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CT-2022-002

OTTAWA, ONT.

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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

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
VIDÉOTRON LTD.**

Intervenors

WRITTEN OPENING STATEMENT OF THE COMMISSIONER OF COMPETITION

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A. Introduction and Overview

1. This case represents a watershed moment for wireless competition in Canada in which the following question will be answered:

Will the country continue to see the growth of strong regional facilities-based competitors, or will it see wireless competition that is weakened and dependent?

2. The respondents' proposed divestiture offers the latter. The divested entity would be unlikely to replace the vigorous maverick role played by Shaw in injecting competition into the Ontario, BC and Alberta markets. The divestiture package, with numerous problematic behavioural elements, is in the interests of neither consumers nor the economy. The Proposed Merger and the Proposed Divestiture should be rejected by the Tribunal.
3. In what follows, the "Proposed Merger" refers to the proposed acquisition of Shaw Communications Inc. by Rogers Communications Inc. pursuant to an "Acquisition Agreement" dated March 13, 2021. The "Proposed Divestiture" refers to the proposed sale of Freedom Mobile to Videotron pursuant to a definitive agreement dated August 12, 2022, between Rogers, Shaw and Videotron Inc. and related entities.
4. This brief focuses on the evidence that is expected to form the basis of the Commissioner's application at the hearing. It follows the structure found in the application. The last section separately addresses the applicable Statutory Framework and Law.

B. Relevant Markets

5. The Proposed Merger would cause a substantial prevention or lessen of competition ("SLPC") in **wireless services in Ontario, BC, and Alberta**; the Proposed Divestiture does not remove the "S" from the SLPC **in wireless services in BC and Alberta**.
6. With respect to the dimensions of the relevant market, Dr. Miller's expert economic evidence is as follows:

- the **product market** of wireless services is “no broader than postpaid and prepaid mobile wireless services offered to consumers”; and
- the **geographic market** is “no broader than a province” – in this case Ontario, BC, and Alberta.¹ On the latter, Dr. Miller notes:

... my analysis of ordinary course documents indicates that the parties (as well as other wireless carriers) compete at the province (or sub-province level) by offering geographically targeted plan and device promotions, as well as by making targeted improvements in the quality of their networks.²

7. Neither of these propositions are matters of controversy in this case.
8. The market for **business services** is distinct given the unique demand characteristics and supply-side structure. However “some particularly small businesses (e.g., a self-employed individual) are indistinguishable from a consumer and are generally included in the market for consumer service.”³
9. Shaw is a poised entrant in the market for business wireless services. The Proposed Merger would prevent Shaw’s expansion into that market. The Commissioner no longer alleges a *substantial* prevention or lessening of competition in that market. However, the evidence relating to competition in that market will show that Shaw was poised to enter, evidencing the growth and expansion trajectory that Shaw was on. Plans in this respect ended shortly after the announcement of the Proposed Merger. There is a prevention or lessening of competition in this market which is relevant to the efficiency trade-off as a qualitative anti-competitive effect, to the extent that trade-off becomes relevant.

¹ Tribunal Record (“TR”) 362, Expert Report of Nathan H. Miller, dated September 21, 2022 (“Miller Report”), para 41; he noted that “a degree of differentiation appears to exist between postpaid and prepaid service, but note that the difference is not likely to change the substance of my conclusions” – para 46.

² TR 362, Miller Report, para 49. He noted that while different market characteristics exist within provinces at more local levels, “Abstracting from sub-provincial differences in coverage is unlikely to meaningfully alter the results of my analysis because Shaw and the Big 3 carriers have substantial overlap in their within-province coverage in Alberta, British Columbia, and Ontario, particularly in major population centers.” (para 50)

³ TR 362, Miller Report, para 45.

C. Industry Structure: The Canadian Wireless Market Features High Concentration and Barriers to Entry

10. The wireless services market in Canada is characterized by concentration, high barriers to entry and coordinated behaviour among the “Big 3” facilities-based incumbents (Rogers, Bell and Telus). The result has been high historical pricing and lower data usage in comparison to most other western economies.

1. Barriers to Entry

11. Barriers to entry into wireless services in Canada are high. A new entrant in the wireless services market in Canada faces numerous regulatory, financial, logistical and marketing hurdles. The CRTC in its April 2021 decision found that “barriers to entry into consumer mobile wireless services remain high and adversely impact new market entry or market expansion by regional wireless carriers and others.”⁴ Barriers identified by Dr. Miller include:

- “securing spectrum, which is a scarce resource expensive to acquire”; and
- “building up or acquiring a cellular network, which is an infrastructure that requires lengthy construction periods for its deployment as well as large operating and capital expenses to maintain and expand”.⁵

12. With respect to entry by access to wholesale facilities as an MVNO, the respondents have accepted:

... for the purpose of this Application that significant MVNO entry is not likely in a time period or on a scale that is likely to constrain any increase in market power alleged by the Commissioner in connection with the Transaction coupled with the Divestiture.⁶

13. Other barriers to entry include:

- **Infrastructure Access and Sunk Costs:** an entrant faces delays and regulatory hurdles accessing municipal rights-of-way (and other public

⁴ Agreed Book of Documents (“ABD”) 004282 (RBCH00013_000000159), paras 100-101.

⁵ ABD 004282 (RBCH00013_000000159), para 54.

⁶ ABD 000642 (REAB00012_000000002), p 26.

places), support structures owned by Incumbent Local Exchange Carriers, utility-owned support structures and multi-dwelling units; the need for municipal consent;

- **Scale:** sources of scale economies include access to financial resources to service capital investment associated with building a competitive mobile wireless network. Such economies create a “need to build scale by gaining subscriber share across all segments of the mobile wireless market.”⁷
- **Retail Distribution:** “wireless requires a significant retail distribution presence because of the importance of devices”.⁸
- **Branding and Customer Perception:** [REDACTED]
[REDACTED].⁹
- **Access to Devices:** [REDACTED]
[REDACTED].¹⁰
- **Wireline assets:** Barriers to expansion are lower for wireless carriers that operate a pre-existing wireline network in that geographic area as a result of:
 - [REDACTED]
[REDACTED].¹¹
 - [REDACTED]
[REDACTED].¹²

⁷ ABD 004304 (RBCH00013_000000228), para 10.

⁸ ABD 004304 (RBCH00013_000000228), para 36(a).

⁹ ABD 002347 (SJR-CCB00465938), p 19.

¹⁰ ABD 002306 (SJR-CCB00427103), p 1.

¹¹ TR 364, Expert Report of Michael A M Davies, dated September 23, 2022 (“Davies Report”), paras 80-81.

¹² TR 248, Witness Statement of Blaik Kirby (Bell), dated September 23, 2022 (“Kirby Statement”), paras 23-24; TR 364 Davies Report, paras 40, 48, and 53.

○ [REDACTED] ¹³

○ [REDACTED]
[REDACTED] ⁴ and

○ [REDACTED]
[REDACTED] ¹⁵

14. As a result, any new entrant would need several years to gain a foothold, and much longer to achieve the kind of market presence obtained by Shaw. Mr. English on behalf of Shaw says in his Witness Statement in this proceeding:

[REDACTED] ¹⁶

2. Concentration

15. Concentration is high in wireless markets. Pre-merger wireless subscriber market shares in Ontario, BC, and Alberta are set out below:¹⁷

Exhibit 3

Percentage of Consumer Subscribers to Consumer Phone Service: January – April 2021

[REDACTED]

16. The best indicator of market share in the case of an assessment of this transaction involving Shaw is new customer acquisitions. The *Merger Guidelines* note:

When a regulated or historical incumbent firm is facing deregulation or enhanced competition, shares based on new customer acquisitions

¹³ TR 250, Witness Statement of Stephen Howe (Bell), dated September 23, 2022 (“Howe Statement”), paras 10-12.

¹⁴ TR 258, Witness Statement of Tom Nagel, dated September 22, 2022 (“Nagel Statement”), para 6.

¹⁵ TR 258, Nagel Statement, para 10.

¹⁶ TR 311, Witness Statement of Trevor English, dated September 23, 2022 (“English Statement”), para 53.

¹⁷ TR 362, Miller Report, exhibit 3.

may be a better indicator of competitive vigor than are shares based on existing customers.¹⁸

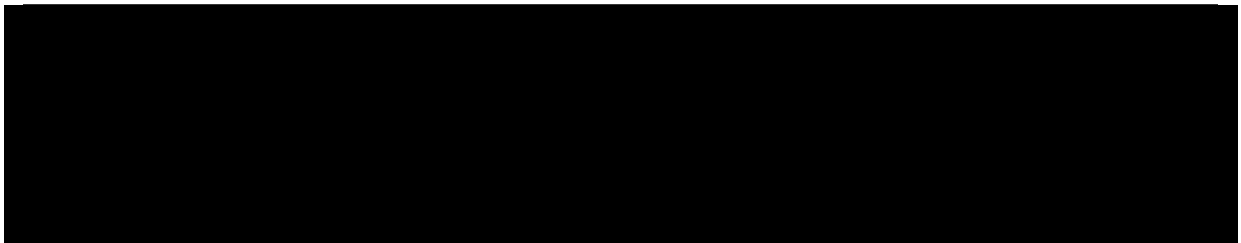
17. The number of new customer acquisitions in the wireless market are referred to as “gross adds”. Dr. Miller concludes:

The best approximation of “new customer acquisitions” that is available to me is the same measure that mobile wireless carriers often use to assess their competitive success, their share of “gross adds.” Gross adds are the new customers that a wireless carrier gains during a particular period of time.¹⁹

18. Dr. Miller presents “the market share based on gross adds of consumer mobile phone service between January and April of 2021”, as “the most recent period in which data that I use to conduct the merger simulation are consistently available for all carriers.”²⁰ He excludes data for non-phone mobile service (e.g., connectivity for tablets) and business accounts:

Exhibit 2

Market Shares Based on Gross Adds of Consumer Phone Service: January – April 2021



3. Industry Background: Failed Entry, High Prices, Low Data Consumption

19. Over the last two decades, there has been a history of failed entry and consolidation, frustrating regulatory efforts to stimulate competition by entry of independent players:

¹⁸ ABD 004672 (RBCH00045_000000005), *Merger Enforcement Guidelines* (2011) (“MEGS”), para 5.4.

¹⁹ ABD 004672 (RBCH00045_000000005), *MEGS*, para 61.

²⁰ TR 362, Miller Report, para 63.

- In 2007, Industry Canada announced a spectrum auction to stimulate greater competition in the wireless industry. Spectrum auctions allow organizations to bid on the rights to use certain bands of frequency;²¹
- In the 2008 auction, several firms purchased “set-aside” spectrum (spectrum reserved by ISED for those providers with less than 10% national wireless subscriber market share), including corporations carrying on business as Vidéotron Ltd. Inc. (now, Vidéotron Ltd., "Videotron"),²² WIND Mobile,²³ Mobilicity,²⁴ and Public Mobile,²⁵ respectively;
- In 2013, Telus acquired Public Mobile;²⁶
- In 2015, Rogers acquired Mobilicity;²⁷
- In 2016, Shaw acquired WIND Mobile.²⁸

20. In Canada, the combination of high concentration and significant barriers to entry have produced higher prices and lower data usage than in other jurisdictions. [REDACTED]

[REDACTED]

[REDACTED]²⁹

²¹ TR 268, Witness Statement of Mathew McCarthy, dated September 23, 2022 (“McCarthy Statement”), Exhibit F.

²² TR 268, McCarthy Statement, Exhibit H.

²³ TR 268, McCarthy Statement, Exhibit I.

²⁴ TR 268, McCarthy Statement, Exhibit J.

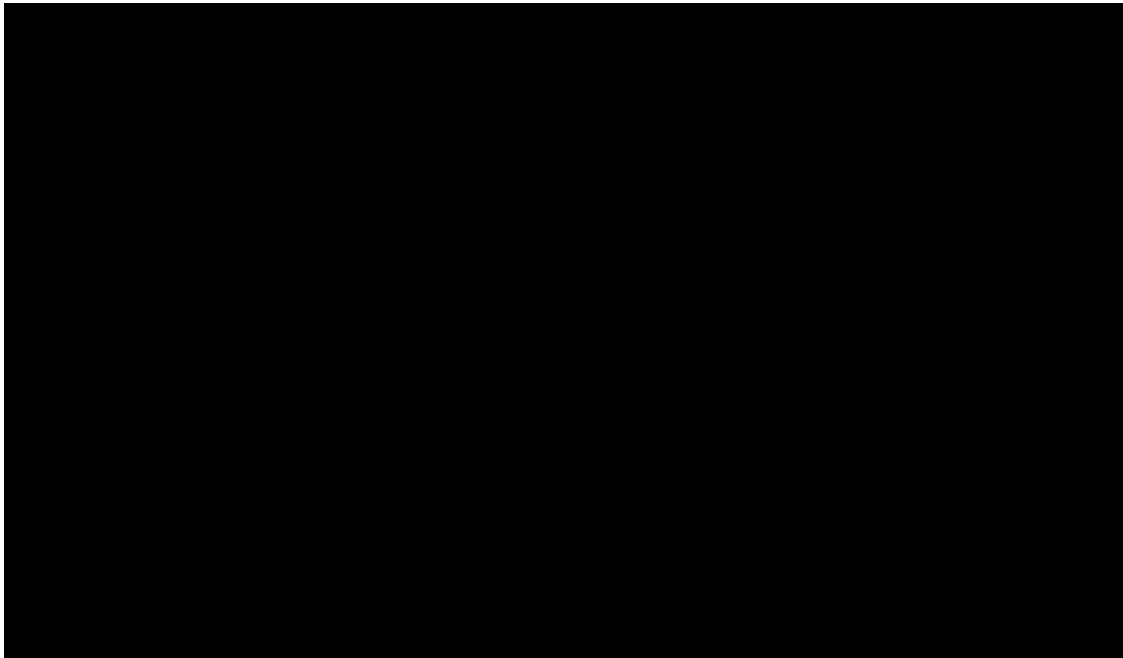
²⁵ TR 268, McCarthy Statement, Exhibit K.

²⁶ TR 268, McCarthy Statement, Exhibit L.

²⁷ TR 268, McCarthy Statement, Exhibit M.

²⁸ TR 268, McCarthy Statement, Exhibit N.

²⁹ ABD 000946 (ROG00192359), para 6.



21. The CRTC identified Canada as a high-priced market in an April 2021 study, after reviewing various international sources:

... almost all international reports and studies that were submitted or referred to throughout this proceeding, despite using different methodologies and different datasets, pointed to similar conclusions and consistently reported higher retail prices in Canada.³⁰

D. Shaw Has Been a Maverick Competitor in Wireless Markets, Bringing Innovation, Low Prices and Greater Data Usage to Consumers

22. After decades of unsuccessful regulatory efforts to introduce competition, Shaw emerged as a maverick disrupter in the wireless markets in Ontario, BC and Alberta over the period 2016-2021. The Proposed Merger would both:

- Lessen competition by eliminating Shaw as an independent competitive player; and
- Prevent competition by curtailing Shaw as a growing disruptive and innovative force.

1. Shaw's Track Record of Disruptive Competition

³⁰ ABD 004282 (RBCH00013_000000159), para 120.

23. Until the 1990's, Shaw was primarily in the wireline cable television and broadcasting businesses in Western Canada and Ontario. In 1996, it began offering wireline internet services in British Columbia and Alberta. In 2016, it acquired Wind.³¹
24. Before its acquisition, Wind “faced financial and operational challenges, in large part due to significant network disadvantages, as WIND was challenged to make the necessary investments [in 4G] to remain competitive”.³² However, Shaw brought to the table the capital and scale needed; according to Mr. English, “the [\$2.65B] proceeds from the sale of Shaw Media were used to fund the Company’s acquisition of WIND, as well as to contribute to the subsequent development of and upgrades to WIND’s wireless network”.³³
25. The key to Shaw’s emergence has been its acquisition and investment in wireless facilities and assets which complement and benefit from the competitive platform that its wireline and other operations have provided.
26. Shaw has been a force of innovation and dynamic competition. It has been responsible for numerous “firsts” in the relevant Wireless Services markets, such as being the first carrier to eliminate overage fees, the first carrier to offer devices for free on term contracts, the first carrier to offer Wi-Fi offloading (access to numerous locations for free Wi-Fi by its customers), and the first and only carrier to offer \$0 phone plans with internet bundles.

a) Freedom Mobile

27. Shaw changed Wind Mobile’s name to Freedom and in November 2016 began rolling out an LTE network in major Canadian cities within Alberta, British Columbia, and Ontario.³⁴

³¹ TR 303, Witness Statement of Brad Shaw, dated September 23, 2022, para 5.

³² TR 311, English Statement, para 51.

³³ TR 311, English Statement, para 65.

³⁴ ABD 002285 (SJR-CCB00420123), para 2.

28. Freedom made several competitive initiatives which led to lower prices, increased data consumption and competitive responses by the Big 3.

29. First, with the launch of Freedom's Big Gig plans in 2017, Shaw's strategy disrupted the market and [REDACTED]

[REDACTED]⁵

30. Throughout 2018, Shaw continued to expand and improve its network, and [REDACTED]

[REDACTED]³⁶ In November 2018, it launched its next market disruption, Freedom's 100GB Big Binge plans.

31. [REDACTED]
[REDACTED]
[REDACTED]

It followed through on those commitments by launching its Absolute Zero promotion and a series of commercials targeting Rogers, Telus and Bell, depicting a fictional company named "Monolithic Wireless" and its slogan "Charge More. Give Less.", featuring Canadian actor Will Arnett.

32. [REDACTED]
[REDACTED]
[REDACTED]³⁷

33. The effects were summarized by Dr. Miller as follows:

Since 2016, Shaw has competed with Rogers and other large wireless carriers through the introduction of low priced data plans. These competitive offerings, including the launch of Big Gig plans in 2017, the introduction of the Big Binge Bonus promotion in 2018, and the introduction of Big Gig Unlimited plans in 2019, have contributed to expanding Shaw's subscriber base in all three provinces since 2016.

...

Rogers, Bell, and Telus have responded to Shaw's competitive initiatives, including by offering price promotions, introducing plans

³⁵ ABD 001714 (SJR-CCB00044899), p 2.

³⁶ ABD 002335 (SJR-CCB00464393), p 2.

³⁷ ABD 002180 (SJR-CCB00361187), p 4.

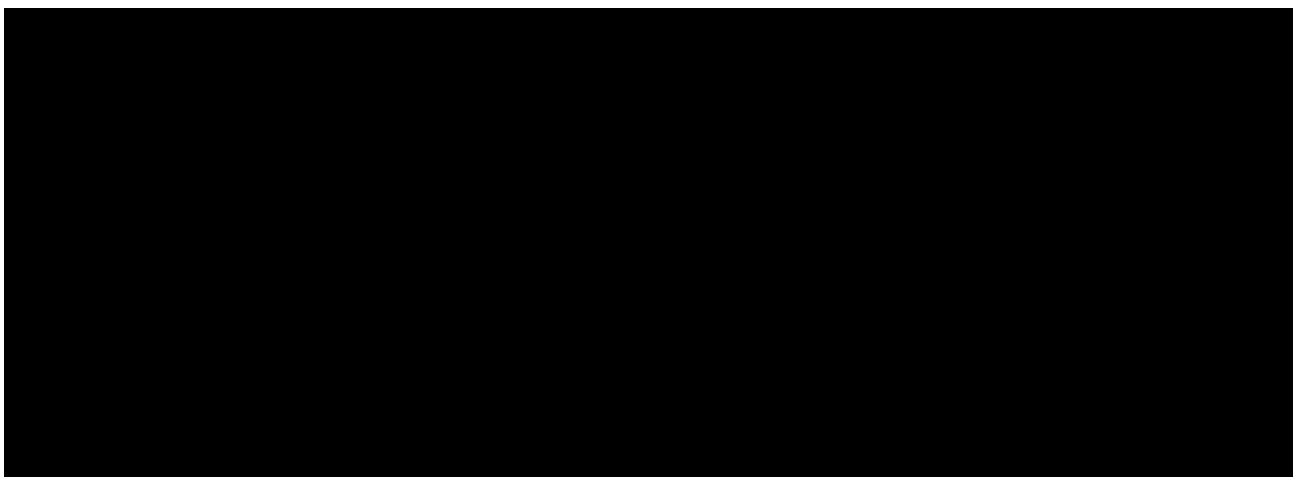
with more data at a less expensive base price (per gigabyte), and reducing data overage charges.³⁸

34. Freedom's competitive initiatives, and benefits to consumers, are analysed in further detail in the report of Dr. Miller.³⁹ Dr. Miller observes with respect to the competitive responses to these initiatives for example:

- “The magnitude of the change in data usage, [REDACTED] is consistent with the fact that these promotions represented a substantial decrease in their typical pricing for similar data plans” (see Exhibits 7 and 9 below);
- “the Big Gig event spurred incumbents into action, reduced prices and increased output” (see Exhibits 7 and 9 below).⁴⁰

Exhibit 7⁴¹

Change in Data Usage by Carrier and Province



³⁸ TR 362, Miller Report, paras 76 and 78.

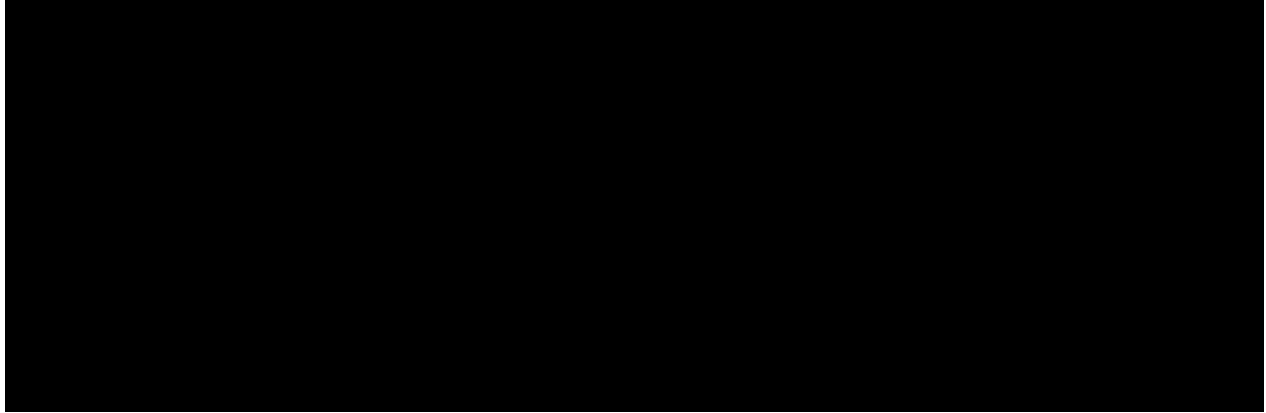
³⁹ TR 362, Miller Report, paras 87 and following.

⁴⁰ TR 362, Miller Report, para 105.

⁴¹ TR 362, Miller Report, exhibit 7.

Exhibit 9⁴²

Change in Average Incremental Price per Gigabyte of Data Allocation by Carrier and Province



35. On July 30, 2020, Shaw launched Shaw Mobile in British Columbia and Alberta. This new Shaw wireless brand quickly gained market share. It benefitted from its connection to Shaw in various ways, including the benefits of cross-selling, shared network infrastructure, the “Shaw” brand and retail.

36. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ”⁴³

37. Shaw Mobile was advertised as an innovative wireless product, using highly discounted wireless plans when bundled with Shaw’s internet services to offer customers “unprecedented savings”. At that time, Shaw Mobile plans were up to \$60 cheaper than equivalent plans offered by incumbent premium brands. Dr. Miller summarizes some of the main competitive features of the Shaw Mobile launch:

[REDACTED] plans at launch were offered to its wireline subscribers: a voice and text plan with no recurring monthly charge that offers by-the-gig data purchases (the “By-the-Gig” plan), and an unlimited plan charging \$45 for 25 gigabytes of unthrottled data. [REDACTED]
[REDACTED]

⁴² TR 362, Miller Report, exhibit 9.

⁴³ ABD 002289 (SJR-CCB00420532), pp 11 and 50.

[REDACTED] The plans also offer access to Shaw Wi-Fi hotspots, thereby leveraging Shaw's wireline assets to potentially reduce subscribers' consumption of mobile data. Shaw Mobile marketed this feature as an option that could allow some subscribers to consume less data, to "virtually eliminate their monthly wireless data bill."⁴⁴

38. Shaw leveraged its wireline business to offer a disruptive wireless pricing model to strengthen wireline customer relationships and capture more of the Canadian wireless market. [REDACTED]

39. Shaw Mobile's launch was met with overwhelming customer demand, outperformed Freedom Mobile and was driving Shaw's wireless subscriber growth, despite only being offered in Alberta and British Columbia, less populous markets than Ontario.

[REDACTED]

[REDACTED]

⁴⁴ TR 362, Miller Report, para 111.

⁴⁵ ABD 003065 (SJR-CCB00875213), p 14.

40. [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶

41. Dr. Miller analyses the competitive impact of Shaw Mobile. Among his conclusions is that “the available evidence from Rogers documents indicates that [REDACTED]
[REDACTED]
[REDACTED]⁴⁷ He concludes:

Overall, I find that the launch of Shaw Mobile promoted vigorous competition between Shaw’s brands and competitor carriers. Its launch benefitted consumers directly because Shaw Mobile offered bundled service options that were differentiated from the offerings of existing wireless brands at low prices. It also prompted an increase in price competition with and between existing brands. The launch of Shaw Mobile was associated with an increase in new data subscriber additions for Shaw overall, including both Freedom and Shaw Mobile. The promotions offered by the Big 3 and Shaw’s Freedom resulted in persistent lower prices of data and higher usage of data for these newly added subscribers. These benefits accrued not only in Alberta and British Columbia, where Shaw Mobile entered, but spilled over to Ontario as well, as the result of retaliatory promotions targeted at Freedom.⁴⁸

42. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁴⁹

⁴⁶ ABD 003131 (SJRБ-CCB00880307), p 2.

⁴⁷ TR 362, Miller Report, para 132.

⁴⁸ TR 362, Miller Report, para 132.

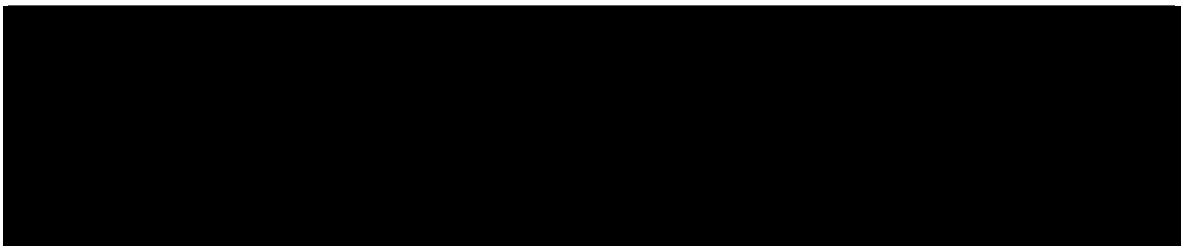
⁴⁹ ABD 002783 (SJRБ-CCB00880307), pp 53 and 54.

43. The lesson from the success of Shaw Mobile is that the foundation for growth and competitive strength in Canadian wireless markets is facilities-based competition. Competitors who own facilities are driven by incentives and fueled by revenue sources derived from joint wireline and wireless facilities.

2. Rogers-Shaw Rivalry

44. Prior to the announcement of the merger, Shaw and Rogers were intense rivals to each other in the relevant markets. Dr. Miller presents porting data, which provide information on consumers’ switching between wireless carriers. The data “confirms that Rogers and Shaw do indeed compete closely with one another, as their market shares would indicate, and that the proposed acquisition is likely to lessen competition.”⁵⁰

Exhibit 4
Shares of Port-outs, January – April 2021



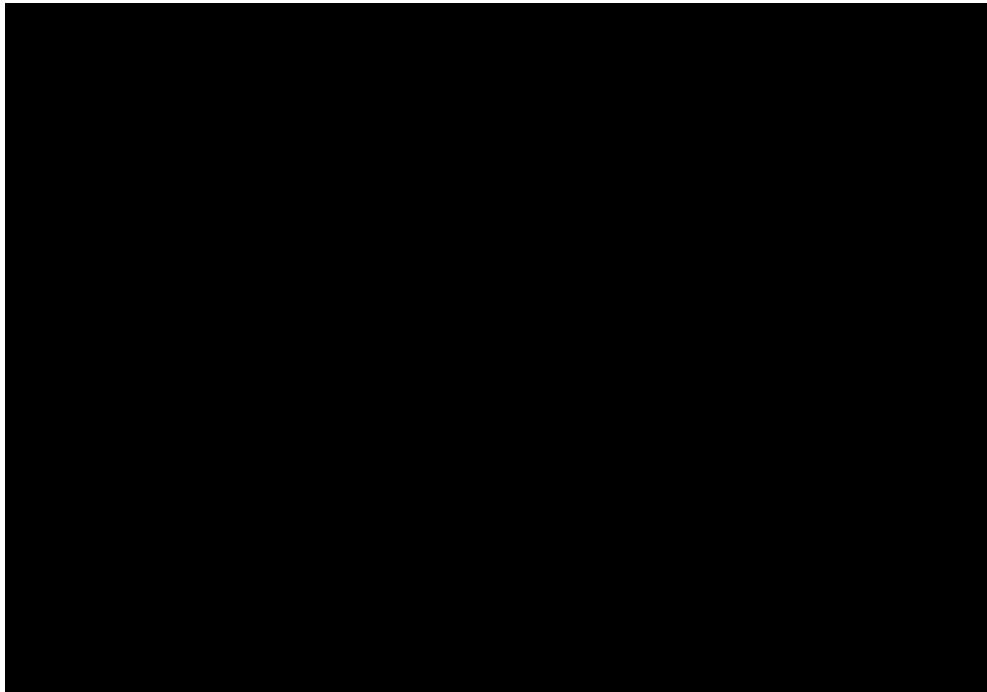
45. Ordinary course documents also indicate that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵¹

46. [REDACTED]
[REDACTED]⁵²

⁵⁰ TR 362, Miller Report, para 68.

⁵¹ ABD 001307 (ROG00591419), p 3.

⁵² ABD 000815 (ROG00122938).



47. Similarly, Shaw Mobile gained a significant number of customers in a short period –

[REDACTED]

[REDACTED]

[REDACTED] ⁵³

3. Shaw's Growth Trajectory

48. The Shaw-Rogers merger prevents competition by eliminating or delaying future expansion and growth by Shaw. At the time of the Acquisition Agreement in March 2021, Shaw:

- was growing;
- had planned expansion:

- [REDACTED]

1. [REDACTED]

2. [REDACTED]

⁵³ ABD 002823 (SJR-CCB00823720).

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵⁴ and

[REDACTED]

- [REDACTED]⁵⁵

49. Industry expert Michael Davies analysed Shaw's ability to roll out 5G services and concluded:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

50. [REDACTED]
[REDACTED] For example:

- [REDACTED]
[REDACTED]⁶

⁵⁴ ABD 002645 (SJRБ-CCB00705302), p 47.

⁵⁵ TR 412, Read-ins relating to Videotron's Examinations, October 17, 2022, pp 326-327.

⁵⁶ ABD 002771 (SJRБ-CCB00814711), p 22.

- [REDACTED]

51. Shaw was a poised competitor with the ability to constrain carriers' actions even prior to completing such entry or expansion.

52. Shaw will argue that it did not have the financial wherewithal to properly invest in wireless while also maintaining its wireline business at the time of the acquisition. For example, Brad Shaw, Shaw's Chief Executive Officer, said in his witness statement that "the economics of the [wireless] business remain challenging"⁶⁰ and the Shaw family is "[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]"⁶¹ Similarly, Trevor English, Shaw's Chief Financial & Corporate Development Officer, said in his witness statement that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶²

53. The evidence will show that this spin on the facts is incorrect. Trevor English publicly stated (on Shaw's F2021 Q1 Analyst Call) that "[c]onsidering our solid Q1 operating and financial performance, including free cash flow growth, ample liquidity and a strong balance sheet, we are on track to meet our commitments for fiscal 2021,

⁵⁷ TR 309, Witness Statement of Rod Davies, dated September 23, 2022 ("Davies Statement"), Exhibit 1 at p 26.

⁵⁸ ABD 002407 (SJR-CCB00503738), p 9.

⁵⁹ ABD 002615 (SJR-CCB00697193).

⁶⁰ TR 303, Shaw Statement, para 20.

⁶¹ TR 303, Shaw Statement, para 23.

⁶² TR 311, English Statement, para 99.

[REDACTED]

[REDACTED] ⁶³

54. Indeed, Shaw's publicly disclosed financial statements differ markedly from its witness statements. The following are figures from Shaw's annual report for fiscal 2020, the last complete year before the merger was announced:

- Cash: \$763 million
- Total Assets: \$16.165 billion
- Long-Term Debt: \$4.547 billion vs. Shareholders' Equity: \$6.233 billion
- Revenue: \$5.407 billion
- Operating Income: \$1.16 billion
- Net income: \$688 million
- Adjusted EBITDA: \$2.391 billion
- Free Cash Flow: \$747 million

4. The Merger Reduces Network Competition and Network Choice

55. Industry expert Michael Davies explains that among the competitive variables that consumers value and search for in the market for wireless services, quality is a key consideration. Reliability and speed of the wireless network are the main considerations. As a reflection of this, wireless carriers refer in their promotional material to reliability and speed.⁶⁴

56. Rogers analysed the positioning of its rivals and itself in its internal analyses.

57. On July 8, 2022, Rogers experienced a network outage that affected [REDACTED] wireline customers and [REDACTED] wireless customers, or approximately [REDACTED] of

⁶³ ABD 004240 (SJR-CCB00477411), para 11.

⁶⁴ TR 364, Davies Report, paras 205-209.

customers for wireless services in Canada.⁶⁵ The outage had other serious and significant consequences for business, public services and public safety:

[REDACTED] Many other providers lost partial or all service due to the outage, including roaming partners of Rogers who could no longer roam, partners who use Rogers wholesale services, all TPIA vendors who use Rogers, as well as Rogers Bank, Rogers Media, critical infrastructure (hospitals, energy providers), and governmental and municipal customers.⁶⁶

58. As Mr. Davies notes: “This experience will have made the reliability of wireless networks a more salient factor in the choices that customers make about their wireless service providers, and hence increase the extent to which competitors in the wireless services market compete with respect to the reliability of their wireless networks.”⁶⁷
59. This is the third recent and significant outage experienced by Rogers’ network since 2019.⁶⁸
60. Shaw offered consumers a competing facilities-based wireless network which has provided choice in the area of reliability, quality and resiliency.
61. If the merger and divestiture to Videotron were consummated, Freedom’s wireless network, and Freedom’s subscribers, would rely upon the combined Shaw-Rogers wireline network for backhaul and transport. In that hypothetical world, Michael Davies notes that under an outage like that on July 8, “Vidéotron would have lost connectivity to [REDACTED]

[REDACTED]⁶⁹

⁶⁵ TR 364, Davies Report, para 214.

⁶⁶ TR 364, Davies Report, para 219

⁶⁷ TR 364, Davies Report, para 216.

⁶⁸ ABD 000433 (REAA00011_000000010), p 36-37.

⁶⁹ ABD 000433 (REAA00011_000000010), p 36-37.

62. The merger would result in the loss of choice – from “three distinct wireless networks (Rogers, Bell/Telus and a regional provider such as Shaw)” to two distinct networks – those of Rogers/Shaw and of Bell/Telus.⁷⁰

63. The reduction in competition and choice would have significant effects on consumers and the economy. Consumers will lose an aspect of their choice of quality. This reduced choice will blunt the incentive of wireless competitors in BC and Alberta to compete by investing in and offering the most resilient and reliable network possible.

E. Shaw Has Declined as a Direct Result of the Arrangement Agreement

64. [REDACTED]
[REDACTED]
[REDACTED] These changes are directly attributable to the Proposed Merger, not to the impact of COVID-19 or other changed market conditions.

1. [REDACTED]

65. [REDACTED]
[REDACTED]
[REDACTED]

66. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] ⁷¹

⁷⁰ ABD 000433 (REAA00011_000000010), para 221.

⁷¹ ABD 002875 (SJR-CCB00828008), p 2.



67. [Redacted]
[Redacted]
[Redacted] ⁷²

2. Areas of Decline

68. Since March 2021, Shaw's decline has been manifested as follows:

- [Redacted]
[Redacted]
[Redacted]
[Redacted]
- [Redacted]
[Redacted]
[Redacted]
[Redacted]
- [Redacted]
[Redacted]
[Redacted]

⁷² ABD 003030 (SJRB-CCB00865756), p 5.

- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED] and
- [REDACTED]
[REDACTED]
[REDACTED]

F. As a Result, the Proposed Merger Would Result in a Substantial Prevention or Lessening of Competition

69. The Proposed Merger is likely to prevent or lessen competition substantially in the following ways:

- By preventing competition – but for the merger, Shaw was likely to have continued to expand and to innovate, as evidenced by its:
 - Track record as a maverick disrupter and innovator;
 - [REDACTED]
[REDACTED]
 - [REDACTED]
[REDACTED]
 - [REDACTED] and
 - [REDACTED]
- By eliminating competition between Shaw and Rogers and lessening competition between Shaw and the other competitors in the market. But for the Proposed Merger, Shaw would have continued to compete in those respects. Its competitive effect is evidenced by:

- the competitive response by the Big 3 to Shaw’s new plan offerings and low pricing, including by offering enhanced plans and promotions and targeting customers lost from Shaw’s competitive behaviour;

- [REDACTED]
[REDACTED]
[REDACTED] and

- [REDACTED]
[REDACTED]
[REDACTED]

70. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

71. In the context of an already concentrated market characterized by high barriers to entry, and the other factors reviewed above, this would enhance Rogers’ market power and cause a substantial prevention or lessening of competition.

72. Dr. Miller examined the effects of the merger in Alberta, British Columbia and Ontario using a “merger simulation model”. He noted that “[m]erger simulation models are a well known method for assessing the competitive effects of a merger that has gained wide acceptance at the Competition Bureau and at competition authorities in other jurisdictions”.⁷³

73. Dr. Miller noted that the merger simulation model may underestimate a merger’s effects in the following respects:

⁷³ TR 362, Miller Report, para 137.

- It does not take into account the impact of future planned expansion by a firm, [REDACTED] and [REDACTED]
- It does not take into account the impact of a merger which may increase the potential for coordination.⁷⁴

74. The model predicts price increases as follows:

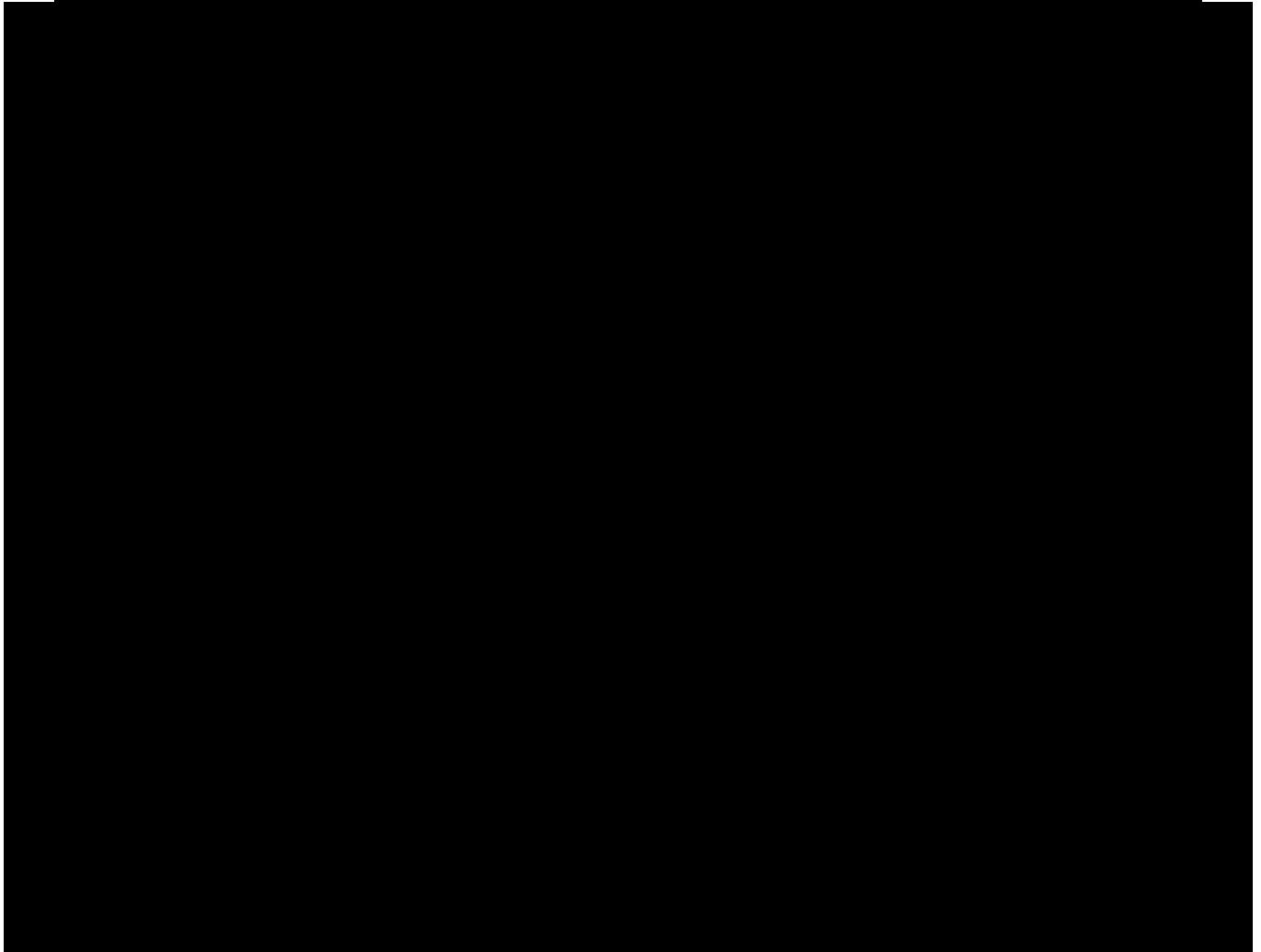
- Prices for Rogers and Fido brands increase by 13.3 to 19.6 percent in Alberta, 10.1 to 18.4 percent in British Columbia, and 6.1 to 11.1 percent in Ontario. Prices for Chatr increase by 22.9 percent in Alberta, 20.2 in British Columbia, and 10.4 percent in Ontario.
- Prices for Freedom and Shaw Mobile increase by 10.0 to 20.3 percent in Alberta and 13.2 to 29.9 percent in British Columbia, while prices for Freedom increase by 23.5 to 27.5 percent in Ontario.⁷⁵

75. In tabular form, the results are:

⁷⁴ TR 362, Miller Report, paras 147-8.

⁷⁵ TR 362, Miller Report, para 180.

Exhibit 20
Percent Price Increases for the Parties' Brands Predicted by the Model



76. These results confirm that the merger is likely to prevent or lessen competition substantially in wireless services in Ontario, BC, and Alberta.

G. Remaining Competition Will not Constrain Post-Merger Market Power

77. Dr. Miller's evidence notes that the hallmarks of a coordinated market among the Big 3 can be observed in the wireless services in Canada. The evidence he cites includes:

- "monitoring promotions and sending each other signals about the duration of promotions";⁷⁶ and

⁷⁶ TR 362, Miller Report, para 28.

- “behavior that may maintain less aggressive price competition within a carriers’ tacitly acknowledged ‘home market’.”⁷⁷
78. Before the CRTC, Shaw itself has cited “substantial evidence of coordinated behaviour” before the entry of regional competitors (such as Shaw), including high prices in areas in which there is no such fourth facilities-based regional player.⁷⁸
79. After reviewing the evidence, Dr. Miller concludes “it is reasonably likely that Shaw’s presence as a strong fourth carrier in Alberta, British Columbia, and Ontario has inhibited coordination among the Big 3 in those provinces.”⁷⁹
80. The removal of Shaw as an independent regional competitor – a “strong fourth carrier” as Dr. Miller puts it – would increase the likelihood of coordination by the remaining competitors. The remaining players – Bell and Telus – would not provide a sufficient competitive constraint on a combined Rogers-Shaw to address the substantial prevention or lessening of competition that the merger would likely bring about given the proclivity to coordinated behaviour rather than rivalrous independent competition.

H. The Proposed Remedy Does Not Eliminate the “S” in the SLPC

81. Section J below addresses the legal burden associated with the issue of remedy. In summary, the respondents bear the burden of showing that the Proposed Divestiture is sufficient to alleviate the SLPC of the Proposed Merger. The Tribunal only possesses jurisdiction to order that the merger proceed in whole or part. The behavioural aspects of the divestiture package proposed may not form part of the order. These contractual commitments undermine, and do not support, the Proposed Divestiture. They create dependence by Freedom on Rogers, would foster greater coordination, would result in uncertainty and a loss of competitive control over critical wireless assets which foster wireless competition and are now shared by Shaw-Freedom.

⁷⁷ TR 362, Miller Report, para 28.

⁷⁸ ABD 004345, p 34.

⁷⁹ TR 362, Miller Report, para 206.

82. Videotron divestiture package [REDACTED] brought forward by the respondents in an attempt to address the clearly anti-competitive effects of the Proposed Merger. It, like the previous proposals, is deficient in addressing those effects for the reasons that follow.

1. The Proposed Merger Has Already Diminished Shaw’s Competitiveness; the Divestiture Does Not Make Up This Ground

83. The appropriate starting point for measuring whether the lessening of competition is still “substantial” after the Proposed Divestiture is the “but for” world of Shaw at the time of proposed acquisition and in view its growth trajectory and plans for expansion.

84. The Proposed Merger has already resulted a competitively-impaired Shaw and Freedom, meaning that any remedy proponent would have to overcome that handicap as part of remedying the effect of the transaction. This amounts essentially to a “moving back of the starting blocks” for the remedy purchaser in order to remedy the anti-competitive effects from the but-for world.

85. A key contributor to Shaw’s competitive impairment has been its inability to bid on 3500 MHz spectrum, and the resulting decision to drop the planned roll-out of 5G services. The Proposed Merger has also reduced Shaw’s competitive strength in a number of other ways.

86. Since the announcement of the Proposed Merger, Freedom Dealers have been impacted by Shaw’s passive competitive posture, including reduced promotional activity and device subsidies, less aggressive advertising, the lack of a 5G network and a lack of device inventory.⁸⁰

87. The evidence from competitors Bell and Telus shows that Shaw’s competitive intensity in Alberta, British Columbia and in Ontario has decreased materially since the announcement of the Proposed Merger on March 15, 2021.⁸¹

⁸⁰ TR 262, Witness Statement of Sudeep Verma (Freedom Dealers), dated September 22, 2022.

⁸¹ TR 366, Witness Statement of Charlie Casey (TELUS), dated September 23, 2022, para 8 and TR 248, Kirby Statement, paras 36-41.

88. The evidence will also show that Videotron noted Freedom has reduced its competitiveness and marketing spend since the announcement of the Proposed Merger.

89. [REDACTED]
[REDACTED]⁸²

90. Unlike the growth-oriented and disruptive pre-merger Freedom Mobile, Videotron would acquire a significantly diminished Freedom Mobile, lagging behind in investment and on a downward trajectory. Videotron would have to overcome this handicap in order to remedy the SLPC from the Arrangement Agreement.

2. There is a Loss of Disruptive Competition from Shaw Mobile

91. Second, the divestiture does not include the Shaw Mobile subscribers. Shaw Mobile was, prior to the Proposed Merger, a disruptive force and gaining market share for Shaw [REDACTED]

a) Shaw Mobile's Reduced Competitive Incentive In Rogers' Hands

92. The transfer of the Shaw Mobile subscribers to Rogers will reduce competition, as Dr. Miller explains:

A merger between Rogers and Shaw would reduce the incentives for Shaw to compete vigorously with the Big 3 carriers both through low-priced conventional plans and through bundled plans. The merged entity would take into account the impact of the introduction of competitive plan offerings by Shaw on Rogers' subscriber base in Alberta, British Columbia, and Ontario.⁸³

93. In addition, Rogers will have a reduced in incentive to reduce prices due to fears of "re-pricing its base" of existing customers.

94. This is not merely theoretical. [REDACTED]
[REDACTED]
[REDACTED]

⁸² ABD 003065 (SJR-CCB00875213), p 14.

⁸³ TR 362, Miller Report, para 84.

[REDACTED]

95. [REDACTED]

96. Absorbed into Rogers, Shaw Mobile will no longer play the role of disrupter, innovative competitor, or maverick.

b) Shaw Mobile was on a Growth Trajectory; Videotron is an Unproven Competitor in Western Canada

97. The respondents will attempt to characterize the competitive contribution of Shaw Mobile as insignificant or temporary. This is inconsistent with the evidence cited at length above, which will show Shaw Mobile’s competitive impact and upward growth trajectory prior to the announcement of the Proposed Merger.

98. On the other hand, while Videotron has an established reputation and wireline base in Quebec, it is an unproven commodity in BC and Alberta. It will not have the benefit of an existing wireline base or the established Shaw brand, which has significantly higher awareness than Freedom in Alberta and British Columbia,⁸⁴ and it would likely take years for Videotron to establish a trusted brand reputation.

3. Reduced Competitive Incentives Due to Loss of Wireline Assets

99. The divested entity would not have the same incentive possessed by Shaw [REDACTED]
[REDACTED]
[REDACTED] 5 [REDACTED]
[REDACTED]
[REDACTED]

⁸⁴ ABD 002282 (SJRБ-CCB00419797), slide 11.

⁸⁵ ABD 002376 (SJRБ-CCB00481070), slide 10.

100. Without the wireline revenue and benefits to the wireline business, Videotron will not have the incentive nor the ability to profitably offer these plans. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

86

101. Videotron would not be able to maintain competition through bundling by relying on TPIA access in Alberta and British Columbia. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

87

102. Wholesale access to a wireline network replaces significant fixed costs with significant variable costs, which lowers the incremental margin on wireline.

103. Shaw is currently incented to offer wireless services at low prices because it benefits from retaining wireline subscribers at a relatively high margin. Videotron would earn lower margins on wireline subscribers⁸⁸ and so would not have the same incentive to offer aggressive wireless bundle plans to attract and retain wireline subscribers. This is backed by Videotron's own admission that the new CRTC regulations weakened TPIAs as competitors.⁸⁹

104. The behaviour of Shaw and Videotron also reflect the difficulties of relying on TPIA to offer bundles:

- Shaw could utilize TPIA to offer bundled services in Ontario, but chose not to, electing instead to offer bundles only within its wireline footprint.⁹⁰

⁸⁶ ABD 000273 (RBCH00031_000000005), p 6-8.

⁸⁷ TR 256, Witness Statement of Christopher Hickey (Distributel), dated September 21, 2022 ("Hickey Statement"), paras 24-25.

⁸⁸ ABD 000256 (RBCH00020_000000403), para 44; ABD 000371 (RDMM00002_000000006), Q952

⁸⁹ ABD 000371 (RDMM00002_000000006), Q841.

⁹⁰ TR 403, Read-Ins Relating to Shaw's Examination 08-22, p 57, Q 339.

- Prior to its acquisition of VMedia in July 2022, Videotron also did not offer bundled services outside of its wireline footprint via TPIA, except in a single locality, Abitibi.⁹¹

105. [REDACTED]

106. However, in Abitibi there was only one incumbent supplier of wireline services when Videotron entered.⁹² This allowed Videotron to enter as the only alternative to what was essentially a localized monopoly. That is not the case in most of the markets Videotron will enter in BC and Alberta.

107. [REDACTED]

[REDACTED].⁹³ This shows the comparative cost advantage that an owned wireline network affords, even for a competitor that has already established a customer base through the use of TPIA.

4. Loss of Assets, Personnel and Reputation Associated with the Shaw Business will Hamper a Divested Freedom

108. The divested Freedom would lose several key competitive advantages enjoyed during its integration with Shaw.

a) Reduced Economies of Scale and Scope

109. The divested entity would lose the [REDACTED] Shaw Mobile customers and will thus face a smaller revenue base and scale from wireless services than when Shaw offered both the Freedom and Shaw Mobile brands. Industry expert Michael Davies notes:

The new entity will also have greatly diminished scale relative to that of Shaw with its Freedom Mobile and Shaw Mobile products, and relative to the scale of a larger carrier such as Rogers. There are

⁹¹ ABD 000371 (RDMM00002_000000006), Q945.

⁹² ABD 000087 (QUE00000102), p 1.

⁹³ ABD 000371 (RDMM00002_000000006), Q952 ; ABD 000371 (RDMM00002_000000006), Q945 and TR 339, Witness Statement of Jean-François Lescadres, dated September 23, 2022, para 117; ABD 000371 (RDMM00002_000000006), Q821.

significant economies of scale associated with wireless networks, and with the overall business of providing wireless services, and there are economies of scope across mobile services and fixed services.⁹⁴

b) Loss of Owned Wireline Network to Homes

110. Videotron has stated that its existing wireline network and customer base in Quebec were:

- [REDACTED] and
- [REDACTED]
[REDACTED]

111. It has stated that without a wireline network and an existing customer base it would be at a significant disadvantage:

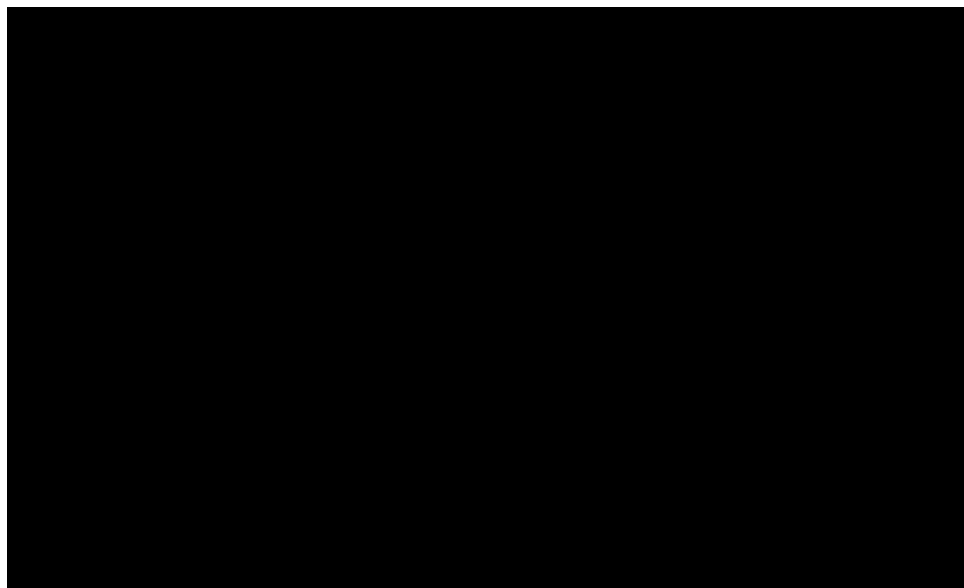
If Videotron entered Southern Ontario, Alberta, or British Columbia as a MVNO, it would not have a wireline network or an existing customer base to bundle or cross-sell mobile wireless services and would be at a significant disadvantage relative to the Incumbents in these provinces.⁹⁵

112. [REDACTED]
[REDACTED]⁹⁶

⁹⁴ Davies report, para 205

⁹⁵ ABD 000256 (RBCH00020_000000403), para 42.

⁹⁶ ABD 000652 (RFI00000229), slide 16.



c) Loss of Owned Fibre Backhaul

113. Freedom is using Shaw's wireline assets for [REDACTED] of its fibre backhaul services. As a result, a large proportion of their costs are currently paid to their parent company which benefits both Shaw and Freedom.
114. Telus' evidence will be that the ownership of backhaul facilities provides a competitor a number of advantages, which include increasing control over network performance, routings, timely maintenance of critical facilities and network reliability.⁹⁷
115. Bell's evidence will show that there are significant advantages to deploying a wireless network within a wireline network footprint, including reduced costs and deployment timelines, and greater opportunity to innovate.⁹⁸
116. Convergence between wireless and wireline networks is increasingly critical for operators to achieve network synergies, provide a seamless connected customer experience and supply the robust wireline backhaul that 5G wireless networks will need. It is therefore increasingly important for operators to own the wireline assets they use.

⁹⁷ TR 252, Witness Statement of Nazim Benhadid (Telus), dated September 20, 2022.

⁹⁸ TR 250, Howe Statement.

117. There are therefore both cost and time savings in owning rather than leasing fibre.

118. Unlike Shaw, Videotron will have to lease backhaul from Rogers instead of owning it, which puts Videotron at a cost disadvantage relative to Shaw because leasing backhaul is less efficient and more costly than owned backhaul.

119. Furthermore, owned fibre will be increasingly important for 5G deployment.

d) Loss of Shared Human Resources and Management

120. [REDACTED]

121. [REDACTED]⁹⁹

122. [REDACTED]¹⁰⁰

⁹⁹ ABD 003073 (SJRБ-CCB00875582), p 18.

¹⁰⁰ TR 364, Davies Report, para 255 (citations omitted).

123. [REDACTED]
 [REDACTED]
 [REDACTED]⁰¹

e) Loss of Owned Wifi and Access to Private Wifi Sites

124. Freedom relies on Shaw’s Go Wi-Fi network of hotspots to enhance the wireless experience of its customers, provide data offload and improve network coverage. Although Videotron-Freedom will retain access to Shaw’s public Wi-Fi hotspots, they will lose access to more than 350,000 home hotspots.

125. Wi-Fi hotspots are used to improve Freedom’s network and offload traffic. The evidence will show that:

- [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
- [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
- [REDACTED]
 - [REDACTED]

126. The Proposed Divestiture will diminish and put at risk Freedom’s customers access to Wi-Fi hotspots:

¹⁰¹ ABD 003815 (RBCH00031_000000002), Schedule G.

- [REDACTED]
[REDACTED]
[REDACTED]

and

- [REDACTED]
[REDACTED]
[REDACTED]

127. Contrary to the respondents' assertions that the Go Wi-Fi network is of declining importance to Shaw's wireless offering, the evidence will show that:

- Go Wi-Fi was a marketing tool used consistently by Shaw;
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] and
- [REDACTED]
[REDACTED]
[REDACTED]

128. Rogers' business plans demonstrate the substantial value they anticipate deriving from Shaw's public hotspot locations, such as the fact that:

- [REDACTED]
[REDACTED]
- [REDACTED]; and
- [REDACTED]
[REDACTED]

129. [REDACTED]
[REDACTED]
[REDACTED]⁰²

f) Loss of a Recognized Brand

130. Incumbent, facilities-based carriers such as Shaw (an historical cable operator in the west) have the benefit of “decades of incumbency... with all the associated advantages, including established brands and customer bases.”¹⁰³ The Shaw brand is respected and appreciated in Western Canada, and contributed to the success of the launch of their wireless service.

131. The evidence will show that Shaw’s brand recognition was seen as having numerous benefits to the company and its competitiveness, including

- enabling more rapid and less costly customer acquisition in Shaw’s footprint; and
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

132. Unlike Shaw, Videotron will not reap the competitive advantages bestowed by Shaw’s brand recognition in its home footprint of Alberta and British Columbia. The evidence will show that Freedom, despite being present in the market for a significantly longer period of time, suffers from having lower brand awareness than Shaw Mobile.

133. As a result, Videotron-Freedom, as a new entrant, would:

- be subject to uncertain patterns of growth; and

¹⁰² TR 258, Nagel Statement.

¹⁰³ ABD 004733 (SJR-CCB00895852).

- face pressure to distinguish itself from the incumbent carriers by offering further discounts or incurring additional marketing costs.

g) Loss of Cross-Selling Opportunities

134. Shaw's existing base of wireline customers allowed it to gain wireless share at a reduced cost of acquisition and improve Customer Lifetime Value. Shaw had [REDACTED] existing household customers to sell Shaw Mobile to, while Videotron will have none.

135. [REDACTED]
[REDACTED]
[REDACTED] Videotron-Freedom will be a less effective competitor in Alberta and British Columbia than Shaw-Freedom due to the loss of these synergies.

136. Shaw Mobile was highly successful at bundling wireless with its wireline customer base, gaining over [REDACTED] subscribers in the first year after launch [REDACTED] of which are bundled). [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

137. Videotron, which will only be acquiring the wireless customers of Freedom, will continue to be faced with this same challenge in Alberta and British Columbia.

h) Increased Costs and Delay to Deploy 5G

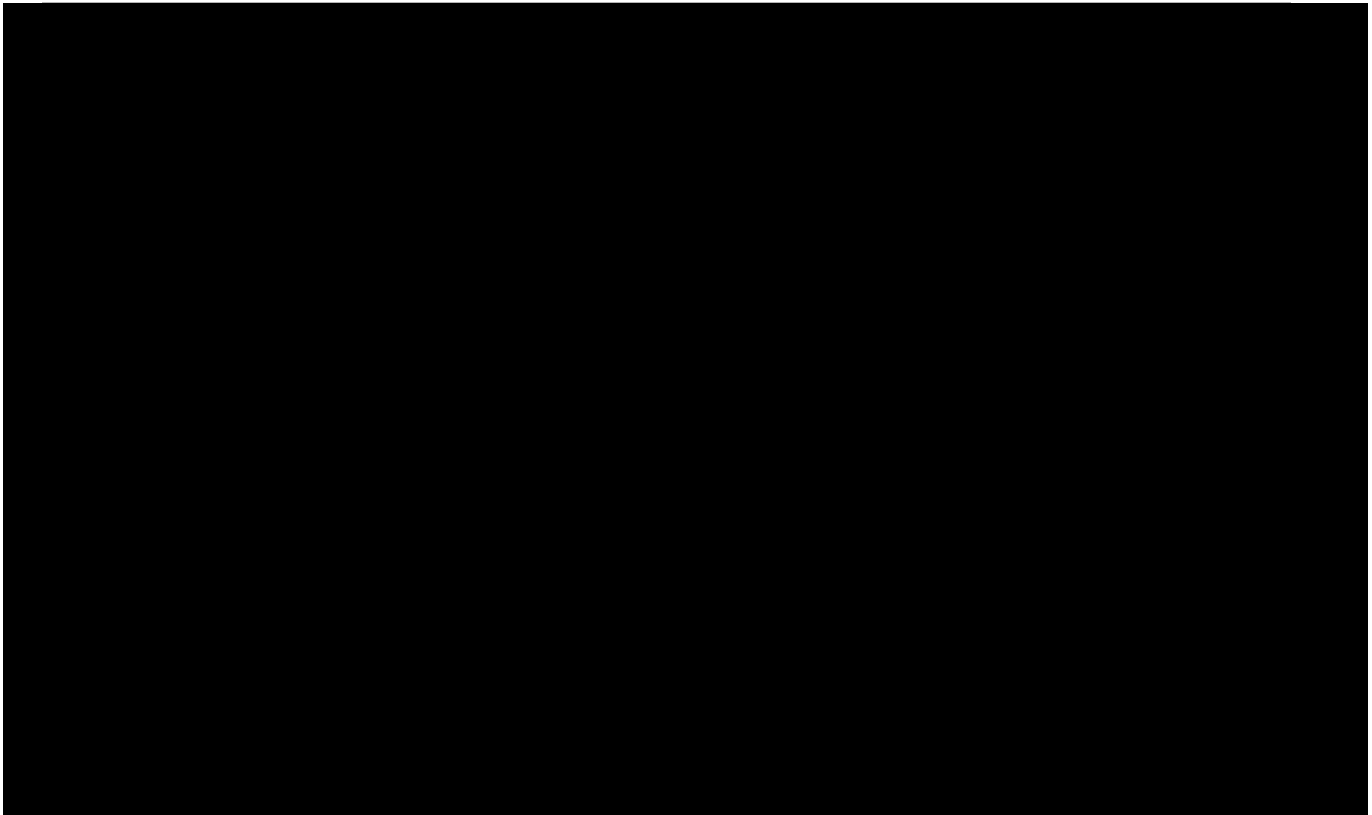
138. In the context of 5G deployment, the relationship between wireless and wireline is even more important. The evidence will show that Shaw and Videotron recognize the importance of wireline for the deployment of 5G.

139. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

divestiture of Freedom to Videotron as proposed, in which “Rogers acquires the Shaw Mobile brand, while Freedom Mobile becomes an independent entity under the ownership of Videotron.” He explained that this is a lower bound because the model assumes a “perfect transfer” of subscribers, a result which is unlikely to be achieved. His results are as follows:

Exhibit 22

Percent Price Increases for the Parties’ Brands Predicted by the Model with a “Perfect Transfer” Divestiture



148. Dr. Miller noted price increases as follows:

prices of New Rogers brands, including the Shaw Mobile brand, are predicted to increase by 5.5 to 14.3 percent in Alberta and by 9.6 to 12.8 percent in British Columbia in the 8-brand “perfect-transfer” model. This increase is consistent with New Rogers taking into account the fact that it can recapture customers that may switch between Shaw Mobile and its legacy brands, and vice versa.¹⁰⁶

¹⁰⁶ TR 362, Miller Report, para 228.

149. Dr. Miller notes with respect to the “perfect transfer” assumption that “a divestiture is unlikely to replicate so perfectly a divested product’s competitiveness. Consequently, there would be an unquantifiable portion of the harms that the model assumes the divestiture addresses which would, in practice, not be addressed.” These include:

- Videotron’s dependence on Rogers for key services under a relationship between competitors which carries “higher risks that the terms of these services will be abused—or at least not complied with as amicably as in the current state of affairs in which, instead, they are provided within the same integrated enterprise under Shaw’s ownership”;¹⁰⁷
- Reduced control over assets, which means “New Freedom will likely need to choose between lowering the quality they promise to customers or incur additional costs to deliver that quality”;¹⁰⁸
- With the loss of more than 400,000 Shaw Mobile subscribers, New Freedom will have “less incentive to maintain and grow the Freedom brand to the same extent as Shaw did because the return on that investment will be lower”;¹⁰⁹
- ██████████ would not give New Freedom the ability to offer bundled services that are comparable to what Shaw currently offers, nor would it restore the same incentives for long-term investment”;¹¹⁰ and
- “loss of the benefits of integration between Freedom and Shaw likely means higher costs of infrastructure, lower returns on the capital invested for an expansion, and less managerial incentive in building the brand’s reputation for disrupting the market”.¹¹¹

¹⁰⁷ TR 362, Miller Report, para 233.

¹⁰⁸ TR 362, Miller Report, para 234.

¹⁰⁹ TR 362, Miller Report, para 236.

¹¹⁰ TR 362, Miller Report, para 237.

¹¹¹ TR 362, Miller Report, para 239; See also TR 256, Witness Statement of Christopher Hickey, Affirmed September 21, 2022, para 15: (“it would not be feasible to use Shaw’s regulated wholesale services to offer

150. Another source of unquantified anti-competitive effects identified by Dr. Miller is the likelihood of increased coordination between the Big 3, given that the “divestiture makes Videotron more attuned to retaliation across provinces than either Shaw or Videotron currently are, [therefore] Videotron would be more similar to the Big 3 and less likely to disrupt coordination attempts among them.”¹¹²
151. In sum, the evidence of Dr. Miller reinforces the conclusion that the Proposed Divestiture is not likely to alleviate the substantial prevent or lessening of competition from the Proposed Merger.

I. The Efficiencies Trade-Off

152. If the Tribunal finds that the Proposed Divestiture does not alleviate the SLPC, Rogers bears the burden of showing that any cognizable efficiencies are greater than, and outweigh, those anti-competitive effects of the Proposed Merger.
153. Rogers has not discharged its burden in this case. The anti-competitive effects of the Proposed Merger, reviewed in detail above, outweigh the cognizable efficiencies put forward by the respondents.

1. The Proposed Merger Will Not Result in Efficiencies That Outweigh and Offset the Anti-competitive Effects

154. The respondents will attempt to justify the Proposed Merger by pointing to projected cost savings that they say will lead to gains in efficiency (the “Claimed Efficiencies”). The respondents bear the burden to establish any such gains.
155. As discussed below, section 96 limits the Tribunal’s assessment of efficiencies to those generated by “the proposed merger” in respect of which the s. 92 application was filed and would not be attained if the order were made. In this case, the Tribunal must thus limit the assessment of efficiencies to those that are generated by the proposed acquisition of Shaw by Rogers and that would be lost as a result of the Tribunal’s order.

the wireline Internet service component of a wireline Internet and wireless service bundle similar to Shaw’s current bundled offering as doing so would result in insufficient or negative margins.”)

¹¹² TR 362, Miller Report, para 249.

156. The vast majority of the Claimed Efficiencies are not substantiated by facts, data, and proper analysis.

157. The Commissioner's efficiencies expert, Dr. Mark Zmijewski,¹¹³ applies basic principles of accounting, economics and finance to assess whether the Brattle Report substantiates the Claimed Efficiencies. In particular, Dr. Zmijewski applies three criteria. These are whether the Brattle Report:

- a. provides adequate documentation to support and explain the Claimed Efficiencies;
- b. uses standard, widely accepted and reliable principles, methods, and analyses to measure the claimed efficiencies and employ them appropriately; and
- c. uses facts and data, the foundation of any economic analyses, to support the inputs and assumptions used in the analyses.¹¹⁴

a) The Claimed Efficiencies Are Not Substantiated

158. The evidence will show that the vast majority of efficiencies claimed in the Brattle Report are not substantiated, applying these criteria. Three common threads run through Dr. Zmijewski's review of the claimed efficiencies in the Brattle Report.

159. First, many of the Brattle Report's estimates simply accept management assertions or are based on unverifiable business judgment,¹¹⁵ or unverified technical inputs.¹¹⁶ An independent third party – or adjudicator – has no ability to independently substantiate a manager's subjective view.¹¹⁷ Moreover, a standard that accepts management incentives would lead to the acceptance of all efficiencies claims, regardless of merit.¹¹⁸

¹¹³ Pronounced "Zme-YEV-ski".

¹¹⁴ TR 460, Expert Report of Mark E. Zmijewski dated October 20, 2022 ("Zmijewski Report"), para 34.

¹¹⁵ TR 460, Zmijewski Report, para 39.

¹¹⁶ TR 460, Zmijewski Report, para 45.

¹¹⁷ TR 460, Zmijewski Report, para 39.

¹¹⁸ TR 460, Zmijewski Report, para 60.

160. Second, the MEGs state that productive efficiencies “result from real cost savings in resources, which permit firms to produce more output or better quality output from the same amount of input.”¹¹⁹ As Dr. Zmijewski observes, demonstrating that planned cost savings do not result from, or cause, a reduction in the quantity or quality of output requires data and analysis.¹²⁰ By contrast, the Brattle Report assumes, by definition, that this requirement is met, without analysis or support.¹²¹
161. Third, Dr. Zmijewski identifies methodological flaws that put in question the likelihood and magnitude of the claimed efficiencies. For example, where the Brattle Report compares Rogers and Shaw through key performance indicators (“**KPI**”) of certain labour functions, the Brattle Report assumes, without investigating, that differences are attributable to the relative efficiency of the two organizations.¹²² Dr. Zmijewski observes that in doing so, the Brattle Report overlooks a number of confounding factors that undermine its conclusions.¹²³
162. The Brattle Report does not even rely on the KPI methodology in respect of the majority of the claimed labour efficiencies. Approximately 75% of the total labour claimed efficiencies, which is the biggest single category of claimed efficiencies, are calculated based on a reduction in post-closing headcount by a percentage that is assumed by the Brattle Report with no analysis.¹²⁴ Dr. Zmijewski’s illustrative calculation of the claimed labour efficiencies will demonstrate the significant impact of these flaws on the magnitude of the projected savings.¹²⁵

¹¹⁹ ABD 004672 (RBCH00045_000000005), *MEGs*, para 12.14.

¹²⁰ TR 460, Zmijewski Report, para 44, 54.

¹²¹ See TR 320, Expert Report of Andrew C. Harington dated September 23, 2022 (“Brattle Report”) at para 70 (“...but with no reduction in output”) and para 73 (“I have not included... savings that would result from a reduction of output”).

¹²² TR 460, Zmijewski Report, paras 77-79.

¹²³ See TR 460, Zmijewski Report, paras 84-86 (“Field Operations Labour Confounding Factor”); paras 87-90 (“Supply Chain Labour Confounding Factor”); paras 91-92 (“Corporate Real Estate Labour Confounding Factor”).

¹²⁴ TR 460, Zmijewski Report, para 99.

¹²⁵ TR 460, Zmijewski Report, paras 112-114.

b) Rogers' Claimed Network Efficiencies are Based on Flawed Assumptions and do not Reflect Rogers' Post-Outage Commitments

163. Efficiencies related to network rely on technical assessments; the Brattle Report does not analyse the reliability of these technical assessments.¹²⁶
164. Industry expert Michael Davies, who has more than thirty years' experience,¹²⁷ assesses the engineering aspects of the type of network-related efficiencies claimed in the Brattle Report. He concludes that they do not reflect the impact on Rogers' network architecture of Rogers' July 8, 2022 network outage and Rogers' subsequent public commitments to building a reliable and resilient network.¹²⁸ The original network efficiencies claimed are simply no longer valid.¹²⁹
165. Finally, Mr. Davies also observes that a wireless network that is part of the same business as a wireline network can enjoy economies of scope and scale.¹³⁰ However, the Brattle Report "provides no analysis whatsoever of the losses that would result from the separation of Shaw's wireless business into two parts, and its wireline and wireless networks from each other."¹³¹ Hence a negative efficiency of unknown magnitude has been completely ignored.¹³²

c) The Claimed Efficiencies to be Allegedly Realized by Videotron are not Cognizable and in any case, Limited

166. The respondents have also claimed efficiencies that they say are brought about by the proposed divestiture to Videotron, which was entered into in response to

¹²⁶ TR 460, Zmijewski Report, paras 136, 140-141, 148, 154, 157-158, 188-189.

¹²⁷ TR 283, Davies Report, para 1.

¹²⁸ TR 465, Reply Expert Report of Michael Davies dated October 20, 2022 ("Davies Reply Report"), para 94.

¹²⁹ TR 465, Davies Reply Report, para 116.

¹³⁰ TR 465, Davies Reply Report, para 101.

¹³¹ TR 465, Davies Reply Report, para 94.

¹³² TR 465, Davies Reply Report, para 106.

regulatory challenges to the transaction by the federal Minister of Innovation, Science and Industry¹³³ as well as this proceeding.

167. As addressed in section J below, the alleged Videotron Efficiencies are not cognizable in law given that they do not result from the Proposed Merger.

168. With respect to the alleged MVNO efficiencies (efficiencies resulting from the suggestion that Videotron can forego investments it would have made as an MVNO entrant), there is an additional reason they are not cognizable. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ¹³⁴ [REDACTED]

169. In the alternative, these alleged efficiencies are minimal and subject to the same shortcomings as those identified above in respect of the Rogers Efficiencies.

d) Substantiated Efficiencies

170. The efficiencies from the Proposed Merger are no greater than:

- a. \$30.9 million steady-state run rate;¹³⁵ or
- b. \$60.9 million¹³⁶ steady-state run rate if the Tribunal were to accept labour costs savings in the amounts set out in the Illustrative Labour-Related Rogers Efficiencies.

171. If the Tribunal were to find that the Divestiture Efficiencies are cognizable at law, which they are not, the efficiencies from the Proposed Divestiture are no greater than:

¹³³ TR 306, Witness Statement of Paul McAleese dated September 23, 2022, paras 340-341.

¹³⁴ ABD 000274 (RBCH00031_000000007), p 2.

¹³⁵ TR 460, Zmijewski Report, p 111, Exhibit VI-10 ("Substantiated Rogers Efficiencies"), [REDACTED]

¹³⁶ [REDACTED]

- a. \$1.0 million steady-state run rate;¹³⁷ or
- b. \$8.4 million¹³⁸ steady-state run rate if the Tribunal were to accept labour costs savings in the amounts set out in the Illustrative Labour-Related Videotron Efficiencies.

2. Anti-competitive effects

172. The anti-competitive effects of the Proposed Merger in this case have been described in detail above (with the exception of the wealth transfer, which is described below) and include:

- quantitative effects of a likely price increase, involving
 - the deadweight loss to society calculated by Dr. Miller – which is a “lower bound amount” - in the range of \$322 to 324 million per year; and
 - socially adverse transfer of income in the range of \$582 to 619 million per year, for a total anticompetitive effect in the range of \$766 to 796 million per year; or
 - decrease in weighted total surplus in the range of \$642 to 1,922 million per year.
- qualitative effects which include:
 - greater likelihood of coordinated competitive behaviour by replacing Shaw/Freedom with Videotron, which will be dependent on, and more closely aligned in interest with, Rogers. This is likely to lead to even higher prices and further loss of welfare;
 - loss of future innovative competitive initiatives and products offered by Shaw;

¹³⁷ TR 460, Zmijewski Report, p 115, Exhibit VII-3 (“Substantiated Videotron Efficiencies”), [REDACTED]

¹³⁸ [REDACTED]

- loss of choice and resiliency of one of the three independent telecommunications facilities-based networks in western Canada; and
- replacement of Shaw with Rogers, which has a poorer track record of customer service and satisfaction.

3. Wealth Transfer

173. Drs. Lars Osberg and Katherine Cuff will provide expert evidence to inform the Tribunal's assessment of the distributional impacts of the Proposed Merger. Dr. Osberg will discuss how the Proposed Merger is likely to redistribute wealth amongst various income groups in Canada. Dr. Osberg's analysis of the redistribution of wealth resulting from a merger is based on in his examination of Statistics Canada data. Dr. Cuff describes how the Canadian income tax system may be relevant to the manner in which the Tribunal considers or weighs the redistribution of income.
174. In his expert report, Dr. Lars Osberg explains that the winners and losers from the proposed Rogers/Shaw merger are remarkably different in wealth and income. His view is that:
- the financial winners from the merger will be the shareholders of cell phone companies, who are disproportionately likely to be at the very top of the income and wealth distribution of Canada; and
 - consumers throughout the income and wealth distribution will be the losers as they will pay any increase in the price of cell phone services.
175. In terms of the winners from a merger, Dr. Osberg considers foreign shareholders, the Rogers and Shaw families and other Canadian shareholders and how gains resulting from increased prices are likely to be spread throughout the income distribution. Foreign shareholders will receive approximately a quarter of the gains from the merger.¹³⁹ The Rogers and Shaw families will receive approximately a third

¹³⁹ TR 289, Expert Report of Lars Osberg ("Osberg Report"), dated September 21, 2022, para 11.

of the gains from the merger, in proportion with their shareholdings. These families are at the very, very top of the income distribution.¹⁴⁰

176. The Tribunal should not recognize gains by foreign shareholders or the gains to the families given their high incomes and extreme wealth. Other Canadian shareholders can be expected to receive the remainder of the gains from a merger. However, Dr. Osberg finds that stock ownership among other Canadian shareholders is concentrated in the higher income distributions. A very tiny part of the financial gains to shareholders will be received by less affluent Canadians. For example, assuming ownership of the merged firm is proportionate to the overall ownership of financial assets, Dr. Osberg estimates that the least wealthy half of Canadians will get 8% of the direct financial benefits of the merger.¹⁴¹
177. In examining the distribution of the losses – who loses from increased prices and by how much – Dr. Osberg reviews Statistics Canada data regarding cell phone consumption and concludes that cell phone charges are a significant part of the cost of living of Canadian households at all income levels and that wireless services appear to be a modern necessity. He identifies cell phone spending by income decile to assist the Tribunal in understanding how post-merger price increases in wireless services are likely to impact Canadians across the income distribution, from the lowest income deciles to the top “one percent”. Table 2.1.5 of his report identifies cell phone spending by income decile to identify amounts that are likely to be subject to price increases.
178. Noting that diminishing marginal utility implies that a dollar’s change in income matters less for the utility of the affluent than for the utility of poor households, Dr. Osberg’s opinion is that estimates of consumer surplus loss or gain deriving from price changes should be sensitive to income distribution.¹⁴² In other words, the financial gains and losses affect people differently depending on their incomes and this should be noted when evaluating transfers in wealth brought about by the

¹⁴⁰ TR 289, Osberg Report, paras 12-13.

¹⁴¹ TR 289, Osberg Report, para 23.

¹⁴² TR 289, Osberg Report, paras 55-58.

merger. The details of Dr. Osberg's expert evidence are intended to provide a robust foundation for the Tribunal to assess the redistribution of wealth that the merger is likely to bring about.

179. Dr. Cuff's evidence will be that the allocation of income tax burdens in the Canadian personal income tax system reflect policy choices and implicit social value judgements about individuals and households with different incomes and characteristics. Her evidence discusses how the Canadian tax system is progressive and treats higher income individuals/households differently than lower income individuals/households, reflecting an underlying equity principle and specific policy objectives.
180. Dr. Cuff's evidence will be that the differential treatment of different income groups by the Canadian income tax system informs the Tribunal about how it could weight changes in consumer and producer surplus as a result of the merger.
181. The Commissioner relies on the evidence of Drs. Osberg and Cuff to identify the options available to the Tribunal for weighing and balancing the transfer of wealth the merger is likely to bring about according to the methodologies outlined by the Tribunal in the *Superior Propane* decisions, namely (a) the socially adverse transfer methodology which discounts socially adverse transfers from consideration and (b) a balancing weights approach that identifies the weights for consumer and producer surplus.

J. Statutory Framework And Law

1. Overview

182. This brief sets out the relevant statutory framework and law applicable to this case.

2. The Section 92 Framework

183. The Competition Tribunal is a statutory Tribunal whose mandate is to hear and dispose of applications made under Part VII.1 and VIII of the Act, in this case an application that the Commissioner has made under section 92 of the Act.¹⁴³

184. Section 92(1) of the Act provides as follows with respect to a proposed merger:

92 (1) Where, ***on application by the Commissioner***, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

...

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) ***with the consent of*** the person against whom the order is directed ***and the Commissioner***, ordering the person to take any other action.

185. The Commissioner's section 92 application seeks the following in its prayer for relief:

¹⁴³ *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), s. 8, Commissioner's Book of Authorities, Tab 18.

- a. an order directing the respondents not to proceed with the acquisition of all of the issued and outstanding shares of Shaw by Rogers (the “**Proposed Merger**”); and
 - b. in the alternative, an order requiring the respondents not to proceed with that part of the Proposed Merger necessary to ensure that it does not prevent or lessen and is not likely to prevent or lessen competition substantially.
186. The Commissioner’s section 92 application is in respect of the proposed acquisition by Rogers of all the issued and outstanding shares of Shaw. There is no application properly before the Tribunal about any other transaction in any other form. The matter before the Tribunal is therefore whether to prohibit that Proposed Merger in whole or in part. Pursuant to section 92, absent consent of the Commissioner, the Tribunal cannot order anything except the partial or complete prohibition of the transaction. There is no consent in this case. The Commissioner is seeking an order prohibiting the parties from proceeding with the Proposed Merger. The parties cannot change the jurisdiction of the Tribunal by contract after the application is filed. The Tribunal does not have jurisdiction to accept a behavioural remedy with positive obligations under contractual arrangements absent the Commissioner’s consent.
187. The burden of proof is on the Commissioner to demonstrate that it is more likely than not that the Proposed Merger will lead to a substantial prevention or lessening of competition.
188. The proposed divestiture of Freedom to Videotron is irrelevant at this stage of the analysis and beyond the jurisdiction of the Tribunal pursuant to section 92 when evaluating the evidence of whether the Proposed Merger is likely to substantially lessen or prevent competition.
189. It would be an error of law and beyond the jurisdiction of the Tribunal to include consideration of the Proposed Divestiture in its evaluation of the evidence of whether the Proposed Merger is likely to prevent or lessen competition substantially pursuant to section 92.

190. If the Tribunal determines that the evidence does not establish a likely substantial lessening or prevention of competition (“SPLC”) emanating from the Proposed Merger, the Commissioner’s application is dismissed.

a) Section 92 Remedies Mergers that Substantially Increase Market Power

191. The evil that section 92 of the Act addresses is the likelihood that a merger will prevent or lessen competition substantially.¹⁴⁴ The Tribunal will find that a merger is likely to prevent or lessen competition substantially where it creates, maintains or enhances the ability of the merged entity to exercise market power unilaterally or in coordination with other firms.¹⁴⁵

192. Market power is the ability of a firm to profitably maintain a material price increase or to diminish quality, variety, service, advertising or other dimensions of competition for a significant period of time.¹⁴⁶ The question is, most simply, are customers likely to be faced with significantly higher prices or significantly less choice over a significant period of time than they would be likely to experience in the absence of the merger?¹⁴⁷

193. Anti-competitive effects arising from a merger may be unilateral and/or coordinated.¹⁴⁸ Unilateral effects result when a merged firm can profitably increase price, restrict supply or limit other dimensions of competition without effective

¹⁴⁴ *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para 85 (“**Southam SCC**”), Commissioner’s Book of Authorities, Tab 11.

¹⁴⁵ *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 S.C.R. 161, at para 44 (“**Tervita**”), Commissioner’s Book of Authorities, Tab 16.

¹⁴⁶ *Tervita*, at para 44; *Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.) (“**Hillsdown**”), at para 75, Commissioner’s Book of Authorities, Tab 7; *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 34 (“**Canadian Waste Services**”), at para 7, Commissioner’s Book of Authorities, Tab 1, aff’d 2003 FCA 131, Commissioner’s Book of Authorities, Tab 2; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15 (“**Superior Propane I**”), at para 258, Commissioner’s Book of Authorities, Tab 5.

¹⁴⁷ *Canada (Director of Investigation & Research) v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.) (“**Southam CT**”) at para 408, Commissioner’s Book of Authorities, Tab 8, aff’d [1997] 1 S.C.R. 748, Commissioner’s Book of Authorities, Tab 11; *Superior Propane I*, at para 303, Commissioner’s Book of Authorities, Tab 5.

¹⁴⁸ *Tervita*, at para 44, Commissioner’s Book of Authorities, Tab 16.

discipline from competitive responses by rivals.¹⁴⁹ Coordinated effects result when a merger changes the competitive dynamics in a market such that coordination is substantially more likely or effective.¹⁵⁰

194. There is no obligation for the Commissioner to show that the merged entity will likely raise the price (or reduce quality or service); the only requirement is for the Commissioner to show that the merged firm has the ability to do so.¹⁵¹

b) Market definition

195. While the Act does not require the Tribunal to define markets,¹⁵² market definition is unquestionably a helpful tool for assessing competition as it allows for an assessment of (i) the products and locations that are close substitutes for the products and locations of the merging parties, (ii) market power, (iii) the merging parties' competitors, (iv) the existing levels of price and non-price competition, and (v) market shares and concentration levels.¹⁵³ Market definition is a means to the end of identifying the significant market forces that constrain or are likely to constrain the merged entity.¹⁵⁴
196. The Tribunal typically defines markets following the hypothetical monopolist approach that uses market definition as a lens for focusing the competition assessment. Under this approach "a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a 'hypothetical monopolist') would impose and sustain a small but significant and non-transitory increase in price ('SSNIP') above levels that would likely exist in the absence of the

¹⁴⁹ ABD 004672 (RBCH00045_000000005), *MEGS*, para 6.10.

¹⁵⁰ ABD 004672 (RBCH00045_000000005), *MEGS*, paras 6.23-6.27.

¹⁵¹ *Superior Propane I*, at para 258, Commissioner's Book of Authorities, Tab 5; *Canadian Waste Services*, at para 108, Commissioner's Book of Authorities, Tab 1.

¹⁵² *Superior Propane I*, at para 56, Commissioner's Book of Authorities, Tab 5; *Commissioner of Competition v. CCS Corp.*, 2012 Comp. Trib. 14 ("**CCS Tribunal**"), at para 363, Commissioner's Book of Authorities, Tab 13.

¹⁵³ *CCS Tribunal*, at paras 360-364, Commissioner's Book of Authorities, Tab 13.

¹⁵⁴ *Southam CT*, at para 49, Commissioner's Book of Authorities, Tab 8.

merger”.¹⁵⁵ The Tribunal typically defines a SSNIP as a five percent price increase lasting a year.¹⁵⁶

197. Despite the usefulness of the market definition framework, it will often only be realistic for the Tribunal to expect approximations as market boundaries cannot and will not in many instances be precise.¹⁵⁷ While market definitions should be as precise as reasonably possible, the Tribunal should not be preoccupied with market definition to the point of losing sight that its purpose, which is to assist in determining whether the merger is likely to substantially prevent or lessen competition.¹⁵⁸
198. The Commissioner has pled, first, that the relevant product and geographic markets are the provision of Wireless Services in Ontario, Alberta and British Columbia.
199. The respondents have not challenged the fundamentals of the Commissioner’s approach to market definition but have raised two discrete objections:
- a. that business consumers do not constitute a separate product market as alleged by the Commissioner; and
 - b. the Commissioner has not defined the product market as bundled wireless and wireline services despite alleging anti-competitive effects due to bundling of wireless and wireline services.¹⁵⁹
200. Business Services also constitutes a separate product market. Business customers have different requirements than individual consumers. Importantly, the competitive

¹⁵⁵ *CCS Tribunal*, at para 58, Commissioner’s Book of Authorities, Tab 13.

¹⁵⁶ *CCS Tribunal*, at paras 60 and 94, Commissioner’s Book of Authorities, Tab 13; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1995] 3 F.C. 557 (C.A.), at para 121, Commissioner’s Book of Authorities, Tab 10.

¹⁵⁷ *Hillsdown*, at para 61, Commissioner’s Book of Authorities, Tab 7; *Commissioner of Competition v. Toronto Real Estate Board*, 2016 Comp. Trib. 7, at para 132, Commissioner’s Book of Authorities, Tab 14, aff’d 2017 FCA 236, Commissioner’s Book of Authorities, Tab 15.

¹⁵⁸ *Southam SCC*, at 79, Commissioner’s Book of Authorities, Tab 11; *Superior Propane I*, at para 48, Commissioner’s Book of Authorities, Tab 5; *CCS Tribunal*, at para 92, Commissioner’s Book of Authorities, Tab 13.

¹⁵⁹ TR 178, Fresh as Amended Response of Rogers Communications Inc., at para 31.

conditions in Business Services are different from Wireless Services because Shaw does not currently compete in Business Services.

c) The Merger is to be Compared to the “but for” World

201. The test for assessing whether a merger lessens or prevents competition is comparative and involves a forward looking assessment of competitive conditions in the world where the merger proceeds to a counterfactual where it does not. This is the “but for” test. Using the “but for” test, the Tribunal should assess whether the merged firm is likely to exercise materially greater market power in the actual scenario than the “but for” scenario.¹⁶⁰

d) Factors to Consider in Conducting the Competition Assessment

202. The degree to which a merger concentrates markets is undoubtedly a relevant consideration in merger review and market share data can provide a *prima facie* indication as to whether a merger creates or enhances market power.¹⁶¹ However, the Tribunal must not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share,¹⁶² as market share may either overstate or understate a firm’s market power.¹⁶³

203. Section 93 enumerates a non-exhaustive set of factors the Tribunal may consider in determining whether a merger is likely to substantially lessen or prevent competition.¹⁶⁴ The effectiveness of the remaining domestic and foreign competitors, as noted in subsections 93(a), (c), (e) and (f), must be considered by the Tribunal in assessing the likelihood a merger will substantially prevent or lessen competition substantially.¹⁶⁵ Subsection 93(f) of the Act, which refers to “(f) any

¹⁶⁰ *Tervita*, at paras 50-55, Commissioner’s Book of Authorities, Tab 16.

¹⁶¹ *Hillsdown*, at para 76, Commissioner’s Book of Authorities, Tab 7.

¹⁶² Competition Act, R.S.C., 1985, c. C-34, (the “**Act**”), s. 92(2), Commissioner’s Book of Authorities, Tab 17.

¹⁶³ *Hillsdown*, at para 87, Commissioner’s Book of Authorities, Tab 7.

¹⁶⁴ *Tervita*, at para 79, Commissioner’s Book of Authorities, Tab 16.

¹⁶⁵ *Superior Propane I*, at paras 212-239, Commissioner’s Book of Authorities, Tab 5.

likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor” should be of particular note. The presence or absence of barriers to entry and expansion, as noted in subsection 93(d), is likewise another factor of central analytic importance, particularly in the area of Wireless Service.¹⁶⁶

204. Barriers to entry and expansion in the Wireless Services market are high and include but are not limited to: access to and cost of wireless spectrum, significant access to and investment in infrastructure, sufficient scale, access to retail distribution, branding, access to flagship devices, access to wireline assets and the related ability to bundle. Apart from their general denial of the allegations in the Notice of Application, the respondents have not contested the Commissioner’s assertions in this respect.

e) Substantiality

205. The substantiality component of section 92 refers to the degree and duration of the extra market power the merger is likely to confer on the merged entity – this involves an assessment of how much higher prices are likely to be because of the merger and how long the merged entity is likely to maintain those higher prices owing to a lack of competition.¹⁶⁷ The substantiality of a lessening or prevention of competition should be assessed having regard to all available evidence, including **both qualitative and quantitative evidence**.¹⁶⁸

206. The Tribunal should consider substantiality in relative terms. The magnitude, scope and duration of these price and non-price effects are interrelated and should consider this factors together when assessing whether an increase in market power is a substantial lessening or prevention of competition. For example, where a predicted price increase is high and affects a large volume of sales, the Tribunal

¹⁶⁶ Barriers to entry are factors that hinder the ability of a firm to commence business and establish itself as a viable competitor: *Tervita*, at para 71, Commissioner’s Book of Authorities, Tab 16.

¹⁶⁷ *Tervita*, at para 4, Commissioner’s Book of Authorities, Tab 16.

¹⁶⁸ *Tervita*, at para 100, Commissioner’s Book of Authorities, Tab 16.

may accept a shorter predicted duration as substantial.¹⁶⁹ Similarly, smaller incremental price or non-price effects may be substantial where the acquiring or acquired business had pre-merger market power.¹⁷⁰

207. There is no rigid numerical threshold for evaluating the degree or duration of market power that a merger maintains or enhances, e.g., a likely 5% price increase for one or two years, or a small but significant non-transitory price increase.¹⁷¹ Nevertheless, the ability of the merged entity to sustain a material price increase or reduction in the non-price dimensions of competition for approximately two years relative to the “but for” scenario provides a useful benchmark for assessing substantiality.¹⁷²

3. Appropriate Remedy

208. Section 92 of the *Act* provides that where, “on application of the Commissioner”, the Tribunal finds that a “merger or proposed merger” is likely to create a SPLC, the Tribunal “may, subject to [section 96]”, order one of the remedies in paragraphs 92(1)(e) and (f) of the *Act*. If the Tribunal does not find that the Proposed Merger is likely lessen competition substantially, the Commissioner’s Application fails. If the Tribunal finds that the Proposed Merger is likely to lessen competition substantially, the next step is to determine the appropriate remedy.
209. When the Tribunal finds that a merger is likely to substantially lessen or prevent competition, the *Act* does not direct the Tribunal to restore competitive conditions to the pre-merger situation. Rather, the *Act* requires an order that ensures competition is not lessened or prevented substantially, and therefore some lessening of

¹⁶⁹ *CCS Tribunal*, at paras 275 and 384, Commissioner’s Book of Authorities, Tab 13.

¹⁷⁰ *CCS Tribunal*, at paras 212-213, Commissioner’s Book of Authorities, Tab 13; *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.), at para 758, Commissioner’s Book of Authorities, Tab 12.

¹⁷¹ *Tervita*, at para 45, Commissioner’s Book of Authorities, Tab16; *Hillsdown*, at para 119, Commissioner’s Book of Authorities, Tab 7.

¹⁷² *CCS Tribunal*, at paras 378-379, Commissioner’s Book of Authorities, Tab 13.

competition may be tolerated.¹⁷³ A remedy under section 92 must be effective in ensuring that a merger does not substantially lessen or prevent competition. The Tribunal must prefer a remedy that overshoots this mark to one that fails to reach it.¹⁷⁴

210. The case law sets out the criteria that an appropriate remedy must meet. The remedy must restore competition to the point at which it can no longer be said to be substantially less than it was before the merger (and not restoring the parties to the pre-merger competitive situation).¹⁷⁵ At the very least, the remedy must be effective. If the choice is between a remedy that goes farther than is strictly necessary and a remedy that does not go far enough, then the former is to be preferred.¹⁷⁶
211. The Tribunal only has the jurisdiction to order structural remedies. In the case of a proposed merger, the Tribunal may only order a person not to proceed with all or part of the merger. The Tribunal is limited in its powers to these “blunt instruments”. A post-merger contract is not an available remedy.¹⁷⁷
212. The case law establishes that the party putting forward a remedy proposal has the burden of demonstrating its availability and effectiveness.¹⁷⁸ The respondents argue that the Proposed Divestiture will remedy the anti-competitive effects arising from

¹⁷³ *Southam SCC*, at paras 82-85, Commissioner’s Book of Authorities, Tab 11; *CCS Tribunal*, at para 216, Commissioner’s Book of Authorities, Tab 13; *Hillsdown*, at para 106, Commissioner’s Book of Authorities, Tab 7; *Superior Propane I*, at paras 127-128, Commissioner’s Book of Authorities, Tab 5.

¹⁷⁴ *Southam SCC*, at para 89, Commissioner’s Book of Authorities, Tab 11; *Hillsdown*, at 164, Commissioner’s Book of Authorities, Tab 7; *Canadian Waste Services*, at para 32, Commissioner’s Book of Authorities, Tab 1.

¹⁷⁵ *Southam SCC*, at paras 83-85, Commissioner’s Book of Authorities, Tab 11.

¹⁷⁶ *Southam SCC*, at para 89, Commissioner’s Book of Authorities, Tab 11.

¹⁷⁷ *Canadian Waste Services*, at paras 45, 46 and 48, Commissioner’s Book of Authorities, Tab 1.

¹⁷⁸ See *Canada (Director of Investigation & Research) v. Southam Inc.* (1995), 127 D.L.R. (4th) 329 (F.C.A.), at para 18, Commissioner’s Book of Authorities, Tab 9: “Having proposed the remedy, Southam certainly had an obligation to satisfy the Tribunal that it was effective”. The Supreme Court expressly upheld the Federal Court of Appeal’s finding that respondents to a section 92 application have the onus of showing their proposed remedy is available and effective. See *Southam SCC*, at para 89, Commissioner’s Book of Authorities, Tab 11. See also *Canadian Waste Services*, at para 107, Commissioner’s Book of Authorities, Tab 1.

their merger. The burden therefore falls on them to show that the Proposed Divestiture is effective to remove the substantial lessening of competition.

213. The Proposed Divestiture is neither effective nor available. It is not “effective”, because the prevention and lessening of competition from the Proposed Merger is likely to be substantial even factoring in the Proposed Divestiture. Nor is the divestiture as proposed by the respondents one that is “available” under the Act. The Proposed Divestiture relies on behavioural components, which absent the consent of all parties is outside of the power of the Tribunal to order under section 92.¹⁷⁹
214. If the Tribunal determines that the evidence does establish that the Proposed Acquisition of Shaw by Rogers is likely to prevent or lessen competition substantially, it will next determine how broad a prohibitory order under section 92 is required to remove the substantial lessening of competition.
215. The Commissioner’s position is that it is necessary to prohibit the respondents from proceeding with the Proposed Merger.
216. The parties propose a divestiture of Freedom – a prohibition on Rogers buying the Freedom assets. The Proposed Divestiture is insufficient to meet the remedy standard in *Southam*.
217. Anything beyond prohibition (in whole or in part), including any contractual arrangements or other behavioural commitments proposed by the parties is beyond the scope of consideration by the Tribunal.¹⁸⁰
218. If the Tribunal determines that the Proposed Divestiture is adequate to remedy the SLPC from the Proposed Merger, then that order is issued.
219. If the Tribunal determines that the Proposed Divestiture is an inadequate remedy, it moves to the section 96 analysis.

¹⁷⁹ Act, s. 92(1)(f)(iii)(B), Commissioner’s Book of Authorities, Tab 17.

¹⁸⁰ *Canadian Waste Services*, at para 110, Commissioner’s Book of Authorities, Tab 1.

4. Anti-Competitive Effects Outweigh Cognizable Efficiencies

a) The Exception in Section 96 of the Act

220. Rogers attempts to justify its anticompetitive merger with Shaw by asserting that the Proposed Merger and Proposed Divestiture will achieve productive efficiencies.
221. Subsection 96(1) of the *Act* provides that the Tribunal shall not make an order to remedy an otherwise anti-competitive merger where the merger is “likely to bring about gains in efficiency” that “would not likely be attained if the order were made”, and which are “greater than”, and “will offset” the “effects” of any lessening of competition.
222. The respondents bear the burden under section 96 to establish the extent of the efficiency gains, as well as on the “ultimate issue” of whether the efficiency gains are likely to be greater than, and to offset, the effects proven by the Commissioner.¹⁸¹
223. First, Rogers must demonstrate that it will achieve increased productive efficiency.¹⁸² Second, Rogers must also show that the gains are likely to be brought about by the Merger.¹⁸³ Third, Rogers must demonstrate that the gains do not result from a redistribution of income.¹⁸⁴ Fourth, Rogers must demonstrate that the gains

¹⁸¹ *Tervita*, at para 122, Commissioner’s Book of Authorities, Tab 16; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104 (“**Superior Propane II**”), at paras 157 and 177, Commissioner’s Book of Authorities, Tab 3.

¹⁸² Subsection 96(1) of the *Act*: “...gains in efficiency...”, Commissioner’s Book of Authorities, Tab 17; *Tervita*, at para 102, Commissioner’s Book of Authorities, Tab 16; *CCS Tribunal*, at para 262 “first screen”, Commissioner’s Book of Authorities, Tab 13; *Hillsdown*, at para 130, Commissioner’s Book of Authorities, Tab 7; ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.4.

¹⁸³ Subsection 96(1) of the *Act*: “...merger... has brought about or is likely to bring about...”, Commissioner’s Book of Authorities, Tab 17; *Tervita*, at para 113, Commissioner’s Book of Authorities, Tab 16; *CCS Tribunal*, at para 262 “second screen”, Commissioner’s Book of Authorities, Tab 13; *Superior Propane I*, at para 462, Commissioner’s Book of Authorities, Tab 5; *Hillsdown*, at paras 133 and 141, Commissioner’s Book of Authorities, Tab 7; ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.13 (second bullet) and 12.20 (first bullet).

¹⁸⁴ Subsection 96(3) of the *Act*, Commissioner’s Book of Authorities, Tab 17; *Tervita*, at para 113, Commissioner’s Book of Authorities, Tab 16; *CCS Tribunal*, at para 262 “third screen”, Commissioner’s Book of Authorities, Tab 13; *Superior Propane I*, at para 430, Commissioner’s Book of Authorities, Tab 5; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16 (“**Superior Propane III**”), at paras 46 and 142, Commissioner’s Book of Authorities, Tab 6; *Hillsdown*, at para 73,

will benefit the Canadian economy.¹⁸⁵ Fifth, Rogers must prove that the gains would not be attained if the Tribunal were to make an order.¹⁸⁶

224. Any efficiencies that meet the five screens set out above must be properly quantified, to the extent they are quantifiable.¹⁸⁷ This includes quantifying and deducting all costs incurred in order to achieve those efficiencies.¹⁸⁸
225. Merging parties bear the burden of validating their efficiency claims.¹⁸⁹ The Merger Enforcement Guidelines have recognized that cognizable efficiencies must be objectively verifiable and substantiated with documentation.¹⁹⁰
226. Cost savings alone are not efficiencies. Productive efficiency is achieved when output is produced using the most cost-effective combination of productive resources available under existing technology.¹⁹¹ Productive efficiency refers to the creation of a given volume and quality of output at the lowest possible resource cost.¹⁹² A gain in productive efficiency means producing more output or better quality

Commissioner's Book of Authorities, Tab 7; ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.20 (third bullet).

¹⁸⁵ Section 1.1 of the *Act*, Commissioner's Book of Authorities, Tab 17; *Superior Propane III*, at para 196-197, Commissioner's Book of Authorities, Tab 6; *CCS Tribunal*, at para 262 ("fourth screen"), Commissioner's Book of Authorities, Tab 13; ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.20 (fourth bullet).

¹⁸⁶ Subsection 96(1) of the *Act*: "...and that the gains in efficiency would not likely be attained if the order were made", Commissioner's Book of Authorities, Tab 17 *Tervita*, at para 113, Commissioner's Book of Authorities, Tab 16; *Superior Propane III*, at para 149, Commissioner's Book of Authorities, Tab 6; *CCS Tribunal*, at paras 264 and 267 ("fifth screen"), Commissioner's Book of Authorities, Tab 13; ABD 004672 (RBCH00045_000000005), *MEGS*, at paras 12.9, 12.13 (fourth bullet), and 12.20 (second bullet).

¹⁸⁷ *Tervita*, at paras 124 and 147, Commissioner's Book of Authorities, Tab 16; ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.20: "The parties must provide a quantification of the gains in efficiency and a detailed and robust explanation of how the quantification was calculated."

¹⁸⁸ *Superior Propane I*, at paras 339-340, Commissioner's Book of Authorities, Tab 5; ABD 004672 (RBCH00045_000000005), *MEGS*, at paras 12.10 and 12.19.

¹⁸⁹ ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.3: "...the parties must be able to validate efficiency claims to allow the Bureau to ascertain the nature, magnitude, likelihood and timeliness of the asserted gains, and to credit (or not) the basis on which the claims are being made".

¹⁹⁰ ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.10: "To enable the objective verification of anticipated efficiency gains, efficiency claims should be substantiated by documentation prepared in the ordinary course of business, wherever possible."

¹⁹¹ *Tervita*, at para 102, Commissioner's Book of Authorities, Tab 16.

¹⁹² ABD 004672 (RBCH00045_000000005), *MEGS*, at paras 12.4 and 12.14-12.16.

output from the same amount of input; savings that resulting from a reduction in quality or output are excluded.¹⁹³ Rogers has not demonstrated that quality and output will not be reduced by its projected costs savings. Therefore the claimed efficiencies are not true resource savings for the Canadian economy.

227. While efficiencies can be realized in any merger, the requirement under section 96 of the *Act* is to demonstrate the real value of the efficiencies; where the quantum cannot be measured, the burden is not met.¹⁹⁴ Where the burden to properly quantify its claimed efficiencies is not met, those claims should be denied in their entirety.¹⁹⁵
228. Rogers has substantially failed to establish the efficiencies gains it claims in this proceeding. The efficiencies are speculative, unproven and unlikely to be achieved, are based on unrealistic assumptions and flawed methodologies, are not brought about by the Proposed Merger or would likely have been achieved irrespective of the Proposed Merger, and fail to properly account for the cost to achieve.

b) Videotron's Cost Savings are Not Cognizable at Law

229. Any savings Videotron may achieve are as a result of the Proposed Divestiture, not the Proposed Merger.¹⁹⁶
230. The text of section 96 refers to efficiency gains brought about by the “merger in respect of which the application is made”. It is evident on a plain text reading of that provision that the “application” in question is the Commissioner’s application under section 92. The “merger in respect of which the application is made” refers to the merger which is identified in the Commissioner’s Notice of Application. This is

¹⁹³ ABD 004672 (RBCH00045_000000005), *MEGS*, at paras 12.14 and 12.20.

¹⁹⁴ *Superior Propane I*, dissenting reasons of Member Lloyd at para 485, Commissioner’s Book of Authorities, Tab 5.

¹⁹⁵ *Tervita*, at paras 128-129 and 154, Commissioner’s Book of Authorities, Tab 16; see also *Superior Propane I*, at paras 348 and 352, Commissioner’s Book of Authorities, Tab 5.

¹⁹⁶ Subsection 96(1) of the *Act*: “...merger... has brought about or is likely to bring about...”, Commissioner’s Book of Authorities, Tab 17; *Tervita*, at para 113, Commissioner’s Book of Authorities, Tab 16; *CCS Tribunal*, at para 262 “second screen”, Commissioner’s Book of Authorities, Tab 13; *Superior I*, at para 462, Commissioner’s Book of Authorities, Tab 5; *Hillsdown*, at paras 133 and 141, Commissioner’s Book of Authorities, Tab 7; ABD 004672 (RBCH00045_000000005), *MEGS*, at paras 12.13 (second bullet) and 12.20 (first bullet).

consistent with the opening words of section 92: “The Tribunal, on application by the Commissioner, may...”.

231. In this case, the Commissioner’s the Notice of Application is on its face in respect of the Proposed Merger.¹⁹⁷ Since the Notice of Application has not been amended, the “merger in respect of which the application is made” remains the Proposed Merger, not the Proposed Merger and Proposed Divestiture. There is no other application properly before the Tribunal about any other transaction in any other form.
232. In the alternative, even if efficiencies claims from the Proposed Divestiture were cognizable at law, which they are not, the vast majority of the efficiencies claimed in respect of Videotron’s acquisition of Freedom are not cognizable under section 96 for the same reasons as those claimed in respect of the Proposed Merger.
233. In particular, Videotron’s MVNO efficiencies are not cognizable because Videotron was not likely to expand as an MVNO absent the Proposed Divestiture.

c) The Anti-Competitive Effects of the Proposed Merger

234. The Commissioner must prove anti-competitive effects.¹⁹⁸ Where the effects are measurable, they must be estimated.¹⁹⁹ Qualitative effects are those that may not be measurable as they are dependent on individual preferences in the market.²⁰⁰
235. The word “effects” has been interpreted to include all the anti-competitive effects to which a merger in fact gives rise.²⁰¹ The “effects” are not limited to potential losses to the economy as a whole; it should include all anti-competitive effects having regard to all of the statutory purposes set out in the purpose clause of the Act.²⁰²

¹⁹⁷ See the relief set out on p 2 in respect of the “Proposed Merger”, defined in para 14 (p 7).

¹⁹⁸ *Tervita*, at paras 122 and 124, Commissioner’s Book of Authorities, Tab 16; *Superior Propane I*, at para 403, Commissioner’s Book of Authorities, Tab 5; *Superior Propane II*, at paras 157 and 177, Commissioner’s Book of Authorities, Tab 3; *Canada (Commissioner of Competition) v. Superior Propane Inc*, 2003 FCA 53 (“**Superior Propane IV**”), at para 35, Commissioner’s Book of Authorities, Tab 4.

¹⁹⁹ *Tervita*, at para 124, Commissioner’s Book of Authorities, Tab 16; *Superior Propane IV*, at para 35, Commissioner’s Book of Authorities, Tab 4.

²⁰⁰ *Tervita*, at para 100, Commissioner’s Book of Authorities, Tab 16.

²⁰¹ *Superior Propane II*, at paras 111-112, Commissioner’s Book of Authorities, Tab 3.

²⁰² *Superior Propane II*, at paras 111-112, Commissioner’s Book of Authorities, Tab 3. See also *Hillsdown*, at para 151, Commissioner’s Book of Authorities, Tab 7; ABD 004672 (RBCH00045_00000005), *MEGS*,

Section 96 “applies to the transaction in its entirety” and the comparison is done “across all markets and areas”.²⁰³

236. In this case, the relevant effects include both the deadweight loss as well as the wealth transfer.

i. Deadweight loss

237. The “deadweight loss” is a reduction in total consumer and producer surplus within Canada resulting from a price increase.²⁰⁴ The deadweight loss is a loss of allocative efficiency.²⁰⁵ Deadweight loss results from the fall in demand for the merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute.²⁰⁶

ii. Wealth Transfer

238. As referred to above, a portion of the consumer surplus that is lost when price increases is recaptured by the producer in the form of increased surplus. This causes a wealth transfer or redistribution from buyers to sellers.²⁰⁷ The redistribution of income that results from an anti-competitive merger of producers has a negative effect on consumers (through loss of consumer surplus) and a corresponding positive effect on shareholders (excess profit).²⁰⁸

at para 12.21 (emphasis added): “The effects to be considered are not limited to resource allocation effects and include all the anti-competitive effects that are likely to arise from a merger; having regard to all the objectives of the Act. Determination of the relevant anti-competitive effects depends upon the particular circumstances of the merger in question and the markets affected by the merger.”

²⁰³ *Superior Propane III*, at para 140, Commissioner’s Book of Authorities, Tab 6.

²⁰⁴ ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.25.

²⁰⁵ ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.25.

²⁰⁶ *Superior Propane IV*, at para 13, Commissioner’s Book of Authorities, Tab 4; cited in *Tervita*, at para 94, Commissioner’s Book of Authorities, Tab 16.

²⁰⁷ ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.28.

²⁰⁸ *Superior Propane III*, at para 329, Commissioner’s Book of Authorities, Tab 6.

239. The Federal Court of Appeal held in *Superior Propane II* that income distribution cannot be excluded automatically as a potential anti-competitive effect.²⁰⁹ In *Superior Propane III*, the Tribunal counted a portion of the wealth transfer as an effect in the balancing analysis.²¹⁰
240. In this case, the increase in prices or qualitative effects from the Proposed Merger will result in a transfer of wealth from low- and moderate-income groups in society to the respondents, whose shareholders include ultra-rich members of the family ownership groups of these companies. Increased profits will also be paid to non-Canadian investors.
241. These effects are socially adverse and must be given weight in the trade-off analysis.

d) Rogers Has Failed to Prove that the Efficiencies are Greater Than, and Offset, the Anti-Competitive Effects

242. As noted above, Rogers bears the burden on the “ultimate issue” of whether the efficiency gains are likely to be greater than, and to offset, the effects proven by the Commissioner.²¹¹ Section 96 is in substance a balancing test intended to balance the potential for good against the potential for harm.²¹²
243. In this case, the cognizable efficiencies of the Proposed Merger and/or Proposed Divestiture, if any, are not greater than and do not offset its anti-competitive effects.

²⁰⁹ *Superior Propane II*, at para 112, Commissioner’s Book of Authorities, Tab 3. See also *Hillsdown*, at paras 145 and 156, Commissioner’s Book of Authorities, Tab 7; and section 1.1 of the Act: “...provide consumers with competitive prices and product choices”.

²¹⁰ *Superior Propane III*, Commissioner’s Book of Authorities, Tab 6.

²¹¹ *Tervita*, at para 122, Commissioner’s Book of Authorities, Tab 16; *Superior Propane II*, at paras 157 and 177, Commissioner’s Book of Authorities, Tab 3.

²¹² *Tervita*, at para 90, Commissioner’s Book of Authorities, Tab 16; *Superior Propane II*, at para 75, Commissioner’s Book of Authorities, Tab 3.

244. The “greater than” aspect of the test requires that the efficiency gains be more extensive or of a larger magnitude than the anti-competitive effects.²¹³ The “offset” aspect requires that efficiency gains compensate for the anti-competitive effects.²¹⁴
245. Together, the terms “greater than” and “offset” mandate that the Tribunal determine both quantitative and qualitative aspects of a merger, and then weigh and balance those aspects.²¹⁵ The Tribunal’s analysis will consider quantitative efficiencies and effects, and qualitative efficiencies and effects, before reconciling the “whole universe” of relevant factors into an ultimate determination.²¹⁶ As this Tribunal has recognized, weighing the effects of a lessening of competition, on the one hand, and efficiency gains, on the other, involves a balancing of incommensurables: it is a matter of judgment.²¹⁷
246. In this case, as set out above, the respondents have substantially failed to demonstrate the claimed efficiency gains within the meaning of section 96 of the Act. In any event, any gains in efficiency it has established are outweighed by the proven anti-competitive effects.
247. The Proposed Merger is harmful to the Canadian economy and serves none of the purposes intended to be served by section 96 of the Act. Section 96 was intended to help Canadian companies achieve the economies of scale which would be necessary to counter foreign competition, not to enable mergers between domestic competitors.

²¹³ ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.33.

²¹⁴ ABD 004672 (RBCH00045_000000005), *MEGS*, at para 12.33.

²¹⁵ *Tervita*, at para 145, Commissioner’s Book of Authorities, Tab 16.

²¹⁶ *Tervita*, at para 147, Commissioner’s Book of Authorities, Tab 16.

²¹⁷ *Superior Propane III*, at para 374, Commissioner’s Book of Authorities, Tab 6.