

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

**RESPONSE TO THE COMMISSIONER'S MOTION TO VARY THE
SCHEDULING ORDER**

PART I - GROUNDS ON WHICH THE MOTION IS OPPOSED

1. The Commissioner's motion is premised on a material change in circumstances flowing from the proposed divestiture of Freedom Mobile to Videotron Ltd. (the "**Divestiture**") and Videotron's participation in these proceedings as an intervener. That premise is wrong.

2. From the outset of this proceeding, the Commissioner has been aware that Freedom Mobile would be fully divested rather than acquired by Rogers. Rogers and Shaw made that crystal clear in press release issued within hours of their being notified that the Commissioner intended to commence this proceeding. They also pleaded and relied upon the intended divestiture of

Freedom Mobile in their Responses to the Commissioner's Notice of Application.

[REDACTED]

4. Rogers, Shaw and Videotron announced publicly on June 17, 2022 that they had entered into a binding letter agreement and term sheet for the divestiture of Freedom Mobile. Thus, by no later than that date, it was eminently foreseeable—if not inevitable—that Videotron would seek to intervene in this proceeding.

5. Yet the Commissioner raised no concern with respect to the schedule for this proceeding until five weeks later. Indeed, the Commissioner said nothing for two weeks after Videotron formally sought to intervene in this proceeding on July 7, 2022. Instead, on July 21, 2022—the very last day on which the Commissioner was entitled to respond to Videotron's motion for leave to intervene—the Commissioner brought a motion to upend the schedule and delay the commencement of the hearing in this matter by six weeks. The Commissioner did so without any advance warning to Rogers or to Shaw.

6. The Commissioner has sought a lengthy adjournment of the hearing on the merits of this proceeding even though: (i) the Commissioner himself proposed an expedited schedule, on account that a delay in the proceedings would allegedly harm competition; (ii) Shaw and Rogers have been consistent in insisting that this case be litigated on a highly expedited timetable; and (iii) the Tribunal made clear in its Scheduling Order that the current timelines comply with the principles under section 9(2) of the *Competition Tribunal Act*.

7. Videotron’s participation in this proceeding as an intervener does not require meaningful adjustments to the Scheduling Order, let alone a lengthy adjournment of the hearing. To the contrary, the Divestiture and Videotron’s participation in this case will likely streamline the proceeding by focusing on the Divestiture, obviating the need for the parties to lead evidence and make submissions concerning whether the proposed transaction between Rogers and Shaw should be cleared even without the Divestiture. The hearing will be shorter rather than longer.

8. In short, there is no compelling reason to delay and prolong this proceeding. The Commissioner’s motion should be denied.

A. BACKGROUND

9. On March 15, 2021, Rogers and Shaw entered into an Arrangement Agreement whereby Rogers agreed to purchase all of the issued and outstanding shares of Shaw for approximately \$26 billion, inclusive of the assumption of debt (the “**Transaction**”). Rogers and Shaw announced publicly the Transaction that same day.

[REDACTED]

[REDACTED]

[REDACTED] The Globe and Mail reported the same

day that Rogers had invited Videotron to bid on Freedom Mobile. The report also noted that “Pierre Karl Péladeau, president and chief executive officer of Videotron Ltd. owner Quebecor, has made his interest in acquiring Freedom known since the merger deal between Rogers and Shaw was announced in March, 2021.”

13. On May 7, 2022, the Commissioner notified Rogers and Shaw that he would be commencing an Application before the Competition Tribunal in an attempt to block the Transaction from being completed. As alluded to above, within hours Rogers and Shaw affirmed publicly that they were committed to divesting Freedom Mobile:

The companies have offered to address concerns regarding the possible impact of the Transaction on Canada’s competitive wireless market by proposing the full divestiture of Shaw’s wireless business, Freedom Mobile. Rogers and Shaw are engaged in a process to sell Freedom Mobile, with a view to addressing concerns raised by the Commissioner of Competition and ISED.

14. Two days later, on May 9, 2022, the Commissioner commenced this Application under section 92 of the *Competition Act* for an order blocking the Transaction in its entirety. The Commissioner alleged that the Transaction would substantially prevent or lessen competition in wireless markets in British Columbia, Alberta, and Ontario.

15. As stated above, on June 17, 2022, Rogers, Shaw, and Videotron announced that they had entered into a binding letter agreement and term sheet for the divestiture of Freedom Mobile to Videotron.

16. The Tribunal issued its Scheduling Order in this proceeding that same day. The Order established a schedule for motions for leave to intervene, and it set aside three full days for hearings on those motions. The Tribunal issued its Scheduling Order following multiple Case Management Conferences that were convened to discuss the timetable for this proceeding. During those Case

Management Conferences, counsel to Rogers and Shaw made repeated submissions concerning the importance of litigating this matter in a highly expedited manner.

17. Indeed, the Scheduling Order notes that the Tribunal set the schedule after considering, among other things, “the Parties’ requests that this matter proceed to a hearing as soon as practicable” and “the principles found in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), which direct the Tribunal to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit”.

18. On July 7, 2022, Videotron brought a motion for leave to intervene in the proceeding. As stated above, the Commissioner waited until July 21, 2022, the very last day permitted under the Scheduling Order, to respond to Videotron’s request and to bring his motion to vary the Scheduling Order.

B. THERE IS NO COMPELLING REASON TO VARY THE SCHEDULING ORDER

19. Rule 139(1) of the Competition Tribunal Rules provides that “dates and other requirements established by case management orders are firm”. Rule 139(2) provides that a party may bring a motion to vary the order but it must show that “compelling reasons exist for a change in the order”. The Commissioner has failed to meet that burden.

(i) Videotron’s Participation in this Proceeding Did Not Catch the Commissioner by Surprise

[REDACTED]

[REDACTED] and because the Commissioner

obtained documents from Videotron pursuant to an order issued under s. 11 of the *Competition Act*.

21. Videotron has made no secret of its interest in acquiring Freedom Mobile. Members of Videotron's senior leadership have proclaimed the company's interest in such an acquisition publicly, vocally advocating to become a divestiture buyer of Freedom Mobile in national media. Major newspapers reported on negotiations between Rogers and Videotron starting in early May 2022.

22. Rogers and Shaw put the Commissioner formally on notice as to the centrality to this case of a divestiture of Freedom Mobile by pleading it in their Responses on June 3, 2022, nearly two months ago.

23. The parties agreed to conduct this proceeding on an expedited schedule, including a procedure for potential interventions, with full knowledge that: (i) Rogers and Shaw intended to divest Freedom Mobile; and (ii) Videotron was a likely divestiture buyer. Any conceivable doubt the Commissioner may have had in this regard was removed by no later than June 17, 2022, when Rogers, Shaw and Videotron announced the Divestiture.

(ii) *The Divestiture And Videotron's Involvement Will Streamline And Not Delay This Proceeding*

24. There is no basis for the Commissioner's assertion that the Divestiture and Videotron's involvement require delaying and prolonging the hearing. To the contrary, the Divestiture and Videotron's participation will narrow the issues in dispute and therefore reduce the time required for the hearing as the parties focus on the core issues relating to the Divestiture. In fact, even as the pleadings now stand, the Tribunal must engage with dueling arguments that are premised on the presence and absence of the Divestiture.

25. Further, at the request of the Commissioner, Videotron has consented to a discovery process whereby it will produce documents and make a

representative witness available for examination for discovery. That process does not require any adjustment to the overall schedule established in the Tribunal's Scheduling Order. As detailed in Videotron's reply to the Commissioner's response to its intervention, the Commissioner already has a detailed understanding of Videotron and its business as a result of: [REDACTED]

[REDACTED] (ii) Videotron's response to a s. 11 Order; and, [REDACTED]

[REDACTED] Further, Videotron has agreed to produce additional relevant documents, if any, by the end of August. The examination for discovery of Videotron's witness can occur shortly thereafter. There is no need for it to be conducted in tandem with examinations for discovery of the representative witnesses of Rogers and Shaw, which will proceed in the second half of August.

(iii) *The Tribunal Has A Statutory Obligation To Proceed Expeditiously*

26. As noted in the Scheduling Order, s. 9(2) of the *Competition Tribunal Act* provides that all proceedings before the Tribunal must be "dealt with informally and expeditiously as the circumstances and considerations of fairness permit."

27. In addition, the Practice Direction Regarding an Expedited Proceeding Process Before the Tribunal states that "a period of five (5) to six (6) months between the filing of a Notice of Application ('NOA') and the commencement of the hearing on the merits will typically be a reasonable timeline for the Expedited Process." The Expedited Process was developed pursuant to consultations with the Commissioner, and the Commissioner has agreed that it applies to this case.

28. The Tribunal has already determined that this case should proceed on an expedited timetable, including by setting down the hearing on the merits commencing on November 7, 2022, approximately six months after the

PUBLIC

Commissioner filed his Notice of Application. It is imperative that that the hearing dates be maintained. The Commissioner has offered no compelling reason to depart from them.

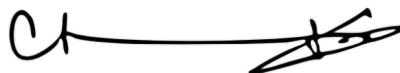
PART II - ORDERS REQUESTED

29. Rogers and Shaw respectfully request that this motion be denied.
30. Rogers and Shaw seek their costs in this motion.

PART III - DOCUMENTARY EVIDENCE TO BE RELIED ON

1. The Affidavit of Tanya Barbiero, sworn on July 28, 2022;
2. the Affidavit of Jean-Francois Lescardres, sworn on July 28, 2022; and
3. such further and other evidence as counsel may advise and the Tribunal may permit.

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



LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750
145 King Street West
Toronto, ON M5H 1J8

Jonathan Lisus
Tel: 416.59878736
jlisus@lolg.ca

Crawford Smith
Tel: 416.598.8648
csmith@lolg.ca

Matthew Law
Tel: 416.849.9050
mlaw@lolg.ca

Bradley Vermeersch
Tel: 416.646.7997
bvermeersch@lolg.ca

Lawyers for the Respondent,
Rogers Communications Inc.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
kentthomson@dwpv.com

Derek D. Ricci (LSO# 52366N)
Tel: 416.367.7471
dricci@dwpv.com

Steven G. Frankel (LSO# 58892E)
Tel: 416.367.7441
sfrankel@dwpv.com

Chanakya A. Sethi (LSO# 63492T)
Tel: 416.863.5516
csethi@dwpv.com

Fax: 416.863.0871

Lawyers for the Respondent,
Shaw Communications Inc.