Rogers-Shaw-Videotron Deal Will Increase Competition, Tribunal Finds

Michael Osborne

Chair, Canadian Competition Practice

mosborne@cozen.com
Phone: (647) 417-5336
Fax: (416) 361-1405

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The Rogers Communications Inc. deal to buy Shaw Communications Inc. after Shaw sells its Freedom Mobile business to Videotron Ltd. will increase competition, Canada's Competition Tribunal found.

The Commissioner of Competition had applied for a full block of the deal, alleging that it would raise mobile phone plan prices and reduce competition. In dismissing the case, the Tribunal rejected every allegation made by the Commissioner, holding not only that the merger would not adversely affect competition it would, in fact, lead to more intense competition, lower prices, and more choice for consumers.

Triple Play Merger

In March 2021, Rogers agreed to buy Shaw for $26 billion. Rogers and Shaw are both internet, cable TV, and mobile phone providers. Their internet and TV businesses do not overlap: Rogers is in Ontario, while Shaw is in British Columbia and Alberta. But, their mobile businesses do overlap. Rogers is the largest of Canada's "big three" mobile companies, while Shaw operates two mobile brands, Freedom Mobile, a low-cost provider, and Shaw Mobile, offered to its cable and internet subscribers.

Unsurprisingly, Canada's Competition Bureau was concerned that the tie-up would harm mobile phone competition. Proposals by Rogers and Shaw to divest Freedom to two different financial buyers failed to allay this concern.

The Commissioner filed a challenge to the merger in May 2022, seeking a "full-block" of the deal.

Just over one month later, Rogers and Shaw agreed to sell Freedom to Videotron for $2 billion. Videotron is a Quebec-based internet, cable TV, and mobile phone provider. Rogers also agreed to provide Videotron with backhaul, transport, and other services at attractive rates.

But, this was not enough to satisfy the Bureau. Two attempts at mediation failed, and the case went to a full trial that ended in mid-December.

The Tribunal dismissed the Commissioner's application in an 88-page decision issued on New Year's Eve, a record 17 days after the last day of argument.

Litigating a Hypothetical Transaction?

The Commissioner argued that Tribunal must first examine the original deal—Rogers buying Shaw, including Freedom—before considering whether divesting Freedom to Videotron would remedy any substantial lessening or prevention of competition (SLPC) caused by the merger.

The Tribunal refused this invitation to rule on a hypothetical transaction. It emphasized that Shaw would sell Freedom to Videotron *before* Rogers would buy Shaw. As a result, "the 'proposed merger,' as defined by the Commissioner, is *no longer being proposed*." This is because "what Rogers proposes to acquire will no longer include the shares or assets of Freedom." "Rogers will never own Freedom or operate Freedom," as Shaw's president said. The Tribunal's criticism of the Commissioner was scathing, saying, "The Commissioner's insistence that the Tribunal spend scarce public resources assessing something that will never happen is divorced from reality."

Whether the analysis is conducted in one step, as the Tribunal did, or in two steps, as the Commissioner insisted, should make no difference. The test is the same. After both the merger and

the divestiture, is there an SLPC?

There is a difference in who bears the burden, however. On the Commissioner's two-step approach, the burden shifts to Rogers and Shaw to show that the divestiture would be an effective remedy. On the one-step approach followed by the Tribunal, it remained on the Commissioner throughout. However, this almost certainly made no difference because the Tribunal found that the merger plus divestiture would actually increase competition. Essentially, it found the divestiture would more than remedy any SLPC.

Videotron would be a "More Aggressive and Effective Competitor"

The most important question in determining whether the deal would cause an SLPC was whether Videotron, as the owner of Freedom, would be an aggressive and effective competitor.

The Tribunal found that it would. Videotron, an experienced and successful "market disruptor" in Quebec, "is much more committed than Shaw to be a long-term participant in the relevant markets" and "would be a *more aggressive and effective competitor* than Freedom and Shaw Mobile."

The Tribunal also rejected the Commissioner's contention that Freedom needed Shaw's wireline network to compete. Many wireless providers compete successfully without owning their own wireline networks. Freedom itself has no wireline network in Ontario, where most of its customers live. Telus, Bell, and Rogers all compete in regions where they do not own any wireline network. Nor would Freedom become overly dependent on network services provided by Rogers, as it is free to buy them from other providers in a market that has been found to be competitive.

No Material Price Increase

The Tribunal also found that the merger would not lead to materially increased mobile plan prices in British Columbia and Alberta.

The Commissioner's expert opined that mobile prices would rise by 0.8% in Alberta and 2.5% in British Columbia as a result of the merger. But, this increase would not be uniform. Freedom would lower its prices by more than 15%, while Bell and Telus would leave theirs essentially unchanged. Only Rogers would increase prices by any significant amount (12.1% in British Columbia and 9.6% in Alberta).

However, these predictions were "not reliable and substantially overstated" and "highly doubtful," the Tribunal found. Roger's expert had "persuasively demonstrated" that once certain shortcomings were addressed, the Commissioner's model would not predict material price increases.

While the Tribunal did not remark on it, it seems improbable that Rogers could successfully raise its prices by up to 12%. The fact that its closest competitors, Bell and Telus, were not raising their prices makes it unlikely that Rogers could raise its prices without bleeding subscribers.

Fix it First?

This case marks a number of firsts in the Canadian merger review. It is the first time that a merger has been litigated pre-closing. It is also the first time that the case has centered on a proposed remedy, that is, where parties "litigated the fix."

The decision also confirms that the Tribunal will not analyze hypothetical transactions. Thus, if parties materially change their deal before the case goes to trial, the Tribunal will look at the deal as it is structured at the time of trial.

This does not mean parties will modify their mergers on the courthouse steps, as the Commissioner seems to fear. Rogers and Shaw agreed to divest Freedom to Videotron just over a month after the Commissioner filed his application. Had they waited until just before trial, the Commissioner would have been entitled to an adjournment in order to modify his case to meet the new reality.

Parties to mergers that clearly raise competition issues are best advised to fix it first. That is to say, incorporate a fix into the deal before filing a notification with the Competition Bureau, not after

the Commissioner challenges it.

The Commissioner's Appeal

The Commissioner's appeal is scheduled to be heard on January 24, 2023. For our prediction on the outcome of this appeal, see Commissioner's appeal of Rogers-Shaw decision likely to fail.