Rogers Shaw Notice of Application pursuant to s. 92.
Public CT – 2022-002
Intervention request

By John Roman
May 18 2022

1. I am requesting intervener status as an individual who, since 2014, has appeared at the CRTC as an intervener on Broadcasting, Telecommunications, and Telecommunications related competition issues. These hearings have included:

i. 2019-379: Renewal of CBC/R-C Licences
ii. 2015-134: Review of Basic Telecommunications Services
iii. 2016-192: Examination of Differential Pricing Practices related to Internet Data Plans

in which I have worked to contribute to a better understanding of the issues before the Commission. I respectfully submit that I can also contribute to a better understanding of the issues before the Tribunal.

2. I am requesting the status under s9(3) of the Competition Tribunal Act[1], and s42 of the Competition Tribunal Rules[2]. I have no financial, personal or other connection with either Rogers or Shaw, directly or indirectly. When interestingly this matter is entirely as a public interest intervener.

3. In the event the intervener status is granted, the text of my submission on the merits is set out below.

Should the Proposed Transaction be Approved or Denied?

4. I support the Rogers-Shaw endeavour, and request the transaction be approved. The telecommunications part of the industry has demonstrated elements of natural monopoly for some decades now. This has been resistant to repeated government efforts to foster competition through various policies designed to increase the number of competitors, none of which has succeeded in the long run. The usual economic response to elements of natural monopoly is regulation to control or limit abuse of market power. That has been and remains the function of the CRTC. The Commissioner's submissions fail to give sufficient weight to the decades long inability of the Canadian market to foster more competition through a greater number of competitors. Implicit in the Commissioner's submissions is the assumption that the CRTC cannot be successful in carrying out its statutory duties. I respectfully disagree with that assumption.

5. The decades of concentration of ownership across both the broadcast and telecommunications sectors have made this merger inevitable, even essential. The telecommunications aspect of this merger is necessary for the broadcasting side of the industry to succeed. The two industry aspects are linked, and though hearings are being held separately on different industries, one cannot unscramble this communications omelet.

6. The Commissioner requested three orders:
a) an order directing the Respondents not to proceed with the Proposed Transaction;

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[1] "Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the Competition Act, to make representations relevant to those proceedings in respect of any matter that affects that person."

[2] "A motion under subsection 9(3) of the Competition Tribunal Act for leave to intervene shall be filed within 10 days after the end of the period for filing a response."

b) in the alternative, an order requiring the Respondents not to proceed with that part of the Proposed Transaction necessary to ensure that it does not prevent or lessen and is not likely to prevent or lessen competition substantially;
c) an order directing the Respondent, Rogers Communications Inc., to divest such additional assets as are required to eliminate the substantial lessening or prevention of competition;

7. The first point is unreasonable from a business perspective. Shaw should have the right to be bought if its shareholders approve. There are very few companies in Canada that have the ability to purchase Shaw, and even fewer who understand the industries Shaw is in. Though foreign companies could do both, they are restricted from purchase given the protections against foreign ownership that Canada places on its broadcasting/telecommunications infrastructure. This really only leaves Bell or Rogers as reasonable potential purchasers. If either were to try to make the purchase, the Commissioner would likely make the same objection, so either the objection is unreasonable, or by extension of the Commissioners' logic, Shaw must remain an independent business whether it wants to or not. It is not the function of Canada's competition policy to prevent such transactions.

8. The final point explores divestiture. The Commissioner says the current amount is insufficient but does not clarify what is the right amount. Should Rogers divest itself of its MLSE holdings along with the Freedom brand to better support the new entity? No of course not, but, we are presented with the 'how long is a piece of string' argument, with no measurement given by the Commissioner. It is unreasonable to make this a guessing game of how much is enough. The divestiture of the wireless brand Freedom should be sufficient as long as it is sold to a company that can continue on its trajectory of competitiveness. That determination would have to be made based on what plans any buyer had for it, which reasonably would be to make it as or more competitive than before - because otherwise why spend the money to purchase Freedom in the first place?

9. The second point, and to a degree, even the third point are unnecessary.

10. The findings in Paragraphs 1-50 of the Commissioner's report are not disputed. However, the remainder of the submission appears to be predicated on the incorrect notion that the wireless telecommunications market is unregulated, which is obviously not the case, as the preceding paragraphs often mention the regulator, the CRTC.

11. The majority of the headings in 'section B' read like there would be no brake or control on unfettered market dominance by the new Rogers-Shaw monolith, e.g., "b. Future Wireless Services Competition will be Prevented by the Proposed Transaction", "c. Remaining Competition Will not Constrain Post-Merger Market Power", etc. These could likely be the case if it were an unregulated industry, but it is not. There is a regulator with authority to take actions necessary to protect Canadians if it finds it necessary to do so.

12. Currently, I have a 'Part 1 application' before the CRTC concerning the competition levels in the telecommunications market. I have asked , the CRTC to review its historic forbearance policy, and to suspend its application so as to actively regulate the telecommunications industry in Canada in light of the existing lack of competition and the reduction of one market participant through this proposed transaction .

13. If the part 1 application for a hearing (and the hearing itself) are successful, the Commission's longtime forbearance approach would come to an end, and the CRTC would actively encourage more competitive pricing and service options as well as act as a brake on any company exerting monopoly power in the telecommunications marketplace.

14. These solutions fall within the wheelhouse of the regulator. Moreover, it would be appropriate and correct for the Tribunal to urge the CRTC to exercise its statutory authority to protect Canadians from exactly the concerns raised paragraphs 59-103 of the Commissioners submission.[3]

15. Looked at in isolation, we can see that wireless competition and pricing, are indeed concerns and have been for a number of years. Wind Mobile, the precursor to Shaw's Freedom brand was unable to make a significant impact. However, Shaw was able to make progress with Freedom and, with astute regulatory encouragement, a new owner of 'the new Freedom' could potentially be just as viable as any other competitor.

16. The root of Commissioner's objection must be that the Commissioner does not deem a federally mandated regulator sufficiently competent to regulate its industry and protect Canadians when the existing industry structure and market forces are clearly unable to do so. Stopping this transaction won't cure the inherently oligopolistic industry structure with its economies of scope and scale, it will only make investment in the industry riskier and costlier, hurting consumers. Who will want to start a new competitive business in this industry if you can't sell it?

17. If this proposed transaction is denied on the unarticulated assumption that the regulator is incapable or incompetent, it will be exceedingly difficult to have the CRTC be further empowered by the pending legislation in Bills C-11 and C-18. In essence the Tribunal will be sending a message to the federal government: don't give the CRTC more authority as the Commission is already unable or unwilling to meet existing needs. This is not something I believe the Tribunal intends to signal.

18. In conclusion, I respectfully submit that the Tribunal should deny requested application by the Commissioner.

Sincerely,

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[3] https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/520922/index.do