Commissioner's Appeal of Rogers-Shaw Decision Likely to Fail

The Canadian Commissioner of Competition's appeal from a decision of the Competition Tribunal allowing the Rogers-Shaw-Videotron deal to go ahead is likely to fail.

On New Year's Eve, the Competition Tribunal dismissed the Commissioner of Competition's bid to block a deal that would see Rogers Communications Inc. buying Shaw Communications Inc. after Shaw sold its Freedom Mobile wireless business to Videotron Ltd. For a summary of this decision, see Rogers-Shaw-Videotron deal will increase competition, the Tribunal finds.

But Rogers and Shaw will have to keep the champagne on ice for a little longer. The Commissioner appealed even before the Tribunal issued its full reasons. His appeal will be heard on January 24, 2023.

What is the Commissioner Arguing on Appeal?

The Commissioner advanced four highly technical arguments. These arguments failed to convince the Tribunal at trial and are unlikely to meet with greater success on appeal. Indeed, the Tribunal's finding that the deal will increase competition means that even if the Commissioner is right on the technicalities, the result would be no different. Because of this, we believe the Commissioner's appeal is likely to fail. We outline the problems with the Commissioner's arguments below.

One-Step or Two-Step Analysis?

The Commissioner's first argument is that the Tribunal should have analyzed the merger in two steps. The first step is determining whether the original deal (Rogers buys all of Shaw) would cause a substantial lessening or prevention of competition (SLPC). Only then should the Tribunal move to the second step and determine whether the divestiture of Freedom to Videotron would remedy any SLPC.

There are several problems with this argument.

First, the result would have been the same whether the Tribunal used a one-step or two-step analysis because the test is the same. In both approaches, the ultimate question is whether there is an SLPC after the merger and divestiture have been completed.

The only difference is the burden of proof. On the two-step approach, the Commissioner bears the burden of proving an SLPC on the first step, but Rogers and Shaw bear the burden of showing that the divestiture will be effective on the second. On the one-step approach, the Commissioner bears the burden throughout.

Cases are almost never decided based on who bears the burden. This case is no exception. The Tribunal found that competition would increase as a result of the merger and divestiture. That means that any SLPC would be more than remedied by the divestiture of Freedom to Videotron. Had the Tribunal followed a two-step analysis, the result would have been the same, as the Tribunal itself noted.

Second, the Commissioner's argument ignores reality. Shaw entered into a binding agreement to sell Freedom to Videotron before Rogers acquired Shaw. This is different from a divestiture that is proposed after the Tribunal finds that a merger will cause an SLPC. Freedom will be sold to Videotron regardless. The divestiture thus substantively changed the transaction. Freedom will not be a part of the Shaw that Rogers buys. As the Tribunal stated, it "cannot ignore objective facts" but "should be appropriately concerned with the 'true state of affairs.'"

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Finally, the Commissioner's argument posits that he has the right to conclusively determine what the merger is by defining it in his application. However, the *Competition Act* contains a definition of "merger," which means that what the merger is, or if there even is a merger, is as open to being disputed as any other issue in a proceeding. And the issues in the proceeding are defined by the pleadings of all parties, not just the Commissioners'. Ultimately, the Tribunal decides this issue, not the Commissioner.

Did the Tribunal Fail to Explain Why the Result Would be the Same?

The Commissioner's second argument is that the Tribunal did not explain its finding that if the burden had been on Rogers and Shaw to show that the Freedom divestiture remedies any SLPC, that burden would be satisfied.

Although the Tribunal devoted only one sentence to this point, its reasons amply justify its conclusion. Rogers and Shaw led evidence to show that the merger and divestiture would be pro-competitive. The Tribunal discussed and accepted that evidence. In short, the reasons show that Rogers and Shaw met any burden they might have had.

Magnitude, Scope, and Duration

The Commissioner's third argument is that the Tribunal did not properly consider the "substantiality" of the SLPC because it only considered the magnitude of effects without also considering their scope and duration.

The Tribunal found that the merger plus divestiture would not materially raise prices. It did not discuss the scope and duration of this non-material effect. However, even assuming the scope to be the entire geographic market (British Columbia and Alberta) and the duration to be perpetual, the magnitude remains non-material.

In any event, after finding that the merger plus divestiture would not increase prices by a material amount, the Tribunal went on to find that it would actually increase competition. Ultimately, therefore, the competitive effects found by the Tribunal were an *increase* in competition, not a decrease.

Rogers' Contract to Provide Network Services

The Commissioner's fourth argument is that the Tribunal cannot rely on "unenforceable behavioral commitments," namely Rogers' contract with Videotron to provide network services at favorable prices, without the Commissioner's consent (which was not forthcoming).

This argument is founded on limitations in the *Competition Act* on what the Tribunal can order. The Tribunal can make structural orders (blocking the merger or ordering divestitures) as well as behavioral orders (ordering a party to conduct itself in a certain way). Behavioral orders, however, can only be made with the consent of the party against whom they are directed and the Commissioner.

However, there is no need to order Rogers to provide network services to Freedom; Rogers has already contractually bound itself to do so. All the Tribunal needed to do was to dismiss the case, as it did. The limitations on the Tribunal's powers are thus not engaged.

What the Commissioner is really arguing is that because the Tribunal cannot order Rogers to enter into an agreement to provide services to Videotron without the Commissioner's consent, it cannot even consider an agreement that Rogers has already entered into.

Nothing in the *Competition Act* suggests that the Tribunal's analysis of a merger is limited in this way. On the contrary, it empowers the Tribunal to consider "any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger."

Finally, the Commissioner's contention that Rogers' "commitments" are unenforceable is wrong. Contracts are enforceable and are enforced by the courts. The Tribunal found that Rogers' obligations are "complete, final, and enforceable upon closing."