

Canadian enforcer's failed bid to block Rogers/Shaw was "unreasonable", tribunal says

Julie Masson
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Canada's competition commissioner adopted an "unnecessarily contentious approach" in his failed attempt to block *Rogers/Shaw*, which warrants awarding "elevated legal costs" to the merged entity, the country's specialist tribunal has ruled.

The Competition Tribunal held in its [ruling](#) on costs on Tuesday that the country's competition commissioner, Matthew Boswell, did not conduct himself in the public interest throughout the Rogers/Shaw merger prohibition proceedings and rejected Boswell's bid to reduce the costs awarded for the agency's high-profile court loss last year.

The ruling noted that the commissioner maintained he should not be forced to pay elevated legal costs "in the absence of highly exceptional circumstances, which he asserts do not exist in this case."

But the tribunal rejected that argument and found that Boswell's repeated attempts to block the deal was "unreasonable." The tribunal added that the contentious approach adopted by the commissioner throughout the litigation "significantly increased the costs" that the parties were required to incur.

Moreover, in response to the commissioner's claim that awarded costs should also reflect any success that he had on issues, the tribunal said that it did not find in his favour "with respect to most of the key issues and sub-issues that were in dispute".

The tribunal, therefore, ordered the commissioner to pay roughly C\$13 million (€8.8 million) in costs to Rogers and Shaw, rejecting his request to either materially reduce costs to "reflect the important public interest in bringing the case" or to order a C\$10.9 million (€7.3 million) lump sum.

A bureau spokesperson told GCR that the agency is "disappointed" with some of the tribunal's characterisations of the commissioner's conduct.

The commissioner "acted in the public interest to protect competition throughout the entire proceeding and we fundamentally disagree with any suggestion to the contrary," she said.

"We stand by the findings of our extensive investigation and the decision to challenge this merger. We brought a strong, evidence-based and responsible case to the Tribunal," she added.

The bureau's mandate is to protect competition and the public interest in competition for Canadians and remains "undeterred" in its pursuits to do just that, she said.

A spokesperson for Rogers said that the decision “speaks for itself.”

The case

Canada’s Competition Bureau [challenged](#) Rogers’ C\$26 billion (€17.7 billion) acquisition of the country’s fourth-largest wireless services provider last May, arguing that the deal would eliminate an established, independent, low-priced competitor from the market.

Rogers subsequently offered to fully divest Shaw’s Freedom mobile business to Quebecor’s Videotron, but the bureau rejected that remedy.

The agency concluded the divestiture was ineffective since separating Freedom Mobile from Shaw to create a new entity would not provide the latter with the necessary assets to “replicate” the current competitive presence of Freedom Mobile under Shaw.

The tribunal [rejected](#) bureau’s challenge against the tie-up in December, ruling that the deal is not likely to reduce competition or lead to higher prices in two western provinces.

The enforcer then appealed against that ruling to Canada’s Federal Court of Appeal, which [sided](#) in favour of the tribunal in January.

“Seriously flawed”

Omar Wakil, a partner at Torys in Toronto, said that this decision “re-enforces prior judicial sentiment that the Competition Bureau’s approach was seriously flawed in both substance and process”.

Considering the tribunal found the bureau engaged in unreasonable behaviour, the enforcer will hopefully view this as an opportunity to evaluate and improve its approach to merger control enforcement, Wakil said.

However, he questioned whether the agency is of the same mindset.

The bureau in prior public statements has said that it continues to think it brought a strong and responsible case and that the law should change to make enforcement easier and to immunise the commissioner against cost awards, Wakil said.

McMillan partner Joshua Krane in Toronto said that when faced with the risk of significant cost awards going forward, the commissioner will have to give additional consideration to divestiture packages that may resolve many of the disputed issues with merging parties.

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Documents



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