COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: July 22, 2022
CT- 2022-002

Sara Pelletier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. Doc. # 80

CT-2022-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34.

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

**ROGERS COMMUNICATIONS INC. AND
SHAW COMMUNICATIONS INC.**

Respondents

MOTION RECORD

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Table of Content

Tab	Document	Page
1	Notice of Motion dated July 21, 2022	4
2	Affidavit of Stephen Moon	10
A	Pierre Karl Péladeu article	23
B	Letter dated April 7, 2022, from Videotron to the Commissioner of Competition	27
C	Letter of Agreement	30
D	Divestiture Press Release	55
E	Videotron ARC Request	61
F	Order dated July 29, 2021	85
G	Information Bulletin on Merger Remedies	111
H	Model Timing Agreement for Merger Reviews involving Efficiencies	152
3	Response of the Commissioner of Competition to a Request by Videotron for Leave to Intervene	171

CT-2022-002

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B E T W E E N :

COMMISSIONER OF COMPETITION

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- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT the Commissioner of Competition (the "**Commissioner**") will make a motion to the Competition Tribunal ("**Tribunal**") at such time and place and in such manner as is determined by the Tribunal.

THE MOTION IS FOR an Order varying the Scheduling Order dated June 17, 2022 (the "**Scheduling Order**"):

a) requiring Videotron Ltd. ("**Videotron**") to serve its Affidavit of Documents and production of documents by August 15, 2022;

b) putting over oral examinations for discovery by four weeks to the period of September 19, 2022 to October 7, 2022

c) extending the time provided for oral examinations by one week;

d) extending the time for the hearing of this Application by one week; and

e) modifying the other dates for the pre-hearing steps and the hearing of this application in consequence of the foregoing in the manner to be directed by the Tribunal.

THE GROUNDS FOR THE MOTION ARE:

a) Compelling reasons exist for the proposed change to the Scheduling Order. A material change in circumstances has occurred since the issuance of the Scheduling Order resulting from: (i) the binding Letter of Agreement and Term Sheet dated June 17, 2022 for the acquisition of Freedom Mobile Inc. ("**Freedom**"), a wholly-owned subsidiary of Shaw Communications Inc., by Quebecor Inc. ("**Quebecor**") through its wholly-owned subsidiary, Videotron (the "**Proposed Divestiture**"); and, (ii) Videotron's motion for leave to intervene dated July 7, 2022;

b) The broad scope of participation proposed by Videotron in its motion for leave to intervene;

c) The additional steps required, including the need for the Commissioner to receive documentary discovery from Videotron, review the materials obtained, and conduct oral examination for discovery in order to know the case to meet in respect of the Proposed Divestiture, the efficiencies alleged, and other related issues;

d) The additional steps were not accounted for in the Scheduling Order given that it was only after the Scheduling Order had been discussed in case management that the Proposed Divestiture was disclosed to the public and to the Commissioner;

e) Videotron has raised new issues not reflected in the pleadings filed by the parties that are specific to the Proposed Divestiture and Videotron's proposed intervention, including efficiencies accruing to Videotron alleged to arise from the Proposed Divestiture;

f) The Commissioner would suffer prejudice from this application proceeding on the basis of the current Scheduling Order; It is not possible to fit the additional steps required to address the Proposed Divestiture and Videotron's proposed intervention into the current Scheduling Order without unreasonably detracting from, or conflicting with, the time scheduled for other steps in this proceeding, which would detrimentally impact the Commissioner's ability to know, meet, and present his case; and

g) *Competition Tribunal Rules*, SOR/2008-141, ss 83 & 139.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

a) the Affidavit of Stephen Moon dated July 21, 2022.

Dated at Toronto, Ontario this 21st day of July, 2022.

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CT-2022-02

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34, as amended.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

AFFIDAVIT OF STEPHEN MOON
(Affirmed July 21, 2022)

I, Stephen Moon, a Competition Law Officer with the Competition Bureau (the "**Bureau**"), of the City of Gatineau, in the Province of Québec, **AFFIRM AND SAY AS FOLLOWS**:

1. I make this affidavit in support of the Commissioner of Competition's (the "**Commissioner**") motion to vary the Order of Justice Little dated June 17, 2022 that established the schedule for the pre-hearing steps and the hearing of this application (the "**Scheduling Order**").

2. On June 17, 2022, the Respondents and Quebecor Inc. ("**Quebecor**") entered into a binding Letter of Agreement and Term Sheet for the acquisition of Freedom Mobile Inc. ("**Freedom**"), a wholly-owned subsidiary of Shaw Communications Inc. ("**Shaw**"), by Quebecor through its subsidiary, Videotron Ltd. ("**Videotron**") (the "**Proposed Divestiture**").

3. I have been employed as a Competition Law Officer with the Bureau since January 2020. During this time I have been involved in the review of mergers and proposed mergers to determine whether such transactions: (a) prevent or lessen or are likely to prevent or lessen competition substantially, and (b) bring about any cognizable efficiencies under the *Competition Act* (the **"Act"**)**.**

4. I am part of the case team working on a review of the proposed acquisition of Shaw by Rogers Communications Inc. ("**Rogers**") (the "**Merger**"). Except where otherwise indicated, I have personal knowledge of the matters to which I depose. Where I do not have personal knowledge, I have set out the grounds for my belief.

5. In its motion to intervene, Videotron proposes to provide evidence and its perspective on:

   a) Videotron's operational abilities including its history as an effective and disruptive competitor in Québec;

b) whether the Proposed Divestiture provides Videotron with sufficient assets to compete effectively in Ontario, Alberta and British Columbia;

c) whether the Proposed Divestiture enables Videotron to operate independently of Rogers;

d) whether the Proposed Divestiture produces any efficiencies that would accrue to Videotron;

e) Videotron's plans regarding entry, pricing, bundling, and competition; and

f) the effect the Proposed Divestiture and Videotron's plans will have on competition in the Canadian wireless industry.[1]

6. These issues are central to the case before the Competition Tribunal (the "**Tribunal**"), including whether the Proposed Divestiture eliminates or renders insubstantial the substantial prevention or lessening of competition resulting from the Merger and yields any cognizable efficiencies.

I. Timeline of Videotron's Interest in Acquiring Freedom

7. As early as May 20, 2021, Pierre Karl Péladeau (Quebecor's CEO) publicly opposed Rogers' proposed acquisition of Freedom as part of the Merger on competition grounds and expressed interest in Quebecor acquiring Freedom. In an editorial in The Globe and Mail on that date, attached as **Exhibit "A"**, Mr. Péladeau wrote, "Rogers must be directed to fully divest itself of the wireless assets of Freedom… Quebecor, for one, will be taking a serious look at the opportunities that emerge from such a divestiture."

8.

[1] Affidavit of Jean-François Lescadres (July 7, 2022), Motion Record of Videotron Ltd., Tab 2 at para 22.

9.

10.

11.

12. On May 9, 2022, the Commissioner filed applications under sections 92 and 104 of the *Act* seeking to block the closing of the Merger.

13. On May 30, 2022, to settle the Commissioner's application under section 104 of the *Act*, the Respondents and the Commissioner entered into a Consent Agreement whereby the Respondents agreed not to close the Merger until either the Tribunal's disposition of this application or with the agreement of the Commissioner.

14. On June 3, 2022, Rogers and Shaw filed responses to this application.

15. On June 16, 2022, the Commissioner filed replies to Rogers' and Shaw's

responses to this application.

16. On June 17, 2022, Justice Little issued the Scheduling Order.

17. On June 17, 2022, the Respondents and Quebecor entered into a binding Letter of Agreement and Term Sheet for the Proposed Divestiture (attached as **Exhibit "C"**) and issued a press release announcing the Proposed Divestiture (attached as **Exhibit "D"**).

18. [redacted].

19. [redacted].

20. [redacted]

II. Impact of the Videotron Intervention on the Existing Schedule for the Application

21. Reviewing and analyzing Videotron's affidavit of documents, preparing for oral examinations for discovery and providing information to the Commissioner's expert witnesses on the issues raised would require the Bureau to expend significant additional time, including with respect to:

    a. assessment of the Proposed Divestiture, including the sufficiency of the assets, their valuation of Freedom, financing, claimed efficiencies, integration planning and evaluation and analysis of the impact of the Proposed Divestiture on competition;

    b. information related to all ancillary agreements for ongoing services that would form part of the Proposed Divestiture, including agreements related to data transport, Shaw "Go Wi-Fi", roaming and third-party-internet-access services, as well as the terms and rates of such agreements;

    c. business plans, including plans relating to retail strategy, subscriber growth, pricing, device and plan offerings (including bundles), marketing, brand positioning, network coverage area, customer service, potential entry or expansion, spectrum acquisitions, network building, capital spending, and 5G deployment, including the expected timing, spectrum requirements and costs of that deployment;

    d. *pro forma* financial statements and capital expenditure forecasts with respect to the Proposed Divestiture; and

e. claimed efficiencies, including with respect to entry into any new geographic area outside of Québec, including using the mobile virtual network operator ("**MVNO**") framework regulated by the Canadian Radio-television and Telecommunications Commission (the "**CRTC**").

22. The information from Videotron and Quebecor already in the Commissioner's possession does not address, or minimally addresses, the foregoing issues relating to the competitive impacts and potential efficiencies resulting from the Proposed Divestiture. With respect to the Videotron and Quebecor information in the Commissioner's possession:

a. On July 29, 2021, the Federal Court issued an Order under section 11 of the *Act* against Quebecor in respect of the Merger (the "**Section 11 Order**"), which is attached as **Exhibit "F"**. The Section 11 Order requested records and written returns relating to Quebecor's competitive assessment of the Merger, wireless services in Canada and its wireless services business. Quebecor's responses to the Section 11 Order are insufficient to assess the issues relating to the Proposed Divestiture, because the Section 11 Order specifications focus on the Merger and wireless services without reference to the Proposed Divestiture.

b.

[2] ARC Request, page 2.

c. [redacted]

23. As of the date of this affidavit, the Bureau is not in possession of a final agreement between the Respondents and Quebecor for the Proposed Divestiture. Further time will be required to review any documents reflecting such a final agreement and the competitive assessment thereof and to consider any modifications to the terms of the final agreement compared to the Letter of Agreement and Term Sheet dated June 17, 2022.

24. Completing oral examinations for discovery of Videotron would add to the length of the pre-hearing steps in this application, as would sharing the transcript and any undertaking responses with the Commissioner's experts for review. The need for additional factual witnesses would have to be assessed as well, which would also result in more time expended, especially if additional factual witnesses are added.

25. Videotron has requested the ability to call both expert and factual evidence at the hearing of the application.[3] Preparing to answer the expert and factual evidence Videotron proposes to file would add to the burden placed on the Bureau, the Commissioner's experts and factual witnesses in terms of potential response, as

[3] Affidavit of Jean-François Lescadres (July 7, 2022), Motion Record of Videotron Ltd., Tab 2 at para 24(e).

would Videotron increasing the number of witnesses at the hearing. Both of these add time to the process.

III. The Bureau's Review Process

26. The following considerations and anticipated steps provide more detail as to why the inclusion of the Proposed Divestiture into this case would require additional time on the part of the Bureau. The Bureau most frequently undertakes these steps in the context of a merger review and negotiated settlement, where there is typically more time. Due to this litigation and expedited process, the Bureau must already complete these steps with respect to the Merger on a compressed schedule.

27. Analyses of competitive effects and efficiencies in complex mergers are complicated and require significant information to carry out appropriately. The Proposed Divestiture has added complications given the technical nature of the wireless industry, the multifaceted wireless regulatory framework and the proposed reliance on several significant long-term agreements.

28. Once the Bureau has received the necessary information to assess a proposed divestiture, it uses the criteria in paragraph 13 of the Bureau's *Information Bulletin on Merger Remedies in Canada* (attached as **Exhibit "G"**) to determine whether a proposed divestiture would provide effective relief to an anti-competitive merger:

    a. the asset(s) chosen for divestiture are both viable and sufficient to eliminate the substantial lessening or prevention of competition;

    b. the divestiture will occur in a timely manner; and

    c. the buyer will be independent and have both the ability and intention to be an effective competitor in the relevant market(s).

29. This requires that the Bureau, among other things, carefully review internal documents, including assessments of the proposed divestiture, business plans, and terms and conditions of agreements, and interview the proposed buyer and market participants in order to: (a) evaluate the sufficiency of the divested assets, which often requires input from industry and economic experts and virtually always requires expert input in litigated cases, (b) update economic modelling, and (c) market test the viability of the remedy with industry participants.

30. With respect to efficiencies, the Bureau also has several considerations and tasks to undertake:

    a. Since the Proposed Divestiture would impact the Shaw assets that Rogers would acquire under the Merger, the Proposed Divestiture would likely impact the efficiencies Rogers claims result from the Merger. The Respondents' efficiencies claims relate to assets that serve both Shaw's wireless and wireline businesses (as well as assets that only serve Shaw's wireline business). To the extent that any of these assets would be impacted by the Proposed Divestiture, Rogers' efficiencies claims will need to be reassessed by the Bureau.

    b. Any efficiencies claims arising from the Proposed Divestiture itself will also require thorough review by the Bureau.

    c. The Bureau requires time and resources to properly review claimed efficiencies. Each claimed efficiency is unique and assessing whether it is cognizable under the *Act* requires in-depth analysis across many dimensions. In order to understand the efficiencies claims being made, the Bureau must thoroughly review the documentary evidence and any expert reports to parse each individual claim, including the underlying calculations and methodology, explicit and implicit assumptions, and the factual basis.

i. In the merger review context, the Bureau uses its *Model Timing Agreement for Merger Reviews involving Efficiencies* (attached as **Exhibit "H"**), which gives the Bureau additional time to assess efficiencies claims. The Respondents entered into such a timing agreement on September 21, 2021 as part of the Bureau's review of the Merger. There is no equivalent tool in the litigation context.

d. The Bureau must then assess whether each efficiencies claim is cognizable under the *Act*. This process necessitates determining each of the following:

i. Whether a claimed efficiency constitutes an allocative, productive, or dynamic efficiency. This involves an assessment of the dynamics of the relevant markets, including how resources are allocated, how inputs drive outputs, and what drives innovation.

ii. Whether a claimed efficiency is likely to be brought about by the merger in question. This requires a thorough review of documents related to the merger from the merging parties and their advisors, such as those created for the purposes of valuation or integration. For claims that rely on avoided future capital outlay, past business plans must also be reviewed. Information in these documents can diverge significantly when they are prepared by different people, at different times and for different purposes. The Bureau must also take into account the steps planned to be taken to achieve the claimed efficiency and the associated risks and contingencies.

iii. Whether a claimed efficiency is merely a redistribution of income, rather than a real savings to the economy. This may require consideration of documents, such as, for example, supply agreements to confirm that lower input costs do not result merely

from increased bargaining power. As another example, to understand whether a claimed efficiency may actually result from a reduction in quality, another type of income redistribution, the merging parties' relative product quality and the associated inputs to achieve that quality must be considered. This is a complex issue since quality has many dimensions and the merging parties must be compared on those dimensions.

iv. Whether the gains from a claimed efficiency are likely to be achieved in Canada. This may require reviewing the merging parties' breakdown of on- and off-shore labour, as well as ownership structures and nationalities of shareholders.

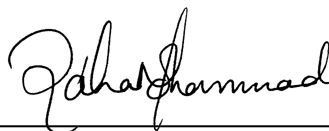
v. Whether an efficiency would be lost due to a remedial Order by the Tribunal (i.e., whether the efficiency would likely be attained through other means or despite the Order). This analysis requires a comparison of the future scenario postulated in the efficiencies claim to the counterfactual scenario of an Order from the Tribunal. The Bureau thoroughly reviews the merging parties' respective current baselines and business planning documents to determine whether the efficiency would likely occur even with a Tribunal Order. The scope of such documents is determined by the scope of the efficiencies claims and can be vast.

e. Once the aforementioned documents and information are gathered and compared, thorough analysis is required to determine if the quantification of the efficiencies performed by the merging parties' experts is reasonable. This quantification includes properly subtracting the costs required to achieve a cognizable efficiency. This vetting may require gathering and modeling data to effectively recreate the processes of the expert with more reasonable facts, assumptions and methodologies.

Affirmed remotely by Stephen Moon stated as being located in the City of Gatineau in the Province of Québec, before me, in the City of Gatineau, in the Province of Québec on July 21, 2022, in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*.	))))))))))))))	
Commissioner of Oaths		Stephen Moon

Raha Araz Mohammad
Commissioner of Oaths etc.
Province of Ontario
LSO P15816.

This is **Exhibit “A”** to the affidavit of Stephen Moon, affirmed remotely by Stephen Moon stated as being located in the city of Gatineau in the province of Quebec, before me at the city of Gatineau in the province of Quebec, on July 21, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.



Commissioner of Oaths etc.

Raha Araz Mohammad
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LSO P15816.

OPINION

The time is now to renew and reinforce Ottawa's four-player wireless policy

PIERRE KARL PÉLADEAU
CONTRIBUTED TO THE GLOBE AND MAIL
PUBLISHED MAY 20, 2021

This article was published more than 1 year ago. Some information may no longer be current.

On March 15, Rogers Communications Inc. RCI-B-T (/investing/markets/stocks/RCI-B-T/) -0.31% ▼ and Shaw Communications Inc. SJR-B-T (/investing/markets/stocks/SJR-B-T/) +0.29% ▲ announced they had reached an agreement for Rogers to acquire Shaw. This blockbuster transaction has understandably generated a considerable amount of media attention and commentary. Much of this commentary has focused on the potential impact of the deal on the Canadian telecommunications landscape and has been very much to the point.

Certain commentators, however, have seized upon this transaction as evidence that Canadian telecommunications policy has failed. In their view, if Shaw cannot make a play as an independent competitor, particularly in wireless, then all hope is lost. We may as well throw in the towel to the Big Three national wireless carriers (BCE Inc.'s BCE-T (/investing/markets/stocks/BCE-T/) -0.27% ▼ Bell Canada, Telus Corp.

in the four-player wireless model simply does not stand up to scrutiny.

What is Bill C-10 and why are the Liberals planning to regulate the internet?

Bill C-10 will not save Canada's dying private broadcasters

As recently as November, 2020, in a submission regarding an eventual auction of spectrum in the 3,800 MHz band, Shaw made the case that investments by facilities-based disruptors such as itself are "driving unprecedented progress toward sustainable competition in the Canadian wireless market."

Including a new entrant set aside as part of the auction, Shaw argued, "will provide significant benefits for Canadians in the form of lower prices and more valuable services. In contrast, the Big Three argue for policies that would enable them to capitalize upon 5G to preserve and extend their joint dominance."

This view, by the way, is far from an isolated one. In a 2019 study published as part of the Canadian Radio-television and Telecommunications Commission's review of wireless services, the Competition Bureau concluded that where the Big Three face an effective facilities-based wireless disruptor, prices are generally 35 per cent to 40 per cent lower than in other parts of Canada.

Quebeckers, of course, have known this effect for years. Ever since launching its own wireless network in 2010, Quebecor Inc.'s QBR-B-T (/investing/markets/stocks/QBR-B-T/) +0.07% ▲ Videotron Ltd. has forced the Big Three to be much more responsive to Quebec consumers. The result has been a virtuous cycle of consumer benefits, with Quebec being the first and only province to meet the federal government's targeted 25-per-cent price reduction for most of the specified wireless

Videotron, to purchase spectrum at auction, to add $2.7-billion in incremental infrastructure investments and, ultimately, to break the wireless cartel.

In short, Canada's four-player wireless policy has produced undeniable benefits for Canadian consumers, first in Quebec and increasingly across the country. Shaw may have decided for its own commercial and family reasons that it no longer wants to be a driver of this policy. That is Shaw's prerogative. But it is absolutely no reason to reject the policy itself.

Innovation, Science and Economic Development Canada and the Competition Bureau now face their most important wireless policy decision since 2007. To allow Freedom Mobile to be absorbed into Rogers would be the death knell of facilities-based competition in much of Canada. A substantial majority of the country's population would be left to the whim of a three-player oligopoly that has shown itself to be willing and able to use its market power to harm consumers.

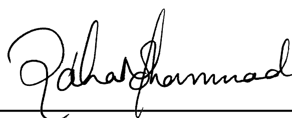
There is, however, a way forward. As a condition for concluding its acquisition of Shaw, Rogers must be directed to fully divest itself of the wireless assets of Freedom Mobile. This divestiture must be accompanied by renewed and reinforced commitments related to pro-competitive auction rules, mandatory roaming, mandatory tower sharing and competitive access to wireline backhaul facilities.

Quebecor, for one, will be taking a serious look at the opportunities that emerge from such a divestiture. We know that the next great wave of wireless investment and innovation is happening now. With the right conditions in place, we can make it work for all Canadian consumers.

Pierre Karl Péladeau is president and CEO of Quebecor Inc.

Your time is valuable. Have the Top Business Headlines newsletter conveniently delivered to your inbox in the morning or evening. Sign up today.

This is **Exhibit "B"** to the affidavit of Stephen Moon, affirmed remotely by Stephen Moon stated as being locatedin the city of Gatineau in the province of Quebec, before me at the city of Gatineau in the province of Quebec, on July 21, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.



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Commissioner of Oaths etc.
Province of Ontario
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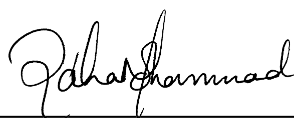
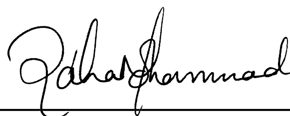
This is **Exhibit "C"** to the affidavit of Stephen Moon, affirmed remotely by Stephen Moon stated as being locatedin the city of Gatineau in the province of Quebec, before me at the city of Gatineau in the province of Quebec, on July 21, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.



Commissioner of Oaths etc.

Raha Araz Mohammad
Commissioner of Oaths etc.
Province of Ontario
LSO P15816.

This is **Exhibit "D"** to the affidavit of Stephen Moon, affirmed remotely by Stephen Moon stated as being locatedin the city of Gatineau in the province of Quebec, before me at the city of Gatineau in the province of Quebec, on July 21, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.



Commissioner of Oaths etc.

Raha Araz Mohammad
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Province of Ontario
LSO P15816.

ROGERS, SHAW AND QUEBECOR ANNOUNCE AGREEMENT FOR SALE OF FREEDOM MOBILE

The proposed divestiture of Freedom Mobile to Quebecor will ensure the presence and viability of a strong fourth wireless carrier in Canada

Quebecor brings an undeniable operational and competitive track record, as well as significant financial resources

TORONTO, CALGARY AND MONTREAL, June 17, 2022 – Rogers Communications Inc. ("Rogers"), Shaw Communications Inc. ("Shaw") and Quebecor Inc. ("Quebecor") today announced an agreement (the "Divestiture Agreement") for the sale of Freedom Mobile Inc. ("Freedom") to Quebecor, subject to regulatory approval (the "Freedom Transaction"). The Freedom Transaction will ensure the presence of a strong and sustainable fourth wireless carrier across Canada. The parties strongly believe the agreement effectively addresses the concerns raised by the Commissioner of Competition and the Minister of Innovation, Science and Industry regarding viable and sustainable wireless competition in Canada.

Under the terms of the Divestiture Agreement, Quebecor has agreed to buy Freedom on a cash-free, debt-free basis at an enterprise value of C$2.85 billion, expanding Quebecor's wireless operations nationally. The Divestiture Agreement provides for the sale of all of Freedom branded wireless and Internet customers as well as all of Freedom's infrastructure, spectrum and retail locations. It also includes a long-term undertaking by Shaw and Rogers to provide Quebecor transport services (including backhaul and backbone) and roaming services. The parties will work expeditiously and in good faith to finalize definitive documentation.

As Freedom's new owner, Quebecor will bring a strong operational track record, a history of competing vigorously and successfully in telecommunications services, including its wireless brands in Quebec and Eastern Ontario, and significant financial and spectrum resources to enable an expedient path to the next evolution of 5G technology for Freedom.

"Our agreement with Quebecor to divest Freedom is a critical step towards completing our proposed merger with Shaw. We strongly believe the divestiture will meet the Government of Canada's objective of a strong and sustainable fourth wireless services provider," said Tony Staffieri, President and CEO of Rogers. "This agreement between proven cable and wireless companies will ensure the continuation of a highly competitive market with robust future investments in Canada's world class networks. We look forward to securing the outstanding regulatory approvals for our merger with Shaw so that we can deliver significant long-term benefits to Canadian consumers, businesses and the economy."

"This is a truly Canadian-made solution that will benefit all Canadians by delivering increased competition and choice, the next generation of telecommunications services and enabling the transformative benefits of a combined Rogers and Shaw. We look forward to completing the Shaw Transaction which would make Rogers a truly national telecommunications provider." said Edward Rogers, Chairman of Rogers Communications.

"This is a turning point for the Canadian wireless market," said Pierre Karl Péladeau, President and CEO of Quebecor. "Quebecor's Videotron subsidiary is the strong 4th player who, coupled

with Freedom's solid footprint in Ontario and Western Canada, can deliver concrete benefits for all Canadians. We have always believed that for there to be healthy competition in wireless services only a player with a proven track record can successfully enter the market. This is a value-added transaction for all consumers and the Canadian economy. After fifteen years of growth in the Quebec wireless market, we have demonstrated our expertise, our ability to innovate and our financial strength. Now we are taking another step to bring the opportunities our customers already enjoy to consumers across Canada." Mr. Péladeau added that Quebecor and Rogers have always had a strong relationship.This trilateral agreement with Shaw is yet another example.

"Today's announcement marks an important milestone in our bold and transformative journey to join together with Rogers," said Brad Shaw, Executive Chairman and CEO of Shaw. "Since Shaw entered the wireless business in 2016, we have made significant strides towards changing the Canadian wireless landscape. We made a promise to Canadians that we would increase choice and affordability and I'm proud to say we delivered on that promise. Today's announcement ensures that Freedom Mobile will remain a strong competitor."

Required Approvals

The Freedom Transaction is conditional, among other things, on clearance under the Competition Act and the approval of ISED and would close substantially concurrently with closing of the Rogers-Shaw transaction.

The Rogers-Shaw transaction, announced March 15, 2021 has already been approved by the shareholders of Shaw and the Court of Queen's Bench of Alberta, and the Canadian Radio-television and Telecommunications Commission, and remains subject to review by the Competition Bureau and the Minister of Innovation, Science and Industry (ISED).

Rogers standalone financial guidance for 2022, provided on April 20, 2022, remains unchanged.

Caution Regarding Forward Looking Statements

This news release includes "forward-looking statements" within the meaning of applicable securities laws, including, without limitation, statements about the terms and conditions of the Freedom Transaction, the anticipated benefits and effects of the Freedom Transaction and the Rogers-Shaw Transaction and the timing thereof, the potential timing and anticipated receipt of the required regulatory approvals for the Freedom Transaction and the Rogers-Shaw Transaction, and the anticipated timing for closing of the Freedom Transaction and the Rogers-Shaw Transaction. Forward-looking information may in some cases be identified by words such as "will", "anticipates", "expects", "intends" and similar expressions suggesting future events or future performance.

We caution that all forward-looking information is inherently subject to change and uncertainty and that actual results may differ materially from those expressed or implied by the forward-looking information. A number of risks, uncertainties and other factors could cause actual results and events to differ materially from those expressed or implied in the forward-looking information or could cause the current objectives, strategies and intentions of Rogers, Shaw, or Quebecor to change. Such risks, uncertainties and other factors include, among others, the possibility that the Freedom Transaction or the Rogers-Shaw Transaction will not be completed in the expected timeframe or at all; the failure to obtain any necessary regulatory approvals in

connection with the Freedom Transaction or the Rogers-Shaw Transaction in the expected timeframe or at all; the possibility that the parties will not be able to reach a resolution with the Commissioner of Competition or ISED regarding the Rogers-Shaw Transaction; pending or potential litigation associated with the Rogers-Shaw Transaction or the Freedom Transaction, including any hearing or proceeding by or involving regulatory authorities; the failure to realize the anticipated benefits of the Freedom Transaction and the Rogers-Shaw Transaction in the expected timeframe or at all; and general economic, business and political conditions. Accordingly, we warn investors to exercise caution when considering statements containing forward-looking information and that it would be unreasonable to rely on such statements as creating legal rights regarding the future results or plans of Rogers, Shaw or Quebecor. We cannot guarantee that any forward-looking information will materialize and you are cautioned not to place undue reliance on this forward-looking information. Any forward-looking information contained in this news release represent expectations as of the date of this news release and are subject to change after such date. A comprehensive discussion of other risks that impact Rogers, Shaw and Quebecor can also be found in their public reports and filings which are available under their respective profiles on as applicable www.sedar.com and www.sec.gov.

Forward-looking information is provided herein for the purpose of giving information about the Freedom Transaction and the Rogers-Shaw Transaction, their expected timing and their anticipated benefits. Readers are cautioned that such information may not be appropriate for other purposes. The completion of the Freedom Transaction and the Rogers-Shaw Transaction is subject to certain closing conditions, termination rights and other risks and uncertainties including, without limitation, regulatory approvals and, in the case of the Freedom Transaction, agreement by the parties of the terms of a definitive agreement on or before July 15, 2022 or such other date as agreed by the parties. There can be no assurance that such regulatory approvals will be obtained or that either the Freedom Transaction or the Rogers-Shaw Transaction will occur, or that either will occur on the terms and conditions described herein or previously announced. The Freedom Transaction and the Rogers-Shaw Transaction could be modified, restructured or terminated. There can be no assurance that the Freedom Transaction or the Rogers-Shaw Transaction will be acceptable to regulatory authorities and, if applicable, will be completed in order to permit the Freedom Transaction or the Rogers-Shaw Transaction to be consummated. Finally, there can be no assurance that the anticipated benefits of either the Freedom Transaction or the Rogers-Shaw Transaction will be achieved in the expected timeframe or at all.

All forward-looking statements are made pursuant to the “safe harbour” provisions of the applicable Canadian and United States securities laws. Neither Rogers, Shaw nor Quebecor are under any obligation (and Rogers, Shaw and Quebecor expressly disclaim any such obligation) to update or alter any statements containing forward-looking information, the factors or assumptions underlying them, whether as a result of new information, future events or otherwise, except as required by law. All of the forward-looking information in this news release is qualified by the cautionary statements herein.

About Rogers

Rogers is a leading Canadian technology and media company that provides world-class communications services and entertainment to consumers and businesses on our award-winning networks. Our founder, Ted Rogers, purchased his first radio station, CHFI, in 1960. Today, we are dedicated to providing industry-leading wireless, cable, sports, and media to millions of customers across Canada. Our shares are publicly traded on the Toronto Stock

Exchange (TSX: RCI.A and RCI.B) and on the New York Stock Exchange (NYSE: RCI). For more information, please visit: www.rogers.com or http://investors.rogers.com.

About Shaw Communications Inc.
Shaw is a leading Canadian connectivity company. The Wireline division consists of Consumer and Business services. Consumer serves residential customers with broadband Internet, Shaw Go WiFi, video and digital phone. Business provides business customers with Internet, data, WiFi, digital phone, and video services. The Wireless division provides wireless voice and LTE data services.

Shaw is traded on the Toronto and New York stock exchanges and is included in the S&P/TSX 60 Index (Symbol: TSX – SJR.B, NYSE – SJR, and TSXV – SJR.A). For more information, please visit www.shaw.ca

About Quebecor Inc.
Quebecor, a Canadian leader in telecommunications, entertainment, news media and culture, is one of the best-performing integrated communications companies in the industry. Driven by their determination to deliver the best possible customer experience, all of Quebecor's subsidiaries and brands are differentiated by their high-quality, multiplatform, convergent products and services.

Québec-based Quebecor (TSX: QBR.A, QBR.B) employs nearly 10,000 people in Canada.

A family business founded in 1950, Quebecor is strongly committed to the community. Every year, it actively supports more than 400 organizations in the vital fields of culture, health, education, the environment and entrepreneurship.

For more information:

Rogers Communications media contact
1-844-226-1338
media@rci.rogers.com

Rogers Communications investment community contact
Paul Carpino
647-435-6470
paul.carpino@rci.rogers.com

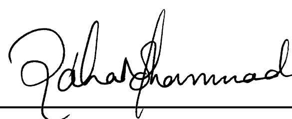
Shaw Communications Inc. contact
Chethan Lakshman, VP, External Affairs
403-930-8448
chethan.lakshman@sjrb.ca

Shaw Communications investment community contact
investor.relations@sjrb.ca

Quebecor Inc. media contact
medias@quebecor.com

Quebecor Inc. investor relations contact
Hugues Simard, Chief Financial Officer
hugues.simard@quebecor.com

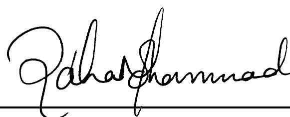
This is **Exhibit "E"** to the affidavit of Stephen Moon, affirmed remotely by Stephen Moon stated as being locatedin the city of Gatineau in the province of Quebec, before me at the city of Gatineau in the province of Quebec, on July 21, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.



Commissioner of Oaths etc.

Raha Araz Mohammad
Commissioner of Oaths etc.
Province of Ontario
LSO P15816.

This is **Exhibit "F"** to the affidavit of Stephen Moon, affirmed remotely by Stephen Moon stated as being located in the city of Gatineau in the province of Quebec, before me at the city of Gatineau in the province of Quebec, on July 21, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.



Commissioner of Oaths etc.

Raha Araz Mohammad
Commissioner of Oaths etc.
Province of Ontario
LSO P15816.

Federal Court — Cour fédérale

Date: 20210729

Docket: T-1160-21

Ottawa, Ontario, July 29, 2021

PRESENT: THE CHIEF JUSTICE

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* into the proposed acquisition of Shaw Communications Inc. by Rogers Communications Inc., reviewable under Part VIII of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring Quebecor Inc. to produce records pursuant to paragraph 11(1)(b) of the *Competition Act*; and

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring Quebecor Inc. to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

QUEBECOR INC.

Respondent

ORDER TO
PRODUCE RECORDS AND WRITTEN RETURNS OF INFORMATION

UPON the *ex parte* application made by the Commissioner of Competition ("**Commissioner**") for an Order pursuant to paragraphs 11(1)(b) and 11(1)(c) of the *Competition Act*, RSC, 1985, c C-34, as amended ("**Act**"), which was heard this day at the Federal Court, Ottawa, Ontario;

AND UPON reading the affidavit of Laura Sonley affirmed on July 21, 2021;

AND UPON being satisfied that an inquiry is being made under section 10 of the Act relating to the proposed acquisition of Shaw Communications Inc. by Rogers Communications Inc., reviewable under Part VIII of the *Competition Act* ("**Inquiry**");

AND UPON being satisfied that the Respondent has, or is likely to have, information that is relevant to the Inquiry;

1. **THIS COURT ORDERS** that the Respondent, Quebecor Inc., shall produce to the Commissioner all records and any other things specified in this Order, in accordance with the terms of this Order.

2. **THIS COURT FURTHER ORDERS** that the Respondent, Quebecor Inc., shall make and deliver to the Commissioner all written returns of information specified in this Order, in accordance with the terms of this Order.

3. **THIS COURT FURTHER ORDERS** that in order to facilitate the handling, use, and orderly maintenance of records and to ensure the accurate and expeditious return of records, other things specified in this Order and written returns of information produced pursuant to this Order, the Respondent, Quebecor Inc., shall comply with the following requirements:

    a. the Respondent, Quebecor Inc., shall produce records, other things and information in its possession, control or power;

    b. the Respondent, Quebecor Inc., shall make and deliver a written return of information in such detail as is required to disclose all facts relevant to the corresponding specification in this Order;

c. unless otherwise specified, the Respondent, Quebecor Inc., shall produce (i) records created or received during the period from 1 January 2019; and (ii) written returns of information in respect of the period from 1 January 2017;

d. the Respondent, Quebecor Inc., shall produce all records and written returns of information in accordance with the Bureau's Guidelines for the Production of Electronically Stored Information ("**E-Production Guidelines**") attached at Schedule III of this Order;

e. the Respondent, Quebecor Inc., shall scan each paper record into a separate electronic record and produce that copy in lieu of the original record unless making this copy would compromise the integrity of the original, render the copy difficult to read, or the original record size exceeds 216 mm x 356 mm (8½ in x 14 in); and a duly authorized representative of the Respondent, Quebecor Inc., shall certify by affidavit the copy is a true copy of the original record;

f. a duly authorized representative of the Respondent, Quebecor Inc., shall certify by affidavit that all electronic records produced by the Respondent, Quebecor Inc., pursuant to this Order are true copies of the electronic records in their possession, control or power;

g. each written return of information made by the Respondent, Quebecor Inc., shall be sworn or solemnly affirmed by a duly authorized representative of the Respondent, Quebecor Inc., as having been examined by that person and as being, to the best of his or her knowledge and belief, correct and complete in all material respects;

h. if a record contains information that the Respondent, Quebecor Inc., claims is privileged, the Respondent, Quebecor Inc., shall produce the record with the privileged information redacted and in accordance with paragraph 6 of this Order;

i. the Respondent, Quebecor Inc., shall make all written returns of information, including those relating to revenues, costs and margins, in accordance with generally accepted accounting principles ("**GAAP**"), International Financial Reporting Standards ("**IFRS**"), or other accounting principles that the Respondent, Quebecor Inc., uses in its financial statements. Where the Respondent, Quebecor Inc., produces a record or makes and delivers a written return of information using accounting principles other than GAAP or IFRS, the Respondent, Quebecor Inc., shall explain the meaning of all such accounting terms;

j. the Respondent, Quebecor Inc., shall define, explain, interpret or clarify any record or written return of information whose meaning is not self-evident;

k. the Respondent, Quebecor Inc., shall identify all calendars, appointment books, telephone logs, planners, diaries, and items of a similar nature that are produced in response to this Order with the name of the person or persons by whom they were used and the dates during which they were used;

l. before producing records pursuant to this Order, a duly authorized representative of the Respondent, Quebecor Inc., responsible for producing electronic records in accordance with the E-Production Guidelines attached at Schedule III of this Order shall contact a person identified in paragraph 15 of this Order and provide particulars regarding how the Respondent, Quebecor Inc., will comply with the E-Production Guidelines. The Respondent, Quebecor Inc., shall make reasonable efforts to address any additional technical requirements the Commissioner may have relating to the production of electronic records in accordance with the E-Production Guidelines;

m. use of the singular or the plural in the Schedules of this Order shall not be deemed a limitation, and the use of the singular shall be construed to include, where appropriate, the plural and vice versa; and

n. use of a verb in the present or past tense in the Schedules of this Order shall not be deemed a limitation, and the use of either the present or past tense shall be construed to include both the present and past tense.

4. **THIS COURT FURTHER ORDERS** that the Respondent, Quebecor Inc., shall make and deliver, in a written return of information, an index in which the Respondent, Quebecor Inc., identifies all records (or parts of records) responsive to the Specifications in Schedule I of this Order for which privilege is claimed. The index shall include the title of the record, the date of the record, the name of each author, the title or position of each author, the name of each addressee and recipient, the title or position of each addressee and recipient, and the paragraphs or subparagraphs of Schedule I of the Order to which the record is responsive. In lieu of listing the title or position of an author, addressee or recipient for each record, the Respondent, Quebecor Inc., may make and deliver a written return of information listing such persons and their titles or positions.

5. **THIS COURT FURTHER ORDERS** that where the Respondent, Quebecor Inc., asserts a legal privilege in respect of all or part of a record, the Respondent, Quebecor Inc., shall, in a written return of information:

a. produce, for each record, a description of the privilege claimed and the factual basis for the claim in sufficient detail to allow the Commissioner to assess the validity of the claim; and

b. identify by name, title and address, all persons to whom the record or its contents, or any part thereof, have been disclosed.

Without restricting any other remedy he may seek, the Commissioner may, by written notice to the Respondent, Quebecor Inc., at any time require the Respondent, Quebecor Inc., to produce records for which solicitor-client privilege is claimed to a person identified in subsection 19(3) of the Act.

6. **THIS COURT FURTHER ORDERS** that the Respondent, Quebecor Inc., shall make and deliver a written return of information confirming that the records or things produced pursuant to this Order were either in the possession of or on the premises used or occupied by the Respondent, Quebecor Inc., or in the possession of an officer, agent, servant, employee or representative of the Respondent, Quebecor Inc.. If a record or thing produced by the Respondent, Quebecor Inc., pursuant to this Order does not meet the above conditions, the Respondent, Quebecor Inc., shall make and deliver a written return of information explaining the factual circumstances about the possession, power, control and location of such record or thing.

7. **THIS COURT FURTHER ORDERS** that the Respondent, Quebecor Inc., shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it is not producing pursuant to this Order a record, thing, type of record or type of thing that was formerly in the possession, control or power of the Respondent, Quebecor Inc., and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent, Quebecor Inc., had continued to have possession, control or power over the record, thing, type of record or type of thing. The Respondent, Quebecor Inc., shall state in this written return of information (a) when and how the Respondent, Quebecor Inc., lost possession, control and power over a record, thing, type of record or type of thing; and (b) the Respondent's, Quebecor Inc.'s, best information about the present location of the record, thing, type of record or type of thing.

8. **THIS COURT FURTHER ORDERS** that the Respondent, Quebecor Inc., shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it never had possession, control or power over a record, thing, type of record or type of thing responsive to a Specification in this Order, that another person not otherwise subject to this Order has possession, control or power over the record, thing, type of record or type of thing, and that the record, thing, type of record or

type of thing would be responsive to a Specification of this Order if the Respondent, Quebecor Inc., possessed the record, thing, type of record or type of thing. The Respondent, Quebecor Inc., shall state in this written return of information its best information about (a) the Specification to which the record, thing, type of record or type of thing is responsive, (b) the identity of the person who has possession, control or power of the record, thing, type of record or type of thing, and (c) that person's last known address.

9. **THIS COURT FURTHER ORDERS** that the Respondent, Quebecor Inc., shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that a record, thing, type of record or type of thing responsive to this Order has been destroyed and that the record, thing, type of record or type of thing would have been responsive to a Specification of this Order if it had not been destroyed. The Respondent, Quebecor Inc., shall in this written return of information state whether the record, thing, type of record or type of thing was destroyed pursuant to a record destruction or retention policy, instruction or authorization and shall produce that policy, instruction or authorization.

10. **THIS COURT FURTHER ORDERS** that the Respondent, Quebecor Inc., shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe it does not have records, things or information responsive to a Specification in this Order because the record, thing or information never existed. The Respondent, Quebecor Inc., shall, upon request of the Commissioner, make and deliver a further written return of information explaining why the record, thing or information never existed.

11. **THIS COURT FURTHER ORDERS** that where the Respondent, Quebecor Inc., previously produced a record or thing to the Commissioner the Respondent, Quebecor Inc., is not required to produce an additional copy of the record or thing provided that the Respondent, Quebecor Inc.: (1) identifies the previously produced

record or thing to the Commissioner's satisfaction; (2) makes and delivers a written return of information in which it agrees and confirms that the record or thing was either in the possession of the Respondent, Quebecor Inc., on premises used or occupied by the Respondent, Quebecor Inc., or was in the possession of an officer, agent, servant, employee or representative of the Respondent, Quebecor Inc.; and where this is not the case, the Respondent, Quebecor Inc., shall make and deliver a written return of information explaining the factual circumstances about the possession, power, control and location of such record or thing; and (3) receives confirmation from the Commissioner that such record or thing need not be produced.

12. **THIS COURT FURTHER ORDERS** that where the Respondent, Quebecor Inc., produces records or things or delivers written returns of information that are, in the opinion of the Commissioner, adequate for the purposes of the Inquiry, the Commissioner may, by written notice, waive production of any additional records, things or information that would have otherwise been responsive to the Order.

13. **THIS COURT FURTHER ORDERS** that the Respondent, Quebecor Inc., shall make and deliver a written return of information that:

    a. describes the authority of the person to make the written return of information on behalf of the Respondent, Quebecor Inc.;

    b. includes a statement that, in order to comply with this Order, the person has made or caused to be made:

        i. a thorough and diligent search of the records, things and information in the possession, control or power of the Respondent, Quebecor Inc.;

        ii. appropriate enquiries of the Respondent's, Quebecor Inc.'s, personnel; and

c. states the person has examined the records and things produced and written returns made and delivered pursuant to the Order and that those records, things and written returns are, to the best of his or her knowledge and belief, correct and complete in all material respects.

14. **THIS COURT FURTHER ORDERS** that the returns of records shall be completed within 60 days of the service of this Order, and written returns of information shall be completed within 30 calendar days of the service of this Order.

15. **THIS COURT FURTHER ORDERS** that the Respondent, Quebecor Inc., shall produce all records and things and deliver all written returns of information to the Commissioner at the following address:

Competition Bureau
Mergers Directorate
Place du Portage Phase I
50 Victoria Street
Gatineau, Quebec K1A 0C9

Attention: Laura Sonley, Sorina Sam, Marie-Hélène Brière

a. communications or inquiries regarding this Order shall be addressed to:

Department of Justice
Competition Bureau Legal Services
Place du Portage Phase I
50 Victoria Street
Gatineau, Quebec K1A 0C9

Attention: Derek Leschinsky, Steve Sansom, Katherine Rydel

16. **THIS COURT FURTHER ORDERS** that this Order may be served in person or by means of facsimile machine, electronic mail (with acknowledgement of receipt) or registered mail on a duly authorized representative of the Respondent(s) or on counsel for the Respondent(s) who have agreed to accept such service.

"Paul S. Crampton"

Chief Justice

SCHEDULES I AND II

Notice Concerning Obstruction

Any person who in any manner impedes or prevents, or attempts to impede or prevent, any inquiry or examination under the Act, or who destroys or alters or causes to be destroyed or altered, any record or thing that is required to be produced under section 11 of the Act may be subject to criminal prosecution for obstruction of justice, contempt of court or other federal criminal violation. Where a corporation commits such an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence, may also be prosecuted. Conviction of any of these offences is punishable by fine or imprisonment, or both.

Relevant Period

For the purpose of Schedules I and II, the Respondent, Quebecor Inc., shall unless otherwise specified: (i) produce records created or modified during the period from 1 January 2019 to 1 July 2021; and (ii) make and deliver written returns of information for the period from 1 January 2017 to 1 July 2021.

Definitions

For the purpose of Schedules I and II, the following terms shall have the respective meanings set out below and any grammatical variations of those terms shall also have the corresponding meanings:

"**5G**" means 5th generation technology;

"**Act**" means the Competition Act, R.S.C., 1985, c. C-34, as amended;

"**Affiliate**" has the same meaning as in subsection 2(2) of the Act;

"**Backhaul**" means the infrastructure used to connect wireless cell sites to one another and the core network, including but not limited to fibre and microwave connections;

"**Bureau**" means the Competition Bureau;

"**Company**" means Quebecor Inc., its domestic and foreign parents, predecessors, divisions, Affiliates, and all directors, officers, and employees of the foregoing;

"**MVNO**" a wireless communications service provider that does not own the Wireless Network over which it provides Wireless Services;

“**Person**” means any individual, partnership, limited partnership, firm, corporation, association, trust, unincorporated organization, or other entity, including Company;

“**Proposed Transaction**” means the proposed acquisition of Shaw Communications Inc. by Rogers Communications Inc. as described in Rogers and Shaw news releases dated March 15, 2021;[1]

“**Record**” has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, mobile phone text messages, messages using third party messaging applications, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;

“**Relevant Area**” means (unless otherwise specified in a particular paragraph or subparagraph of this order) Canada;

“**Senior Officer**” means the chairperson, president, chief executive officer, vice-president, secretary, treasurer, chief financial officer, chief operating officer, general manager, managing director, or any individual who performs their functions;

“**Wireless Network**” means any infrastructure used to provide Wireless Services; and

“**Wireless Services**” means the provision of mobile communication services including voice, text, data, mobile broadband internet, and applications to consumers and business users of mobile devices excluding tablets and internet of things devices.

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[1] Rogers (2021). Rogers and Shaw to come together in $26 billion transaction, creating new jobs and investment in Western Canada and accelerating Canada’s 5G rollout.
Shaw (2021). Rogers and Shaw to come together in $26 billion transaction, creating new jobs and investment in Western Canada and accelerating Canada’s 5G rollout.

SCHEDULE I

RECORDS TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1)(b) OF THE ACT

1. Provide all Records, prepared or received by a Senior Officer relating to the Company's assessment of the Proposed Transaction with respect to competition, competitors, market shares, markets, pricing strategies, and investment relating to Wireless Services, including related to 5G, implications for pre-existing or potential future network sharing agreements, the potential for sales growth or expansion into new products or geographies, and alternative transactions involving either of the merging parties.

2. Provide all reports, studies, surveys, analyses, strategic, business, and marketing plans prepared or received by a Senior Officer with respect to Wireless Services in the Relevant Area relating to the entry by the Company into any new geographic area outside of Quebec.

3. Provide all Records prepared or received by a Senior Officer, with respect to Wireless Services in the Relevant Area (excluding Quebec except in relation to Records relating to Rogers) relating to negotiations with any Person regarding actual or potential agreements, including agreement renewals, to share or access any Wireless Network including but not limited to MVNO access, spectrum, towers, Backhaul, or roaming.

4. Provide a copy of all agreements in force at any time during the Relevant Period with respect to Wireless Services relating to:

   (a) actual or potential sharing of any component of a Person's Wireless Network;

   (b) resale of Company's Wireless Network; and/or

   (c) jointly building or expanding a Wireless Network.

SCHEDULE II

WRITTEN RETURNS OF INFORMATION TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1)(c) OF THE ACT

5. For Wireless Services, provide a current organizational chart and identify the individuals from Quebecor Inc. or Vidéotron Ltée. who are at the Director level or above and will be searched for the purpose of responding to this Order, including their name, title, and a description of their roles and responsibilities.

6. Provide the following annual data related to Wireless Services in the Relevant Area for each wireless service plan offered by the Company and by customer postal code:

    (a) average number of subscriber lines over the year;

    (b) total gross subscriber line additions for the year;

    (c) total net subscriber line additions for the year;

    (d) total wireless service revenue for the year; and

    (e) total wireless service data usage in gigabytes for the year.

7. Provide the following data related to Wireless Services in the Relevant Area for each wireless service plan offered by the Company:

    (a) plan ID to link with subscriber data (requested in Specification #6);

    (b) plan provider brand (e.g. Fizz, Videotron)

    (c) plan description;

    (d) device category (e.g. mobile phone, tablet)

    (e) pre-paid or post-paid indicator;

    (f) shared plan indicator;

    (g) first or additional line indicator;

(h) whether the plan includes a device or device subsidy;

(i) Plan limits for each included service (e.g. voice minutes, data);

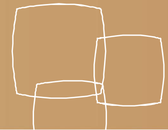
(j) Plan speed limits (e.g. "3G" plans); and

(k) Additional plan restrictions (e.g. data throttled when roaming or over plan limit).

SCHEDULE III

E-PRODUCTION GUIDELINES

Competition Bureau Canada   Bureau de la concurrence Canada



Enforcement Guidelines

Production of Electronically Stored Information

Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

For information on the Competition Bureau's activities, please contact:

Information Centre
Competition Bureau
50 Victoria Street
Gatineau QC K1A 0C9

Tel.: 819-997-4282
Toll free: 1-800-348-5358
TTY (for hearing impaired): 1-800-642-3844
Fax: 819-997-0324
Website: www.competitionbureau.gc.ca

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Cat. No. Iu54-54/2015E-PDF
ISBN 978-0-660-01970-3

2015-04-28

Aussi offert en français sous le titre Production de renseignements stockés électroniquement.

PREFACE

The Competition Bureau (the "Bureau"), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the "Act"), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau has issued these guidelines for the Production of Electronically Stored Information ("ESI") to promote the efficient processing and review of any electronic production received by the Bureau and to resolve any details before parties collect and produce responsive records. Transparency regarding the Bureau's preferences for receiving ESI improves predictability and helps producing parties make informed decisions. These guidelines reflect the Bureau's current preferences based on existing technologies used by the Bureau to process and review ESI and will be updated, as required, where the Bureau adopts new or different technologies.

John Pecman
Commissioner of Competition

I. TABLE OF CONTENTS

- 1. INTRODUCTION 1
- 2. APPLICABILITY OF THE GUIDELINES 1
- 3. ONGOING COMMUNICATION 2
- 4. TECHNICAL INSTRUCTIONS 2
- HOW TO CONTACT THE COMPETITION BUREAU 5

SCHEDULES

- SCHEDULE A 6
- SCHEDULE B 6

1. INTRODUCTION

These guidelines for the production of electronically stored information (“ESI”) set out the Competition Bureau’s (the “Bureau”) preferred formats for receiving ESI produced in response to compulsory processes and, in certain instances, produced voluntarily in the course of an inquiry or investigation under the *Competition Act* (the “Act”).

The Bureau continuously strives to carry out its mandate in the most efficient and effective means possible. The receipt of ESI in a format set out below will assist the Bureau in achieving that objective through the reduction of processing and reviewing times and will avoid unnecessary costs and delays associated with unusable productions. Early and regular communication among the Bureau, producing parties and their counsel regarding production methodologies and formats is encouraged. Given the technical nature of the subject matter, it is also beneficial to involve persons with the requisite technical expertise, whether in-house or those of a third-party service provider, when using these guidelines, including participating in discussions with Bureau representatives regarding the production of ESI.

These guidelines reflect the Bureau’s current preferences based on existing technologies used by the Bureau to process and review ESI and will be updated, as required, where the Bureau adopts new or different technologies.

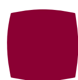
These guidelines do not address the type or scope of information that may be required or requested by the Bureau in the course of an inquiry or an investigation, nor do they address the Bureau’s preferred practices regarding the production of non-electronic records or other things, except where those records are converted to ESI.

2. APPLICABILITY OF THE GUIDELINES

The Bureau generally seeks production in accordance with these guidelines when seeking a court order under section 11 of the Act or under the *Criminal Code*. Further, the Bureau expects that producing parties will adhere to these guidelines in the following instances:

- responding to a supplementary information request issued under subsection 114(2) of the Act;
- submitting a production pursuant to participation in the Bureau’s Immunity or Leniency Programs; and
- submitting information voluntarily.

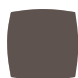
In this regard, a copy of the guidelines will generally be incorporated in or appended to an order or request for information.



3. ONGOING COMMUNICATION

Bureau staff will contact producing parties shortly following the issuance of an order or request for information to which these guidelines apply and will be available for ongoing dialogue regarding the production of ESI.

Producing parties, together with their technical staff and/or third-party service provider, are strongly encouraged to speak with Bureau staff (case officers and technical staff) prior to collecting and prior to producing ESI to discuss production details, including the manner in which ESI is stored, the types of information that are available on the electronic source and the format of production.



4. TECHNICAL INSTRUCTIONS

4.1 All ESI (i.e., information readable in a computer system) should be produced free of computer viruses or malware, be accessible, readable and printable, and be devoid of passwords or encryption.

4.2 All ESI should be produced in its original electronic format (i.e., native format), except where near-native format is required by subsections 4.3.2 or 4.6 or where an image production is produced as per subsection 4.8. Detailed instructions are set out in Schedule A for production using computer systems without application export capabilities and in Schedule B for production using litigation application exports. The Bureau's preference is to receive ESI in accordance with Schedule B.

4.3 Where a record being produced is part of a family, all parent and child records should be produced and the parent/child relationship should be preserved. A family is a collection of pages or files produced manually or by a software application, constituting a logical single communication of information, but consisting of more than one single stand-alone record. Examples include:

4.3.1 a fax cover, the faxed letter, and an attachment to the letter, where the fax cover is the parent and the letter and attachment are each a child.

4.3.2 email repositories (e.g., Outlook .PST, Lotus .NSF) can contain a variety of records, including messages, calendars, contacts, and tasks. For purposes of production, all parent records, both native (e.g., documents, spreadsheets, presentations) and near-native email, calendar, contacts, tasks, notes and child records (e.g., object linking and embedding items and attachments of files to

emails or to other parent records) should be produced, with the parent/child relationship preserved. Similar items found and collected outside an email repository (e.g., .MSG, .EML, .HTM, .MHT) should be produced in the same manner; and

4.3.3 archive file types (e.g., .zip, .rar) should be uncompressed for processing. Each file contained within an archive file should be produced as a child to the parent archive file. If the archive file is itself an attachment, that parent/child relationship should also be preserved.

4.4 Hard copy or paper records produced as ESI should be produced as single page TIFF images with a resolution of 300 dpi (dots per inch) and OCR generated text. The records should be produced as they are kept, reflecting attachment relationships between records and information about the file folders within which the record is found. Where colour is required to interpret the record, such as hard copy photos, and certain charts, that image should be produced in colour. These colour images are to be produced as .jpg format. Hard copy photographs should be produced as colour .jpg, if originally in colour, or greyscale .tif files if originally in black and white.

The following bibliographic information, if it is available, should also be provided for each record:

a. document ID
b. date
c. author / author organization
d. recipient / recipient organization

4.5 The records produced should be indexed as being responsive to the applicable paragraphs or subparagraphs in the [Order/Request].

4.6 Each database record submitted in response to a paragraph or subparagraph of the [Order/Request]:

4.6.1 should be produced whole, in a flat file, in a non-relational format and exported as a delimited text file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^Field1^|^Field2^|^Field3^ etc.); and

4.6.2 should include a list of field names; a definition for each field as it is used by the producing party, including the meanings of all codes that can appear as field values; the format, including variable type and length, of each field; and the primary key in a given table that defines a unique observation.

4.7 With regard to de-duplication:

- 4.7.1 for investigations relating to Part VI of the Act, all copies of records should be provided; and
- 4.7.2 for investigations relating to Parts VII.1 and VIII of the Act, the producing party may use de-duplication or email threading software if the producing party provides the Bureau with a written description of the proposed process to be used, including what is considered a duplicate, and the Bureau confirms that the deployment of such process permits the producing party to comply fully with the [Order/Request].

4.8 Documents requiring redaction pursuant to any claim of privilege should be produced as single-page TIFF or multi-page PDF images and designated "Redacted" in the field as described in Schedule B. Appropriately redacted searchable text (OCR of the redacted images is acceptable), metadata, and bibliographic information must also be provided. All documents that are part of a document family that includes a document withheld pursuant to any claim of privilege will be designated "Family Member of Privileged Doc" in the field as described in Schedule B for all other documents in its family. Placeholder images with BEGDOC#, FILENAME, FILEPATH and reason withheld (e.g., "Privileged") should be provided in place of the document images of the privileged document.

4.9 All ESI should be provided on portable storage media appropriate to the volume of data (e.g., USB/flash drive, CD, DVD, hard drive) and should be identified with a label setting out the matter name, the contents and the date of production. Each medium should contain no more than 250,000 files (e.g., native ESI or images or a combination of both).

4.10 In the event that ESI is delivered in a format that is not one of the formats set out in Schedule A or Schedule B, the ESI should be provided along with all available instructions and other materials, including software, as necessary for the retrieval and use of the ESI (subject to any software licensing restrictions, which the producing party and the Bureau should discuss in advance of production).

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Website

www.competitionbureau.gc.ca

Address

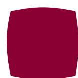
Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone

Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-800-642-3844

Facsimile

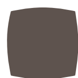
819-997-0324



SCHEDULE A

Computer Systems with No Application Export Capabilities

1. ESI generated by office productivity suite software should be produced in its native format.
2. Emails should be produced in their near-native format. Where an email has attachments, the attachments should be left embedded in the native file and not extracted separately.



SCHEDULE B

Litigation Application Exports

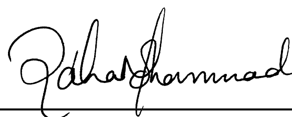
1. A load file (e.g., Opticon (OPT), IPRO (LFP), Summation (DII) or Ringtail (MDB)) and all related ESI should be produced in native format except where near-native format is required by subsections 4.3.2 and 4.6.
2. Within the delimited metadata file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^Field1^|^Field2^|^Field3^ etc.), and depending on the nature of the ESI, the following fields should be provided:

   DOCID
   BEGDOC
   ENDDOC

BEGATTACH
ENDATTACH
FILEPATH
PARENTBATES (bates number of parent record)
CHILDBATES (bates number(s) of any child records)
MD5HASH (MD5HASH of the native format ESI)
TEXTPATH (link to extracted text on the production media for tiffs only)
NATIVEPATH (link to any files produced in native or near-native format on the production media)
CUSTODIAN
ALLCUSTODIAN
TO
FROM
AUTHOR
CC
BCC
SUBJECT/TITLE
FILENAME
DOCDATE
DATESENT
TIMESENT
DATECREATED
TIMECREATED
DATELASTMOD
TIMELASTMOD
DATEACCESSED
TIMEACCESSED
SPECIFICATION
FILEEXTENSION
REDACTED
FAMILYMEMBERPRIVILEGEDDOC

3. The ESI produced should be indexed by using the ‘SPECIFICATION’ field as being responsive to the paragraphs or subparagraphs in the [Order/Request]. If multiple values exist for the specification, they should be separated by a semi-colon (e.g. 1a;1b;2a, etc.).

This is **Exhibit "G"** to the affidavit of Stephen Moon, affirmed remotely by Stephen Moon stated as being located in the city of Gatineau in the province of Quebec, before me at the city of Gatineau in the province of Quebec, on July 21, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.



Commissioner of Oaths etc.

Raha Araz Mohammad
Commissioner of Oaths etc.
Province of Ontario
LSO P15816.

Information Bulletin on Merger Remedies in Canada

Bulletin

September 22, 2006

Table of contents

- Preface
- I. Objectives of remedial action
- II. Designing remedies
- III. Implementing remedies
- IV. Trustee provisions
- V. Confidential schedules
- VI. Compliance and enforcement of merger remedies
- VII. International coordination and cooperation

Preface

This Bulletin sets out the Competition Bureau's ("the Bureau")current policy on merger remedies. [1] It is intended to provide guidance on the objectives for remedial action and the general principles applied by the Bureau when it seeks, designs, and implements remedies. While such principles are

essential elements, which will be taken into account in all cases where remedial action is required, it is important to realize that all remedies will be tailored to the specific facts and circumstances of each case. Remedies will also be tailored according the Bureau's ongoing experience regarding the efficacy of previously implemented remedies. In other words, the Bureau will apply a principled yet flexible and evolving approach to designing and implementing merger remedies.

To facilitate negotiated settlements between merging parties and the Bureau, a template consent agreement, which generally follows the principles articulated in this Bulletin, is available on the Bureau's website. [2] This template consent agreement sets out the Bureau's general expectations; however, the terms and conditions of each consent agreement will be tailored to the specific facts and circumstances of each case. During merger remedy negotiations, it is the practice of the Bureau to prepare the first draft of any consent agreement and to retain carriage over the draft document throughout any negotiations that follow.

I. Objectives of remedial action

1. Remedies are required when a merger or proposed merger ("merger") is likely to prevent or lessen competition substantially in one or more relevant markets. In such cases, the Commissioner of Competition ("the Bureau" or "the Commissioner") [3] will take remedial action to prevent a merged entity, alone or in coordination with other firms, from having the ability to exercise market power, as a result of the merger. [4] When the Bureau believes that a merger is likely to prevent or lessen competition substantially, it can either apply to the Competition Tribunal ("Tribunal") to challenge it under section 92 of the

Competition Act [5] ("the Act"), or negotiate remedies with the merging parties in order to resolve the competition concerns by consent. [6]

2. The standard for achieving an acceptable remedy in either a contested or consent proceeding is set out by the Supreme Court in *Canada (Director of Investigation and Research) v. (Versus) Southam Inc. (Incorporated)* [7] In this case, the Court concluded that "the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger." [8] Throughout this Bulletin, this standard is referred to as either "eliminating the substantial lessening or prevention of competition" or, for ease of reference, as "preserving competition" [9] in the relevant markets.
3. Eliminating the substantial lessening or prevention of competition sometimes means that the remedy must go beyond that which is necessary to restore competition to an otherwise acceptable level. To this end, the Supreme Court, in *Southam*, emphasized the importance of ensuring that the remedy **fully** eliminates the substantial lessening (or prevention) of competition: "If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate, but from a legal point of view, such a remedy is not defective." [10]
4. When a merger is likely to prevent or lessen competition substantially, the Bureau generally attempts to negotiate an agreement with the merging parties without proceeding to litigation. This approach

enables a less costly and more expeditious resolution of the matter. In negotiating a resolution, the Bureau aims to address competition concerns in all markets where a likely substantial lessening or prevention of competition has been identified. In cases where it is not possible to address all such competition issues on consent, the Bureau is prepared, where appropriate, to consider limiting or narrowing the scope of litigation. This enables the uncontentious parts of a merger to proceed while the Bureau challenges only those portions that are likely to result in a substantial lessening or prevention of competition before the Tribunal. Such settlements normally require the merging parties to agree, at a minimum, to hold separate the asset(s) and/or business(es) [11] that could be the subject of an order. Hold-separate provisions are described more fully in sections II and III of this Bulletin.

5. If a merger does proceed to litigation (i.e. (that is), being challenged under section 92 of the Act), the Bureau will identify proposed remedies in its application to the Tribunal. [12] As set out in section 92(1)(e) and 92(1)(f), the Act is very specific about the remedies the Tribunal can impose in contested cases. In the case of a merger that has closed, remedial action is limited to either dissolution of the merger or disposition of assets or shares. With a proposed merger, the Tribunal can only direct that the merger or part of the merger not proceed, or otherwise prohibit certain actions by the merging parties.

6. With the consent of the merging parties and the Bureau, in the cases of either a proposed merger or a merger that has closed, the Act allows for a wider range of remedies to be considered. [13] To be effective, a remedy must eliminate the substantial lessening or prevention of competition resulting from the merger. Ultimately, an effective remedy is based on the unique circumstances of the case and theory of competitive harm, as alleged by the Bureau or determined by

the Tribunal. Accordingly, an effective remedy could include addressing any impediments to competition that would otherwise allow remaining or potential competitors to constrain market power following the merger. [14]

7. In addition to being effective, remedies must also be enforceable and capable of timely implementation so that the substantial lessening or prevention of competition can be eliminated as quickly as possible. Accordingly, in the case of divestitures, an acceptable buyer of divested asset(s) ("buyer") must be provided with those asset(s) necessary to achieve the goal of eliminating the substantial lessening or prevention of competition, as quickly as possible. Careful consideration is given to identifying the asset(s) required for a buyer to compete effectively over the long term.

II. Designing remedies

8. When designing remedies, terms must be clear and measures must be sufficiently well defined. This is to ensure timely implementation of the remedy and either no or minimal future monitoring by the Bureau. Additionally, clear terms and defined measures ensure that such remedies can be enforced by the Bureau or the Tribunal, which includes being enforced by way of contempt proceedings should a party not comply with them. [15] The range of remedies considered by the Bureau is described below.

A. Structural remedies [16]

9. The anti-competitive effects that are likely to arise from a merger result from a structural change to the market. Unless structural changes that have harmful effects on competition are challenged, they are often

long lasting and can adversely affect innovation, economic performance and consumer welfare. Accordingly, structural remedies are usually necessary to eliminate the substantial lessening or prevention of competition arising from a merger.

10. Structural remedies are typically more effective than behavioural remedies. For example, behavioural remedies may prevent the merged entity from efficiently responding to changing market conditions and may restrain potentially pro-competitive behaviour by the merged entity and/or other market participants. Furthermore, it is difficult to determine the appropriate duration of a behavioural remedy, since it is often difficult to gauge how long it will take for new entry or expansion to be established in the relevant market(s). Competition authorities and courts generally prefer structural remedies over behavioural remedies because the terms of such remedies are more clear and certain, less costly to administer, and readily enforceable. [17] Disadvantages with respect to the costs associated with behavioural remedies include:

- the direct costs of monitoring the activities of the merged entity, and the merged entity’s adherence to the terms of the remedy;
- the costs to other market participants, who must rely on arbitration proceedings arising from self-governing mechanisms; and
- the indirect costs associated with any efforts by the merged entity to circumvent the spirit of the remedy.

11. Most structural remedies involve a divestiture of asset(s) rather than an outright prohibition or dissolution of the merger. [18] However, prohibition or dissolution will be required when less intrusive remedies, which would otherwise eliminate the substantial lessening or prevention of competition, are unavailable. The remainder of this

section describes the essential components of designing remedies that require a divestiture of asset(s).

i. Divestitures

12. Divestitures seek to:
    i. preserve competition through the sale of asset(s) to a new market participant; [19] or
    ii. strengthen an existing source of competition through the sale of asset(s) to an existing market participant.

13. The following criteria must be met for a divestiture to provide effective relief to an anti-competitive merger:

- the asset(s) chosen for divestiture must be both viable and sufficient to eliminate the substantial lessening or prevention of competition;
- the divestiture must occur in a timely manner; and
- the buyer must be independent and have both the ability and intention to be an effective competitor in the relevant market(s).

(a) Viability of the asset(s) chosen for divestiture

14. Divestitures can include one (or more) standalone operating business(es) and/or one or more components of a standalone operating business(es). Importantly, divestitures must include all assets necessary for the buyer to be an effective long-term competitor who will preserve competition in the relevant market(s). While divestitures of asset(s) or business(es) within the relevant market are usually sufficient to address competition concerns, in certain circumstances it may be necessary to include asset(s) outside the relevant market. For example, this may be the case when economies of scale and/or scope

are important or when the asset(s) related to the relevant market do not comprise a standalone operating business.

15. A divestiture of a standalone operating business(es) means that the whole of one of the merging parties' overlapping businesses is to be divested. This includes all necessary management, personnel, manufacturing and distribution facilities, retail locations, individual products or product lines, intellectual property (e.g. (for example) including patents or brands), administrative functions, supply arrangements, customer contracts, government and regulatory approvals, leases, and other components of an operating business. Such a divestiture is required, for example, when something less than a standalone operating business cannot be separated or when the creation of a viable and effective competitor depends on the divestiture of the whole business unit and its associated asset(s).
16. A divestiture of one or more components of a standalone operating business means that less than the whole of one of the merging parties' overlapping businesses is to be divested. Provided it eliminates the substantial lessening or prevention of competition arising from a merger, a divestiture of less than a standalone operating business may be acceptable when some of the components needed to run the business are otherwise available. For example, a potential buyer of certain discrete asset(s) may not require certain administrative functions (e.g. (for example) human resources, or accounting) or distribution asset(s) of an ongoing business unit to become a viable and effective competitor if it already owns these capabilities or can readily obtain them from sources outside of the merged entity.
17. Divesting a standalone operating business increases the level of certainty that the remedy will be effective, since the business has

proven its ability to compete in the market and survive independently. Accordingly, the Bureau applies greater scrutiny to divestitures of less than a standalone operating business since there is limited or no proven track record that the components of the business will be able to operate both effectively and competitively. Furthermore, when divestitures of less than a standalone operating business consist primarily of intellectual property or other limited categories of assets, the Bureau will typically need to be satisfied, in advance of consenting to a remedy, that willing buyers, with the necessary capabilities, are available to purchase the asset(s). [20]

18. The Bureau also applies greater scrutiny to situations in which the proposed divestiture package is created out of a mixture of assets (i.e. (that is), referred to as a "mix and match" approach) from both merging parties. Mix and match remedies are often less successful at preserving competition, as such asset packages have an unproven track record of business viability and are subject to integration issues, which are usually more difficult to resolve than with divestitures comprised of a standalone operating business.
19. In light of these above reasons, the Bureau generally prefers a divestiture of a standalone operating business(es) from one merging party, normally the target company being acquired in the merger, to one buyer. [21] This approach reduces the uncertainty associated with both the viability of the divestiture package and integration issues, and limits the detrimental effects that could arise from the acquiring party in the merger obtaining confidential information about the asset(s) to be divested.
20. Prior to agreeing to a divestiture package, the Bureau may seek information from the marketplace. Such "market testing" is particularly

important in those situations where the marketability, viability, and ultimately the effectiveness of a divestiture package in eliminating the substantial lessening or prevention of competition arising from a merger, are uncertain or in doubt. Market testing may include seeking information from industry participants such as competitors, customers and suppliers, as well as from industry experts. [22]

21. In addition to considering whether a divestiture consisting of one (or more) standalone operating business(es) and/or one or more components of a standalone operating business(es) is required, the following provisions are helpful in ensuring the viability of the asset(s) to be divested and are therefore given careful consideration when designing remedies.

Hold-separate provisions

22. Once the Bureau determines that a merger is likely to lessen or prevent competition substantially, and identifies the scope of remedies necessary to address the competition concerns, the Bureau will normally require the merging parties to "hold separate" those asset(s) that could be the subject of a Tribunal order, until the divestiture is completed. [23] Hold-separate provisions preserve the Bureau's ability to achieve an effective remedy **pending its implementation**. [24] Hold-separate provisions also reduce the likelihood that the asset(s) will deteriorate during the divestiture process. Moreover, such provisions ensure the merging parties do not combine their operations or share confidential information before the divestiture occurs, thereby avoiding the problem of "unscrambling the eggs" if the merger has to be restructured at a later date. Hold separate provisions also preserve the Tribunal's flexibility to order an alternate remedy should the original divestiture not be effected.

23. The Bureau will usually require that hold-separate provisions apply to asset(s) beyond those that are to be divested pursuant to a consent agreement. In limited cases, such as those involving the divestiture of a standalone operating business, the Bureau may require the hold-separate provisions to cover only the portions of the merger that are likely to result in anti-competitive effects. Hold-separate provisions are further discussed in section III of this Bulletin: Implementing Remedies

Alternatives to hold-separate provisions

24. In very limited circumstances, it may be sufficient to direct the acquiring party, which must divest the asset(s)/business(es) ("the vendor"), to maintain the competitive viability of the asset(s) to be divested, without having to hold such asset(s) separate from the vendor's other operations. To this end, "maintenance provisions" rather than hold-separate provisions may be sufficient when:

- the asset(s) to be divested cannot operate on a standalone basis, but are discretely identifiable such that it would not be difficult to "unscramble the eggs"; and
- it can be demonstrated that there is *de minimus* risk of disclosing confidential or competitively sensitive information (e.g. (for example) if pricing and cost information is transparent in the industry, or if there are specific provisions in the consent agreement that will prevent disclosure of such information).

25. In such cases, the vendor must provide sales, managerial, administrative, operational, and financial support, as necessary in the ordinary course of business, so as to promote the continued effective operation of the asset(s). The vendor may also be required to honour all material contracts (e.g. (for example) sales and employment

contracts) and agree to other provisions to ensure the ongoing viability of the asset(s), including those provisions relating to maintaining employment. While the asset(s) may not need to be held separate, information about customers and sales for each of the merging parties' businesses should be kept segregated in order to both facilitate due diligence for the buyer during the divestiture period, and to maintain the competitive viability of the asset(s) to be divested.

Representations and warranties

26. To increase the attractiveness and viability of the divestiture package, the vendor must provide reasonable and ordinary commercial representations and warranties to the buyer. What is reasonable and ordinary will depend on the industry in question, as each industry may have unique requirements. Depending on the circumstances, such representations and warranties will usually need to remain in effect at least until all divestitures contemplated by the remedy are complete. [25] In addition, when necessary, the vendor must indemnify the buyer to offset liabilities that either cannot or should not be separated from the asset(s) to be divested. Following the appointment of a divestiture trustee ("trustee"), the trustee shall have the sole authority, with oversight and approval by the Bureau only, to determine the reasonable and ordinary commercial representations and warranties, for the purpose of effecting the divestiture. The vendor will agree to and accept such trustee determinations in the consent agreement.

(b) Ensuring timeliness and success of the divestiture

27. A remedy is most effective when it is achieved in a timely manner. Timeliness reduces uncertainty for all affected parties by ensuring that competition is preserved as quickly as possible, by minimizing the competitive harm, and by mitigating potential asset deterioration.

Fix-it-first

28. To eliminate the risks and uncertainty associated with implementing a remedy post-closing, merging parties are strongly encouraged to remedy competition issues arising from a merger by resolving them before closing the merger. A "fix-it-first" solution occurs when:

   i. the vendor is able to divest the relevant asset(s) to an approved buyer [26] prior to, or simultaneously with, the closing of the merger; or

   ii. there is a purchase and sale agreement in place, which identifies an approved buyer for a specific set of assets, and the divestiture is executed simultaneously with the merger.

29. The Bureau strongly prefers fix-it-first solutions. This type of remedy often provides an optimal resolution because it resolves competition issues up-front while giving certainty to the merging parties.

30. Acceptable fix-it-first solutions are typically structural in nature. A fix-it-first solution alleviates concerns about whether the remedy package will be marketable, ensures that the asset(s) in question do not deteriorate, and preserves competition in the relevant market(s) as expeditiously as possible. While fix-it-first solutions are still subject to Bureau approval, the registration of a consent agreement is typically not required. However, if the Bureau believes that the divestiture may be delayed until after the merger closes, or may not occur at all, the Bureau will likely require a consent agreement, as the divestiture will no longer be effected on a fix-it-first basis. The consent agreement may not have to be registered if the divestiture is actually completed before the merger has closed.

31. When fix-it-first solutions are not available, the following provisions are important in ensuring a timely and successful divestiture after the merger closes.

Time periods

32. Imposing and enforcing timely deadlines to the divestiture process improves the effectiveness of a remedy. The shorter the divestiture period, the less likely that factors such as the deterioration of assets, the loss of customers and/or key personnel, or otherwise, will cause the divestiture to be ineffective. Certain safeguards, such as hold-separate provisions, may lessen the degree to which the asset package may deteriorate. Such provisions are temporary and are designed to maintain the current state of the asset(s).

33. The Bureau typically agrees to provide the vendor with an initial fixed period of time ("initial sale period") to sell the remedy package at the best price and terms that the vendor can negotiate with potential buyers. The initial sale period will be between three and six months, [27] which is considered sufficient time in which to both initiate and complete the divestiture. The actual time period allotted for the initial sale period will normally be confidential. The Bureau may grant a short extension of this time period in exceptional circumstances, which will be determined on a case-by-case basis. During the initial sale period, the vendor will normally be required to meet certain milestones, which will be pre-determined on a case-by-case basis. [28] Compliance with such milestones must be reported to the Bureau at the Bureau’s request.

34. As further explained in section IV of this Bulletin, if the vendor cannot sell the asset(s) within the initial sale period, a trustee appointed by the Bureau will have a period of time ("trustee period"), the duration of which will be made public at the outset of the trustee period, in order to complete the divestiture without any limitations on price. During the trustee period, the trustee shall have the authority to control the

divestiture process, subject to oversight and approval by the Bureau only.

No minimum price

35. To increase the likelihood that the divestiture will occur, the Bureau will require that, during the trustee period, the remedy package be divested at no minimum price. [29] As the sale price and terms of which the divestiture package are to be determined by the trustee, the Bureau will not agree to provisions or terms that refer in any way to a minimum or floor price. [30] The trustee’s primary obligation is to divest the remedy package to a qualified buyer at no minimum price.

"Crown jewel" provisions

36. The Bureau’s goal is to design a remedy package that will eliminate the substantial lessening or prevention of competition arising from a merger without going beyond what is necessary to resolve such competition concerns. However, given the prospective nature of proposed divestitures, there is frequently some uncertainty as to whether the remedy will be viable (i.e. (that is), whether the divestiture will be completed). Thus, an additional asset package (commonly referred to as a "crown jewel") may be required as part of the remedy in order to reduce any such uncertainty.
37. Crown jewel provisions allow for specified asset(s) to be added or substituted into the initial divestiture package of asset(s), which limits any uncertainty by increasing the viability of the remedy. Importantly however, while crown jewel provisions do provide the vendor with an incentive for a timely completion of the initial divestiture package, such provisions are not intended to be punitive. That is, those asset(s) that comprise the crown jewel will, as much as possible, relate to the competitive harm. [31] In other words, crown jewel provisions are

intended to not only provide the vendor with an incentive to divest the initial divestiture package, but also to provide the Bureau with confidence that if the initial divestiture package is unsuccessful, there will still be a viable remedy available.

38. While crown jewel provisions are usually determined before the trustee period commences, such provisions are triggered only during the trustee period. Both the existence and content of crown jewel provisions are not made public until the trustee period commences. Crown jewel provisions are not required in a fix-it-first solution.

(c) Independence and competitiveness of the buyer

39. The suitability of a buyer (i.e. (that is), a market participant) is directly related to the viability and sufficiency of an asset package. An acceptable buyer must have both the ability and incentive to compete, so that competition will be preserved in the relevant market(s). The buyer must operate independently of the merged entity in all aspects of competition, even if various means of support (e.g. (for example) supply arrangements and other forms of technical assistance) are part of the remedy package for a transitional period of time. Ultimately, the acceptability of a buyer will depend on the particular facts of the case and will be guided by the Bureau's understanding of the competitive dynamics in the market and the theory of competitive harm (e.g. (for example) unilateral and/or coordinated effects). The approval of any buyer, whether proposed by the vendor or the trustee, during either the initial or trustee sale period respectively, is a matter for the Bureau alone to determine.

40. The capabilities and resources of prospective buyers are especially critical with divestitures consisting of less than an autonomous business where the package of assets lacks an established

infrastructure. In such cases, a successful outcome depends on finding an appropriate match between the asset package and the buyer. It may therefore sometimes be necessary for the vendor to id entify the buyer up-front before the Bureau agrees to the remedy package. This is known as an "up-front buyer provision".

41. An up-front buyer provision is different from a fix-it-first solution in that the buyer of the divested asset(s) must be approved by the Bureau in advance of registering a consent agreement, but the asset(s) are divested after the merger closes. This approach helps ensure the timeliness of the divestiture and the viability of the asset(s) to be divested, and may avoid the need for hold-separate provisions. [32] Since up-front buyer provisions do not entail an open bidding process or public offering, the Bureau will exercise increased vigilance to ensure the buyer and vendor are independent of one another.

B. Quasi-Structural remedies [33]

42. In certain circumstances, an effective remedy may require the merging parties to take some action, in addition to or other than a divestiture, to remedy competition concerns. While allowing the merged entity to retain ownership of the asset(s) acquired in the merger, certain actions may have structural implications for the marketplace. This includes those actions that reduce barriers to entry, provide access to necessary infrastructure or key technology, or otherwise facilitate entry or expansion. Examples, under certain circumstances, include:

- licensing intellectual property;
- removing anti-competitive contract terms, such as non-competition clauses and restrictive covenants;

- granting non-discriminatory access rights to networks, especially when horizontal overlap is coupled with both vertical integration and a risk of foreclosure of inputs; or
- supporting the removal or reduction of quotas, tariffs, or other impediments imposed by regulatory bodies or industry groups, which may be achieved with the help of efforts by the merged entity.

43. While such measures may help preserve a competitive environment, it is necessary to fully examine their effects in the context of the particular industry as a whole. The Bureau will only accept quasi-structural remedies, if, once fully implemented, they adequately eliminate the substantial lessening or prevention of competition arising from the merger in the relevant market(s) on a continuing basis without the need for future intervention or monitoring. In other words, such remedies must satisfy the same requirements as any other structural remedy.
44. Remedial action involving intangible assets, such as intellectual property, is often accomplished through licensing rather than through an outright divestiture. While licensing agreements allow the merged entity to retain ownership rights to patents, trademarks, or other intellectual property, they may be quasi-structural when they reduce or eliminate an important barrier to entry by enabling one or more third parties (i.e. (that is), parties who otherwise possess the necessary capabilities) to participate in markets that, in the absence of the licence, would be foreclosed to them. Licensing can also be efficiency enhancing since it is less likely to discourage future research and development.
45. Before accepting a licensing agreement as a remedy, the Bureau will determine whether the scope of the licence must be:

i. exclusive to the licensee;
ii. co-exclusive, such that the merged firm can retain certain rights to use these asset(s), including the right to operate under the licensed intellectual property; or
iii. non-exclusive, such that multiple firms can have access to the intellectual property through sub-licensing provisions.

46. The scope of the licensing agreement depends on the nature of the competitive harm and the particular facts of the case. For example, a licence will likely be exclusive only to the licensee when the intellectual property is product-specific and the merged entity can rely on its other intellectual property to compete effectively with the licensee in the relevant market. In contrast, it may be appropriate to allow the merged entity to retain certain usage rights when the intellectual property being licensed is primarily used for other products that are not part of the relevant market, and the merged entity requires such intellectual property for such other products. Sub-licensing may be appropriate when the owner of the intellectual property, pre-merger, previously licensed to multiple licensees and will likely engage in sub-licensing to other firms in the future.

C. Combination remedies

47. A combination remedy refers to a structural divestiture combined with other relief that is behavioural in nature. Certain behavioural terms may help ensure an effective remedy is ultimately implemented when they supplement or complement the core structural remedy, especially if used during a transition or bridging period until a competitive market structure develops. Including behavioural components in a remedy may be useful if such components provide a buyer and/or

other industry participants with the ability to operate effectively and as quickly as possible.

48. Examples of behavioural remedies that may support structural remedies include:

- short-term supply arrangements for the buyer of the asset(s) to be divested, at a price defined to approximate direct costs. This is especially effective if the buyer requires an immediate supply of inputs, but needs a short period of time to establish its own supply management capabilities;
- the provision of technical assistance to help a buyer or licensee train employees in complex technologies, especially for those technologies related to intellectual property;
- a waiver by the merged entity of restrictive contract terms that lock-in customers for long periods of time. This is especially effective when other switching costs deter customers from moving their business to the buyer of the divested asset(s); and
- codes of conduct, which can be readily monitored and expeditiously enforced by a third party (e.g. (for example) through binding arbitration procedures).

While such behavioural remedies may be important to the success of the buyer, and thus the preservation of competition, they would not, on their own, be effective alternatives to a successful structural remedy. Furthermore, as with all remedies, such behavioural remedies must require either minimal or no ongoing monitoring by the Bureau. Additionally, such remedies must be enforceable by either the Bureau or the Tribunal. If

behavioural remedies do not meet such monitoring and enforceability criteria, the Bureau will neither agree to such remedies nor seek to impose them.

D. Standalone behavioural remedies

49. Standalone behavioural remedies are seldom accepted by the Bureau. It is difficult to design a behavioural remedy that will adequately replicate the outcomes of a competitive market. Even if such a remedy can be designed in clear and workable terms, it is likely to be less effective and more difficult to enforce than a structural remedy. Moreover, any attempt to provide for a standalone behavioural remedy usually imposes an ongoing burden on the Bureau and market participants, including the merged entity, rather than providing a permanent solution to a competition problem.
50. Standalone behavioural remedies may be acceptable when they are sufficient to eliminate the substantial lessening or prevention of competition arising from a merger, and there is no appropriate structural remedy. Additionally, as stated previously, standalone behavioural remedies must require either no or minimal future monitoring by the Bureau, and be enforceable by either the Bureau or the Tribunal. Otherwise, the Bureau will neither agree to such remedies nor seek to impose them.

III. Implementing remedies

i. Hold-separate provisions

51. Hold-separate provisions, previously discussed in section II of this Bulletin, are required in most consent agreements pending completion

of the agreed-upon remedy. [34] These provisions ensure that confidential information is not communicated to the vendor during the implementation phase of the remedy. These provisions also ensure that the designated asset(s) or business(es) to be divested are: preserved; economically viable; and operated at arm's length from the merged entity throughout both the initial and trustee sale periods. Hold-separate provisions may also be required when the vendor must make ongoing capital investments in, or otherwise support, the asset(s) to be divested during the implementation phase of the remedy.

52. Normally, it is necessary to immediately appoint an independent manager ("hold-separate manager") to operate the asset(s) to be divested until the divestiture is complete. The Bureau requires that a hold-separate manager have extensive experience in the market(s) in question and operate independently (i.e. (that is), at arm's length from the vendor). In addition, the vendor must transfer to the hold-separate manager all rights, powers, and authority necessary to perform his or her duties and responsibilities under the consent agreement. To this end, the vendor must not exercise any direction or control over the management of the asset(s) to be divested. The hold-separate manager will be responsible for the day-to-day management of the asset(s) to be divested and, if necessary, will report directly to an independent monitor.
53. The Bureau will normally require the appointment of an independent third party to monitor compliance with the consent agreement ("monitor"). [35] A monitor should have no ties, financial or otherwise, with the merging parties. The monitor will have complete access to all personnel, books, records, documents, facilities, or to any other relevant information that he or she requests. The monitor will ensure

that the vendor uses its best efforts to fulfill its obligations under the consent agreement. The monitor will report, in writing, to the Bureau, as set out in the consent agreement.

ii. Responsibilities of the vendor (general)

54. To keep the Bureau fully informed throughout the initial and trustee sale periods, the vendor must report to the Bureau in writing on a regular basis with respect to the status of the asset(s) to be divested, as well as the progress of the vendor's efforts to accomplish the divestiture. This allows the Bureau to monitor whether the vendor is making best efforts to complete the divestiture.
55. Reports should include a description of the divestiture process, including negotiations, and the identity of all third parties contacted and prospective buyers who have come forward. In addition, the Bureau may also request other information, such as correspondence between the vendor and prospective buyers and a description of the state of the asset(s) at the time of reporting. A description of any material changes in the value or status of the asset(s) to be divested, which could affect their market value, must also be reported. The Bureau will have the right to request additional information at any time regarding the progress of the proposed divestiture.
56. The vendor of the designated asset package will be responsible for payment of services of the hold-separate manager, the monitor, and, if the asset(s) are not sold during the initial sale period, the trustee. The vendor will also be responsible for indemnifying the trustee with respect to any expenses and non-payment of fees associated with the divestiture.

iii. Obtaining Bureau approval of a qualified buyer

57. In addition to approving the remedy package, the Bureau must approve the buyer of the divested asset(s), so as to ensure that such asset(s) will be operated by a vigorous competitor, and that the divestiture itself will not result in a substantial lessening or prevention of competition in the relevant market(s). Requiring such approval increases the likelihood that the buyer will preserve competition in the relevant market(s).
58. The Bureau's approval of a buyer is based on the following criteria:

   i. the divestiture of the asset(s) to the proposed buyer must not itself adversely affect competition;
   ii. the buyer must be independent (i.e. (that is), at arm's length) from the vendor;
   iii. the buyer must have the managerial, operational, and financial capability to compete effectively in the relevant market(s); and
   iv. the asset(s) being divested must be used by the buyer to compete in the relevant market(s) post-divestiture. This means that the asset(s) must be sold to a firm that will compete effectively in the market and have the intention to keep the asset(s) in the relevant market(s) after the divestiture process. This determination will be based, in part, on business plans that explain how the proposed buyer plans to compete in the future.

59. When a remedy package includes assets in several geographic areas, so as to address competition concerns in multiple local or regional markets, it may be necessary to approve more than one buyer. However, the Bureau's willingness to accept multiple buyers depends on the nature of the adverse effects that must be addressed with a remedy. For example, a single buyer is more likely to be required when

economies of scale and/or scope are important to ensuring the elimination of the substantial lessening or prevention of competition.

IV. Trustee provisions

60. When the sale of the asset(s) to be divested is not completed in the initial sale period, and in the manner contemplated by the consent agreement (or the divestiture order in contested cases), the Bureau will appoint a trustee to divest the asset(s). [36] As mentioned in section II of this Bulletin, the inclusion of trustee provisions provides some assurance that the asset(s) will be divested in a timely and effective manner. The trustee period, the duration of which shall be made public at the outset of the trustee period, will be between three and six months. The Bureau may grant a short extension of this time period in exceptional circumstances, which will be determined on a case-by-case basis.
61. Prior to the start of the trustee period, the trustee must be given sufficient time and info rmation to become familiar with the terms of the consent agreement and the asset(s) to be divested. This ensures that the divestiture process can proceed without delay at the initiation of the trustee period.
62. During the trustee period, the trustee will have the authority to control the divestiture process, subject to oversight and approval by the Bureau only. The vendor will not normally be included in the divestiture process, including negotiations. Furthermore, the vendor will have no contact with prospective purchasers, unless otherwise approved by the Bureau.
63. During the trustee period, the trustee must have full and complete access to personnel, books, records, facilities related to the asset(s) in

question, or any other information deemed relevant by the trustee to effect the divestiture. To facilitate the necessary degrees of access, the trustee will, among other things, be entitled to attend, as frequently as the trustee determines necessary, the physical premises of the vendor. The vendor will be required to respond, both promptly and fully, to all requests from the trustee. To this end, the vendor must identify a person who is responsible for responding to all trustee information requests.

64. The trustee will be required to report to the Bureau in writing, on a regular basis, all efforts to accomplish the divestiture. Such reports will include details on the steps being taken by the trustee to effect the divestiture, the identity of prospective buyers, and the status of negotiations with such prospective buyers.
65. The completion of the divestiture is subject to the Bureau's approval only, and must be made to a "qualified" [37] buyer who meets the criteria stipulated in the consent agreement (or divestiture order). The trustee shall use commercially reasonable efforts to negotiate the most favourable terms and conditions [38] available at that time, and if necessary to effect the divestiture, may sell the asset(s) at no minimum price. [39] The trustee's opinion of what constitutes "most favourable" terms and conditions is subject to approval by the Bureau only. As the trustee's primary obligation is to divest the remedy package to a qualified buyer, the vendor's right to challenge the terms and conditions of the divestiture is limited to situations whereby the trustee commits malfeasance, gross negligence, or acts in bad faith.
66. If at the end of the trustee period the trustee has submitted a divestiture plan or believes that the divestiture can be accomplished within a short period of time, the trustee period may be extended at

the Bureau's sole discretion. In the event that the asset(s) to be divested have not been divested within the trustee period (including any applicable extensions to this period), the Bureau may apply to the Tribunal for such order as is necessary to effect the divestiture [40] and the parties will submit in the consent agreement to the Tribunal's jurisdiction to grant such relief required to achieve that objective. Depending on the particular circumstances of the case, the Bureau may recommend to the Tribunal that other asset(s), or steps be taken, in addition to those required in the divestiture package, are needed to effect the divestiture.

V. Confidential schedules

67. The Bureau aims to be as transparent as possible with respect to the terms of consent agreements. However, at the request of the vendor, the Bureau may agree to let certain provisions of a negotiated settlement requiring divestitures remain confidential during the initial sale period only. In particular, the length of the initial sale period, the fact that there is no minimum price, and both the existence and the specific asset(s) that form part of the crown jewel package, may be considered by the Bureau for inclusion in confidential schedules to a consent agreement.
68. When such confidential schedules exist, bona fide prospective buyers who sign confidentiality agreements will have access to information about the initial asset package itself, but not to confidential schedules.
69. Once the trustee period begins, most terms will be made public, including the time period in which the divestiture must occur, all crown jewel provisions, and the fact that the divestiture package must be sold at no minimum price.

70. Full disclosure of the terms of a consent agreement will occur in the following circumstances:

- in multi-jurisdictional cases, where remedies are coordinated with other agencies, to the extent that terms are made public in the other jurisdictions; and
- upon completion of the divestiture(s) in a negotiated settlement.

VI. Compliance and enforcement of merger remedies

71. The Bureau will commit the necessary time and resources to ensuring the merged entity complies with the required remedies. During the implementation phase of the remedy, the Bureau will have the ability to interview officers, directors, employees, and agents of the merging parties, as necessary, to ensure compliance with the divestiture order.

72. Crafting clear terms that are readily enforceable and require little or no oversight is a key objective when designing remedies, and can effectively serve as a deterrent for non-compliance. In the Bureau’s experience, merged entities generally comply with the terms of negotiated settlements (or divestiture orders in contested cases). However, when non-compliance requires further enforcement action, the Bureau will take the necessary steps to ensure that the terms of the remedy are fully implemented.

73. The nature of the non-compliance will determine the type of action that will likely be taken by the Bureau. When substantive issues relating to competition arise, it may be sufficient, in some cases, to discuss such issues with the merged entity to determine whether non-compliance has been inadvertent. Where there is a disagreement

on the interpretation of the terms of the remedy, it may be necessary to apply to the Tribunal for an order that interprets or clarifies the agreement. Where a merged entity clearly and/or wilfully acts in contempt of a Tribunal order or a registered consent agreement, the Bureau will take appropriate action to enforce the terms of the settlement, as well as any other action that may be necessary. [41]

74. Moreover, in the event that a remedy package is not divested in the agreed-upon time periods, the Bureau retains the right to challenge the merger before the Tribunal to address the substantial lessening or prevention of competition under section 92 of the Act.

VII. International coordination and cooperation

75. The increasing number of global mergers has enhanced the need for communication, coordination, and cooperation among competition authorities in different jurisdictions. The Bureau uses a number of cooperation arrangements or agreements with its foreign counterparts to help facilitate information exchange, investigations, and ultimately the coordination of remedies. [42] When the Bureau requires confidential information from its foreign counterparts, such cooperation is facilitated by the provision of waivers by the merging and/or affected third parties to the antitrust authorities in foreign jurisdictions. [43] When foreign competition agencies require confidential information from the Bureau, such cooperation is subject to the confidentiality provisions of section 29 of the Act.

76. The Bureau will coordinate with other competition authorities on remedies when a worldwide or multi-jurisdictional merger is likely to have anti-competitive effects in Canada that are similar, or related to,

those that are likely to result in other jurisdictions. Coordination can involve communicating, as developments occur within jurisdictions, participating in joint discussions with the merging parties, and fashioning parallel remedies in Canada that are similar to those in other jurisdictions.

77. The greater the extent to which competition issues identified in Canada are similar to those in other jurisdictions, the greater the likelihood that coordinated remedies will be effective. As Canadian assets are involved in many global mergers, coordination of remedies is of particular importance for the Bureau, since it increases the likelihood that remedies will be consistently applied across jurisdictions. Consistent and coordinated remedies help avoid potential frictions stemming from situations whereby a remedy in one jurisdiction may not be acceptable in another. Consistent and coordinated remedies can also lead to a more effective resolution than would be attained through independent enforcement action. Furthermore, such remedies reduce uncertainty for businesses.

78. To resolve competition concerns within Canada, the Bureau may either take specific action or it may determine that action beyond what will be taken in foreign jurisdictions is not required. While enforcement decisions are made on a case-by-case basis, the Bureau is more likely to formalize negotiated remedies within Canada when the matter raises Canada-specific issues, when the Canadian impact is particularly significant, when the asset(s) to be divested reside in Canada, or when it is critical to the enforcement of the terms of the settlement. [44] In contrast, the Bureau may rely on the remedies initiated through formal proceedings by foreign jurisdictions when the asset(s) that are subject to divestiture, and/or conduct that must be carried out as part of a behavioural remedy, are primarily located outside of Canada. [45]

However, the Bureau will do so only if it is satisfied that the actions taken by foreign authorities are sufficient to resolve the competition issues in Canada.

79. When coordinating cross-border remedies, a primary objective is to prevent conflicts that may arise when remedies are intended to address competition concerns in different jurisdictions. For example, due to potential differences in concentration and/or market share levels in relevant markets in Canada, the United States, and/or other countries, a potential conflict may arise when a single buyer must be approved for a North American or worldwide divestiture. Furthermore, cross-border remedies often require that the Bureau coordinate with its foreign counterparts to ensure that a single trustee or monitor is appointed to oversee the divestiture of the worldwide assets. Having a common trustee or monitor who understands the objectives of the remedies for each jurisdiction can reduce the potential for conflicts to arise when determining acceptable buyers for the divested assets.

80. While consistent and coordinated remedies are desirable, each jurisdiction must retain the authority and ability to ensure remedies that are sufficient within its own borders. Importantly, the jurisdiction of the Bureau, and ultimately of the Tribunal, requires that the competition test, as set out in section 92 of the Act, is met. Therefore, within the framework of its own laws, and to the extent compatible with its own interests, the Bureau will generally take another jurisdiction’s interests and policies into account only to the extent that such interests and policies do not limit or prevent Canadian competition concerns from being remedied.

top of page

Footnotes

1 This Bulletin is intended solely to provide information and is not intended to be a substitute for the advice of counsel. The Bulletin is not a binding statement of how discretion will be exercised in a particular situation. Final interpretation of the law is the responsibility of the courts and the Competition Tribunal. The Bulletin replaces and supercedes any other publications of the Bureau in this area.

2 Competition Bureau Mergers Consent Agreement Template

3 For the purposes of this Bulletin, the terms "Commissioner" and "Bureau" are used interchangeably, as appropriate to the topic discussed.

4 The analytical framework used to determine whether a merger is likely to prevent or lessen competition substantially is described in detail in the Bureau's *2004 Merger Enforcement Guidelines*.

5 RS, 1985, c. (Chapter) C-34

6 See section 105 of the *Competition Act*.

7 *Canada (Director of Investigation & Research, Competition Act) v. (Versus) Southam Inc. (Incorporated)* [1997] 1 S.C.R. (Supreme Court Reports) 748. [Hereinafter referred to as "*Southam*"].

8 Southam at 85.

9 "Preserving competition" is strictly for ease of reference. The Bureau will seek to obtain all remedies according to the standard set out in Southam

< a href="#fn10-rf1'>10 *Southam at 89.*

11 Although businesses are generally comprised of more than just assets, for ease of reference, the terms "asset(s)" and "business(es)," in the context of divestitures, are used interchangeably throughout this Bulletin. Furthermore, such terms are to be interpreted broadly: for example, depending on the circumstances, a divestiture of "asset(s)" may also entail the divestiture of shareholdings.

12 In contested cases, required remedies take the form of a "Tribunal order" or "divestiture order".

13 Negotiated remedies between the Bureau and the merging parties take the form of a "consent agreement", which is registered with the Tribunal. As set out in section 105 of the Act, a registered consent agreement has the same force and effect as a Tribunal order.

14 Effective remedies are ultimately intended to preserve competition, rather than promote certain competitors.

15 As stated by the Tribunal in *Canada (Director of Investigation & Research, Competition Act)* v. (Versus) *Imperial Oil Limited* (1989) 89/03 at 86 - 88, "Orders which are sought from the Tribunal should be precise and enforceable without the need to return to the Tribunal for a variation or interpretation of those orders before they can be enforced. The Tribunal is not a regulatory agency. It does not see its role as one of continually monitoring an industry participant by reference to general standards. It has neither the staff nor the expertise to do so." It also noted that "terms have to be sufficiently precise and unambiguous so that they can be enforced by way of contempt proceedings should a party not comply with them."

16 In general, a structural remedy addresses the anti-competitive effects arising from a merger by directly intervening in the competitive structure of the market. Divestitures are the most common form of structural remedy. In some cases, a divestiture (or licensing) of intellectual property, so long as no ongoing monitoring and enforcement is required, may also be considered a structural remedy. A behavioural remedy, on the other hand, addresses the anti-competitive harms stemming from a merger by modifying or constraining the behaviour of the merging firms. Behavioural remedies are normally ongoing and require a substantial amount of monitoring and enforcement.

17 In its remedy decision, the Tribunal in *Canada (Commissioner of Competition) v. (Versus) Canadian Waste Services Holdings Inc. (Incorporated)* (October 3, 2001), CT-2000/002, stated at 110, "once there has been a finding that a merger is likely to substantially prevent or lessen competition, a remedy that permanently constrains that market power should be preferred over behavioural remedies that last over a limited period of time and require continuous monitoring of performance. This is not to say that, in cases where both the respondents and the Commissioner consent, behavioural remedies cannot be effective. However, the Tribunal notes that enforcing the remedy proposed by the respondents would have the potential of being cumbersome and time-consuming and that monitoring such order would involve the Commissioner in commercial conduct more than would the administration of the divestiture order." Also see paragraph 111 where the Tribunal notes that divestitures are described by the U.S. (United States) Supreme Court as "simple, relatively easy to administer, and sure."

18 In some cases, the severing of structural links through the elimination of interlocking directorates may be an effective alternative to the divestiture of assets.

19 A new market participant is a company that is not presently competing in the relevant market, but has the necessary capabilities (e.g. (for example) financial, managerial, or otherwise) to become an effective competitor. A newly formed entity with no significant experience in the market will not normally be an acceptable buyer.

20 In such cases, the Bureau is also more likely to require crown jewel provisions, which are discussed further below.

21 This approach is commonly referred to as a "clean sweep".

22 In some cases, before agreeing to a divestiture package, the Bureau may consult with industry experts to determine the market value of possible asset(s) to be divested.

23 The Bureau will not normally agree to hold-separate arrangements prior to the merger closing.

24 This is the primary objective of hold-separate provisions. In contrast, the Bureau will not normally agree to hold-separate provisions **pending completion of a merger** investigation. Moreover, if the Bureau has identified competition issues that require remedial action, but has not reached agreement with the merging parties regarding appropriate remedies, the Bureau will not normally agree to hold-separate provisions **pending completion of negotiations**.

25 In some cases, depending on the circumstances, certain representations and warranties might need to be extended past the divestiture period.

26 For the criteria in which the Bureau's approval of a buyer is based, see the section in this Bulletin entitled Obtaining Bureau Approval of a Qualified Buyer.

27 Based on both the Bureau's past experience in Canada and the experience of competition authorities in other jurisdictions, the Bureau has determined that three to six months is an appropriate initial sale period. Nonetheless, within this range, the actual time period in a given case will be a reflection of the business realities in question.

28 For example, such milestones will normally include: the preparation of offering materials, soliciting interest in the asset(s) to be divested, and entering into negotiations.

29 The term "no minimum price" also includes those uncommon situations whereby the vendor will have to compensate (i.e. (that is), make payment to) the buyer. For example, in cases where the asset(s) to be divested cannot be separated from certain liabilities, the vendor will have to compensate the buyer for any costs associated with such liabilities. Similarly, in cases where the costs associated with such liabilities are uncertain, the vendor may need to indemnify the buyer.

30 For example, this includes terms and provisions such as, but not limited to, "fair market value," "going concern," "liquidation price," "going out of business," and "fire sale."

31 In other words, a crown jewel is essentially a mechanism for correcting an unsuccessful remedy by making the remedy more viable. When determining the contents of a crown jewel, the *Southam* standard, as discussed in section I of this Bulletin, will apply.

32 Up-front buyer provisions, however, do not obviate the need for "maintenance provisions." See the section on Alternatives to Hold-Separate Provisions in this Bulletin for more information concerning maintenance provisions.

33 Quasi-Structural Remedies are a sub-category of structural remedies in that they effect structural change.

34 In contested proceedings, hold-separate provisions are necessary to preserve the potential remedy pending resolution of the litigation, and usually take the form of a Tribunal order.

35 A monitor is required when either hold-separate provisions or maintenance provisions are part of the remedy.

36 In the case of a divestiture order in a contested case, the Bureau will seek the authority to appoint the trustee to divest the asset(s).

37 This includes the buyer having, or acquiring, the capabilities and resources to operate the asset(s) and any other conditions identified in this Bulletin (e.g. (for example) for details regarding what constitutes a "qualified" buyer, see the sections in this Bulletin entitled Independence and Competitiveness of the Buyer and Obtaining Bureau Approval of a Qualified Buyer).

38 "Terms and conditions" includes, among other things, the sale price of the divestiture asset(s).

39 In certain circumstances, it may be necessary for the vendor to provide, or to add to, transitional means of support provided to the purchaser (e.g. (for example) supply arrangements and other forms of technical assistance) so that the asset(s) to be divested remain viable. Such transitional means of support, when deemed reasonable and necessary, will be in the discretion of the trustee to negotiate and conclude once the trustee period begins. Such discretion by the trustee is subject to the oversight and approval of the Bureau only.

40 For clarity, "the divestiture" implies both the initial divestiture package, as well as any subsequent crown jewel asset(s).

41 For example, the Bureau may seek the imposition of civil and/or criminal penalties.

42 The Bureau’s current cooperation agreements and arrangements can be found at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_04450.html

43 Such waivers allow for the exchange of confidential information from foreign competition agencies to the Bureau, which would otherwise be prohibited by law in the respective foreign jurisdictions.

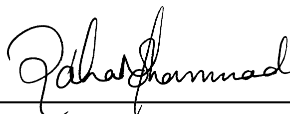
44 This could arise in circumstances where issues with a multi-jurisdictional merger are the same in Canada as a foreign jurisdiction. In one case, the foreign jurisdiction may conclude that because of costs or the size of markets, it should order the sale of a business, including intellectual property rights, on a worldwide basis. In a different case, the foreign authority might conclude that because of costs or scale of business, it would be sufficient to simply order the sale of the business, including the intellectual property rights, within its own jurisdiction. In the latter case, Canada would need its own Canada-specific remedy.

45 Notably, the Act provides for a three-year period during which the Bureau can challenge a transaction. Therefore, in the event that parties do not carry through with remedies that apply to Canada, but are enforceable only in foreign jurisdictions within that time frame, the Bureau may challenge the transaction at the Tribunal.

Date modified:

2022-01-20

This is **Exhibit "H"** to the affidavit of Stephen Moon, affirmed remotely by Stephen Moon stated as being located in the city of Gatineau in the province of Quebec, before me at the city of Gatineau in the province of Quebec, on July 21, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.



Commissioner of Oaths etc.

Raha Araz Mohammad
Commissioner of Oaths etc.
Province of Ontario
LSO P15816.

Government of Canada Gouvernement du Canada

Model Timing Agreement for Merger Reviews involving Efficiencies

On this page:

1. Introduction
2. The efficiency exception
3. Information requirements to test efficiencies
4. Conclusion

- Appendix I: Model Mergers Timing Agreement
- Appendix II: Efficiencies information requirements
- Footnotes

1. Introduction

Consistent with the Commissioner of Competition's (the "Commissioner") commitment to transparency, this document is intended to inform businesses and their advisors of the Competition Bureau's (the "Bureau") approach to analysis of efficiencies in accordance with section 96 of the *Competition Act* (the "Act") and in what circumstances the Bureau will conduct an assessment of merging parties' efficiencies claims. [1]

The vast majority of merger transactions do not raise concerns under section 92 of the Act. The Bureau's approach is to expeditiously identify those few transactions that may raise material competition concerns and provide timely clearance for the remaining transactions to provide commercial certainty. For the small number of cases that do raise material competition concerns, the focus of the Bureau's review is to determine whether the proposed transaction is likely to substantially prevent or lessen competition in one or more relevant markets in Canada through investigative steps such as requiring the production of documents and data pursuant to a Supplementary Information Request ("SIR") or an order of the Court pursuant to section 11 of the Act.

In certain of these cases, the merging parties may assert during the course of the Bureau's review of the proposed transaction that the efficiency exception set out in section 96 of the Act applies. The Bureau may engage with the merging parties to consider whether there is adequate evidence to support that the efficiencies exception is met in formulating a recommendation to the Commissioner on whether to file a section 92 application where: sufficient evidence and information is provided to the Bureau for it to assess the efficiency claims; and the merging parties commit not to complete the proposed transaction during the period that efficiencies are being evaluated. The process described herein is intended to apply to this small subset of cases.

2. The efficiency exception

Section 92 of the Act allows the Tribunal to make an order when it finds that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially." A substantial prevention or lessening of competition ("SPLC") results only from mergers that are likely to create,

maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power. In any case brought before the Tribunal pursuant to section 92, the Commissioner bears the burden to prove, on a balance of probabilities, that the proposed transaction is likely to prevent or lessen competition substantially in one or more relevant markets in Canada.

Section 96 of the Act provides an efficiency exception to the provisions of section 92. Where efficiency gains that are likely to be brought about by the merger are greater than, and offset, the anti-competitive effects, the Tribunal shall not make an order under section 92. [2] The merging parties bear the burden to establish, on a balance of probabilities, any relevant efficiency gains [3] and that such efficiency gains are likely to be greater than, and will offset, the likely anti-competitive effects of the merger. [4] This trade-off analysis involves a cost benefit analysis that assesses whether the alleged efficiency gains from the merger owing to the integration of resources outweigh the anti-competitive effects that result from the decrease in or elimination of competition that arises due to the merger.

Given that efficiency analyses are forward looking estimations that are associated with varying degrees of uncertainty, testing claimed efficiency gains and conducting the trade-off analysis is typically a complex process that involves the review of significant amounts of documents and data from the merging parties and requires engagement between the Bureau and the merging parties, their counsel, businesspeople and their experts.

In the Bureau's experience, merging parties have often not been either willing or able to provide efficiencies-related information or submissions at an early stage of the review. This may arise because of information restrictions during the due diligence phase, which could result in parties having insufficient certainty relating to efficiencies to be in a position to

make submissions to the Bureau, or because uncertainty about the appropriate remedy makes it inefficient to prepare detailed efficiencies submissions early in the review process. Instead, merging parties have waited for the Bureau to reach a definitive conclusion that the merger is likely to result in an SPLC before providing detailed information regarding efficiencies. As a result of the efficiencies information not being received at an early stage of the review, the analysis of the merging parties' claimed efficiencies has been shifted late into the Bureau's review of the transaction, when the Bureau's resources are focused on assessing the anticompetitive effects of a merger in order to make a determination of whether enforcement action is required. In addition, when merging parties seek to have their efficiencies claims assessed by the Bureau when the Bureau's analysis of potential competitive harm is ongoing, significant time of the Bureau team and the merging parties could be spent assessing efficiencies claims that would not be affected by a remedy.

In notifiable transactions, the Bureau will utilize the second statutory waiting period following issuance of a SIR to assess the anticompetitive effects of a merger. If merging parties anticipate raising an efficiencies defence and would like the Commissioner to consider their efficiencies claims before making an enforcement decision, they may enter into a timing agreement, which provides for analysis of efficiencies and the resulting trade-off to occur after the end of the second waiting period, and for merging parties not to close their transaction while this analysis is underway. [5]

2.1 The Model Timing Agreement

Given that the Model Timing Agreement includes terms relating to timing of SIR compliance, it is contemplated that merging parties would enter into a timing agreement prior to the beginning of the second statutory waiting

period. Entering into a timing agreement would not be perceived as a concession that a merger will give rise to a SPLC, but rather as a recognition that a matter involves complex competition issues that will require detailed analysis, including the quantification of a range of anticompetitive effects by the Bureau.

The Model Timing Agreement provides for opportunities for merging parties to receive updates from the Bureau in respect of its analysis of anticompetitive effects, including with respect to its empirical analysis. These updates are intended to enable merging parties to understand the scope of the Commissioner's concerns and the estimated range of anticompetitive effects, based on the Bureau's analysis at that time. Where updates pertain to the Bureau's empirical analysis, the Bureau will be willing to engage in a discussion with merging parties and economic experts they have retained regarding the empirical methodology used, including providing references to any academic literature relevant to that methodology, as well as a description of the inputs and assumptions relied on as part of the Bureau's modelling work.

As set out in paragraph 8 of the Model Timing Agreement, the efficiencies submissions made by the merging parties should relate to the efficiencies that would be lost if a remedial order were made in respect of the concerns identified by the Bureau. Depending on the nature of the concerns and the markets involved in the transaction, the particular remedial order that would be required in response to the concerns identified by the Bureau might not always be straight-forward, or in certain matters, there may be several possible remedial orders that would resolve the concerns. In such cases, merging parties should make submissions on their efficiencies claims based on candidate remedial orders addressing the Bureau's concerns. It will be necessary for the efficiencies submission to explain why

the claimed efficiencies would be lost as a result of the remedial order, with reference to the specific integrations necessary to achieve the efficiencies which would no longer be possible.

Though the Model Timing Agreement lengthens the Bureau's review process beyond statutory waiting periods, efficiencies are not a factor for the Bureau to assess in determining whether a merger is likely to give rise to a SPLC, but rather a defence that merging parties may raise in respect of an anticompetitive merger. Without certainty that the Bureau will have sufficient time to assess merging parties' claimed efficiencies, the Bureau's resources will be focused on working toward litigation in the case of a merger that is likely to give rise to an SPLC. However, should a commitment be in place such that sufficient time is provided to the Bureau to conduct a detailed assessment of the merging parties' efficiencies claims, the Commissioner will consider efficiencies in assessing the need for, or the extent of, enforcement action in respect of a merger.

3. Information requirements to test efficiencies

The merging parties bear the burden of proof for any claimed efficiencies and are uniquely situated to provide this evidence and information as only they have access to the information necessary to estimate and evaluate efficiencies projections, including access to company employees with responsibility for planning and implementation of current and prior merger integrations. To conduct the trade-off analyses with sufficient rigour such that the Commissioner may make an informed enforcement decision, evidence and information supporting efficiency claims should be provided on a with prejudice basis [6] and be sufficiently detailed to enable the Bureau

to ascertain the nature, magnitude, likelihood and timeliness of the asserted gains, and to credit (or not) the basis on which the claims are being made.

Although the evidence and information required to assess merging parties' efficiencies claims will vary depending on the structure of the parties' businesses, how they plan to integrate them and the particular industry involved, there are certain pieces of information that are likely to be required. These categories of information are set out in Appendix II. Typically, this information will be provided alongside a submission provided to the Bureau by the merging parties, which describes the efficiencies they expect to realize through a transaction. Efficiencies should be quantified where reasonably possible, and supported by a clear methodology described in detail in the submission such that the Bureau has a sufficient degree of certainty that the efficiencies are likely to be achieved over the time period claimed. Parties seeking to rely on qualitative efficiencies as part of a section 96 defence will need to explain why they are not reasonably measurable. Any assumptions being relied upon should be clearly set out and explained in detail, including why the assumptions are reasonable (or, if asserted, conservative). The Bureau will also require schedules and spreadsheets detailing any calculations made in the submission.

Along with submissions, it is important that the underlying evidence is also provided to the Bureau, including all supporting documentation, models and calculations, such that the Bureau is able to verify how efficiencies were calculated and perform sensitivity tests on any models or forecasts used to derive the estimates. This underlying evidence should include any documents relied upon by the merging parties in analyzing potential efficiencies, which could include internal analysis leading to the decision to undergo a merger, internal efficiencies projections, third party studies, and

any relevant due diligence materials. Where the merging parties have relied on business or operational planning models in their calculations, this needs to be brought to the Bureau's attention as the Bureau will likely require access to these models and information related to the models' reliability, such as information regarding the past application of these models by the parties (or others), and the predictive success. Further examples of the materials that are typically provided by merging parties to substantiate claims made in their submission are also set out in Appendix II.

While it is the Bureau's expectation that all supporting information relied on in the creation of the merging parties' efficiencies submission will be provided with the submission, paragraph 9 of the Model Timing Agreement states that the Bureau will send requests for information ("RFIs") to the merging parties in respect of the efficiency claims and supporting evidence within 7 days of receipt of the efficiencies materials provided by the merging parties. The RFIs sent to the merging parties are not intended to further probe the claimed efficiencies or to seek further substantiation of the claims. Rather, the RFIs will seek to clarify or confirm assumptions made or the Bureau's understanding of the evidence being relied upon for the efficiencies submissions, with a goal of increasing the probative value of the examinations of the merging parties' representatives by answering any narrow questions beforehand.

Following the review of the merging parties' submissions and the accompanying evidence on efficiencies, the Bureau will likely have further questions for merging parties related to their claims. In order to ensure that accurate and complete responses to these questions are provided, the Model Timing Agreement contemplates the examination of representatives of the merging parties after an efficiencies submission and the supporting evidence has been provided to the Bureau. In addition to engaging with

merging parties and experts retained by the parties, the Bureau also may use its own outside experts, including industry, economic or accounting experts, to advise on potential efficiencies arising from the merger.

4. Conclusion

The process set out in this document, and outlined in further detail in the Model Timing Agreement, for merger reviews involving the assessment of merging parties' efficiencies claims has been informed by the Bureau's recent experience with such cases. As noted, these cases account for a small proportion of the merger matters reviewed by the Bureau in a given year, however, these merger reviews involve resource intensive analysis, both in relation to the assessment of anticompetitive effects as well as the assessment of efficiencies. The Model Timing Agreement provides that merging parties can make efficiencies submissions with sufficient understanding of the concerns with a transaction identified by the Bureau such that they may focus on the efficiencies that would be lost in the event of an order in the markets of concern. In addition, the Model Timing Agreement provides the Bureau with sufficient time to assess the Parties' claimed efficiencies such that the Commissioner may be in a position to decide whether to exercise enforcement discretion by not challenging a transaction that is likely to substantially prevent or lessen competition.

Given that each merger matter where parties raise an efficiencies defense presents new issues to evaluate, the Bureau's approach will continue to be refined going forward. The Model Timing Agreement sets out a framework under which merging parties' efficiencies claims may be assessed by the Bureau, however this framework may need to be adapted depending on particularities of a certain case, such as when parties seek to enter into a timing agreement. In addition, as the Bureau gains further experience with

the Model Timing Agreement, it will continually reassess its process for analyzing efficiencies in merger reviews for whether there is a more effective manner to undertake this analysis. Accordingly, the Bureau remains open to receiving feedback in relation to the Model Timing Agreement, and will update this guidance as the process continues to evolve.

Appendix I: Model Mergers Timing Agreement

This TIMING AGREEMENT is made as of [date] between [Purchaser] and [Vendor/Target] (collectively the "Merging Parties") and the Commissioner of Competition (the "Commissioner").

Recitals

A. Purchaser proposes to acquire [describe the proposed transaction] (the "Proposed Transaction").

B. The Commissioner is of the view that the Proposed Transaction may result in a substantial [prevention and/or lessening] of competition in [describe relevant markets], and desires to complete his assessment and, if necessary, implement an appropriate remedy, before the Merging Parties close the Proposed Transaction.

C. The Merging Parties expect that the Proposed Transaction will generate efficiencies and desire that the Commissioner assess those efficiencies for the purpose of s. 96 of the *Competition Act* (the "Act") before filing any application under s. 92, s. 100 or s. 104 of the Act.

D. The Merging Parties and the Commissioner desire to establish a schedule for the expeditious resolution of this matter with a view to

avoiding, or narrowing the scope of litigation if appropriate.

Agreement

In consideration of the terms set out in this agreement, the sufficiency of which is acknowledged, the Parties agree as follows:

1. The Merging Parties shall provide at least [30 days'] notice before closing the Proposed Transaction or any part of the Proposed Transaction, unless the Commissioner has issued a no action letter. The Merging Parties shall not provide such notice until at least 30 days after complying with the supplementary information requests pursuant to s. 114(2) of the Act (the "SIRs"). After the Merging Parties have provided such notice, the Commissioner and Competition Bureau shall have no further obligations under this agreement, and apart from observing the notice period before closing the Proposed Transaction, the Merging Parties shall have no further obligations under this agreement.
2. The Commissioner shall not file an application under s. 92, s. 100 or s. 104 of the Act unless the Merging Parties have provided the notice described in paragraph 1 of this agreement or waived compliance with this provision.
3. The Merging Parties shall respond to the data specifications of the SIRs as soon as possible, and in any event no later than 30 days before full compliance with the SIRs. If a complete response to the data specifications is received within 60 days after the SIR was issued, Instruction A.1.(c)(ii) (Continuing Production Requirement) shall not apply.
4. The Mergers case team shall provide an update on the status of their review, including a response to any requests [made prior to or in the

7 days following issuance of the SIRs] to modify the scope of the SIRs, no later than 30 days after SIR issuance.

5. No later than 45 days after receipt of the data described in paragraph 3 of this agreement and provided that the merging parties have not fully complied with the SIRs until at least 30 days after responding to the data specifications, the Mergers case team shall provide an update on its quantitative assessment, including a description of the empirical methodology, model and preliminary findings.
6. No later than 30 days after full SIR compliance, Mergers management and the case team will be available to meet with the Merging Parties (by phone or at the Bureau's Gatineau office, at the Merging Parties' option) and provide an update on its assessment including
    i. its assessment to date in respect of each market where Mergers' preliminary view is that a remedy may be required (a "market of concern");
    ii. identifying any additional information or analysis likely to be of assistance in completing its assessment; and
    iii. a preliminary quantification of the range of deadweight loss in respect of each market of concern.
7. At any time, the Merging Parties may, on a without prejudice basis, propose remedies to address any or all of the Bureau's concerns. If, following the meeting described in paragraph 6 of this agreement, the Merging Parties request that Mergers provide feedback on its assessment of the sufficiency of one or more proposed remedies, Mergers shall provide its assessment to date of those proposed remedies within [30 days] after the request. At the time of the request, the Merging Parties shall identify any confidentiality concerns

regarding the proposed remedies, and the Bureau shall consider those concerns in market testing the proposed remedies. The Merging Parties acknowledge that a full assessment of proposed remedies may not be possible without market testing, and that nothing in this agreement restricts the Bureau's ability to communicate confidential information pursuant to section 29 of the *Competition Act*.

8. Following the meeting described in paragraph 6 of this agreement (and, at the Merging Parties' option, following receipt of the feedback requested pursuant to paragraph 7), the Merging Parties shall provide their submission on efficiencies that would be lost if a remedial order were made in respect of the concerns identified by Mergers management, together with all supporting documents and data. The Merging Parties acknowledge that the extent to which the Bureau is prepared to accept claimed efficiencies will depend on the quality of information in support of those claims, and that it is incumbent on them to provide complete information at this stage. [7]

9. No later than 7 days after receiving the information described in paragraph 8 of this agreement, the Mergers case team shall provide a request for information seeking clarifications regarding the claimed efficiencies. The Merging Parties are encouraged to discuss this request for information and their responses, including potential rolling production.

10. No later than 30 days after providing complete responses to the Bureau's request described in paragraph 9 of this agreement, each Merging Party shall identify and make available a representative to meet with the Mergers case team and be examined under oath on any matter relevant to the claimed efficiencies. Such examinations will be conducted no later than 40 days after the Merging Parties have

provided complete responses to the Bureau's request described in paragraph 9.

11. No later than 30 days after the interviews described in paragraph 10 of this agreement, Mergers management and the case team will
    i. identify the markets in which a remedy is required;
    ii. provide an updated anticompetitive effects quantification and
    iii. on a without prejudice basis, quantify the efficiencies that Mergers believes have been substantiated as likely to be lost in the event of a remedy.
12. After the information described in paragraph 11 of this agreement has been provided, the Merging Parties may propose a meeting with the Commissioner, and the Parties shall make reasonable efforts to schedule that meeting at a mutually convenient time. The Parties acknowledge that it may be productive to advance settlement negotiations and consent agreement drafting as far as reasonably possible before such meeting.
13. Nothing in this agreement precludes the Parties from communicating more frequently or earlier than required by this agreement. The Parties may amend any time periods in this agreement on consent, such consent not to be unreasonably withheld.
14. For greater certainty, information described in this agreement as being without prejudice is intended to be protected by settlement privilege. Other information exchanged pursuant to this agreement is confidential, but will typically not be subject to settlement privilege. Any positions or conclusions of the Merging Parties or the Commissioner expressed in relation to this agreement may change as

they obtain new information or refine their assessments.

DATED this day of ____________, 20__

COMMISSIONER OF COMPETITION

____

Name: Matthew Boswell
Title: Commissioner of Competition

[PURCHASER]

____

I/We have authority to bind the corporation

Name: ____________
Title: ____________

[VENDOR/TARGET]

____

I/We have authority to bind the corporation

Name: ____________
Title: ____________

Appendix II: Efficiencies information requirements

Information requirements will be based on the particular efficiencies claimed and the industry that the parties operate in such that it is not possible to assemble a complete and exhaustive list of necessary

information. That said, the categories of information to be sought are generally as follows:

- Information on parties' operations and assets:
  - EXAMPLES: Information on assets and their locations, capacity utilization by product line and by facility, any constraints on production, and headcount information.
- Plans for the merging parties' businesses in the absence of the merger:
  - EXAMPLES: Information on planned capital expenditures, cost savings plans, anticipated product introduction, and other strategies under consideration if the merger did not go forward.
- Analysis and planning documents relating to the implementation of the merger:
  - EXAMPLES: integration plans such as Board presentations and all underlying data and calculations, forward-looking costing (fixed vs variable) and capital expenditures planned post-merger.
- Analysis of merger efficiencies:
  - EXAMPLES: models or other analyses that quantify the efficiencies, as well as the documents or data relied upon in those analyses and support for any underlying assumptions.
- Information from past comparable integrations:
  - EXAMPLES: Documents fitting in the categories above with respect to past transactions, and backward looking documents assessing efficiencies achieved and costs incurred.

Footnotes

1 This document does not supersede the *Merger Enforcement Guidelines* ("MEGs"), which set out the Bureau's general approach to merger review, including efficiencies, and is not a binding statement of how the Bureau's analysis is carried out in any particular case. The specific facts of a case, as well as the nature of the information and data available, will determine how the Bureau assesses a transaction and may sometimes require methodologies other than those noted here. The Bureau may revisit certain aspects of this guidance in the future based on amendments to the *Act*, decisions of the Competition Tribunal and the courts, developments in the economic literature and the Bureau's case experience.

2 The decision of the Supreme Court of Canada in Tervita provides guidance on the application of section 96. Additional guidance has also been provided by the Federal Court of Appeal and the Tribunal, including in the *Superior Propane* series of decisions.

- *Canada (Commissioner of Competition) v Superior Propane Inc*, 2000 Comp Trib 15, 7 CPR (4th) 385 *Superior I* Comp Trib];
- *Canada (Commissioner of Competition) v Superior Propane Inc*, 2001 FCA 104, [2001] 3 FCR 185 [*Superior II* FCA];
- *Canada (Commissioner of Competition) v Superior Propane Inc*, 2002 Comp Trib 16, 18 CPR (4th) 417 [*Superior III* Comp Trib];
- *Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53, [2003] 3 FC 529 [*Superior IV* FCA].

3 As described further in paragraph 12.6 and 12.13 of the MEGs, to meet their burden the merging parties must establish the nature, magnitude, likelihood and timeliness of efficiency gains. Merging parties must also demonstrate how their efficiency claims pass the cognizability screens.

4 As noted in paragraph 12.6 of the MEGs, whether or not a case proceeds to litigation, the Bureau can seek information where appropriate from the merging parties and other sources to evaluate gains in efficiencies and anti-competitive effects.

5 See Appendix I for a model of a timing agreement for a merger matter involving analysis of efficiencies (the "Model Timing Agreement")

6 As explained in paragraph 14 of the Model Timing Agreement, unless the agreement indicates otherwise, information exchanged pursuant to the agreement will be treated as confidential, but will typically not be subject to settlement privilege. It is recognized that positions or conclusions of the merging parties or of the Commissioner may change as further information becomes available or as analysis is refined further.

7 See Appendix II for a list of types of information that are generally sought in support of claimed efficiencies

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Date modified:
2022-01-20

CT-2022-002

COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

RESPONSE OF THE COMMISSIONER OF COMPETITION TO A REQUEST OF VIDEOTRON LTD. FOR LEAVE TO INTERVENE

AND

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION ON A MOTION TO VARY THE SCHEDULING ORDER

Table of Contents

PART I – OVERVIEW 1
PART II – FACTS 1
PART III – ISSUES 5
PART IV – SUBMISSIONS 5
A. The Commissioner does not Oppose Videotron Being Granted Intervenor Status 5
B. Scope of Intervention 6
C. The Commissioner Should be Allowed to Discover Videotron 7
D. The Scheduling Order Will Have to Be Amended to Account for Videotron's Intervention 10
i. It is Appropriate for the Tribunal to Amend the Scheduling Order 10
ii. Additional Time is Required for the Commissioner to Know the Case to Meet 11
iii. Additional Time is Required to Address the New Issues Raised by Videotron 13
iv. The Current Schedule Cannot Accommodate the Additional Litigation Steps Required 13
PART V – ORDER SOUGHT 14

PART I – OVERVIEW

1. Videotron has brought a motion for leave to intervene with broad participatory rights. As Videotron is the proposed purchaser of assets the Respondents propose to divest, the Commissioner does not generally oppose Videotron being granted intervenor status on the basis it proposes.

2. However, Videotron's intervention must be tempered in three ways.

3. First, fairness and expediency require that the Commissioner be granted the right to documentary discovery and oral examination of Videotron, so that the Commissioner knows the case to meet and to avoid surprise and delay at the hearing of this application.

4. Second, it is improper for Videotron to raise the issues of amelioration of anti-competitive effects and efficiencies accruing to itself as a result of the Proposed Divestiture, as these are not issues raised in the pleadings by any party.

5. Third, Videotron's attendance at oral examinations for discovery should be conditional on an amended Confidentiality Order permitting disclosure of confidential information to Videotron or its external counsel.

6. As a consequence of the broad nature of Videotron's proposed intervention, the Commissioner has brought a motion to vary the Scheduling Order. Additional time is necessary to account for the increased complexity of this application and the additional steps required to accommodate Videotron's broad participation.

PART II – FACTS

7. With respect to the Commissioner's Response to Videotron's motion for leave to intervene, the following facts are relevant.

   a. On May 9, 2022, the Commissioner of Competition (the "**Commissioner**") brought an application for an order pursuant to section 92 of the *Competition Act* (the "**Act**") with respect to the proposed acquisition by Rogers Communications

Inc. ("**Rogers**") of Shaw Communications Inc. ("**Shaw**") (the "**Merger**"). The Commissioner seeks a full block of the Merger or, in the alternative, certain relief to eliminate the substantial prevention or lessening of competition that would result from the Merger.

b. On June 17, 2022, the Respondents and Quebecor Inc. ("**Quebecor**") entered into a binding Letter of Agreement and Term Sheet for the acquisition of Freedom Mobile Inc. ("**Freedom**"), a wholly-owned subsidiary of Shaw, by Quebecor through its wholly-owned subsidiary, Videotron Ltd. ("**Videotron**") (the "**Proposed Divestiture**").[1]

c. The Scheduling Order of Justice Little dated June 17, 2022 (the "**Scheduling Order**") was issued on the same day as, the Proposed Divestiture agreement was signed. The pleadings in this matter were all filed before, and make no reference to, the proposed role of Videotron in the Proposed Divestiture.

d. The Respondents' responses to the notice of application make no reference to Videotron as a proposed divestiture purchaser.[2]

e. Those responses also make no reference to the topics Videotron now proposes to intervene in respect of:

   i. Videotron's operational abilities including its history as an effective and disruptive competitor in Quebec;

   ii. whether the Proposed Divestiture provides Videotron with sufficient assets to compete effectively in Ontario, Alberta and British Columbia;

   iii. whether the Proposed Divestiture enables Videotron to operate independently of Rogers;

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[1] Affidavit of Jean-François Lescadres (7 July 2022), Motion Record of Videotron Ltd., Tab 2 at para 16.
[2] Response of Rogers Communications Inc. (3 June 2022), CT-2022-002/44 (Comp Trib); Response of Shaw Communications Inc. (3 June 2022), CT-2022-002/45 (Comp Trib).

iv. whether the Proposed Divestiture produces any efficiencies that would accrue to Videotron;

v. Videotron's plans regarding entry, pricing, bundling, and competition; and

vi. the effect the Proposed Divestiture and Videotron's plans will have on competition in the Canadian wireless industry.[3]

f. The Consent Agreement between the parties dated May 30, 2022 was also reached and filed prior to, and without reference to, a proposed divestiture to Videotron.[4]

g. On July 7, 2022, Videotron brought this motion for leave to intervene in this proceeding.

8. In addition to the above, the following facts are also applicable to the Commissioner's motion to vary the Scheduling Order.

a. As early as May 20, 2021, Quebecor's CEO publicly opposed Rogers' proposed acquisition of Freedom as part of the Merger on competition grounds and expressed interest in Quebecor acquiring Freedom.[5]

b. [redacted]

c. The information from Videotron and Quebecor already in the Commissioner's possession does not address, or minimally addresses, the issues relating to

[3] Notice of Motion (7 July 2022), Motion Record of Videotron Ltd., Tab 1 at para 8.
[4] Registered Consent Agreement (s. 104) (30 May 2022), CT-2022-002/43 (Comp Trib).
[5] Affidavit of Stephen Moon (21 July 2022), Motion Record of the Commissioner of Competition, Tab 2 at para 7.
[6] Affidavit of Stephen Moon (21 July 2022), Motion Record of the Commissioner of Competition, Tab 2 at para 11.

the competitive impacts and potential efficiencies resulting from the Proposed Divestiture.[7]

d. [redacted]

e. [redacted]

f. Should the Commissioner be granted the right to document discovery and oral examination of Videotron, reviewing and analyzing Videotron's affidavit of documents, preparing for oral examinations for discovery and providing information to the Commissioner's expert witnesses on the issues raised would require the Bureau to expend significant additional time.[10]

[7] Affidavit of Stephen Moon (21 July 2022), Motion Record of the Commissioner of Competition, Tab 2 at para 22.
[8] Affidavit of Stephen Moon (21 July 2022), Motion Record of the Commissioner of Competition, Tab 2 at para 19.
[9] Affidavit of Stephen Moon (21 July 2022), Motion Record of the Commissioner of Competition, Tab 2 at para 20.
[10] Affidavit of Stephen Moon (21 July 2022), Motion Record of the Commissioner of Competition, Tab 2 at para 21.

PART III – ISSUES

9. The issues on Videotron's motion for leave to intervene are as follows:

   a. whether the Competition Tribunal (the "**Tribunal**") should grant Videotron intervenor status in this application;

   b. the appropriate scope for Videotron's intervention; and

   c. whether the Commissioner should be allowed documentary discovery and oral examination of Videotron;

10. The issue on the Commissioner's motion to vary the Scheduling Order is whether compelling reasons exist for a change in the Scheduling Order.

PART IV – SUBMISSIONS

A. The Commissioner does not Oppose Videotron Being Granted Intervenor Status

11. Section 9(3) of the *Competition Tribunal Act* allows the Tribunal to grant a person leave to intervene in any proceedings before the Tribunal, other than under Part VII.1 of the *Act*.[11]

12. On a motion for leave to intervene, the onus is on the person seeking leave to intervene to establish the following:

   a. the matter alleged to affect the person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate;

   b. the person seeking leave to intervene must be directly affected;

   c. all representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner; and

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[11] *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 9(3); *Competition Act*, RSC 1985, c C-34.

d. the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.[12]

13. The Commissioner accepts that Videotron meets the test for leave to intervene.

14. However, it is not appropriate for Videotron to raise the new issues of whether the Proposed Divestiture ameliorates the anti-competitive effects of the Merger and produces any efficiencies that would accrue to Videotron. Neither issue has been pleaded by any party. An intervenor may have pertinent information and a useful perspective about the issues, but an intervenor may not re-cast the case.[13] Unless a party amends its pleadings to raise the issue, Videotron cannot expand the scope of this application.

15. Notwithstanding the Commissioner's position on this motion, the Commissioner reserves the right to take the position that the Proposed Divestiture does not alleviate the likely substantial lessening or prevention of competition resulting from the Merger. Furthermore, the Commissioner reserves the right to take the position that any efficiencies that would accrue to Videotron as a result of the Proposed Divestiture, if any, are not cognizable efficiencies in this application for the purpose of section 96 of the *Act*.[14]

B. Scope of Intervention

16. If leave to intervene is granted, Videotron may make representations relevant to the proceedings in respect of any matter that affects that it.[15]

17. Beyond the right to present argument, the Tribunal has the discretion to determine any further participation rights of Videotron.[16] The scope of Videotron's participation as intervenor should be determined in the circumstances of this case, in accordance

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[12] *Commissioner of Competition v Direct Energy Marketing Limited*, 2013 Comp Trib 16 at paras 3 & 12.
[13] *The Commissioner of Competition v Reliance Comfort Limited Partnership*, 2013 CACT 17 at para 25.
[14] Notice of Motion (7 July 2022), Motion Record of Videotron Ltd., Tab 1 at para 8(d).
[15] *Competition Tribunal Act*, RSC 1985, c C-34, s 9(3).
[16] *Canada (Director of Investigation & Research) v Canadian Pacific Ltd.*, 1997 CarswellNat 3117 at para 3, [1997] CCTD No 14 (FCA).

with fairness and fundamental justice, and subject to statutory or regulatory requirements.[17]

18. The Commissioner does not oppose the scope of intervention proposed by Videotron in its Notice of Motion.[18]

19. However, the attendance of Videotron at the oral examinations of the parties should be conditional on Videotron or its external counsel obtaining access to confidential information under an amended confidentiality order. As requested by Videotron, such an order is to be discussed with the parties and agreed upon by the Tribunal.[19]

20. The Commissioner anticipates oral examinations will include extensive references to competitively-sensitive information of Rogers, Shaw and other (potential) competitors. In the absence of a confidentiality order applicable to Videotron, such information should not be disclosed to Videotron, a current market participant and competitor. The unrestrained sharing of competitively-sensitive information between competitors reduces the vigor and independence of competitive behaviour and harms the efficient functioning of competitive markets.

C. The Commissioner Should be Allowed to Discover Videotron

21. In addition to the participatory rights proposed by Videotron, the Commissioner also requests the right to documentary discovery and oral examination of Videotron. These rights are essential to the Commissioner's ability to properly advance this application.

22. In considering whether to allow parties to discover an intervenor, the Tribunal has previously allowed for such discovery in two, non-exhaustive situations:

[17] *American Airlines, Inc. v Canada (Competition Tribunal)*, [1989] 2 FC 88 at para 34, [1988] FCJ No 1049, aff'd [1989] 1 SCR 236 (FCA).
[18] Notice of Motion (7 July 2022), Motion Record of Videotron Ltd., Tab 1 at para 11.
[19] Notice of Motion (7 July 2022), Motion Record of Videotron Ltd., Tab 1 at para 28.

a. where an intervenor likely has information sufficiently important to a party's case, because answers regarding that information should be provided directly by the intervenor so that it can be tested through cross-examination;[20] and

b. where discovery is necessary to avoid surprise and resulting delay.[21]

23. These circumstances reflect the fact that discovery is an essential right to satisfying considerations of fairness and expediency. Such considerations support granting the Commissioner discovery of Videotron.

24. First, fairness requires that the Commissioner be allowed to discover Videotron. The Respondents entered into the agreement for the Proposed Divestiture with Quebecor after the Commissioner filed this application and pleadings were closed. This development gives rise to critical and complex issues relevant to the case the Commissioner must meet. Insofar as Videotron supports the position of Rogers and Shaw, the Commissioner is entitled to "be informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial."[22]

25. The centrality of Videotron's anticipated proposed intervention and potential related evidence means the Commissioner would be significantly disadvantaged and could be surprised at trial without discovery. Videotron proposes to lead evidence and make submissions in support of the Respondents on the sufficiency of the Proposed Divestiture (i.e., Videotron's ability to compete in the wireless services markets in British Columbia, Alberta, and Ontario as a result of the Proposed Divestiture).[23] This has not previously been raised in any pleading. This goes to determining a core issue in this application: namely, whether the Proposed Divestiture eliminates or

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[20] *Canada (Competition Act, Director of Investigation and Research) v AC Nielsen Company of Canada Limited*, [1994] CCTD No 15 at 5.
[21] *Canada (Director of Investigation & Research) v Canadian Pacific Ltd.*, 1997 CarswellNat 3117 at para 23, [1997] CCTD No 14.
[22] *Bell Helicopter Textron Canada Limitée v Eurocopter*, 2010 FCA 142 at para 14.
[23] Notice of Motion (7 July 2022), Motion Record of Videotron Ltd., Tab 1 at para 18.

renders insubstantial the substantial prevention or lessening of competition resulting from the Merger.

26. Videotron also proposes to raise the issue of efficiencies accruing to it by virtue of the Proposed Divestiture.[24] This has not previously been raised in any pleading. Given that efficiencies can be a determinative issue, if the pleadings are amended to allow Videotron to intervene on the issue, the Commissioner is entitled to know and fully test, prior to the hearing, the quantum and basis for the efficiencies being claimed.

27. Thus, Videotron asserted having direct knowledge and possession of information that is sufficiently important to the Commissioner's case to warrant discovery of Videotron. Answers to the Commissioner's questions regarding that information should be provided directly by Videotron on discovery so that it can be examined and tested through cross-examination.[25] The Commissioner cannot meaningfully respond to Videotron's fact and expert evidence without access to the oral and documentary discovery that underpins it.

28. Second, discovery of Videotron by the Commissioner would also be in the interest of expediency. The Supreme Court of Canada described discovery as "essential to prevent surprise or 'litigation by ambush', to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable."[26] Similarly, the Tribunal has previously granted the Commissioner the right to discover an intervenor in order to avoid surprises at the hearing and the consequent delays and disruptions.[27]

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[24] Notice of Motion (7 July 2022), Motion Record of Videotron Ltd., Tab 1 at para 8(d).
[25] *Canada (Competition Act, Director of Investigation and Research) v AC Nielsen Company of Canada Limited*, [1994] CCTD No 15 at 5.
[26] *Juman v Doucette*, 2008 SCC 8 at 24.
[27] *Canada (Director of Investigation & Research) v Canadian Pacific Ltd.*, 1997 CarswellNat 3117 at 12, [1997] CCTD No 14.

29. The Commissioner is unable to ascertain all relevant facts regarding the Proposed Divestiture without discovery of Videotron. In its written submissions on this motion, Videotron itself submits that:

> No other party can provide the Tribunal with the direct, first-hand evidence of Videotron's operational history and experience; what assets and other rights Videotron requires to adequately compete in British Columbia, Alberta and Ontario; what plans Videotron has to immediately and effectively compete upon completing the Divestiture; and what effect Videotron's entry will have on competition.[28]

30. The exclusive possession by Videotron of this information supports discovery by the Commissioner in order to prevent ambush, encourage settlement, and narrow the issues. Given the complexity of assessing issues relating to a substantial prevention or lessening competition as well as efficiencies, the Commissioner will necessarily be ambushed without the right to discover and examine Videotron.

D. The Scheduling Order Will Have to Be Amended to Account for Videotron's Intervention

31. As a consequence of both Videotron's new role as purchaser in the Proposed Divestiture and its proposed intervention, the Scheduling Order will have to be amended to accommodate Videotron's participation in this proceeding.

i. It is Appropriate for the Tribunal to Amend the Scheduling Order

32. Although dates set by case management orders are firm, the Tribunal may amend the Scheduling Order if it is satisfied that compelling reasons exist for a change in the order.[29] In this case, a material change in circumstances has occurred since the issuance of the Scheduling Order as a result of: (i) the binding agreement on June 17, 2022 between the Respondents and Quebecor for the Proposed Divestiture; and (ii) the proposed intervention of Videotron, including the scope of its participation.

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[28] Written Submissions, Motion Record of Videotron Ltd., Tab 3 at para 5.
[29] *Competition Tribunal Rules*, SOR/2008-141, s 139(3).

Both events occurred after the current schedule was discussed at case management conferences and the Scheduling Order was issued.

33. It is well-settled that interventions may result in disruption caused by an increase in the magnitude, timing, complexity, and costs of a proceeding.[30] That is particularly true here given the scope of the issues Videotron has raised in its intervention. The impact of such disruption must be accounted for in an amended Scheduling Order.

34. Even though this application is proceeding under the Expedited Proceeding Process, the Tribunal should "err on the side of caution and ensure that considerations of procedural fairness are not sacrificed for the sake of trial efficiency and expeditiousness."[31] Expeditiousness must be balanced against the right to fairness.[32]

ii. Additional Time is Required for the Commissioner to Know the Case to Meet

35. Unfairness, and possibly injustice, will result from continuing with the current schedule. In order for the Commissioner to know the case to be met, additional time is required for the Commissioner to obtain and review relevant information from Quebecor and Videotron.

36. The Commissioner does not currently have sufficient information about the "direct, first-hand evidence of Videotron's operational history and experience; what assets and other rights Videotron requires to adequately compete in British Columbia, Alberta and Ontario; what plans Videotron has to immediately and effectively compete upon completing the Divestiture; and what effect Videotron's entry will have on competition" that Videotron intends to introduce.[33]

37. The announcement of the Proposed Divestiture with Videotron as the purchaser occurred after the Commissioner filed this application. [redacted]

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[30] See e.g. *M v H*, 1994 CarswellOnt 473 at para 37, 20 OR (3d) 7.
[31] *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 18 at para 47.
[32] *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 18 at para 54.
[33] Written Submissions (7 July 2022), Motion Record of Videotron Ltd., Tab 3 at para 5.

[34] Resultingly, the Commissioner's inquiry into the Merger did not include information gathering efforts with respect to the impact Videotron would have as a purchaser of Freedom.[35]

38. [36]

39. The Commissioner's usual route of issuing a Supplementary Information Request is not available at this time because the parties to the Proposed Divestiture have not filed with the Commissioner the requisite pre-merger notifications pursuant to subsection 114(1) of the *Act*.[37]

40. Fairness requires that additional time be added to the schedule of this application to allow the Commissioner to obtain the requisite information to know the parties' case, whether through discovery or other means; review that information; and prepare the Commissioner's case.

41. The Commissioner's process for reviewing the impact of a merger absent litigation is normally extensive.[38] The Bureau is already constrained by the litigation process from conducting an expansive review of the Proposed Divestiture. Further compression of the schedule prejudices the Commissioner's ability to know, analyze, and test the impacts of the Proposed Divestiture on the substantial lessening and prevention of competition arising from the Merger and any cognizable efficiencies for the purposes of this application.

[34] Affidavit of Stephen Moon (21 July 2022), Motion Record of the Commissioner of Competition, Tab 2 at para 11.
[35] Affidavit of Stephen Moon (21 July 2022) at para 22.
[36] Affidavit of Stephen Moon (21 July 2022) at para 19.
[37] Affidavit of Stephen Moon (21 July 2022) at para 22(c).
[38] Affidavit of Stephen Moon (21 July 2022) at paras 26-30.

iii. Additional Time is Required to Address the New Issues Raised by Videotron

42. Videotron proposes to intervene with respect to new issues; specifically, whether the Proposed Divestiture eliminates the substantial prevention or lessening of competition resulting from the Merger and produces any cognizable efficiencies that would accrue to Videotron.[39] The issues of whether the Proposed Divestiture remedies the anti-competitive effects of the Merger and whether cognizable efficiencies for the purposes of section 96 of the Act accrue to a non-party to the Merger have not been raised in the pleadings by any party.

43. While the Commissioner opposes the raising of these issues without appropriate amendments to the pleadings, if Videotron is ultimately granted leave to intervene on these issues, its introduction will add to the complexity of this application. Consequently, additional time is required for the parties to address these new issues procedurally (including the need for amendments to the pleadings) and substantively (through discovery on the issue and the presentation of factual and expert evidence at the hearing).

iv. The Current Schedule Cannot Accommodate the Additional Litigation Steps Required

44. The current Scheduling Order already follows an expedited process. Practically, the Scheduling Order's tight deadlines cannot feasibly accommodate the additional litigation steps, required both pre-trial and at the hearing, stemming from Videotron's intervention without prejudice to the Commissioner. These steps include the leading of factual and expert evidence by Videotron at the hearing and those related to the added complexity of issues relating to the Proposed Divestiture.

45. To shoehorn Videotron's intervention into the current schedule would unreasonably detract from, or conflict with, the time scheduled for other steps in this application.

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[39] Notice of Motion (7 July 2022), Motion Record of Videotron Ltd., Tab 1 at para 8(d).

This would detrimentally impact the Commissioner's ability to know, meet, and present his case.

46. Consideration should be given in an amended Scheduling Order to the following:

    a. Videotron's introduction of issues relating to the elimination of the substantial prevention or lessening of competition resulting from the Merger and the accrual of efficiencies to itself as a result of the Proposed Divestiture;

    b. Videotron's request to amend the confidentiality order and requisite notice to affected third parties;

    c. preparation of an Affidavit of Documents and document production by Videotron, if granted by the Tribunal;

    d. oral examination for discovery of Videotron by the Commissioner, if granted by the Tribunal;

    e. the leading of factual and expert evidence by Videotron prior to and at the hearing of this application; and

    f. written and oral argument by Videotron at the hearing.

47. The scope of participation by Videotron in these proceedings presents a disruption that can only be fairly remedied by an amendment to the Scheduling Order. While the Respondents may desire a commitment to the current schedule, unrealistic expectations would only cause further delay. Nonetheless, in the spirit of expediting the resolution of this application, the Commissioner is seeking only a limited extension of the schedule necessary to accommodate the intervention.

PART V – ORDER SOUGHT

48. With respect to Videotron's motion for leave to intervene, the Commissioner requests that:

a. Videotron be granted leave to intervene in this application with respect to the issues described at paragraph 8 of Videotron's Notice of Motion;

b. Videotron be granted the participatory rights described at paragraph 11 of Videotron's Notice of Motion, subject to any limitations that the Tribunal sees fit arising from the impact on the schedule for this application as set out in the Scheduling Order;

c. the Commissioner be granted the right of documentary discovery and oral examination for discovery of Videotron; and

d. the attendance of Videotron or its external counsel at the oral examinations for discovery of the parties be conditional on the Confidentiality Order dated May 19, 2022 being amended to permit disclosure of confidential information to Videotron or its external counsel.

49. With respect to the Commissioner's motion to vary the Scheduling Order, the Commissioner requests an order:

a. requiring Videotron to serve its Affidavit of Documents and production of documents by August 15, 2022;

b. putting over oral examinations for discovery by four weeks to the period of September 19, 2022 to October 7, 2022

c. extending the time provided for oral examinations by one week;

d. extending the time for the hearing of this Application by one week; and

e. modifying the other dates for the pre-hearing steps and the hearing of this application in consequence of the foregoing in the manner to be directed by the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of July 2022.

Kevin Hong
____

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LIST OF AUTHORITIES, STATUTES, AND REGULATIONS

Authorities

1. *American Airlines, Inc. v Canada (Competition Tribunal)*, [1989] 2 FC 88 at para 34, [1988] FCJ No 1049, aff'd [1989] 1 SCR 236 (FCA).

2. *Bell Helicopter Textron Canada Limitée v Eurocopter*, 2010 FCA 142.

3. *Canada (Competition Act, Director of Investigation and Research) v AC Nielsen Company of Canada Limited*, [1994] CCTD No 15.

4. *Canada (Director of Investigation & Research) v Canadian Pacific Ltd.*, 1997 CarswellNat 3117 at para 3, [1997] CCTD No 14 (FCA).

5. *Commissioner of Competition v Direct Energy Marketing Limited*, 2013 Comp Trib 16.

6. *Juman v Doucette*, 2008 SCC 8.

7. *M v H*, 1994 CarswellOnt 473 at para 37, 20 OR (3d) 7.

8. *The Commissioner of Competition v Reliance Comfort Limited Partnership*, 2013 CACT 17.

9. *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 18.

Statutes and Regulations

1. *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), section 9(3).

2. *Competition Tribunal Rules*, SOR/2008-141, s 139(3).

CT-2022-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34.

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

MOTION RECORD

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