in sections 125 and 126 of the *Competition Act*. These sections empower the Bureau to be an influential voice for competition in key regulatory proceedings. Prior to the 1976 amendments, the Bureau did not have a statutory right to intervene.[16] This was altered when the addition of sections 125 and 126 of the *Competition Act* empowered the Bureau to become an influential voice for competition in key regulatory proceedings. Under section 125 of the *Competition Act*, the Bureau is authorized to make representations and call evidence before any federal board in respect of competition, whenever such representations are relevant to the federal board and to the factors that the board is entitled to take into consideration in determining the matter.[17]

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[16]In its 1969 *Interim Report on Competition Policy*, the Economic Council of Canada stated: "[t]he hidden cost to the economy of poor regulatory performance provide, in our view, a strong justification for applying the principles of competition policy, in suitably modified form to the regulated sector of the economy, the more so since some parts of this sector, such as regulated communications activities, are likely to grow in relative economic importance over the next few years." Economic Council of Canada, *Interim Report on Competition Policy*, Queen's Printer, 1969 at p. 160.

[17]Regulatory federal boards are defined as any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or

As part of the Department of Industry Canada, the Bureau participates in policy and legislative development committees within the Department. This provides it with the opportunity to provide internal advice on competition and legislation. The Bureau may also, where appropriate, provide input and advice regarding policy and legislative development by other government department(s). Bureau representatives appear before Parliamentary Committees to comment on issues related to the *Competition Act*, other statutes, or any other matter that is relevant to competition policy.[18]

The Bureau has played an effective role in promoting competition in communications. The Bureau's advocacy has occurred through interventions before the CRTC, as well as providing policy advice to Parliament and to the government departments overseeing the communications industry (Industry Canada and Heritage Canada). In its submissions to the CRTC and the government, the Bureau has recommended that, whenever possible, public policy should attempt to achieve social policy goals (e.g. universal service, affordable telephone service, promotion of Canadian content and culture) through the adoption of mechanisms that are least restrictive to competition. The Bureau has also argued for the removal of barriers to foreign firms and the relaxation, if not elimination, of foreign ownership restrictions to encourage new investment in infrastructure and to promote competition within the communications sector.

Of course, the Bureau is not alone in its interests in media industries. Both the *Competition Act* and the *Broadcasting Act* apply to radio and television industries. As discussed in more detail below, in 1999, the Bureau and the CRTC signed an Interface Agreement which describes the authority of the CRTC and the Bureau.

(ii) Advocacy Work Involving Media Industries

The Competition Bureau has advocated competition in numerous cases that directly, or indirectly, affect media enterprises. The specifics of several of these advocacy efforts are listed below.

Ownership of Specialty Programming Services CRTC Public Notice 2000-165

In 2000, the Canadian Cable Television Association (CCTA) asked the CRTC to change its cross-ownership rules to permit cable companies to acquire discretionary analog program undertakings.

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distribution of a product.

[18]Thus, for example, the Commissioner appeared before the Standing Committee on Transport in 1999 to discuss competition issues raised by the potential restructuring of the airline industry. Additionally, a representative of Civil Matters Branch made an oral presentation before the House of Commons Sub-Committee on the Review of the *Special Import Measures Act* to argue, among other things, that the legislation should be revised to explicitly include the impact of dumping duties on competition as a factor to be considered in assessing the "public interest." This advocacy effort ultimately yielded positive legislative changes.

The Bureau supported the CCTA's proposal on competition and economic efficiency grounds. The Bureau made these recommendations to enable cable companies to benefit from the economies of scale and scope associated with the ownership of broadcasting distribution undertakings and programming. At the same time, the Bureau recognized that cable companies are dominant firms and that regulations are required to limit their ability to exercise their market power.

Radio Broadcasting CRTC Public Notice 1999-55

In this proceeding the Bureau cautioned the CRTC that, by approving radio station management agreements as a condition of licence, it could create a 'regulated conduct defence' under the *Competition Act*. This would effectively sanction pricing arrangements related to advertising markets, which could have detrimental effects. The CRTC did not accept the Bureau's position.

Television Broadcasting CRTC Public Notice 1999-83

The CRTC proposed that its Pay Television Regulations, should be amended to ensure that pay television licensees do not acquire rights to pay-per-view programs on an exclusive or other preferential basis.

The Bureau supported the proposal. The Bureau stated that such a proposal would be an appropriate way to ensure that new entrants into the broadcast distribution market are given equal access to pay-per-view programming.

Non-Traditional Broadcast Services CRTC Public Notice 98-20 and CRTC Public Notice 98-82

This CRTC proceeding is better known as the 'New Media' proceeding. In this proceeding, the essential question was whether the CRTC should attempt to regulate the Internet. The Bureau argued that it was neither necessary or practical for the CRTC to try and regulate the Internet. Moreover, in the Bureau's view, there was no market failure in terms of the provision of ample and diverse Canadian content via new media. The CRTC's position closely mirrored that of the Bureau.

Access to TV Network Signals from U.S. Satellites CRTC Public Notice 98-60

The Bureau intervened in support of smaller Canadian cable systems seeking the freedom to access their U.S. signals from U.S. satellite service providers.

Application by NBTel for a BDU licence CRTC Public Notice 1998-1

In 1998, the Bureau intervened in support of NBTel's application for a Broadcasting Distribution Undertaking (BDU) licence. The Bureau noted that NBTel had met all of the 'no-head-start' criteria

related to opening its network to competition and that the application had the potential to provide meaningful competition to the incumbent cable companies. The CRTC granted the licence.

Television broadcasting CRTC Public Notice 1998-44

In 1998-1999, the Bureau made a number of significant interventions relating to the Canadian broadcast industry. The Bureau's submission focussed on two issues: the desirability of eliminating the market entry test (in terms of economic impact) for licensing new local broadcasting undertakings; and the role of the Bureau in examining TV broadcasting mergers, should existing ownership restrictions be relaxed. The purpose of the Bureau's interventions was to provide greater consumer choice and increased competition in local TV broadcasting markets.

Radio Broadcasting CRTC Public Notice 1998-42

In 1998-1999, the Bureau made an intervention to the CRTC with respect to the regulatory treatment given to joint industry management agreements in local radio broadcast markets.

The Bureau submitted that radio station management agreements should be examined by the CRTC in the context of content and cultural objectives of the *Broadcasting Act* and rely on the provisions of the *Competition Act* to safeguard competition in local radio advertising markets.

Allocation of Satellite Capacity CRTC Public Notice 97-13

The Bureau advocated that the CRTC continue with its 'Order of Priority' (OPL) list for the allocation of scarce satellite capacity and maintain resale and sharing rules as a means of efficiently allocating space. To ensure that common ownership of satellite capacity by certain large users did not result in discriminatory access, the Bureau advocated that the OPL process be made more transparent.

Broadcast Distribution CRTC Public Notice 1996-69

In May 1996, the CRTC issued a Public Notice calling for submissions on a number of proposed revisions to the regulations relating to the distribution of television broadcasting. This review was necessary as a result of the development of new means of broadcasting distribution in competition with cable operators. These include direct-to-home (DTH) satellites, local multipoint communications systems (LMCS or "wireless cable") and telephone companies.

The Bureau filed a submission in mid-July and a second stage submission in mid-August. The Bureau's submissions supported the elimination of the exclusive licensing policy and endorsed certain pro-

competitive proposals by the CRTC. The submission also recommended the adoption of criteria for assessing actual competitive entry before price deregulation of the cable companies. Also, it was submitted that new entrants should have access to Canadian specialty and pay television services on nondiscriminatory terms and conditions and that the CRTC should consider whether exclusive long term contracts with condominiums and apartment buildings raise significant barriers to entry. The second submission also addressed possible predatory pricing and cross subsidization by incumbent cable operators.

The CRTC announced its new regulatory framework on March 11, 1997. The new policies address a transition from a monopoly to a competitive environment for broadcasting distribution, and aim to establish rules that treat all distributors fairly.

Pacific Place Competitive Cable Licencing Public Notice CRTC 1996

In 1996 the Bureau intervened in support of an application by the Pacific Place condominium group for a broadcast distribution licence. The plan was to link multiple high-rise residential buildings to a Satellite Master Antenna system for the supply of cable services. The CRTC awarded the licence over the objections of the incumbent cable supplier, Rogers Communications.

Cable Access Rules CRTC Public Notice 1995-128

This proceeding dealt with the rules under which newly licenced speciality channels should be granted access to distribution via the cable systems. A particular problem was the terms of access to channels in which cable companies had an ownership interest. The Bureau suggested a 'back of the bus' approach, i.e. that channels owned by the cable companies should only be granted access after all other channels had been accommodated.

Radio Station Intervention Public Notice CRTC 1995-204

This proceeding dealt with the CRTC's treatment of radio station management agreements. Pursuant to these agreements, radio broadcast licence holders would pool certain management and other functions, including the sale of advertising. The Bureau cautioned the Commission as to the risk that such agreements could potentially raise issues under the *Competition Act* regarding local advertising markets. The CRTC decided that it would monitor such agreements more closely in the future.

Direct-to-Home (DTH) Policy Review Panel (1995)

In 1995, the Bureau provided submissions to the DTH Satellite Broadcasting Policy Review Panel. This Panel was established by the Government in the wake of a CRTC decision, taken without public hearing, to issue an Exemption Order Pursuant to Section 9 (4) of the *Broadcasting Act*.

The Bureau advocated that there should be an open market approach for licencing DTH distribution undertakings and that competition should be encouraged. The Review Panel accepted the Bureau's position favouring competition and concluded that DTH operators should be approved on the basis of neutral and objective licencing criteria as opposed to selective use of the Exemption process.

Information Highway Proceeding CRTC Public Notice 1994-130

This was a major CRTC proceeding dealing with convergence and the rules of engagement for competition between the cable and telephone companies. The Bureau advanced three main arguments. First, the Bureau argued that the cable and telephone markets should be opened to competition. Second, the Bureau observed that there was no need to delay the opening of these markets to competition as advocated by the cable industry. Third, the Bureau concluded that the CRTC should move away from content controls in favour of targeted subsidies to promote meritorious, but under-represented Canadian content. The CRTC adopted a competition driven convergence policy, but adopted a 'no-head-starts' policy on entry of the cablecos and telcos into each others' core markets and maintained Canadian content rules.

Tiering of Cable services and Universal Pay Television

The Bureau filed comments with the CRTC on September 20, 1982, and appeared on November 30, 1982 at the public hearings. The issues in the case were as follows. Programming services which were retransmitted by cable on television channels 2 to 13 were commonly referred to as the "basic service", while others offered on channels made available through the use of a converter were referred to as the "augmented channel service". Historically, cable companies charged their subscribers a single fee for all programming services. With the advent of discretionary services, including pay television and specialty programming, the CRTC chose to consider the possible establishment of a tiered system by cable television companies.[19]

[19]Tiering is the combining of one or more of the services offered by a cable company which is sold to subscribers for a monthly charge. A multiple tiering arrangement could include a first, possibly mandatory, package and one or more discretionary programs.

The Bureau argued that the CRTC should minimize its regulation of tiered cable service in order to permit the maximum level of competition to develop among providers of the service. Specifically, the Bureau recommended that all tiers, including the basic service tier, should be offered on a discretionary basis. Accordingly, the Bureau opposed the introduction of a mandatory universal pay television service. In addition, the Bureau recommended that, with the exception of the first or basic tier, neither the rates charged for discretionary tiers nor their content should be regulated. The Bureau also urged the CRTC to impose accounting procedures on cable companies which would help detect any cross-subsidization of their discretionary tiers.

Pay Television

On April 21, 1981, the CRTC requested applications for licences to carry on broadcasting undertakings to provide pay television services in Canada. The Bureau intervened in the proceedings in providing a written submission and also appeared before the Commission.

CRTC/Competition Bureau Interface Agreement (1999)

On November 19, 1999, it was announced that the Bureau and the CRTC agreed on a document describing the authority of the CRTC under the *Telecommunications* and *Broadcasting Acts* and that of the Bureau regarding the telecommunications and broadcasting sectors.

The interface document followed discussions between the two organizations on their respective responsibilities and authorities. Its purpose was to provide industry stakeholders, including the general public, with greater clarity and certainty about the overall regulatory and legal framework governing the telecommunications and broadcasting sectors which were undergoing rapid change and transition from detailed regulation to greater reliance on market forces. It dealt with a range of competitive issues including access, merger review, competitive safeguards and various marketing practices but not matters, unrelated to competition, to which the CRTC's mandate extended.

Summary

Over the past 35 years, the Competition Bureau has been involved in numerous matters relating to media enterprises. The approach taken reflects the goals and purposes of the *Competition Act*. As this report illustrates, the *Act* is not intended nor designed to deal with the important question of “diversity of voices.”

Appendix A: Merger Examinations Concluded

There are a number of relevant cases in regard to which the only information in the public domain is a mention that the examination was concluded as posing no issue under the *Competition Act*. These mentions are typically found in the Bureau's Annual Report.

1993

CHUM Ltd. / Trillium Cable Communications Ltd. (CKLW-AM and CKLW-FM radio stations); Industry - Radio Broadcasting; Result- File closed; concluded as posing no issue under the *Competition Act*.

Power Corporation of Canada Inc. / Southam Inc (certain shares); Industry-newspapers; Result-File closed; concluded as posing no issue under the *Competition Act*.

1992

Canadian Corporate News Inc. / Southam Inc. (certain assets); Industry - publishing; Result-File closed; concluded as posing no issue under the *Competition Act*.

WIC Western International Communications Ltd. / Newco Niagara Television Ltd.; Industry - Television broadcasting; Result - File closed; concluded as posing no issue under the *Competition Act*; transaction processed under Advance Ruling Certificate.

1991

Southam Inc. / Wiarton Echo Publishing Limited; Industry-Newspapers; Result-File closed; concluded as posing no issue under the *Competition Act*.

Télé-Métropole Inc. / Réseau Pathonic Inc.; Industry-Radio and television stations; Result-File closed; concluded as posing no issue under the *Competition Act*.

Thomson Newspapers Corp. / The Financial Times of Canada; Industry-Newspapers publishing and distribution; Result-File closed; concluded as posing no issue under the *Competition Act*.

Trinity International Holdings PLC / Vancouver East Ender, West Ender, and Bowen Island Undercurrent; Industry-Newspapers; Result-File closed; concluded as posing no issue under the *Competition Act*.

WIC Western International Communications Ltd. / Allarcom Limited and Allarcom Pay Television Limited; Industry-Television broadcasting; Result-File closed; concluded as posing no issue under the *Competition Act*.

1990

Newfoundland Capital Corporation / Q-Radio Stations; Industry-Radio broadcasting; Result-File closed; concluded as posing no issue under the *Competition Act*.

Paramount Communications Inc. / Time Inc.; Industry-Entertainment and publishing; Result-File closed; concluded as posing no issue under the *Competition Act*.

Transcontinental Printing Inc. / Canadian Publishers Co.Ltd; Industry-Printing and publishing; Result- The Bureau monitored the effects of the merger during the three year limitation period; transaction processed under Program of Advisory Opinions.

Southam Inc./ Jemcom Inc.; Industry-Printing and publishing; Result-File closed; concluded as posing no issue under the *Competition Act*.

Western International Communications Limited / MH Acquisition Inc.; Industry-Television Broadcasting; Result-File closed; concluded as posing no issue under the *Competition Act*.

1989

CFPL Broadcasting Ltd./ Niagara Television Ltd.; Industry-Television Broadcasting; Result-File closed; concluded as posing no issue under the *Competition Act*.

Maclean Hunter Limited/Selkirk Communications Limited; Industry-Television and radio broadcasting; Transaction to be restructured after closing; Transaction processed under Program of Advisory Opinions.

Southam Newspaper Group Limited / North Shore Free Press Ltd.; Industry-Newspaper publishing; Result-File closed; concluded as posing no issue under the *Competition Act*.

Télé-Metropole Inc. / Pathonic Network Inc; Industry-Television broadcasting; Result-File closed; concluded as posing no issue under the *Competition Act*.

1988

Hollinger Inc. / Unimedia Inc.; Industry-Newspapers; Result-File closed; concluded as posing no issue under the *Competition Act*.

Rogers Communications Inc. / Selkirk Communications Inc.; Industry-Radio/television broadcasting; Result-File closed; concluded as posing no issue under the *Competition Act*.

Southam Inc. / Brabant Newspapers Ltd.; Industry-Community newspapers; Result - Bureau monitored the effects of the merger during the three-year limitation period; Transaction processed under Program of Advisory Opinions.

Thomson Newspapers Limited / Brandon Sun; Industry-Newspapers; Result-File closed; concluded as posing no issue under the *Competition Act*.