CT-2022-002

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
(Respondents' Refusals Motion)

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TAB 1

CT-2022-002

THE COMPETITION TRIBUNAL

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BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.

Intervenors

RESPONSE OF THE COMMISSIONER
(Respondents' Refusals Motion)

THE GROUNDS ON WHICH THE COMMISSIONER OF COMPETITION OPPOSES THE RESPONDENTS' MOTION ARE:

1. The Respondents, Rogers Communications Inc. ("**Rogers**") and Shaw Communications Inc. ("**Shaw**"), have brought a motion to compel answers to questions that were properly refused during the examination for discovery of the Commissioner of Competition ("**Commissioner**"). The Respondents' questions are improper and the answers to them are irrelevant and privileged. The Commissioner submits that their motion should be dismissed with costs.

2. The Respondents move to compel the Commissioner to answer 15 questions relating to recommendations he received concerning the sufficiency of the divestitures they proposed to enter into with a view to eliminating the substantial lessening and prevention of competition alleges in the section 92 application and the section 104 application.

3. The Respondents seek to discern the advice the Commissioner received about their proposals to avoid/end this litigation.

4. Their questions are improper and seek irrelevant information. A section 92 application is not a judicial review.

5. The answers to the Respondents' questions are also privileged. Litigation in respect of the Proposed Transaction was reasonably contemplated and the dominant purpose for all the documents and all of the information sought by the Respondents is to prepare for the litigation under sections 92 and 104 of the Act. Rogers' questions pertain to recommendations that are the joint work of the Department of Justice Canada and the Competition Bureau that worked together on making these recommendations. Revealing the content of these recommendations or identifying the facts that the Department of Justice Canada and the Competition Bureau carefully selected for inclusion in these recommendations would deny the Commissioner the zone of privacy that the law affords to him to prepare for and conduct this litigation and vitiate solicitor-client privilege.

6. As such, the Respondents' improper questions were properly refused.

7. Sections 92, 93 and 96 of the *Competition Act*, R.S.C., 1985, c. C-34.

8. Subsections 8 and 8.1 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.).

9. Rules 2, 34 and 64 of the *Competition Tribunal Rules*, SOR/2008-141.

10. Rules 240 and 242 of the *Federal Courts Rules*, SOR/98-106.

11. 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 Kristen McLean affirmed September 10th, 2022; and

b) Such further or other documents as counsel may advise and the Tribunal may permit.

DATED AT OTTAWA, ONTARIO, this 12th day of September, 2022.

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TAB 2

CT-2022-002

THE COMPETITION TRIBUNAL

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COMMISSIONER OF COMPETITION

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- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

ATTORNEY GENERAL OF ALBERTA
VIDEOTRON LTD.

Intervenors

Affidavit of Kristen McLean

I, Kristen McLean, an Acting Senior Competition Law Officer with the Competition Bureau ("**Bureau**"), of the City of Ottawa, in the Province of Ontario, **AFFIRM AND SAY AS FOLLOWS**:

1. I am the lead competition law officer for the Bureau's team in connection with the proposed acquisition ("**Proposed Transaction**") of Shaw Communications Inc. ("**Shaw**") by Rogers Communications Inc. ("**Rogers**"), have worked on this

matter since the Bureau learned of the Proposed Transaction in March 2021, and was the Commissioner of Competition's (the "**Commissioner**") representative for Examinations for Discovery that took place on August 24 and 25, 2022. I have personal knowledge of the matters herein except where stated to be based on information and belief and where so stated, I verily believe it to be true.

2. A meeting took place between representatives of the Bureau and representatives of Rogers, Shaw on October 18, 2021. During this meeting, the team advised Rogers and Shaw that it had concluded that the Proposed Transaction was likely to give rise to a substantial lessening of competition in the supply of wireless services in Ontario, Alberta and British Columbia. At this time, the Bureau suggested that Rogers and Shaw analyze the efficiencies that would be lost as a result of a full block of the Proposed Transaction given concerns about separating the wireline and wireless businesses.

3. [redacted]

4. A copy of the letter sent by counsel to the Commissioner is attached as **Exhibit A**.

5. [redacted]

6. On April 7, 2022, counsel to Quebecor Inc. advised the Commissioner that Quebecor had made an unsolicited proposal to Rogers to acquire Freedom Mobile Inc. and Shaw Mobile.

7. [redacted]

[redacted]

b. [redacted]

c. [redacted]

8. The Bureau conveyed all of these points to Rogers and Shaw on April 27, 2022.

9. Following a without prejudice meeting that took place between the Commissioner of Competition, the Bureau and its counsel and representatives of Shaw and Rogers, counsel for the Commissioner provided Rogers and Shaw with notice that the Commissioner would commence litigation. A copy of the letter from the Commissioner's counsel is attached as **Exhibit B**.

10. [redacted]

[redacted]

11. Rogers and Shaw did not file materials with the Competition Tribunal in response to the Commissioner's section 104 application. Instead a Consent Agreement was registered with the Tribunal on May 30, 2022. The Consent Agreement provides that Rogers and Shaw are not to proceed with the closing of the Proposed Transaction until either the Tribunal's disposition of the section 92 application or with the agreement of the Commissioner.

12. On June 17, 2022, counsel to Rogers advised that Rogers and Shaw had entered into a letter of agreement ("**LOA**") with Quebecor for the sale of Freedom Mobile. On August 18, 2022 counsel to Rogers provided the Commissioner with a copy of the resulting Share Purchase Agreement. The LOA and Share Purchase Agreement excluded Shaw Mobile branded cellular wireless business (including subscribers) among other things from the Videotron remedy.

13. I have reviewed the chart of refusals that are the subject of Rogers' motion. I confirm that the dominant purpose for all those documents and all of the information sought by Rogers was to prepare for the litigation under sections 92 and 104 of the Act. Additionally, Rogers' questions pertain to recommendations that are the joint work of the Department of Justice Canada and the Competition who worked together on making these recommendations.

14. In view of the differences between the divestitures of proposed by Rogers and Shaw and the concerns the Bureau communicated to Rogers and Shaw including on October 18, 2021 and April 27, 2022, the Bureau's consideration

of the requests made for advance ruling certificates in connection with the Stonepeak and Videotron transactions were always subordinate to the dominant purpose of preparing for the litigation with Rogers and Shaw.

Affirmed before me by video conference at the City of Ottawa in the Province of Ontario on September 10, 2022 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*.

Derek Leschinsky
LSO# 48095T
A Commissioner for Taking Oaths

Kristen McLean

EXHIBIT A

_____

This is Exhibit “A” to the affidavit of **Kristen McLean**, affirmed remotely by **Kristen McLean** stated as being located in the city of Ottawa in the province of Ontario, before me at the city of Ottawa in the province of Ontario, on September 10, 2022, in accordance with O.Reg431/20, Administering Oath or Declaration Remotely.

EXHIBIT B

_____

This is Exhibit “B” to the affidavit of **Kristen McLean**, affirmed remotely by **Kristen McLean** stated as being located in the city of Ottawa in the province of Ontario, before me at the city of Ottawa in the province of Ontario, on September 10, 2022, in accordance with O.Reg431/20, Administering Oath or Declaration Remotely.

Ministère de la Justice Canada
Department of Justice Canada

Bureau de la concurrence
Services juridiques

Competition Bureau
Legal Services

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May 6, 2022

BY EMAIL

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Dear Counsel:

Re: The proposed acquisition of Shaw Communications Inc. by Rogers Communications Inc.

Further to my letter dated May 2, 2022 and your correspondence and other submissions over the course of the last week, the Bureau has carefully reviewed these materials. As you know, these materials raise issues which have been before the Bureau for over a year; the Bureau does not consider that the limited new information recently received, in conjunction with the entirety of the other material provided by the parties and third parties, has changed the views which were set out in meetings and correspondence since October 6, 2021 and most recently in meetings on April 27 and 29, 2022. As stated in the referenced letter, the Commissioner is strongly of the view that protection of the public interest in competition, including clear evidence of the competitive decline of the Shaw wireless business since the announcement of the proposed transaction, requires that this matter be placed before the Competition Tribunal.

We have thus received instructions from the Commissioner to file applications under sections 92 and 104 of the Competition Act in this matter, *inter alia*, seeking to block the closing of the transaction pursuant to section 92 and interim orders pursuant to section 104. We are providing this information on a confidential basis today, after market close, as requested by counsel.

We would ask counsel to confirm that you will accept electronic service of the applications and supporting material using your firm's respective file transfer websites. That would facilitate sending and receipt for both applicant and respondents. We would

ask for your separate responses on behalf of your respective clients within the next hour, so that we may make arrangements accordingly.

We will not be in a position to provide the applications until they are filed with the Tribunal, which we expect will occur as early as Monday. As soon as we have certified copies of the applications in hand, we will serve same electronically, assuming your consent as above.

We would also ask that you confirm that copies of the unredacted materials will not be disclosed to any client and will be held on an outside counsel basis for only counsel and independent experts until a confidentiality order can be registered and confidentiality claims are settled. (Attached is a copy of the order used in the Secure proceeding which is now before the Tribunal, which provides a precedent. We propose seeking an order on consent along the same lines from the Tribunal in due course.)

Finally, pursuant to the Tribunal's Practice Direction Regarding an Expedited Process Before the Tribunal, we have instructions to seek an expedited process for the hearing of this matter and the Practice Direction indicates that we are to signal whether there is consent to same at the time of filing the application. We have until 5 days after filing to signal to the Tribunal whether an order is being sought where there is no consent, so this issue is somewhat less urgent.

Thank you in advance for your cooperation,

Sincerely yours,

Derek Leschinsky
Senior Counsel
Competition Bureau Legal Services

CT-2022-002

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

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Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

Attorney General of Alberta
Vidéotron Ltd.

Intervenors

Affidavit of Kristen McLean

TAB 3

CT-2022-002

THE COMPETITION TRIBUNAL

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

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Applicant

- and -

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

- and -

ATTORNEY GENERAL OF ALBERTA
VIDEOTRON LTD.

Intervenors

COMMISSIONER'S MEMORANDUM OF FACT AND LAW
(for Respondents' Refusals Motion)

PART I – OVERVIEW

1. The Respondents, Rogers Communications Inc. ("**Rogers**") and Shaw Communications Inc. ("**Shaw**"), have brought a motion to compel answers to questions that were properly refused during the examination for discovery of the Commissioner of Competition ("**Commissioner**"). The Respondents' questions are improper and the answers to them are irrelevant and privileged. The Commissioner submits that their motion should be dismissed with costs.

2. The Respondents move to compel the Commissioner to answer 15 questions relating to recommendations he received concerning the sufficiency of the divestitures they proposed to enter into with a view to eliminating the substantial lessening and prevention of competition alleged in the section 92 application and the section 104 application.

3. The Respondents seek to discern the advice the Commissioner received about their proposals to avoid/end this litigation.

4. Their questions are irrelevant. A section 92 application is not a judicial review.

5. The answers to the Respondents' questions are also privileged. Litigation in respect of the Proposed Transaction was reasonably contemplated and the dominant purpose for all the documents and all of the information sought by the Respondents is to prepare for the litigation under sections 92 and 104 of the *Competition Act* ("**Act**"). The Respondents' questions pertain to recommendations that are the joint work of the Department of Justice Canada ("**Justice Canada**") and the Competition Bureau (the "**Bureau**") that worked together on making these recommendations. Revealing the content of these recommendations or identifying the facts that Justice Canada and the Bureau carefully selected for inclusion in these recommendations would deny the

Commissioner the zone of privacy that the law affords to him to prepare for and to conduct this litigation.

PART II – FACTS

A. The Background to the Competition Tribunal Proceedings

6. On May 9, 2022, the Commissioner filed an application to the Competition Tribunal ("**Tribunal**") challenging the proposed acquisition by Rogers of Shaw (the "**Proposed Transaction**") pursuant to section 92 of the Act, along with an application for an order under section 104.

7. A reasonable prospect of litigation in respect of the Proposed Transaction was identified by senior officials in the Bureau as early as May 5, 2021, and a litigation hold was implemented.[1]

8. Before the filing of the section 92 and 104 applications in May 2022, the Commissioner advised the Respondents on October 18, 2021, that the Proposed Transaction was likely to give rise to a substantial lessening of competition in the supply of wireless services in Ontario, Alberta and British Columbia. At that time, the Bureau suggested that Rogers and Shaw analyze the efficiencies that would be lost as a result of a full block of the Proposed Transaction given concerns about separating the wireline and wireless businesses.[2]

9. On February 8, 2022, the Commissioner advised Rogers and Shaw that a remedy that included the divestiture of the entire Freedom Mobile business would likely not be sufficient to remedy the prevention or substantial lessening of competition brought about by the Proposed Transaction. Specifically, counsel to the Commissioner advised the Respondents that:

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[1] Respondents' Motion Record (Respondents' Refusals Motion), Tab M, p. 1130, para 10, Affidavit of Sorina Sam, sworn July 26, 2022 ("Sam Affidavit") and Exhibit A thereto Respondents' Motion Record, pp 1134.

[2] Commissioner's Motion Record (Respondents' Refusals Motion), Tab 1, p 15, para 2, Affidavit of Kristen McLean, sworn September 10, 2022 ("McLean Affidavit").

> [t]he Bureau is of the view that a remedy is required in Alberta, British Columbia, and Ontario. As described, even under the assumption that the entirety of the Freedom Mobile business was divested – including backhaul, the entirety of the Freedom customer base, the Freedom brand, the Freedom retail distribution network, access to handsets and all of the Freedom RAN assets and spectrum – this would not be likely to remedy the prevention or substantial lessening of competition in Alberta and British Columbia from the severance of the Shaw wireline assets, which are connected to Shaw's wireless business.[3]

10. The Respondents subsequently entered into arrangements with third parties for potential divestitures of the Freedom Mobile business, including on March 25, 2022, with an entity owned by Stonepeak Infrastructure Partners' Fund IV ("**Stonepeak**"). The Respondents also received an unsolicited offer from Quebecor Inc., the parent company of Vidéotron Ltd. ("**Videotron**"), on April 7, 2022, a fact about which the Commissioner was informed at the time.[4]

11. On April 27, 2022, the Commissioner advised the Respondents that the Stonepeak remedy would not eliminate the substantial lessening of competition resulting from the Proposed Transaction and that it was not a viable or effective remedy.[5]

12. The materials the Commissioner filed with the Tribunal on May 9, 2022, in support of the application for an order under section 104 were lengthy and included 12 affidavits, including three from experts. The work to prepare these materials had been ongoing for several months prior to filing, at least as early as January 2022.[6]

B. The Commissioner's Section 104 Application is Resolved Through the Registration of a Consent Agreement

[3] Commissioner's Motion Record (Respondents' Refusals Motion), Tab 1, p 15, para 3, McLean Affidavit.
[4] Commissioner's Motion Record (Respondents' Refusals Motion), Tab 1, p 16, paras 5-6, McLean Affidavit.
[5] Commissioner's Motion Record (Respondents' Refusals Motion), Tab 1, p 16-17, paras 7-8, McLean Affidavit.
[6] Commissioner's Motion Record (Respondents' Refusals Motion), Tab 1, p 17-18, para 10, McLean Affidavit.

13. The Respondents did not file materials with the Tribunal in response to the Commissioner's section 104 application. Instead a Consent Agreement was registered with the Tribunal on May 30, 2022. The Consent Agreement provides that the Respondents are not to proceed with the closing of the Proposed Transaction until either the Tribunal's disposition of the section 92 application or with the agreement of the Commissioner.[7]

C. The Respondents' Refusals Motion

14. The Respondents' motion seeks answers to 15 questions that were refused during the examinations for discovery of the Commissioner's representative. All of these questions seek to elicit the content of the recommendations the Commissioner received concerning the sufficiency of the divestitures the Respondents proposed to enter into with a view to eliminating the substantial lessening and prevention of competition alleged in the section 92 application and the section 104 application.

15. The Respondents say in their Memorandum of Fact and Law that:

    (a) "[t]he Tribunal and parties ought to have the benefit of the Commissioner's views on the divestiture proposal";[8] and

    (b) the recommendations the Commissioner received about their proposals to remedy the substantial lessening and prevention of competition alleged in the section 92 application will provide a "cogent and considered account" of the Commissioner's views.[9]

D. Evidence Concerning the Nature of the Recommendations Requested by the Respondents

[7] Commissioner's Motion Record (Respondents' Refusals Motion), Tab 1, p 18, para 11, McLean Affidavit.
[8] Respondents' Memorandum of Fact and Law, p 3, para 10.
[9] Respondents' Memorandum of Fact and Law, p 19, para 61.

16. The evidence of the Bureau's Team Lead in respect of the Proposed Transaction is that the dominant purpose of all the documents and all of the information sought by the Respondents was to prepare for the litigation under sections 92 and 104 of the Act and that "Rogers' questions pertain to recommendations that are the joint work of the Department of Justice Canada and the Competition Bureau who worked together on making these recommendations".[10]

PART III – SUBMISSIONS

17. Rule 240 of the *Federal Courts Rules*[11] 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[12] 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.

A. The Law Does Not Support the Respondents' Position on Relevance

18. It is well established that it is the "fruits of the investigation", the documents and information gathered by an agency, that are relevant to legal proceedings brought by that agency before an administrative tribunal, not the internal analyses or recommendations received by a public official.[13] This view has been adopted by the Tribunal.

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[10] Commissioner's Motion Record (Respondents' Refusals Motion), Tab 1, p 18, para 13, McLean Affidavit.
[11] *Federal Courts Rules*, SOR/98-106, rule 240, Book of Authorities, Tab 23.
[12] *Federal Courts Rules*, SOR/98-106, rule 242, Book of Authorities, Tab 23.
[13] See generally, *Re Phillips*, 2012 CarswellOnt 14984 (Ont Sec Com), at para 34, Book of Authorities, Tab 1; *Wang v York Regional Police Services*, [2007] OHRTD No 11 (Ont HR Trib), at paras 12-13, Book of Authorities, Tab 2; *British Columbia (Securities Commission) v Scharfe*, 2003 BCCA 360, at paras. 6-7, Book of Authorities, Tab 3 ***[Scharfe]***; *Mitton (Re)*, 2002 LNBCSC 697 (BC Sec Com), at paras 9-11, Book of Authorities, Tab 4; *Cox (Re)*, 2001 LNBCSC 128 (BC Sec Com), at paras 6-11 and 51-55, Book of Authorities, Tab 5; *Mills (Re)*, [1999] IDACD No 41 (IIROC

19. In finding that "many of the questions which the [Commissioner's] representative has been asked are not relevant to the present litigation", the Tribunal in *Canada (Director of Investigation and Research) v. Southam Inc.*[14] held:

> ***The issue before the Tribunal [in a case under section 92 of the Act] is not the conduct of the ["Commissioner's] investigation***. The issue is whether the challenged acquisitions are likely to result in a substantial lessening of competition …[15] [Emphasis added.]

20. The Tribunal reaffirmed this principle again just this year in another refusals decision concerning an application brought under section 92 of the Act. In *Canada (Commissioner of Competition) v. Secure Energy Services Inc.*,[16] the Tribunal held that:

> ***The issue before the Tribunal is not the 'reasonableness' of the Commissioner's decision to challenge this merger – it is not judicial review … It is not about how the Commissioner conducted its investigations*** or the techniques used in those investigations. Whether they were proper and well conducted or botched is of no relevance to the Tribunal's consideration of the alleged substantial lessening of competition of this Merger.[17] [Emphasis added.]

21. Contrary to the Respondents' Memorandum of Fact and Law, "the Commissioner's views on the divestiture proposal" are not at issue in the section 92 application. Unlike a judicial review whose focus is on the reasonableness of an administrative decision, the Tribunal will decide the Commissioner's section 92 based on the evidence gathered by the Commissioner placed on the record before Tribunal. The Tribunal will

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Discipline Dec) Book of Authorities, Tab 6; and *Re Vancouver Stock Exchange*, 1999 LNBCSC 65 (BC Sec Com), Book of Authorities, Tab 7.

[14] *Canada (Director of Investigation & Research) v Southam Inc* (1991), 38 CPR (3d) 68 (Comp Trib), at para 9, Book of Authorities, Tab 8 ***[Southam]***.

[15] *Canada (Director of Investigation & Research) v Southam Inc* (1991), 38 CPR (3d) 68 (Comp Trib), at paras 10-11, Book of Authorities, Tab 8

[16] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2022 Comp Trib 3, Book of Authorities, Tab 9 ***[Secure]***.

[17] *Ibid.*, at para 10, Book of Authorities, Tab 9.

consider whether the Respondents have satisfied that their proposed divestiture eliminates the substantial lessening and prevention of competition the Commissioner alleges in the section 92 Application.[18] Again, the Tribunal will do so based on the evidence gathered by the Commissioner and placed on the record before Tribunal, not the internal recommendations that the Commissioner received about such matters. Such information does not assist the Tribunal in its evaluation of the issues before it.

22. The mandate of the Tribunal with respect to a case under section 92 is determined by statute. The manner in which the Respondents frame their Response cannot alter the Tribunal's statutory role and turn a section 92 proceeding into a judicial review.[19]

23. The Respondents seek to access the internal workings of the Commissioner, the Bureau and its legal counsel. The Respondents' motion is improper and the Tribunal must decline their request for irrelevant information concerning the administrative process. Even if such an avenue was available to them at law – and it is not – the Respondents have not provided any evidentiary foundation to challenge the administrative process. It is precisely this kind of improper fishing expedition that causes unnecessary delay, adds cost and diverts the Tribunal from the factual inquiry that Parliament has mandated it to carry out.

24. The Respondents want to divert attention from the important questions of whether their Proposed Transaction substantially lessens or prevents competition and what order should be made to eliminate the substantial harm. The Tribunal should decline their request to fish around for distractions. The Respondents' request is particularly problematic in this case with its expedited schedule as, if granted, it could quickly create unfairness or a

[18] *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at paras 85-89, Book of Authorities, Tab 10.
[19] *Scharfe*, *supra* note 14, at para 7.

cause a sideshow that would have no legitimate purpose under the statutory framework.

B. The Respondents' Motion Should Also be Dismissed Because it Seeks to Obtain Information that is Subject to Litigation Privilege

25. The purpose of litigation privilege was well explained in *Susan Hosiery Ltd. v. Minister of National Revenue*[20] where Justice Jackett of the former Exchequer Court of Canada stated as follows:

> Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. ***If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system***.[21] [Emphasis added.]

26. Litigation privilege "is not directed at, still less, restricted to, communications between solicitor and client", it is available to lawyer and client alike.[22] Litigation privilege gives rise to an immunity from disclosure of documents and communications whose dominant purpose is the preparation for litigation or impending litigation.[23]

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[20] *Susan Hosiery Ltd v Minister of National Revenue,* [1969] 2 Ex CR 27, Book of Authorities, Tab 11 ***[Susan Hosiery]***. See also *Blank v Canada (Minister of Justice)*, [2006] 2 SCR 319, Book of Authorities, Tab 12 ***[Blank].***

[21] *Susan Hosiery*, *supra* note 21, at para 9, Book of Authorities, Tab 11. See also *Blank*, *supra* note 21, at para 34, Book of Authorities, Tab 12 ***[Blank].***

[22] *Lizotte c Aviva Cie d'assurance du Canada*, 2016 SCC 52, at para 22, Book of Authorities, Tab 13 ***[Lizotte]***; *Blank, supra* note 21*,* at para 27.

[23] *Lizotte, supra* note 23*,* at paras 1 & 33*.*

27. Litigation privilege is a class privilege. This means that once litigation is reasonably anticipated and a party creates a document for the dominant purpose of litigation, there is a presumption of non-disclosure and immunity. The onus shifts to the other party to show that it falls within a known exception.[24]

28. Where a document has been prepared for mixed purposes, it is necessary to consider the circumstances in which the document was created and to determine the dominant purpose of its preparation. The nature of the document and the timing of its creation are important factors in that determination. The question of why a document was created and which purpose was dominant is always a factual question that must be determined based on the circumstances surrounding its creation.[25]

29. Because assessing the dominant purpose for a document is a factual question about why it was created, the jurisprudence recognizes that a document may be created for the dominant of purpose of litigation when a statute imposes a duty on a person to take a particular action or do certain things. In this regard, the Saskatchewan Court of Queen's Bench has held:

> The existence of a statutory obligation to report on an incident does not necessarily preclude claims of litigation privilege in material created during an investigation conducted, in part, to comply with that reporting obligation.[26]

30. The evidence respecting the basis for litigation privilege over the documents at issue in the Respondent's Refusals' Motion is incontrovertible. The evidence of the Bureau's Case Team Lead in connection with the Proposed Transaction is that "the dominant purpose for all those documents and all of

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[24] *Lizotte, supra* note 23*,* at paras 32-37.
[25] *R v Husky Energy Inc*, 2017 SKQB 383, at para 47, Book of Authorities, Tab 14 ***[Husky]***; *PMG Technologies Inc v Transport Canada*, 2018 FC 344, at para 18, Book of Authorities, Tab 15.
[26] *Husky, supra* note 23, at para 47.

the information sought by Rogers was to prepare for the litigation under sections 92 and 104 of the Act".[27]

31. The objective indicia supporting the Team Lead's statements are explained in further detail in her affidavit. They can however be summarized in a nutshell:

(a) on October 18, 2021, the Bureau informed the Respondents that the Proposed Transaction was likely to give rise to a substantial lessening of competition in the supply of wireless services in Ontario, Alberta and British Columbia and told them they should analyze efficiencies that would be lost as a result of an application for a full block of the Proposed Transaction given concerns about separating the wireline and wireless businesses;

(b) the work to prepare to draft the section 92 application and the lengthy section 104 material had been ongoing since at least as early as January 2022;

(c) [redacted]

(d) the Respondents thereafter entered into arrangements with third parties to divest Freedom Mobile, but not the wireline assets of Shaw, among other things; and

(e) this motion pertains to recommendations that are the joint work of the Justice Canada and the Bureau that worked together on making these recommendations.

[27] Commissioner's Motion Record (Respondents' Refusals Motion), Tab 1, p 18, para 13, McLean Affidavit.

32. The Commissioner acknowledges receiving requests from the Respondents for advanced ruling certificates in connection their proposed divestitures. These requests were duly considered, but these remedy proposals fell short of addressing the concerns previously expressed by the Commissioner. As the Team Lead states:

> In view of the differences between the divestitures proposed by Rogers and Shaw and the concerns the Bureau communicated to Rogers and Shaw including on October 18, 2021 and April 27, 2022, the Bureau's consideration of the requests made for advance ruling certificates in connection with the Stonepeak and Videotron transactions were always subordinate to the dominant purpose of preparing for the litigation with Rogers and Shaw.[28]

C. The Respondents' Motion Should Also be Dismissed Because it Seeks to Obtain Information that is Subject to Solicitor-Client Privilege

33. Solicitor-client privilege attaches to communications that fall along the continuum of communications in which a solicitor tenders advice.[29] Documents that are part of the "necessary exchange of information of which the object is the giving of legal advice" are subject to solicitor-client privilege.[30] Legal advice is intended to be confidential.[31]

34. Given that the recommendations put in issue by the Respondents' Refusals Motion reflect the joint work of Justice Canada and the Bureau who worked together on making the recommendations to the Commissioner, it would be inappropriate for the Tribunal to require them to be produced to the Respondents. Legal advice and consideration of litigation strategy are intertwined throughout the sought-after documents and communications. The

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[28] Commissioner's Motion Record (Respondents' Refusals Motion), Tab 1, p 18-19, para 14, McLean Affidavit.
[29] *Samson Indian Nation and Band v Canada*, [1995] 2 FC 762 (CA), at para 8, Book of Authorities, Tab 16.
[30] *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at para 28, Book of Authorities, Tab 17.
[31] *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809, at para 15, Book of Authorities, Tab 18.

legal advice cannot be disentangled from these recommendations. An order disclosing the documents and information would vitiate solicitor-client privilege, which is sacrosanct.[32]

D. Disclosing the Information in the Recommendations to the Respondents Would Defeat Privilege and Should Not be Ordered

35. The Commissioner has provided the Respondents with extensive details regarding his position on their proposed divestitures and the basis for it through the several meetings that the Bureau has held with the Respondents, their experts and their counsel, the correspondence from the Commissioner's counsel, the pleadings in this application, and the Commissioner's Response to Demand for Particulars. The Commissioner's position and the basis for it has been known to the Respondents since early in 2022.

36. In *Blank v. Canada (Minister of Justice)*, Fish J. speaking on behalf of the majority of the Supreme Court, noted that were differences between the approach of the majority of the Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz*[33] and that of the British Columbia Court of Appeal in *Hodgkinson v. Simms*[34] with respect to documents gathered or copied, but not created, for the purpose of litigation. Although ultimately leaving the resolution of the issue for another day, Fish J. stated that he preferred the approach in *Hodgkinson,* which was as follows:

> It is my conclusion that the law has always been, and, in my view, should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed

[32] *R v McClure*, [2001] 1 SCR 445, at para 35 ("solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance") & para 41 (solicitor-client is a principle of "fundamental justice" that is "important to the administration of justice as a whole"), Book of Authorities, Tab 19.
[33] *General Accident Assurance Co v Chrusz,*(1999), 45 OR (3d) 321 (CA), Book of Authorities, Tab 20.
[34] *Hodgkinson v Sims,* (1988), 55 DLR (4th) 577 (BCCA), Book of Authorities, Tab 21.

> required, unless the client consents, to claim privilege for such collection and to refuse production.[35]

37. Fish J. preferred the approach in *Hodgkinson* because "[e]xtending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege".[36]

38. Following the Supreme Court's decision in *Blank*, the Ontario Court of Appeal in *Ontario (Correctional Services) v. Goodis*[37] clarified that there were three sets of reasons in *Chrusz* and that only Carthy J.A. had expressly rejected the approach in *Hodgkinson*. The Court of Appeal in *Goodis* highlighted that, like the majority in *Blank*, Doherty J.A. and Rosenberg J.A in *Chrusz*, had preferred an approach whereby copies of non-privileged documents might be privileged if they were the result of selective copying or the result of research or the exercise of skill and knowledge and "left open the question of privilege with respect to copies of non-privileged documents". The Ontario Court of Appeal, in *Goodis*, then sustained litigation privilege claims "related to the fact-finding and investigation process of counsel to assist in defending the Ministry in the civil actions" because they were assembled as result of the "<u>exercise of skill and knowledge</u>" [emphasis added].[38]

39. The principle that litigation privilege extends to factual information assembled through the "exercise of skill and knowledge" must dispose of the Respondents' request for what they characterize as the "underlying facts/documents" referenced in the recommendations made to the Commissioner.

40. The administration and enforcement of the *Act* in relation to mergers is unquestionably complex. The selection of the information contained in the

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[35] *Blank*, supra note 21, at para 62.
[36] *Blank, supra* note 21, at paras 62-64.
[37] *Ontario (Ministry of Correctional Services) v Goodis*, 89 OR (3d) 457 (CA), Book of Authorities, Tab 22 ***[Goodis]***.
[38] *Goodis*, *supra* note 38, at paras 61-63.

recommendations the Commissioner received concerning divestitures that are alleged to eliminate a substantial lessening and prevention of competition in connection with immanent and ongoing litigation unquestionably require the exercise of skill and knowledge. The information reflected in these recommendations cannot be disclosed to the Respondents without disclosing the litigation assessment and litigation strategy of the Commissioner in relation to the Respondents' proposed divestitures.

41. The Respondents' are not entitled to a roadmap of the Commissioner's litigation assessment and strategy. The zone of privacy respecting the Commissioner's preparations must be respected.

PART V – ORDER SOUGHT

42. The Commissioner respectfully requests that the Tribunal dismiss the Respondents' motion with costs.

DATED AT OTTAWA, ONTARIO, this 12th day of September, 2022.

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CT-2022-002

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 AND VIDÉOTRON LTD.

Intervenors

MOTION RECORD

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