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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 COMMUNICATIONS INC. and SHAW COMMUNICATIONS INC.

Respondents

– and –

ATTORNEY GENERAL OF ALBERTA and VIDEOTRON LTD.

Intervenors

**MEMORANDUM OF FACT AND LAW OF THE RESPONDENT,
SHAW COMMUNICATIONS INC.**

**RESPONSE TO COMMISSIONER'S MOTION TO STRIKE SHAW'S EVIDENCE
AND SHAW'S CROSS-MOTION TO STRIKE COMMISSIONER'S EVIDENCE**

October 26, 2022

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**MEMORANDUM OF FACT AND LAW
OF SHAW COMMUNICATIONS INC.**

PART I – INTRODUCTION

1. The general rule in Tribunal proceedings is that pre-trial evidentiary challenges are the exception because such matters are best left to the merits hearing. Yet barely two weeks before the Trial in this matter is set to begin, the Commissioner has brought a Motion seeking to strike portions of Shaw’s evidence, thus using up valuable time that the Tribunal and the parties could be putting toward trial preparation in this expedited matter.

2. The Commissioner's purported basis for his Motion is that Shaw's evidence includes improper lay opinion evidence and hearsay. Both assertions are groundless. Worse still, however, the Commissioner's objections to Shaw's evidence are entirely hypocritical. As Shaw has demonstrated in its Cross-Motion, the Commissioner's own evidence is rife with statements that are similar in all material respects to the evidence of Shaw that the Commissioner impugns—down to ***the very same documents and sources***.

3. Shaw submits that both Motions are unnecessary, wasteful and, in any event, premature. As a matter of fundamental fairness, the issues on this motion should be decided by a full Panel of the Tribunal in the context of Trial. The Tribunal is more than capable of assessing and, to the extent necessary, disregarding any improper evidence—from any party—once it has had a chance to see how the evidence will be used at Trial, including by subjecting the witnesses in question to examination, cross-examination and questioning from the Panel that may shed light on the issue of admissibility. There is simply no need to engage in this premature skirmish, which risks prejudicing the efforts of the parties on the eve of Trial. Instead, the objections raised on these motions should be addressed, to the extent necessary, in argument and/or in the Tribunal's reasons for decision on the merits.

4. Nevertheless, to the extent the Tribunal determines that it is appropriate to resolve the Commissioner's objections before Trial and that any of the Commissioner's objections are valid, the Tribunal should, for the same reasons, also strike the comparable statements, in the Commissioner's evidence, as identified in Shaw's Cross-Motion.

5. Although Shaw believes firmly that the Commissioner's objections lack merit, in an attempt to resolve this motion, or at least narrow the dispute before the Tribunal, Shaw has offered to withdraw voluntarily, to the extent necessary, certain statements made in the challenged Witness Statements. These withdrawals are indicated with strikethroughs in the chart attached as **Schedule C** to this Memorandum. The chart also includes Shaw's specific response to each of the objections advanced by the Commissioner.

PART II – FACTUAL BACKGROUND

A. The Commissioner's Motion to Strike Portions of Shaw's Witness Statements

6. On October 14, 2022, the Commissioner moved to strike portions of the Witness Statements of, among others, three of Shaw's most senior executives (Brad Shaw, Paul McAleese and Trevor English) and Shaw's investment banker and strategic advisor in connection with the proposed merger between Shaw and Rogers (Rod Davies). Each of Messrs. Shaw, McAleese, English and Davies is a senior and long-standing participant in Canada's telecommunications industry. Each has substantial knowledge about both Shaw and Freedom, but also about their principal competitors and the telecommunications industry generally. They have filed testimony in this matter seeking to share their unique and highly informed perspectives with the Tribunal.

7. The Commissioner does not challenge the relevance of any of these witnesses' testimony. Rather, the Commissioner asserts that portions of the Witness Statements of Messrs. Shaw, McAleese, English and Davies contain impermissible lay opinion evidence or hearsay. The Commissioner's challenges are summarized below by witness and

category in the order in which they appear in Appendix “A” to the Commissioner’s Notice of Motion.

(i) ***The Trevor English Witness Statement***

8. Mr. English is the Executive Vice President, Chief Financial and Corporate Development Officer at Shaw. He has held numerous management and executive roles at Shaw for the past 18 years.¹ As a senior executive of Shaw, Mr. English has developed extensive knowledge of the Company’s wireline and wireless businesses, as well as substantial familiarity with the business of Shaw’s competitors. Mr. English has been involved in Shaw’s major capital deployment decisions, including its spectrum acquisitions.²

9. Mr. English’s Witness Statement describes the inception and development of Shaw’s wireless and wireline businesses, the major strategic business decisions that the Company has made in recent years, the rationale for the transaction between Rogers, Shaw and Videotron (the “**Proposed Transaction**”) and the future of Shaw if the Proposed Transaction does not proceed.

10. The Commissioner objects to portions of Mr. English’s Witness Statement on the grounds that it contains both impermissible opinion evidence and hearsay. For example, the Commissioner challenges Mr. English’s observations at paragraph 155 of his Witness Statement contrasting the reaction of the capital markets at the time that Freedom’s sale to Videotron was announced with the reaction of the markets at the time that Shaw’s

¹ Witness Statement of Trevor English sworn on September 23, 2022 (“**English Witness Statement**”) at para. 18.

² English Witness Statement at para. 19.

acquisition of WIND (later rebranded as Freedom) was announced in 2016. The Commissioner raises these objection even though Mr. English was personally involved with both transactions. The impugned passage at paragraph 155 of Mr. English's Witness Statement reads as follows:

The appreciation in Quebecor's share price is particularly telling. It indicates that the collective judgment of independent analysts and investors was that the proposed sale of Freedom to Videotron is highly accretive to Videotron and that Videotron will be able to operate Freedom viably and profitably. This is in contrast to the equity markets one-day share price decline of Shaw of ~8% when we announced the original WIND acquisition in late 2015.³

11. As explained below, the statement in question is purely factual and includes properly admissible lay opinion evidence, given Mr. English's significant, real world, knowledge and understanding of Shaw's business and the Proposed Transaction.

12. The Commissioner has also objected to Mr. English's quotation at paragraph 201 of his Witness Statement from a recent interview that Darren Entwistle, the CEO of TELUS, gave to *The Globe and Mail*. He raises this complaint despite the fact that representatives of TELUS have voluntarily chosen to participate as adverse witnesses against Shaw in these proceedings. The language challenged by the Commissioner is as follows:

TELUS itself appears to recognize the competitive threat that this would pose to it. In a recent interview with the *Globe & Mail* published on September 16, 2022, Darren Entwistle, the Chief Executive Officer of TELUS, acknowledged that he is concerned by the prospect of a "recapitalized Shaw":

³ "Schedule C": Shaw's Responses to the Commissioner's Objections, see #2.

As he plots his final chess moves, the loquacious and, by his own admission, anxiety-riddled CEO has other worries on his mind, as well. Among them is a potential seismic shift in the industry's competitive landscape, as federal regulators mull a proposed \$26- billion merger between Rogers Communications Inc. and Shaw Communications Inc. If approved, the deal will not only combine two of the country's largest cable networks, providing Shaw with fresh capital to deploy in Western Canada. It will also create an opportunity for Videotron Ltd. owner Quebec Inc. to expand its wireless business outside Quebec. [...]

Shaw has been steadily losing market share to Telus in Western Canada in recent years, and Mr. Entwistle admits he's worried a recapitalized Shaw could be a fiercer competitor for Telus.

"Anyone that tells you that they're not worried about the competition shouldn't be in the job," he said, adding that anxiety can drive creativity and innovation.

"I get paid to be anxious about stuff even when there's nothing obvious to be anxious about. ...**So yeah, I'm anxious about [Rogers-Shaw]. I'm anxious about how the market may evolve.** People would say to me, 'If the Rogers-Shaw deal doesn't go through I guess you're happy.' I said, 'No, I'm anxious either way.'"⁴ [emphasis added in Mr. English's Witness Statement]

(ii) *The Rod Davies Witness Statement*

13. Mr. Davies is the Managing Director and Head of the Canadian Communications, Media and Technology investment banking group at TD Securities. He has over 25 years of experience providing strategic advisory services to clients in the communications, media and technology industries. Since Mr. Davies joined TD Securities, he has routinely

⁴ "Schedule C": Shaw's Responses to the Commissioner's Objections, see #17.



(iii) *The Brad Shaw Witness Statement*

16. Mr. Shaw is the Chief Executive Officer and Executive Chair of the Board of Directors of Shaw.⁹ Mr. Shaw has over 35 years of experience at Shaw. He has intimate knowledge of the Company's wireline and wireless businesses, including the acquisition of WIND Mobile (now Freedom) in 2016 and the Proposed Transaction.¹⁰ As a result of his long experience in leadership positions at Shaw, Mr. Shaw also has deep knowledge about the wider Canadian telecommunications industry, including Shaw's competitors.

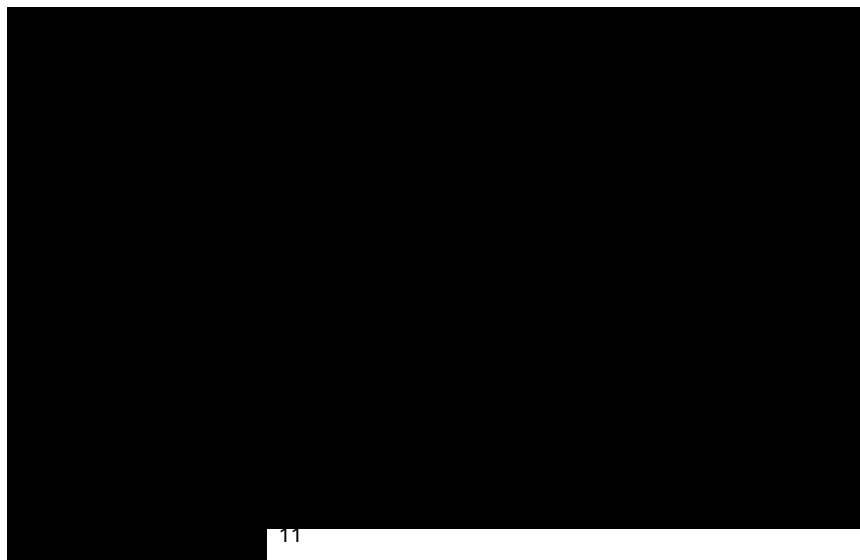
17. Mr. Shaw's Witness Statement details the Shaw family's involvement in the business through the Shaw Family Living Trust, the means by which the Trust and Shaw's Board approved the Proposed Transaction, the impact of the proposed sale of Freedom to Videotron and the impact of the ongoing litigation to the business.

⁸ "Schedule C": Shaw's Responses to the Commissioner's Objections, see #22.

⁹ Witness Statement of Brad Shaw sworn on September 23, 2022 ("**Shaw Witness Statement**") at para. 1.

¹⁰ Shaw Witness Statement at para. 16-17.

18. The Commissioner's objections to Mr. Shaw's testimony allege that his testimony contains inadmissible lay opinion evidence. For example, the Commissioner challenges Mr. Shaw's testimony at paragraph 51 of his Witness Statement as to why certain terms negotiated by Videotron as part of its purchase of Freedom from Shaw will position the combined Freedom-Videotron business to offer favourable bundled wireline Internet and wireless packages to customers:



(iv) *The Paul McAleese Witness Statement*

19. Mr. McAleese is the current President of Shaw and has held this position since April 2020.¹² As President, Mr. McAleese is responsible for all of Shaw's wireline and wireless divisions and all aspects of the Company's strategy and business.¹³ From this and other senior roles at Shaw, Mr. McAleese has developed extensive knowledge of the businesses of Shaw's competitors. Mr. McAleese also possesses personal knowledge of

¹¹ "Schedule C": Shaw's Responses to the Commissioner's Objections, see #24.

¹² Witness Statement of Paul McAleese sworn on September 23, 2022 ("**McAleese Witness Statement**") at para. 1.

¹³ McAleese Witness Statement at para. 1.

the global telecommunications industry flowing from the leadership positions he previously held at prominent telecommunications firms in the United States and the United Kingdom.¹⁴

20. Mr. McAleese's Witness Statement discusses Shaw's wireline and wireless businesses in depth. Among other things, he describes: (i) the Company's acquisition of WIND Mobile; (ii) its consideration of a 5G roll-out; (iii) the role of Shaw Go WiFi; (iv) the bundling of wireline Internet and wireless services; (v) the Proposed Transaction; and (vi) its efforts to compete in light of significant uncertainties associated with the completion of the Proposed Transaction.

21. As he does with other witnesses, the Commissioner objects to Mr. McAleese's testimony on the grounds of impermissible lay opinion evidence. For example, the Commissioner challenges Mr. McAleese's statement at paragraph 15 of his Witness Statement that wireless carriers globally have been able to thrive without owning their own wireline network, with specific reference to T-Mobile in the United States:

Similarly, one of the largest and most successful wireless carriers in the United States – T-Mobile US Inc. ("T-Mobile") – has operated successfully for years in providing wireless services to its customers in the United States even though it did not own or operate its own wireline network or provide wireline services. The suggestion that one cannot compete aggressively and successfully in the wireless business in Canada without also owning and operating a wireline business is simply wrong.¹⁵

¹⁴ McAleese Witness Statement at para. 17.

¹⁵ "Schedule C": Shaw's Responses to the Commissioner's Objections, see #32.

22. The Commissioner objects to this evidence even though Mr. McAleese explains in his Witness Statement that he lived and worked in the United States for more than a decade before he joined Shaw in 2017. He also explains in his Witness Statement that he “was (and remain[s])” well aware of the wireless businesses carried on by T-Mobile in the United States.¹⁶

23. The Commissioner also objects, on hearsay grounds, to Mr. McAleese’s statement at paragraph 168 comparing Freedom’s network speeds to those of other wireless carriers, even though Mr. McAleese’s statement cites ***the same leading third-party data provider that is relied on by the Commissioner’s own witnesses:***

[REDACTED] . The current speed disadvantage of the Freedom network is easily verifiable. A company known as Ookla LLC publishes a regular series of reports comparing the quality of telecommunications networks around the world; its reports on Canadian wireless companies are publicly available online: <https://www.speedtest.net/global-index/canada?mobile#market-analysis>. Ookla’s latest “Speedtest” report that includes Freedom pertains to the first quarter of 2022. It indicates that the speed of Freedom Mobile’s network is significantly below that of its competitors.

[REDACTED]

¹⁶ McAleese Witness Statement at para. 212.

¹⁷ “Schedule C”: Shaw’s Responses to the Commissioner’s Objections, see #33.

24. At least **three** of the Commissioner's witnesses from three separate telecommunications companies—Bell, TELUS and Comcast—rely on the very same Ookla reports for the very same purpose as Mr. McAleese. All of these witnesses are, of course, subject to examination, cross-examination and questioning from the Panel at the Trial, including with respect to their reliance on the Ookla data in question.

B. Shaw's Cross-Motion To Strike Equivalent Portions of The Commissioner's Witness Statements

25. To be clear, Shaw was (and remains) content to have the Commissioner's evidence presented to the Tribunal without the need for the current Motion to be heard on the eve of Trial. However, to ensure fairness and avoid any asymmetry between the treatment of its own evidence and the Commissioner's, Shaw has been compelled to file a Cross-Motion to strike comparable statements in the Commissioner's Witness Statements.

26. The similarities between the statements that the Commissioner has challenged in Shaw's evidence and those found in the Commissioner's own evidence are clear and undeniable. While the Commissioner objects when Shaw witnesses offer any assessment of the competitive strength of a market participant, the Commissioner appears to have no concerns with his own witnesses doing exactly the same thing. For example, Blaik Kirby, a senior executive at Bell, does just that at paragraph 26 of his Witness Statement, when he compares the competitive abilities of both Shaw and Videotron and offers a prediction

regarding Shaw's hypothetical competitive strength in the event the Proposed Transaction is not approved¹⁸:

Prior to the announcement of the Proposed Acquisition, Shaw Mobile was beginning to play a similarly disruptive role in Alberta and British Columbia. **I expected Shaw Mobile to continue to play this role and to increase its impact on the market**, just as Videotron had done previously, given that it was in a similar position to the one occupied by Videotron when it launched—namely, a well-capitalized company with a large established wireline subscriber base, a well-established local brand, and a small wireless subscriber base and market share. **If the Proposed Acquisition does not proceed, I expect Shaw Mobile will return to playing this disruptive role in the market.** [emphasis added]

27. Further, although the Commissioner is unwilling to allow Shaw's witnesses to rely on certain third-party documents because he claims their use constitutes inadmissible hearsay, he is content to have his own witnesses do so repeatedly. To name just a few examples:

- (a) Comcast representative Tom Nagel's Witness Statement [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- (b) the Witness Statement of Mr. Kirby of Bell at paragraphs 21, 34, 39-41 refers to and relies on data collected by a third-party data provider, [REDACTED], and at page 4, footnote 2 cites **the very same investment bank analyst reports relied on by Shaw** (and criticized by the Commissioner);

¹⁸ Witness Statement of Blaik Kirby sworn on September 23, 2022 ("Kirby Witness Statement") at para. 26.

- (c) the Affidavit of Kenneth Mathieu, which appends more than a dozen *investment bank analyst reports of the same kind as relied on by Shaw* (and criticized by the Commissioner);
- (d) TELUS representative Charlie Casey's Witness Statement at paragraph 8 refers to and relies on reports prepared by a different third-party data provider, Comlink; and
- (e) Competition Bureau employee Stephanie Assad's Witness Statement at paragraphs 5-10 purports to summarize hundreds of submissions concerning the Proposed Transaction received from members of the public.

28. These are just a handful of the many improper statements and documents contained in the Commissioner's evidence that are challenged by Shaw. A complete list is found in **Appendix "A"** to Shaw's Notice of Motion dated October 17, 2022.

PART III – POINTS IN ISSUE

29. The Motion and Cross-Motion raise the following three issues:
- (a) Are the evidentiary challenges raised by the Commissioner and Shaw appropriate for resolution now or should they be deferred to the merits hearing?
 - (b) Has the Commissioner demonstrated that Shaw's evidence is clearly and plainly inadmissible as impermissible lay opinion evidence or improper hearsay?
 - (c) If the Tribunal determines that portions of Shaw's evidence should be struck on these grounds, what portions of the Commissioner's evidence should be struck on the same basis?

PART IV – SUBMISSIONS

30. The Commissioner’s Motion should be dismissed in its entirety. As a threshold matter, his concerns regarding Shaw’s evidence are better resolved at trial, where the Tribunal can better assess the intended use of the impugned material in its proper context. In any event, the Commissioner’s objections are without merit: *first*, the evidence that the Commissioner challenges as impermissible lay opinion evidence is compliant with the principles established by this Tribunal, the Supreme Court of Canada and the Federal Court of Appeal; and *second*, the evidence he characterizes as inadmissible hearsay is either not proffered for a hearsay purpose or falls within one of the well-established exceptions to the hearsay rule. If this Tribunal nevertheless finds that any portions of Shaw’s Witness Statements should be struck, it must likewise strike the many comparable statements in the Commissioner’s evidence.

A. The Commissioner’s Motion Should Not Be Determined Before Trial

31. The jurisprudence of both this Tribunal and the Federal Court of Appeal clearly establishes that an adjudicator asked to rule on an interlocutory evidentiary challenge enjoys the discretion either to resolve the challenge immediately or defer it to the merits hearing.¹⁹ Still, as the Court of Appeal has admonished repeatedly, interlocutory evidentiary challenges “are not to become routine” and “usually will fail” because such matters are often best left to Trial.²⁰ A court should rule immediately on such challenges

¹⁹ See, *inter alia*, *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8 at para. 18 (QL), Shaw’s BOA at Tab **22**; and *AstraZeneca Canada Inc. v. Apotex Inc.*, 2003 FCA 487 at para. 12 (QL), Shaw’s BOA at Tab **2**; and *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2018 Comp. Trib. 15 at paras. 15-25, Shaw’s BOA at Tab **19**.

²⁰ *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8 at para. 18 (QL), Shaw’s BOA at Tab **22**; *AstraZeneca Canada Inc. v. Apotex Inc.*, 2003 FCA 487 at para. 12 (QL), Shaw’s BOA at Tab **2**; and see more generally, *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2018 Comp. Trib. 15 at paras. 15-25, Shaw’s BOA at Tab **19**; *Thibodeau v. Halifax International Airport Authority*, 2018

only where: (i) a violation of evidentiary principles is self-evident such that it is unlikely that “reasonable minds might differ on the issue”; and (ii) the prejudice to the opposing party in not striking out the impugned evidence is both serious and readily established.²¹

The Commissioner has not established either of these elements.

32. *First*, there is no clear violation of evidentiary principles. To the contrary, as developed further below, Shaw’s evidence respects the boundaries that this Tribunal’s jurisprudence has established for lay opinion evidence offered by senior corporate executives. Likewise, Shaw has offered the purported hearsay statements either for valid non-hearsay purposes or subject to recognized exceptions to the hearsay rule. Even if there is ambiguity on these points, that ambiguity counsels in favour of staying the Tribunal’s hand until the use of this evidence is clear at Trial.

33. *Second*, the Commissioner has not shown how resolving his objections at Trial will materially prejudice him. To the extent the Commissioner offers any argument on this point, it is hyperbolic and conclusory: He contends that he will be “materially prejudiced if he has to prepare for the hearing based on witness statements” from Messrs. Shaw,

FC 223 at paras. 11 & 17, Shaw’s BOA at Tab **40**; and *Canada (Comm’r of Compet’n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at para. 60, Shaw’s BOA at Tab **17**.

²¹ *Bernard v. Canada*, 2015 FCA 263 at paras. 9-12, *leave to appeal refused*, [2016] S.C.C.A. No. 34, Shaw’s BOA at Tab **6**; *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8 at paras. 17-18 (QL), Shaw’s BOA at Tab **22**; *AstraZeneca Canada Inc. v. Apotex Inc.*, 2003 FCA 487 at paras. 12-13 (QL), Shaw’s BOA at Tab **2**; *Board of Internal Economy v. Canada*, 2017 FCA 43 at paras. 29-30, Shaw’s BOA at Tab **7**; *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2018 Comp. Trib. 15 at paras. 15-25, Shaw’s BOA at Tab **19**; *Thibodeau v. Halifax International Airport Authority*, 2018 FC 223 at paras. 11 & 17, Shaw’s BOA at Tab **40**; and *Canada (Comm’r of Compet’n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at paras. 1, 5, 22-24 & 59-61, Shaw’s BOA at Tab **17**. By analogy, see also *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196 at paras. 8-11, *leave to appeal refused*, [2016] S.C.C.A. No. 326, Shaw’s BOA at Tab **1**.

McAleese, English, and Davies that “**do not in any way** comply with the relevant rules”—even though he challenges only a small portion of that evidence.²²

34. The Commissioner’s reliance on *Board of Internal Economy v. Attorney General* is inapposite.²³ As Justice de Montigny explained in that ruling, “the discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances.”²⁴ Unlike the Motion before this Tribunal, the *Board of Internal Economy* case involved genuinely exceptional circumstances: Justice de Montigny was there confronted with a flagrant violation of fundamental evidentiary principles involving purported reliance on an affidavit from a fact witness “replete with legal opinion.”²⁵ By contrast, here, the issue is whether seasoned corporate executives may offer their informed perspective about the operation of their business and its place in the telecommunications market. Accordingly, the Tribunal should defer resolution of the Motions until trial.

B. Shaw’s Witness Statements Do Not Contain Inadmissible Lay Opinion Evidence

(i) Legal Test

35. This Tribunal has, for many years, embraced the pragmatic principles governing the admission of lay opinion evidence that were articulated by the Supreme Court forty years ago in *R. v. Graat* by Justice Dickson (as he then was).²⁶ Applying these principles, this Tribunal has accepted that the admissibility of lay opinion evidence is not in itself

²² Commissioner’s Written Representations at para. 24 (emphasis added).

²³ Commissioner’s Written Representations at para. 23.

²⁴ *Board of Internal Economy v. Canada*, 2017 FCA 43 at para. 29, Shaw’s BOA at Tab 7.

²⁵ *Board of Internal Economy v. Canada*, 2017 FCA 43 at para. 30, Shaw’s BOA at Tab 7.

²⁶ *R. v. Graat*, 1982 CarswellOnt 101 (S.C.C.), Shaw’s BOA at Tab 36.

problematic; rather, “[t]he real issue will be the assessment and weight to be given to such evidence after it is admitted.”²⁷ Unsurprisingly, the Tribunal regularly relies on lay opinion evidence to reach its decisions on the merits.²⁸

36. As the Supreme Court explained in *Graat*, and as this Tribunal has long accepted, the tenuous distinction between “fact” and “opinion” should be relaxed or even ignored entirely in circumstances where: (i) a lay witness provides testimony based on his or her own experiences and observations; and (ii) that evidence will be of use to the Tribunal.²⁹ As the Federal Court of Appeal has more compendiously explained, lay opinion evidence is permissible: (i) “where the witness is in a better position than the trier of fact to form the conclusions”; (ii) where “the conclusions are ones that a person of ordinary experience can make”; (iii) where “the witnesses have the experiential capacity to make the conclusions”; **or** (iv) “where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts.”³⁰

²⁷ *Canada (Comm’r of Compet’n) v. Imperial Brush Co.*, 2007 Comp. Trib. 22 at para. 11, Shaw’s BOA at Tab **16**; *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para. 148, Shaw’s BOA at Tab **20**; and *Canada (Comm’r of Compet’n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at paras. 7, 9, 16, 30 & 35, Shaw’s BOA at Tab **17**.

²⁸ *Sears Canada Inc. v Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp. Trib 6 at paras 36-37, Shaw’s BOA at Tab **44**.

²⁹ *R. v. Graat*, 1982 CarswellOnt 101 (S.C.C.) at paras. 46-64 (QL), Shaw’s BOA at Tab **36**; *Canada (Comm’r of Compet’n) v. Imperial Brush Co.*, 2007 Comp. Trib. 22 at paras. 9-14, Shaw’s BOA at Tab **16**; *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2018 Comp. Trib. 15 at para. 10, Shaw’s BOA at Tab **19**; *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at paras. 146 & 148, Shaw’s BOA at Tab **20**; and *Canada (Comm’r of Compet’n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at paras. 7, Shaw’s BOA at Tab **17**.

³⁰ See, *inter alia*, *Toronto Real Estate Board v. Canada (Comm’r of Compet’n)*, 2017 FCA 236 at para. 79, Shaw’s BOA at Tab **41**; as well as *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para. 146, Shaw’s BOA at Tab **20**; and *Canada (Comm’r of Compet’n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at para. 7, Shaw’s BOA at Tab **17**.

37. In view of these principles, this Tribunal has admitted lay opinion evidence from a senior corporate officer that addresses, among other things:

- (a) the nature of the applicable industry, market and broader business sector in which the corporation competes;
- (b) the place of the corporation within that market;
- (c) the identification and calculation of the corporation's market share as well as the estimated market positions of the corporation's competitors (based on the witness's experience and on publicly available data);
- (d) future expansion and investment plans of the corporation;
- (e) the capacity, productivity and throughput of the corporation itself as well as the capacity, productivity and throughput of its rivals (based on the witness's experience and on publicly available data); and
- (f) internal calculations (undertaken by others within the corporation) quantifying estimated costs savings or losses that would have occurred in a "but for" scenario.³¹

(ii) ***Shaw's Witness Statements Offer Permissible Opinion Evidence***

38. The impugned testimony by Messrs. Shaw, McAleese and Shaw falls squarely within the guardrails established by the Tribunal's case law because their statements either fall within or are analogous to the foregoing categories of admissible lay opinion evidence.

³¹ *Canada (Comm'r of Compet'n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at paras. 12-16, 19 25-30 & 32-36, Shaw's BOA at Tab 17; and *Canada (Comm'r of Compet'n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at paras. 152-153, Shaw's BOA at Tab 20.

39. Messrs. Shaw, McAleese and English are each highly experienced telecommunications executives with extensive knowledge of telecommunications markets. Their knowledge of Freedom's business and its place in relation to the broader Canadian market is beyond reproach. As this Tribunal has recognized, the inherently comparative phenomenon of market position means that to understand one's own market position necessarily implies some understanding of the market position of one's competitors.³² Thus, these witnesses' informed perception legitimately extends to the relationship between their business and that of their competitors.

40. From this jurisprudential vantage point, it is clear that Messrs. Shaw, McAleese and English are uniquely well-suited to form conclusions about how Freedom—the business they know inside and out—can be a competitive force when it joins hands with a well-capitalized firm. Contrary to the Commissioner's assertions, Messrs. Shaw, McAleese and English are very much testifying about "*their business*" in the 'but for' world", because the greater part of the combined Freedom-Videotron is the Freedom business.³³

41. A few examples from the Commissioner's attempted challenges illustrate the precise scope of the impugned opinion evidence offered by Messrs. Shaw, McAleese and English:

- (a) "The terms of the Divestiture Agreement provide Videotron with significant benefits and operational advantages relative to Freedom under Shaw's

³² Canada (Commissioner of Competition) v Parrish & Heimbecker, Ltd., 2020 Comp. Trib 15 at para. 15, Shaw's BOA at Tab 17.

³³ Toronto Real Estate Board v Commissioner of Competition, 2017 FCA 236 at para. 81, Shaw's BOA at Tab 41 (emphasis in original).

ownership. As a result, Videotron will be better placed than Shaw now is to continue as a disruptive force in the wireless market, compete vigorously and emerge as a fourth national carrier.”³⁴

- (b) “The combination of Videotron and Freedom will result in a much stronger wireless competitor that is capable of challenging the ‘Big 3’ throughout most of Canada. Videotron has a proven track record as a disruptor in the wireless business in Quebec, where it has offered innovative services and won significant market share at the expense of all of Rogers, BCE and TELUS. With the acquisition of Freedom, Videotron will have greater scale, an enhanced portfolio of spectrum, and a 5G-capable network in Ontario, Alberta and British Columbia (to go with its existing operations in Quebec and portions of Ontario).”³⁵
- (c) “Videotron will have what it needs to emerge as a fourth national wireless carrier, including scale, spectrum, and physical infrastructure that spans most of the country.”³⁶

42. Each constituent element of these conclusions flows from the competence and direct observation of Messrs. Shaw, McAleese and English. Each statement concerns the business of Freedom and the terms, known intimately by Shaw’s senior executives, on which Videotron will acquire this business. When coupled with their understanding of Videotron’s role in the telecommunications market this empirical foundation entitles Messrs. Shaw, McAleese and English to form conclusions about how Freedom could perform in well-capitalized hands.

³⁴ McAleese Witness Statement at para. 361.

³⁵ Shaw Witness Statement at para. 51.

³⁶ English Witness Statement at para. 204.

(iii) ***Mr. Davies' Evidence is Admissible as the Evidence of a Participant Expert***

43. The challenged statements in Mr. Davies' testimony are admissible on a different basis. As noted above, Mr. Davies' repetition of the advice that he provided to Shaw does not constitute an opinion proffered to the Tribunal but a simple recounting by Mr. Davies of a factual event in which he participated and an historical opinion that he provided to Shaw. Accordingly, his role in this proceeding is akin to that of a participant expert who (in the words of the Federal Court of Appeal) is permitted to "testify as to [his] observations and participation in the underlying events and the opinions that [he] gave at the relevant time on the basis of [his] ordinary skill, knowledge and training."³⁷ It is uncontroversial that such a participant expert is a fact witness whose opinion evidence is admitted for the truth of its contents.³⁸

C. Shaw's Witness Statements Do Not Contain Inadmissible Hearsay

(i) ***Legal Standard***

44. As the Tribunal well knows, "[h]earsay is testimony or written evidence of a statement made to a witness by a person who is not called as a witness, the statement

³⁷ *Roher v. Canada*, 2019 FCA 313 at para. 16-17 (and paras 32-33), *leave to appeal refused*, [2020] S.C.C.A. No. 50, Shaw's BOA at Tab 27.

³⁸ See, *inter alia*, *Westerhof v. Gee Estate*, 2015 ONCA 206 at para. 70, *leave to appeal refused*, [2015] S.C.C.A. No. 198, Shaw's BOA at Tab 43.

being offered to show the truth of the matter stated therein”.³⁹ Thus, where testimony is **not** offered for its truth, it is not hearsay and the rule against hearsay has no application.⁴⁰

45. Even where a statement is offered for the truth of its contents, it may nevertheless be admitted into evidence either: (i) if it falls into one of the recognized common law or statutory exceptions to the hearsay rule (e.g., the exception applicable to business records or admissions); **or** (ii) if it satisfies the twin criteria of “reliability” and “necessity” constituting the “principled” exception to hearsay.⁴¹

46. With respect to the principled exception, the onus of establishing the reliability and necessity criteria lies with the party who seeks to rely on hearsay materials.⁴² Importantly, each of reliability and necessity is assessed in a fluid rather than a fixed manner, and

³⁹ *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6 at paras. 84-85, affirmed without reference to this issue, 2011 FCA 188, Shaw's BOA at Tab **32**. See also: *Canada (Comm'r of Compet'n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para. 156, Shaw's BOA at Tab **20**; *Canada (Comm'r of Compet'n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at paras. 37, Shaw's BOA at Tab **17**; and *Canada (Comm'r of Compet'n) v. Parrish & Heimbecker, Ltd.*, 2021 Comp. Trib. 2 at para. 141, Shaw's BOA at Tab **18**; *R. v. Khelawon*, 2006 SCC 57 at paras. 34-35 & 56, Shaw's BOA at Tab **37**; and *CBS Canada Holdings Co. v. Canada*, 2017 FCA 65 at para. 19, Shaw's BOA at Tab **11**.

⁴⁰ *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6 at paras. 80-85, affirmed without reference to this issue, 2011 FCA 188, Shaw's BOA at Tab **31**; *Thibodeau v. Halifax International Airport Authority*, 2018 FC 223 at paras. 16-17, Shaw's BOA at Tab ; *Canada (Comm'r of Compet'n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at paras. 42, Shaw's BOA at Tab **17**. See more generally: *R. v. Khelawon*, 2006 SCC 57 at paras. 36 & 57; *R. v. Evans*, [1993] 3 S.C.R. 653 at para. 16 (QL), Shaw's BOA at Tab **37**; *CBS Canada Holdings Co. v. Canada*, 2017 FCA 65 at paras. 19-20, Shaw's BOA at Tab **11**; and *Teva Canada Ltd. v. Pfizer Canada Inc.*, 2016 FCA 161 at para. 89-90, *leave to appeal refused*, [2016] S.C.C.A. No. 362, Shaw's BOA at Tab **32**.

⁴¹ *Canada (Comm'r of Compet'n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para. 157, Shaw's BOA at Tab **17**; *Canada (Comm'r of Compet'n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at para. 38, Shaw's BOA at Tab ; *Canada v. Iris Technologies Inc.*, 2021 FCA 223 at paras. 29-33, Shaw's BOA at Tab **17**; and *Coldwater Indian Band v. Canada*, 2019 FCA 292 at para. 48, Shaw's BOA at Tab **24**.

⁴² *Canada (Comm'r of Compet'n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para. 158, Shaw's BOA at Tab **20**; and *Canadian Tire Corp. V. P.S. Partsource Inc.*, 2001 FCA 8 at paras. 11 & 14 (QL), Shaw's BOA at Tab **22**.

each is mutually supporting of the other (*i.e.*, where a piece of evidence bears strong hallmarks of reliability, the assessment of necessity is relaxed and vice versa).⁴³

47. A document is “reliable” (or, more specifically, it possesses the requisite characteristic of “threshold reliability”) if there are sufficient circumstantial or evidentiary guarantees that its contents are trustworthy.⁴⁴ In assessing reliability, the Tribunal may consider the circumstances in which the document came into existence (as explained in the affidavit to which the document is exhibited) and its own ability to evaluate the document’s trustworthiness.⁴⁵ *Indicia* of reliability include: (i) the fact that the hearsay document is buttressed and supported by contemporaneous materials;⁴⁶ (ii) the fact that the hearsay document was created by a party’s employee during the ordinary course of her employment;⁴⁷ and (iii) the fact that statistical material contained in a hearsay document was generated and disseminated by a reputable third-party provider of data.⁴⁸

48. A document is “necessary” (or, more accurately, it is “reasonably necessary” and thus admissible) in circumstances where it is relevant and there is no other readily available source of evidence that establishes the tendering party’s version of events.⁴⁹

⁴³ *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para. 159, Shaw’s BOA at Tab **22**.

⁴⁴ *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para. 158, Shaw’s BOA at Tab **22**.

⁴⁵ *Canada v. Iris Technologies Inc.*, 2021 FCA 223 at paras. 29-30, Shaw’s BOA at Tab **14**.

⁴⁶ *Coldwater Indian Band v. Canada*, 2019 FCA 292 at para. 49, Shaw’s BOA at Tab **24**.

⁴⁷ *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para. 160, Shaw’s BOA at Tab **20**.

⁴⁸ *Canada v. Facebook, Inc.*, 2021 FC 599 at paras. 27-29 & 31, Shaw’s BOA at Tab **13**.

⁴⁹ *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para. 158, Shaw’s BOA at Tab **20**; and *Coldwater Indian Band v. Canada*, 2019 FCA 292 at para. 41, Shaw’s BOA at Tab **24**.

Satisfaction of this criterion may require an explanation from the tendering party as to why non-hearsay evidence was unavailable to establish the points at issue.⁵⁰

49. In a recent ruling, Justice Stratas provided several considerations that must be borne in mind when assessing the necessity criterion:

- (a) most fundamentally, the concept of necessity must be applied flexibly and contextually and it must be recognized that, in some cases, “necessity” may mean nothing more than “expediency” or “convenience”;
- (b) certain proceedings are intended to be expeditious and streamlined, and this affects the content of the necessity criterion; and
- (c) “the nature and practical exigencies of a proceeding” can affect the evaluation of necessity and, accordingly, the admissibility of evidence.⁵¹

50. Providing a practical illustration of these points, Justice Stratas noted that the goal of “practicality”—that is, the desirability of rendering a proceeding more efficient by reducing the number of affidavits required to establish every disputed fact—can itself satisfy the prerequisite of “necessity”.⁵²

(ii) ***Many of the Documents Referred to By Shaw Witnesses Are Not Offered for the Truth of Their Contents***

51. Even if the above statements are not admissible pursuant to exceptions to the hearsay rule, they may still be admissible for a non-hearsay purpose. Indeed, many of the documents Shaw’s witnesses cite in their material are not offered for the truth of their

⁵⁰ *Canada (Comm’r of Compet’n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15 at para. 15, Shaw’s BOA at Tab 17.

⁵¹ *Coldwater Indian Band v. Canada*, 2019 FCA 292 at para. 52-55, Shaw’s BOA at Tab 24. See also: *Canada v. Facebook, Inc.*, 2021 FC 599 at paras. 27-31, Shaw’s BOA at Tab 13.

⁵² *Coldwater Indian Band v. Canada*, 2019 FCA 292 at paras 59-60, Shaw’s BOA at Tab 24.

contents, but to prove the existence of the statements, which is a classic non-hearsay purpose. To the extent this intended use is not clear at this early juncture, that is yet another reason counseling in favour of deferring the resolution of the Motions until Trial.

(a) Newspaper and Magazine Articles

52. The Commissioner challenges a series of newspaper and magazine articles attached to the statements of Messrs. English and McAleese. These articles are appended not for the truth of their contents, but rather because their existence (*i.e.*, the fact that they were published and thereby came to the attention of the public) is itself important to Shaw's arguments.

53. The distinction between tendering a newspaper article for the truth of its content and tendering it as proof of its existence has been repeatedly recognized and applied by courts, including the Federal Court. These courts have accepted that media reports are legitimately introduced into evidence for a variety of valid reasons that fall outside the hearsay rule, including because the articles themselves provide confirmation: (i) that there has been media coverage of a dispute; (ii) that there has been coverage of a party's public statements or its acknowledgement of past difficulties; (iii) that statements have been made that may reveal a person's contemporaneous state of mind; (iv) that certain information has been accessible to the public; (v) that certain opinions are circulating in the forum of public ideas; and (vi) that certain words or concepts have currency in the market.⁵³

⁵³ *Thibodeau v. Halifax International Airport Authority*, 2018 FC 223 at paras. 7, 8, 11-17, 21 & 22, *Shaw's BOA* at Tab **40**; *Canada v. Facebook, Inc.*, 2021 FC 599 at paras. 19, *Shaw's BOA* at Tab **13**; *Bruzzese v. Canada*, 2014 FC 230 at paras. 55-58, *Shaw's BOA* at Tab **10**; *Sweet v. Canada*, 2022 FC 1228 at paras. 42-45 & 48-50, *Shaw's BOA* at Tab **39**; *Saskatchewan Health Care Association v.*

54. In appending the impugned articles to its Witness Statements, Shaw does not ask the Tribunal to accept these materials for the truth of their contents. Rather, they have been adduced as evidence of statements concerning Shaw or the telecommunications industry more broadly that have been disseminated to the public. The Tribunal is not invited to form any conclusions as to the truth of the contents of that reporting. What matters, and what Shaw introduces the statements to prove, is that such claims were published in broadly circulated media outlets. Shaw's witnesses are, of course, prepared to speak to that impact of these issues.

55. For example, the Commissioner challenges Mr. McAleese's citation of a *PC Mag* article that unfavourably characterized Freedom's network speeds.⁵⁴ As Mr. McAleese explains, "[c]onsumer publications have advised potential Freedom subscribers of this fact in various head-to-head speed test comparisons."⁵⁵ Whether *PC Mag* accurately reported Freedom's speed, however, is not the point. Rather, the fact which Shaw seeks to prove is that Freedom's speed was characterized negatively relative to other Canadian wireless carriers by a leading consumer magazine, because the public perception of a wireless carrier's network speed is an essential input into carriers' strategic decision-making. That is a quintessential non-hearsay purpose.

Saskatchewan Union of Nurses, 1999] S.J. No. 195 (Q.B.) at paras. 11-20, Shaw's BOA at Tab **38**; *Chopra v. Canada*, 2005 FC 958 at para. 32 (QL), affirmed, 2006 FCA 295, leave refused, [2006] S.C.C.A. No. 437, Shaw's BOA at Tab **23**; *Canadian Coalition for Firearm Rights v. Canada*, 2021 FC 130 at paras. 15, 16, 18, 20 & 21, Shaw's BOA at Tab **21**; and *London Life Insurance Co. v. Manufacturers Life Insurance Co.*, [1999] F.C.J. No. 394 (T.D.) at para. 23, Shaw's BOA at Tab **28**.

⁵⁴ McAleese Witness Statement at para. 166.

⁵⁵ Responding McAleese Witness Statement at para. 74.

56. Similarly, although Shaw submits that *The Globe and Mail* interview with Mr. Entwistle of TELUS is admissible pursuant to the admissions exception to hearsay (see below), it also submits in the alternative that this interview can be admitted for the non-hearsay purpose of establishing that it was reported Mr. Entwistle made these statements in a public forum. As just described, consumer expectations about a wireless carrier's network are relevant to this case. The interview with Mr. Entwistle is relevant to the matters in this proceeding regardless of whether it is true that TELUS is, in fact, "blowing its brains" over 5G or that its executives fear a fully-capitalized Shaw. In short, the fact that these statements were made is highly relevant to matters at issue in this case because such statements, particularly coming from such a senior figure in the industry, contribute to the expectations of other market participants and consumers.

(b) Investment Bank Analyst and Other Similar Reports

57. The same analysis applies to the various analysts' reports and consultants' reports that are appended to the Witness Statements of Messrs. English and McAleese. As Mr. McAleese explains at paragraph 142 of in his Responding Witness Statement, he and other senior executives rely on these reports precisely because they shape public and investor sentiments about public companies:

[A]nalyt reports from investment banks such as TD and others (for example, RBC, Scotiabank, BMO, CIBC, National, Desjardins) are also routinely relied upon by Shaw and other industry participants, including senior executives and their investor relations teams, to understand and predict investor sentiment about their companies. As one such senior executive, I have understood for years that analyst commentary, precisely because it is authored by sophisticated individuals with deep knowledge of and expertise in the relevant industry, can shape public perceptions about public companies like Shaw. I routinely

review and rely upon information in Analyst's reports on conducting my day-to-day responsibilities as the President of Shaw. It has been my experience that senior executives of other telecommunications companies similarly refer to and rely upon analyst reports. [emphasis added]

58. Although Shaw submits that the analyst reports (and, in particular, the market share surveys conducted by Vince Valentini of TD Securities, described more fully below) satisfy the principled exception to the hearsay rule, the reports are also admissible for non-hearsay purposes. These reports are evidence that certain propositions circulated through the Canadian telecommunications market and informed investor sentiment about that market during the relevant period. These reports are widely read and therefore probative of how Shaw's financial and strategic decision-making was being framed to interested capital markets participants. The fact of that framing has nothing to do with whether or not the underlying assertions contained in the reports are accurate.

59. Similarly, the Commissioner's objection to a December 2015 report [REDACTED]
[REDACTED]
[REDACTED].

60. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

61. Shaw does not offer [REDACTED] in violation of the rule against hearsay. The relevance of the report is not the truth or falsity of the analysis contained therein. Rather, the report is relevant because its content informed the strategic decision-making of Mr. McAleese, as discussed in his Witness Statement.

(iii) *The Interview by TELUS' CEO Constitutes an "Admission" and Thus Falls Within A Recognized Exception to the Hearsay Rule*

62. The Commissioner's objection to Shaw's reliance on the interview given by Mr. Entwistle of TELUS to *The Globe and Mail* does not withstand scrutiny. The interview can and should be admitted for the truth of its contents under the well-established and non-controversial "informal admission" exception to the hearsay rule.

63. The law is clear that statements made by a person or their agent outside a proceeding on an issue relevant to the proceeding can be used to challenge the evidence of the person to whom the statement is attributable.⁵⁷ Moreover, statements made by senior corporate officers that are reported in the press can be (and, indeed, have been) admitted into evidence as informal admissions attributable to the corporation itself.⁵⁸

⁵⁶ McAleese Witness Statement at Exhibit 113.

⁵⁷ *R. v. Evans*, [1993] 3 S.C.R. 653 at para. 24 (QL), *Shaw's BOA* at Tab **35**; *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161 at para. 102, *leave to appeal refused*, [2016] S.C.C.A. No. 362, *Shaw's BOA* at Tab **32**; *CBS Canada Holdings Co. v. Canada*, 2017 FCA 65 at para. 24 (in *obiter*), *Shaw's BOA* at Tab **11**; *Canada v. Facebook, Inc.*, 2021 FC 599 at paras. 22, 25, 32 & 40, *Shaw's BOA* at Tab **13**; *Thibodeau v. Halifax International Airport Authority*, 2018 FC 223 at paras. 7 & 12-14 & 22, *Shaw's BOA* at Tab **40**; and *Canada v. Consolidated Motors Ltd.*, [1949] Ex.C.R. 254 at para. 19 (QL), *Shaw's BOA* at Tab **12**.

⁵⁸ See, *inter alia*, *Thibodeau v. Halifax International Airport Authority*, 2018 FC 223 at paras. 7, 12-14 & 22, *Shaw's BOA* at Tab **40**; and *Canada v. Facebook, Inc.*, 2021 FC 599 at paras. 22, 25, 32 & 40, *Shaw's BOA* at Tab **13**. To the same effect, information and data retrieved from a corporation's own

64. As both the Supreme Court of Canada and Federal Court of Appeal have affirmed, the entry of such a statement into evidence requires no circumstantial guarantees of trustworthiness because it does not lie in the mouth of the person who made the statement to assert its lack of reliability.⁵⁹ Instead, a party seeking to bar the admission of such a statement into evidence must provide its own separate evidence that disproves the truth of the statement.⁶⁰

65. This law provides a full answer to the Commissioner's objection. TELUS has chosen to inject itself as a participant into these proceedings. The statements of its CEO—including most especially his fears about the competitive prospects of the telecommunications market after the Proposed Transaction—are highly relevant. And no evidence contradicting the truth of Mr. Entwistle's statements has been proffered.

66. In any event, to the extent that any concern is raised with the reliability of Mr. Entwistle's widely reported statements, two representatives of TELUS have been called as witnesses by the Commissioner. As a consequence, the factual basis of Mr. Entwistle's statements can be tested through their examination.

website or publications likely constitute non-hearsay "admissions" that can be admitted into evidence: see, *inter alia*, *Canadian Coalition for Firearm Rights v. Canada*, 2021 FC 130 at para. 23 & 24, Shaw's BOA at Tab **21**; and *Brockham v. Valmont Industries Holland B.V.*, 2021 BCSC 500 at para. 106, *reversed on other grounds*, 2022 BCCA 80, Shaw's BOA at Tab **8**.

⁵⁹ *R. v. Evans*, [1993] 3 S.C.R. 653 at para. 24 (QL), Shaw's BOA at Tab **35**; and *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161 at para. 102, *leave to appeal refused*, [2016] S.C.C.A. No. 362, Shaw's BOA at Tab **32**.

⁶⁰ *Bayer Inc. v. Cobalt Pharmaceuticals Co.*, 2016 FC 1013 at para. 289, Shaw's BOA at Tab **4**; and *Vancouver Art Metal Works Ltd. v. Canada*, 2001 FCT 265 at paras. 10-13 (QL), Shaw's BOA at Tab **42**.

(iv) ***The Ookla Data and TD Market Share Data Should Be Admitted Under The Principled Exception to the Hearsay Rule***

67. The Commissioner objects to a series of third-party sources that Shaw's Witness Statements cite for various market data (even though the Commissioner's own witnesses rely on the same sources and data). Specifically, the Commissioner objects to:

- (a) data and reports provided by Ookla, a Seattle-based company, that is widely regarded by industry participants as a reliable authority on the relative speeds offered by different wireless and wireline carriers (the "**Ookla Data**"); and
- (b) data collected by investment bank research analyst Vince Valentini and his team at TD Securities regarding the market shares of various wireline and wireless operators in Canada (the "**TD Market Share Data**").

68. Neither objection is well founded. Both the Ookla Data and the TD Market Share Data plainly satisfy the two-pronged principled exception to the hearsay rule because both are circumstantially reliable and necessary to place before the Tribunal in light of the pressing need for speed and efficiency in these proceedings.⁶¹

69. The very recent ruling of Associate Chief Justice Gangé in *Canada v. Facebook* is instructive. The Associate Chief Justice was asked to strike from an affidavit certain statistical evidence that identified the size of Facebook's user base *circa* 2018. This data point was taken from a report, appended to a witness's affidavit, prepared by a specialized

⁶¹ In the *alternative*, the Ookla Data should be admitted for the non-hearsay purpose of showing the relative rankings of wireless carriers regardless of whether those rankings are accurate. As noted above with respect to the PC Mag rankings, public perception of network speed is of vital importance to Shaw and other carriers because it informs consumer decision-making about from whom to purchase wireless services. Similarly, the TD Market Share Data should be admitted for the non-hearsay purpose of showing what Shaw believed its market share to be, as Shaw made business decisions in reliance on that data regardless of its ultimate veracity.

third-party organization named Statista.com. Although no one from Statista.com was made available for cross-examination, the federal Privacy Commissioner argued that the data should be admitted on the grounds that it was **reliable** (as it had been provided by a third party known to be “a reliable data provider”) and was also **necessary** (because it would be inconvenient, inefficient and unnecessary to require direct evidence from Statista.com on this issue). The Associate Chief Justice agreed and allowed the Statistica.com data into evidence.⁶²

70. The same result should apply with respect to both the Ookla Data and the TD Market Share Data.

71. *First*, both sets of data are reliable. Mr. McAleese’s Responding Witness Statement delivered on October 20, 2022 explains that both Ookla and Mr. Valentini are regarded within the wireless industry (and beyond) as sources of authoritative, impartial and reliable data relating to download speeds and market share, respectively.⁶³ That evidence stands uncontradicted. Indeed, the Commissioner’s own witnesses have relied on both Ookla and analyst reports from TD. Nazim Benhadid of TELUS states at paragraph 10 of his Witness Statement that “TELUS regularly relies upon industry reports such as those produced by ... Ookla”.⁶⁴ Moreover, Blaik Kirby of Bell cites at paragraph 8 (footnote 5) of his Witness Statement and includes as Exhibit D to his Witness Statement an analyst report prepared by TD Securities.

⁶² *Canada v. Facebook, Inc.*, 2021 FC 599 at paras. 27-31, Shaw’s BOA at Tab 13.

⁶³ *McAleese* Witness Statement at paras. 75, 141.

⁶⁴ The judiciary has also noted the widespread reliance on Ookla’s “very popular independent third party speed test website.” See *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 (ONSC) at para. 17, Shaw’s BOA at Tab 5.

72. The reliability of the TD Market Data can also be established by comparing it to the Commissioner’s evidence. The market shares reported in the TD report dated December 30, 2021 (attached as Exhibit 64 to Mr. McAleese’s Witness Statement) align almost perfectly with data reported by Mr. Kirby in Exhibit J of his Witness Statement: On page 20 of a Bell slide deck titled, [REDACTED] dated May 13, 2021, a chart titled, [REDACTED] summarizes the market share data of Bell, Rogers, TELUS, Shaw and other carriers.

	TD Report	Bell Data
Bell	29%	[REDACTED]
Rogers	30%	[REDACTED]
TELUS	26%	[REDACTED]
Other	15%	[REDACTED]

73. *Second*, both the Ookla Data and TD Market Share Data are necessary, in the sense that their reception into evidence furthers the Tribunal’s and the parties’ shared goal of expediting these proceedings. Again, Justice Gangé’s comments in the *Facebook* decision are instructive. In rejecting Facebook’s argument that user base statistics from a third-party data provider was impermissible hearsay, Justice Gagné observed that “the need for speed and efficiency affects the necessity analysis” and even a need for “expediency or convenience” can establish necessity:

[30] I note here that the recent guidelines provided by the Federal Court of Appeal in *Coldwater* support the Commissioner’s understanding of necessity—that it is circumscribed by the context:

[53] **First, necessity must be “given a flexible definition, capable of encompassing diverse situations” in which “the relevant direct evidence is not, for a variety of reasons, available”:**.... The “necessity [may not be] so great;

perhaps hardly a necessity, **only an expediency or convenience**, can be predicated”....

[54] Second, section 18.4 of the *Federal Courts Act* provides that applications for judicial review “shall be heard and determined without delay and in a summary way” and, on top of that, this Court has ordered a highly expedited schedule for the consolidated applications. **The need for speed and efficiency affects the necessity analysis.**

[55] Third, sometimes **the nature and practical exigencies of a proceeding can affect** the admissibility of evidence and, in particular, **the Court’s evaluation of necessity.**

[31] In my view, **Facebook’s argument lacks consideration for streamlining and efficiency.** Paragraph 21 and associated Exhibit H are admissible only for the one single data point identified by the Commissioner. **To require witness evidence on that point would be impractical** [emphasis added; citations omitted].⁶⁵

74. The need for a practical approach endorsed by Justice Gagné rings especially true in this matter. It would be ineffective and impractical in the extreme for this Tribunal to require Shaw to call witnesses from Ookla and TD Securities, among other third parties, to establish basic, uncontroversial facts about wireless speeds for multiple providers over multiple years, or market shares for multiple operators, in multiple provinces, over multiple years.

75. Before leaving this topic, it bears mentioning that reception of such evidence would hardly put this Tribunal on the vanguard of the law of hearsay. For example, in a recent decision involving the propriety of relying on hearsay statistics regarding the scope of COVID-related infection and death rates, the Ontario Superior Court observed that when such data is “published by government institutions and reputable private institutions,” it

⁶⁵ *Canada v. Facebook, Inc.*, 2021 FC 599 at paras. 30 & 31, *Shaw’s BOA* at Tab 13, quoting from *Coldwater Indian Band v. Canada*, 2019 FCA 292 at paras. 53-55, *Shaw’s BOA* at Tab 24.

represents “exactly the type of trustworthy hearsay evidence that a reviewing court can rely upon”.⁶⁶ Similarly, data provided by IMS Health Canada Inc., an independent, third-party consolidator of pharmaceutical prescriptions statistics,⁶⁷ is routinely relied upon by both expert and fact witnesses in pharmaceutical litigation conducted before the Federal Courts.⁶⁸ For example, in his 2018 ruling in *Hospira v. Kennedy*, Justice Phelan applied the principled exception and **rejected** the contention that the IMS data tendered by one of the parties was impermissible hearsay: “IMS data is a common source of evidence in these types of trials and its reliability is generally accepted by the Federal Court.”⁶⁹ So too with the Ookla Data and the TD Market Share Data. In short, the Tribunal would be on firm ground in receiving these materials into evidence.

(v) *The Analyst Reports Should Be Admitted Under The Principled Exception to the Hearsay Rule*

76. Beyond the TD Market Share Data, the Court should also admit the other investment bank analyst reports challenged by the Commissioner under the principled exception to the hearsay rule.

77. *First*, analyst reports satisfy the reliability criterion because they are widely respected for their sophisticated analysis of the relevant industry. That is why, as Mr.

⁶⁶ *R. v. Baidwan*, 2020 ONSC 2349 at para. 59, Shaw's BOA at Tab 34.

⁶⁷ In the *words* of Justice Kelen: “IMS Health is a pharmaceutical market tracking company, and recognized as an independent source of reliable data for the worldwide pharmaceutical market....In my view, it was reasonably open to the Minister to reach his decision based on the independent IMS data submitted by...Apotex” (see *AstraZenec Canada Inc. v. Canada*, 2004 FC 1277 at paras. 11 & 48, *reversed without reference to this issue*, 2005 FCA 189, *which was itself reversed*, 2006 SCC 49, Shaw's BOA at Tab 3).

⁶⁸ For illustrative purposes, see *Eli Lilly Canada Inc. v. Teva Canada Ltd.*, 2018 FCA 53 at para. 163, *leave to appeal refused*, [2018] S.C.C.A. No. 163, Shaw's BOA at Tab 25.

⁶⁹ *Hospira Healthcare Corp. v. Kennedy Trust for Rheumatology Research*, 2018 FC 259 at paras. 303, 304 & 306-310, *reversed on other grounds*, 2020 FCA 30 at paras. 27-29, *leave to appeal refused*, [2020] S.C.C.A. No. 79, Shaw's BOA at Tab 26.

McAleese explains in paragraph 142 of his Responding Witness Statement (and as noted above), analyst reports are routinely relied on by Shaw and other industry participants to understand and predict investor sentiments.

78. The Tribunal need not take Mr. McAleese's word for it, however. Mr. Kirby of Bell likewise relies on analyst reports in the Witness Statement submitted by the Commissioner. On page 4, footnote 2, Mr. Kirby cites reports from TD Securities and Canaccord Genuity Capital Markets as authority for "Freedom's pricing strategy [was] 'aggressive'" and attaches both reports to his Witness Statement. To the extent either party wishes to challenge the veracity of statements made by the analysts, they are free to do so by cross-examining Mr. McAleese, Mr. Kirby or another appropriate witness.

79. *Second*, the analyst reports also satisfy the necessity criterion for the reasons previously discussed with respect to the market data. The Tribunal and parties have laboured significantly to ensure that the Trial in this matter can be conducted within four weeks. It is inconsistent with that goal to insist on each party calling multiple analysts to the stand, particularly when there are obvious substitutes for judging the reliability of the statements in the analyst reports.

D. If the Tribunal Strikes Portions of Shaw's Witness Statements, It Should Do The Same With The Commissioner's Comparable Evidence

80. For the reasons discussed at length above, Shaw believes that the Tribunal and the parties would be better served if the Tribunal exercised its discretion to defer resolution of any evidentiary challenges until Trial. If the Tribunal determines, however, that it is appropriate to proceed with the Commissioner's evidentiary challenges before the merits hearing and, further, that any of the Commissioner's objections are meritorious,

then Shaw respectfully requests that comparable evidence proffered by the Commissioner also be struck.

81. As discussed above, the Commissioner's evidence contains a multitude of statements that, if the Commissioner is correct, suffer from the same frailties as Shaw's evidence. For instance, Mr. Kirby's Witness Statement purports to assess the performance of Shaw Mobile in the but-for world, even though Mr. Kirby has no direct familiarity with Shaw's business.⁷⁰ Moreover, as also discussed above, the Commissioner's evidence relies on some of the very same third-party sources now impugned by him, including the Ookla Data and investment bank analyst reports.

82. The Commissioner's evidence actually goes farther than Shaw's in relying on potential hearsay evidence. For instance, the Commissioner has deemed it appropriate to attach to the Witness Statements of Dennis Albert⁷¹ and Stephanie Assad⁷² a large number of complaint letters of concern that are said to reflect public apprehension regarding the Proposed Transaction. There are numerous bases for disregarding these letters entirely, including, for example, the fact that there is no way for either Shaw or this Tribunal to determine whether these complaint letters represent genuine expressions of concern by impartial members of the public.

83. The Commissioner's reliance on these unattributed "complaints" as evidence of public concerns about the Proposed Transaction represents classic hearsay. Most significantly, their anonymity renders them of dubious reliability. Not surprisingly, the

⁷⁰ Witness Statement of Blaik Kirby sworn September 23, 2022 at para. 26.

⁷¹ Witness Statement of Dennis Albert sworn on September 22, 2022 at paras. 5-14.

⁷² Witness Statement of Stephanie Assad sworn September 20, 2022 at paras. 5-10.

Federal Court of Appeal, the Federal Court and other Canadian courts have repeatedly struck out or accorded no weight to complaints or expressions of confusion or concern received from unnamed third parties.⁷³ Indeed, the Federal Court of Appeal has described challenges to this category of hearsay as being so clear-cut that a motion to strike should be granted even at an interlocutory stage of the proceeding.⁷⁴

84. Thus, to the extent that the Tribunal determines that the Commissioner's motion should be granted in whole or in part and strikes out portions of the Witness Statements delivered by Shaw, both fairness and logic dictate that portions of the Witness Statements delivered by the Commissioner must also be struck out.

PART V – ORDERS REQUESTED

85. The Respondent Shaw seeks from the Tribunal the following relief:

- (a) an Order dismissing the Commissioner's motion in its entirety, with costs;
- (b) if necessary, an Order granting the Respondents leave to adduce additional evidence in the event and to the extent any portions of the Witness Statements delivered by Shaw are struck out; and

⁷³ See, *inter alia*, *Canadian Tire Corp. V. P.S. Partsource Inc.*, 2001 FCA 8 at paras. 1, 3, 10 & 16 (QL), *Shaw's BOA* at Tab **20**; *Pfizer Products Inc. v. Canadian Generic Pharmaceutical Association*, 2015 FC 493 at para. 185(b), *Shaw's BOA* at Tab **33**; and *Maugham v. University of British Columbia*, 2009 BCCA 447 at paras. 46-48, *leave to appeal refused*, [2009] S.C.C.A. No. 526, *Shaw's BOA* at Tab **29**.

⁷⁴ *Canadian Tire Corp. V. P.S. Partsource Inc.*, 2001 FCA 8 at paras. 16-19 (QL), *Shaw's BOA* at Tab **22**.

- (c) if necessary, an Order striking out portions of the Witness Statements served and filed by the Commissioner, as described in Appendix A attached to the Notice of Motion of Shaw.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26 day of October, 2022.

October 26, 2022



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, leave to appeal refused, [2016] S.C.C.A. No. 326.
2. *AstraZeneca Canada Inc. v. Apotex Inc.*, 2003 FCA 487 (QL)
3. *AstraZeneca Canada Inc. v. Canada*, 2004 FC 1277, reversed without reference to this issue, 2005 FCA 189, which was itself reversed, 2006 SCC 49
4. *Bayer Inc. v. Cobalt Pharmaceuticals Co.*, 2016 FC 1013
5. *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 (ONSC)
6. *Bernard v. Canada*, 2015 FCA 263 at paras. 10-12, leave to appeal refused, [2016] S.C.C.A. No. 34
7. *Board of Internal Economy v. Canada*, 2017 FCA 43
8. *Brockham v. Valmont Industries Holland B.V.*, 2021 BCSC 500, reversed on other grounds, 2022 BCCA 80.
9. *Brouwer v. British Columbia*, 2000 BCSC 1743
10. *Bruzzo v. Canada*, 2014 FC 230
11. *CBS Canada Holdings Co. v. Canada*, 2017 FCA 65
12. *Canada v. Consolidated Motors Ltd.*, [1949] Ex.C.R. 254
13. *Canada v. Facebook, Inc.*, 2021 FC 599
14. *Canada v. Iris Technologies Inc.*, 2021 FCA 223
15. *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2018 Comp. Trib. 15
16. *Canada (Comm’r of Compet’n) v. Vancouver Airport Authority*, 2019 Comp. Trib. 6
17. *Canada (Comm’r of Compet’n) v. Parrish & Heimbecker, Ltd.*, 2020 Comp. Trib. 15
18. *Canada (Comm’r of Compet’n) v. Parrish & Heimbecker, Ltd.*, 2021 Comp. Trib. 2
19. *Canada (Comm’r of Compet’n) v. Hudson’s Bay Co.*, 2019 Comp. Trib. 2

20. *Canada (Comm’r of Compet’n) v. Imperial Brush Co.*, 2007 Comp. Trib. 22
21. *Canadian Coalition for Firearm Rights v. Canada*, 2021 FC 130
22. *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8 (QL)
23. *Chopra v. Canada*, 2005 FC 958, *affirmed*, 2006 FCA 295, *leave refused*, [2006] S.C.C.A. No. 437
24. *Coldwater Indian Band v. Canada*, 2019 FCA 292
25. *Eli Lilly Canada Inc. v. Teva Canada Ltd.*, 2018 FCA 53, *leave to appeal refused*, [2018] S.C.C.A. No. 163
26. *Hospira Healthcare Corp. v. Kennedy Trust for Rheumatology Research*, 2018 FC 259, *reversed on other grounds*, 2020 FCA 30, *leave to appeal refused*, [2020] S.C.C.A. No. 79
27. *London Life Insurance Co. v. Manufacturers Life Insurance Co.*, [1999] F.C.J. No. 394 (T.D.)
28. *Kaul v. Canada*, 2019 FCA 313, *leave to appeal refused*, [2020] S.C.C.A. No. 50
29. *Maugham v. University of British Columbia*, 2009 BCCA 447, *leave to appeal refused*, [2009] S.C.C.A. No. 526.
30. *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2008 Comp. Trib. 26
31. *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6, *affirmed without reference to this issue*, 2011 FCA 188
32. *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, *leave to appeal refused*, [2016] S.C.C.A. No. 362
33. *Pfizer Products Inc. v. Canadian Generic Pharmaceutical Association*, 2015 FC 493
34. *R. v. Baidwan*, 2020 ONSC 2349
35. *R. v. Evans*, [1993] 3 S.C.R. 653
36. *R. v. Graat*, 1982 CarswellOnt 101 (S.C.C.)
37. *R. v. Khelawon*, 2006 SCC 57
38. *Saskatchewan Health Care Association v. Saskatchewan Union of Nurses*, [1999] S.J. No. 195 (Q.B.)
39. *Sweet v. Canada*, 2022 FC 1228

40. *Thibodeau v. Halifax International Airport Authority*, 2018 FC 223
41. *Toronto Real Estate Board v. Canada (Comm'r of Compet'n)*, 2017 FCA 236
42. *Vancouver Art Metal Works Ltd. v. Canada*, 2001 FCT 265
43. *Westerhof v. Gee Estate*, 2015 ONCA 206, *leave to appeal refused*, [2015] S.C.C.A. No. 198
44. *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp. Trib. 6

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. NIL

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
Trevor English					
1.	Trevor English	Page 6 Para 11	<p>11. As explained below, I, other members of the ELT, our Board of Directors and members of the Shaw family have determined unanimously that the Proposed Transaction with Videotron and Rogers is in the best interests of Shaw, its investors and its many other stakeholders. Moreover, we believe firmly that the Proposed Transaction will significantly enhance competition in the wireline and wireless industries, and is also in the best interests of Canadians.</p>	<p>The paragraph contains inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Trevor English, as an officer of Shaw, is not in a position to comment on what may be in the interest of Canadians and whether the Proposed Transaction will increase competition at large.</p>	<p>Contrary to the allegation of the Commissioner, the statement in question is purely factual and includes properly admissible lay opinion evidence, including because (a) the witness is in a better position than the trier of fact to form the conclusions; and/or (b) the witness has the experiential capacity to make the conclusions.</p> <p>Mr. English is one of the most senior executives at Shaw, currently holding the position of Executive Vice President and Chief Financial and Corporate Development Officer. He has over 18 years of experience in finance and business development roles at Shaw (English Witness Statement, paras 15 to 27).</p> <p>As one of the principal stewards of the business of Shaw over the past several years, Mr. English has developed significant knowledge and understanding of the Company’s relevant operations including in both the wireline and wireless businesses of Shaw. In that capacity, Mr. English has also developed extensive knowledge of the telecommunications industry generally, and where Shaw fits within that business sector, including real world knowledge</p>

SCHEDULE "C": SHAW'S RESPONSES TO THE COMMISSIONER'S OBJECTIONS					
#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
					<p>concerning the principal players in the Canadian telecommunications industry such as the business of Freedom, as well as that of Videotron, Bell, TELUS and Rogers.</p> <p>In addition, Mr. English was personally and directly involved in the process leading up to the proposed acquisition of Shaw by Rogers, including: (i) the decision to proceed with the acquisition and the subsequent negotiation of its terms; (ii) the post-closing integration planning between Rogers and Shaw; and (iii) the proposed divestiture of Freedom to Videotron (English Statement, para 25)</p> <p>Given Mr. English's extensive experience in the telecommunications industry and with the Proposed Transaction, the statements in question are all properly within his knowledge, observation, experience and understanding of facts, conduct or actions. Any concerns regarding this evidence should properly go to weight, rather than to admissibility (see, for example, <i>Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited</i>, 2020 Comp. Trib. 15 at paras 15 to 16).</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
2.	Trevor English	Page 49 Para 155	155. The appreciation in Quebecor’s share price is particularly telling. It indicates that the collective judgment of independent analysts and investors was that the proposed sale of Freedom to Videotron is highly accretive to Videotron and that Videotron will be able to operate Freedom viably and profitably. This is in contrast to the equity markets one-day share price decline of Shaw of ~8% when we announced the original WIND acquisition in late 2015.	<p>The paragraph contains inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Trevor English, as an officer of Shaw, is not in a position to comment Videotron’s future performance.</p>	<p>Please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>In addition, in commenting on the appreciation of Quebecor’s share price (which is a fact observed by Mr. English), Mr. English is not opining on Videotron’s future performance, as alleged by the Commissioner. Rather, Mr. English is summarizing his own personal observations concerning the reaction of the capital markets at the time the proposed sale of Freedom to Videotron was announced, and providing his understanding of those observed facts.</p> <p>In any event, given Mr. English’s significant knowledge of Freedom, Videotron and the terms of the Proposed Transaction, the statements in question are all properly within his knowledge, observation, experience and understanding of facts, conduct and actions (see, for example <i>Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited, 2020 Comp. Trib. 15 at paras 15 to 16.</i></p> <p>With respect to the statement that “[t]his is in contrast to the equity markets one-day share price decline of Shaw of ~8% when we announced the original WIND acquisition in late 2015”, Mr. English</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
					was directly involved in this acquisition (Witness Statement of Trevor English, sworn September 23, 2022 at paras 51 to 67) . Once again, the statement in question is properly within his knowledge, observation, experience and understanding the relevant facts.
3.	Trevor English	Page 50-53 Paras 160-165	<p>160. In the period following the announcement of June 17, 2022, numerous independent analysts who have significant experience covering the telecommunications industry in Canada have expressed their strong support for the Proposed Transaction.</p> <p>161. On June 21, 2022, RBC Capital Markets published an analyst report concerning the Proposed Transaction, a copy of which is attached to this Witness Statement as Exhibit “49”. The report stated:</p> <p>We believe the proposed remedy package with Quebecor is highly complementary to Canada’s broader telecom policy, and importantly, avoids several “lose-lose-lose-lose” scenarios that can emerge if the current transaction is not remedied on a timely basis and therefore unable to close (i.e., an alternative wireline- only transaction, excess overbuilds, multi-year 5G delays, deteriorating competitive positions, prolonged Tribunal/court processes etc.). Specifically, the proposed remedy package in our view: (1) meaningfully bolsters</p>	<p>These paragraphs contain inadmissible hearsay evidence.</p> <p>The witness makes reference to a series of market reports from RBC Capital Markets, National Bank, BMO Capital Markets that contain analysis on the proposed Transaction.</p> <p>The market reports are put forward for the truth of their content, that is, as support of the contention that the proposed Transaction is beneficial for the telecommunications market.</p> <p>The authors of the various market reports have not been called by Rogers/Shaw as witnesses in these proceedings. The</p>	<p>Contrary to the allegation of the Commissioner, Shaw is not tendering the RBC Capital Markets analyst report dated June 21, 2022, National Bank analyst report dated July 7, 2022, BMO analyst report dated August 22, 2022 and National Bank analyst report dated September 22, 2022 for the truth of their contents.</p> <p>Rather, these analyst reports are being tendered for the purpose of illustrating market analysts’ reaction to the announcement of the Proposed Transaction. As explained in the McAleese Responding Witness Statement, analyst reports such as these are routinely relied upon by Shaw and other industry participants in conducting their day-to-day responsibilities (Responding Statement of Paul McAleese, sworn October 20, 2022 at paras 141 to 142).</p> <p>The markets’ reliance on, and the relevance and reliability of, these analyst</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>Quebecor’s sustainability and its path to 5G outside of Quebec by providing Quebecor with increased operating and financial flexibility given enhanced network access; (2) enables Rogers to begin narrowing on a timely basis what appears to be a widening gap to Bell and TELUS with respect to fiber infrastructure and fiber densification in urban markets (a critical element of 5G B2B IoT over the next 5-10 years); (3) strengthens the government’s four facilities-based wireless player policy by providing national scale to a regional operator; and (4) provides much sought after sustained facilities based wireless competition.</p> <p>[emphasis added]</p> <p>162. On July 7, 2022, National Bank published an analyst report concerning the Proposed Transaction, a copy of which is attached to this Witness Statement as Exhibit “50”. The report stated:</p> <p>When does a regulatory process extend too long and begin to work counter-productively? The T-Mobile and Sprint merger took two years, but that was about the U.S. wireless market contracting to three national players from four. That’s significant. In Canada, we’re looking at two geographically complementary cable companies trying to merge while selling a regional wireless player, which has already been sold twice, to another hoping to get bigger. Rogers</p>	<p>Commissioner is therefore deprived of the opportunity to cross-examine the authors who prepared the analysis relied upon. Admitting this evidence would be procedurally unfair to the Commissioner and would impede the truth-seeking function of the Tribunal</p>	<p>reports is further established by the Commissioner’s own evidence, including from Bell and TELUS, which also refers to and attaches numerous analyst reports (see, for example, the Witness of Statement of Blaik Kirby, sworn September 23 at Exhibits D and E, and the affidavit of Kenneth Mathieu, affirmed October 20 at Exhibits 13-21).</p> <p>In any event, to the extent that the statements in question can be characterized as hearsay, they meet the twin criteria of necessity and reliability under the principled approach (<i>R v Khelawon, 2006 SCC 57, para 42</i>).</p> <p>With respect to necessity, the Commissioner requested an expedited timetable for the hearing of this matter. It is not an efficient use of the limited trial time in this proceeding to require Shaw (or the Commissioner) to provide direct evidence from each and every author, reporter, and analyst whose statements have been put forward as evidence (see <i>Coldwater Indian Band v Canada, 2019 FCA 292 at paras 58 to 59</i>).</p> <p>With respect to reliability, the very nature of the analyst reports – which are widely published and scrutinized by professionals with specialized skill and experience – provides the requisite circumstantial guarantees of trustworthiness. Moreover,</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>could have expedited opening the door to Quebecor long before mid-May. However, it finally made the important pivot. Over the past few years, the Canadian government has analyzed competition in wireless and published multiple reports and policies. We assume that regulators have established a better understanding of how different parties could more optimally challenge the status quo and help rework some of the competitive dynamic in Canadian wireless.</p> <p>We believe that Quebecor would have presumably been high on any government list pre-2020 and would have remained so throughout the pandemic. [emphasis added]</p> <p>163. On August 22, 2022, BMO Capital Markets published an analyst report concerning the Proposed Transaction, a copy of which is attached to this Witness Statement as Exhibit “51”.</p> <p>The report stated:</p> <p>We remain of the view that there is a path to approval of the Rogers-Shaw-Quebecor transaction. Ultimately, our optimism is based on the government’s long-standing support of a four-player policy. With that being the case, it seems logical to conclude that the government will ultimately approve this transaction with Quebecor as the buyer of Freedom. Simply put, rejecting the</p>		<p>the Commissioner will have the opportunity both to (i) lead evidence concerning the necessity and reliability of analyst reports, including from the Bell and TELUS witnesses, and (ii) cross-examine the witnesses from Shaw, Rogers and Videotron concerning the necessity and reliability of the analyst reports.</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>transaction will throw the four-player narrative into an untenable position.</p> <p>In our view, Quebecor represents the best solution available to satisfy the government’s industrial policy. It meets ownership requirements, has an operational track record in the business and enough balance sheet capacity to fund the purchase. Moreover, it comes in at a lower cost base than Shaw and with more attractive commercial arrangements. It seems to us the Competition Bureau, directly or indirectly, has extracted concessions for which it can rightly claim credit. [emphasis added]</p> <p>164. Just yesterday, on September 22, 2022, National Bank published an analyst report concerning the Proposed Transaction, a copy of which is attached to this Witness Statement as Exhibit “66”. The report analyzes the Commissioner’s Response to Demand for Particulars in this case, which set out 12 perceived “difficulties” that the Commissioner believes Videotron will face operating the Freedom wireless business without the supposed “benefits delivered by Shaw from its wireline business”. The report concludes that “We see no ‘smoking gun’ among them” and that:</p> <p>Videotron has proven to be the most successful regional wireless operator in Canada with full and deep-pocketed financial support from its parent Quebecor.</p>		

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>Shaw over the past 10+ years has struggled in the face of competitive pressures from Telus and pursued different strategies to cope with the latter’s fibre rollout. Shaw Mobile was the company’s latest effort to reduce Internet churn and was an offering on unsustainable economic terms. Looking back at Figures 1 and 2 earlier in this report, it’s clear that Videotron has operated as successfully, if not better but certainly not worse than Shaw in wireless. To suggest that Videotron would provide less effective financial, managerial, technical or other support and not be able to replicate Shaw’s competitiveness is to misjudge Videotron and ignore its capabilities, commitment, and overall track record to date in wireless. As for the Big 3, not only do they compete against one another, but Videotron can be expected to stimulate a renewed level of competitive intensity in wireless on price, value offers, and also bundling via TPIA. Aggressive promotions recently launched by Videotron in Manitoba via VMedia are well below Bell Internet pricing and triggering retaliatory moves. In thereport by Wall Communications (Price Comparisons of Wireline, Wireless and Internet Services in Canada and with Foreign Jurisdictions) which was prepared for ISED and made public on Feb. 15, Videotron’s Fizz Mobile was highlighted as offering the cheapest plans in Canada for data packages of 7-9 GB</p>		

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>and 10-19 GB. Freedom or really Shaw Mobile may be the cheapest on zerodata plans offering just talk and text which we don’t view as realmobile plans in a world where the average consumer is destined to progressively require and use more data. Meanwhile, Videotron’s Fizz Mobile also allows customers to roll over unused data and it also has a rewards program to enable free mobile data and/or price rebates.</p> <p>[...]</p> <p>Freedom has been operated as a standalone division of Shaw and its separation is not expected to be difficult, lengthy or costly. The vast majority of Freedom’s subscribers and Shaw’s overall subscribers are in Ontario where Shaw has no wireline operations much as Wind never had any across its footprint. Freedom accesses backhaul services in Ontario on commercial terms through the Big 3 and on arm’s length (commercial) terms with Shaw in Alberta and British Columbia. Videotron would access backhaul similarly and with no prejudice. Videotron would buy Freedom’s more than 800 retail locations and also contractually have access to Shaw’s over 450K Go Wi-Fi hotspots. With Freedom, Videotron would double revenues, EBITDA, and subscribers and gain scale along the way, so we don’t see how Freedom loses scale except for its separation from Shaw, but again, Quebecor</p>		

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>has the resources to fund investments in Freedom and access to the TPIA regime to bundle.</p> <p>165. The report also indicated its “surprise” that the Commissioner’s position with respect to the acquisition of Shaw by Rogers has not evolved in reaction to the announcement that, as a condition to that acquisition, Freedom would be divested to Videotron:</p> <p>Admittedly, paragraphs 38-49 of the Notice of Application were outlined before Rogers/Shaw struck a deal with Quebecor’s Videotron for the divestiture of Freedom Mobile. That said, we remain surprised that the Competition Bureau hasn’t updated its arguments over the past three months to reflect the reality of the proposed remedial solution which ostensibly nullifies the concerns raised in these paragraphs. Videotron, a successful operator in wireless, would be acquiring a fully functioning mobile operation in Freedom that already has invested in all facets of the business and established commercial arrangements where necessary for backhaul as well as domestic and international roaming. Spectrum is not an issue as Freedom has what it needs and Videotron also not only possesses 3500 MHz spectrum outside Quebec as a prelude to future 5G deployment outside of its current footprint but will also be positioned</p>		

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			well to add more mid-band spectrum in next year’s 3800 MHz auction		
4.	Trevor English	Page 6-7 Paras 11-14	11. As explained below, I, other members of the ELT, our Board of Directors and members of the Shaw family have determined unanimously that the Proposed Transaction with Videotron and Rogers is in the best interests of Shaw, its investors and its many other stakeholders. Moreover, we believe firmly that the Proposed Transaction will significantly enhance competition in the wireline and wireless industries, and is also in the best interests of Canadians.	Parts of paragraph 11, 12, 13 and 14 contain inadmissible lay opinion evidence. A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.	Please see the response to Item 1 above, which applies with equal force to this objection.
5.			12. Among other things, the acquisition of Freedom by Videotron will create a wireless carrier that is well positioned to fulfill the Government of Canada’s longstanding and important policy goal of creating a viable and effective fourth national wireless competitor. To my knowledge, there is no other participant in the wireless industry in Canada capable of realizing that goal. Following its acquisition of Freedom, Videotron will have [REDACTED] [REDACTED] [REDACTED] [REDACTED] The new Videotron-Freedom business will have the scale, spectrum, resources, assets, experience, expertise and motivation to	Trevor English, as an officer of Shaw, is not in a position to comment on Videotron’s future performance or that of other competitors, such as Telus. Nor is he in a position to comment on the performance of the market at large subsequent to Proposed Transaction.	Please see the response to Item 1 above, which applies with equal force to this objection. Further, Mr. English is not commenting on the future performance of Videotron or that of other competitors. Rather, Mr. English is commenting on matters that are properly within his knowledge, observation, experience and understanding, given his significant knowledge of the business of Freedom and Videotron, as well as his personal and direct involvement in the negotiation of the Proposed Transaction (English Witness Statement, para 25).

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>compete effectively and aggressively against Bell, TELUS and Rogers in the provision of wireless services throughout much of Canada (and, additionally, a new ability to sell wireline services outside its footprint at rates lower than regulated wholesale rates).</p>		
6.			<p>13. The acquisition by Rogers of the wireline business of Shaw will also significantly enhance competition in the provision of wireline services. Among other things, Tthe merged business of Rogers and Shaw will have the necessary scale, resources, experience and sophistication to compete more aggressively and effectively against TELUS in Western Canada in the provision of wireline services than Shaw has been able to in recent years.</p>		<p>Please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>Further, Mr. English is not commenting on the performance of the market at large subsequent to the Proposed Transaction. Rather, Mr. English is commenting on matters that are properly within his knowledge, observation, experience and understanding, given his significant knowledge of the business of Shaw and Rogers, as well as his personal and direct involvement in the negotiation of the Proposed Transaction (English Statement, para 25).</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>[REDACTED]</p>	<p>their businesses in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence".</p> <p>Trevor English, as an officer of Shaw, is not in a position to comment on Videotron's future performance or that of other competitors, such as Telus. Nor is he in a position to comment on the performance of the market at large subsequent to completion of the Proposed Transaction.</p>	<p>Transaction, the statements in question are all properly within his knowledge, observation, experience and understanding of facts, conduct and actions (English Witness Statement, para 25). Indeed, his background and experience makes him ideally suited to comment on the terms of the Proposed Transaction and the impact they will have on the business he has been a principal steward over for years.</p>
9.			<p>158. At the same time, the Proposed Transaction is the best — and perhaps the only — opportunity to fulfill the Government of Canada's longstanding policy objective of creating a viable and effective fourth national wireless competitor. Following its acquisition of Freedom, Videotron will have more than [REDACTED] wireless customers in a national market of approximately 30 million consumers, [REDACTED]</p> <p>The new business will therefore have the scale, resources, assets, experience, expertise and motivation to compete effectively and aggressively against Bell, TELUS and Rogers throughout much of Canada.</p>		<p>Please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>Further, Mr. English is not commenting on the future performance of Videotron or that of other competitors (or the market at large). Rather, Mr. English is commenting on matters that are properly within his knowledge, observation, experience and understanding, given his significant knowledge of the business of Freedom and Videotron, as well as his personal and direct involvement in the negotiation of the Proposed Transaction (English Witness Statement, para 25).</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
10.			159. Critically, unlike Shaw, Videotron was able to participate in the recent 3500 MHz spectrum auction and succeeded in acquiring spectrum licences that cover markets within Freedom's footprint. The acquisition of that spectrum will provide Freedom, under the ownership of Videotron, with a viable path toward deploying 5G services.		<p>With respect to the first sentence, Videotron's success in acquiring 3500 MHz is a publicly verifiable fact and does not contain any opinion or commentary by Mr. English.</p> <p>With respect to the second sentence, please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>Further, Mr. English is not commenting on the future performance of Videotron or that of other competitors (or the market at large). Rather, Mr. English is commenting on matters that are properly within his knowledge, observation, experience and understanding, given his significant knowledge of the business of Freedom and Videotron, as well as his personal and direct involvement in the negotiation of the Proposed Transaction (English Witness Statement, para 25).</p>
11.	Trevor English	Page 57 Para 178	178. [REDACTED]	<p>Paragraph 178 contains inadmissible lay opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the 'but for' world" and they "are not in a better position</p>	<p>Please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>Further, Mr. English is <i>not</i> commenting on matters beyond his own conduct, nor is he forming conclusions about the greater economic consequences of the "but for" world. Rather, Mr. English is commenting on matters that are properly within his</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
				<p>than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence".</p> <p>Trevor English, as an officer of Shaw, is not in a position to offer evidence on Videotron</p>	<p>knowledge, observation, experience and understanding, given his significant knowledge of the business of Freedom and Videotron, as well as his personal and direct involvement in numerous spectrum auctions over many years (English Witness Statement, paras 19 to 20, 25, 167 and 172 to 177). Mr. English's direct involvement in these prior spectrum auctions gives him unique and relevant insight into the planning and strategizing associated with such auctions.</p>
12.	Trevor English	Page 58 Para 179	<p>179. [REDACTED] if the Proposed Transaction is permitted to proceed, Videotron will be able to leverage Freedom's existing radio access network infrastructure to quickly put the 3500 MHz spectrum that it acquired in 2021 to use in 5G services across Freedom's service area. I understand that the spectrum licenses that Videotron acquired in that auction are currently not being used, contrary to the public interest."</p>	<p>Paragraph 179 contains inadmissible lay opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence".</p> <p>Trevor English, as an officer of Shaw, is not in a</p>	<p>Please see the response to Item 11 above, which applies with equal force to this objection.</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
				position to offer evidence on the public interest	
13.	Trevor English	Page 59 Para 184	<p>184. It is in the self-interest of both Bell and TELUS to seek to derail or delay the completion of the Proposed Transaction. Indeed, both Bell and TELUS voiced their strong opposition to the Proposed Transaction in the CRTC hearing to consider Rogers’ acquisition of Shaw’s broadcasting assets held in November 2021. Attached to my Witness Statement as Exhibits “56” and “57” are copies of news articles reflecting comments made by Bell and TELUS in the course of this CRTC hearing. Following the CRTC hearing, both Bell and TELUS made Final Submissions to the CRTC in writing, reiterating their opposition and calling for the CRTC to withhold its approval of the transaction. I have attached to my Witness Statement as Exhibits “58” and “59” Bell’s Final Submission dated December 13, 2021 and TELUS’ Final Submission dated December 13, 2021, respectively.</p>	<p>This paragraph contains inadmissible hearsay evidence.</p> <p>The witness makes reference and appends a series of news articles which are clearly inadmissible.</p>	<p>Mr. English is not tendering the news articles attached as Exhibits “56” and “57” for the truth of their contents. Rather, these news articles are being submitted to assist in establishing the timing of the events in question, as well as to establish the fact that Bell and TELUS provided comments during the course of the CRTC hearing in November 2021.</p> <p>Further, and in any event, any concerns regarding the reliability of the statements in question can be addressed through the examination and cross-examination of witnesses from Bell and TELUS, who the Commissioner will be calling as witnesses at trial.</p>
14.	Trevor English	Page 59 Para 187	<p>The TELUS-Bell network sharing arrangement has placed Shaw at a significant competitive disadvantage. Although Shaw does not know all of the precise details of these arrangements between Bell and TELUS, it is widely known in the industry that Bell and TELUS pool their spectrum and</p>	<p>Paragraph 59 contains inadmissible opinion evidence. Speculative in nature.</p> <p>A witness cannot testify on matters beyond their own conduct and that of their</p>	<p>Please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>Further, Mr. English is <i>not</i> commenting on matters beyond his own conduct, nor is he commenting on the “greater economic consequences of the ‘but for’ world”.</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>their capital. They have been able to divide the country in two and provide wireless services nationally at half the cost that any other carrier would have to pay. The network sharing arrangements between Bell and TELUS are so pervasive that these two companies are widely known in the industry as “Belus”.</p>	<p>businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Trevor English, as an officer of Shaw, is not in a position to offer evidence on Bell and Telus commercial arrangements.</p>	<p>Rather, Mr. English is commenting on matters that are properly within his knowledge, observation, experience and understanding, given his significant knowledge concerning the telecommunications industry generally, and where Shaw fits within that business sector, including real world knowledge concerning the principal players in the Canadian telecommunications industry such as Bell and TELUS.</p>
15.	Trevor English	Page 61 Para 195	<p>195. [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p> <p>In October 2019, BMO Capital Markets published an analyst report entitled, “Q4/F19: Starving Wireline to Feed Wireless?” In this analyst report, BMO notes that Shaw’s wireless business has “been dilutive to free cash flow as the company makes significant investments” to close the gap with our competitors. Meanwhile “[w]ireline continues to bleed subscribers (should bode well for TELUS)”, “[w]ireline capex intensity is expected to come down significantly”, and “ongoing market share losses to TELUS could be a growing</p>	<p>The paragraph contains inadmissible hearsay evidence.</p> <p>The witness makes reference to a market report from BMO Capital Markets that contain analysis on the proposed Transaction.</p> <p>The market reports are put forward for the truth of their content, that is, as support of the contention that the proposed Transaction is beneficial</p>	<p>Please see the response to Item 3 above, which applies with equal force to this objection.</p> <p>To be clear, Shaw is not tendering the BMO Capital Markets Report for the truth of its contents. Rather, this analyst report is being tendered for the fact that the analysts expressed the view in question. As explained in the McAleese Responding Witness Statement, analyst reports such as these are routinely relied upon by Shaw and other industry participants in conducting their day-to-day responsibilities (McAleese Responding Witness Statement, paras 141 to 142).</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>concern". [REDACTED] [REDACTED] [REDACTED] I attached to my Witness Statement as Exhibit "63" a copy of this BMO analyst report.</p>	<p>for the telecommunications market.</p> <p>The author of the market report has not been called by Rogers/Shaw as witnesses in these proceedings. The Commissioner is therefore deprived of the opportunity to cross-examine the author who prepared the analysis relied upon. Admitting this evidence would be procedurally unfair to the Commissioner and would impede the truth-seeking function of the Tribunal.</p>	
16.	Trevor English	Page 62 Para 198	<p>198. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>Paragraph 198 contains inadmissible lay opinion evidence. Speculative in nature.</p> <p>A witness cannot testify on matters beyond their own conduct and that of their businesses in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but</p>	<p>Please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>Further, Mr. English is not commenting on matters beyond his own conduct, nor is he commenting on the "greater economic consequences of the 'but for' world". Rather, Mr. English is commenting on matters that are properly within his knowledge, observation, experience and understanding, given his significant knowledge concerning the telecommunications industry generally, and where Shaw fits within that business</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
				<p>for' world, nor do they have the experiential competence".</p> <p>Trevor English, as an officer of Shaw, is not in a position to offer evidence on unrelated company's business. Nor is he entitled to make a claim that blocking the transaction would be harmful to competition and the interests of Canadian consumers.</p>	<p>sector, including real world knowledge concerning the principal players in the Canadian telecommunications industry.</p>
17.	Trevor English	Page 62 Para 201	<p>201. [REDACTED]</p> <p>In a recent interview with the Globe & Mail published on September 16, 2022, Darren Entwistle, the Chief Executive Officer of TELUS, acknowledged that he is concerned by the prospect of a "recapitalized Shaw": As he plots his final chess moves, the loquacious and, by his own admission, anxiety-riddled CEO has other worries on his mind, as well. Among them is a potential seismic shift in the industry's competitive landscape, as federal regulators mull a proposed \$26- billion merger between Rogers Communications Inc. and Shaw Communications Inc. If approved, the deal will not only combine two of the country's largest cable networks, providing Shaw with</p>	<p>The paragraph contains inadmissible hearsay evidence.</p> <p>The witness makes reference to a news article which is not admissible evidence.</p>	<p>Mr. English is not tendering the Globe & Mail article dated September 16, 2022 for the truth of its contents.</p> <p>In contrast, this news article is being admitted for the sole purpose of establishing that the Globe & Mail disseminated to the public statements attributed to Mr. Entwistle regarding his views on the effect that the combined Rogers-Shaw entity will have on TELUS following the conclusion of the Proposed Transaction.</p> <p>Further, notwithstanding the fact that Shaw does not tender the article for the truth of its contents, the article is admissible pursuant to the admissions exception to the prohibition on hearsay</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>fresh capital to deploy in Western Canada. It will also create an opportunity for Videotron Ltd. owner Quebec Inc. to expand its wireless business outside Quebec. [...]</p> <p>Shaw has been steadily losing market share to Telus in Western Canada in recent years, and Mr. Entwistle admits he’s worried a recapitalized Shaw could be a fiercer competitor for Telus.</p> <p>“Anyone that tells you that they’re not worried about the competition shouldn’t be in the job,” he said, adding that anxiety can drive creativity and innovation.</p> <p>“I get paid to be anxious about stuff even when there’s nothing obvious to be anxious about. ...So yeah, I’m anxious about [Rogers-Shaw]. I’m anxious about how the market may evolve. People would say to me, ‘If the Rogers-Shaw deal doesn’t go through I guess you’re happy.’ I said, ‘No, I’m anxious either way.’” [emphasis added]</p>		<p>evidence. Shaw need not articulate circumstantial guarantees of trustworthiness because it does not lie in the mouth of the speaker to suggest that the statement is unreliable (<i>Teva Canada Ltd. v. Pfizer Canada Inc.</i>, 2016 FCA 161 at para. 102; <i>Canada v Facebook Inc.</i>, 2017 FCA 65 at para 24).</p> <p>Moreover, the Commissioner’s concerns about the reliability of this evidence are misplaced. This evidence can be thoroughly tested by the Commissioner through the examination of the two TELUS witnesses he has put forward in this case.</p>
18.	Trevor English	Page 63 Para 202	202. A copy of the Globe & Mail’s article of September 16, 2022 is attached to this Witness Statement as Exhibit “64”. In addition, I have attached to this Witness Statement as Exhibit “65” a copy of an analyst report published by TD on September 19, 2022 commenting on the interview given by Mr. Entwistle.	<p>The paragraph contains inadmissible hearsay evidence.</p> <p>The witness makes reference to a news article which is not admissible evidence.</p> <p>The witness makes reference to a market report</p>	Please see the response to Items 3 and 17 above, which apply with equal force to this objection.

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
				<p>from TD that contains analysis on the proposed Transaction. The market report is put forward for the truth of their content, that is, as support of the contention that the proposed Transaction is beneficial for the telecommunications market.</p> <p>The author of the market report has not been called by Rogers/Shawas witnesses in these proceedings. The Commissioner is therefore deprived of the opportunity to cross-examine the author who prepared the analysis relied upon. Admitting this evidence would be procedurally unfair to the Commissioner and would impede the truth-seeking function of the Tribunal.</p>	
19.	Trevor English	Page 63 Para 203	203. There is no doubt in my mind that the Proposed Transaction will enhance competition in the wireline business, including in Western Canada. Rogers will be able to compete more effectively as a national wireline carrier. With its scale and resources,	<p>Paragraph 203 contains inadmissible opinion evidence.</p> <p>A witness cannot testify on matters beyond their own</p>	<p>Please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>Further, Mr. English is <i>not</i> commenting on the future business strategy and/or</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>██████████, challenging TELUS in Western Canada and continuing to offer high-quality and highly competitive services across its national footprint.</p>	<p>conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Trevor English, as an officer of Shaw, is not in a position to offerevidence on Rogers’ business strategy and/or operations.</p>	<p>operations of Rogers, nor is he commenting on the “greater economic consequences of the ‘but for’ world”. Rather, Mr. English is commenting on matters that are properly within his knowledge, observation, experience and understanding, given his significant knowledge of the business of Shaw, Rogers and TELUS, as well as his personal and direct involvement in the negotiation of the Proposed Transaction (English Witness Statement, para 25).</p>
20.	Trevor English	Page 63 Para 204	<p>204. The Proposed Transaction will also enhance competition in the wireless business. Videotron will have what it needs to emerge as a fourth national wireless carrier, including scale, spectrum and physical infrastructure that spans most of the country. The Government of Canada will be closer than ever has been to accomplishing its goal of spurring the emergence of a fourth national wireless carrier.</p>	<p>Paragraph 203 contains inadmissible opinion evidence.</p> <p>A witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they</p>	<p>Please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>Further, Mr. English is <i>not</i> commenting on the “greater economic consequences of the ‘but for’ world”, nor is he commenting the competitive landscape at large. Rather, Mr. English is commenting on matters that are properly within his knowledge, observation, experience and understanding, given his significant knowledge concerning the telecommunications industry generally, and where Shaw fits within that business sector, including real world knowledge</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
Brad Shaw					
23.	Brad Shaw	Page 13 Para 51	51. The combination of Videotron and Freedom will result in a much stronger wireless competitor that is capable of challenging the “Big 3” throughout most of Canada. Videotron has a proven track record as a disruptor in the wireless business in Quebec, where it has offered innovative services and won significant market share at the expense of all of Rogers, BCE and TELUS. With the acquisition of Freedom, Videotron will have greater scale, an enhanced portfolio of spectrum, and a 5G-capable network in Ontario, Alberta and British Columbia (to go with its existing operations in Quebec and portions of Ontario). Videotron will acquire that scale, spectrum and network, along with retail distribution, at a substantial discount compared to the amount of capital Shaw has invested into Freedom.	<p>Paragraph 51 contains inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Brad Shaw, as an officer of Shaw, is not in a position to give evidence on the marketplace at large and, more specifically, Videotron.</p>	<p>Please see the response to Item 1 above, which applies with equal force to this objection.</p> <p>Mr. Shaw is the Chief Executive Officer and Executive Chair of the Board of Directors of Shaw. He is the most senior executive of Shaw and has over 30 years of experience in the telecommunications industry (Shaw Witness Statement, paras 1 and 15).</p> <p>As one of the principal stewards of the business of Shaw over the past three decades, Mr. Shaw has developed significant knowledge and understanding of the Company’s relevant, real world, operations, including in both the wireline and wireless businesses of Shaw. In that capacity, Mr. Shaw has also necessarily developed extensive knowledge concerning the telecommunications industry generally, and where Shaw fits within that business sector, including real world knowledge concerning the principal players in the Canadian telecommunications industry such as Videotron, Bell, TELUS and Rogers.</p> <p>In addition, Mr. Shaw was personally and directly involved in the process leading up to the proposed transaction of Shaw by</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
					<p>Rogers, including the proposed divestiture of Freedom to Videotron (Shaw Statement, paras 24 to 48).</p> <p>Given Mr. Shaw's extensive experience in the telecommunications industry and with the Proposed Transaction, the statements in question are all properly within his knowledge, observation, experience and understanding of facts, conduct or actions. Any concerns regarding this evidence should properly go to weight, rather than to admissibility (see, for example, <i>Canada (Commissioner of Competition) v Parrish & Heimbecker, 2020 Comp. Trib. 15 at paras 15 to 16</i>).</p>
24.	Brad Shaw	Page 13 Para 52	52. [REDACTED]	<p>Paragraph 52 contains inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence".</p>	<p>Shaw is a party to the Share Purchase Agreement dated August 12, 2022 between Videotron Ltd., Quebecor Inc., Rogers Communications, Shaw Communications Inc., Shaw Telecom Inc. and Freedom Mobile Inc.</p> <p>Accordingly, Mr. Shaw, in his role as Chief Executive Officer and Executive Chair of the Board of Directors of Shaw, has personal knowledge concerning the terms of the commercial arrangements that Videotron has secured with Rogers. Given this personal knowledge of the terms of the agreements, as well as his knowledge of Shaw's operating costs, Mr. Shaw is in a position to comment that the</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			[REDACTED]	Brad Shaw, as an officer of Shaw, is not in a position to give evidence on the marketplace at large and, more specifically, Videotron or how Freedom will perform under Videotron ownership.	terms of the Proposed Transaction are favorable and will allow Freedom under Videotron's ownership to have lower operating costs.
25.	Brad Shaw	Page 13 Para 53	53. I firmly believe that the proposed sales of Freedom to Videotron and of Shaw to Rogers are in the best interests of the Company and its stakeholders. I also believe that the Proposed Transaction is in the best interests of Canadians and the future of telecommunications in Canada. With respect to the wireline side of our business, the Transaction will result in a company that has the scale, experience, resources and incentives to invest substantially in its wireline network across the country and to compete vigorously and effectively in the wireline business, including against TELUS in Western Canada. Moreover, the sale of Freedom to Videotron will result in a company that has the scale, experience, resources and incentives to invest and compete aggressively and effectively in the wireless business in ways that Shaw simply has not been and will not be able to.	Paragraph 53 contains inadmissible opinion evidence. A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence". Brad Shaw, as an officer of Shaw, is not in a position to give evidence on the marketplace at large and, more specifically, Videotron or how Freedom	Please see the response to Item 24 above, which applies with equal force to this objection.

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
				will perform under Videotron ownership.	
26.	Brad Shaw	Page 14 Para 54	54. The Proposed Transaction is, from my perspective and the perspective of Shaw, a win for all stakeholders, including our customers. It is a win for Rogers, which will gain new strength as a national wireline telecommunications provider. It is a win for Videotron, which will have the tools and resources to emerge as a viable and effective fourth national wireless carrier. It is a win for the Government of Canada, which has never been this close to achieving its objective of creating a fourth national wireless carrier, and may never get this close again if the Proposed Transaction were to be blocked. It is a win for the Commissioner of Competition, since it will significantly enhance competition in the wireless and wireline businesses in Canada and because the sale of Freedom to Videotron directly responds to his stated concerns. Most importantly, it is a win for millions of Canadians, who will benefit from affordable access to high quality telecommunications services.	Paragraph 54 contains inadmissible opinion evidence. A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence". Brad Shaw, as an officer of Shaw, is not in a position to give evidence on the marketplace at large and, more specifically, Videotron or how Freedom will perform under Videotron ownership.	Please see the response to Item 24 above, which applies with equal force to this objection.
27.	Brad Shaw	Page 15 Para 58	58. Finally, I wish to emphasize that the consequences associated with blocking the Proposed Transaction would be harmful not only to Shaw and its stakeholders, but also to	Paragraph 58 contains inadmissible opinion evidence.	Please see the response to Item 24 above, which applies with equal force to this objection.

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>competition in the wireless and wireline industries and to the interests of millions of Canadians.</p>	<p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Brad Shaw, as an officer of Shaw, is not in a position to give evidence on the marketplace at large.</p>	
Paul McAleese					
28.	Paul McAleese	Page 7- 8 Paras 8 - 11	<p>8. The Proposed Transaction involves a unique and transformative series of transactions among Shaw, Rogers and Videotron (and its parent company, Quebecor Inc.) that in my mind will significantly enhance competition throughout much of the Canadian telecommunications industry. The Proposed Transaction involves two key elements:</p> <p>(a) First, the purchase by Videotron from Shaw of Freedom, which will result in the expansion of Videotron’s wireless</p>	<p>Paragraphs 8, 9 10 and 11 contains inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic</p>	<p>Contrary to the Commissioner’s objection, Mr. McAleese is not providing any opinion evidence at all in this statement. Rather, the statement in question merely describes from Mr. McAleese’s perspective the sequence and terms of the Proposed Transaction. These facts are squarely within the knowledge of Mr. McAleese. As the President of Shaw and the former leader of its wireless business, Mr. McAleese is keenly aware of the terms of the Proposed Transaction and its implications (Paul McAleese</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>operations to Alberta, British Columbia and large parts of Ontario that Videotron does not already serve; and</p> <p>(b) Second, immediately following the divestiture of Freedom to Videotron, the purchase by Rogers of Shaw’s wireline business (which includes Internet, cable and satellite television, and traditional phone services)</p>	<p>consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Paul McAleese, as an officer of Shaw, is not in a position to give evidence on the marketplace at large and more specifically, Videotron performance.</p>	<p>Witness Statement, sworn September 23 2022, at para 338).</p> <p>To the extent that the statement does include any opinion evidence, the statements are nonetheless properly within his knowledge of facts, conduct or actions. Any concerns regarding this evidence should go to weight, rather than to admissibility (see, for example, <i>Canada (Commissioner of Competition) v Parrish & Heimbecker, 2020 Comp. Trib 15 at paras 15 to 16).</i></p>
29.			<p>9. The Proposed Transaction will create two important new dynamics in the Canadian telecommunications industry. First, the new combined business of Shaw and Rogers will have the scale, assets, resources, expertise and incentives required to compete vigorously and effectively in Canada’s rapidly changing wireline communications industry. The combined entity will be far better positioned than a stand-alone Shaw would otherwise be to make the necessary investments to challenge Shaw’s chief wireline competitor in Western Canada, TELUS. As explained below, TELUS is substantially larger than Shaw, with a market capitalization, revenues and assets that are each approximately two- to three-times greater than those of Shaw.</p>		<p>Contrary to the allegation of the Commissioner, the statement in question is purely factual or includes properly admissible lay opinion evidence, including because (a) the witness is in a better position than the trier of fact to form the conclusions; and/or (b) the witness has the experiential capacity to make the conclusions.</p> <p>Mr. McAleese is the President of Shaw and one of the Company’s most senior executive officers. He has over 30 years of experience in the telecommunications industry in various executive and other roles, including in Canada, the United States and the United Kingdom (Paul McAleese Witness Statement, sworn September 23, at paras 17 to 23).</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
					<p>As one of the principal stewards of the business of Shaw over the past several years, Mr. McAleese has developed significant knowledge and understanding of the Company’s relevant, real world, operations, including in both the wireline and wireless businesses of Shaw. In that capacity, Mr. McAleese has also necessarily developed extensive knowledge concerning the telecommunications industry generally, and where Shaw fits within that business sector, including real world knowledge concerning the principal players in the Canadian telecommunications industry such as Videotron, Bell, TELUS and Rogers.</p> <p>In addition, as the President of Shaw and the former leader of its wireless business, Mr. McAleese is keenly aware of the terms of the Proposed Transaction and its implications (First McAleese Statement, para 338).</p> <p>Given Mr. McAleese’s extensive experience in the telecommunications industry and with the Proposed Transaction, the statements in question are all properly within his knowledge, observation, experience and understanding of facts, conduct or actions. Any concerns regarding this evidence should properly go to weight, rather than</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
					to admissibility (see, for example, <i>Canada (Commissioner of Competition v Parrish & Heimbecker</i> , 2020 Comp. Trib 15 at paras 15 to 16).
30.			10. Second, the combination of Freedom and Videotron will finally be able to achieve and implement the Federal Government’s longstanding policy objective of creating a strong and effective fourth national wireless carrier. Freedom-Videotron will – for the first time – offer the national scale, assets, expertise and capabilities needed to invest for the long-term and compete aggressively, effectively and on a sustainable basis in the provision of wireless services against the “Big 3” wireless incumbents (Bell, TELUS and Rogers).		Please see the response to Item 29 above, which applies with equal force to this objection.
31.			11. The terms of the Proposed Transaction will enable Freedom-Videotron to carry on business as a viable, effective and disruptive force across the combined footprint of Freedom and Videotron in Alberta, British Columbia, Ontario and Quebec – in a way that would not have been possible for Shaw. This is so for a variety of significant reasons, including: (a) Videotron is a well-known and experienced provider of both wireline and wireless services, with a longer and more		Please see the response to Item 29 above, which applies with equal force to this objection.

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>successful history of growth in its home markets than Freedom;</p> <p>(b) the purchase price of [REDACTED] [REDACTED] [REDACTED] being paid by Videotron to acquire Freedom (in which Shaw has, to date, invested approximately \$4.5 billion) will enhance Videotron’s flexibility to invest in both 5G and aggressive customer-acquisition strategies to gain market share and “bring the fight” to the Big 3 in both Ontario and Western Canada, as it has already done in Quebec;</p> <p>(c) Videotron will have over [REDACTED] wireless customers (compared to Freedom’s existing customer base of only approximately [REDACTED] customers), giving the new business unprecedented scale that no competitor in the wireless industry in Canada (other than Bell, Rogers and TELUS) has ever enjoyed;</p> <p>(d) as a result of various long-term agreements Videotron has secured with Rogers (including backhaul and roaming) as part of the divestiture of Freedom to Videotron, [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>		

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>(e) unlike Freedom, Videotron: (i) has already successfully deployed 5G networks in its wireless footprint; and (ii) owns the critical 3500 MHz spectrum across Freedom’s current wireless footprint, permitting it to rapidly deploy the next-generation 5G services in Freedom’s footprint [REDACTED] and</p> <p>(f) because of the access to [REDACTED] wholesale wireline home Internet services Videotron has secured from Rogers, Videotron will have the ability – if it chooses – to profitably offer wireline- wireless bundles to consumers across the entire combined wireline footprint of Rogers-Shaw. This materially expands the competitive framework by creating the potential for an additional competitor in home Internet in each of Western Canada and Ontario.</p>		
32.	Paul McAleese	Page 10-11 Paras 15-16	15. Similarly, one of the largest and most successful wireless carriers in the United States – T-Mobile US Inc. (“T-Mobile”) – has operated successfully for years in providing wireless services to its customers in the United States even though it did not own or operate its own wireline network or provide wireline services. The suggestion that one cannot compete aggressively and	<p>Paragraphs 15 and 16 contain inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are</p>	<p>Please see the response to Item 29 above, which applies with equal force to this objection.</p> <p>In addition, as set out in his First Witness Statement, Mr. McAleese lived and worked in the United States for more than a decade before he joined Shaw in 2017. He was (and remains) well aware of the</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>successfully in the wireless business in Canada without also owning and operating a wireline business is simply wrong.</p> <p>16. I have been in this business for many years. For all of the reasons I elaborate on below, it is difficult for me to imagine a better opportunity to realize the Government of Canada’s longstanding objective of creating a fourth national wireless carrier than the one the Proposed Transaction presents.</p>	<p>notin a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Paul McAleese, as an officer of Shaw, is not in a position to give evidence on the USA marketplace and more specifically, on how the merger will affect Canadians.</p>	<p>wireless business carried on by T-Mobile in the United States (Paul McAleese Witness Statement, sworn September 23, at para 212).</p> <p>Given Mr. McAleese’s extensive experience in the telecommunications industry generally, including in the United States, the statements in question are all properly within his knowledge, observation, experience and understanding of facts, conduct or actions. He has the requisite degree of knowledge to comment on T-Mobile and, more generally, the ability of telecommunications companies to compete in wireless without also owning a wireline business.</p>
33.	Paul McAleese	Page 50-51 Paras 166 -168	<p>166. [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] This advantage in spectrum holdings translates directly into wireless network advantages in the form of greater speed, capacity and coverage. Just like adding lanes to a highway permits morecars to travel along it at higher speeds, obtaining additional spectrum allows a wireless carrier to offer</p>	<p>Paragraphs 166, 167 and 168 contain inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are notin a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they</p>	<p>Please see the response to Item 29 above, which applies with equal force to this objection.</p> <p>Further, and contrary to the Commissioner’s allegations, the statements at paragraphs 166, 167 and 168 do not contain any inadmissible hearsay.</p> <p>With respect to the PC Mag articles in question, Shaw is not tendering the articles for the truth of their contents. Rather, they are being tendered to establish that the advantages and disadvantages of telecommunications networks are commented on, including in</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>larger amounts of wireless data and to transmit at higher speeds. In my experience, these network advantages are then touted in marketing materials, and lead directly to an increase in perceived customer experience, competitive advantage and market share for all of Bell, TELUS and Rogers. An article from PC Mag entitled “Fastest Mobile Networks Canada 2022” illustrates that network strength functions as a key differentiator of wireless carriers in the eyes of the public. This article is attached to my Witness Attachment as Exhibit “51”.</p> <p>167. For instance, on September 20, 2022, an article published in PCMag entitled “Fastest Mobile Networks Canada 2020”, reported on network speed and quality for wireless providers in cities and provinces across Canada. The article highlighted the disparity between the Big 3 (with their 5G+ networks and spectrum) and regional carriers. In particular, the article noted that “[s]ince 2015, Bell and Telus have traded off the win in our study, largely because together, they generally have more wireless spectrum than Rogers”, but that “Rogers’ aggressive 5G+ buildout this year... [lead] it to win in Montreal, Ottawa, and Vancouver”, emphasizing the importance of capital and spectrum to the ability to compete in Canada’s wireless market. A</p>	<p>have the experiential competence”.</p> <p>Paul McAleese, as an officer of Shaw, is not in a position to give evidence on the marketplace and more specifically, on how the merger will affect Canadians.</p> <p>Paragraphs 166, 167 and 168 also contain inadmissible hearsay evidence.</p> <p>The witness makes reference to a series of articles which is not admissible evidence. The author of the articles has not produced a witness statement. The Commissioner is therefore deprived of the opportunity to cross-examine the author who prepared the analysis relied upon. Admitting this evidence would be procedurally unfair to the Commissioner and would impede the truth-seeking function of the Tribunal.</p>	<p>publications such as PC Mag. The evidence of Mr. McAleese reflected in the paragraphs in question from his Witness Statement is that the existence and dissemination of these reports, regardless of the truth of their contents, inform public perception of Freedom and other telecommunications providers. As a result, the statements in question are relevant and admissible.</p> <p>In any event, to the extent that the statements in question can be characterized as hearsay, they meet the twin criteria of necessity and reliability under the principled approach (<i>R v Khelawon, 2006 SCC 57 at para 42</i>).</p> <p>With respect to necessity, the Commissioner requested an expedited timetable for the hearing of this matter. It is not an efficient use of the limited trial time in this proceeding to require Shaw (or the Commissioner) to provide direct evidence from each and every author, reporter, and analyst whose statements have been put forward as evidence (see <i>Coldwater Indian Band v Canada, 2019 FCA 292 at paras 58 to 59</i>).</p> <p>With respect to reliability, including in particular as it pertains to the Ookla Report, there are sufficient circumstantial guarantees of trustworthiness to allow for the admissibility of the documents in</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>copy of this article is attached to my Witness Statement as Exhibit “51”.</p> <p>168. [REDACTED]</p> <p>[REDACTED] The current speed disadvantage of the Freedom network is easily verifiable. A company known as Ookla LLC publishes a regular series of reports comparing the quality of telecommunications networks around the world; its reports on Canadian wireless companies are publicly available online: https://www.speedtest.net/global-index/canada?mobile#market-analysis. Ookla’s latest “Speedtest” report that includes Freedom pertains to the first quarter of 2022. It indicates that the speed of Freedom Mobile’s network is significantly below that of its competitors. [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>		<p>question. Indeed, the Commissioner’s very own Witness Statements from Blaik Kirby of Bell (Exhibit I), Nazim Benhadid of Telus (paragraph 10), and Tom Nagel of Comcast (paragraph 8) each rely on the very same type of Ookla Reporting. Their evidence confirms that Ookla Reports are accepted within the telecommunications industry as an accurate source.</p> <p>Further, to the extent that there is any lingering doubt concerning the necessity and reliability associated with these Reports, the Commissioner will have the opportunity to not only cross-examine Mr. McAleese, but also examine his own witnesses from Bell, TELUS and Comcast.</p> <p>In the alternative, if these reports are tendered for the truth of their contents, they are admissible. The Ookla data is proper evidence because the circumstances surrounding its collection, dissemination, and subsequent use permit the trier of fact to sufficiently assess its evidentiary value.</p> <p>Ookla’s network performance analysis is reliable. It represents the industry benchmark for reporting on network performance according key metrics. Further, the Commissioner’s very own Witness Statements from Blaik Kirby of</p>

SCHEDULE "C": SHAW'S RESPONSES TO THE COMMISSIONER'S OBJECTIONS					
#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
					Bell (exhibit I), Nazim Benhadid of Telus (paragraph 10), and Tom Nagel of Comcast (paragraph 8) rely on Ookla's reporting and generally confirm it is accepted within the telecommunications industry as an accurate source. As such, Bell, Telus, and Comcast's willingness to tout their Ookla network performance results strongly support the position that Ookla data is reliable and admissible.
34.	Paul McAleese	Page 56 Para 179	179. In my experience, there are ample options for the provision of backhaul services in Canada. In more urban, densely-populated portions of the country, a wireless carrier can typically choose from as many as four to six different options for any given cell site location. If fibre backhaul is unavailable, a microwave solution is almost invariably possible. In summary, backhaul is a commodity that is widely-available at competitive wholesale prices.	Paragraph 179 contains inadmissible opinion evidence. A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence". Paul McAleese, as an officer of Shaw, is not in a position to give evidence on the availability of backhaul in the	Please see the response to Item 29 above, which applies with equal force to this objection.

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
				marketplace and whether that market is competitive.	
35.	Paul McAleese	Page 57 Para 187	187. In my experience, the reliance by one wireless carrier on the backhaul and transport resources of other carriers and third parties in the manner described above is a familiar, desirable and deliberate aspect of the telecommunications industry in Canada. It would be wasteful, including from a capital allocation perspective, for every wireless carrier to spend the time and money required to build a wireline fibre network capable of delivering backhaul and transport services across a country as vast and topographically challenging as Canada, especially when other technological solutions, namely wireless microwave, are also widely available.	<p>Paragraph 187 contains inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Mr. McAleese is opining on the state of competition in the market for backhaul services. This is prejudicial opinion evidence. The competitiveness of a market is not a matter for lay opinion evidence as it requires identification of product and geographic markets, market shares within those markets and an assessment of</p>	<p>Please see the response to Item 29 above, which applies with equal force to this objection.</p> <p>In addition, Mr. McAleese has specific knowledge concerning the leasing arrangements in question, including as a result of his knowledge of arrangements between Shaw and other telecommunications providers (Paul McAleese Responding Witness Statement, sworn October 20, 2022, at para 150).</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
				<p>competition within those markets, including for example direct and indirect indicators of market power. Mr. McAleese is not an expert economist and provides only a bald and conclusory statements about the competitiveness of backhaul based on the existence of backhaul providers.</p>	
36.	Paul McAleese	Page 58 Para 188	<p>188. Reliance on another party’s backhaul and transport services is thus not detrimental, even for the most sizeable players in Canada’s wireless market. Indeed, it can be more cost-effective to lease these services than to own them outright.</p>	<p>Paragraph 188 contains inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Mr. McAleese is opining on the state of competition in the market for backhaul</p>	<p>Please see the response to Item 29 above, which applies with equal force to this objection.</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
				<p>services. Mr. McAleese is not an expert economist and provides only a bald and conclusory statement about the use of backhaul from other parties.</p>	
37.	Paul McAleese	Page 65-66 Para 212, 214-216)	<p>212. As stated above, I lived and worked in the United States for more than a decade before I joined Shaw in 2017. I was (and remain) well aware of the wireless business carried on by T-Mobile US Inc. (“T-Mobile”) in the United States. T-Mobile is one of the largest and most successful providers of wireless services in the United States, across a</p> <p>number of different metrics, as illustrated in the following table: (p. 65 table)</p> <p>214. T-Mobile operated successfully for years in providing wireless services to its customers in the United States even though it did not own or operate its own wireline network or provide wireline services.</p> <p>215. T-Mobile acquired a wireline business in 2020 (after first announcing the transaction in 2018) when it merged with Sprint. The data depicted in the table above, as of December 31, 2017, illustrates the success that T-Mobile was able to obtain without ever having owned or operated its own wireline network. Incidentally, on September 7, 2022, T-Mobile announced</p>	<p>Paragraphs 212, 214, 215 and 216 contain inadmissible opinion evidence.</p> <p>A lay witness cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence”.</p> <p>Paul McAleese, as an officer of Shaw, is not in a position to give evidence on the USA marketplace and more specifically T-Mobile.</p>	Please see the response to Item 32 above, which applies with equal force to this objection.

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>that it has reached an agreement to sell this entire wireline business to Cogent Communications for USD\$1. This transaction is referred to in a recent article entitled “T-Mobile sells wireline business to Cogent for \$1, expects hefty charge”, published by Reuters, and dated September 7, 2022, a copy of which is attached to my Witness Statement as Exhibit “66”. The transaction is also reported to include a 4.5 year, US\$700 million contract for Cogent to provide transitional services to T-Mobile.</p> <p>216. Clearly, T-Mobile has been highly successful in providing wireless products and services to its customers without also owning and operating its own wireline network or business.</p>		
38.	Paul McAleese	Page 69 Para 230	230. Just today, on September 23, 2022, the Globe and Mail quoted TELUS’ CEO, Darren Entwistle explaining how “we’re [TELUS] blowing our brains on fibre and 5G”. I attach the article “Telus CEO says it’s time for Ottawa to relax foreign-ownership rules for large telecoms. He’s right”, which I attach as Exhibit “81”.	<p>Paragraph 230 contains inadmissible hearsay evidence.</p> <p>The witness makes reference to an article which is not admissible evidence. The author of the articles has not produced a witness statement. The Commissioner is therefore deprived of the opportunity to cross-examine the author who prepared the analysis relied upon. Admitting this</p>	<p>Shaw is not tendering the Globe & Mail article dated September 23, 2022 for the truth of its content.</p> <p>Rather, the article is being admitted for the sole purpose of establishing that Mr. Entwistle commented publicly on the investment associated with fibre and 5G.</p> <p>In any event, to the extent that the statement in question can be characterized as hearsay, it meets the twin criteria of necessity and reliability under the principled approach (<i>R v Khelawon, 2006 SCC 57, para 42</i>).</p>

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#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
				evidence would be procedurally unfair to the Commissioner and would impede the truth-seeking function of the Tribunal.	<p>With respect to necessity, the Commissioner requested an expedited timetable for the hearing of this matter. It is not an efficient use of the limited trial time in this proceeding to require Shaw (or the Commissioner) to provide direct evidence from each and every author, reporter, and analyst whose statements have been put forward as evidence (<i>Coldwater Indian Band v Canada, 2019 FCA 292 at paras 58 to 59</i>).</p> <p>With respect to reliability, the Commissioner is adducing evidence from two senior representatives of TELUS (Mr. Casey and Mr. Benhadid). The Commissioner will have the opportunity to cross-examine these senior representatives of TELUS concerning the substance of the statement in question made by their Chief Executive Officer.</p>
39.	Paul McAleese	Page 83 Para 269	269. Nor did Shaw Mobile have any significant impact on the Average Billing Per User of Shaw (or “ABPU”) in 2020 or 2021 either in British Columbia, Alberta or Ontario. Shaw’s ABPU in British Columbia increased from \$67.17 in 2020 to \$68.09 in 2021. In Alberta, Shaw’s ABPU increased from \$71.15 in 2020 to \$71.65 in 2021. In Ontario, where Shaw Mobile plans were not available, the Company’s ABPU decreased from \$66.84 in 2020 to \$65.14 in 2021. These figures were extracted from the TD	<p>The paragraph contains inadmissible hearsay evidence.</p> <p>The witness makes reference to a market report from TD that contains analysis on the proposed Transaction. The market report is put forward for the truth of their content, that is, as</p>	<p>To the extent that the statement in question can be characterized as hearsay, it meets the twin criteria of necessity and reliability under the principled approach (<i>R v Khelawon, 2006 SCC 57 at para 42</i>).</p> <p>With respect to necessity, the Commissioner requested an expedited timetable for the hearing of this matter. It is not an efficient use of the limited trial time in this proceeding to require Shaw</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>Securities analyst reports dated January 5, 2021 and December 30, 2021, attached to my Witness Statement as Exhibits “110” and “64”. By comparison, Rogers reported ABPU of \$63.24 in 2020 and \$63.45 in 2021, and Telus reported ABPU of \$70.49 in 2020 and \$69.83 in 2021. Bell reported ABPU of \$64.69 in 2020 and \$74.07 in Q3 2021, after which it no longer reported ABPU. These figures are extracted from the 2020 and 2021 Annual Reports of Telus and Rogers, and the 2020 Annual Report and Q3 2021 Press Release of Bell, and are attached to my Witness Statement as Exhibits “78”, “109”, “8”, “107” and “111”.</p>	<p>support of the contention that the proposed Transaction is beneficial for the telecommunications market.</p> <p>The author of the market report has not been called by Rogers/Shaw as witnesses in these proceedings. The Commissioner is therefore deprived of the opportunity to cross-examine the author who prepared the analysis relied upon. Admitting this evidence would be procedurally unfair to the Commissioner and would impede the truth-seeking function of the Tribunal.</p>	<p>(or the Commissioner) to provide direct evidence from each and every author, reporter, and analyst whose statements have been put forward as evidence (<i>Coldwater Indian Band v Canada, 2019 FCA 292 at paras 58 to 59</i>).</p> <p>With respect to reliability, the very nature of the analyst reports – which are widely published and scrutinized by professionals with specialized skill and experience – provides the requisite circumstantial guarantees of trustworthiness. Moreover, the Commissioner will have the opportunity both to (i) lead evidence concerning the necessity and reliability of analyst reports, including from the Bell and TELUS witnesses, and (ii) cross-examine the witnesses from Shaw, Rogers and Videotron concerning the necessity and reliability of the analyst reports.</p> <p>In addition, the evidence of Mr. McAleese – who will be subject to cross-examination by the Commissioner at trial – is that he and others at Shaw, and other industry participants, rely on TD consistently for publicly available market share information. Because market participants do not themselves have access to information concerning the business operations of their competitors, they routinely rely on the information of the nature prepared by the sophisticated</p>

SCHEDULE "C": SHAW'S RESPONSES TO THE COMMISSIONER'S OBJECTIONS					
#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
					<p>team of analysts at TD Securities, who have particular knowledge of and expertise in the telecom industry in Canada and follow it carefully on a day-to-day basis (Responding Witness Statement of Paul McAleese, sworn October 20 2022 at para 141).</p> <p>Moreover, the Commissioner will have the opportunity both to (i) lead evidence concerning the necessity and reliability of analyst reports, including from the Bell and TELUS witnesses, and (ii) cross-examine the witnesses from Shaw, Rogers and Videotron concerning the necessity and reliability of the analyst reports.</p>
40.	Paul McAleese	Page 84 Para 272	[REDACTED]	<p>The paragraph contains inadmissible hearsay evidence.</p> <p>The witness makes reference to Environics Analytics report that contains analysis on a segmentation system.</p> <p>The author of the report has not been called by Rogers/Shaw as witnesses in these proceedings. The Commissioner is therefore deprived of the opportunity to cross-examine the author who prepared the analysis</p>	<p>Contrary to the allegations of the Commissioner, Shaw is not tendering the EA slide deck in question for the truth of its contents.</p> <p>Rather, the document is being tendered for the purpose of establishing the fact that EA developed the six market segments in question.</p>

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>Note published by TD Securities Inc. entitled “Annual Wireless Stats and Map”, dated December 30, 2021, and attached to my Witness Statement as Exhibit “169”. It is a sophisticated facilities-based carrier that also operates a significant wireline business.</p> <p>390. The terms of the Divestiture Agreement have put Videotron in an even better position to compete vigorously and effectively in the wireless industry across Canada, in a way that Freedom never did and was incapable of doing. Given my experience, it is difficult for me to imagine a better outcome for Canadian consumers and promotion of competition, affordability, investment and innovation than the one the Divestiture Agreement presents.</p> <p>391. Conversely, if the Proposed Transaction is blocked, the market dominance of the Big 3- and especially Bell and TELUS- may never be challenged. I have attached to my Witness Statement as Exhibit “170” an RBC Capital Markets Report dated August 15, 2022, entitled, “Canadian Telecommunications Services Q2/22 Review – Recovery Momentum Continuing into Q3/22”, which articulates the numerous negative implications of Rogers not acquiring Shaw as: (i) being a delay in 5G deployment and/or lower quality of service; (ii) a closing of the door on the prospect of a fourth national facilities-based operator in Canada;</p>		

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>and (iii) the government's four player facilities-based wireless policy [being] at risk". Without the Proposed Transaction, RBC Capital Marketsexpected "the door could very well be closed on the prospect of Canada gaining a fourth national facilities-based operator."</p> <p>392. Moreover, on August 22, 2022, BMO Capital Markets published an analyst report concerning the implications of the Proposed Transaction. Attached as Exhibit “171” to my Witness Statement is a BMO Capital Markets Report dated August 22, 2022, “Quebecor Is as Good as it Gets for ISED”, that states that"Quebecor is positioned to be a more competitive and moresustainable fourth wireless player than Shaw proved to be. To [BMO Capital Markets], this is completely aligned with the government's long-standing wireless policy".</p> <p>393. There is no other participant in the wireless industry in Canada that is capable of competing with the Big 3, now or in the foreseeable future. And no other participant in this industry will have access to the extraordinarily favourable arrangements that Videotron has been able to secure for itself, asdescribed above.</p>		
42.	Paul McAleese	Page 123-124 Paras 407-409	407. In his Witness Statement, Mr. English addresses in detail what Shaw will look like going forward if the Proposed Transaction is	Paragraphs 407-409 contain inadmissible opinion evidence.	Please see the response to Item 29 above, which applies with equal force to this objection.

SCHEDULE “C”: SHAW’S RESPONSES TO THE COMMISSIONER’S OBJECTIONS

#	Witness Statement	Reference (page/para)	Statement	Basis for Objection	Shaw Response
			<p>industry that will drive competition for both wireline and wireless services, to the benefit of all Canadians.</p> <p>409. The divestiture of Freedom to Videotron and the combination of the wireline business of Shaw and Rogers are not only a logical and compelling solution for Shaw’s difficulties, but a unique opportunity to create a better and more competitive telecommunications industry in Canada, for the benefit of all Canadians. That is a unique opportunity that is unlikely to arise again.</p>		