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A look at Merger Review in Light of Corporate Consolidations in Communications

Introduction

The communications industry has undergone enormous change in recent years, due in part to new technologies, shifts in regulatory philosophy and consumption patterns, and greater international competition. These changes have coincided with a trend of mergers and takeovers in the industry. All of these factors together blur the lines that have been drawn around specific communications sectors, and bring into question the sufficiency of the legislation, regulation, and regulators now in place to deal with a quickly converging and evolving industry.

This paper looks at the merger review system in Canada, using as an example the recently announced deal between CanWest Global Communications Corp. ("CanWest") and Hollinger Inc. ("Hollinger"). It examines the interplay between sectoral regulation and general competition law. In it, I will examine the historical reasons for the state of the law in Canada, with some reference to the experiences of other countries, since this is an area where there is a great deal of international consultation.

The Deal

On July 31, 2000, Hollinger and CanWest announced that CanWest would purchase most of Hollinger's Canadian assets for approximately \$3.5 billion in cash and shares.¹ Hollinger possessed the Southam group of newspapers, which publishes daily newspapers in most major Canadian cities, and the nation-wide *National Post*. Hollinger also owned a large number of community papers throughout the country, trade publications, and Internet properties including canada.com. CanWest bought most of the community newspapers, trade publications, all the metropolitan dailies, and 50 per cent of the *National Post*, as well as the Internet assets, and the Southam Magazine and Information Group.

CanWest owns television stations, cable channels, and radio stations in Canada, and production, program distribution, and media assets.²

¹ "Hollinger Inc., Hollinger International Inc., and its Affiliates Announce the Sale of CDN \$3.5 Billion of Canadian Assets to CanWest Global Communications Corp." (31 July 2000) online: Hollinger International, News Release <http://www.hollinger.com/press/2000/Press_073100.htm> (date accessed: 6 October 2000) [hereinafter "Hollinger"].

² T. Cole, "A Mogul in the Making" *The Globe and Mail* (29 September 2000) B1.



Hollinger will acquire a 15 per cent interest in CanWest.³ All is subject to review.

Examining the Deal

The transaction is interesting as it highlights the trend towards amalgamation in the communications industry that has raised questions about corporate concentration and its effects on the public.⁴ This deal involves newspapers, a broadcaster with different types of operations, a television production company, the international distribution rights to a large collection of programming, and new, or non-traditional, media. Both companies also have extensive holdings outside of Canada, and have been on acquisition sprees in recent years. As the technologies themselves converge, the corporate structures in the industry are following a parallel course.⁵

The deal also illustrates some of the challenges regulators and competition authorities are faced with, raising the following questions: should the sector-specific Canadian Radio-television and Telecommunications Commission ("CRTC") decide the fate of the agreement, or should the Commissioner of the Competition Bureau exercise the merger review power under general competition legislation? On the basis of what legal and policy considerations should the decision be made?

Sectoral Regulation or General Competition Authority

Competition Authority

The *Competition Act*⁶ is the primary statutory source of competition law in Canada. It aims at ensuring that markets are working competitively. Some of the ways in which the *Act* does this include prohibiting any

³ Hollinger, *supra* note 1.

⁴ B. Marotte, "CRTC concerned by news media mergers" *The Globe and Mail* (6 October 2000) B2. Other deals cited were the proposed takeover of CTV by BCE, a deal between BCE and Thomson Corp., and the proposed takeover of Groupe Videotron Ltée and TVA by Quebecor.

⁵ For a discussion of this phenomenon, see A. Gates, "Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector" (2000) 58 *U. of T. Faculty of Law Rev.* 83. [Hereinafter "Convergence and Competition"] The author explores the implications of technological convergence on the communications industry and its regulation.

⁶ S.C. 2000, c-34.

⁷ *Competition Act*, *supra* note 6.

⁸ It is estimated that in the 1990s, approximately 35 countries have adopted for the first time or strengthened their existing competition laws: World Bank *Competition Policy in a Global Economy* (Washington: The World Bank, 1998) at 2.

⁹ Statutes of Canada, 1892, c.29. Title VI, Part XXXIX deals with "Offences connected with Trade and Breaches of Contract"; ss. 516-519 prohibited conspiracies in restraint of trade, and s. 520 prohibited combinations in restraint of trade.

¹⁰ *Competition Act*, *supra* note 6.

¹¹ OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, *Relationship Between Regulators and Competition Authorities*, Doc. No. DAF/FE/CLP(99)8 (1999) [hereinafter "Regulators and Competition Authorities"] at 8-9.

¹² *Competition Act*, *supra* note 6, s. 1.1.

¹³ Regulators and Competition Authorities, *supra* note 11 at 116.

¹⁴ Regulators and Competition Authorities, *supra* note 11 at 8-9.

¹⁵ *Broadcasting Act*, 1991, S.C. c. B-9.01.

¹⁶ S.C. c. 38.

¹⁷ *Canadian Radio-television and Telecommunications Commission Act*, S.C. c. C-22, s.12. The specific goals will be discussed further in the following section.

grouping of companies formed to create a position of dominance (by combining for anti-competitive ends) (s. 45(1)); any company or group of companies from taking advantage of a position of dominance, for example by stifling competition or inflating prices (s. 78); and deceptive advertising (Part VII.1).⁷ Although many countries are only now implementing competition legislation⁸ Canada has had provisions prohibiting restraint of trade since the *Criminal Code* was first enacted in 1892.⁹ Competition laws are couched in general terms, giving the relevant authority the power to oversee the workings of the economy as a whole. Competition agencies tend to react to specific behaviors of industry players, often as a result of a complaint. In the area of merger review, there are pre-merger notification rules and guidelines, and the Competition Tribunal has the power to review mergers, either before or after they occur (s.92(1)).¹⁰ They also have a focused mandate to protect and promote competition, and generally, the policy goals, which must be balanced, do not conflict as much as the policy goals of sectoral regulators.¹¹ According to the Canadian *Competition Act*, its purpose is:

...to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.¹²

Competition law also tends to be more penal than sectoral regulation, with authorities able to fine companies or order them to stop certain arrangements or agreements. Canadian competition law includes both civil and criminal sanctions.¹³

Sectoral Regulation

Sectoral regulation is by definition concerned with a particular segment of the economy, and tends to be more concerned with the overall workings of that sector with the aim of ensuring fairness, rather than with the investigation and prohibition of specific behaviours defined as anti-competitive. Sectoral regulators tend to take a more regulatory, preventative approach, often through licensing schemes.¹⁴

This more holistic approach is often reflected in the regulator's mandate to promote a number of policy goals, with competition among them. The CRTC, for example, must promote the policy goals stated in the *Broadcasting Act*¹⁵ and the *Telecommunications Act*¹⁶ when regulating those industries.¹⁷ Certain objectives of these Acts are often in conflict with other objectives listed in the same Act.¹⁸

The differences in the mandates of the sectoral as opposed to competition authorities can be traced to the different functions each was meant to fulfil. Generally, sectoral regulation arose in the context of managing industries where there was some form of government intervention in market mechanisms. Telecommunications is a good example, as the telephone industry was regulated as a natural monopoly from roughly the turn of the century until recently.¹⁹ Broadcasting is another example, where governments stepped in to deal with issues of scarcity.²⁰ One theory posits that as these industries move towards full deregulation and liberalization, sectoral regulation becomes less important, and general competition law should be applied.²¹ Deregulation and liberalization affect telecommunications more than broadcasting, because of continued content regulation in broadcasting. There are, however, some aspects of the broadcasting industry subject to the same pressures as telecommunications. The two will be discussed in greater detail later in this paper.

Interaction Between the Two

The existence of sectoral regulators and competition authorities within the same country means that the two must cooperate. In the United Kingdom (U.K.), this interaction has been worked out into a written set of rules,²² and written into the U.K. *Competition Act, 1998*,²³ with the aim of ensuring consistency. In Canada, the relationship between the Competition Bureau and sectoral regulators is set out to some degree in the *Competition Act*,²⁴ but is also governed by specific agreements and common law principles.²⁵ In the past, there has been some friction between the Competition Bureau and the CRTC, particularly as the telecommunications market was becoming more competitive.²⁶ More recently, the Competition Bureau has demonstrated a willingness to allow the CRTC to carry out its functions in relation to telecommunications and broadcasting.²⁷ In 1999, the two bodies described the way they would interact in different situations. Neither the CRTC or the Competition Bureau will interfere in areas where the other has exclusive authority. Where the CRTC has authority, but does not exercise its regulatory power (by forbearance or exemption),²⁸ the *Competition Act* applies to the activities that are not being addressed by the CRTC.²⁹

Where there is concurrent authority between the two (primarily in the area of merger review), the bodies have accepted that there is parallel jurisdiction, and that the transaction must comply with both the industry-specific legislation and the *Competition Act*. There is also some concurrency with regard to marketing practices, and the Competition Bureau will deal with marketing practices specifically mentioned in the *Act*, such as false advertising, and exclusive or tied selling.³⁰

¹⁸ See e.g. P.D. Swanson "Encouraging competition in Canadian Telecommunications: changing perceptions of regulation and the understudy role of Competition Law" (1997) *Communications L.J.* 2(2) 57 [Hereinafter "Encouraging competition"] at 59, where some of the conflicting policy goals in the *Telecommunications Act* are discussed.

¹⁹ R. Babe, *Telecommunications in Canada* (Toronto: University of Toronto Press, 1990) at 137; Encouraging Competition, *supra* note 18.

²⁰ Canada, Department of Communications, *Evolution of the Canadian Broadcast System: Objectives and Realities 1928-1968* by D. Ellis (Ottawa: Department of Communications, 1979) at 75, discussing the report of the 1929 Royal Commission on Radio Broadcasting.

²¹ Regulators and Competition Authorities, *supra* note 11 at 7.

²² Regulators and Competition Authorities, *supra* note 11, summarized at 244-247.

²³ (U.K.), 1998, c. 41. The *Act* replaces a number of prior legislative instruments, and amends even more Acts still in place, many of them dealing with the seven sectoral regulators in the U.K.

²⁴ *Supra* note 6.

²⁵ See e.g. the "Regulated Conduct Defense" which applies in certain situations to exempt some regulated industries from compliance with the *Competition Act*. See Regulators and Competition Authorities, *supra* note 11 at 115-116.

²⁶ Encouraging competition, *supra* note 18 at 61-62.

²⁷ Regulators and Competition Authorities, *supra* note 11, at 113-114; Convergence and Competition, *supra* note 5, at 101; OECED, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, *Regulation and Competition Issues in Broadcasting in the Light of Convergence* Doc. No. DAFFE/CLP(99)1 (1999) [hereinafter "Regulation and Competition Issues"] at 179.

²⁸ The *Broadcasting Act*, *supra* note 15, s. 9 (4), allows the CRTC to exempt licensees from some requirements if it feels enforcing the requirements will not contribute to the policy goals. The *Telecommunications Act*, *supra* note 16, allows forbearance in some cases (s. 34 (1)) and allows some classes of carriers to be exempted from the application of the *Act* (s. 9 (1)) if the CRTC determines that these actions are consistent with policy goals.

²⁹ CRTC & Competition Bureau, *Background: CRTC/Competition Bureau Interface* (Ottawa: Industry Canada, 1999) online: <<http://strategis.ic.gc.ca/SSG/ct01544e.html>> (date accessed: 17 October 2000) [Hereinafter "CRTC/Competition Bureau Interface"].

³⁰ CRTC/Competition Bureau Interface, *supra* note 29.

³¹ *Supra* note 6, s.125 (1).

³² *Supra* note 6, s.126 (1).

³³ Industry Canada, *Competition Bureau Annual Report 1999-2000* (Ottawa: Industry Canada, 2000).

The Commissioner of the Competition Bureau ("Competition Commissioner") is responsible for reviewing mergers and conducting investigations into potentially anti-competitive practices. Under the *Competition Act*, the Competition Commissioner can appear before all federal boards, commissions, or tribunals at their request, at the request of the Minister of Industry (who oversees the Competition Bureau), or on the initiation of the Competition Commissioner.³¹ The Competition Commissioner may make representations before provincial regulatory bodies, at their request, or with their leave.³² According to the Competition Bureau's annual report, the Competition Commissioner ("as the statutory champion of competition") intervened in seven CRTC hearings in 1999, and six hearings conducted by other sectoral or trade regulators.³³ Representations by the Competition Commissioner to the CRTC have had some influence in the past.³⁴

The *Competition Act* contains a clause that allows exemptions for mergers that would result in efficiency gains that offset the anti-competitive effects of the merger.³⁵ In addition, the Competition Bureau, in urging sectoral regulators to encourage competition within their industries, is careful to say that competition should be encouraged as a means of achieving some or all of their other policy goals.³⁶

Sectors Within the Communications Industry

This section will examine the relevant sectors of the communications industry, and describe the traditional form of regulation applied to them, as well as the rationale for that regulation, and some of the major policy goals. The media sectors typically implicated in convergence are newspapers, broadcasting, telecommunications, and new media.

Newspapers

Newspapers in Canada are exempt from sectoral regulations or regulators. This reflects the importance placed on the ideal of freedom of expression, and more specifically of the press. The newspaper industry is, however, subject to general laws, such as the *Competition Act*, the law of libel and slander, and other laws that may apply.

The last attempt to regulate the press in Canada inspired the following statement:

The [*British North America Act*] contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs... the practice of this right of free public discussion of affairs is ... the breath of life for parliamentary institutions.³⁷

Since then, the *Canadian Bill of Rights* guaranteed freedom of speech and of the press³⁸ and the *Charter of Rights and Freedoms* guarantees “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”³⁹

However, there is an important distinction between regulating the press for content and regulating the press for other reasons. In the 1980s, there was some support for regulating the corporate relationships in the newspaper industry. The rationale for this regulation was summarized as follows:

Freedom of the press is not a property right of owners. It is the right of the people. It is part of their right to free expression, inseparable from their right to inform themselves. The Commission believes that the key problem posed by its terms of reference is the limitation of those rights by undue concentration of ownership and control of the Canadian daily newspaper industry.⁴⁰

The UK regulates the newspaper industry on issues other than content, but stops short of having a dedicated newspaper regulator.⁴¹ In Canada, the newspaper industry falls under the *Competition Act*, and there have been cases brought against newspaper owners under that *Act*.⁴²

Broadcasting

Broadcasting in Canada is regulated by the CRTC under the *Broadcasting Act*, which defines broadcasting as “any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus.”⁴³

The primary rationale for regulating broadcasting was to allocate the scarce resource of radio (then television) frequencies. In Canada, the advent of both radio and television broadcasting raised nationalistic concerns about the harm from exposure to primarily American programming, available free over the airwaves to most Canadians, leading to rules about Canadian content and ownership. These concerns also gave rise to rules designed to safeguard Canadian advertising dollars and requiring cable television providers to include a certain percentage of Canadian channels in their packages.⁴⁴

Broadcasting is regulated by a multi-class licensing system.⁴⁵ Any changes to the terms of a licence, change in ownership, or transfer of shares of a licensee, requires prior approval from the CRTC.⁴⁶ In making such decisions, the CRTC is required to take into account the policy goals contained in section 3 of the *Broadcasting Act*. Broadly, these relate to the rationales discussed above.

³⁴ See e.g. the discussion on the Pacific Place Cable hearings *supra* note 18 at 60.

³⁵ *Supra* note 6, s. 96 (1) (a).

³⁶ A. Lafond (Deputy Commissioner of Competition), “The Roles and Responsibilities of the Industry Regulator versus the Competition Bureau as Regulated Industries Become Competitive” (Address to the Conference Board Regulatory Reform Program Meeting, 19 February, 1999).

³⁷ *Re Alberta Legislation* [1938] 2 D.L.R. 81 (S.C.C.) at 107.

³⁸ S.C. 1960, c. 44, reprinted in W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed. (Ottawa: Carleton Library, 1975), s. 1 (c) and (f).

³⁹ *Canadian Charter of Rights and Freedoms*, s. 2 (b), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11.

⁴⁰ Royal Commission on Newspapers (1981) *Report* (Hull: Minister of Supply and Services), at 1.

⁴¹ See: “Guidance on DTI procedures for handling Newspaper Mergers”, online: U.K. Department of Trade and Industry <<http://www.dti.gov.uk/CACP/cp/nmerger.htm>> (date accessed: 6 October 2000). There are considerations within competition law that are specific to mergers and other practices within the newspaper industry, recognizing that industry’s importance in a democracy.

⁴² Notably, *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748 [Hereinafter *Southam*]. The Supreme Court upheld

the Competition Tribunal's finding that the effects of Southam owning both daily newspapers in Vancouver and two community newspapers in the area was seen to substantially lessen competition in the real estate advertising market.

⁴³ *Supra* note 15, s. 2 (1).

⁴⁴ For a more complete discussion, see D. Ellis, *Fast Forward: Home Entertainment and the New Technologies* (Toronto: Friends of Canadian Broadcasting, 1992) at 149-152.

⁴⁵ The classes include public and private broadcasters, public and private networks, cable distributors, and cable specialty channels.

⁴⁶ CRTC/Competition Bureau Interface, *supra* note 29.

⁴⁷ *Supra* note 16, s. 2 (1).

⁴⁸ Some argue that the national unity concern was introduced to ensure federal jurisdiction over telecommunications: W.T. Stanbury "Telecommunications Regulation and the Constitution: The Main Themes" In J. Buchan et al, eds., *Telecommunications and the Constitution* (Montreal: Institute for Research on Public Policy, 1982) 1 at 6.

⁴⁹ CRTC/Competition Bureau Interface, *supra* note 29.

⁵⁰ Canada-US Free Trade Agreement, North American Free Trade Agreement, and the General Agreement on Trade in Services round on telecommunications.

Telecommunications

Telecommunications, also regulated by the CRTC, is defined in the *Telecommunications Act* as "the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system."⁴⁷ Regulation in this context was based on the need to oversee the monopolist telephone companies, and now rests primarily on the need to ensure a smooth transition to full competition and deregulation. There are additional concerns about promoting universal service, protecting consumers, ensuring fair interconnection, and fostering national unity through telecommunications.⁴⁸ The CRTC has a mandate to promote the policy goals in the *Telecommunications Act*.

The traditional expertise of the telecommunications regulator is managing the effects of monopolies or companies with a high degree of market dominance. The market for telecommunications services is opening up, and is populated by incumbents (former telephone monopolists) and their competitors. The competition between the two in the formerly monopolistic markets is highly regulated, and issues of market concentration tend to focus on companies moving out of their geographic areas or out of their traditional market sectors through mergers (for example, the merger between Telus and BC Tel, and BCE's purchase of CTV television network). Interconnection is watched carefully by a group with specific technical expertise,⁴⁹ and national unity concerns are reflected in ownership restrictions that have survived at least three international trade agreements.⁵⁰

New Media

Some examples of new media are Internet applications, and interactive forms of traditional media. New media that may conceivably fall under the CRTC's purview have been specifically exempted from regulation.⁵¹ The content of new media must comply with general libel and slander, obscenity, and other laws. One of the problems related to enforcing these laws where new media are concerned relates to liability; often, it is unclear who the originator of the content is, and who is legally responsible for it.⁵²

New media also have implications for traditional media. In regard to regulation, high-speed digital networks have far greater capacity than over-air or even cable transmission systems, eliminating the need for regulation to ensure fair allocation of a scarce resource; increased availability of international content (via satellite or over the Internet) makes enforcement of Canadian content rules difficult; and in some cases, the medium itself will defy the attempts of regulators to characterize it. In regard to patterns of use, new media in some cases can be a substitute for, or even threaten to displace, traditional media.⁵³

Cross-Sector Operations

Increasingly, cross-sector operations are resulting, and the CRTC is not always in the best position to deal with these issues. The CRTC may not have the mandate to deal with cross-ownership, given that it regulates telecommunications and broadcasting under separate regimes. In practice, the CRTC issues most decisions under either its telecommunications or broadcasting authority, which have dedicated staffs. Since there are different government departments, and to some extent mutually exclusive Acts,⁵⁴ governing the two sectors, it is unclear whether the CRTC can consider the two in combination.⁵⁵ There may be some leeway where new media are concerned, given that they have been considered by the CRTC as an issue concerning both telecommunications and broadcasting.⁵⁶

In the case of newspaper/broadcasting arrangements, the CRTC did at one time restrict ownership of newspapers and broadcasting licences, but under questionable legislative authority.⁵⁷ As a result, the Competition Bureau seems best placed to deal with corporate arrangements that escape the boundaries of telecommunications or broadcasting, and exclusively competent to consider arrangements that escape the boundaries of both sectors.

Market Definition

With cross-sector mergers, the crucial issue becomes how to define the affected market. The *Competition Act* is framed in terms of fostering competition in "respect of any article" (s. 31), "article or commodity" (s. 32 (1)), "products" (s. 50 (1)), or "defined market" (s. 77 (1) (b)). It is this last term that offers the Competition Bureau the ability to define the market at which it is looking. According to the Competition Bureau, "In merger analysis, relevant markets are defined by reference to actual and potential sources of competition that constrain the exercise of market power," and overlap of products and geographical markets will not be enough to put them in the same relevant market.⁵⁸

An important consideration will be the availability of the same market products, but the authorities will also take into account the availability of substitutions; other products that may not be identical, but that demonstrate elasticity of demand. This is not an easy task at the best of times, and when the market relates to convergent communications, it is even more complex. The point has been made that while convergence has increased the available substitutes for traditional media offerings, it has done so for a small (though growing) portion of the population.⁵⁹

Questions will undoubtedly revolve around when the potential for competition from one product is real enough to counteract concentration in

⁵¹ CRTC, *Exemption Order Respecting Experimental Video-on-Demand Programming Undertakings*, Broadcasting Public Notice 1994-118, 16 September 1994.

⁵² Regulation and Competition Issues, *supra* note 27 at 297.

⁵³ Some of these implications are discussed at greater length in *Convergence and Competition*, *supra* note 5 at 106-107.

⁵⁴ The *Telecommunications Act*, *supra* note 16, does not apply to broadcasting by broadcasting undertakings (s. 4), and the *Broadcasting Act*, *supra* note 15, does not apply to a telecommunications common carrier acting solely in that capacity (s. 4 (4)).

⁵⁵ One exception to this rule is s. 9 (1) (f) of the *Broadcasting Act*, *supra* note 15, which requires a broadcaster to seek CRTC approval before entering a distribution agreement with a telecommunications carrier.

⁵⁶ CRTC, *New Media*, Broadcasting Public Notice 1999-84 / Telecom Public Notice 99-14.

⁵⁷ D. Townsend, "Regulation of Newspaper / Broadcasting, Media Cross-Ownership in Canada" (1984) Autumn *U.N.B.L.J.* 261, at 262, where the author notes that nothing in the relevant legislation gave the CRTC jurisdiction over the newspaper industry.

⁵⁸ Director of Investigation and Research, *Competition Act: Merger Enforcement Guidelines* (Information Bulletin No. 5) (Ottawa: Consumer and Corporate Affairs Canada, 1991) at 7.

⁵⁹ *Convergence and Competition*, *supra* note 5 at 108-109.

the sale of another product. It is interesting that in recent cases where the *Competition Act* has been applied against communications companies, markets were defined in terms of uses of advertising.⁶⁰

Application to the CanWest-Hollinger Deal

The relevant authorities have decided that the CRTC will be the body to review the deal, presumably because of concerns related to the communications sector. While the CRTC has a mandate to promote diversity in the broadcasting system, the effects of this deal on broadcasting will be limited. Hollinger will take a 15 per cent interest in CanWest, a figure which is well under even foreign ownership allotments. The CRTC does not have the mandate to review the effects of the deal on the newspaper industry. Even if the CRTC could look at the effects of the newspaper industry, it is arguable that the most significant effects of the deal will be on the overall communications market.

This leads us to the ability of the Competition Bureau to try to define affected markets, and have greater latitude in what it considers.⁶¹ The competition authorities' recent experience in communications has shown an industry-driven definition of affected markets, focussing on the effects of amalgamations on companies doing business with newspapers. While mergers in the communications industry affect advertisers, producers and other companies, focussing on these markets ignores other markets which may be affected by anti-competitive practices. While advertisers form an important market, so too does the audience for the content.

Alternate Views

It might be helpful to examine some alternate views of the communications industry. The EU Directorate General of Information, Communications, Culture and Audiovisual Media ("DG X") notes that there are theoretical reasons to continue treating communications as a separate regime, in spite of the developments discussed above. They include the need to promote pluralism, provide quality content, respect linguistic and cultural diversity, and protect of minors.⁶² These goals coincide with the goals of Canadian communications policy, and with the theme that freedom of expression is tied to access to information, and participation in the political process.

DG X suggests a useful distinction between public and private communications.⁶³ This allows the communications market to be broken down so that policy issues with regard to the public sphere are considered, while deregulation is allowed to proceed in areas that do not merit separate treatment. This view is reflected in the special newspaper provisions in the UK, in European discussions of the audiovisual sector⁶⁴ and, generally, in a

⁶⁰ See *Southam*, *supra* note 42 and Regulation and Competition Issues, *supra* note 27 at 180-183.

⁶¹ The fact that the Competition Bureau defines a market is not enough; the definition of the market will be at issue in any proceedings before the Competition Tribunal, and in any subsequent appeals or judicial reviews.

⁶² In Regulation and Competition Issues, *supra* note 27 at 298.

⁶³ Regulation and Competition Issues, *supra* note 27 at 304.

⁶⁴ EC, *Television Without Frontiers Directive* (89/552/EEC as modified by 97/36/EC).

recognition of the right to information and its relation to public participation in a society.

Conclusion

Recognizing the importance of communications and the desirability of a diverse array of views in public communication should be fundamental to the review of media mergers. The merger review system in Canada does not adequately take these factors into account due to the overly narrow mandate of the CRTC and the purely economic mandate of the Competition Bureau. The Hollinger-CanWest example demonstrates the possibility that a major consolidation of market power in the dissemination of public communication may not be captured by existing legislation and regulation.

In applying public policy, it is important to keep in mind the intricacies of the communications sector. First, we must look to the services offered by a communications company. Regardless of the medium, these may be broken down roughly into distribution channel, content, and advertising. Specific public policy considerations about access to diverse sources of information should concentrate on content, and on the others only insofar as they might affect availability of content.

The public/private communications distinction suggested by DG X is a technology-neutral way of looking at the function of a mode of communication that may serve to filter those aspects of the industry that require a special regime. It is not perfect, and there will be technologies that do not easily fit into either of the categories, but it is a good starting point.

What is needed is a new way for the relevant agencies to work together, one that combines the broad mandate of the Competition Bureau (which includes ensuring consumers have access to competitive prices and product choices) with the sectoral expertise of the CRTC. Within the existing framework, the simplest way to accomplish this might be to allow the Competition Bureau to conduct the review, calling on submissions from the CRTC about sector-specific concerns. This sort of arrangement could be duplicated with other sectoral regulators, for hearings that affect a regulated sector but overflow the regulator's mandate.

Postscript:

As Appeal was going to press, the Federal Government announced it would appoint a panel to study issues of media concentration in Canada.