



[2022] 1 F.C.R. D-12

## COMPETITION

Appeal from Competition Tribunal order dated December 31, 2022 (2023 Comp Trib 1) — Appellant initially applied to Competition Tribunal for order blocking merger between respondents, Rogers Communications Inc., Shaw Communications Inc. — Later, divestiture of Shaw's subsidiary, Freedom Mobile Inc., to Videotron Ltd. became part of overall transaction — To make order blocking overall transaction, Tribunal needed to find that it would be likely to prevent or lessen competition substantially in accordance with *Competition Act*, R.S.C., 1985, c. C-34, s. 92 — Competition Tribunal not concluding as such — Considered extensive testimony of lay, expert witnesses, documentary evidence — Preferred testimony of almost all respondents' experts over appellant's — While Competition Tribunal dealing with some relatively uncontroversial issues of law, Competition Tribunal's task largely factual — Whether Competition Tribunal committed reversible error in making order — Overall, Competition Tribunal made two key factually suffused findings of mixed fact, law: transactions would not be likely to prevent or lessen competition substantially; transactions in some key aspects actually promote competition — In competition terms, present matter far from close case — Two key findings amply supported by evidence, were central to outcome of case, were unshakeable in Court — Even if Competition Tribunal erred on narrow legal points appellant was raising, was not established that result could have been different — Thus, would be pointless to send case back to Competition Tribunal for re-decision — This point alone was sufficient to dismiss appellant's appeal but, for completeness, points of law appellant raising addressed — First, appellant submitted that, as matter of law, Competition Tribunal had to consider only merger of respondents Rogers, Shaw, which was original version of transactions, not merger with additional element proposed after Tribunal's proceedings started: divestiture of Freedom Mobile to Videotron — Appellant stated that this mattered in particular since respondents would bear burden of proving that divestiture would ensure that any lessening of competition shown by appellant would no longer be substantial — Argument rejected; burden of proof can matter where there is gap in evidence on key element or where, overall, case is so close that make-weight or tie-breaker is needed — However, this was not a close case — Considering force of evidentiary record before it, Competition Tribunal concluded that result would have been same even if it accepted appellant's view of burden of proof — Reasoned basis for such finding present — Tribunal's many clear, strong findings of fact supporting respondents' positions provided such basis — Burden of proof can also matter where ignoring it or circumstances surrounding it might cause procedural unfairness to party — Here, however, appellant knew about divestiture to Videotron, Competition Tribunal's possible views on burden of proof early enough to react, prosecute its case to fullest — Whether Competition Tribunal could consider actual, real matter (i.e. merger and divestiture rather than just merger) coming down to what Act says — Here, purpose of Act predominated — Act aims to address truth, reality, not fiction, fantasy — Examining merger alone would be foray into fiction, fantasy — Efficiency is another purpose of Act: change in transaction would require entire process under Act to start all over again from beginning — Delay, potentially substantial, could cause a transaction that, in fact, is pro-competitive and in the public interest, to die — Appellant also submitted that Tribunal erred by considering network access agreements, pricing commitments without appellant's consent, contrary to Act, ss. 92(1)(f)(iii)(B) but this was wrong — Tribunal's remedial jurisdiction under s. 92(1)(f) was not engaged because it found no substantial lessening of competition to begin with — Finally, just before hearing of present appeal, appellant brought motion for leave to admit fresh evidence, showing that party applying to Canadian Radio-television and Telecommunications Commission, raising certain competitive aspects of divestiture of Freedom Mobile — However, test for admission of fresh evidence not met — Motion for fresh evidence,

appeal dismissed.

CANADA (COMMISSIONER OF COMPETITION) V. ROGERS COMMUNICATIONS INC. (A-286-22, 2023 FCA 16, Stratas J.A., reasons for judgment dated January 24, 2023, 10 pp.)