

Convincing neutral decision-makers: legal and evidentiary lessons from the Rogers–Shaw and Microsoft–Activision decisions

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Introduction

While international competition regimes rarely operate in precisely the same way, many share a common feature: the decisions of the country's competition law authority are subject to third-party review. Usually, Canadian and United States enforcers must prove their case in front of an independent judiciary. In Europe, enforcement decisions may be subject to judicial review or appeal. Whatever the precise structure, the third-party review process has important implications for enforcers and merging parties alike. Perhaps the most fundamental is whether third-party reviewers approach the law and evidence the same way as enforcers. Often, they do not. Two recent Canadian and American merger cases are striking examples of this phenomenon. In these cases, judges dismissed the enforcer's case because they fundamentally disagreed with the enforcer's approach to the law and the evidence provided.

In Canada, the CAD 26bn Rogers–Shaw merger – one of the largest domestic corporate transactions in the nation’s history – closed in April 2023 after over two years of unsuccessful government regulatory challenges and litigation. The global Microsoft–Activision acquisition – labelled the largest acquisition in the technology industry’s history – faced significant regulatory opposition from regulators in the US and the United Kingdom before finally closing on 13 October 2023.¹ An attempt by the US Federal Trade Commission (FTC) to block the Microsoft–Activision transaction failed in July 2023.

Although one case involves a vertical merger in the technology industry and the other involved a horizontal merger in the telecommunications industry, the enforcers approached both cases in a similar fashion, and both lost their cases for the same reason: their approach to the law and the evidence was fundamentally different than that adopted by the courts. Despite the differences between the cases, Canada’s Competition Tribunal in Rogers–Shaw and Judge Corley in Microsoft–Activision adopted a strikingly similar approach to the law and evidence: one grounded in the principles of fairness, efficiency and common sense. Their decisions hold valuable evidentiary and legal lessons for enforcers and practitioners alike.

This paper summarises both cases, outlines the key similarities in the eventual decisions and concludes with a list of critical takeaways for enforcers and practitioners to refer to in circumstances where they must convince third-party decision-makers of the correctness of their position.

Rogers–Shaw

On 15 March 2021, Rogers Communications Inc announced an agreement to acquire competitor Shaw Communications Inc in a deal valued at approximately CAD 26bn (inclusive of debt).² Rogers and Shaw provide internet, cable television and mobile phone services in Canada. The Canadian Competition Bureau (CCB) conducted an extensive review of the transaction over the course of 14 months, following which the Commissioner of Competition (the ‘Commissioner’) filed an application with the Tribunal requesting an order blocking the transaction on the

1 Reuters, ‘Microsoft closes \$69 billion Activision Blizzard deal after Britain’s nod’ (13 October 2023) www.reuters.com/markets/deals/uk-antitrust-regulator-clears-microsofts-acquisition-activision-2023-10-13/.

2 Rogers, ‘Rogers and Shaw to come together in \$26 billion transaction, creating new jobs and investment in Western Canada and accelerating Canada’s 5G rollout’ (15 March 2021) about.rogers.com/news-ideas/rogers-and-shaw-to-come-together-in-26-billion-transaction-creating-new-jobs-and-investment-in-western-canada-and-accelerating-canadas-5g-rollout accessed 17 September 2023.

basis that it substantially lessened and prevented competition in wireless markets in three Canadian provinces: Alberta, British Columbia and Ontario.³

To address the Commissioner's concerns, Rogers and Shaw agreed to sell Shaw's wireless business, Freedom Mobile, to Videotron a little over a month after the Commissioner filed his application with the Tribunal.⁴ Videotron is an internet, cable television and mobile phone provider headquartered in Quebec. As part of the divestiture agreement, Rogers also agreed to provide Videotron with favourable supply agreements for backhaul, transport and other services at preferential rates. The CCB, however, did not view the divestiture and the ancillary service agreements as sufficient to resolve their competition concerns concerning the merger. Following two failed attempts at mediation, the case proceeded to an 18 day-long trial at the Tribunal, where the panel heard from 40 lay and expert witnesses and considered thousands of pages of documentary evidence.

The Tribunal issued an expedited decision on 30 December 2022, dismissing the Commissioner's application in its entirety.⁵ The Tribunal found that the proposed transactions and ancillary agreements were not likely to prevent or substantially lessen competition. Rather, the evidence demonstrated that the transactions were pro-competitive and likely to enhance and promote competition in both the wireline and wireless markets across Canada. The Commissioner immediately appealed the Tribunal's decision, and the Court of Appeal heard the appeal on an expedited schedule. The Court of Appeal unanimously dismissed the Commissioner's appeal, labelling the Commissioner's alleged legal errors as being 'without merit' and concluding that the Tribunal's findings were 'unshakeable'.⁶ Two months later, Canada's Minister of Innovation, Science and Industry, François-Philippe Champagne, gave the green light for the transactions to go ahead subject to certain conditions, including a requirement that Videotron offer plans at least 20 per cent cheaper than those currently available by the major players, restrictions

3 *Commissioner of Competition v Rogers Communications Inc and Shaw Communications Inc*, CT-2022-002, Notice of Application decisions.ct-tc.gc.ca/ct-tc/cd/en/item/520930/index.do accessed 17 September 2023.

4 Videotron, 'Rogers, Shaw and Quebecor announce agreement for sale of Freedom Mobile' (17 June 2022) corpo.videotron.com/en/pressroom/Rogers-Shaw-and-quebecor-announce-agreement-sale-freedom-mobile accessed 17 September 2023.

5 *Commissioner of Competition v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 [*Rogers-Shaw Tribunal*] <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521175/index.do> accessed 17 September 2023.

6 *Commissioner of Competition v Rogers Communications Inc, Shaw Communications Inc, and Videotron Ltd*, 2023 FCA 16 at para 27 [*Rogers-Shaw FCA*] <https://decisions.fca-cf.gc.ca/fca-caf/decisions/en/item/521096/index.do> accessed 17 September 2023.

on the transfer of wireless licences, and the expansion of mobile services and the 5G wireless network.⁷ The deal subsequently closed on 3 April 2023.⁸

Microsoft–Activision

On 18 January 2022, Microsoft Corporation agreed to acquire Activision Blizzard, Inc, one of the world’s largest gaming companies, for US\$68.7bn in cash.⁹ The proposed acquisition would bring several popular gaming franchises under Microsoft’s ownership, including World of Warcraft, Diablo, Overwatch and Call of Duty. This deal attracted scrutiny from regulators around the world, who voiced concerns that the acquisition may hurt competition and give Microsoft too much market power in the video game market. These concerns largely focused on the acquisition’s potential effect on market share in the console gaming market, including the fear that Microsoft could make Activision’s games exclusive to its consoles, as well as potential harm done to the cloud gaming market.

Beginning in 2022, the Microsoft–Activision merger received approval in several jurisdictions, including Brazil, China, the European Union, Japan, Saudi Arabia, South Africa and South Korea, among others. In the UK, the Competition and Markets Authority (CMA) blocked the deal in April 2023.¹⁰ The US FTC sued to block the deal in December 2022.¹¹ Call of Duty was the primary focus of the FTC’s complaint. It argued that Call of Duty was so popular among consumers (and such

7 Innovation, Science and Economic Development Canada, ‘Statement from Minister Champagne concerning competition in the telecommunication sector’ (31 March 2023) www.canada.ca/en/innovation-science-economic-development/news/2023/03/statement-from-minister-champagne-concerning-competition-in-the-telecommunication-sector.html accessed 17 September 2023.

8 Rogers, ‘Rogers Closes Transformative Merger with Shaw’ (3 April 2023) about.rogers.com/news-ideas/rogers-closes-transformative-merger-with-shaw accessed 17 September 2023.

9 Microsoft News Centre, ‘Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across every device’ (Microsoft, 18 January 2022) news.microsoft.com/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device accessed 17 September 2023.

10 Competition and Markets Authority, ‘Microsoft / Activision deal prevented to protect innovation and choice in cloud gaming’ (gov.uk, 26 April 2023) www.gov.uk/government/news/Microsoft-Activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming accessed 17 September 2023.

11 Federal Trade Commission, ‘FTC Seeks to Block Microsoft Corp.’s Acquisition of Activision Blizzard, Inc.’ (8 December 2022) www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc accessed 17 September 2023.

an important supply for video game platforms) that the combined firm was likely to foreclose access to the game from its rivals for its own economic benefit.¹²

On 12 June 2023, the FTC filed an action in the District Court in the Northern District of California to preliminarily enjoin the deal pending completion of the FTC's main administrative action.¹³ The District Court heard this action on an expedited schedule, as the merger had an 18 July termination date (and a potential US\$3bn termination fee owed to Microsoft by Activision if the transaction did not close by that date). Judge Jacqueline Corley rejected the FTC's motion for a preliminary injunction on 10 July 2023, finding that the evidence on record did not demonstrate a likelihood that the FTC would prevail on its claim that the merger may substantially lessen competition. On the contrary, Judge Corley found that the evidence was indicative of increased consumer access to Call of Duty and other Activision content.¹⁴ Following this decision, in a reconsideration move widely considered surprising and unprecedented, the CMA agreed to hear a new proposal from Microsoft on a modified transaction structure that could satisfy its concerns and permit the deal to go forward.¹⁵ The restructured deal triggered a new regulatory investigation from the CMA. The CMA considered that the restructured deal made important changes that substantially addressed its concerns relating to the original transaction. Microsoft proposed remedies in response to the CMA's limited residual concerns regarding certain provisions of the sale of Activision's cloud streaming rights to Ubisoft, which the CMA found sufficient to ensure the deal is properly implemented. The CMA announced its approval on 13 October 2023, concluding that the newly structured deal is a 'gamechanger' that will promote competition in cloud gaming.¹⁶ Microsoft and Activision closed the deal the same day.

12 *Federal Trade Commission v Microsoft Corporation et al*, 3:23-cv-02880 (ND Cal) at 1:15–18 [*FTC v Microsoft*] https://storage.courtlistener.com/recap/gov.uscourts.cand.413969/gov.uscourts.cand.413969.1.0_1.pdf accessed 17 September 2023.

13 *Ibid* 1:13–15.

14 *Ibid* 52:26–53:4.

15 Reuters, 'UK antitrust regulator: We await new Microsoft proposal on Activision deal' (20 July 2023) www.reuters.com/markets/deals/uk-antitrust-regulator-we-await-new-microsoft-proposal-activision-deal-2023-07-20.

16 Competition and Markets Authority, 'Microsoft concession a gamechanger that will promote competition' (gov.uk, 13 October 2023) www.gov.uk/government/news/microsoft-concession-a-gamechanger-that-will-promote-competition accessed 13 October 2023.

Structural and legal parallels

Horizontal versus vertical merger

Although Rogers–Shaw was a horizontal merger and Microsoft–Activision is a vertical merger, both cases boil down to a foreclosure issue. The Commissioner asserted that the divestiture of Freedom to Videotron would result in Freedom being a less effective competitor than immediately prior to the Merger’s announcement.¹⁷ In support of this assertion, the Commissioner argued that (1) Freedom under Videotron’s ownership would have reduced scale than under that of Shaw; (2) it would lose access to certain network infrastructure; and (3) Freedom would have a degree of dependency on Rogers that would reduce its ability to compete effectively. The Commissioner further argued that the ancillary service agreements between Rogers and Videotron were insufficient, as they would result in Videotron being vulnerable to the goodwill of a competitor for the supply of critical assets and services for an indeterminate period of time – a competitor that the Commissioner alleged had already ‘sabotaged’ its network-sharing agreement with Videotron in Quebec.¹⁸ In other words, the Commissioner submitted that these executed and binding service agreements were inadequate to alleviate competition concerns resulting from the proposed transactions, as Rogers would likely breach the terms of the agreements and instead choose to foreclose Videotron’s network access.

The Tribunal did not agree, viewing the service agreements as ‘very favourable arrangements’ making Rogers ‘contractually committed’ to providing certain services at preferential rates that are ‘much less expensive’ than some of Videotron’s other existing service agreements.¹⁹ In addressing the Commissioner’s claims that the service agreements would permit Rogers to undermine Freedom’s competitiveness, the Tribunal relied on the evidence of the Respondents’ businesspeople, in particular, the testimony of Videotron’s Vice President of Finance, Jean-Francois Lescadres. Lescadres testified *inter alia* that Videotron had a long history of contractual relationships with Rogers, a dependency that had never prevented Videotron from successfully competing against Rogers and its other competitors in the past.²⁰ He further explained that Videotron had negotiated contractual provisions in the service agreements to protect itself from such action on the part of Rogers.²¹

Similarly, foreclosure was the main issue in the Microsoft–Activision decision. As Justice Corley highlights in the decision’s opening paragraph, the crux of the

17 See n 5 above, paras 264–65.

18 *Ibid* para 296.

19 *Ibid* paras 283–84.

20 *Ibid* para 311.

21 *Ibid* para 310.

FTC's complaint is that the combined firm is 'probably going to foreclose [Call of Duty] from its rivals for its own economic benefit to consumers' detriment' as a result of the game's popularity among consumers and importance to video game platforms.²² The Court rejected this claim, finding that scrutiny of Microsoft's acquisition of Activision resulted in Microsoft committing to keep Call of Duty available on the PlayStation console for ten years, make the game available on Nintendo Switch, and also make Activision's content available on several cloud gaming services for the first time ever.²³ Judge Corley's decision relied heavily on the testimony of Microsoft executives and internal business documents that clearly demonstrated Microsoft would not have the incentive to foreclose access to Call of Duty. The Court also accepted that Microsoft would face irreparable reputational harm if it were to foreclose Call of Duty from PlayStation, citing testimony from Microsoft and Activision executives supporting this concern.²⁴

Considering the merger 'as modified'

In both Rogers–Shaw and Microsoft–Activision, the transactions as originally proposed were subsequently modified by agreements entered into by the parties after the initial signing. The Commissioner and the FTC both took the position that the Tribunal and the Court were required to assess the transactions as originally proposed, and any subsequent modifying agreements were to be considered remedies proposed by the parties to alleviate any anti-competitive concerns regarding the mergers. These legal positions were firmly rejected by both decision-makers.

In Rogers–Shaw, the June 2022 agreement between Rogers, Shaw and Videotron for the sale of Freedom Mobile to Videotron contractually confirmed the reality that Freedom Mobile would never be acquired by Rogers. This reality was well-known by the parties long before the divestiture deal was inked, as Minister Champagne announced in March 2022 that he would 'simply not permit' the transfer of Freedom's wireless spectrum to Rogers.²⁵ Notwithstanding these facts, the Commissioner insisted that the Tribunal must assess the deal as originally proposed before considering the Videotron deal, which he characterised as a

²² See n 12 above, 1:15–18.

²³ *Ibid* 52:21–25.

²⁴ *Ibid* 36:23–37:12.

²⁵ Innovation, Science and Economic Development Canada, 'Minister of Innovation, Science and Industry reaffirms that competitiveness is central to a vibrant telecommunications sector' (3 March 2022) www.canada.ca/en/innovation-science-economic-development/news/2022/03/minister-of-innovation-science-and-industry-reaffirms-that-competitiveness-is-central-to-a-vibrant-telecommunications-sector.html accessed 17 September 2023.

proposed remedy for which the parties bore the burden of establishing that the divestiture would alleviate the anti-competitive effects of the proposed merger.²⁶

The Tribunal starkly rejected the Commissioner's assertion that it was required to assess the original deal, finding that the original deal was 'no longer being proposed' and that 'Rogers will never own Freedom or operate Freedom'.²⁷ The Tribunal did not mince its words when giving its opinion of the Commissioner's position: 'the Commissioner's insistence that the Tribunal spend scarce public resources assessing something that will never happen is divorced from reality.' The Federal Court of Appeal echoed this sentiment in its decision, where Justice Stratas characterised the Commissioner's position as a 'foray into fiction and fantasy'.²⁸

In Microsoft's case, two months after the FTC filed its complaint, Xbox and Nintendo signed a ten-year agreement that guaranteed future Call of Duty titles would be available on the Nintendo Switch (and any successor Nintendo consoles) after the merger closed.²⁹ Microsoft also announced long-term agreements with five cloud streaming providers after the FTC's complaint was filed, which promised to bring Activision content to cloud streaming services for the first time ever.³⁰ Following an earlier written offer, Microsoft signed an agreement with Sony to keep Call of Duty games on PlayStation consoles on 16 July 2023 (subsequent to Judge Corley's denial of the FTC's motion for a preliminary injunction).³¹

Like the Commissioner, the FTC argued that Microsoft's binding written offer to Sony had no relevance to its prima facie burden to establish that the merger is likely to be anti-competitive and that the offer was a 'proposed remedy' that could only be considered after a finding of liability under Section 7 of the Clayton Act.³² In rejecting this argument, Judge Corley found that the relevant case law contradicts the FTC's position. She cited *FTC v Arch Coal Inc* (which was also relied on by the merging parties in Rogers-Shaw), where the Court found that ignoring the divestiture 'would be tantamount to the Court assessing "a purely hypothetical transaction of the Commission's making – that none of the parties are proposing"'.³³ With respect to Microsoft's post-FTC complaint agreements with the cloud streaming providers, Judge Corley found that these agreements completely addressed the FTC's argument that the combined firm will foreclose

26 See n 5 above, para 108.

27 *Ibid* paras 109–10.

28 See n 6 above, para 18.

29 See n 12 above, 18:17–19.

30 *Ibid* 49:9–14.

31 Reuters, 'Microsoft signs agreement to keep Call of Duty on Playstation' (16 July 2023) www.reuters.com/technology/microsoft-signs-agreement-keep-call-duty-playstation-2023-07-16 accessed 17 September 2023.

32 See n 12 above, 39:1–3.

33 *FTC v Arch Coal, Inc*, No 1:04-cv-00534, ECF No 67 (DDC 7 July 2004).

access to Call of Duty from its cloud gaming competitors.³⁴ She found that the reality was the opposite: the merger would enhance competition in the cloud streaming market, as Activision's content had never been available on cloud streaming services pre-merger.

Evidentiary parallels

Evidence of the parties' businesspeople versus evidence of competitors

The Tribunal and the Court largely relied upon and accepted the evidence of competent credible businesspeople from the merging parties regarding their business intentions and strategy, in particular where this evidence was supported by internal communications and strategic business documents.

In contrast, the enforcers rejected this evidence as incredible and self-serving. Yet, despite their scepticism, both the Commissioner and the FTC failed to lead evidence that undermined the compelling evidence of the businesspeople that was integral to the merging parties' cases. It appears that the Commissioner and the FTC were quick to discount the legitimacy of the parties' stated intentions regarding the future of their business and any intention to foreclose their competitors. This approach seriously misjudged how courts approach evidence. Without a reason to discount sworn testimony, the courts were always likely to prefer the evidence of competent and credible businesspeople. Asking courts to discount their testimony as incredible without support proved to be ineffective.

Similarly, both enforcers misjudged the evidentiary value of testimony from competitors who were highly motivated to see the deals fail and preserve their own competitive positions. Both the Tribunal and Judge Corley were generally sceptical of evidence from competitors of the merging parties and their assessment of the credibility of competitor witnesses was adversely affected by the competitors' stated opposition to the proposed transactions.

In Rogers–Shaw, the Tribunal relied on the evidence of Mr Lescadres in rejecting the Commissioner's foreclosure arguments and in addressing several of the Commissioner's other arguments. Mr Lescadres, whom the Tribunal found to be candid and highly knowledgeable, testified regarding Videotron's history of being a maverick competitor and went into detail about Videotron's future business plans, including its plans and projections for the Freedom business.³⁵ His testimony was supported by Videotron's detailed financial modelling and business plan, which satisfied the Tribunal that Videotron would likely be able to achieve its stated

³⁴ See n 12 above, 49:7–14.

³⁵ See n 5 above, para 105.

intentions and goals.³⁶ As the merging parties submitted in their closing arguments, Videotron's financial modelling and business plan 'went essentially unchallenged at trial', with the Commissioner failing to lead evidence against or cross-examine any material aspect of the plans.³⁷ Further, as explicitly noted in the Tribunal's decision, the Commissioner's principal expert witness, Dr Nathan Miller, did not engage at all with Videotron's business plan when preparing his expert report and during his testimony was unable to recall that it contained detailed cash flow projections and operating expenses, among other information.³⁸

While the Tribunal accepted Mr Lescadres' evidence, it was much more hesitant about the evidence from officers of Telus and Bell, two key telecommunications competitors who vigorously opposed the transaction.³⁹ The Tribunal found their credibility was strained based on their lack of knowledge about certain key issues and their inability to recall certain matters that should have been directly in the scope of their experience and expertise. Further, and perhaps more importantly, Telus and Bell's 'spirited' and 'intense' opposition to the merger adversely affected the weight the Tribunal accorded to their witness testimonies. The Tribunal's reluctance to accept the evidence of competitors at face value is apparent from the very first sentence of the Tribunal's decision: 'A well-known adage in the competition law community holds that when competitors oppose a merger, it is often a good indication that the merger will be beneficial for competition.'⁴⁰

In Microsoft–Activision, Judge Corley relied on the evidence of Microsoft and Activision's business executives in finding that Microsoft would not have an incentive to foreclose post-merger, including the examples discussed above. She also identified several other instances where the FTC made arguments contrary to the testimony of the merging parties' businesspeople but failed to produce any supporting evidence for these assertions. In addition to the FTC's insistence that Microsoft's agreements with Sony, Nintendo and the cloud gaming providers were only relevant as proposed remedies, the FTC claimed that the merger would decrease innovation as game developers and publishers would have less incentive to work with Microsoft.⁴¹ On the contrary, Judge Corley found that the FTC failed to adduce any corporate testimony to support this theory of reduced innovation. Judge Corley was also not persuaded by the FTC's 'bald assertion' that an independent

36 *Ibid* para 285.

37 *Commissioner of Competition v Rogers Communications Inc and Shaw Communications Inc*, CT-2022-002, Closing Submissions of Rogers Communications Inc, Shaw Communications Inc and Videotron Ltd at para 37, decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521154/index.do accessed 17 September 2023.

38 See n 5 above, paras 73, 291.

39 *Ibid* paras 89–92, 306.

40 *Ibid* para 1.

41 See n 12 above, 45:2–11.

Activision would choose to put its content on cloud gaming services.⁴² Despite the production of nearly one million documents and 30 depositions, the FTC did not identify a single document that contradicted Microsoft's public commitment to make *Call of Duty* available on PlayStation (and Nintendo Switch).⁴³ The FTC also failed to identify any instance where a game sharing *Call of Duty*'s characteristics and popularity had been withdrawn and made exclusive.⁴⁴

In respect of evidence from competitors, Judge Corley found the FTC's 'heavy' reliance on certain evidence from PlayStation's Chief Executive Officer Jim Ryan unpersuasive.⁴⁵ The FTC cited his evidence in arguing that Microsoft's written offer to Sony to keep *Call of Duty* on PlayStation was insufficient. Judge Corley, noting Sony's opposition to the merger, echoed the Tribunal's perspective on evidence from competitors that oppose the deal: 'Perhaps bad for Sony. But good for *Call of Duty* gamers and future gamers.'

Enforcers are right to be cautious about the evidence from merging parties, who have an obvious incentive to convince enforcers of their good intentions. But a cautious approach means carefully considering that evidence in the context of the entire evidentiary record. It does not mean rejecting that evidence as incredible because merging parties cannot be trusted. Regrettably, it appears both the Commissioner and the FTC's serious level of mistrust prevented them from seeing the full extent of the evidentiary record. Whether these cases will cause them to change their approach remains to be seen. However, the CCB's March 2023 submission to the Government of Canada's consultation and related discussion paper on 'The Future of Competition Policy in Canada'⁴⁶ does not bode well for change. In justifying the need for certain amendments to the Competition Act, the CCB alleges that when it comes to antitrust compliance, dominant companies are becoming increasingly sophisticated, which may enable them to escape scrutiny for harmful anti-competitive conduct. The submission describes how sophisticated firms are learning to avoid documenting anti-competitive intent in internal communications and documents, and instead 'paper and emphasize a pretextual justification'.⁴⁷ The CCB makes these arguments in respect of proposed changes to the abuse of dominance provisions of the Competition Act; however, its arguments provide useful insight into how the CCB will continue to approach

42 *Ibid* 49:27–50:10.

43 *Ibid* 36:3–10.

44 *Ibid* 37:13–38:10.

45 *Ibid* 39:17–27.

46 Competition Bureau Canada, 'The Future of Competition Policy in Canada: Submission by the Competition Bureau' (15 March 2023) ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/future-competition-policy-canada accessed 17 September 2023.

47 *Ibid* s 2.1.

evidence and business justifications put forward by merging parties, both in the context of the CCB's review of mergers and in the context of litigation.

The level of mistrust and suspicion in the CCB's recommendation is striking and unhelpful. More sophisticated merging parties may be better at describing their conduct in a favourable manner to the CCB and in avoiding the creation of 'bad' documents. But the same would be true of complainants that increasingly employ in-house or external antitrust and regulatory counsel to 'pitch' enforcement activity to the CCB. Yet, as Rogers–Shaw demonstrated – to its detriment – the CCB seems more likely to believe the sophisticated submissions from complainants than from merging parties.

Shortcomings in expert evidence

As one would expect in a merger case, expert economic evidence was critical to both enforcers' cases and to the eventual outcome. In both cases, the enforcers' expert evidence was seriously undermined for many similar reasons. In Microsoft–Activision, this was the result of a completely unsupported assumption in a key model input, to which the entire model and analysis were highly sensitive. In Rogers–Shaw, the primary weakness in Dr Miller's model was the failure to incorporate up-to-date and relevant data into his analysis without justification.

Professor Robin Lee's expert opinion was the 'lynchpin' of the FTC's argument, wherein he concluded that the economic benefits of making Call of Duty exclusive to Xbox outweigh the associated costs.⁴⁸ Judge Corley noted that Professor Lee's opinion did not dispute the evidence of Microsoft's lack of incentive to foreclose.⁴⁹ Notwithstanding this concession, his vertical foreclosure model assumed rather than proved that 20 per cent of consumers would choose to play Call of Duty on Xbox if it was not available on PlayStation. This outcome, he asserted, supported the conclusion that it would be economically beneficial for Microsoft to foreclose Call of Duty. However, Professor Lee's model was highly sensitive to the conversion rate input; according to his model, lowering the assumed conversion rate from 20 per cent to 17.5 per cent would no longer make it profitable to withhold Call of Duty from PlayStation. Further, Professor Lee failed to consider other relevant factors in his opinion, including Microsoft's agreement with Nintendo and the cloud streaming services, its written offer to Sony and likely reputational harm resulting from foreclosure.⁵⁰ Nor did his conversion rate assumption withstand criticism from Microsoft's expert, Dr Carlton. Judge Corley noted that the FTC decided not to challenge or address the material flaws in Professor Lee's model

⁴⁸ See n 12 above, 40:15–19.

⁴⁹ *Ibid* 40:21–41:11.

⁵⁰ *Ibid* 43:27–44:6.

identified by Dr Carlton. She therefore concluded that those criticisms remained ‘unscathed – and persuasive’.⁵¹

In Rogers–Shaw, the Tribunal identified certain issues with Dr Miller’s evidence, finding that he appeared to ‘cherry-pick’ the facts to support the Commissioner’s case and was reluctant to answer questions about, or acknowledge the limitations of, his analysis.⁵² Perhaps most importantly, Dr Miller did not incorporate data extending beyond the January–April 2021 period in his market share and concentration analysis, which he appeared to acknowledge would have been probative. When cross-examined at trial, Dr Miller could not recall from whom or when he requested the additional data extending beyond that period, nor did he know why he ultimately did not receive it.⁵³ These shortcomings led the Tribunal to conclude that Dr Miller’s testimony was less robust and persuasive on key issues like market shares and price effects than that of the merging parties’ expert, Dr Mark Israel.⁵⁴

Significance of the decisions for competition law

That enforcers might lose cases is no surprise. Close and highly contested cases will produce wins and losses. Such is the reality of third-party review of enforcement decisions. However, the outcomes in Rogers–Shaw and Microsoft–Activision are striking insofar as the enforcers lost both cases for largely the same reasons: they approached key legal and evidentiary issues completely differently than the judges in those cases. In both cases, the judges adopted fair, efficient and common-sense approaches to the legal issues and the evidence presented to them. They rejected inefficient and unfair legal theories that did not align with the situation on the ground. They accepted testimony when it was credible in the context of the larger evidentiary record and rejected evidence unsupported by that larger record. Finally, they rejected expert analysis when it relied too heavily on suspect assumptions or lacked necessary relevant data.

Given the similar analysis and outcomes, Rogers–Shaw and Microsoft–Activision hold important lessons for Canadian and American enforcers and practitioners, as well as those outside of North America who may face similar third-party review of enforcement decisions.

- **Decision-makers will likely consider mergers ‘as modified’ pursuant to subsequent agreements or events.** When preparing to litigate merger cases, parties must appropriately consider the current circumstances surrounding

51 *Ibid* 42:10–43:8.

52 See n 5 above, para 73.

53 *Ibid* para 219.

54 *Ibid* para 73.

the merger and any events or agreements that have occurred since the initial proposal that modify the transaction at issue. Courts are unlikely to look kindly on last-minute strategic changes designed to confer an unfair advantage. But where changes are legitimate and timely responses to enforcers' concerns, it is eminently fair and appropriate that enforcers respond to the merger as it is, not as it once was and will never be again.

- **Decision-makers may trust the evidence and testimony of competent, credible businesspeople and, as demonstrated in these cases, may rely heavily on this evidence in their decisions.** As noted above, a cautious approach to evidence is warranted. But caution does not require rejection. Rejecting testimony from executives that is supported by the evidentiary record is a recipe for disaster. If enforcers intend to challenge such evidence, they must clearly demonstrate the evidence upon which the court or tribunal should doubt the evidence of the businesspeople and accord less weight to it in their deliberations and decisions. Courts and tribunals know that much testimony is, ultimately, given in self-interest. Hence, they determine the credibility of testimony by situating that testimony in the context of the entire record. They do not reject it simply because it is self-interested. Enforcers and merging parties would be wise to take note.
- **Decision-makers may approach evidence and testimony from competitors with particular scrutiny, especially in instances where those competitors have demonstrated opposition to the merger (either publicly or in internal documents).** Merging parties are not saints, but neither are their competitors. Enforcers risk further losses should they rely too heavily on testimony from competitors when that testimony does not align with the larger evidentiary record.
- **Decision-makers will be critical of expert evidence that relies on assumptions or unsupported theories, meaning parties need to adduce expert evidence that is grounded in the evidentiary record and backed by solid scientific theories.** Experts should be provided with all information necessary to prepare and deliver a complete and probative opinion on the relevant aspects of the proposed merger within the scope of their expertise and report. Any shortcomings or limitations should be readily acknowledged by the experts in the report and when testifying, as failure to do so will adversely affect their credibility.
- **Given how courts evaluate these deals and the evidence, enforcers should carefully consider the strength of their case from the outset and following their complaint.** This includes carefully evaluating the evidence to determine whether they can put forward a strong case, including whether there is compelling evidence to challenge the arguments of the merging parties and the evidence of the businesspeople regarding their business intentions and the

anticipated trajectory of the business according to strategic plans and internal analyses. Changing circumstances might justify changes to the litigation strategy, settlement or discontinuance.

In large part, we believe that enforcers and merging parties are aware of and heed the above principles most of the time. However, Rogers-Shaw and Microsoft-Activision demonstrate that they risk losing cases when they do not.

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