COMPETITION TRIBUNAL
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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 one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and –

ROGERS COMMUNICATION INC. AND SHAW COMMUNICATIONS INC.

Respondents

MEMORANDUM OF FACT AND LAW
(Respondents' Refusals Motion)

September 7, 2022

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PART I - INTRODUCTION

1. The respondents bring this motion to compel answers to questions improperly refused on the examination for discovery of the Commissioner. They seek production of:

(b) the underlying facts and documents relied on in support of

2. There is no dispute that the parties have joined issue on the divestiture remedy. It is a fundamental issue in the case. The Tribunal will be asked to conclude whether the transaction, in light of the divestiture, gives rise to a substantial lessening or prevention of competition. The Commissioner maintains that it does. The respondents say that it does not. This will be the central issue at trial.

3. The Commissioner commenced this proceeding in May. He has made it clear he will not grant approval without a divestiture of Shaw's Freedom Mobile business. On June 17, the Commissioner was informed that Rogers, Shaw, and Quebecor had entered into a binding agreement to sell Freedom to Videotron. The Commissioner asserts that the divestiture, as proposed, does not address his concerns.

5. The Commissioner refused all questions about [redacted] and its contents on the basis of litigation privilege. The Commissioner also refused to provide the underlying facts and documents supporting [redacted], which he concedes would not be privileged. These refusals are improper.

6. There is no sustainable claim of litigation privilege attached to [redacted]. Nor would such privilege, if it exists, extend to underlying facts and documents. On the Commissioner's evidence, [redacted]. [redacted]. It was not prepared for the dominant purpose of litigation.

7. Respectfully, the Commissioner's refusals do not serve this process or the Tribunal. This is a large, important, and complex proceeding. The Commissioner has emphasized its importance to the public interest. Many interests will be affected by the Tribunal's decision, which must be made in a compressed timeframe. The Commissioner used his extensive statutory powers to compel over 2.6 million records and dozens of interviews with market participants. The result is an extensive and voluminous record that these parties and the Tribunal will have to grapple with.

8. The best evidence of the Commissioner's concerns arising from his investigation are recorded in [redacted]

[redacted]. Its production will be of great assistance to the Tribunal and the process. It will allow Rogers, Shaw, Videotron, and their experts to focus their evidence and responses to key issues. It will streamline the proceeding and facilitate mediation, the hearing, and appellate review.

9. There is also the question of procedural fairness, which is no small matter. The Commissioner is not an ordinary litigant. He is a public officer with a duty to act in the public interest. This Tribunal and the Federal Court of Appeal have long held that the Commissioner is duty-bound to give full and fair disclosure. Notions of "winning" or tactical advantage are contrary to his mandate. There is no authority which supports the Commissioner's decision to withhold this information.

10. Trial is two months away. A lot has been asked of the Tribunal and these parties in a very short timeframe. The refusal to produce [redacted], and the underlying facts and documents, is highly prejudicial to the respondents' ability to know the case they have to meet and make full answer and defence. The Tribunal and parties ought to have the benefit of [redacted]. This is not an extravagant request or a fishing expedition. Its probative value cannot be disputed. [redacted]. Its contents are critical to a fair and just determination. Rogers, Shaw, and Videotron should not be forced to trial without it.

11. Production is in the interests of justice and fairness.

PART II - SUMMARY OF FACTS

A. The Parties and Intervener

12. Rogers Communications Inc. ("**Rogers**") is a publicly traded telecommunications company providing wireline services to residential and business customers in Ontario, New Brunswick, and Newfoundland, and wireless services across Canada.

13. Shaw Communications Inc. ("**Shaw**") is a publicly traded telecommunications company with residential and business wireline customers in Western Canada and Northern Ontario. Shaw also offers wireless services primarily through its wholly owned subsidiary Freedom Mobile ("**Freedom**"), which it acquired in 2016.

14. Quebecor Inc. ("**Quebecor**") is publicly traded telecommunications company based in Quebec. It operates a wireline business in Quebec and the Ottawa area through its wholly owned subsidiary Videotron Inc. ("**Videotron**"). It is also an experienced wireless provider, having started as an MVNO in 2006 and launched its own facilities-based wireless network in 2010.

B. Transaction Announced; Triggers Commissioner's Statutory Obligation of Good-Faith Review

16. On March 13, 2021, Rogers and Shaw entered into an Arrangement Agreement whereby Rogers agreed to purchase all of the issued and outstanding shares of Shaw for approximately $26 billion (the "**Transaction**"). The Transaction was subject to pre-merger notification and review under the *Competition Act* (the "***Act***").

17. Shortly after the Transaction was announced, the Commissioner appeared before the Standing Committee on Industry, Science and Technology. In his April 7, 2021 remarks, the Commissioner "assure[d] the committee that the bureau's review of the proposed transaction will be very thorough" and "I will make a principled and evidence-based assessment of its competitive impact and take appropriate action."[2]

18. On April 13, 2021, Rogers submitted an Advance Ruling Certificate request ("**Rogers ARC Request**") to the Commissioner. Under s. 102 of the *Act*, this triggered the Commissioner's obligation to consider the request in good faith, "as expeditiously as possible." The Rogers ARC Request was nearly 60 pages with various attachments. It detailed the rationale behind the Transaction and Rogers' plans for Shaw's business.[3]

[2] Transcript of Proceedings of the Standing Committee on Industry, Science and Technology, McKnight Affidavit, Exhibit "I", MR, Tab 2. p. 841.
[3] Rogers ARC Request, McKnight Affidavit, Exhibit "J", MR, Tab 2, p. 862.

The Bureau did not communicate this view to the respondents.

20. At that stage, the Bureau had not commenced any formal inquiry. Nor had it requested supplementary information from Rogers, Shaw, or third parties.

No supplementary information had yet been requested, much less considered, by the Commissioner.

D. Bureau Issues SIRs and Collects Over Two Million Documents

22. On June 3, 2021, the Bureau issued supplementary information requests ("**SIRs**") to Rogers and Shaw.

23. On June 18, 2021, the Bureau started a formal inquiry.[7]

24. In late July and early August 2021, the Bureau issued s. 11 orders to gather third-party information. They included requests of Telus, Bell, and Quebecor/Videotron.[8]

25. On August 16, 2021, Rogers and Shaw submitted responses to the SIRs. They produced over a million documents. The Commissioner also received responses to its information requests from Bell and Telus, which together produced close to a million documents. In total, the Commissioner has collected approximately 2.6 million documents, amounting to 9.9 million pages of material.[9]

26. In addition to its substantial information requests, the Commissioner has conducted over two dozen interviews and meetings with market participants. Those interviews occurred throughout 2021 and 2022. The Commissioner's investigation has been a major undertaking and the material generated is complex and voluminous.

E. Commissioner Files s. 92 Application and Seeks Interim Relief

27. On May 8, 2022, the Commissioner commenced this application under s. 92 to block the Transaction. He alleged that the Transaction was likely to substantially lessen or prevent competition in the wireless markets in Ontario, Alberta, and B.C.

28. In the alternative, the Commissioner sought an order directing Rogers to divest such assets as necessary to eliminate any alleged substantial lessening or prevention of competition.

29. That same day, the Commissioner sought interim orders under s. 104 to prohibit Rogers and Shaw from closing the Transaction pending the Tribunal's disposition of the s. 92 application.

30. The s. 104 application was resolved on May 30, 2022, and Rogers and Shaw filed their responses to the Notice of Application on June 3, 2022.

F. Divestiture Triggers Further Statutory Obligations of Good-Faith Review

31.

32. On June 17, 2022, Rogers, Shaw, and Quebecor entered into a binding letter agreement and term sheet to divest Freedom to Videotron before Rogers' acquisition of Shaw (the "**Divestiture**"). The letter agreement and term sheet provide for

37. On August 4, 2022, the Tribunal granted Videotron leave to intervene in this proceeding. Its participation is intended to assist the Tribunal in determining whether the Divestiture is sufficient to address any substantial lessening or prevention of competition asserted by the Commissioner.

38. On August 12, 2022, Rogers, Shaw, and Quebecor entered into definitive agreements in respect of the Divestiture.

G. Divestiture Is Pleaded As A Fundamental Issue in Dispute

39. In light of the Divestiture, Rogers and Shaw served amended responses on August 8, 2022. The Commissioner replied on August 15, rejecting this remedy.

40. Further amended pleadings have since been exchanged.[16] On the case as pleaded, the fundamental issue is whether there is a substantial lessening or prevention of competition having regard to the Divestiture. This is apparent from Rogers' and Shaw's Fresh As Amended Responses and the Commissioner's Replies.

41. Rogers pleads that:

(a) "The Commissioner cannot establish that the Transaction coupled with the Divestiture will result in a substantial lessening of competition in wireless services" (para. 7);

(b) "With the divestiture of Freedom to Videotron, the Transaction is pro-competitive and will result in significant benefits to wireless customers in B.C., Alberta, and Ontario, as well as significant efficiencies to the Canadian economy on the whole" (para. 9);

(c) "A divested Freedom owned by Videotron would have the same or greater economic incentive to compete as it had when owned by Shaw" (para. 12);

(d) "The Commissioner's analysis of the competitive effects of the Transaction coupled with the Divestiture in the wireless market is flawed and incomplete" (para. 32);

(e) "The Commissioner's assertion that the Transaction would substantially lessen or prevent competition even with the Divestiture is wrong. It is premised, in large part, on the claim that Freedom's competitiveness is dependent on 'leveraging' Shaw's wireline assets. It takes no account of the wireless and wireline assets that Videotron would make available to Freedom and that are available to Freedom under the Divestiture Agreement" (para. 34);

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[16] Rogers and Shaw served Fresh As Amended Responses on August 18, 2022. The Commissioner served Fresh As Amended Replies to Rogers and Shaw on September 2, 2022.

(f) "The Commissioner's assertions that Freedom would not be an effective standalone competitor following the Divestiture are also misguided. What the Commissioner defines as 'New Freedom' is in all material respects the same as old Freedom, except for certain advantages that New Freedom will enjoy as a result of its integration with Videotron" (para. 36);

(g) "Ultimately, the Divestiture provides Videotron with a unique opportunity for fast, efficient and effective expansion outside of Quebec. It will ensure Freedom's position as an effective fourth wireless carrier in British Columbia, Alberta, and Ontario by increasing Videotron's incentive and ability to compete against Rogers, Bell, and Telus" (para. 41).[17]

42. Likewise, Shaw pleads that:

(a) "The Transaction and Divestiture will enhance competition in numerous tangible and meaningful ways, including in Canadian telecommunications at a critical moment for the industry, delivering more affordable services, long-term investments in resilient next-generation wireless and wireline networks, innovation and economic productivity" (para. 6);

(b) "The Commissioner also ignores the many pro-competitive impacts of the Transaction and Divestiture in both the Canadian wireline and wireless services markets" (para. 10);

(c) "While Shaw and Rogers both disagree with the Commissioner's concerns regarding the possible impact of the Transaction on Canada's competitive wireless market, Rogers and Shaw have fully addressed those concerns through the Divestiture" (para. 11);

(d) "Although Shaw and Rogers disagree with the Commissioner's concerns regarding the possible impact of the Transaction on Canada's competitive wireless market, Rogers offered to address those concerns by proposing the full divestiture of Freedom Mobile, including all of Freedom Mobile's spectrum licenses (para. 51);

(e) the Commissioner's analysis of the Proposed Divestiture is "flawed and incomplete for a host of reasons", which include "ignor[ing] current market conditions and realities", "proceed[ing] on the mistaken assumption that Shaw's wireless services cannot be separated from Shaw in an effective manner", and "overstat[ing] and mischaracteriz[ing] the relevance of

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[17] Rogers' Fresh as Amended Response, McKnight Affidavit, Exhibit "B", MR, Tab 2, p. 54.

Shaw's wireline assets to the competitiveness of Shaw's wireless services business" (para. 67).[18]

43. In reply, the Commissioner has maintained his position that "Freedom if divested to Videotron would be a less effective competitor."[19] He claims that:

> The proposed divestiture of Freedom Mobile to Videotron (the "Divestiture") is not an effective remedy. It fails to eliminate the substantial lessening and prevention of competition the Proposed Transaction will cause. Such a divestiture will not replace the significant and growing competition Shaw Mobile was delivering and would continue to deliver in Alberta and British Columbia, and it would make Freedom Mobile a substantially weaker competitor than it would have been but for the Proposed Transaction.[20]

H. The Timetable Is Compressed

44. This is an expedited proceeding.

45. The Tribunal and parties are moving forward on a compressed schedule:

(a) On September 23, the parties are to exchange lists of documents they intend to rely on, witness statements, and expert reports;

(b) On October 20, the parties are to exchange additional documents they intend to rely on, responding witness statements, and responding expert reports;

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[18] Shaw's Fresh As Amended Response, McKnight Affidavit, Exhibit "C", MR, Tab 2, p. 80 .
[19] Commissioner's Fresh As Amended Reply to Shaw, para. 14, McKnight Affidavit, Exhibit "E", MR, Tab 2, p. 121.
[20] Commissioner's Fresh As Amended Reply to Rogers, para. 2, McKnight Affidavit, Exhibit "D", MR, Tab 2, p. 111.

(c) On October 21, the parties are to exchange mediation briefs for a mediation to be held on October 27 and 28;

(d) The hearing is to commence on November 7, for up to five weeks, followed by closing submissions in mid-December;

(e) The schedule also provides for various motions and case management conferences leading up to the hearing.

46. In light of this timetable, the Tribunal has encouraged the parties to take all necessary steps to focus the case.

I. Commissioner's Examination for Discovery

52. Nevertheless, the Commissioner has refused to produce [redacted] or any of the facts and documents underlying it, claiming litigation privilege.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

53. This motion raises the following issues:

(a) Is the [redacted] relevant?

(b) Is it subject to a valid claim of litigation privilege?

(c) In any event, are the respondents entitled to know the underlying facts and documents referred to, and relied on, in [redacted]?

54. The refusals chart can be found in Schedule "C". The respondents submit that [redacted] is relevant and not litigation-privileged. Even if it is somehow litigation-privileged, the respondents are entitled to the underlying facts and documents.

A. [redacted] Is Relevant

55. Relevant is determined by the pleadings. The Federal Court of Appeal in *Lehigh Cement* articulated the test 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.[40]

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[40] *Canada v. Lehigh Cement Limited*, 2011 FCA 120, at para. 34.

56. In *Live Nation*, the Tribunal affirmed this broad approach to relevance on discovery:

> At the discovery stage, relevance is a generous and flexible standard. Doubts 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.[41]

57. This "liberal approach to the scope of questioning on discovery should prevail" because it ensures an even playing field. "What the parties and the Tribunal are both trying to achieve with examinations for discovery is 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."[42]

58. The generous and flexible approach to discovery reflects the unique status of the Commissioner as "guardian of the public interest."[43] As Justice Blanchard held in *Canada Pipe*, "the Commissioner is not a normal adversary"—rather, he is "a public officer with a statutory obligation to act fairly." Indeed, "just as the Crown prosecutor must be motivated by fairness and not the notion of winning or losing, so too the Commissioner must be motivated by goals of fundamental fairness and not by achieving strategic advantage in the proceeding."[44]

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[41] *Canada (Commissioner of Competition) v. Live Nation Entertainment Inc.*, 2019 Comp Trib. 3, at para. 8 [***Live Nation***].

[42] *Live Nation*, at para. 6. See also *Canada (Commissioner of Competition) v. Secure Energy Services Inc.*, 2022 Comp Trib 3.

[43] *Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp Trib 6, at para. 68, rev'd on other grounds in *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24 [***Vancouver Airport Authority FCA***].

[44] *Canada (Commissioner of Competition) v. Canada Pipe Co.,* 2004 Comp. Trib. 2, at paras. 62-64 [***Canada Pipe***].

59. This principle guides the Commissioner's extensive disclosure obligations. "[T]he duty to disclose is inherent in the role of a public officer." And "[t]hough the standard of disclosure may justifiably be different in proceedings before the Tribunal than in criminal proceedings, the underlying notion of fairness must remain constant for both."[45]

60. As Justice Stratas affirmed in *Vancouver Airport Authority*, "procedural fairness obligations require the Commissioner of Competition to disclose … evidence that is relevant to issues in the proceedings. This is necessary for [the respondent] to know the case it has to meet and to fairly defend itself against the allegations."[46]

61. There is no dispute that [redacted], and the facts and documents in support of it, are relevant. All parties join issue on the proposed remedy. [redacted]. The document itself, and its factual and documentary basis, lie at the heart of this case.

62. [redacted] falls well within the Tribunal's generous and flexible standard for discovery. The evidence sought is clearly relevant and critical to a fair and just determination. To make full answer and defence, the respondents are entitled to the specific evidence grounding the Commissioner's view that the proposed remedy is inadequate. The Commissioner refused to disclose any of that information. It cannot be

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[45] *Canada Pipe*, at para. 64.

[46] *Vancouver Airport Authority FCA*, at para. 30.

credibly argued that the parties should go to trial without it—and that the Tribunal would be well served by its absence.

63. The Commissioner's regrettable approach to disclosure is exemplified in his responses to undertakings. On discovery, he undertook to produce [redacted] . His response was a non-answer. The Commissioner simply advised that [redacted] [redacted] In other words, the Commissioner's position is that he will not provide any disclosure of [redacted] .

64. Further, the Bureau's [redacted] are relevant. The Commissioner's Notice of Application makes clear that it takes issue with all of the "proposed divestitures", which it claims "will not eliminate the substantial lessening or prevention of competition".[48] Production of [redacted] will enable a train of inquiry into whether the Commissioner's earlier concerns were effectively answered and remedied by Videotron proposal. This information will be material to the Tribunal's holistic assessment of remedy, on the totality of the evidence.

[redacted]

[48] Commissioner's Notice of Application dated May 8, 2022, at paras. 94-95, McKnight Affidavit, Exhibit "A", MR, Tab 2, pp. 43-44.

B. [redacted] Is Not Litigation-Privileged

i. General Principles

65. Litigation privilege protects documents created for the dominant purpose of litigation. Its objective is "to ensure the efficacy of the adversarial process" by creating a "zone of privacy" to facilitate a party's investigation and preparation of its case.[49] The fact that a party may be conducting an investigation for litigation "does not mean that every document created and/or collected during the investigation assumes the mantle of that overarching dominant purpose so as to be clothed with legal privilege."[50] As discussed below, the evidence is that [redacted] was not prepared for litigation but to discharge the Commissioner's statutory mandate.

66. The party asserting the privilege bears the burden to establish that: (i) the document was created for the dominant purpose of litigation; and (ii) the litigation is ongoing or "may reasonably be apprehended".[51] Each document must be examined, on a case-by-case basis, to determine whether the privilege applies.

ii. Dominant Purpose Is A High Bar

67. The dominant purpose of a document must be made out on the evidence. "[T]o establish 'dominant purpose', the party asserting the privilege [has] to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who

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[49] *Blank v. Canada (Minister of Justice),* 2006 SCC 39, at paras. 27-28 [***Blank***].
[50] *Alberta v. Suncor Energy*, 2017 ABCA 221, at para. 28 [***Suncor***], leave to appeal to SCC ref'd.
[51] *Belgravia Investments Ltd. v. Canada,* 2002 FCT 649, para. 48 [***Belgravia***]; *Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52, at para. 33 [***Lizotte***]; *Blank*, at paras. 38, 59.

authorized it, and what use was or could be made of it."[52] The temporal inquiry is limited to when the document "was created or came into existence, as distinct from the purpose for which it may have been collected or put to use."[53]

68. This test establishes a high bar. It is not sufficient that preparing for litigation is one of several purposes, even if it is a substantial one.[54] This is especially important where one purpose of a document is to comply with a statutory obligation. In such cases, a party must show the dominant purpose for its creation was to prepare for litigation, rather than good-faith compliance with the statutory obligation.[55] A key factor will be whether, despite ongoing or anticipated litigation, the document would still have been prepared for another purpose. The analysis must have regard to the "nature of the records in question and all the real reasons that the records were created."[56]

iii. Dominant Purpose of [redacted] Was Not Litigation

[redacted]

[52] *PMG Technologies Inc. v. Canada (Transport)*, 2018 FC 344, at para. 98.
[53] *Suncor*, at para. 37.
[54] *Dow Chemical Canada ULC v. Nova Chemicals Corp.*, 2014 ABCA 244, at para. 38; *Blank*, para 60.
[55] *Suncor*, at paras. 40-43.
[56] *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, at paras. 87-88, leave to appeal to SCC ref'd.

72. In light of the Commissioner's statutory obligations and evidence on discovery, the assertion of litigation privilege cannot stand. . Its dominant purpose was not to prepare for litigation, but to carry out a discrete and important statutory mandate.

73. would have been prepared regardless of whether there was litigation between the parties. . All of this was

done to comply with the statute. This was also the case for [redacted]
[redacted].

74. Importantly, the fact that litigation was ongoing at the time [redacted]
[redacted] was made does not make it litigation privileged. To adopt the Commissioner's position would allow him to cloak the good-faith exercise of statutory obligations in secrecy any time those obligations coincided with ongoing or anticipated litigation. That is not the law. Even where there may be multiple purposes for a document, the protection of litigation privilege only extends where the dominant purpose is litigation. The Commissioner has failed to discharge that high burden.

75. The Commissioner's approach is tantamount to a form of blanket privilege similar to the one the Commissioner sought, and was denied, by the Federal Court of Appeal in *Vancouver Airport Authority*. In that case, the Commissioner asked the Court to recognize a privilege covering all documents and information received from third parties during his investigations. The Court declined to grant such a privilege, citing concerns over procedural fairness:

> If the class privilege urged by the Commissioner is recognized, something incongruous emerges: Competition Tribunal proceedings are subject to procedural fairness obligations at the highest level, akin to court proceedings, yet the Commissioner can unilaterally assert a class privilege and withhold all documents obtained from third parties in his investigation — here, the entire case against the Airport Authority — unless the Commissioner unilaterally decides to waive the privilege over some of the documents.[59]

[59] *Vancouver Airport Authority FCA*, at para. 113.

76. Here, the Commissioner asserts that the Bureau's analysis on a fundamental issue—done in furtherance of a statutory obligation, separate and apart from any litigation—is subject to litigation privilege simply because this proceeding was ongoing at the time of its preparation. He asks the Tribunal to shield it from discovery, regardless of the purpose for which it was prepared.

77. dBut the law of litigation privilege does not offer that sphere of protection. The Commission's position would, in effect, give him the benefit of an expanded form of litigation privilege with no basis in law. And it would establish a significant informational asymmetry, contrary to basic procedural fairness.

78. The Commissioner's refusal to produce [redacted] cannot be divorced from his role as a public officer. The Commissioner is not an average litigant. He owes a duty of full and fair disclosure. Any notion of "winning" or tactical advantage are contrary to his public interest mandate. He is duty-bound to ensure that the respondents know the case they have to meet, and that the Tribunal has the best available record.

79. The respondents and Tribunal are therefore entitled to know [redacted], and the factual and documentary support for it. Here, [redacted] The process is not well served by this refusal.

80. This is a large, complex, and important case, with a great deal at stake for the parties and the public. Trial is two months away. The parties and the Tribunal are operating on a highly compressed timetable to ready the case for hearing. [redacted] . Production of it will be of immense value to the Tribunal and this process. It will help to focus the evidence to the most important issues cited by the Commissioner. It will make for a more streamlined process and facilitate mediation, the hearing, and appellate review.

81. The respondents respectfully submit that production of [redacted] is manifestly in the interests of justice.

C. In Any Event, Commissioner Must Produce Underlying Facts/Documents

82. Even if the Commissioner's claim of litigation privilege is sustained, the respondents are entitled to know the underlying facts and documents relied on in [redacted]. The Commissioner's refusal to provide this information is improper.

83. Litigation privilege does not extend to underlying facts and documents referred to in privileged work product. In *Lizotte*, the Supreme Court of Canada approved of the "oft-cited case" *Susan Hosiery*, which helpfully explained this important distinction:[60]

> It follows that, whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or of a statement of facts in a particular form requested

[60] *Lizotte*, at para. 20.

> by a lawyer for use in litigation, the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.[61]

84. Put simply, the fact that non-privileged information is used to develop work product for litigation does not render that information privileged. "[L]itigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files."[62] To find otherwise would undermine the discovery process. Thus, "although certain documents may be protected against disclosure, facts contained in those documents, which otherwise may be discoverable, are not protected."[63]

85. This is not controversial, nor is it disputed. On examination, the Bureau confirmed that it was "perfectly aware that facts are not privileged."[64]

[redacted]. None of those facts and documents are

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[61] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R., at p. 35.
[62] *Blank*, at para. 64.
[63] *Belgravia*, at para. 45.
[redacted]

themselves privileged, and they are material to the Commissioner's pleaded position that the divestiture is inadequate. They ought to be produced.

87. The discovery process is intended to prevent ambush and to permit the parties to understand what they will be met with at trial. Basic fairness dictates that the Commissioner cannot withhold factual information going to material issues in dispute. As the Tribunal has recognized, there may be "exculpatory material or other material resting in the investigatory file that could assist the party whose conduct is impugned in testing the evidence called by the Commissioner or in building its own case."[65] There is simply no authority for the Commissioner's position to resist disclosure.

PART IV - ORDER REQUESTED

88. The respondents respectfully request that the Commissioner be ordered to answer the refusals set out in Schedule "C".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September, 2022.

Counsel for Rogers and Shaw

[65] *Vancouver Airport Authority FCA*, at para. 30.

September 7, 2022

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Canada v. Lehigh Cement Limited*, 2011 FCA 120

2. *Canada (Commissioner of Competition) v. Live Nation Entertainment Inc.*, 2019 Comp Trib. 3

3. *Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp Trib 6, rev'd on other grounds in *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24

4. *Canada (Commissioner of Competition) v. Canada Pipe Co.,* 2004 Comp. Trib. 2

5. *Blank v. Canada (Minister of Justice),* 2006 SCC 39

6. *Alberta v. Suncor Energy*, 2017 ABCA 221, at para. 28 [***Suncor***], leave to appeal to SCC ref'd

7. *Belgravia Investments Ltd. v. Canada,* 2002 FCT 649

8. *Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52

9. *PMG Technologies Inc. v. Canada (Transport)*, 2018 FC 344

10. *Dow Chemical Canada ULC v. Nova Chemicals Corp.*, 2014 ABCA 244

11. *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, leave to appeal to SCC ref'd

12. *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Competition Act*, R.S.C. 1985, c. C-34**

Advance ruling certificates

102 (1) Where the Commissioner is satisfied by a party or parties to a proposed transaction that he would not have sufficient grounds on which to apply to the Tribunal under section 92, the Commissioner may issue a certificate to the effect that he is so satisfied.

Duty of Commissioner

(2) The Commissioner shall consider any request for a certificate under this section as expeditiously as possible.

SCHEDULE “C”

REFUSALS CHART