

# **News as Hazardous Waste: Postmedia, the Competition Bureau, and the Supreme Court of Canada**

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## **ABSTRACT**

**Background** In early 2015, a few months after Postmedia Network, Canada's largest newspaper company, purchased 175 Sun Media titles from Quebecor Inc., the Supreme Court of Canada rendered a landmark decision. It allowed the purchase of one hazardous waste company by another because the Competition Bureau, which had blocked the deal, failed to quantify the anti-competitive effects of the monopoly created.

**Analysis** The ruling set an important precedent for the Postmedia purchase, which was approved by the Competition Bureau two months later.

**Conclusions and implications** This article points up the problematic nature of competition cases involving news media companies and the need for reform of the Competition Act to prevent such cases from being decided solely on economic grounds, as now mandated by the Supreme Court.

**Keywords** Newspapers; Postmedia; Competition Bureau; Press ownership concentration

## **RÉSUMÉ**

**Contexte** Au début de 2015, quelques mois après que le plus grand groupe de presse au Canada, Postmedia Network, a acheté les 175 journaux Sun Media de Québecor Inc., la Cour suprême du Canada a pris une décision marquante. Elle a permis l'achat d'une compagnie de matières dangereuses par une autre parce que le Bureau de la concurrence, qui avait bloqué la transaction, avait échoué à quantifier les effets anticoncurrentiels du monopole qui s'ensuivrait.

**Analyse** Cette décision a constitué un précédent important pour l'achat par Postmedia que le Bureau de la concurrence approuverait deux mois plus tard.

**Conclusion et implications** Cet article souligne la nature problématique de cas de concurrence entre compagnies journalistiques et le besoin de réformer la Loi sur la concurrence afin d'empêcher la prise de décisions sur une base économique seulement, à l'instar du verdict de la Cour suprême.

**Mots clés** Journaux; Postmedia; Bureau de la concurrence; Concentration des médias

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When the federal Competition Bureau approved in March 2015 the purchase by Postmedia Network of 175 Sun Media newspapers from Quebecor Media, it effectively allowed a merger of the country's two largest newspaper chains. That gave Postmedia ownership of both dailies in Calgary, Edmonton, and Ottawa. It already published both English-language dailies in Vancouver, as its corporate predecessors had since 1980. The announcement in early 2016 that Postmedia would merge the newsrooms of its dailies in those four cities prompted Parliamentary hearings into the declining level of local news provision. Some blamed the Competition Bureau for failing to forestall the newsroom mergers, but it disavowed responsibility (Bradshaw, 2016; Edge, 2016a). This legal, policy, and historical analysis shows that a contributing factor in its ruling may have been a landmark Supreme Court of Canada (SCC) decision that radically altered the common law on mergers just weeks before the Competition Bureau's Postmedia decision was issued and thus injected an important legal precedent into its deliberations.

The case of *Tervita Corp. v. Canada*, which went little noticed outside the competition law community, triggered long-dormant provisions in the 1986 Competition Act that allowed companies to claim economic "efficiencies" achieved in their operations to justify mergers and acquisitions that would otherwise amount to monopoly. The effect, legal analysts noted, was to raise the bar for the Competition Bureau to prevent future monopolies, thus opening the door even wider to more media mergers. The considerable economic efficiencies available from mergers and acquisitions of news media companies invariably involve cuts to expensive public service journalism, much to the detriment of democracy. The SCC ruling thus increased the urgency for reform of the Competition Act to put the genie back in the bottle and protect news media from the unhindered consolidation the ruling enabled. Such changes had been strongly urged by a Senate committee in 2006, which was harshly critical of what it called "regulatory neglect" of news media by both the Competition Bureau and the Canadian Radio-television and Telecommunications Commission. The recommendation was ignored, however, by the newly elected Harper government, which would remain in power for almost a decade. During this period it presided over both unprecedented consolidation of Canada's newspaper industry and the takeover of its largest and then second-largest newspaper chains by U.S. hedge funds, despite nominal limits on foreign ownership.

Timing of the *Tervita* ruling, in a case involving a hazardous waste landfill monopoly in northern British Columbia, could not have been worse for press ownership concentration in Canada. By interpreting the Competition Act in a way that put the Competition Bureau at a disadvantage in preventing monopolies, it may have contributed to a further increase in the country's level of media ownership concentration, which was already among the world's highest, and may also facilitate future such increases. It explicitly endowed the country's news media, which play a vital role in cultural and political affairs, with the same status as any other business in Canada, such as hazardous waste removal. It was also not the first instance of bad timing, and rulings by the country's highest court, negatively impacting press ownership in Canada

### **Failed reform efforts**

Press ownership concentration has been a major concern in numerous countries for a

half century, and due to the social and political importance of newspapers, this concern has persisted even into the fragmented internet age (Baker, 2007; Barnett, 2010; Karppinen, 2013; Schlosberg, 2017). “The potential for powerful voices to shape ‘perceptions, cognitions and preferences,’” noted Schlosberg (2017), “has always been at the root of media ownership concerns” (p. 3). According to Barnett (2010), “It is almost universally accepted within advanced industrial democracies that concentration of media ownership within too few hands contradicts the basic tenets of democracy, threatening diversity of expression and risking autocratic control of communicative spaces” (p. 1).

Canada has since the 1980s ranked among the countries with the highest levels of press concentration (Dunnett, 1988). According to Noam (2016), Canada ranked behind only Australia and Ireland in control of its newspaper industry by the top few firms, disregarding China’s 100 percent state ownership. Postmedia and Quebecor combined for 53.1 percent of newspaper revenues before the sale to Postmedia of most Quebecor titles (it retained three Québec tabloids) (Noam, 2016). A post-purchase calculation using a different measure—paid daily circulation—put Postmedia first (37.4%), Torstar second (14.3%), and Quebecor third (10.3%), for 62 percent control by the top three firms. More troubling was Postmedia’s dominance in Western Canada, where it owned eight of the nine leading dailies in B.C., Alberta, and Saskatchewan, and published 75.4 percent of paid daily circulation (Edge, 2016b).

In Canada, press ownership concentration before Postmedia’s purchase peaked at the millennium before receding somewhat with the 2009 bankruptcy of industry dominant Canwest Global Communications, as some of its minor titles were sold off separately from its major newspapers. Soderlund and Romanow (2005) calculated that Canwest, Quebecor, and Torstar comprised 62.3 percent of the market in 2004 as measured by daily circulation. “There is simply too much power concentrated in too few hands,” they concluded, “and to believe that all is well would be foolhardy in the extreme” (p. 12). Successive government inquiries into Canada’s news media have focused on alleviating press ownership concentration. Their warnings against allowing concentration to grow higher have mostly been ignored, however, and ownership reform efforts have always failed (Edge, 2016c). The 1970 report of a Special Senate Committee on Mass Media noted there were then only five Canadian cities where “genuine competition” between newspapers existed.

Of Canada’s eleven largest cities, chains enjoy monopolies in seven. The three biggest newspaper chains—Thomson, Southam, and F.P.—today control 44.7 per cent of the circulation of all Canadian daily newspapers; a dozen years ago, the total was only 25 per cent. (Canada, Parliament, Senate, 1970, p. 4)

The report recommended establishment of a Press Ownership Review Board to approve or reject mergers and acquisitions of newspapers and periodicals. The board’s guiding principle would have been that “*all* transactions that increase concentration of ownership in the mass media are undesirable and contrary to the public interest—unless shown to be otherwise” (p. 71, emphasis in the original). After considerable national debate, the recommendation was never adopted. A decade later, a Royal Commission on Newspapers was called to investigate the simultaneous closure by the

Southam chain of its *Winnipeg Tribune* and by the Thomson chain of its *Ottawa Journal*. The closures gave each chain another local monopoly. Thomson also sold its *Vancouver Sun* to Southam, which already owned the *Vancouver Province*, for a third new monopoly. The Royal Commission headed by Tom Kent held hearings across the country and issued a report in 1981. "Newspaper competition, of the kind that used to be, is virtually dead in Canada," it noted. "This ought not to have been allowed to happen" (Canada, Royal Commission on Newspapers, 1981, pp. 215, 218).

Calculating that the Southam and Thomson chains then published 59 percent of the nation's English-language daily newspaper circulation, the so-called Kent Commission recommended limiting chain ownership to five dailies each, the circulation of which could not exceed 5 percent of the national total. The Irving Oil family would have been required to relinquish its provincial monopoly in New Brunswick, and Thomson would have had to divest either its 39 dailies in Ontario or its flagship *Globe and Mail* (Canada, Royal Commission, 1981). Reaction of publishers to the commission's proposals was described by one history of the Thomson chain as a "paroxysm of fury" (Goldberg, 1985). The *Globe and Mail* called the report "a veritable idiot's delight of interference in the ownership and operation of the nation's press" (quoted in Lewis, 1981, p. 30). According to Clow and Machum (1993), the Kent Commission was "one of the most condemned Royal Commissions in Canadian history;" as the newspaper industry attacked Kent "with a savagery out of all proportion to the change he recommended" (p. 98).

Perhaps understandably, given the political pressure that was applied by publishers, the limits contained in a proposed Canada Newspaper Act that was tabled the following year were less strict than the Kent Commission's recommendations. The act would have set the ownership limit for each chain at 20 percent of the nation's press. Thomson and Southam, which were both over that level, would have been permitted to retain their holdings but frozen in size (Lewis, 1981). The legislation languished on the order paper, however, failing even to be introduced as the Liberal government of Pierre Elliott Trudeau, in its dying days, instead prioritized repatriating the Constitution from Great Britain and introducing the Charter of Rights and Freedoms. *Maclean's* magazine concluded at the time that the act died "largely because the government did not have the will to face costly court battles and yet another political war with powerful interests" (Lewis, 1982). A decade later, Kent wrote that the act failed to see life because the Trudeau government was by then "mired in economic problems that it did not know how to deal with, beset by so many critics on so many fronts that, despite its majority, its enthusiasm for controversial action was greatly depleted" (Kent, 1992). Criminal charges of conspiracy and monopoly were laid against the chains by the anti-trust regulator of the day, the Restrictive Trade Practices Commission (RTPC), but despite an incriminating paper trail that included seized company memos, the case ended in acquittal after the judge concluded the closures constituted "good business sense, not an illegal conspiracy" (Austen, 1983).

### **The Competition Bureau**

A 1977 SCC decision that had increased the difficulty of obtaining a criminal conviction in competition cases coincidentally also involved a media monopoly. The RTPC charged the Irving family with criminal monopoly of newspaper ownership in 1972

after it acquired all five of the daily newspapers in New Brunswick. It obtained a conviction at trial, along with an order that the Irvings divest one of the newspapers, and each newspaper was fined \$150,000. The conviction was overturned on appeal, however, and the SCC upheld that decision (Couture, 2013). The judgment increased the Crown's burden of proof because the SCC ruled it must prove not only a lessening of competition, but also detriment to the public. The court also, according to a legal analyst, "refused to infer public detriment from the one hundred percent market share of the accused" (MacCrimmon, 1983, p. 586).

The failure of the RTPC to obtain a conviction against the newspaper chains, or in any other monopoly case it prosecuted, was followed within a few years by new legislation. According to one legal scholar, the 1986 Competition Act "literally rewrote the book on competition law in Canada, particularly with regard to merger control and the review of the activities of dominant firms" (Ross, 1998, p. 1). It replaced criminal procedures for the review of mergers and monopolies with civil ones, created a new administrative branch (the Competition Bureau) to investigate and rule on competition cases, and a quasi-judicial body made up of lay experts and Federal Court judges (the Competition Tribunal) to adjudicate disputes. By lowering the criminal test for conviction (proof beyond a reasonable doubt) to the civil test for rulings (proof on a balance of probabilities), the Competition Act aimed to provide more effective anti-monopoly legislation. The Competition Bureau soon got its first chance to prevent additional press ownership concentration, when Southam added most of the Vancouver area's community newspapers to its monopoly on dailies there in the late 1980s. The bureau ordered Southam to divest several titles that it found competed directly, but the company refused and a Competition Tribunal held hearings in Vancouver. It reduced the number of titles Southam was ordered to divest to one and company appeals to the Federal Court of Appeal and the SCC resulted in the order being upheld (Competition Bureau, 2004).

By the late 1990s, a series of transactions brought Canadian press concentration to its highest level yet. Conrad Black took over the Southam chain in 1996 through his company Hollinger Inc., and Quebecor—until then a provincial newspaper chain attached to a worldwide printing empire—acquired the Sun Media chain in 1998. That raised concentration of newspaper ownership by the five largest chains from 73 percent in 1996 to 93 percent in 1999, with Hollinger alone accounting for 42 percent of newspaper circulation nationally (Canada, Standing Senate Committee on Transport and Communications, 2004). The following year, Canadian news media underwent their most radical ownership change. The AOL-Time Warner merger in the U.S. in early 2000 popularized cross-media ownership, or "convergence." By the end of that year, Black sold the Southam dailies to Canwest Global Communications, which owned the Global Television network, the CTV network partnered with the *Globe and Mail*, and Quebecor acquired the French-language TVA network.

A Senate inquiry into Canadian news media was convened in 2003 after controversies over news manipulation by the Asper family of Winnipeg, which owned Canwest Global Communications (Edge, 2007). The Senate committee's final report in 2006 recommended automatic review of any merger of news gathering organiza-

tions that gave an owner an audience share of 35 percent or higher in any market. Press freedom provisions in the Charter of Rights and Freedoms, the senators reasoned, should only go so far. “The media’s right to be free from government interference does not extend ... to a conclusion that proprietors should be allowed to own an excessive proportion of media holdings in a particular market, let alone the national market” (Canada, Standing Senate Committee on Transport and Communications, 2006, p. 24). By then, however, momentum for media ownership reform in Canada had once again stalled with the election earlier that year of a neoliberal Conservative government. The federal Department of Canadian Heritage issued a policy response to the Senate report before 2006 ended that officially blessed convergence as a business model for media, stating: “The government recognizes that convergence has become an essential business strategy for media organizations to stay competitive in a highly competitive and diverse marketplace” (Canada, Department of Canadian Heritage, 2006, p. 13).

### Regulatory “neglect”

In a background report to the Senate committee on its work in media industries, the Competition Bureau pointed out that its governing act was “essentially an economic law ... common to all products and services” (Competition Bureau, 2004). As such, in considering mergers and acquisitions of media companies, the bureau was empowered to take into account only their revenues, the bulk of which came not from audiences but from advertisers.

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 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. (Competition Bureau, 2004, p. 8)

Even if it found that a merger would substantially lessen or prevent competition for advertising, however, the Competition Bureau pointed out that 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” (Competition Bureau, 2004, p. 9). In chronicling its recent investigations into mergers involving newspapers, the bureau noted that it found the convergence deals at the millennium had not posed a threat to competition. It concluded there was “no evidence that newspapers, the Internet and television compete directly for retail advertising normally found in newspapers” (Competition Bureau, 2004, p. 12). Its 1998 review of a proposed takeover of the Sun Media chain by the Torstar Corp., however, found the takeover would have “substantially” lessened competition in the 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” (Competition Bureau, 2004, p. 15).

The Senate committee’s 2006 report on news media was sharply critical of both the Competition Bureau and the Canadian Radio-television and Telecommunications

Commission for what it called their “neglect” of Canada’s news media industries. “One challenge is the complete absence of a review mechanism to consider the public interest in news media mergers,” it noted. “The result has been extremely high levels of news media concentration in particular cities or regions” (Canada, Standing Senate Committee, 2006, p. 24). Part of the problem, the report stated, was that the Competition Bureau considered only the economic impact of a media merger on advertisers, not the impact on information needs of Canadians.

While it is true that some readers buy a newspaper for the advertising, most are interested in the news, information and other non-advertising features. ... Clearly, a principal public interest about the news media should be the diversity of news and opinion. For this reason, advertising costs are not always the best indicator of market conditions for the news media given that rates can stay the same (or even decline) in the wake of increased concentration of ownership. (Canada, Standing Senate Committee, 2006, p. 16)

The narrow way in which the Competition Bureau defined markets as local, rather than regional or national, may also have hindered it from preventing anti-competitive practices in the news media, according to the Senate report. “This definition of the news market, combined with the potentially misleading analysis of prices in the advertising market, has led to significant concentration of ownership of various media in Canada, notably community newspapers, in several regions” (Canada, Standing Senate Committee, 2006, p. 17). What may have worked in an economic sense in most industries, it warned, was not appropriate to such a politically important—and constitutionally protected—institution as the nation’s press. “The Competition Bureau’s operating procedures may be well suited to analysing most markets for goods and services in Canada, but not the news media market” (p. 17). The bureau’s “silo” approach also missed a critical dimension of news and information, added the senators. “Namely, the importance of the plurality of owners and the diversity of voices, not just in a given community but in the wider regional and national landscape. This is in sharp contrast to the regulatory regimes in [other] countries” (p. 17).

The Senate report recommended that a new section dealing with news media merger takeovers be added to the Competition Act, requiring automatic review to prevent dominance by one owner in any market, be it local, regional, or national. As the Competition Bureau was unlikely to have the expertise to deal with the public interest in such mergers, the Senate report also recommended that the new section provide for the appointment of an expert panel to conduct the review. None of these measures was enacted, however, as the government had changed earlier in 2006 from Liberal to Conservative (Edge, 2016c).

### **Postmedia purchase**

The recession of 2008–2009 led to steep revenue losses that left Canwest, which was heavily indebted from its acquisition of the Southam newspapers and other media properties, unable to make its loan payments. The company declared bankruptcy in 2009, and its newspaper division was sold separately from its Global Television net-

work the following year. Postmedia Network, a consortium of Canwest creditors with the financial backing of U.S. hedge funds that held much of the company's debt, took over Canwest's newspaper division. The resulting American shareholdings well exceeded the 25 percent federal limit on foreign ownership of news media companies, but in a unique ownership structure, the shares were held in limited-voting stock and thus Canadian shareholders technically controlled the company (Edge, 2016c). Postmedia bought most of the Sun Media newspaper chain from Quebecor in October 2014, excepting only the French-language tabloids *Le Journal de Montréal*, *Le Journal de Québec*, and the free-distribution *Montréal 24 Heures*. This made Postmedia by far the largest newspaper company in Canada, with almost three times the paid daily circulation of second-place Torstar (Edge, 2016b).

Postmedia CEO Paul Godfrey promised that the dailies Postmedia had acquired in Calgary, Edmonton, and Ottawa would continue to operate independently, with their own newsrooms (Artuso, 2014). The *Toronto Star* remarked in an editorial that Postmedia's sudden newspaper dominance was not raising much concern but should.

If the deal is approved by the federal Competition Bureau, one company will own almost all the significant daily papers in English Canada. In most cities, the choice for newspaper readers will be between Postmedia—and Postmedia. Most worrisome, the big decisions that will shape much of English Canada's media landscape will be made south of the border. (“U.S. Hedge Funds,” 2014)

A columnist in the *Globe and Mail* observed that Postmedia had

thrown down the gauntlet to Canadian regulators, and forced the country to have a conversation that it has long avoided: How much are we willing to compromise the principles of a diverse and competitive press in the name of keeping it alive? ... This doesn't just alter Canada's print-media landscape, it takes a bulldozer to it. (Parkinson, 2014)

### **The Tervita case**

When it was introduced in 1986, the Competition Act contained a section which, according to one legal analysis, was “unique among competition/antitrust statutes around the world” (Crampton, 1995, p. 59). Section 96 of the act became known as the “efficiencies defence” because it allowed merging or acquiring parties to avoid an order of divestiture or dissolution by establishing that the economic efficiency gains of a transaction would likely outweigh its anti-competitive effects. According to Crampton (1995), this approach was a “total welfare” balancing process as compared to a “consumer welfare” approach (p. 59). It was taken because “the government of the day had high hopes that it would play a significant role in facilitating efficient restructuring in Canada” (p. 64)—hopes which went largely unrealized.

Efficiencies do not have to be passed on to consumers. This approach occupies the middle ground between the approach of jurisdictions such as the E.U. ... and the approach of the U.S. Department of Justice, which appears to require efficiency gains to be so great that prices will not rise as a result of the merger. (Crampton, 1995, p. 60)



The efficiencies defence went untested for decades, however, until the SCC rendered its *Tervita* judgment in early 2015. This judgment was the court's first merger decision under the Competition Act since the *Southam* case in 1997 and the first time it had ruled on the efficiencies defence allowed in the act (Assaf & Chernenko, 2015; Grant, 2015). The case involved *Tervita Industries Ltd.*, a Calgary-based company that specialized in hazardous waste removal for oil and gas companies. After *Tervita* took over its only regional competitor in northeastern British Columbia in 2011, the Competition Bureau ordered it to either unwind the transaction or divest its newly acquired landfill operations. *Tervita* appealed to a Competition Tribunal and then to the Federal Court of Appeal, both of which upheld the order. It then appealed to the SCC, which agreed that the *Tervita* deal would prevent competition. Evidence produced before the Competition Tribunal had shown that an expected 10 percent drop in hazardous waste remediation costs in the region would be prevented by the merger. "The Tribunal's conclusion that the merger is likely to substantially prevent competition is correct," noted the SCC. "While the Tribunal's treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in absence of the merger was flawed, there was sufficient other evidence upon which it could find a substantial prevention of competition as a result of the merger" (*Tervita Corp. v. Canada*, 2015, pp. 6-7).

The SCC allowed the appeal in a 6-1 ruling, however, pointing out that the Competition Bureau had failed to quantify the merger's anti-competitive effects in order to show they would outweigh the minimal gains in efficiency that had been demonstrated by *Tervita*. The efficiencies defence required the Competition Bureau to put a number on the lessening of competition, the court ruled, just as *Tervita* had done in quantifying the savings expected from the merger. "The defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market" (*Tervita Corp. v. Canada*, 2015, p. 7).

Effects that can be quantified should be quantified, even as estimates, provided such estimates are grounded in evidence that can be challenged and weighed. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis. (p. 58)

The Competition Tribunal, the SCC noted, had accepted that small efficiency gains in overhead expenses would result from the acquired company having access to *Tervita*'s administrative and operating functions. The Competition Tribunal rejected almost all of the efficiencies claimed by *Tervita* because it ruled they would likely have been achieved in any event, but it did accept overhead efficiencies directly attributable to the merger that were equivalent to one-half the salary of one full-time junior back office employee. The Federal Court of Appeal ruled these efficiencies insignificant and did not count them, but the SCC judged them admissible. "The Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved ... if only marginal or insignificant gains in efficiency result from that merger," it ruled. "In this

case, the Commissioner did not meet her burden to prove the anti-competitive effects, and as such, the weight given to the quantifiable effects is zero” (*Tervita Corp. v. Canada*, 2015, p. 10).

### **Reaction to Tervita**

A pair of economists observed that the Tervita decision put Canadian merger law “far out in front of the wave” of integrating economic principles into merger law (Ware & Winter, 2016, p. 366). The ruling, according to Ware and Winter, put a new burden on the Competition Bureau to quantify anti-competitive effects, without which it would lose any challenge to a merger, even with evidence of a substantial lessening of competition. “Tervita thus injected even more economics and econometrics into merger law—to the point where the commissioner describes the case as solidifying the place of economists as the ‘rock stars’ of merger law enforcement” (Ware & Winter, 2016, p. 367).

The reference was to a speech given to a group of lawyers three weeks after the Tervita decision by John Pecman, an economist who headed the Competition Bureau. “I know that most people already have a natural tendency to see economists as the rock stars of competition law enforcement,” said Pecman, “but I’m still pleased that this ruling has clearly made that the only possible point of view” (Pecman, 2015, Tervita section, para. 11). He outlined the additional steps the Competition Bureau was having to take in response to the SCC’s directive to quantify anti-competitive harm. “We have begun to analyse the extent to which the Bureau will need to seek additional types of documents and data to support its reviews. ... In cases where litigation is a real possibility, we’ll need to gather more information from the merging parties and, in some instances, third parties” (Pecman, 2015, Tervita section, para. 10). The Competition Bureau announced its decision not to challenge Postmedia’s purchase of the Sun Media newspapers one month later.

Reaction to the Tervita ruling in the legal community was mixed, noting the ironic result of the case as well as the precedent it set. “This is a strange result, given that the Commissioner’s expert found that the merger would prevent a price decrease of at least 10 percent,” noted the business law magazine *The Litigator*. “The anti-competitive effects from such a prevention of competition must surely be more than one-half of one person’s salary” (Osborne, 2015, A strange result section, para. 2). The consensus was that the onus the ruling put on the Competition Bureau to quantify the anti-competitive effects of a merger or takeover was bound to put it at a major disadvantage. “The SCC’s decision will increase the burden on the Competition Bureau to challenge efficiency claims, as it now must spend significant time and effort to quantify the anti-competitive effects of such transactions,” noted one analysis. “This will likely result in an approach that reinforces the role of efficiencies in merger reviews, which will benefit merger parties” (Bryan & MacDonald, 2015, para. 1). One law firm observed that the SCC had imposed a “significant hurdle” for the Competition Bureau to rebut an efficiencies defence once the merging parties had established even modest efficiencies (Lally, Franklyn, Glossop, Naudie, & Rodal, 2015, p. 4).

### **Postmedia ruling**

After reviewing Postmedia’s acquisition of the Sun Media newspapers for five months,

the Competition Bureau issued the company a “no action” letter stating it would not challenge the purchase. Its investigation oddly concluded that the sale was “unlikely to substantially lessen or prevent competition” in the markets where Postmedia now owned both daily newspapers (Competition Bureau, 2015a). A combination of factors played into its conclusion, according to a press release issued by the Competition Bureau, including

1. the lack of close rivalry between Postmedia and Sun Media newspapers
2. competition from free local daily newspapers
3. the incentive for Postmedia to maintain editorial quality in order to continue to attract readers and advertisers to its newspapers
4. the increasing competitive pressures from digital alternatives in an evolving media marketplace (Competition Bureau, 2015a).

In assessing the degree of competition for advertising between the newspapers involved, the bureau said in a longer statement posted online that it “reached out to a broad set of market contacts, reviewed thousands of documents from industry participants, and carried out extensive econometric analyses” (Competition Bureau, 2015b, Analysis section 2, para. 1). It said it found “very little evidence of direct rivalry between the parties’ newspapers with respect to advertising. Rather, in this particular matter, the evidence demonstrated that the parties are not close rivals” (Analysis section 2, para. 1). Market contacts indicated that prices for advertisements varied “significantly” between the newspapers, which delivered “largely distinct audiences.” Accordingly, the bureau found that the Sun Media tabloids and Postmedia broadsheet newspapers “tend to serve as complements rather than substitutes” (Analysis section 2, para. 1). Econometric analyses using data provided by the parties and other market participants, it added, also “failed to support a finding of strong rivalry between the parties to the proposed transaction” (Analysis section 2, para. 2).

Extensive documentary and empirical evidence, according to the Competition Bureau statement, demonstrated that the parties were also “not close rivals from the perspective of readers, a finding that was supported by the views of market participants and by an analysis of the demographic characteristics of the parties’ respective audiences” (Analysis section 3, para. 1). “In short, the parties’ newspapers appeal to different types of readers and those readers do not tend to substitute between the parties. Furthermore, the evidence showed the presence of free local daily newspapers in the relevant markets to be an important competitive constraint” (Analysis section 3, para. 1).

Another factor considered by the Competition Bureau was that newspaper competition took place in “two-sided” markets, a subject on which it said it was “guided by a recent and expanding economic literature” (Background section, para. 3). Because they earned revenue from both readers and advertisers, newspapers actually competed in two markets instead of the usual one. “The parties are keenly focused on their circulation and readership figures, and rely on them heavily in marketing to potential advertisers,” the bureau noted. “The parties focus their subscription efforts on gaining readers of a particular demographic, which they can, in turn, market to advertisers” (Analysis section 4, para. 1). The markets for readers and advertising that newspapers competed in were both declining, however, which limited the dominance they could

exercise. “Key metrics for the newspaper markets demonstrate that the print newspapers in these markets are facing a steady and continuing decline in readership and advertising. As a result, market conditions exert downward pressure on the parties’ ability to exercise market power” (Background section, para 4). Downward pricing pressure was also exerted on them to compete with free newspapers and to generate additional advertising revenues through improved circulation. It was therefore in the newspapers’ best interests, the Competition Bureau noted, to provide compelling content in order to attract readers they could in turn market to advertisers. “Editorial investments and engaging content are important to gain and retain readership,” it found. “Econometric evidence supports the existence of a strong interaction between the advertising and readership sides of the newspaper markets” (Analysis section 4, para. 1).

Finally, the Competition Bureau mentioned that it “also weighed substantive efficiencies submissions by Postmedia suggesting that the proposed transaction is likely to bring about meaningful cognizable efficiencies” (Competition Bureau, 2015b, Efficiencies section, para. 1). Estimates provided publicly at the time of the Sun Media acquisition were that by combining non-editorial operations of the two chains, Postmedia expected to save between \$6 million to \$10 million in cost cutting efficiencies. Godfrey reiterated that Postmedia planned to follow in Calgary, Edmonton, and Ottawa the model that had been used for decades in Vancouver, seeking efficiencies by combining administrative and production departments, but keeping separate newsrooms (Dobby & Bradshaw, 2015).

### **Escalating efficiencies**

A continued downturn in print advertising revenues throughout 2015, however, forced Postmedia to increase its cost cutting. Following a 20 percent drop in advertising revenue in the company’s fiscal third quarter, Postmedia announced a further round of cost cutting in mid-2015 that was aimed at achieving an additional \$50 million in efficiencies, half from the former Sun Media newspapers (“Postmedia Aims,” 2015). That followed a three-year program of cutbacks at Postmedia newspapers that started in mid-2012 and reduced annual spending by \$136 million, or 20 percent of operating costs (Bradshaw, 2015). The 2015 cost cutting was also despite the fact that Sun Media newspapers had cut about 1,000 jobs two years earlier, diminishing their product so much that Godfrey said when Postmedia’s takeover was announced that they would get more staff, not fewer. “They’d become too thin and need some boosting up,” he said (Flavelle, 2014).

As Postmedia revenues continued to fall, the company announced in mid-January 2016 that it would merge the newsrooms of its duplicate dailies in Vancouver, Calgary, Edmonton, and Ottawa and lay off 90 workers. The announcement was likened by the *Ottawa Business Journal* to a “miniature Black Tuesday for Canadian journalists” (Feibel, 2016, p. 12), referring to the newspaper closures and consolidation that prompted the Kent Commission. The Competition Bureau disavowed responsibility for the move and said it would not re-examine its approval of the Sun Media takeover, despite Postmedia breaking its promises to keep separate newsrooms. “While we expect the parties to honour their public commitment,” a spokesperson told the *Globe*

and Mail, the bureau's decision not to contest the takeover "was not directly dependent on this commitment" (Bradshaw, 2016).

In mid-February 2016, Vancouver Centre MP Hedy Fry announced that the Canadian Heritage ministry committee she chaired would examine the country's growing crisis in news provision. "I know that our government has a strong will to deal with this now," she said. "The thing about politics is that the time comes one day when stuff is facing you so hard that you have to do something about it. That time has come" (Ditchburn, 2016, p. A5). The committee was tasked to study "how Canadians, and especially local communities, are informed about local and regional experiences through news, broadcasting, digital and print media." It also planned to examine media concentration and its impact on local news reporting, and how digital media had altered local news provision (Ditchburn, 2016). The committee quickly began holding regular hearings in Ottawa, which continued into the summer of 2017.

## Conclusions

The SCC decision in Tervita was more than just bad timing for press ownership concentration in Canada. It pointed up the policy weakness identified by the 2006 Senate report on news media that had lain dormant for decades. By failing to distinguish news media, which play an important societal and political role, from other industries, the Competition Act enabled increased press ownership concentration. The news media upon which Canadians depend to inform themselves are thus considered on the same level as companies that deal in such endeavours as hazardous waste removal, which while necessary are hardly a bastion of democracy. The efficiencies defence in the Competition Act is the weak link in whatever regulatory protection exists against increased press ownership concentration in Canada. By considering only advertising revenues and not the information needs of Canadians, efficiencies gained in news gathering may be used to justify even more mergers and acquisitions of news media companies. This ironically may lead to news media companies becoming increasingly efficient by providing Canadians with fewer and fewer sources of news. The 2006 Senate report on news media wisely but fruitlessly recommended changes to the Competition Act to treat news media companies differently than other industries and to have news media mergers reviewed by experts. These recommendations should be renewed by the Heritage Ministry committee. Even if they are enacted by the current Liberal government, however, it may be too late to ameliorate Canada's stratospheric level of press ownership concentration, which may require additional measures to address.

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