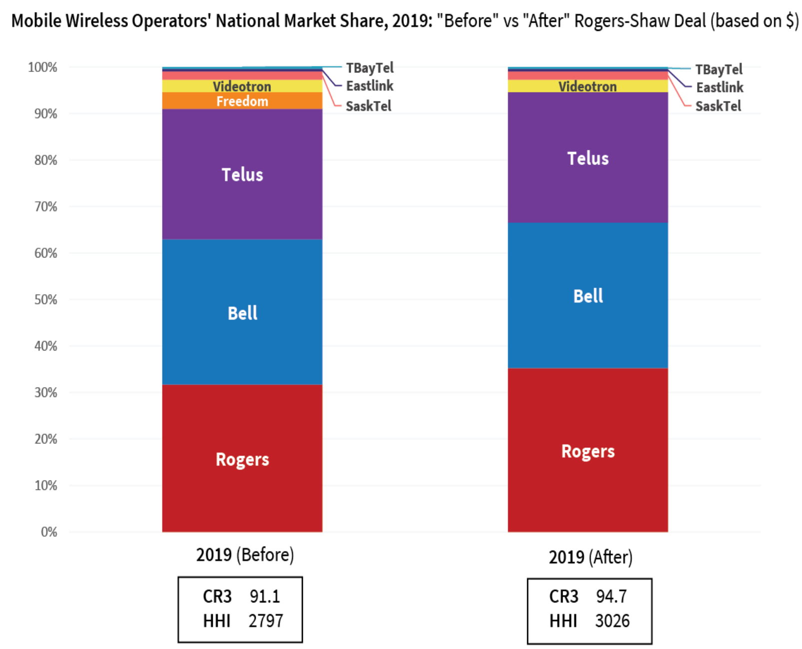
The Great Reversal: Why the Rogers-Shaw Merger is a Raw Deal and Regulators Should Deny It[1]

Valued at $26 billion, the proposed merger between Canada's 2nd and 4th largest communications and media conglomerates, Rogers and Shaw, would be the sixth largest merger in Canadian history (IMMA, 2021). If approved, it would substantially lessen competition in mobile wireless, Internet access, and cable television markets across the country. Approving the merger would effectively overturn a decade-and-a-half of government policies that have painstakingly sought to foster a fourth "maverick" mobile operator in regions across the country. This merger is also a "big data" deal. It puts the personal data of 18.2 million Canadians—integrated across Rogers and Shaw's multiple platforms—at stake, raising crucial questions about the interrelated dynamics of market power, privacy, and data protection.

The mobile wireless market is often held up as the centrepiece of this proposed merger. Rogers is already the biggest player in the national mobile wireless market with a 31.7% market share based on revenue. Shaw's Freedom Mobile has emerged as a significant rival in Ontario, Alberta and BC, where its share of subscribers is more than 8%, and its share of revenue is nearly 6%. If this transaction is approved, Rogers' share of the national market will swell to 35.3%, catapulting it even further ahead, while an increasingly successful fourth player in three of Canada's most populous provinces—Freedom Mobile—will be forever lost. Approving this deal would also see the collective share of the big three national carriers Rogers, Bell and Telus rise from 91% to nearly 95%, turning back the clock on more than a decade of solid progress. Market concentration would surge 239 points on the HHI scale, a red flag that invites intense scrutiny of this merger.

The merger review standards of regulators in Canada, the US, the UK, and the EU are clear: a rise in concentration of this magnitude is likely to lead to a substantial lessening of competition. It would strengthen dominant firms' ability to unilaterally impose price hikes and degrade the quality of service, and would also increase the potential for coordinated behaviour amongst the market's leading players.[2] This horse is still in the barn; it is not too late to shut the gate.[3]



Since the mid-2000s the three Canadian regulators who will assess this merger have all expressed concern over the persistently high levels of

[1] Unless otherwise stated, data cited in the brief are from the Canadian Media Concentration Research Project and can be found in its general workbooks here and on points very specific to this merger, an additional data set can be found here. Some sections of this submission also build off of Klass, Winseck & Wylie (2021).

[2] In the UK and the EU, a deal that moves the HHI by more than 150 points and above an HHI score of 2000 is presumptively considered to significantly diminish competition (Ofcom, 2012a, p. 13, fn 27). In the US, a merger that moves the HHI by more than 200 points and that results in an HHI above 2,500 is considered to be presumptively illegal (US, 2010, p. 19).

[3] While the Competition Bureau does not blindly follow its international peers, it does use similar guidelines to inform its reviews (Competition Bureau, 2011, p. 19). It is also important to note, as the US Department of Justice's *Horizontal Merger Guidelines* state, that decisions turn on "what will likely happen . . . and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal" (p. 1). In other words, the best available evidence, experience, contemporary and historical analogies and reasonable economic theories form the bedrock of regulators' judgments, not deference to impossible (and implacable) demands for infallible proof that are often mounted by those pursuing a merger.

concentration in mobile wireless markets. In 2015 the CRTC noted that, “at the national level, there has been very little change in retail market shares (either by revenue or by number of subscribers) in Canada in the past five years, despite entry into the market by several wireless carriers” (CRTC, 2015, para 35). In 2019, the Competition Bureau told the CRTC that “Bell, Telus and Rogers . . . possess market power at both the retail and wholesale level in most regions in Canada . . . [and] enjoy high levels of profitability compared to both their international and domestic peers” (p. 3). The Bureau also emphasized that a firm with a 35% or more market share has the ability to “unilaterally exercise market power”, while observing that, on a regional basis, “the market share held by the largest firm exceeds the 35% safe harbour threshold in all markets except Quebec” (p. 10). If Rogers is allowed to absorb Shaw, its share of the wireless market will cross that 35% threshold at the *national level*.

Just a week after Rogers and Shaw announced their merger plans, the CRTC (2021) updated its policy for mobile markets, again finding that “Bell Mobility, RCCI [Rogers], and TCI [Telus] . . . together exercise market power in the provision of retail mobile wireless services in all provinces except Saskatchewan, where SaskTel exercises sole market power” (p. 1). It also found that “barriers to entry into the retail market remain high and adversely impact new market entry or market expansion by regional wireless carriers and others” (para 100).

The CRTC also, however, observed that mobile wireless prices, while still high by international standards, are trending downwards, especially in provinces and regions where a fourth ‘maverick’ player or independent carrier had obtained a market share of five percent or more.[4] Concrete examples of this dynamic include the regional competitors’ introduction of unlimited data plans, plans that allow unused data allowances to be rolled over from one month to the next, better customer service, and other service features were also having a disciplining influence on the big 3 national carriers (paras 132-151).

Regulators have consistently stressed that these gains remain insufficient by competitive market and international standards, and that they are fragile. ISED continues to use spectrum policy to foster greater competition in all regions of the country by reserving mobile licenses for smaller players. The CRTC regulates the roaming rates that Bell, Rogers and Telus charge to regional competitors, and recently expanded the range of services that must be offered to help regional carriers expand their footprint. It has also pushed the wireless carriers to introduce affordable mobile options tailored to those who struggle to afford entry-level services. It has also declared that its policies will apply to 5G networks as well, indicating that pro-competition measures will continue to be necessary for the foreseeable future (CRTC, 2021, p. 2). Lastly, the Liberal Government has called for carriers to reduce prices for plans that include unlimited calling and between 2 and 6 GB of data per month by 25% (Macleod, 2020).

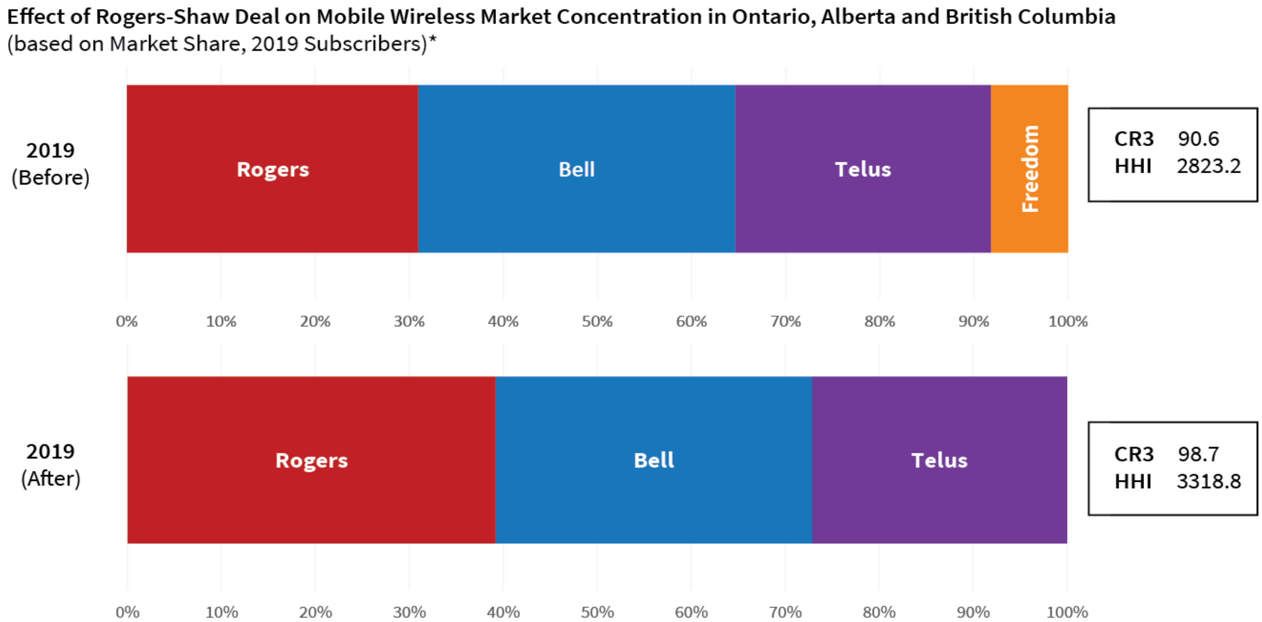
Approval of the Rogers-Shaw merger would unravel these efforts and essentially undo many of the gains made by the policies of successive governments to bring competition to the mobile wireless market. Those policies, for example, have helped Videotron to attract nearly 20% of subscribers in Quebec, much to the benefit of Quebeckers and those living in the National Capital Region. In the Maritime provinces (and Timmins, Ontario), Eastlink now accounts for about 10% of the wireless market, while in Alberta, BC and Ontario, Shaw has been investing in building out its network and attracting subscribers. It has grown its market share to just over 8% (CMCR Project, 2020, p. 32). Allowing Rogers to buy Shaw would pull the rug out from under those who have already benefitted from the additional competition, and would stymy further improvement down the road.

Regulatory approval for the Rogers-Shaw transaction would eliminate the fourth mobile wireless network operator—Shaw-owned Freedom Mobile--in three provinces that account for over two-thirds of the Canadian population: Ontario, British Columbia, and Alberta. Over the last decade, Freedom (and its predecessor Wind) has invested in building out a network that enables it to play the role of a disruptive “maverick" in these provinces. It has garnered subscribers by offering wireless plans that feature generous data allowances and no overage fees that are consistently more affordable than what’s on offer from companies like Rogers. Crucially,

[4] That is, in Ontario, Alberta, BC and the National Capital Region where Shaw’s Freedom Mobile operates, SaskTel in Saskatchewan, Videotron in Quebec and Ottawa and Eastlink in the Maritime provinces and Timmins, Ontario.

Shaw's expansion has increasingly forced Bell, Rogers and Telus to themselves respond by lowering prices and offering unlimited options. Blessing this merger would eliminate Shaw-owned Freedom Mobile as a significant rival in those three provinces which include two of our biggest cities, Toronto and Vancouver, and the nation's capital, with knock-on effects across the country.

As Figure 2 below illustrates, if regulators approve this deal, the national carriers' subscriber market share (CR3) will soar from 90.6% to almost 99%, while the HHI would jump from 2823 to 3319. These blows to competition are so significant that they present a *prima facie* case for regulators to see this as a substantial decline in competition by the lights of the standards used in Canada, the US, UK and the EU, as we saw earlier.



Bigger is not better, faster or more innovative

Rogers and Shaw's claim that a merger is the only way to achieve the scale needed to invest vast sums in 5G networks and to bring broadband links to rural and First Nations communities throughout western Canada (Rogers, 2021, pp. 1-4) strains credulity. For one, Shaw, Videotron, and Eastlink have successfully navigated similar challenges in the past and there's no reason to doubt their capabilities now. In addition, Shaw invests proportionately more of its revenue back into upgrading its fibre broadband and mobile wireless networks than Rogers. In fact, the capital intensity for Shaw's investment in its mobile network over the three most recent years for which full-year data was available has, on average, been nearly three times that of Rogers: 35% vs 13%. Shaw out-invests Rogers for broadband wireline infrastructure as well, with an average annual capital intensity rate of 23% between 2016 and 2019 versus 18% at Rogers (Rogers, 2020; Shaw, 2020).

In addition, it is important to observe that Rogers' debt/equity load is also twice that of Shaw and its debt levels will soar further yet in light of the three short- to mid-term developments: first, if this deal is approved; second, the upcoming 3500 MHz spectrum auction; and third, Rogers' need to renew the rights for Hockey Night in Canada in 2026 (Rogers, 2020, p. 29).[5]

A merger is also not the only option available to the firms when it comes to network investment. Instead, the companies could build on existing network sharing agreements like the one Rogers already has with Quebecor in Ontario and Quebec and the agreements Bell and Telus have had nationally since 2001 (Rogers, 2021, p. 4). These deals, which can involve sharing of fibreoptic cables, towers, and radio access network components, are commonplace in mobile markets, and it's obvious why: they increase efficiency by reducing costs. Sharing

[5] We would like to thank Dr. Greg Taylor, Assoc. Professor, Dept of Communication, Media and Film, University of Calgary, for his help with respect to identifying these three potential additional sources of short- and mid-term debt for Rogers.

agreements enable participating firms to avoid unnecessary investment in duplicative facilities while providing expanded geographic coverage. And, unlike mergers, they do this while maintaining retail competition.[6]

Rogers and Shaw tout the deal on the grounds that it will better enable them to invest vast sums in 5G networks and bring broadband links to rural and Indigenous communities. However, it isn't clear whether the promised investment represents new money above what they had already planned before the merger was announced, which should give serious cause for concern (Karadeglijia, 2021). Furthermore, how can Rogers and Shaw's pledged commitments be tracked and verified after the deal goes through? In fact, as the Commissioner of Competition, Matthew Boswell, recently acknowledged, the Bureau does not have the legislative mandate or resources necessary to assess mergers for compliance after the fact (INDU, 2021). That neither the CRTC nor ISED have such a mandate either leaves a worrying gap in the assessment of major mergers such as the one now being considered.

In addition, while Rogers and Shaw envision deploying 5G and other wireless networks to connect unserved areas, most communities want fibre, which experts have shown to be the best option for future-proof communication networks.[7] Regardless, as these communities try to build their own networks, they face endless obstructionist tactics from incumbents rather than willing and reliable partners (as the public record for the CRTC's (2019) Rural Broadband Barriers inquiry shows). We should cast a wary eye on claims that a merged Rogers and Shaw will solve problems that they have each helped to create and perpetuate over decades.

Rogers and Shaw also seek to justify this merger on the grounds that it will offset the limits to scale allegedly imposed by the small Canadian market (Rogers, 2021, pp. 1-4). However, Canada's lucrative $29.2 billion wireless market is in fact the 8th largest in the world (see Figure 3).

Mobile Wireless Markets in the OECD, EU and Other Select Countries Ranked by Revenue

	Country	Revenue (Millions, CDN$)
1	United States	248,609.3
2	China	171,865.0
3	Japan	103,213.7
4	Korea	63,592.8
5	India	48,294.0
6	Germany	39,472.4
7	Russia	39,357.0
8	Canada	29,200.0
9	United Kingdom	22,706.3
10	France	19,814.9
11	Italy	15,021.6
12	Spain	13,802.6
13	Australia	12,548.2
14	Mexico	11,687.0
15	South Africa	8,671.9
16	Turkey	8,299.0
17	Netherlands	6,121.9
18	Switzerland	5,425.6
19	Belgium	5,253.1
20	Austria	4,168.7
21	Argentina	3,876.0
22	Sweden	2,982.4
23	Finland	2,968.2
24	Czech Republic	2,872.3
25	Norway	2,723.1
26	Portugal	2,600.7
27	New Zealand	2,396.7
28	Ireland	2,330.9
29	Denmark	2,310.9

Note: sources cited in each invidual cell. Annual average exchange rate from the Bank of Canada. 2020 data = no highlight; 2019 data = light green shading.

Rogers' brief to the INDU committee also claims that the academic literature supports its proposed merger: "Independent academic studies . . . confirmed that there is no "optimal" number of wireless operators. Instead, those studies have carefully noted how . . . 4-to-3 wireless mergers generate trade-offs that need to be carefully assessed in the context of each individual transaction" (p. 5). It also claims to summarize the results of this research when it states that "such mergers typically result in per operator increases in investment, and some of these studies have concluded that total investment across the entire wireless industry trends to increase as well in a market with three major players" (p. 5).

This characterization of the research, however, is tendentious and misleading. Firstly, only one of the studies in Rogers' perfunctory review is a published, peer reviewed, academic study conducted by recognized authorities in telecommunications economics and competition policy, including one author who was the European Commission's (ECC Chief Competition Economist (Valletti) (Genakos, Valletti

[6] While such method might temper the competitive intensity to be expected if each firm owned its own facilities, preserving service level rivalry between both firms would be far superior to approving the elimination of the fourth maverick MNO in Ontario, Alberta and BC just as competition reaches levels (i.e. 5.5% or greater) that the Competition Bureau's own studies identity as having a real impact, to say nothing of the implications that would follow from removing the second largest rival to Telus' wireline broadband and broadcasting distribution system in western Canada (see further below).

[7] Crawford, S. (2018). *The Coming Tech Revolution – And Why America Might Miss It,* Yale University Press.

& Verboven, 2018). The other source is an ideologically-driven think tank paper not based on any research and whose main purpose is to advocate—here and generally—for a market fundamentalist stance and an extreme, miserly view of government's role in society and markets (International Centre for Law & Economics, 2019).

Second, Rogers' submission suggests that every merger is unique and, therefore, that generalizations should be avoided in favour of focusing on the specifics. This claim, however, runs directly counter to the headline findings of the study that Rogers itself relies upon: *consolidation leads to higher prices while competition lowers them* (Genakos et al., 2018, pp. 67-68). Rogers also conveniently ignores the study's conclusion that the addition or elimination of a fourth operator has a more significant effect than the addition/elimination of a third operator, and that mergers that took place in the last decade have had a greater impact on prices than changes that occurred in the first decade of the 2000s when markets were less mature (pp. 23-24).

These findings are not unique. A study of mobile pricing in twenty-five countries between 2010 and 2015 conducted by UK Communications regulator Ofcom (2016) found prices to be:

> . . . between 7.3% and 9.2% lower where there is one extra player in a mobile market . . . [and] . . . between 17.2% and 20.5% lower on average in countries where there are four or more mobile operators AND a disruptive firm is in the market. By implication, . . . the removing of a disruptive player from a four-player market (as is proposed in the H3G/O2 merger in the UK) could increase prices by between 17.2% and 20.5% on average, all else being equal (p. 17).

Taking Ofcom's estimated impact of mergers on prices as our guide implies that between $250 million to $700 million per year could flow from subscribers in Ontario, Alberta and BC to Rogers and another $170 million to $535 million per year each to Bell & Telus, respectively (because price increases would be across the board for all mobile wireless subscribers), if regulators approve the Rogers/Shaw merger. Canada's Competition Bureau has conducted similar research, with similar conclusions. In its submission to the CRTC's *Review of Mobile Wireless Services*, for example, the Bureau concludes that "Prices are generally in the range of 35-40% lower in the parts of Canada where wireless disruptors [i.e. Videotron, Freedom and Eastlink] have achieved a market share above 5.5%" (Competition Bureau, 2019, p. 3).

Third, Rogers highlights the Genakos, et. al. study finding that consolidation leads to *small increases* in capital investment *per operator*. However, its fails to note the study's finding that the jury is still out on whether such increases are beneficial (e.g. more network coverage or speed), irrelevant, or inefficient spending (e.g. gold-plated headquarters, wasteful duplication). According to Genakos, et. al. (2018), the available data on capital expenditures is too crude to allow such judgements to be made with any reliability.

Lastly, the study finds *no effect* in terms of total investment for the market as a whole (Genakos, et. al. 2018, pp. 69-72). This casts doubt on Rogers and Shaw's main argument in support of their merger: that it will spur an overall increase in investment that is needed to build out the next generation of 5G and broadband networks in western Canada. Moreover, while claims of "more investment" may have intuitive appeal, when it comes to the efficient allocation of scarce capital dollars, sometimes less is more, as Bell and Telus' longstanding mobile network sharing deal demonstrates (Rajabuin & Middleton, 2018).

Government stances toward mobile wireless M&As: Lessons learned from recent 4 to 3 mergers

While there is no "magic number" in terms of how many MNOs make a competitive market, the literature does reveal a working consensus amongst regulators that wireless markets with four or more MNOs are desirable, if not optimal. Although regulators have taken a range of stances toward 4-to-3 mergers in recent years, as a general rule, they have a high bar to pass, for good reason.

The EC has occasionally taken a permissive approach, giving the green light to four 4-to-3 deals. In three early cases, mergers were approved with a fairly weak upfront MVNO-based remedy, despite the objections of national competition authorities: Austria in 2012 and in Ireland and Germany (2014). After originally objecting to the T-Mobile and Tele2 merger in the Netherlands, the EC did a surprising about-face in 2018 and unconditionally approved the merger (EC, 2019; Rewheel, 2018).

Overall, however, EU regulators have tended to take a more restrictive stance to mobile mergers over the last decade, reflecting the high importance attached to having a fourth player in mobile markets. In 2012, for example, Ofcom approved a 5-to-4 merger in the UK between Orange and T-Mobile, the third and fourth largest operators. However, it required the merged entity, Everything Everywhere (EE), to divest *a quarter* of its 4G spectrum to the fourth largest competitor, Hutchison 3G. While the other competitors strenuously objected to this arrangement, the regulator rejected their pleadings. Taking targeted measures to cultivate a fourth MNO was risky, Ofcom admitted, but the "biggest risk" would be losing the fourth player altogether in the wake of the merger (Ofcom, 2012b, p. 2).

Two other 4-to-3 deals, one in Denmark in 2015 and one in the United Kingdom in 2016, collapsed after the EC's Competition Commissioner required the firms involved to accept the creation of a credible new player as a condition of approval. The EC approved another 4-to-3 merger in Italy in 2016, again requiring the creation of a new player to fill the void. As a result, spectrum and tower sites were divested to Iliad, which also secured a favourable national roaming agreement. More affordable mobile plans hit the market almost immediately (Rewheel, 2016, p. 2).

In 2019, the Australian Competition and Consumer Commission (ACCC) blocked a merger between Vodafone Hutchison and the wireline broadband company, TPG. The ACCC saw TPG as the most likely candidate to form a viable fourth "maverick player" in Australia's stubbornly concentrated mobile market, and because the merger would prevent that from happening, the ACCC opposed the deal. Ultimately its ruling was overturned by the Federal Court in 2020; however, the ACCC (2020) did not disguise its disappointment with the outcome, stating that the court had "closed the door on . . . a once in a generation chance for increased competition in the highly concentrated mobile telecommunications market. . . [and] that competition is lost when incumbents acquire innovative new competitors".

In the US, a bid by AT&T to buy T-Mobile fell apart in 2011 after facing insurmountable competition concerns from regulators. Three years later, an attempt by T-Mobile and Sprint to merge also failed for similar reasons. In 2018 T-Mobile and Sprint made a second bid, this time receiving approval from the Trump Administration's Department of Justice on condition that a new fourth player (Dish) would be created. However, as experts Melody Wang and Fiona Scott Morton have convincingly shown, this merger has been a disaster from the start (Wang & Scott Morton, 2021). The idea that Dish, a satellite provider with no experience in mobile wireless markets, would be able to take divested assets and transform itself into a credible competitive threat to the established national carriers T- Mobile, Verizon and AT&T, has been proven a fantasy.

Although mobile wireless prices were declining in the US for most of the past decade, like clockwork that trend ground to a halt after the deal was approved, and prices have since risen in the merger's wake (US Bureau of Labour Statistics, 2021). Sprint and T-Mobile's two discount flanker brands, Virgin Mobile and Metro, have been shuttered (DeGrasse, 2020), and T-Mobile has shown itself capable of and motivated to finding creative ways to squeeze Dish, effectively raising the new entrant's costs and reducing its ability to attract and retain customers (Singer, 2021; Wang & Scott Morton, 2021; Public Interest Spectrum Coalition, 2021).[8]

Following the merger, T-Mobile was quick to discard its maverick posture, opting instead to fall in line with its new peers Verizon and AT&T. T-Mobile's investors have recently been assured that the priority has shifted from competition based on price to an increased focus on selling its "premium product" (Wang & Scott Morton, 2021). T-Mobile will also be automatically enrolling all of its customers in a privacy-invasive, ad-targeting venture "that will share their web browsing and mobile-app data with advertisers" unless consumers explicitly opt out of these arrangements (Fitzgerald, 2021). In other words, T-Mobile has degraded the quality of its service with respect to people's privacy and protection of their data. With a three-way oligopoly settling into place in the US, T-Mobile intends to deliver $60 billion in shareholder returns between 2023 and 2025, in effect transferring billions of

[8] Manitobans may find this scenario familiar given that Bell's take-over of MTS has resulted in a strikingly similar dynamic, with satellite-based new entrant Xplore Mobile offering less data in 2021 at stagnant prices than it did at the end of 2019.

wealth from households who now pay more for wireless services to the richest ten percent of households in the United States that own 80% of all stocks (Wang & Scott Morton, 2021).

Finally, despite the apparent failure of their post-merger plans, US regulators now find themselves trapped administering a myriad of behavioural remedies whose prospects for success appear dim. This applies most notably to the seven-year deal allowing Dish to roam on T-Mobile's network but also to several other non-discrimination, operational, billing support and customer care roles that T-Mobile must provide to Dish as a condition of the merger. While it may seem obvious in retrospect that behavioural remedies requiring T-Mobile to "act against its own interests . . . [and] assist its direct competitor" (Economides, et. al. 2019, pp. 7-8) were always untenable, the fact is that in the fog of wireless warfare, the way forward is not always clear.

The T-Mobile and Sprint merger now stands as an abject lesson in the harms that arise when regulators allow a real, effective competitor to be traded away for an imaginary future one. (State of New York, et. al., 2019, p. 22; Economides, Philippon, Seamans, Singer, Steinbaum & White, 2019).

Pricing

Freedom has garnered subscribers by offering more affordable wireless plans that eliminate overage fees and feature bigger data allowances than those available from the national carriers. Crucially, in recent years Freedom's growth in the marketplace has forced the Big 3 national carriers—Bell, Rogers and Telus—to respond by themselves lowering prices and offering unlimited options. Canada's incumbent mobile operators—Rogers, Bell and Telus—have taken these price declines as evidence of a job well done (CD Howe, 2021). They also point to blistering fast download speeds that put the big three Canadian carriers at the top of the international comparative rankings on this measure (OpenSignal, 2021).[9]

However, it is still too early to declare a victory. This is because, despite important improvements, prices in Canada have fallen and data allowances have increased at rates far slower than in other countries (ReWheel, 2020). As recently as last month, the CRTC concluded a review of Canada's mobile markets, in which it found that that, "[m]ost international studies provided or referred to by parties found retail prices in Canada to be among the highest in the world" (CRTC, 2021, para 100).[10] In this decision, the CRTC also notably rejected a study commissioned by Telus from Chris Dippon and NERA Economic Consulting that came to an opposite conclusion, finding that "selection bias in the data sheds doubt on the validity of the conclusions drawn in the study" (para 121). In the final instance, the CRTC left little room for doubt about the current state of affairs in Canada:

> The Commission is satisfied that the evidence before it shows that retail prices are higher in Canada than in other comparable jurisdictions. Furthermore, factors such as network costs or network quality do not appear to explain the price differentials. Rather, it is likely that **insufficient competition in Canada contributes to higher prices in comparison to other countries** (para 122, emphasis added).

With Shaw out of the picture, the gains attributable to competitive pressure from Freedom will be reversed. The pledge that Rogers has made to maintain prices for Freedom customers as part of the deal is meaningless, since the brand will quickly be retired and customers will effectively be forced off their existing plans by evolving technology and the changing nature of demand. Bell made a similar promise when it absorbed Manitoba Telecom Services (MTS) in 2017; today Manitoba's mobile services — once the envy of the rest of the country—have lost their edge.

Back in 2017, the Competition Bureau's commissioners ignored their own staff's advice to reject the Bell-MTS transaction (Competition Bureau, 2017). Manitobans are now paying the price. The Competition Bureau should

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[9] While the claim about blistering fast download speeds is true, when we look at the rankings for upload speeds, network availability and the quality of the networks for video, gaming and voice, Bell, Rogers and Telus slip down the ranks, with scores ranging from fair to very good, but never at the top. In other words, Canada is still a laggard, rather than a leader, on this front. See: Opensignal, 2021.

[10] The CRTC reviewed several academic studies and others by Wall Communication prepared for ISED, Tefficient, the FCC, and the OECD.

not repeat its earlier mistake this time around. Approving the Rogers-Shaw deal would overturn nearly a decade-and-a-half of progressive policy under two governments. Moreover, given that this is one of the biggest merger-and-acquisition deals in Canadian history, doing so would reveal the Competition Bureau to be an "emperor with no clothes," and it would be open season for consolidation across the economy.

Approving the deal would also be bad news for Canadians insofar that adoption levels for mobile wireless services in Canada still languish at the bottom of the ranks among Organisation for Economic Co-operation and Development (OECD) countries (31 out of 36 countries) (OECD, 2021). In addition, even with the improvements of recent years, mobile data usage in Canada is still only half of the OECD average (2.9 vs. 5.8 GB per month per subscriber) and about one-third of what it is in the United States (9.2 GB)(OECD, 2021; FCC, 2020, p. 19). With mobile data usage in Canada roughly 4 years behind the US, this is no time to abandon policies that have begun to deliver modest success.

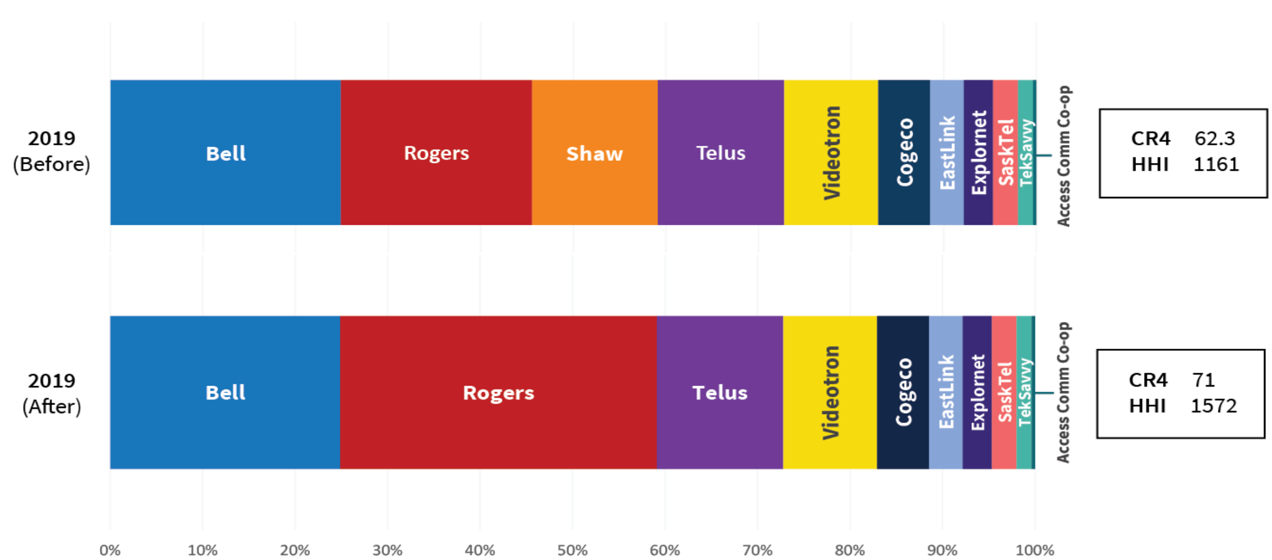
Impact on the National Internet Access and Cable Television Markets

It's often asserted that because Rogers and Shaw's cable television and Internet access services do not serve overlapping geographical areas, this merger will have few, if any, effects on these markets. This assumption is incorrect. These two companies did, essentially, carve up the market into "Cable Monopoly East" (Rogers) and "Cable Monopoly West" (Shaw) 25 years ago. That regulators said nothing at the time, and have remained silent since, is a testament to how compliant they have been in letting these firms set the terms of the landscape. While the companies did not compete with one another head-to-head, Shaw's earlier embrace of newer cable network and set-top box technology once again revealed it to be the more innovative of the two firms (Shaw, 2005, pp. 6, 35). Telus (which does compete with Shaw directly in these markets) was forced to respond in kind, which led it to roll out Internet Protocol television and fibre-to-the-home in Western Canada five years earlier than Bell did in Ontario and Quebec (see the IPTV sheet in the CMCR Project data workbook).

Moreover, Shaw's decision not to enforce monthly data limits on Internet subscribers in Western Canada after the arrival of Netflix in 2010, while companies like Rogers and Bell took the opposite approach, highlights not only that data caps are an artificial construct but also the importance of having competition and a diversity of choices from which people can choose for essential services like internet access. If Rogers is allowed to take over Shaw, will Western Canadians be forced to count their Youtube, CBC and Netflix viewing against a meter? By the time we have an answer to that question, it may be too late.

Figure 4 below illustrates the "before" and "after" impact of this proposed transaction on the national Internet access market.

Internet Access (National): "Before" vs "After" Rogers-Shaw Deal (based on $)



This proposed transaction could also have significant implications for television and film producers and independent television service providers in Canada, including the CBC and cutting-edge entities such as OutTV (Vancouver), DHX (Halifax) and the Aboriginal Peoples Television Network (APTN (Winnipeg). This is because vertical integration between telecoms carriers and television services in Canada are already exceptionally high by historical and international standards. Bell, Rogers, Shaw and Québecor already own CTV, CityTV, Global and TVA, respectively, as well as over 100 other cable channels such as the Discovery Channel, Disney, Sportsnet, and HBO. Accordingly, these carriers have both the incentive and the ability to act as gatekeepers.

While Shaw spun of the Global TV network—the second largest commercial television network in English-language markets in Canada—and several pay TV services to Corus Entertainment, in 2016, the Shaw family controls 80% of Corus' voting shares and five-out-of-seven members on Corus' board of directors is a Shaw family member (Corus, 2020, p. 44; CRTC, 2021).[11] All told, Corus is the second largest television company in Canada (Rogers is third) with total revenues of $1.2 billion and a 14.4% stake in the $2.8 billion conventional broadcast TV market, a 20% stake in the $4.2 billion pay and specialty TV market and a 13.6% stake in the $8.8 billion "total TV market" (an amalgamation of broadcast TV, pay and specialty TV as well as streaming and download television and film services). It is also the third largest commercial radio ownership group in Canada (Rogers is second). In fact, Rogers and Shaw are the second and third largest television and radio ownership groups in Canada, respectively. As a result, this deal implicates vertically-integrated cable-Internet access and programming markets in a very substantial way.

In 2011, recognizing these problems, the CRTC created a vertical integration code that required the big four vertically integrated companies to deal with television programming services on commercially fair terms. That code, however, has been seen as a weak reed since its inception, resulting in independent television services such as OutTV, APTN, Blue Ant and other members of the Independent Broadcasting Group being disadvantaged by an extremely limited set of options through which they can access audiences. At present, they have only four doors to knock on for distribution deals at the national level. If the Rogers-Shaw deal goes through, that number of doors drops to three, and from three to two in the English-language regions of Canada. If these broadcasters can't strike a deal with Bell or Rogers, they will be out of luck, or get tied up in protracted regulatory disputes for years in a fast-shifting landscape as new services (including Netflix, Amazon, YouTube Premium and Apple) move ever deeper into Canada. This will also give them more incentives to turn to Apple, Amazon and Google for distribution deals, thereby tightening the cultural industries' dependence on the global internet platforms.

In the US, the FCC and DOJ have taken a relatively aggressive approach to the horizontal and vertical elements of cable-Internet access consolidation between firms with non-overlapping geographical footprints for much of the last decade. This was first seen in the FCC's conditional approval of the Comcast-NBC Universal take-over in 2011 and then held sway during the AT&T/DirecTV and Charter/Time Warner/Advance Newhouse mergers in 2015 and 2016, respectively. In each case, the FCC imposed conditions to offset the horizontal effects of increased concentration on cable and broadband Internet access markets and vertical effects between those two markets and television, film and online video program markets. In each case, the companies involved were required to accept relatively strict restrictions on their ability to impose usage-based pricing (including a seven-year ban on the use of data caps in the Charter decision), and discriminatory pricing, as well as similar methods that could limit competition in any of the markets implicated, i.e. cable, broadband internet access and programming.

The FCC has been especially concerned to preserve the competitive threat that online video distribution services (OVDs) posed to the traditional cable TV model (FCC, 2011; FCC, 2015; FCC, 2016). The FCC and DOJ have seen cable and internet access companies as "significant players in the two markets where OVDs purchased their two key inputs: programming, and interconnection to last-mile Internet access services. The main concern . . . was that the merged entity would have both a greater ability and incentive to disadvantage OVDs by limiting their

[11] Reports of the proposed Rogers-Shaw merger also indicate that the Shaw family will get two seats on Rogers' board of directors, thereby providing an interlocking venue of potential control between the owners of both entities and their programming respective interests (Rogers, 2021).

access to these two key inputs" (Rodgerson, 2018, p. 33; also see Sallet, 2016).[12] While these measures were put on hold during the Trump Administration, it is already clear that they will likely make a come-back during the Biden Administration as regulators restore their independence and show less deference to corporate interests.

A Big Data Deal?

With data combined from 18.2 million Canadians integrated across Rogers' and Shaw's multiple platforms — internet access, mobile wireless, cable TV, mobile and desktop browsers — this is also a "big data" deal and raises substantial questions about the link between that data and market power as well as about privacy and data protection. As such, this proposed merger is an excellent opportunity for the Competition Bureau to put its recent words about the intersection between big data and its own analysis of mergers and market power into action (Competition Bureau, 2018).

AT&T, Bell, Verizon, Rogers and Shaw and other entities that are building up these massive and valuable data troves claim that doing so will help them to provide a competitive alternative to Google and Facebook. Thus far, however, the efforts for telecoms and media giants to replicate the online advertising business models of Google and Facebook have hardly put a dent in the digital duopoly's dominance. Instead, they have arguably made a bad situation even worse by trying to emulate Google and Facebook's voracious data harvesting and hyper-targeted advertising strategies. The result has been, simultaneously, extraordinary concentration in online advertising markets and an inscrutable "dirty web" based on rival proprietary technical standards, unbridled data harvesting, and fraudulent representations of audience reach and composition (UK Information Commissioners Office, 2019; US DoJ et. al., 2020; US Judiciary Committee, 2020).

A better strategy would be to adopt and apply strong data and privacy protection rules across *every* layer of the internet stack. Given that Rogers and Shaw have adopted different policy stances on different issues at different times, combining them will remove the possibility that at least one of these two companies might emerge as a stronger champion for better privacy and data protection rules for Canadians.

Time to Kill the Rogers-Shaw Mega Merger

Laying things bare, this merger is simply a play by Rogers to extend its dominance of lucrative communication markets from coast to coast. As the pandemic has made all too obvious, we have come to depend on access to advanced communication services as our lifelines to the world, work, school, health information and to one another. Now is not the time for more consolidation, with the inevitable higher prices and drag on innovation that this substantial lessening of competition will entail. What we need to put new technologies to work for the broader good of society through improvements to affordability, access, and diversity. Competition, not consolidation, is the best way to achieve these goals.

Allowing the merger to proceed with meagre, unenforceable concessions would be a mistake. The Bell MTS merger has shown that trading a real, existing competitor for an imaginary future one is a losing proposition.

Regulators and policymakers who hope to serve the public interest should oppose this merger.

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[12] Also see the review and promises of further substantial action to come on this front in FCC's 2016 *Competition in the Market for the Delivery of Video Programming* report, the last from the Obama-era FCC.