THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.

Intervenors

MOTION RECORD

(Motion to Strike Reply Evidence- Dr. Israel and Mr. Butt)

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CT-2022-002

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
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Intervenors

NOTICE OF MOTION
(Motion to Strike Reply Evidence- Dr. Israel and Mr. Butt)

TAKE NOTICE THAT The Commissioner of Competition ("Commissioner") will make a motion to the Competition Tribunal ("Tribunal") on a date to be set by the Tribunal in accordance with its Scheduling Order dated June 17, 2022.

THE MOTION IS FOR

(a) an order striking out parts of Dr. Israel's and the entirety of Mr. Butt's Reply Witness Statements ("New Evidence") on the grounds that they constitute an improper reply;

(b) In the alternative,

a. an order granting the Commissioner leave to file sur-reply evidence, limited to responding to the New Evidence, and

b. an adjournment of (2) two weeks to gather and compile the required evidence in response to the New Evidence and file it with the Tribunal;

(c) Costs of this motion

THE GROUNDS FOR THIS MOTION ARE:

1. The Respondent, Rogers, is using the back door to introduce New Evidence that is outside the time period provided for under the Scheduling Order. All evidence other than responding evidence was due on September 23, 2022. Filing of witness evidence on October 20th was limited to "responding witness statements" and "responding expert report(s)." The Respondent ignores the Scheduling Order and introduces New (not "responding") Evidence through the witness statements of Dr. Israel and Mr. Butt;

2. On September 23, 2022, the Respondent, Rogers, served on the Commissioner expert evidence, namely the affidavit of Dr. Israel, which contains his expert report. The affidavit of Nathan Miller, dated May 6, 2022, was available to Dr. Israel and formed part of his professional assessment;

3. On October 20, 2022, Rogers served on the Commissioner its evidence in reply, including the witness statement of Mr. Butt, and the reply affidavit of Dr. Israel, which contains his responding expert report. Both documents contain New Evidence that is not in response to the Commissioner's evidence and which should have been filed on September 23, 2022, under the terms of the Scheduling Order;

4. Mr. Butt's reply witness statement describes a tool to support engineering design recommendations throughout Rogers' radio access network, which is called Radio Access Network Simulator ("**RANsim**"). The tool was used to assess the Rogers' wireless network with that of Shaw Communications Inc.;

5. Dr. Israel also relies RANsim in his reply expert report, facts introduced through Mr. Butt's reply witness statement. RANsim is used by Dr. Israel to assess costs savings and quality improvements in the merger calculations;

6. The RANsim evidence is New Evidence. RANsim does not form part of the evidence served by the Respondent, Rogers, on September 23, 2022, nor is it in response to any evidence that the Commissioner may have filed in this proceeding to date;

7. New evidence is not permissible under the terms of the Scheduling Order. The door to New Evidence closed on September 23, 2022. The Respondent, Rogers, is now attempting to do an end-run around the Scheduling Order;

8. The Respondent, Rogers, is also splitting its case. The rule against splitting a case is intended to prevent unfair surprise, prejudice and confusion which could result if a party were allowed to put its evidence in on reply;

9. The Respondent, Rogers, has put the Commissioner in a position of unfairness. The Commissioner is not able to respond to complex factual material, obtain responding evidence in the time available, instruct experts to factor it into expert reports filed already, or fairly test or evaluate the facts put in evidence concerning RANsim by Mr. Butt, or the calculations and assessments made by Dr. Israel as part of his merger analysis; and

10. The New Evidence should be struck; or

11. In the alternative, the Commissioner must be afforded with the opportunity to respond to the New Evidence though a right of sur-reply and an adjournment to gather the required evidence.

THE COMMISSIONER RELIES ON THE FOLLOWING EVIDENCE:

(a) Affidavit of Darian Bakelaar, sworn October 27, 2022;
(b) Reply Witness Statements of Dr. Israel and Mr. Butt; and
(c) Such further and other materials that this Tribunal deems necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2022.

Alexander M. Gay

ATTORNEY GENERAL OF CANADA

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Attorney General of Alberta

CT-2022-002

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.

Intervenors

AFFIDAVIT OF DARIAN BAKELAAR
(affirmed on October 27, 2022)

I, **DARIAN BAKELAAR**, Senior Paralegal at the Competition Bureau Legal Services of the Department of Justice Canada, in the City of Gatineau in the Province of Quebec **AFFIRM THAT**:

1. On May 9, 2022, the Commissioner of Competition ("**Commissioner**") brought applications under sections 92 and 104 of the *Competition Act*. As part of his section 104 application, the Commissioner submitted the affidavit of Nathan Miller, dated May 6, 2022, which contains his expert report. This evidence was made available to the Respondent, Rogers Communications Inc. ("**Rogers**").

2. On September 23, 2022, Rogers served on the Commissioner expert evidence, namely the affidavit of Mark A. Israel, which contains his expert opinion/report. The affidavit of Nathan Miller, dated May 6, 2022, was available to Dr. Israel.

3. On October 20, 2022, Rogers served on the Commissioner the witness statement of Muhammad Rizwan Butt, and the reply affidavit of Dr. Israel, which contains his reply expert opinion/report.

4. Mr. Butt's witness statement, at paragraphs 6-16 and Exhibit 2, describes a tool used to support engineering design recommendations throughout Rogers' radio access network, which is called Radio Access Network Simulator ("**RANsim**"). The tool was used to assess the Rogers' wireless network with that of Shaw Communications Inc.

5. At paragraphs 10, 20, 26-29 and Appendix A of his reply expert report, and at Exhibits E and F of his affidavit, Dr. Israel uses the RANsim-related evidence provided by Mr. Butt in his reply to form his expert opinion, including an opinion with respect to costs savings and quality improvements in his merger calculations.

6. I am advised by Ryan Jakubowski and verily believe that the RANsim evidence in the Mr. Butt's witness statement and the Dr. Israel reply affidavit is new evidence ("New Evidence"). I am also advised by Mr. Jakubowski and verily believe that it is not in the evidence served by Rogers on September 23, 2022, nor is it in response to any evidence that the Commissioner may have filed in these proceedings.

7. On October 26, 2022, Alexander Gay, counsel to the Commissioner, wrote to counsel for the Respondent, Rogers, requesting that it withdraw the New Evidence, failing which he was under instruction to bring a motion to compel its removal from the Competition Tribunal record. Attached hereto and marked as **Exhibit "A"** is a copy of the said letter from Alexander Gay, dated October 26, 2022.

Affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me, in the City of Ottawa in the Province of Ontario, on October 27, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner of Oaths

Darian Bakelaar

A Commissioner, etc., Province of Ontario
Commissaire, etc., Province de l'Ontario
Mallory Christina Kelly
exp.: March 2, 2025
exp.: 2 mars 2025
Department of Justice
Ministère de la Justice
Government of Canada
Gouvernement du Canada

This is **Exhibit "A"** to the affidavit of Darian Bakelaar affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me in the City of Ottawa in the Province of Ontario, on October 27, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.

Commissioner of Oaths etc.

Ministère de la Justice
Canada

Department of Justice
Canada

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BY EMAIL

October 26, 2022

LAX O'SULLIVAN LISUS GOTTLIEB LLP
145 King Street West
Suite 2750
Toronto, ON M5H 1J8

Attn: Crawford Smith

Dear Mr. Smith:

Re: *Commissioner of Competition v. Rogers Communications Inc. and Shaw Communications Inc.*, Tribunal File No. CT-2022-002 – RANSim

We write with respect to Rogers' reply evidence relating to Rogers' Radio Access Network Simulator ("**RANSim**"). The introduction of this new evidence on reply is case splitting and raises a new issue on reply. This evidence must be withdrawn immediately, failing which we have instructions to bring an immediate motion to strike. We ask for confirmation of its withdrawal by 10:00 am tomorrow.

The Scheduling Order required Rogers to file its expert reports, including respecting efficiencies, on September 23, 2022. Rogers has put forward for the first time in its reply fact and expert evidence respecting claimed marginal cost savings/efficiencies and quality improvements.

If Rogers does not agree to withdraw its RANSim evidence, the Commissioner will move to strike the RANSim evidence or, in the alternative, to call for an adjournment and the opportunity for the Commissioner to serve evidence relating to RANSim. This will surely delay the hearing.

Just so that the record is clear, we note the following. In drafting his expert report of September 23, 2022, Dr. Israel had the benefit of Dr. Miller's expert report from the section 104 application. Dr. Israel's September 23, 2022 report was silent on RANSim. Included in Rogers' October 20, 2022 reply evidence, for the first time, are discussions on RANSim, all of which is found in Dr. Israel's expert report and Rizwan Butt's witness statement. Rogers introduced such evidence despite no mention of RANSim in the Commissioner's evidence and Dr. Israel's acknowledgment

in his October 20, 2022 report that "[t]he Miller Initial Report is not materially different from the Miller Section 104 Report."

If Rogers sought to rely on RANSim, it should have done so by September 23, 2022, not a month later in reply. The legal test is clear. Evidence that could have reasonably been anticipated to be relevant must be served at the outset. Replies are reserved for responding to the evidence raised in chief. Indeed, Rogers first made submissions on RANSim to the Commissioner on November 8, 2021, months before the litigation commenced. There was nothing in the Commissioner's evidence of September 23, 2022 that changed the relevance of RANSim to the litigation. Therefore, it is not open to Rogers to introduce evidence relating to RANSim in reply.

Accordingly, we again ask that Rogers withdraw Exhibits E and F of Dr. Israel's reply report, as well as the paragraphs in his report that rely on those Exhibits (paras. 10 (partial), 20 (partial), 26-29, and Table 10), and the entirety of Mr. Butt's witness statement.

We look forward to hearing from you immediately.

Yours truly,

Alexander M. Gay

Alexander Gay

cc Jonathan Lisus, Matthew Law, Brad Vermeersch, Ronke Akinyemi, Zain Naqi, *Lax O'Sullivan Gottlieb LLP*
Kent Thomson, Derek Ricci, Chanakya Sethi, Steven Frankel, *Davies Ward Phillips & Vineberg LLP*

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AFFIDAVIT OF DARIAN BAKELAAR
(affirmed on October 27, 2022)

CT-2022-002

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Intervenors

WRITTEN REPRESENTATIONS OF THE COMMISSIONER
(Motion Striking out New Evidence - Dr. Israel and Mr. Butt))

OVERVIEW

1. The Respondent, Rogers Communications Inc. ("**Rogers**"), is using the back door to introduce new evidence in the reply witness statements of Dr. Israel and Mr. Butt ("**New Evidence**") that is outside the time period provided for under the Scheduling Order. All evidence, other than responding evidence, was due on September 23, 2022. The filing of witness evidence on October 20, 2022 was limited to "responding witness statements" and "responding expert report(s)." The Respondent ignores the Scheduling Order and introduces New (not "responding") Evidence

through the witness statements of Dr. Israel and Mr. Butt. This is improper and highly prejudicial to the Commissioner of Competition ("**Commissioner**").

2. On October 20, 2022, Rogers served on the Commissioner its evidence in reply, including the witness statement of Mr. Butt, and the reply affidavit of Dr. Israel, which contains his responding expert report. Both documents contain New Evidence that is not in response to the Commissioner's evidence and which should have been filed on September 23, 2022 under the terms of the Scheduling Order. This evidence was available to the Respondent as of September 23, 2022, but they chose not to file it.

3. New evidence is not permissible under the terms of the Scheduling Order. The door to New Evidence closed on September 23, 2022. The Respondent, Rogers, is now attempting to do an end-run around the Scheduling Order. The Respondent, Rogers, is also splitting its case. The rule against splitting a case is intended to prevent unfair surprise, prejudice and confusion which could result if a party were allowed to put its evidence in on reply.

4. The Respondent, Rogers, has put the Commissioner in a position of unfairness. The Commissioner is not able to respond to complex factual material, obtain responding evidence in the time available, instruct experts to factor it into expert reports filed already, or fairly test or evaluate the facts put in evidence by Mr. Butt, or the calculations and assessments made by Dr. Israel as part of his merger analysis. This is patently unfair and the result of the Respondent splitting its case.

5. The Commissioner respectfully requests that the New Evidence be struck from the witness statements or, in the alternative, the Commissioner be afforded with the opportunity to respond to the New Evidence though a right of sur-reply and an adjournment to gather the required evidence. The integrity of the Tribunal process has been put at issue by the Respondent.

PART I – THE FACTS

6. The Respondent, Rogers, filed reply evidence with the Tribunal that contains new evidence.

7. On May 9, 2022, the Commissioner brought applications under sections 92 and 104 of the *Competition Act*. As part of his section 104 application, the Commissioner submitted the affidavit of Nathan Miller, dated May 6, 2022. This evidence was available to the Respondent, Rogers.[1]

8. On September 23, 2022, Rogers served on the Commissioner expert evidence, namely the affidavit of Mark A. Israel, which contains his expert opinion/report. The Respondent had every opportunity to assess the Commissioner's expert evidence.

9. On October 20, 2022, Rogers served on the Commissioner evidence in reply, including the fact witness statement of Muhammad Rizwan Butt, and the reply affidavit of Dr. Israel, which contains his reply expert opinion/report.[2] The Scheduling Order provides that responding witness statements and expert reports were due on that date.

10. Mr. Butt's witness statement, at paragraphs 6-16 and Exhibit 2, describes a tool used to support engineering design recommendations throughout Rogers' radio access network, which is called Radio Access Network Simulator or "**RANsim**"). The tool was used to assess the Rogers' wireless network with that of Shaw Communications Inc.[3]

11. At paragraphs 10, 20, 26-29 and Appendix A of his reply expert report, and at Exhibits E and F of his affidavit, Dr. Israel uses the RANsim-related evidence provided by Mr. Butt in his reply to form his expert opinion, including an opinion with respect

[1] Affidavit of Darian Bakelaar, at para. 1, Commissioner's Motion Record, at Tab 2.
[2] Affidavit of Darian Bakelaar, at para. 2, Commissioner's Motion Record, at Tab 2.
[3] Affidavit of Darian Bakelaar, at para. 3, Commissioner's Motion Record, at Tab 2.

to marginal costs savings/efficiencies and quality improvements in his merger calculations.[4]

12. The RANsim evidence in the Mr. Butt's witness statement and the Dr. Israel reply affidavit is new. Such New Evidence is not in the evidence materials served by Rogers on September 23, 2022, nor is it in response to any evidence that the Commissioner may have filed in this proceeding.[5]

13. On October 26, 2022, counsel to the Commissioner, invited the Respondent, Rogers, to withdraw the New Evidence, failing which it was under instruction to bring a motion to compel its removal from the Tribunal record. The Respondent has refused to withdraw the New Evidence.[6]

THE ISSUE

14. Is the Commissioner entitled to strike out the New Evidence from the Respondent's reply witness statements?

THE ARGUMENT

15. The Tribunal, as the master of its proceedings, must ensure the integrity of the Tribunal process and instill discipline on the parties. Justice demands it and the public expects it. This Tribunal has the jurisdiction to strike portions of a witness statement that constitutes improper reply evidence or, alternatively, dispense a remedy that ensures fairness between the parties in the proceeding. Either way, the Commissioner is entitled to a remedy.

16. When faced with a recalcitrant party that has neglected or refuses to adhere to the Scheduling Order and tenders expert evidence at the appropriate time, the Tribunal has the authority and the obligation to strike out parts of the offending witness

[4] Affidavit of Darian Bakelaar, at para. 4, Commissioner's Motion Record, at Tab 2.
[5] Affidavit of Darian Bakelaar, at para. 5, Commissioner's Motion Record, at Tab 2.
[6] Affidavit of Darian Bakelaar, at para. 6, Commissioner's Motion Record, at Tab 2.

statement. Although decided within the context of an affidavit, the following words resonate in the ears of justice:

> The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions, or where the Court is convinced that admissibility would be better resolved at an early stage so as to allow the hearing to proceed in a timely and orderly fashion (*McConnell v. Canadian Human Rights Commission*, 2004 FC 817, affirmed 2005 FCA 389).[7]

17. It is well established that an affidavit should be struck at a preliminary stage "where it is in the interest of justice to do so ... or in cases where a party would be materially prejudiced where not striking an affidavit or portions of an affidavit would impair the orderly hearing of the application".[8] The principles regarding the Tribunal exercising its gatekeeper function apply equally to the reply witness statements.[9]

18. As set out further below, portions of the reply affidavit of Dr Israel and the entirety of the witness statement of Mr. Butt tendered by the Respondent constitute an improper reply. They contain New Evidence that could have been anticipated earlier to be relevant and that could and should have been included with the witness statements filed on September 23, 2022. Nor is this evidence in response to the Commissioner's evidence. Such evidence is not proper reply evidence and the Respondent is splitting its case.

RESPONDENT HAVE SPLIT THEIR CASE: IMPROPER REPLY EXPERT EVIDENCE

19. The general rule is that a party to a proceeding will not be allowed to split its case by tendering new evidence on reply that could have been tendered or anticipated

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[7] *McConnell v. Canadian Human Rights Commission*, 2004 FC 817, affirmed 2005 FCA 389, Commissioner's Book of Authorities ("Commissioner's BOA"), at Tab 4; *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 CAF 43, para 16, Commissioner's BOA, at Tab 3; *Quadrini v Canada Revenue* Agency, 2010 FCA 47 ("*Quadrini*") para 18, Commissioner's BOA, at Tab 7.

[8] *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 CAF 43, para 16, Commissioner's BOA, at Tab 3.

[9] *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 CAF 43, para 16, Commissioner's BOA, at Tab 3.

earlier or that is not responsive to an opponent's case. The party must produce all the relevant evidence that it has, or that it intends to reply upon, to establish its case with respect to all the issues raised in the pleadings. It may not hide in the weeds and introduce new evidence that it could have produced and that was available to it on reply. A number of paragraphs contained in the reply witness statement of Dr. Israel and the entirety of Mr. Butt's witness statement contain New Evidence and constitute an improper reply and that allows the Respondent to split its case.

20. The principles governing proper reply evidence are well established and much of the Court's jurisprudence was recently cited by the Associate Chief Justice Gagné in the case of *Merck Sharp & Dohme Corp v Wyeth LLC* ("*Merck Sharp*").[10] Although the Tribunal process is unique and guided by its own rules and the Scheduling Order, much of what is said by Justice Gagné has application in deciding whether the Respondent's evidence should be struck.

21. As stated by Justice Gagné in *Merck Sharp*, there are a few rules that govern and limit the nature of evidence that a party can adduce in reply. They all flow from the fact that a party will not be allowed to hide in the weeds and split its case to the detriment of an opponent.[11] The stakes are high in merger cases and absolute propriety is expected of all parties. In this case, the reply evidence must relate to issues raised by the parties and it must be in response to the evidence of the Commissioner and not evidence that could have been filed with the initial expert report.

22. The case of *Amgen Canada Inc v Apotex Inc*[12] sets out a number of general rules that are generally followed by the Federal Court and which should guide this Tribunal when considering whether reply evidence may be introduced into evidence. Although not directly applicable given that this proceeding is guided by a unique Scheduling Order, it is instructive nonetheless. The rules articulated are as follows:

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[10] *Merck Sharp & Dohme Corp v Wyeth LLC*, 2020 FC 1087, Commissioner's BOA, at Tab 5.
[11] *R v Krause*, 1986 CanLII 39 (SCC), [1986] 2 SCR 466 at 473), Commissioner's BOA, at Tab 8.
[12] *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 at para 12, Commissioner's BOA, at Tab 1.

> 1. Evidence which is simply confirmatory of evidence already before the court is not to be allowed.
>
> 2. Evidence which is directed to a matter raised for the first time in cross-examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
>
> 3. Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.
>
> 4. Evidence which is excluded because it should have been led as part of the plaintiff's case in chief will be examined to determine if it should be admitted in the exercise of trial judge's discretion.

23. In *Merck-Frosst v Canada (Health)*,[13] ("*Merck-Frosst*"), the esteemed Justice Zinn of the Federal Court added a few more factors to be considered when assessing whether evidence is being introduced as proper reply:

> 1. Whether the further evidence serves the interests of justice;
> 2. Whether the further evidence assists the Court in making its determination on the merits;
>
> 3. Whether granting the motion will cause substantial or serious prejudice to the other side; and
> 4. Whether the reply evidence was available and/or could not be anticipated as being relevant at an earlier date.

24. Justice Zinn breaks down the fourth factor into a two-pronged analysis at paragraphs 23 and 25 of *Merck-Frosst* decision which is apposite in this case, namely:

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[13] *Merck-Frosst v Canada (Health)*, 2009 FC 914 at para 10 ("*Merck-Frosst*"), Commissioner's BOA, at Tab 5.

> (23) The first step is to ask whether the proposed evidence is properly responsive to the other party's evidence. It is responsive if it is not a mere statement of counter-opinion but provides evidence that critiques, rebuts, challenges, refutes or disproves the opposite party's evidence. It is not responsive if it merely repeats or reinforces evidence that the party initially filed.
>
> …
>
> (25) If the proposed evidence is found to be responsive, one must then ask whether it could have been anticipated as being relevant at an earlier date. If it could have been anticipated earlier to be relevant, then it is being offered in an attempt to strengthen one's position by introducing "new" evidence that could and should have been included in the initial affidavit. Such evidence is not proper reply evidence as the party proposing to file it is splitting his case. (emphasis added)

25. The concern in allowing new evidence on reply that is neither responsive to the opponent's evidence or that could have been introduced at an earlier date, is that it results in case splitting, causing serious unfairness to an opponent. The opponent, the Commissioner in this case, is left flat footed, and unable to respond to the evidence, making it difficult for the Tribunal to properly adjudicate on the merits Justice Roy in *Angelcare Development Inc v Munchkin, Inc*,[14] has thoughtful words in relation to the dangers of case splitting which are applicable in this case:

> The general rule against case splitting means the party must advance all the evidence they want to bring forward in the first instance; they will not be allowed to make up for their failure to do so in their reply. That suggests that reply evidence would be short and to the point.

26. The Respondent has filed New Evidence that was clearly available to it when it filed its expert reports in September 23, 2022 and which is not in response to anything

[14] *Angelcare Development Inc v Munchkin, Inc*, 2020 FC 1185 ("*Angelcare*"), at para 10, Commissioner's BOA, at Tab 2.

that the Commissioner has filed. The Respondent is now using the back door to introduce New Evidence on efficiencies that is outside the time period provided for under the Scheduling Order. All evidence other than responding evidence was due on September 23, 2022. The filing of witness evidence on October 20, 2022, was limited to "responding witness statements" and "responding expert report(s)." The Respondent ignores the Scheduling Order and introduces New (not "responding") Evidence through the witness statements of Dr. Israel and Mr. Butt.

27. Both the Dr. Israel affidavit and the Mr. Butt Witness Statement contain New Evidence that is not in response to the Commissioner's evidence and which should have been filed on September 23, 2022, under the terms of the Scheduling Order.

28. The Respondent is clearly splitting its case. The rule against splitting a case is intended to prevent unfair surprise, prejudice and confusion which could result if a party were allowed to put its evidence in on reply. The Respondent has put the Commissioner in a position of unfairness. The Commissioner is not able to respond to complex factual material, obtain responding evidence in the time available, instruct experts to factor it into expert reports filed already, or fairly test or evaluate the facts put in evidence by Mr. Butt, or the calculations and assessments made by Dr. Israel as part of his merger analysis.

29. The Commissioner respectfully requests that the New Evidence be struck or, in the alternative, the Commissioner be afforded with the opportunity to respond to the New Evidence though a right of sur-reply and an adjournment to gather the required evidence. The integrity of the Tribunal process has been put at issue by the Respondent.

ORDER SOUGHT

30. The Commissioner seeks

(a) an order striking out parts of Dr. Israel's and the entirety of Mr. Butt's Reply Witness Statements ("New Evidence") on the grounds that they constitute an improper reply;

(b) In the alternative,

a. an order granting the Commissioner leave to file sur-reply evidence, limited to responding to the New Evidence, and

b. an adjournment of (2) two weeks to gather and compile the required evidence in response to the New Evidence and file it with the Tribunal; and

(c) Costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2022

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CT-2022-002

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
VIDEOTRON LTD.

Intervenors

MOTION RECORD
(Motion to Strike Reply Evidence - Dr. Israel and Mr. Butt)

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