



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DEFENSE DE L'INTERET PUBLIC

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October 24, 2011

Julie Dickson, Superintendent
Office of the Superintendent of Financial Institutions
255 Albert Street
Ottawa, ON K1A 0H2

BY E-MAIL to information@osfi-bsif.gc.ca

Dear Superintendent Dickson:

Re: Objection to the proposed incorporation of Rogers Communications Inc. to carry on the business of banking in Canada

BACKGROUND

On September 3, 2011, Rogers Communications Inc. ("Rogers") published a notice in the *Canada Gazette*, Part 1, indicating their intention to make an application for letters patent to incorporate a bank for the purpose of carrying on the business of banking in Canada.¹ As per the notice, the bank would carry on business in Canada under the name Rogers Bank in the English form and Banque Rogers in the French form. Its head office is proposed to be located in Toronto, Ontario.

Rogers' notice states that its proposed bank's business will be "primarily focused on credit, payment and charge card services."

THE PUBLIC INTEREST ADVOCACY CENTRE

The Public Interest Advocacy Centre ("PIAC") is an Ottawa-based non-profit organization that provides legal representation, research and advocacy on behalf of ordinary consumers of important public services.²

¹ *Canada Gazette*, Vol. 145, No. 36, September 3, 2011, <http://www.gazette.gc.ca/rp-pr/p1/2011/2011-09-03/html/misc-divers-eng.html#g108>.

² Please see PIAC's website at <http://www.piac.ca> for more information.

PIAC'S OBJECTION TO ROGERS' APPLICATION

As per s. 26(1) of the *Bank Act*, PIAC submits this letter to the Superintendent as an objection to the proposed incorporation of Rogers to carry on the business of banking in Canada.

We understand that the before issuing letters patent to incorporate a bank, the Minister of Finance shall take into account all matters that the Minister considers relevant to Rogers' application as per s. 27 of the *Bank Act*. The section lists eight criteria for the issuance of letters patent of incorporation. PIAC takes no issue with Rogers' ability to raise capital or to have sufficient capital reserves. Nor are we concerned that Rogers will not be able to hire the requisite persons with banking expertise. Instead, PIAC's concerns stem from the impact of Rogers' communications and media operations with the proposed business of banking on the public interest and potential privacy concerns stemming from Rogers' communications businesses.

1) The Impact of Any Integration of the Business and Operations of Rogers' on the Operation of the Bank

27(f) the impact of any integration of the businesses and operations of the applicant or applicants with those of the bank on the conduct of those businesses and operations;

Our first concern relates to the integration of the communications and media businesses and operations of Rogers with those of the proposed bank.

Rogers' proposal to incorporate as a bank raises the relatively new public policy question of the need for separation of banking and telecommunications, in particular in an age of electronic commerce.

Undue concentration of power (banking and telecommunications) in a single entity

The acquisition of banking letters patent by Rogers has the potential to result in considerable market influence over consumers. By packaging too many essential services in an economy that is increasingly conducted online under the umbrella of a single provider, consumers could be placed in a vulnerable position. Indeed, consumers dedicate 3.4% of their monthly budget to debt-servicing³ and 2.2% to telecommunications services⁴.

Rogers provides both home telephone and wireless telephone service; it has an extensive cable television distribution business and recently has taken control of a significant portion of the broadcasting market with its purchase of Citytv, in addition to its five OMNI multicultural stations and 55 radio stations. In addition, Rogers has important publishing interests, including

³ According to a report by the Certified General Accountants Association, *Driving Force No More: Have Canadian Consumers Reached Their Limit?* http://www.cga-canada.org/en-ca/ResearchReports/ca_rep_2011-06_debt-consumption.pdf at P. 47-52).

⁴ Statistics Canada, *Spending Patterns in Canada 2009*, Table 1 Expenditures Per Household, Canada <http://dsp-psd.pwgsc.gc.ca/collection_2009/statcan/62-202-X/62-202-x2007000-eng.pdf>

Maclean's magazine and many other Canadian magazine publishing properties. Finally, Rogers has the largest cable-based Internet service in Canada with over 1.7 million internet customers.⁵

In short, Rogers is an integrated telecommunications, broadcasting and Internet giant.

In the internet era, such communications networks are de facto gatekeepers to many other services, in particular financial services, that are being delivered more and more via these communications utilities.

The convergence of financial services with a communications portal raises concerns of whether a company that provides an electronic access service should also be in the position to provide access to capital and debt that could be used to purchase other services or even that service itself.

In Canada, the federal government previously tried to prevent the accumulation of undue power or influence in one specific sector by erecting barriers between the "four pillars" of the financial industry: banks, investment dealers, trust companies, and insurers. These barriers have since been eliminated to a large degree, resulting in banks purchasing investment houses and trust companies. Some restrictions do remain: banks are prohibited from selling most kinds of insurance through their branches or websites. The policy rationale for this continuing separation is to prevent tied selling: it protects individuals in vulnerable positions from being encouraged to make additional, sole-sourced purchases.

If the lingering concern associated with insurance sales is rooted in a concern about the anti-competitive and anti-consumer aspects of tied sales, it would appear the same concern could be applied to the new access services Rogers provides to electronic banking and commerce. In Canada's limited telecommunications market, it is possible that, if exclusive or "walled-garden" communications and banking technology became ubiquitous, consumers would feel compelled to use Rogers services as opposed to other (and potentially more cost-effective or need-appropriate) services either in banking or telecommunications.

In short, is there a policy rationale for considering communications to be the new "fifth pillar" or even "third rail" in the banking sphere? Should the Superintendent allow this new experiment without even a public hearing of the implications? PIAC is concerned that the concentration of power in a communications-banking alignment has not been considered in Canada and that the public interest justifies an inquiry, whether on the wide issue of this power concentration or the more narrow basis of potential tied selling.

2) Privacy

Further, the possibility of offending privacy, and in particular, locational privacy is high after the creation of a communications company-based bank. Wireless telephones are already

⁵ Rogers Communication Inc, Seamless Connections Rogers Communications Inc. 2010 Annual Report <2010http://www.rogers.com/cms/investor_relations/pdfs/2010_Annual-Report.pdf> at p. 26.

equipped with GPS functionality; the combination of specific location information with specific details of financial transactions puts consumers in a vulnerable position.

Verizon Wireless has recently adjusted its default privacy setting and contracts to automatically collect its consumers Web browsing history, location data, and application usage for third-party marketing purposes.⁶ In Canada, the picture is more complex and detailed than the U.S., as a result of the application of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and various decisions of the Canadian Radio-television and Telecommunications Commission (CRTC).

It may well be that the Superintendent is not completely conversant with the arcana of telecommunications law. However, one recent change made by the CRTC is relevant to this question. After many years of refusing to allow it, the CRTC has permitted telecommunications service providers to share "customer confidential information" (which includes not only customer name, address and telephone number, but also call records, including location and transmission information) within a corporate group, for the sole purpose of providing related telecommunications or broadcasting services.⁷ It is PIAC's opinion that Rogers likely soon after obtaining a bank charter will: petition the CRTC to allow sharing with the bank division; will argue that the banking services are related telecommunications services under present CRTC rules; or will raise constitutional arguments in court that the CRTC regulations cannot apply to its operations as a financial institution under the *Bank Act*.

Were this possibility to become reality, significant personal banking and communications information could be collected and used in both the banking and communications businesses unless consumers are sufficiently informed and choose to opt out, as required by PIPEDA. We note that while current Verizon subscribers were provided with a letter indicating the change and the availability of the opt-out option, and Rogers may go so far as to similarly notify existing customers of the sharing with an opt-out option, it is likely that this change will soon be buried in the labyrinthine online privacy policies common to both telecommunications and banking service providers and thus become invisible to customers of either the banking or communications services of Rogers.

From a broader policy perspective, the aggregation of information made possible through the mining of financial records and associated location data provided in a phone's GPS raises extreme privacy concerns. As information is increasingly saved, stored, and made searchable, previously discrete pieces of information can now be aggregated to produce a full, even realtime, picture of the way individuals spend or use credit in physical, public space. While payment with a credit card could always be tracked, the additional details provided by web browsing, location, or "mobile app" data provides the capability to provide a fulsome picture of

⁶ Sara Yin, "Verizon Wireless Now Collecting Your Web, Location, App Data" (13 October 2011), PCMag, online: <http://www.pcmag.com/article2/0,2817,2394625,00.asp#fbid=8APeQtFIw7f>.

⁷ See Telecom Regulatory Policy CRTC 2009-723, *Regulatory measures associated with confidentiality provisions and privacy services* (25 November 2009). Online: <http://www.crtc.gc.ca/eng/archive/2009/2009-723.htm>

an individual's preferences and personal history and even to deliver advertisements and offers in relation to time and location.⁸

It is PIAC's opinion, based on its work with consumers regarding issues of privacy and financial services that consumers will indeed have a strong sense that their privacy has been violated when both financial and communications (including location) information freely flows from a communications provider to a financial institution. Potential for aggregation of information in this way offends what Helen Nissenbaum refers to as a violation of these norms: individuals expect information to remain in specific silos, the combination of this information transgresses their expectation of privacy.⁹

As location technologies become commonplace, however, they may impede the ability of individuals to use the Canadian legal framework to protect this expectation. Both PIPEDA and Section 8 of the *Canadian Charter of Rights and Freedoms* use a standard of reasonableness, wherein whether a technology is privacy-invasive is based to some extent on a subjective standard governed by a "reasonable expectation of privacy". With people increasingly using services such as Google Latitude, FourSquare, and Facebook to "check in" to various locations and "tag" their friends there with them, court have begun to find that the privacy interest individuals have in their locations may be diminishing. In this context, the gatekeeper role of the Superintendent becomes crucial: a public inquiry into the advisability of such a combination of these spheres can be ordered under s. 26 of the *Bank Act*.

REQUEST FOR A PUBLIC INQUIRY

Section 26(3) of the *Bank Act* permits the Superintendent to hold a public inquiry into any objections to a proposed incorporation of a bank if she is satisfied that it is necessary and in the public interest to do so. PIAC urges the Office of the Superintendent of Financial Institutions to hold a public inquiry into our objection, as public scrutiny of Rogers' proposal is both necessary and in the public interest. A public inquiry would allow transparent examination of the essential elements of Rogers' proposal, including the risks of a concentration of banking and communications power over consumers in the proposed bank, potential conflicts of interest and serious privacy concerns.

Thank you for your consideration,



Michael Janigan
Executive Director and General Counsel

⁸ Larry Dignan, "Verizon tweaks privacy policy for ad targeting based on physical address" (13 October 2011), ZDNet, online: <<http://www.zdnet.com/blog/btl/verizon-tweaks-privacy-policy-for-ad-targeting-based-on-physical-address/60629>>.

⁹ H. Nissenbaum, "A Contextual Approach to Privacy Online" *Daedalus* 140 (4), Fall 2011: 32-48.