

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

WRITTEN REPLY SUBMISSIONS

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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OVERVIEW

1. Videotron has moved for leave to intervene. The parties agree that Videotron has met the statutory intervention test. Its intervention should be granted.
2. The Commissioner has requested additional terms for Videotron's intervention. Videotron is willing to agree to those terms.
3. Rogers and Shaw have expressed concern that the Commissioner's request of Videotron for document production and discovery will delay the hearing. Videotron understands that the Commissioner is seeking at least a six-week adjournment of the hearing.
4. Videotron submits that its participation in this proceeding, including its document production and oral discovery, can be accommodated without requiring an adjournment. This is so because the proposed Divestiture to Videotron streamlines rather than expands the hearing. As well, the Commissioner has a detailed understanding of Videotron's business from among other things: (i) Videotron's voluntary production of information to the Commissioner beginning in April 2021; (ii) Videotron's response to the Commissioner's section 11 order in September 2021; and (iii) the additional information that Videotron has supplied on a voluntary basis since the Divestiture was announced on June 17, 2022.
5. There is no unfairness to the Commissioner. He has had every opportunity to ask Videotron for more information as necessary. His requests in this regard since June 17, 2022 have been very modest and were fully answered by Videotron. Had the Commissioner believed he needed even more time under the current schedule, he could have advised Videotron of his discovery request earlier rather than waiting for the last possible day to do so under the schedule.

SUBMISSIONS**A. Videotron's Intervention Should be Granted**

6. The parties agree that Videotron meets the test for intervention.¹ Its intervention should be granted.
7. The Commissioner has asked that the Tribunal adjust the scope of Videotron's intervention in three ways.² Videotron agrees to all three.
8. First, the Commissioner seeks document production and oral discovery. Videotron will agree to such discovery. It proposes to produce its documents by August 29, 2022 (this date could be even earlier if the Commissioner's requested discovery is more modest than anticipated). It proposes that its representative be examined for discovery for one day during the week of September 3, 2022. A date late in that week would provide approximately two weeks between production and the examination.
9. Second, the Commissioner argues that Videotron cannot provide information on how the Divestiture addresses any substantial lessening or prevention arising from the Proposed Transaction or any efficiencies that will accrue to Videotron unless the pleadings are amended.³ Videotron will keep its intervention within the bounds of the pleadings, but does not agree with the Commissioner's characterization of the existing pleadings. In any event, it is premature to circumscribe Videotron's subsequent evidence at this early stage other than to say it must fall within the pleadings as currently framed or as may be amended.

¹ Commissioner's Response to Videotron's Motion to Intervene (21 July 2022), CT-2002-002/77 (Comp Trib) at para 13; Respondents' Letter to Justice Little Re Interventions (21 July 2022).

² Commissioners Response to Videotron's Motion to Intervene (21 July 2022), CT-2002-002/77 (Comp Trib) at para 48.

³ *Ibid* at para 14.

10. Third, the Commissioner submits that Videotron needs to be subject to the Tribunal's Confidentiality Order.⁴ Videotron agrees. In its intervention, it specifically raised the issue of an amendment so that Videotron would be subject to the Confidentiality Order.⁵ Videotron proposes that the parties submit an agreed amended order to the Tribunal for this purpose. Until that time, Videotron is prepared to operate under the Confidentiality Order (i.e., by keeping Designated Records on an outside-counsel-only basis in the interim).

B. The Hearing does not need to be Adjourned

11. The existing schedule can accommodate Videotron's intervention, including its agreed document production and discovery. In fact, Videotron's intervention, and the Divestiture more generally, likely significantly narrow the issues in dispute and reduce the time that the hearing will require.

12. As well, the Commissioner will not be prejudiced by the lack of an adjournment.

13. First, the Commissioner has significant information from Videotron already owing to numerous submissions to the Commissioner and meetings with the Competition Bureau case team beginning in April 2021.⁶ That includes information specific to Videotron's historical market position in Quebec and in Ottawa, its growth plans (including growth plans outside of Quebec), its operational and other capabilities, and its business plans with respect to the acquisition of spectrum and the Divestiture. The additional information that Videotron will produce will supplement an already extensive record before the Commissioner, but the

⁴ *Ibid* at para 20.

⁵ Notice of Motion (7 July 2022), Motion Record of Videotron Ltd., Tab 1 at para 6.

⁶ Affidavit of Jean-Francois Lescadres (sworn 28 July 2022).

Commissioner can begin preparing for the hearing and discovery now based on the extensive information that he already has.

14. Second, the Commissioner has had every opportunity to ask Videotron for more information concerning the Divestiture and any claimed efficiencies as soon as the Commissioner understood that the Divestiture was a serious possibility.

- (a) The Commissioner's questions during the parties' June 30, 2022 meeting were modest and have now been fully answered. Despite the references to efficiencies in Videotron's ARC Request Letter, the outstanding questions did not relate to efficiencies at all.⁷
- (b) Following the parties' June 30, 2022 meeting, the Commissioner could have asked additional questions or sought additional information but did not.
- (c) Following Videotron's intervention on July 7, 2022, the Commissioner could have advised immediately that he would seek discovery in connection with Videotron's intervention or sought an order under section 11 of the Act to require Videotron to produce documents. He did not. Instead, he waited until the last day permitted under the schedule. His delay cost the parties two weeks when that time could have been spent agreeing on the scope of discovery in an effort to mitigate any alleged unfairness to the Commissioner.
- (d) As part of his responding materials on July 21, 2022, the Commissioner could have set out the topics on which he sought discovery so that Videotron could

⁷ *Ibid* at paras 18-19.

accelerate its response. He did not. Instead, his counsel advised on July 25, 2022 that such a list would be forthcoming, but it has not been received yet.⁸

15. Finally, the Commissioner's delay with respect to requests of Videotron and his request for an adjournment stand in sharp contrast to the speed with which the Commissioner made decisions and filed evidence in response to prior proposed divestitures referred to in his public pleadings and s. 104 materials (Videotron has not seen the unredacted versions of these materials).

16. Since Mr. Rook's April 9, 2021 letter, Videotron has consistently expressed to the Bureau its willingness to be available to answer questions and provide more information as necessary.

C. Conclusion

17. Videotron requests that the Tribunal grant its intervention and set dates as follows:

- (a) Videotron to deliver its affidavit of documents no later than August 29, 2022; and
- (b) Videotron representative to be examined for discovery on one day during the week of September 3, 2022 with the date to be agreed by the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of July, 2022.

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⁸ *Ibid* at 20.