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CT- 2022-002

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CT-2022-002

OTTAWA, ONT.

Doc. # 205

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*;

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

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

Respondents

- and -

**ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.**

Intervenors

**MOTION RECORD
(Commissioner's Motion on Shaw's Examination for Discovery Refusals)**

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TAB 1

CT-2022-002

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

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

Respondents

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**ATTORNEY GENERAL OF ALBERTA
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NOTICE OF MOTION
(Commissioner's Motion on Shaw's Examination for Discovery Refusals)

TAKE NOTICE THAT the Applicant, the Commissioner of Competition (“**Commissioner**”), will make a motion to the Competition Tribunal (“**Tribunal**”) on September 13, 2022 by videoconference, or on an alternative day and place as may be set by the Tribunal.

THE MOTION IS FOR:

1. An Order compelling the Respondent Shaw Communications Inc. (“**Shaw**”) to produce, as set out in Appendix “A” to this Notice of Motion:
 - a. legible high-quality colour versions of the documents portions of which are not legible; and
 - b. the documents responsive to a second question to which Shaw has withheld documents due to an improper privilege claim, as applicable,within one week from the date of the Order;
2. Costs of this motion; and
3. Such further and other relief as the Commissioner may request and the Tribunal may permit.

THE GROUNDS FOR THE MOTION ARE:

4. On May 9, 2022, the Commissioner filed an application to the Tribunal challenging the proposed acquisition by Rogers Communications Inc. of Shaw pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34;
5. On August 22 and 23, 2022, Paul McAleese was examined for discovery on behalf of Shaw;
6. During the examination, certain undertakings were provided;
7. On September 2, 2022, Shaw delivered a document that set out its answers to undertakings, including producing documents certain portions of which are illegible and withholding the response to another question due to an improper privilege claim;
8. The Commissioner seeks an Order in respect of the two questions, as listed in Appendix “A”;

9. The documents certain portions of which are illegible listed in Appendix "A" have already been produced, so their relevance, the fact that requesting them is not unreasonable, unnecessary, or unduly onerous, and that they are not privileged has already been established.
10. The second question listed in Appendix "A" is relevant to issues raised in the pleadings, is not unreasonable, unnecessary, or unduly onerous, and the information and documents sought are not privileged;
11. Subsections 8 and 8.1 of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp);
12. Rules 2, 34 and 64 of the *Competition Tribunal Rules*, SOR/2008-141;
13. Rules 240 and 242 of the *Federal Courts Rules*, SOR/98-106; and
14. Such further or other grounds as counsel may advise and the Tribunal may permit.

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

- a) The Affidavit of Darian Bakelaar affirmed September 7, 2022;
- b) The Commissioner's Motion Record in respect of the Commissioner's Motion on Rogers's Examination for Discovery Refusals; and
- c) Such further or other documents as counsel may advise and the Tribunal may permit.

DATED AT OTTAWA, ONTARIO, this 7th day of September, 2022.

ATTORNEY GENERAL OF CANADA

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**Counsel for the Intervenor,
Attorney General of Alberta**

TAB 2

CT-2022-002

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

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Respondents

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**ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.**

Intervenors

AFFIDAVIT OF DARIAN BAKELAAR
Affirmed September 7, 2022
(Commissioner's Motion on Shaw's Examination for Discovery Refusals)

I, **DARIAN BAKELAAR**, of the City of Ottawa, in the Province of Ontario, **AFFIRM THAT:**

1. I am employed as a senior paralegal with Competition Bureau Legal Services of the Department of Justice Canada. I have personal knowledge of the matters to which I depose in this affidavit. Where I do not have knowledge, I have set out the grounds for my belief.
2. On August 22 and 23, 2022, counsel for the Commissioner of Competition (the "**Commissioner**") orally examined Shaw Communications Inc. ("**Shaw**") for discovery via Zoom, which I attended via Zoom. Paul McAleese represented Shaw.
3. A court reporter with Neesons, a court reporting firm, attended the oral examination of Paul McAleese via Zoom and transcribed the examination. Attached as **Exhibit "A"** is the Transcript for the Examination of Paul McAleese on August 22, 2022 as prepared by Neesons. Attached as **Exhibit "B"** is the Transcript for the Examination of Paul McAleese on August 23, 2022 as prepared by Neesons.
4. On August 26, 2022, counsel for the Commissioner sent by email a list of undertakings given by Shaw at the examination. Attached as **Exhibit "C"** is a true copy of this email. Attached as **Exhibit "D"** is a true copy of the list of undertakings attached to the email from the Commissioner.
5. On September 2, 2022, Alisa McMaster e-mailed the responses of Shaw to counsel for the Commissioner. Attached to Alisa McMaster's e-mail was a document that sets out Shaw's answers to undertakings. Attached as **Exhibit "E"** is a true copy of the e-mail from Alisa McMaster. Attached as **Exhibit "F"** is a true copy of the attachment to the email from Alisa McMaster.
6. Attached as **Exhibit "G"** is a true copy of the document identified as SJRB-CCB00895907, which was produced by Shaw to the Commissioner on September 2, 2022 further to Exhibit "F".

- 7. Attached as **Exhibit “H”** is a true copy of the document identified as SJRB-CCB00895949, which was produced by Shaw to the Commissioner on September 2, 2022 further to Exhibit “F”.
- 8. Attached as **Exhibit “I”** is a true copy of the document identified as SJRB-CCB00895950, which was produced by Shaw to the Commissioner on September 2, 2022 further to Exhibit “F”.
- 9. On September 7, 2022, counsel for the Commissioner sent an email to counsel to Shaw advising them of the issues encountered with the documents identified as Exhibits G, H and I, as well as other documents identified in the email. A copy of the email is attached as **Exhibit “J”**.

Affirmed remotely by Darian Bakelaar)
 stated as being located in the City of)
 Ottawa in the Province of Ontario, before)
 me, in the City of Gatineau, in the)
 Province of Québec on September 7,)
 2022, in accordance with O. Reg.)
 431/20, *Administering Oath or*)
Declaration Remotely.)



Commissioner of Oaths etc.



Darian Bakelaar

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

Exhibit A

This is **Exhibit "A"** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario before me in the city of Gatineau in the province of Quebec, on September 7, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.



Commissioner of Oaths etc.

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

Exhibit B

This is **Exhibit "B"** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario before me in the city of Gatineau in the province of Quebec, on September 7, 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.

Exhibit C

This is **Exhibit “C”** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me in the city of Gatineau in the province of Quebec, on September 7, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.

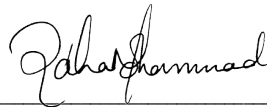


Commissioner of Oaths etc.

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

Exhibit D

This is **Exhibit "D"** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me at the city of Gatineau in the province of Quebec, on September 7, 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.

Exhibit E

This is **Exhibit “E”** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me at the city of Gatineau in the province of Quebec, on September 7, 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.

Exhibit F

This is **Exhibit “F”** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me at the city of Gatineau in the province of Quebec, on September 7, 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.

Exhibit G

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Commissioner of Oaths etc.

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

Exhibit H

This is **Exhibit “H”** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me at the city of Gatineau in the province of Quebec, on September 7, 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.

Exhibit I

This is **Exhibit "I"** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me at the city of Gatineau in the province of Quebec, on September 7, 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.

Exhibit J

This is **Exhibit “J”** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me at the city of Gatineau in the province of Quebec, on September 7, 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.

TAB 3

CT-2022-002

THE COMPETITION TRIBUNAL

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BETWEEN:

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Applicant

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

Respondents

and

**ATTORNEY GENERAL OF ALBERTA
VIDEOTRON LTD.**

Intervenors

**COMMISSIONER'S MEMORANDUM OF FACT AND LAW
(for Commissioner's Motion on Shaw's Examination for Discovery Refusals)**

PART I – OVERVIEW

1. The Applicant, the Commissioner of Competition (“**Commissioner**”), moves for an order requiring the Respondent, Shaw Communications Inc. (“**Shaw**”), to produce legible high-quality colour versions of the documents provided by Shaw in response to certain questions and the documents responsive to a second question seeking Shaw’s internal analysis of synergies, for which Shaw has withheld documents due to an improper privilege claim, each from the examination of Shaw’s representative, Paul McAleese. The Commissioner also seeks the costs of this motion.

PART II – FACTS

A. The Application

2. On May 9, 2022, the Commissioner applied to the Competition Tribunal (“**Tribunal**”) to remedy the substantial prevention or lessening of competition likely to be caused by Rogers Communications Inc.’s (“**Rogers**”) proposed merger with Shaw (the “**Proposed Transaction**”).
3. In his Notice of Application, at paragraphs 50-104 of the Statement of Grounds and Material Facts, the Commissioner has alleged that the Proposed Transaction is likely to substantially prevent or lessen competition in the provision of wireless services to each of consumers and businesses in British Columbia, Alberta and Ontario.
4. In its Fresh As Amended Response at paragraph 7, Rogers has raised the efficiencies defence by claiming that the efficiencies likely to be generated by the Proposed Transaction, together with the divestiture of Freedom Mobile to Videotron Ltd., would outweigh any substantial lessening of competition. Shaw, in its Fresh As Amended Response at paragraph 110, has pleaded that it will rely on Rogers’ submissions with respect to efficiencies.

5. In his Fresh As Amended Reply to Rogers at paragraphs 18-24, the Commissioner denies that the cognizable efficiencies claimed by Rogers will be greater than and offset the anti-competitive effects.
6. Given the foregoing, the Commissioner's alleged anti-competitive effects and the Respondents' alleged efficiencies are live issues for the Tribunal to determine in this litigation.

B. Questions improperly responded to by Shaw

7. The examination of Shaw's representative, Paul McAleese, took place on August 22 and 23, 2022. During the examination, undertakings were given on certain questions.
8. Pursuant to the Scheduling Order of the Tribunal dated June 17, 2022, Shaw delivered its answers to undertakings on September 2, 2022.
9. Shaw failed to produce, as set out in Appendix "A" to the Commissioner's Notice of Motion, (i) legible colour versions of certain of the documents provided in response to undertakings, and (ii) the documents responsive to a second question for which Shaw has withheld documents due to an improper privilege claim.

PART III – ISSUE

10. The issues to be decided by the Tribunal is whether, as listed in Appendix "A" to the Commissioner's Notice of Motion, legible colour copies must be produced by Shaw of certain documents; and whether Shaw must answer the Commissioner's question regarding internal analysis of synergies.

PART IV – SUBMISSIONS

11. Rule 240 of the *Federal Courts Rules* requires that a person being examined for discovery answer, to the best of that person's knowledge, information, and belief, any question that is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party. Rule 242 lists the permissible reasons for objecting to answer, namely because the answer is

privileged, the question is not relevant, unreasonable or unnecessary, or it would be unduly onerous to make the inquiries required in order to respond.

12. Whether a question is relevant will depend on the pleadings in the proceeding.¹ The Federal Court of Appeal in *Lehigh* set out the test for relevance as follows:

[...]a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute.

13. The Tribunal in *Commissioner of Competition v Live Nation Entertainment, Inc et al* cited *Lehigh* and described relevance as a “generous and flexible” standard at the discovery stage. The Tribunal decided that “[d]oubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper.”
14. This low bar stems from the principle that the objective of discovery is to permit “a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each party has to meet”.²
15. Where relevance is established, the Tribunal may still exercise its discretion to disallow a question. This will be a balancing exercise between the potential value of the answer against the risk that a party is abusing the discovery process. Factors considered in deciding whether to exercise this discretion include whether answering the question would create undue hardship, where there are other means of obtaining the information sought, or where the question is part of a fishing expedition.

¹ *Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3 at paras 7-9.

² *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 at para 46, as cited by in *Live Nation*, supra, at para. 6.

16. The headings below correspond to the those set out in Appendix “A” to the Notice of Motion. Below, the relevance of each category is set out, as well as why there are no grounds for refusals even though the questions are relevant.

Category 1: Documents certain portions of which are illegible

17. Question 55 relates to the budgets that have been approved by Shaw’s Board of Directors for the past three fiscal years. Shaw has provided copies of such budgets in response to its undertaking. However, certain portions of the documents are illegible. For example, in respect of document SJRB-CCB00895907, high-quality colour copies are required in order to interpret:
 - (a) pp5 and 6, which contain colour-coded bar charts;
 - (b) p7, which contains a chart in the lower left in which one of the two lines is invisible;
 - (c) p23, which contains data on the lower line of the left-hand chart which are illegible;
 - (d) pp31, 39042, 46, which have colour-coded charts.
18. Other documents in respect of which this issue has been flagged are identified in Appendix A.
19. Since Shaw has already provided copies of these documents, it is clear that this question was properly asked and must be responded to. It should be uncontroversial that legible copies of responsive documents must be produced.

Category 2: Shaw’s Efficiencies/Synergies Analyses

20. Questions 23-28 ask for Shaw’s analyses of efficiencies or synergies arising from the transaction undertaken since the examinations conducted on April 19 and 20, 2022 pursuant to the Efficiencies Timing Agreement between the Commissioner and Rogers and Shaw. Excluded from the Commissioner’s request are such analyses carried out by the Respondents’ experts.

21. As mentioned above, Rogers' Fresh As Amended Response pleads the applicability of the efficiencies defence, and Shaw's Fresh As Amended Response relies on Rogers' efficiencies submissions. The Commissioner disputes that the efficiencies defence applies in his Fresh As Amended Reply to Rogers. The analyses sought by the Commissioner are, therefore, relevant.
22. Shaw did not provide any of the requested analyses on the basis that it is "not aware of any additional non-privileged documents responsive to this request."³ Such analyses of efficiencies or synergies are not properly the subject of a privilege claim.
23. Solicitor-client privilege will only attach to those communications that fall along the continuum of communications in which a solicitor tenders advice.⁴ Preparing analyses of efficiencies or synergies, which is required for operational purposes (i.e., integration planning for the Proposed Transaction and proposed divestiture), is not part of the "necessary exchange of information of which the object is the giving of legal advice."⁵ The Federal Court of Appeal has made clear that operational documents, even those prepared pursuant to legal advice, are not privileged, except in very limited circumstances:

Similarly, an organization might receive plenty of legal advice about how to draft a policy against sexual harassment in the workplace. But the operational implementation of that advice – the policy and its circulation to personnel within the organization for the purpose of ensuring the organization functions in an acceptable, professional and business-like manner – is not privileged, except to the extent that the policy communicates the very legal advice given by counsel.⁶

24. Although legal counsel may be involved in the preparation of analyses of efficiencies or synergies carried out by Shaw or its contractors (putting aside those undertaken

³ Appendix "D" of the Affidavit of Darian Bakelaar, at page 3.

⁴ *Samson Indian Nation and Band v Canada*, [1995] 2 FC 762 (FCA), at para 8.

⁵ *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at para 28.

⁶ *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at para 31.

by experts), such analyses are financial in nature and do not contain any legal advice. As such, they are not solicitor-client privileged.

25. Litigation privilege can only attach to “documents whose dominant purpose is preparation for litigation”.⁷ While preparation for litigation may be a purpose behind the creation of analyses of efficiencies or synergies by Shaw or its contractors (as opposed to those created by experts), it is not the dominant purpose. Undoubtedly, the dominant purpose for the preparation of such analyses of efficiencies or synergies is integration planning. To argue otherwise means taking the position that efficiencies are sought primarily for the efficiencies defence, rather than maximizing the value of the transaction.
26. In short, it is clear that there is no reasonable basis for Shaw to withhold the requested analyses of efficiencies or synergies on privilege grounds.

PART V – ORDER SOUGHT

27. The Commissioner respectfully requests that the Tribunal order Shaw to answer the questions listed in Appendix “A” of the Commissioner’s Notice of Motion.

DATED AT OTTAWA, ONTARIO, this 7th day of September, 2022.

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Competition Bureau Legal Services
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⁷ *Lizotte c Aviva Cie d'assurance du Canada*, 2016 SCC 52 at para 1.

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Counsel to the Commissioner of Competition

CT-2022-002

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- and -

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

- and -

**ATTORNEY GENERAL OF ALBERTA AND
VIDÉOTRON LTD.****Intervenors**

MOTION RECORD

ATTORNEY GENERAL OF CANADA

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