

FILED / PRODUIT

Date: September 2, 2022

CT- 2022-002

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

CT-2022-002

OTTAWA, ONT.

194

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

- and -

**ATTORNEY GENERAL OF ALBERTA AND
VIDEOTRON LTD.**

Intervenors

**FRESH AS AMENDED REPLY to the Response of Rogers Communications Inc.
of the Commissioner of Competition**

I. OVERVIEW

1. The within application seeks to block Canada's largest wireless company from acquiring its closest competitor because the Proposed Transaction is anti-

competitive. It will harm millions of Canadian consumers in Ontario, Alberta and British Columbia through higher prices, lower quality services, and lost innovation. The Fresh as Amended Response of Rogers Communications Inc. (the “Response”) ignores and seeks to obfuscate the substantial harm their Proposed Transaction and the Divestiture will visit upon the Canadian economy. Rogers’ assertion that the Proposed Transaction and the Divestiture are competitively neutral (or that they will increase competition) is incorrect.

2. The proposed divestiture of Freedom Mobile to Videotron (the “Divestiture”) is not an effective remedy. It fails to eliminate the substantial lessening and prevention of competition the Proposed Transaction will cause. Such a divestiture will not replace the significant and growing competition Shaw Mobile was delivering and would continue to deliver in Alberta and British Columbia, and it would make Freedom Mobile a substantially weaker competitor than it would have been but for the Proposed Transaction. The substantial growth in Freedom’s competitive significance under Shaw’s ownership amply demonstrate the significant benefits Freedom received from Shaw. In any case, the completion of the proposed divestiture to Videotron is subject to the ISED Minister’s approval. The respondents bear the onus of proving that such divestiture is likely to be completed.
3. While Rogers claims there will be many benefits related to the Proposed Transaction and the Divestiture, the cognizable efficiencies Rogers can demonstrate are insufficient to outweigh and offset the anti-competitive effects.
4. While Rogers’ Response asks the Tribunal to permit “the Transaction coupled with the Divestiture”, Rogers fails to discharge its burden to demonstrate that the proposed remedy will be effective.
5. The Tribunal should prohibit this anti-competitive merger.

II. POINTS IN REPLY

6. The Applicant repeats and relies upon the facts in his Notice of Application, Statement of Grounds and Material Facts and Concise Statement of Economic

Theory (collectively, the “Application”), and except as hereinafter expressly admitted, denies the allegations in the Response. Unless otherwise indicated, defined terms in this Fresh as Amended Reply have the meaning ascribed to them in the Application.

7. The Applicant admits the facts contained in the following: paragraphs 14, 16, 17, 18, the first sentence of paragraph 20; paragraph 22; the second sentence of paragraph 27; and paragraph 29 of the Response.

A. Market Definition

8. Rogers does not deny the market definition put forward by the Applicant, but suggests that Business Services is not a separate market.¹ To the contrary, Business Services involve unique demand, marketing, pricing and other characteristics which justify its consideration as a market separate from Wireless Services.

B. Shaw Mobile’s Competitive Impact was Significant and Growing

9. Contrary to the Respondent’s claims,² Shaw Mobile’s impact on competition was significant and growing before the announcement of the Proposed Transaction.
10. Shaw Mobile gained a significant number of customers in a short period – much of which was at Rogers’ expense, accounting for half of Rogers’ losses in Alberta and British Columbia post-launch. This prompted competitive responses from Rogers, Bell and Telus to offset subscriber losses to Shaw Mobile. The competitive responses of the National Carriers included aggressive retention and win-back offers targeted at Shaw Mobile and Freedom Mobile customers in Alberta, British Columbia and Ontario.

¹ Paragraph 31 a. of the Response.

² Subparagraphs 33(c) and (d) of the Response.

C. The Respondent's Position on the Importance of Wireline Assets are Contradictory and Self-Serving

11. The Respondent erroneously downplays the competitive significance of wireline assets and scale to competition for Wireless Services in Alberta and British Columbia³ despite its awareness of the material facts set out in the Commissioner's Application.
12. The Respondent's position on the significance of wireline assets to wireless competition is not only wrong as it pertains to Alberta and British Columbia, but it is also at odds with Rogers' assertion that Shaw's wireline assets would enhance Rogers' ability to compete, including against the other National Carriers. Rogers' position that with the Proposed Transaction Rogers "will be better placed to compete in wireless services against Bell and Telus"⁴ contradicts Rogers' claim that Freedom Mobile can be severed from Shaw's wireline business without suffering a substantial competitive disadvantage. This is simply not the case. Severing Freedom Mobile from Shaw's wireline business will substantially compromise its ability to compete and provide much-needed competitive discipline to the National Carriers. Shaw is a disruptive entrant that is still growing its wireless business while Rogers is an incumbent that is already the largest wireless carrier in Canada with significant spectrum holdings, established brands, and a nationwide wireless network, retail distribution footprint and already claims to have Canada's largest and most reliable 5G network. The Proposed Transaction plus a Freedom Mobile divestiture would eliminate Shaw Mobile and significantly weaken Freedom Mobile such that the net effect would be a substantial lessening and prevention of competition.
13. As a national carrier with substantial existing market share, and in light of other market characteristics described in the Application,⁵ Rogers' incentives to compete in Wireless Services are significantly different from those of Shaw. The Proposed Transaction would give rise to a greater likelihood of coordinated behaviour among

³ Paragraphs 10-13, 34-37 of the Response.

⁴ Paragraph 38 of the Response.

⁵ Notice of Application herein, at paragraphs 74-90.

the incumbent facilities-based carriers, not increased competition as Rogers has suggested

D. Shaw Planned to Continue to Grow its Business Before the Announcement of the Proposed Transaction

14. Counter to the Respondent's claims,⁶ Shaw planned to make 5G investments, enter new areas and expand into wireless Business Services. Shaw has a proven track record of investing in and expanding its business and Shaw would have continued but for the Proposed Merger. Shaw's decisions to cease these investments and to compete less vigorously are a result of the Proposed Transaction.

E. MVNO Entry is Unlikely to be Timely or Sufficient to Replace Competition from Shaw

15. The CRTC's MVNO Policy will not cure the substantial lessening and prevention of Competition the Proposed Transaction creates.⁷ Rogers does not deny that MVNO entry is not likely in a period or on a scale that would constrain the likely increase in market power attributable to the Proposed Transaction.
16. Rather, the CRTC's MVNO Policy sought to protect and enhance the pre-merger competition brought about by regional carriers like Shaw who would have been the main beneficiary of the CRTC's policy. The diminishment of Shaw's Wireless business due to the Proposed Transaction and Divestiture will thus substantially reduce the effectiveness of the CRTC MVNO policy and further compound the anti-competitive effects of the Proposed Transaction.

F. There Would be No Increase in Competition

17. While Rogers pleads that the Proposed Transaction and the Divestiture would increase competition,⁸ as noted above, that is not the case, given factors which include Rogers' different market position and incentives from Shaw and the difficulties and reduced competitiveness which Vidoetron will face without wireline

⁶ Subparagraphs (d) and (e) of the Response.

⁷ See paragraphs 28-30 of the Response.

⁸ Paragraphs 38-40 of the Response.

assets and other benefits derived by Shaw from its wireline business. These factors make it likely that there will be increased post-merger coordination and reduced competition in Wireless Services. Contrary to Rogers' assertions, prior to the proposed transaction being announced, Shaw was poised to expand, by steps including extending its network in Ontario and the west, participating in the acquisition of new spectrum and offering 5G services.

G. Claimed Efficiencies Do Not Save this Anticompetitive Merger

18. Rogers attempts to justify its anticompetitive merger with Shaw by asserting that it, and the divestiture of Freedom to Videotron, will achieve productive and dynamic efficiencies. The Respondents bear the burden of establishing the likelihood and the extent of each efficiency gain that they claim, and that such gains, if realized, would provide cognizable benefits to the Canadian economy and that they are likely to be greater than, and offset, the anticompetitive effects of the Proposed Transaction.
19. The efficiencies claims made cannot save this anti-competitive merger, as they:
 - a. are speculative, unproven and unlikely to be achieved in whole or in part or are grossly exaggerated;
 - b. are based on unrealistic assumptions and flawed methodologies;
 - c. are not brought about by the Proposed Transaction or Divestiture or would likely have been achieved irrespective of the Proposed Transaction; and
 - d. fail to account or to properly account for the cost to achieve the claimed efficiencies.
20. Additionally, the efficiencies Rogers claims⁹ are not cognizable under the Act as:

⁹ Paragraphs 43-44 of the Response.

- a. Rogers, in seeking to achieve these efficiencies in the manner it proposes, will reduce product choice, lower output, and degrade the quality of Wireless Services in Ontario, Alberta and British Columbia;
 - b. they are not all true resource savings for the Canadian economy; and
 - c. they will not all accrue to the Canadian economy but outside of Canada.
21. Further, the Respondents require the approval of the ISED Minister under the *Radiocommunication Act*, R.S.C., 1985, c. R-2 to complete the Proposed Transaction and the proposed divestiture to Videotron. To the extent that the Respondents may be required to modify or agree to modify aspects of the Proposed Transaction and to divest wireless spectrum given the requirements of the *Radiocommunication Act*, any claimed efficiencies that the Respondents cannot realize as a result thereof are not cognizable under the *Competition Act*. Those claimed efficiencies are lost on account of the operation of the *Radiocommunication Act*, not any order under the *Competition Act*.
22. Any cognizable efficiencies that may be obtained through the Proposed Transaction and/or Divestiture that would be lost if the order sought by the Commissioner were made will not be greater than or offset the anticompetitive effects of the Proposed Transaction.
23. Neither the Proposed Transaction nor the Divestiture will contribute to the efficiency and adaptability of the Canadian economy but would require consumers of Wireless Services in Ontario, Alberta and British Columbia to pay materially higher prices, have fewer choices and experience a deterioration in the quality of Wireless Services. These effects will result in a corresponding loss of allocative efficiency, or deadweight loss, to the Canadian economy that outweighs any cognizable efficiencies that may arise from the Proposed Transaction and/or Divestiture.
24. Furthermore, the increase in prices or qualitative effects will result in a transfer of wealth from low- and moderate-income groups in society to the Respondents, whose shareholders include ultra-rich members of the family ownership groups of

these companies. Increased profits will also be paid to non-Canadian investors. These effects are socially adverse and otherwise must be given weight against any efficiencies that may arise. As a result, the cognizable efficiencies of the Proposed Transaction and/or Divestiture, if any, are not greater than or would offset its anti-competitive effects.

Dated: June 16, 2022

Amended August 15, 2022

Fresh as Amended September 2, 2022

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Attention: John S. Tyhurst
Derek Leschinsky
Katherine Rydel
Ryan Caron
Kevin Hong

Counsel to the Commissioner of Competition

TO: Lax O'Sullivan Lisus Gottlieb

Suite 2750, 145 King St W.
Toronto ON M5H 1J8

Attention: Jonathon Lisus
Crawford Smith
Matthew Law
Bradley Vermeersch

Counsel to Rogers Communications Inc.

AND TO: Davies Ward Phillips & Vineberg LLP

155 Wellington Street West
Toronto, ON, M5V 3J7

Attention: Kent E. Thomson
Derek D. Ricci
Steven G. Frankel
Chanakya Sethi

Counsel to Shaw Communications Inc.

AND TO: Bennett Jones LLP

3400 One First Canadian Place
Toronto, ON M5X 1A4

Attention: John F. Rook Q.C.
Emrys Davis
Alysha Pannu

Counsel to Videotron Ltd.

AND TO: Attorney General of Alberta

Justice and Solicitor General
Legal Services Division
4th Floor, Bowker Building 9833 – 109 Street
Edmonton, AB T5K 2E8

Attention: Kyle Dickson-Smith
Opeyemi Bello
Andrea Berrios

Counsel to Government of Alberta