Federal Court of Appeal | Cour d'appel fédérale

**Date: 20230124**

**Docket: A-286-22**

**Citation: 2023 FCA 16**

**CORAM:** **STRATAS J.A.**
**BOIVIN J.A.**
**LOCKE J.A.**

**BETWEEN:**

**COMMISSIONER OF COMPETITION**

**Appellant**

**and**

**ROGERS COMMUNICATIONS INC., SHAW COMMUNICATIONS INC. and VIDEOTRON LTD.**

**Respondents**

Heard at Ottawa, Ontario, on January 24, 2023.
Judgment delivered from the Bench at Ottawa, Ontario, on January 24, 2023.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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**REASONS FOR JUDGMENT OF THE COURT**
**(Delivered from the Bench at Ottawa, Ontario, on January 24, 2023).**

**STRATAS J.A.**

[1] The Commissioner of Competition appeals to this Court from the Competition Tribunal's order dated December 31, 2022: 2023 Comp Trib 1. The jurisdiction for this appeal is section 13 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd. Supp.).

## A. Background

[2] The Commissioner of Competition initially applied to the Competition Tribunal for an order blocking a merger between the respondents, Rogers Communications Inc. and Shaw Communications Inc. Later, a divestiture of Shaw's subsidiary, Freedom Mobile Inc., to Videotron Ltd. became part of the overall transaction.

[3] To make an order blocking the overall transaction, the Tribunal would have had to find that it would be likely to prevent or lessen competition substantially: section 92 of the *Competition Act*, R.S.C. 1985, c. C-34.

[4] In 413 tightly-written paragraphs, many full of detail, the Competition Tribunal did not so conclude. It considered the testimony of over 40 lay and expert witnesses and thousands of pages of technical, documentary evidence. As an expert body, it preferred the testimony of almost all of the respondents' experts over those of the Commissioner. The Competition Tribunal did deal with some issues of law, some relatively uncontroversial. But overall, the Competition Tribunal's task was largely factual.

## B. Section 13 appeals and the standard of review

[5] On appeal, we are to treat the order of the Competition Tribunal "as if it were a judgment of the Federal Court": *Competition Tribunal Act*, s. 13(1).

[6] This means that we can reverse the Competition Tribunal where it has erred on:

- legal points, including legal points that dominate the answer to a question of mixed fact and law, or

- factually suffused questions of mixed fact and law,

and the error(s) could have affected the result.

[7] On the first matter—legal points—we do not defer to the Competition Tribunal: if it is wrong, we can interfere. But on factually suffused questions of mixed fact and law, we defer to the Tribunal, in fact quite significantly. To interfere on factually suffused questions of mixed fact and law, we must find palpable and overriding error or an "obvious error" going to the "very core of the outcome of the case". This is a high threshold. It is "not enough to pull at leaves and branches and leave the tree standing". Rather, "[t]he entire tree must fall". See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46, adopted by the Supreme Court in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at paras. 37-38; see also *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344.

[8] Section 13 of the *Competition Tribunal Act* does not allow appeals on pure questions of fact where, as here, leave has not been sought.

[9] Thus, for the most part in this appeal, the Commissioner has mainly raised questions of law—some of which are narrow and some of which can be combined for simplicity. Given section 13 of the *Competition Tribunal Act*, the standard of review and the nature of the Competition Tribunal's decision, the Commissioner was right to be selective.

## C. Analysis

[10] Overall, the Competition Tribunal made two key, factually suffused findings of mixed fact and law. These are:

- the transactions would not be likely to prevent or lessen competition substantially (paras. 5-6, 163, 180-183, 244, 246, 264, 295, 320, 329, 335, 339, 347-348, 351, 353, 365, 385-386, 390 and 403-404); and

- the transactions in some key aspects actually promote competition (paras. 5-7, 240, 245, 268-269, 277, 350-351, 355, 389, 406 and 409).

Strictly speaking, the latter was not necessary for the Tribunal's decision. But it is important. It tells us that, in competition terms, this was far from a close case.

[11] These two key findings were amply supported by the evidence, were central to the outcome of the case, and are unshakeable in this Court. Even if the Competition Tribunal erred on the narrow legal points the Commissioner now raises in this Court, we are not persuaded that

the result could have been different. Thus, it would be pointless to send this case back to the Competition Tribunal for re-decision: *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 and *Bruno v. Dacosta*, 2020 ONCA 602, 69 C.C.L.T. (4th) 171 at para. 20 (for appeals from a court, which section 13 suggests this is akin to); *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 139-142 (for reviews of tribunal decision-making, which we have before us here).

[12] This alone is sufficient to dismiss the Commissioner's appeal. But, for completeness, we shall offer some reasons on the points of law the Commissioner raises. They are without merit.

[13] First, the Commissioner submits that, as a matter of law, the Competition Tribunal had to consider only the merger of the respondents Rogers and Shaw, which was the original version of the transactions, not the merger with an additional element proposed after the Tribunal's proceedings started: the divestiture of Freedom Mobile to Videotron. The Commissioner says that this matters: for one thing, the respondents would bear the burden of proving that the divestiture would ensure that any lessening of competition shown by the Commissioner would no longer be substantial.

[14] We disagree with the Commissioner. The burden of proof can matter where there is a gap in the evidence on a key element or where, overall, the case is so close that a make-weight or a tie-breaker is needed. Close this case was not. In fact, considering the force of the evidentiary record before it, the Competition Tribunal concluded (at para. 124) that the result would have been the same even if it accepted the Commissioner's view of the burden of proof.

[15] The Commissioner submits that a reasoned basis for that finding is not present. We disagree. The Tribunal's many clear, strong findings of fact supporting the respondents' positions provide the basis. We are not left to guess where the Tribunal was coming from: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 (for appeals from a court, which section 13 suggests this is akin to); *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157; 185 C.P.R. (4th) 83 (for reviews of tribunal decision-making, which we have before us here).

[16] The burden of proof can also matter where ignoring it or the circumstances surrounding it might cause procedural unfairness to a party. Here, however, the Commissioner knew about the divestiture to Videotron and the Competition Tribunal's possible views on the burden of proof early enough to react and prosecute its case to the fullest. Counsel for the Commissioner fairly conceded during oral argument of this appeal that there were no grounds for a procedural fairness complaint.

[17] Whether the Competition Tribunal could consider the actual, real matter—the merger and divestiture rather than just the merger—comes down to what the *Competition Act* says. To decide that, we analyze the text, context and purpose of the relevant parts of the Act. We do this neutrally, dispassionately and objectively, as lawyers who happen to have a judicial commission, not as policymakers or politicians. Nor do we fiddle around with the authentic meaning of the legislation passed by our elected representatives—for example, by injecting our own preferred policies or personal preferences into the analysis to skew the result. See *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 at paras. 41-

50 and *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556, citing controlling authorities of the Supreme Court such as *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 and *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. See also the recent Supreme Court authorities to similar effect in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, *R. v. Rafilovich*, 2019 SCC 51, 442 D.L.R. (4th) 539 and *Michel v. Graydon*, 2020 SCC 24, 449 D.L.R. (4th) 147.

[18] Here, the purpose of the *Competition Act* predominates. The *Competition Act* aims to address truth and reality, not fiction and fantasy. Examining the merger alone—a merger that, by itself, will not and cannot happen without the divestiture—would be a foray into fiction and fantasy. The Competition Tribunal is not forever shackled to the transaction pleaded by the Commissioner long ago and at an early stage: *CSX Transportation, Inc. v. ABB Inc.*, 2022 FCA 96 at para. 12. And, absent procedural fairness concerns before the Tribunal, of which there were none serious enough for the Tribunal to intervene materially, it seems contrary to another purpose of the Act—efficiency. A change in the transaction would require the entire process under the Act, including the Bureau's study and assessment of the transaction to start all over again from the beginning. In some cases, this delay, potentially substantial, could cause a transaction that, in fact, is pro-competitive and in the public interest, to die. On this and on related points, we substantially agree with the reasons of the Competition Tribunal at paras. 107-124. We also substantially agree with Rogers' Memorandum of Fact and Law at paras. 62-80 and Shaw's Memorandum of Fact and Law at paras. 13-60.

[19] We note that there may be a case where the change in a transaction is so significant that the hearing before the Competition Tribunal is no longer fair or the Competition Tribunal is no longer able to effectively evaluate the changed transaction but this is not that sort of case. As a factually suffused matter that cannot be questioned for palpable and overriding error, the Tribunal (at para. 124) was confident that its result would not have been different in this case had it proceeded in the manner the Commissioner suggests.

[20] The Commissioner also submits that the Competition Tribunal erred in law by failing to follow the Supreme Court's decision in *Canada v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1. We distinguish *Southam* for the reasons given by the Competition Tribunal (at paras. 121-122). In *Southam*, unlike here, the Commissioner had already discharged the burden of showing that the merger substantially lessened competition.

[21] The Commissioner adds that the Competition Tribunal erred in law by failing to follow certain United States cases. Aside from the fact they are foreign, they are also distinguishable. On this and other grounds for distinguishing the United States cases, we substantially agree with Shaw's Memorandum of Fact and Law at paras. 56-60.

[22] The Commissioner also submits that the Competition Tribunal did not "holistically" consider the factors of magnitude, duration and scope under section 92 of the *Competition Act*. We disagree: see the Tribunal's reasons at paras. 8, 163, 218, 244, 365, 400 and 408 and the submissions of Rogers in its memorandum of fact and law at paras. 89-94. In oral argument, the

Commissioner appears to be inviting us to reweigh the evidence, which we cannot do. In any event, the standard of palpable and overriding error has not been met.

[23] Finally, the Commissioner also submits that the Tribunal erred by considering the network access agreements and pricing commitments without the Commissioner's consent, contrary to subpara. 92(1)(*f*)(iii)(B) of the *Competition Act*. We disagree. The Tribunal's remedial jurisdiction under para. 92(1)(*f*) was not engaged because it found no substantial lessening of competition to begin with. Here, in the context of this case, we substantially agree with Rogers' submissions at paras. 97-101 of its memorandum of fact and law and Videotron's submissions at paras. 21-46 of its memorandum of fact and law.

## D. The motion

[24] Just before the hearing of this appeal, the Commissioner brought a motion for leave to admit fresh evidence. The fresh evidence shows that a party has applied to the Canadian Radio-telecommunications and Telecommunications Commission, raising certain competitive aspects of the divestiture of Freedom Mobile.

[25] We will dismiss the motion. The fact that just days ago but months after the divestiture became known, someone has started a proceeding before another administrative body has nothing to do with our task: to decide whether the Competition Tribunal committed reversible error in making the order it did. The test for the admission of fresh evidence in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212 is not met.

## E. Disposition

[26] For the foregoing reasons, the motion for fresh evidence and the appeal will be dismissed with costs.

[27] This appeal has been prosecuted, defended and administered on a highly expedited basis. The Court thanks the parties for their efforts and their high-quality submissions. It also expresses its sincere appreciation to the Registry and Court staff who, facing very difficult deadlines, have distinguished themselves once again.

"David Stratas"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-286-22 |
| **APPEAL FROM THE ORDER OF THE COMPETITION TRIBUNAL DATED DECEMBER 30, 2022, FILE CT-2022-002** | |
| **STYLE OF CAUSE:** | COMMISSIONER OF COMPETITION v. ROGERS COMMUNICATIONS INC., SHAW COMMUNICATIONS INC. AND VIDEOTRON LTD. |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | JANUARY 24, 2023 |
| **REASONS FOR JUDGMENT OF THE COURT BY:** | STRATAS J.A.<br>BOIVIN J.A.<br>LOCKE J.A. |
| **DELIVERED FROM THE BENCH BY:** | STRATAS J.A. |

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