

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 12

File No.: CT-2022-002

Registry Document No.: 174

**IN THE MATTER OF** an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the Competition Act, RSC 1985, c C-34 as amended;

BETWEEN:

**The Commissioner of Competition**  
(applicant)

and

**Rogers Communications Inc.**  
**Shaw Communications Inc.**  
(respondents)

and

**Attorney General of Alberta**  
**Videotron Ltd.**  
(intervenor)



Decided on the basis of the written record

Before: Mr. Justice Andrew D. Little (Chairperson)

Date of reasons for order and order: **August 19, 2022**

**REASONS FOR ORDER AND ORDER (MOTION FOR LEAVE TO INTERVENE)**

[1] John P. Roman seeks leave of the Tribunal to intervene in this proceeding under subsection 9(3) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp).

[2] For the reasons that follow, Mr. Roman’s motion will be dismissed, without costs.

## **I. BACKGROUND**

### **A. THE COMMISSIONER’S APPLICATION**

[3] The Commissioner commenced this proceeding by Notice of Application filed on May 9, 2022, under section 92 of the *Competition Act*, RSC 1985, c C-34. For present purposes, it is sufficient to describe the issues raised in the application at a high level of generality.

[4] The Commissioner’s application concerns the proposed acquisition by Rogers Communications Inc. (“Rogers”) of Shaw Communications Inc. (“Shaw”) (the “Proposed Transaction”). In general terms, the application claims that the Proposed Transaction has and will likely lessen or prevent competition substantially under section 92, by removing Shaw as a competitor in certain markets for the provision of certain services described by the Commissioner as “Wireless Services”.

[5] With respect to the analysis under section 92 of the *Competition Act*, the Commissioner’s application alleges that the Wireless Services market is highly concentrated, that Rogers and Shaw are close competitors, and that Shaw has been a vigorous and effective competitor and a “competitive disrupter” in the markets in which it operates. The Commissioner’s application defines product markets for the provision of Wireless Services to consumers other than business customers, and for the provision of Wireless Services to business customers (a “Business Services” product market). The Commissioner’s application identifies the provinces of British Columbia, Alberta and Ontario as relevant geographic markets for assessing the effects of the Proposed Transaction on the markets for the delivery of Wireless Services and Business Services. The Commissioner’s application pleads, in paragraphs 59 to 104, that the Proposed Transaction has lessened and will lessen, and will prevent, competition substantially in the markets proposed by the Commissioner.

[6] By way of remedy, the Commissioner’s application seeks, in part:

- (a) an Order directing the respondents not to proceed with the Proposed Transaction;
- (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 Rogers to divest such additional assets as are required to eliminate the substantial lessening or prevention of competition.

[7] The respondents both oppose the Commissioner’s application. Each has filed a Response and an Amended Response, in which they plead that the Commissioner’s application should be dismissed.

[8] The Commissioner has filed Replies and Amended Replies to the Rogers and Shaw Responses and Amended Responses.

## **B. MR. ROMAN’S MOTION FOR LEAVE TO INTERVENE**

[9] By written request dated May 18, 2022, filed shortly after the Commissioner filed his Notice of Application, Mr. Roman requested intervener status under subsection 9(3) of the *Competition Tribunal Act*, “as an individual who, since 2014, has appeared at the CRTC on broadcasting, telecommunications, and telecommunications related competition issues” (referring to the Canadian Radio-television and Telecommunications Commission (the “CRTC”). His submission did not elaborate on his appearances before the CRTC. He seeks to intervene in this Tribunal proceeding as a “public interest” intervener.

[10] Mr. Roman supports the Proposed Transaction and requested that it be “approved”.

[11] Mr. Roman advised that he has no financial, personal or other connection with either of the respondents Rogers and Shaw, directly or indirectly.

[12] Mr. Roman did not file an affidavit in support of his request for leave to intervene. He did set out his intended submissions on the “merits” of the Commissioner’s application. His position was that the Commissioner’s requested orders in this proceeding should not be granted. His submissions provided reasons why he is of the view that the Proposed Transaction should proceed and the Commissioner’s application should be denied.

[13] Mr. Roman submitted that telecommunications in Canada have displayed “elements of natural monopoly for some decades” which have been resistant to repeated government efforts to foster competition through policies designed to increase the number of competitors. In Mr. Roman’s submission, it is the function of the CRTC to control or limit abuse of market power by regulation of those elements of the alleged natural monopoly. Mr. Roman contended that it was implicit in the Commissioner’s position in this proceeding that the CRTC cannot be successful in carrying out its statutory duties, a position with which Mr. Roman disagrees.

[14] Mr. Roman’s submissions focused on why he believes the Tribunal should not grant the three remedial Orders requested by the Commissioner (set out at paragraph 6 above).

[15] Mr. Roman opposes the Commissioner’s request for an Order directing the respondents not to proceed with the Proposed Transaction because it is “unreasonable from a business perspective”. His position effectively is that the respondent, Shaw, should have the right to be purchased if its shareholders approve. According to Mr. Roman, the Commissioner is unreasonable to object because it is not the function of Canada’s competition policy to prevent transactions agreed between private parties.

[16] Mr. Roman also takes the position that the Commissioner’s other two requests for Orders in this proceeding, in particular the request for a disposition of assets to address any substantial lessen or prevent competition under section 92, are “unnecessary” and that the divestiture of certain stated assets should be sufficient with conditions.

[17] Mr. Roman’s submission does not dispute the Commissioner’s allegations in the Notice of Application (paragraphs 1-50). His position is that there is a regulator, the CRTC, that has the authority to take actions necessary to protect Canadians from alleged “market dominance” in the telecommunications industry. Mr. Roman advised that he has filed an application before the CRTC “concerning the competition levels in the telecommunications market” and requesting that the CRTC “actively regulate the telecommunications industry in Canada in light of the existing lack of competition and the reduction of one market participant through” the Proposed Transaction. He suggests that the Tribunal urge the CRTC to exercise its statutory authority to protect Canadians from the concerns raised in the Commissioner’s Notice of Application.

[18] Mr. Roman did not file a written Reply to the Commissioner’s or the respondents’ positions (described below) on his request for leave to intervene.

### **C. THE PARTIES’ POSITIONS ON MR. ROMAN’S MOTION**

#### **(1) The Commissioner’s Position**

[19] By Response filed on July 21, 2022, the Commissioner opposed Mr. Roman’s motion to intervene, on two bases.

[20] First, the Commissioner identified certain alleged procedural defects in the motion filed by Mr. Roman. The Commissioner submitted that Mr. Roman did not comply with Rule 43(2)(c) of the *Competition Tribunal Rules*, SOR/2008-141, which provides that a person’s motion for leave to intervene “shall set out ... (c) a concise statement of the matters in issue that affect that person and the unique or distinct perspective that the person will bring to the proceeding”.

[21] Second, the Commissioner submitted that Mr. Roman’s motion to intervene did not meet the substantive requirements for intervention under Rule 43(2) and the Tribunal’s prior decisions. The Commissioner submitted that Mr. Roman’s request to intervene:

- (a) sought to expand the issues in this proceeding to matters not legitimately within the scope of the Tribunal’s consideration, namely, the statutory authority of the CRTC and its exercise of that authority;
- (b) did not provide any basis for finding that he would be “directly affected” by a matter in this proceeding; and
- (c) did not establish that he could bring a “unique or distinct perspective” that will assist the Tribunal in deciding the issues arising in this proceeding.

[22] The Commissioner therefore requested that the Tribunal dismiss Mr. Roman’s motion to intervene. The Commissioner did not seek an Order in respect of costs of this motion.

#### **(2) The Respondents’ Position**

[23] In a letter dated July 21, 2002, the respondents noted that Mr. Roman’s request for leave to intervene was limited to making brief written submissions as set out in his request. On that basis, the respondents took no position concerning his request for leave to intervene.

## II. ANALYSIS

### A. The Test for Leave to Intervene

[24] Subsection 9(3) of the *Competition Tribunal Act* provides:

(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the <i>Competition Act</i> , to make representations relevant to those proceedings in respect of any matter that affects that person.	(3) Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la <i>Loi sur la concurrence</i> , afin de présenter toutes observations la concernant à l'égard de ces procédures.
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[25] The requirements for filing a motion for leave to intervene are set out in Rules 42 and following of the *Competition Tribunal Rules*. A motion for leave to intervene:

- (a) is made by serving on each of the parties a motion for leave to intervene and an affidavit setting out the facts on which the motion is based (Rule 43(1)(a)); and
- (b) must comply with the content requirements in Rule 43(2)(a) to (g), which include:
  - i. a concise statement of the matters in issue that affect the person seeking leave to intervene and the “unique or distinct perspective that the person will bring to the proceeding” (Rule 43(2)(c));
  - ii. a concise statement of the competitive consequences arising from the matters referred to in paragraph (c) with respect to which that person wishes to make representations (Rule 43(2)(d));
  - iii. a description of how that person proposes to participate in the proceedings (Rule 43(2)(g)).

[26] In *Commissioner of Competition v Direct Energy Marketing Limited*, 2013 Comp Trib 16 (“*Direct Energy*”), at paragraph 3, the Tribunal stated that in order to be granted intervener status:

... the person seeking leave to intervene must meet the following requirements:

- (a) The matter alleged to affect the person seeking leave to intervene must be legitimately within the scope of the Tribunal’s consideration or must be a matter sufficiently relevant to the Tribunal’s mandate;
- (b) The person seeking leave to intervene must be directly affected. The word “affects” has been interpreted ... to mean “directly affects”;

(c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner;

(d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it ...

[Citations to prior Tribunal decisions omitted.]

See also *Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp Trib 2 (“*Visa Canada*”), at paras 9 and following; *Commissioner of Competition v Toronto Real Estate Board*, 2011 Comp Trib 22, at para 21; *Commissioner of Competition v Canadian Waste Services Holdings*, 2000 Comp Trib 9 (“*Canadian Waste*”), at para 3.

[27] As may be seen, the Tribunal’s requirements on leave to intervene do not permit a person to intervene if they are merely interested in a matter filed before the Tribunal: see *Visa Canada*, at paras 12-13, citing *Canada (Director of Investigation and Research) v Air Canada*, 1992 CanLII 2035, 46 CPR (3d) 184 and *AC Nielsen Company of Canada Ltd. v Canada (Director of Investigation and Research)*, 1994 CanLII 2933 (Comp Trib). The intervention requirements are much more strict. Among other things, a person must demonstrate that they are directly affected by a proceeding and that they have a unique or distinct perspective on the competition issues in the proceeding.

[28] In past proceedings, the Tribunal has permitted interveners to participate in the proceeding with respect to identified issues and in specific ways. Depending on the circumstances in each proceeding, the Tribunal may permit a successful intervener to file written submissions, adduce evidence and play a limited role at the hearing, on issues identified by the proposed intervener and approved by the Tribunal: see e.g., *Direct Energy*, at paras 19, 31 and 48-49; *Visa Canada*, at paras 50-53; *Canadian Waste*, at paras 4-5. A successful intervener does not become another respondent to the proceeding with full rights and responsibilities, but instead has a distinct role as defined in the Tribunal Order granting intervener status.

## **B. Hearing of this Motion**

[29] Mr. Roman did not request that the motion be determined in writing, nor did he request a hearing. In my opinion, a hearing is unnecessary to determine this motion: see Rules 43(3) and 46(1).

## **C. Decision**

[30] The Tribunal concludes that Mr. Roman’s motion for leave to intervene must be dismissed. It fails to meet the legal and evidentiary requirements for intervention, in at least two substantive ways. The Commissioner is also correct that the motion materials filed by Mr. Roman are technically deficient.

[31] First, Mr. Roman has not demonstrated that he is directly affected by the Commissioner’s application. Mr. Roman’s request for leave to intervene shows that he is interested in this

proceeding as a Canadian citizen and has views on competition policy and on competition issues related to the telecommunications industry. However, Mr. Roman's motion materials do not identify any business or capacity in which he will be impacted by the proceeding, or describe how he may be affected by the resolution of any issue or by any remedy that may be granted. He does not submit that he is a participant in any market raised in the Commissioner's application or that he has business interests that may be affected by it. In short, there is no reason to believe that Mr. Roman is directly affected by this proceeding, or impacted in a manner that is different from any member of the Canadian public: *Visa Canada*, at paras 12-13, 15, 28-32 and 37. Mr. Roman's appearances at the CRTC on "broadcasting, telecommunications, and telecommunications related competition issues" were not described in the materials filed in support of the intervention motion. On their face, those appearances do not provide a basis for being "directly affected" by the present application.

[32] Second, Mr. Roman's motion materials do not present or support a unique or distinct perspective that Mr. Roman proposes to provide to the Tribunal on the issues that arise in this proceeding under the *Competition Act*. His position is that the Tribunal should dismiss the Commissioner's application because the Commissioner's position is inconsistent with Mr. Roman's views about competition policy and how the CRTC can and should regulate the telecommunications industry. Mr. Roman's request to intervene did not attempt to relate his position to any specific issues arising under the *Competition Act* in this proceeding. His proposed intervention does not provide any perspective on the issues actually pleaded in the Commissioner's Notice of Application (apart from the alternative remedies described above).

[33] As noted above, Mr. Roman's position opposes the Commissioner's three alternative requests for Orders, but not on the basis of any evidence or position he may submit related to an element of the analysis under sections 92 and following of the *Competition Act*. Mr. Roman's submissions also did not attempt to connect his appearances at the CRTC on "broadcasting, telecommunications, and telecommunications related competition issues" to a possible distinctive perspective that falls within Rule 43(2)(c) and the Tribunal's prior decisions.

[34] Mr. Roman's position appears to include the position that the Commissioner should not have commenced an application under section 92 and the Tribunal should not adjudicate it, owing to Mr. Roman's views on competition policy in Canada and his position on the CRTC's purported role in regulating the telecommunications industry. However, and without commenting on the CRTC's role, I observe that Parliament has provided in section 7 of the *Competition Act* that the Commissioner's responsibility is to administer and enforce that statute. Parliament has assigned the Tribunal to hear and dispose of all applications made under Part VIII of the *Competition Act*, which includes applications commenced by the Commissioner under section 92. Mr. Roman did not make any submissions to justify how the Tribunal could decline to adjudicate the section 92 application filed by the Commissioner. In addition, if (hypothetically) there were a basis to do so, it would presumably be a respondent's role to raise the issue. Neither respondent did so in this proceeding.

[35] The proposed intervention would therefore not provide any material assistance to the Tribunal on the issues it will have to resolve in this proceeding.

[36] Finally, the Commissioner is correct that the motion for leave was technically deficient as it did not comply with Rules 43(1)(a) and 43(2)(c).

**III. CONCLUSION**

[37] The motion for leave to intervene will therefore be dismissed. The Commissioner did not request costs and none will be ordered.

**FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:**

[38] Mr. Roman's motion for leave to intervene is dismissed.

[39] There is no order as to costs.

DATED at Ottawa, this 19th day of August, 2022.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little



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