

PUBLIC

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

ATTORNEY GENERAL OF ALBERTA and VIDEOTRON LTD.

Intervenors

OPENING STATEMENT OF THE RESPONDENT, ROGERS COMMUNICATIONS INC.

PUBLIC

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PART I - OVERVIEW

1. The stakes in this proceeding could not be higher. The Tribunal’s decision will determine the future of the Canadian telecommunications industry for the next decade or more. It will determine whether the federal government’s longstanding objective establishing a fourth national wireless carrier—an objective previously supported by the Commissioner of Competition—will be fulfilled.

2. The Commissioner has given the Tribunal a stark choice.

3. It can allow the proposed transaction to proceed and entrust Freedom to the capable and experienced hands of Videotron, introducing to Western Canada a carrier with an enviable track record of disruptive competition. Doing so will give Videotron a national platform, and Freedom an immediate path to 5G service [REDACTED]. This will allow it to compete more vigorously than it did under Shaw’s ownership, and make generational investments that will deliver greater choice, better prices, and more powerful and reliable networks.

4. Or the Tribunal can acquiesce to the Commissioner’s demand and block the proposed transaction. It can return Shaw and Videotron to their corners of the market. It can leave Freedom and its subscribers [REDACTED]. It can prevent Rogers from expanding its wireline network, a development the CRTC has found is in the public interest and which the Commissioner has not challenged. It can entrench the advantages that Bell and Telus enjoy from a national network-sharing agreement. And it can block Videotron from realizing its ambition to expand nationally, reducing prices by [REDACTED] or more, as it has done in Quebec.

5. The Commissioner bears the burden of proving that the transaction will cause a substantial lessening or prevention of competition in the wireless markets in British Columbia, Alberta, and Ontario. His evidence falls well short of meeting this burden.

6. It is important to identify the precise harm the Commissioner alleges. He alleges the proposed transaction will give rise to anti-competitive effects from the transfer of Shaw's *wireline* business and assets to Rogers. The principal focus of his objection is Rogers' retention of a minority of wireline customers who also subscribe to "Shaw Mobile" branded wireless service as part of a bundle.

7. The Commissioner claims Shaw Mobile has been a significant disruptor in the wireless market. It is nothing of the kind, and never has been. It is not even a true wireless product; it is a bundled product that serves as a wireline retention tool. It is not a "maverick competitor", and is priced comparably with the only other bundle in the market, offered by Telus, not Rogers. The Commissioner's theory of harm rests on a mischaracterization of Shaw Mobile.

8. But even taking the Commissioner's case at its highest, his expert economist concludes the anti-competitive effect of Rogers' retention of Shaw Mobile subscribers is a [REDACTED] [REDACTED] Even if this were accurate, it is not on any reasonable metric a "substantial" lessening or prevention of competition. Thus, prior to accounting for the significant flaws in the Commissioner's economic approach and analysis, he will not be able to discharge his burden under s. 92.

9. Nor will the proposed transaction cause any harm to Freedom or Videotron customers. In fact, the Commissioner's expert concludes that Freedom's prices will go down between [REDACTED] [REDACTED] And this price reduction is now ensured, as Videotron has accepted the conditions imposed just last week by the Minister of Innovation, Science and Industry on the transfer of Freedom's spectrum licences:

First, I am giving notice that any new wireless licences acquired by Vidéotron would need to remain in its possession for at least 10 years. A new service provider needs to be in it for the long run.

Second, I would expect to see prices for wireless services in Ontario and Western Canada comparable to what Vidéotron is

¹ Dr. Miller claims a price increase of 2.5% in British Columbia and 0.8% in Alberta.

currently offering in Quebec, which are today on average 20 per cent lower than in the rest of Canada.²

10. The Commissioner has not quantified any anti-competitive effects from the sale of Freedom to Videotron. This is because there are none. The two operate in separate markets. The transaction will not lead to any greater concentration in market shares. It simply involves Videotron expanding outside of Quebec and stepping into the shoes of Freedom in Ontario, British Columbia, and Alberta.

11. Faced with no path to quantify any effects from this sale, the Commissioner advances an amorphous “qualitative” claim that Freedom will be a “less effective” competitor under Videotron. He will not prove this either. Videotron is the most disruptive regional competitor in Canada, an observation the Commissioner himself has made in the past but since forgotten. It has reduced prices in Quebec, such that they are now the lowest in the country. It has a business plan and strategy to aggressively compete, fully costed, conservative in its assumptions, and manifestly achievable. Videotron has secured all assets and arrangements it considers necessary to effectively compete. The Commissioner’s dismissal of Videotron’s considered business judgment—by way of the theories and speculations of an industry consultant who lacks depth of knowledge in the Canadian wireless space—is difficult to credit.

12. The Commissioner’s case asks this Tribunal to ignore the simple reality that the market will have more and better options as a result of this transaction. [REDACTED]

[REDACTED]

13. The evidence will show that this transaction will not harm the competitive landscape for wireless services. It will improve it: choices will increase; networks will strengthen; prices will fall; and consumers will benefit. The Commissioner, respectfully, should be prepared to explain to this Tribunal how and why this is not the best possible outcome for Canadians.

² [“Statement from Minister Champagne on competitiveness in the telecommunications sector”](#), October 25, 2022.

PART II - A BRIEF NOTE ON THE EVIDENTIARY RECORD

14. Over the next six weeks, the Tribunal will hear from 33 fact witnesses and 13 experts on a range of topics, including the competitive dynamics and economics of the telecommunications market, the business rationale underlying this transaction, and Videotron's plan to become Canada's fourth national carrier. Tens of thousands of pages of evidence have been filed.

15. The Tribunal will be guided by the commercial realities in the Canadian telecommunications industry, not untethered theories or speculation. It will have the benefit of evidence from senior, seasoned leaders from Rogers, Shaw, and Videotron about the challenges and opportunities facing the companies participating in this transaction. Each of these witnesses has decades of experience running wireless businesses. They will explain their careful, reasoned judgment in relation to the core issues this Tribunal will decide. Their evidence about the viability and competitiveness of their businesses, both before and after the transaction closes, is rooted in fact and market reality and therefore reliable and probative.

16. The Commissioner's case is different. It rests in large part on a selective, decontextualized reading of documents from Rogers, Shaw, and Videotron regarding past competitive trends and dynamics. His approach is static, backward-looking and untethered from the commercial realities and industry outlook. The result is an incomplete and, respectfully, unreliable snapshot of the competitive landscape for wireless services.

17. The Commissioner also relies heavily on evidence from Bell and Telus—Rogers' closest competitors—who have vigorously opposed the transaction at every stage [REDACTED]

[REDACTED] (despite Bell having itself unsuccessfully bid to purchase Shaw). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Commissioner has served four witness statements (two each) from senior representatives of Bell and Telus and a fifth from a representative of Distributel, which is now a subsidiary of Bell. This evidence is central to his case.

18. Bell and Telus are not disinterested observers, and their [REDACTED]

[REDACTED] must be weighed when this Tribunal evaluates the Commissioner's allegation that the transaction will reduce competition in

the wireless market. Videotron's disruptive effect is well known to all industry players, and its national expansion will place significant competitive pressure on Bell, Telus, and Rogers in particular. In this context, the Tribunal should carefully weigh the Commissioner's evidence that Videotron, with this transaction, will somehow have lost the competitive edge every industry participant, including the Commissioner, has recognized as "formidable".

19. The Tribunal's review of the evidence must be driven by common sense, market realities, and due regard for the experience and business judgment of Videotron, which has committed billions of dollars in the Canadian wireless industry and billions more to this transaction.

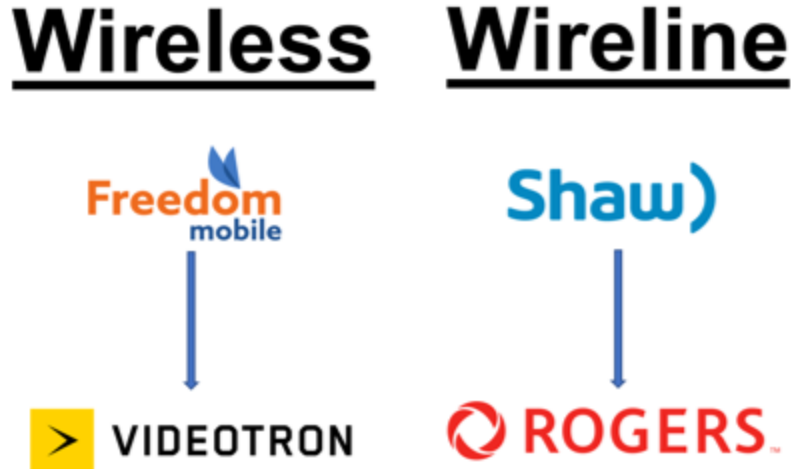
PART III - THE TRANSACTION AND THE COMMISSIONER'S BURDEN

20. On March 15, 2021, Rogers and Shaw entered into an arrangement agreement for Rogers to acquire all issued and outstanding shares of Shaw for a total purchase price of approximately \$26 billion (inclusive of the assumption of debt). Under the terms of this agreement, Rogers was to purchase the entirety of Shaw's wireline and wireless businesses.

21. That is no longer the case. On June 17, 2022, the parties agreed to Shaw's sale of Freedom to Videotron. What the Commissioner is now opposing is a fundamentally different proposition than the original transaction—which in any event has now been foreclosed by the recent announcement of Minister Philippe Champagne that he will not approve the transfer of Shaw's spectrum licences to Rogers.

22. The transaction will proceed in two steps. First, Shaw will sell Freedom, including all of its spectrum and network assets, to Videotron. Rogers will never own Freedom or its assets. Second, immediately after Videotron acquires Shaw's wireless assets, Rogers will acquire Shaw's wireline assets.³

³ Rogers will also acquire Shaw's broadcasting business, which is not at issue and has been approved by the CRTC.



23. The transaction the Commissioner asks the Tribunal to block through s. 92 of the *Competition Act* is depicted above: the sale of Shaw’s wireline business to Rogers, and the sale of Freedom’s wireless business to Videotron. The Commissioner must prove that this transaction gives rise to a substantial lessening or prevention of competition in the British Columbia, Alberta, and Ontario wireless markets. Only if he can discharge this burden—which he cannot—does the analysis shift to the efficiencies defence under s. 96.

24. This case is unlike any other case this Tribunal has seen; there is no “merger to monopoly” or significant increase in concentration levels in any market or industry. The Commissioner bears the heavy burden of demonstrating that the anti-competitive effects he alleges actually rise to the level of “substantiality”.

25. A fair, careful review of the evidence will reveal that he has not come close to meeting this burden.⁴ The Commissioner does not quantify any harm to competition in the wireless market arising from Freedom’s sale to Videotron. Nor does he allege any harm to competition in the wireline market arising from Shaw’s sale to Rogers. The only harm the Commissioner alleges is that the transfer of Shaw’s *wireline* assets to Rogers will give rise to anti-competitive effects in the *wireless* market.

⁴ This analysis is set out in Shaw’s opening statement.

26. This is a novel proposition not grounded in the evidence. It treats Shaw Mobile, a bundled product and wireline retention tool, as if it were a wireless-only product, such that there is a reduction in the number of competitors. But there is not. [REDACTED]

27. [REDACTED]
[REDACTED]
[REDACTED]

28. The Commissioner's fundamental mischaracterization of Shaw Mobile as a purely wireless product permeates his entire case and allows him to find harm where there is none.

29. Even then, the harm the Commissioner alleges is marginal at best. Taking his evidence at its highest, his economic expert, [REDACTED]

[REDACTED] This manifestly does not meet the test for a substantial lessening or prevention of competition.

A. VIDEOTRON'S ACQUISITION OF FREEDOM'S WIRELESS BUSINESS

30. Videotron provides wireless services in Quebec and the Greater Ottawa Area. Freedom does so in Ontario, Alberta, and British Columbia. Except for a very small overlap in Ottawa, each operates in different geographic markets. There is virtually no competition between Videotron and Freedom across their respective wireless footprints.

31. The transaction will allow Videotron to expand *outside of its existing footprint* and step into Freedom's shoes in markets in which it does not currently compete. For this reason, the evidence of Dr. Miller does not identify any quantifiable anti-competitive effects arising out of the sale of Freedom's wireless business to Videotron. The anti-competitive effects he asserts in respect of Freedom are "qualitative" only. They go to Videotron's competitive abilities and incentives as compared to Freedom under Shaw's ownership.

32. The Commissioner cannot credibly dispute Videotron's financial, operational and managerial capacity to run Freedom. His primary objection is that Videotron will be competitively disadvantaged because it will not own the wireline assets that Shaw currently

owns, and will become “dependent” on Rogers for wireline network access if Rogers acquires those assets.

33. The evidence will not bear this out. It will demonstrate that Freedom has been run separately from Shaw’s wireline business, and those assets have never been integral to Freedom’s success. Freedom under Videotron’s ownership will be even less dependent on this network if the transaction proceeds. [REDACTED]

[REDACTED]

[REDACTED] Videotron’s demonstrated track record as the industry’s the most disruptive wireless carrier, backed by a detailed plan for wireless competition and an investment of nearly \$3 billion, will make Freedom significantly more competitive, not less, than it was under Shaw.

B. ROGERS’ ACQUISITION OF SHAW’S WIRELINE BUSINESS

34. Rogers’ wireline business serves consumers in Southern and Eastern Ontario, New Brunswick, and Newfoundland. Under the transaction, it will acquire Shaw’s wireline business, which offers services to consumers in British Columbia, Alberta, and Northern Ontario. There is no overlap between these two businesses. And the Commissioner does not allege anti-competitive effects in the wireline services market. Rogers’ acquisition of Shaw’s wireline business in the west will be a powerful boost to competition in those markets.

35. There can be no doubt that this transaction positions Roges to be an even more vigorous competitor in the wireline market. The integration of Shaw’s wireline network will give Rogers a robust and redundant network that reaches across Canada, with last mile services in three of Canada’s largest four provincial markets.

36. Despite not alleging any anti-competitive effects in the wireline market, the Commissioner seeks to block the transaction in its entirety and deprive consumers of enhanced wireline competition and the benefit of the industry’s most disruptive wireless competitor. He

⁵ Affirmative Witness Statement of Jean-Francois Lescadres (“**Lescadres Affirmative**”), signed September 23, 2022, para. 7(a).

would prevent the emergence of Videotron as a further national carrier in new markets with the most favourable commercial terms in its operating arsenal.

PART IV - VIDEOTRON'S ACQUISITION OF FREEDOM IS PRO-COMPETITIVE

A. VIDEOTRON IS CANADA'S STRONGEST REGIONAL WIRELESS COMPETITOR

37. Over the last decade, Videotron has established its reputation as the most disruptive, competitive force in the Canadian wireless industry—more so than Freedom. The Commissioner has recognized this in his reports and statements. In submissions before the CRTC in 2019, the Competition Bureau concluded that “the growth of Freedom is having a price reducing impact on [Rogers, Bell and Telus], but not at the level of Videotron in their respective markets”.⁶

38. Videotron's effectiveness as a maverick has been widely recognized by other market participants. [REDACTED] Telus has acknowledged it to be a “formidable competitor”.⁷

39. The Tribunal will hear from Videotron. Pierre-Karl Péladeau and Jean-François Lescadres will testify about Videotron's entry into the wireless space, the tremendous growth it has experienced, the benefits it has delivered to consumers, and its plans for further disruption:

- (a) Videotron began offering wireless services to Quebecers in 2006, initially as a “mobile virtual network operator” (“**MVNO**”) using Rogers' physical network infrastructure;
- (b) By 2010, Videotron acquired its own spectrum licences and built its own facilities-based wireless network. It has invested billions of dollars into that business, to the great benefit of consumers;
- (c) Videotron is now a leader in bringing innovative wireless products to market. In 2018, it launched Canada's first digital-only discount wireless brand, Fizz Mobile,

⁶ Telecom Notice of Consultation CRTC 2019-57 – Review of Mobile Wireless Services, Further Comments of the Competition Tribunal dated November 22, 2019, para. 236 (emphasis added).

⁷ Responding Witness Statement of Dean Prevost (“**Prevost Reply**”), affirmed October 20, 2022, Exhibit 14; Cross-examination of Eric Edora, October 13, 2021, p. 33, *Telus Communications Inc. v. Videotron Ltée., Fibrenoire Inc.*

that offers plans tailored to subscribers' individual data needs.⁸ It was the first wireless carrier to launch a 5G network in Montreal, and continues to roll out this technology across its entire wireless footprint;⁹

(d) Notwithstanding relentless competition from Rogers, Bell, and Telus, Videotron and Fizz have established a market share of over 22% within their footprint (Quebec and the Greater Ottawa Area).¹⁰ This compares to Shaw's 9% market share in Alberta and British Columbia across both the Freedom and Shaw Mobile brands.¹¹ This Tribunal should place strong weight on and take comfort in this record. It is the best evidence of Videotron's superior capabilities, particularly because Videotron and Freedom both began operations as facilities-based operators in or around 2010;

(e) Videotron's wireless business continues to have strong momentum. It expects to overtake each of Rogers, Bell, and Telus in total market share in its existing market (Quebec), as it routinely wins more wireless customers than its competitors.¹² [REDACTED]

[REDACTED]

13

and

(f) In market research reports from independent sources, Videotron and Fizz perform better than Rogers, Bell, and Telus on customer care, network quality, purchase experience, and along various other metrics. This superior performance and customer satisfaction has been consistently reported over the past several years.¹⁴

⁸ Affirmative Witness Statement of Dean Prevost ("**Prevost Affirmative**"), affirmed September 23, 2022, para. 59(a) & Exhibit 21.

⁹ Lescadres Affirmative, para. 4.

¹⁰ Lescadres Affirmative, para. 5.

¹¹ TD Securities Inc., "Industry Note: Equity Research", 30 December 2021, p. 2.

¹² Lescadres Affirmative, para. 5.

¹³ Prevost Reply, para. 63.

¹⁴ Expert Report of Kenneth J. Martin ("**Martin Affirmative Report**"), dated September 23, 2022, paras. 28-31.

40. The Tribunal will also hear from Videotron’s witnesses that its success in Quebec has not been dependent on its wireline assets. That success has generated real and significant benefits for consumers in Quebec, where wireless subscribers pay much lower prices than subscribers in other provinces. In some cases, prices in Quebec are 40% lower than in other provinces—a consequence of what is known as the “Videotron Effect”.¹⁵

B. VIDEOTRON’S PLAN TO BECOME CANADA’S FOURTH NATIONAL CARRIER

41. To its credit, Videotron has had a longstanding ambition to expand its business to the rest of Canada and has actively pursued opportunities over the years to do so. Its acquisition of Freedom will allow it to quickly and efficiently realize this ambition, and fulfil the federal government’s policy of achieving a fourth national wireless carrier, with over [REDACTED] million subscribers across Canada’s four largest provincial markets. The Commissioner asks the Tribunal to block a major fast-forward in Videotron’s ability to develop its presence in Ontario, Alberta, and British Columbia without the barriers it would otherwise face as a new market entrant.¹⁶ The rationale for his position is difficult to appreciate, to say the least.

42. Videotron’s decision to acquire Freedom was not made lightly. It was a carefully considered business judgment, backed by an initial investment of nearly \$3 billion from Videotron’s parent company, Quebecor Inc., with billions more in committed investments over the coming years.

43. The Tribunal will hear evidence from Videotron’s senior leadership about the detailed financial planning that has gone into this decision. They have developed a competitive strategy by which to aggressively market wireless services under both the Freedom and Fizz banners, with prices [REDACTED] lower than what is currently offered in Ontario, Alberta, and British Columbia.¹⁷ The transaction is fully backed by Videotron’s President, Mr. Péladeau, who has affirmed his personal commitment to that growth strategy as Videotron’s controlling shareholder.¹⁸

¹⁵ Lescadres Affirmative, para. 6.

¹⁶ Affirmative Witness Statement of Pierre-Karl Péladeau (“Péladeau Affirmative”), signed September 23, 2022, paras. 7, 24-34.

¹⁷ Lescadres Affirmative Witness Statement, paras. 162-164.

¹⁸ Péladeau Affirmative, para. 48.

44. Mr. Péladeau recently underscored that commitment. On October 25, 2022, the Minister of Industry announced conditions that Videotron must satisfy to obtain the transfer of Shaw’s spectrum licences: first, that Videotron maintain those licences for at least 10 years, because “a new service provider would need to be in it for the long run”, and second, that Videotron’s prices for wireless services in Ontario and Western Canada be reduced to the pricing levels that Videotron is currently offering in Quebec.¹⁹

45. Mr. Péladeau embraced these conditions unequivocally and without hesitation in a press release issued later that evening. He explained that they are “in line with our business philosophy” and that Videotron “will work to deliver better prices for Canadians in the other provinces and to end the reign of the ‘Big 3’”:

We are pleased to see that Minister Champagne recognizes and supports the highly competitive environment created by Videotron in Québec's wireless market over the past several years, which has brought Quebecers the lowest prices and best wireless plans in Canada. We intend to accept the conditions stipulated by the Minister and incorporate them into the new version of the Rogers-Shaw/Quebecor-Freedom Mobile transaction, which has already been negotiated. They are in line with our business philosophy, which has proved highly successful in Quebec, where we have taken a significant market share in a very short span of time. We will work to deliver better prices for Canadians in the other provinces and to end the reign of the ‘Big 3’ by promoting competition, the public interest and the digital economy in Canada.²⁰

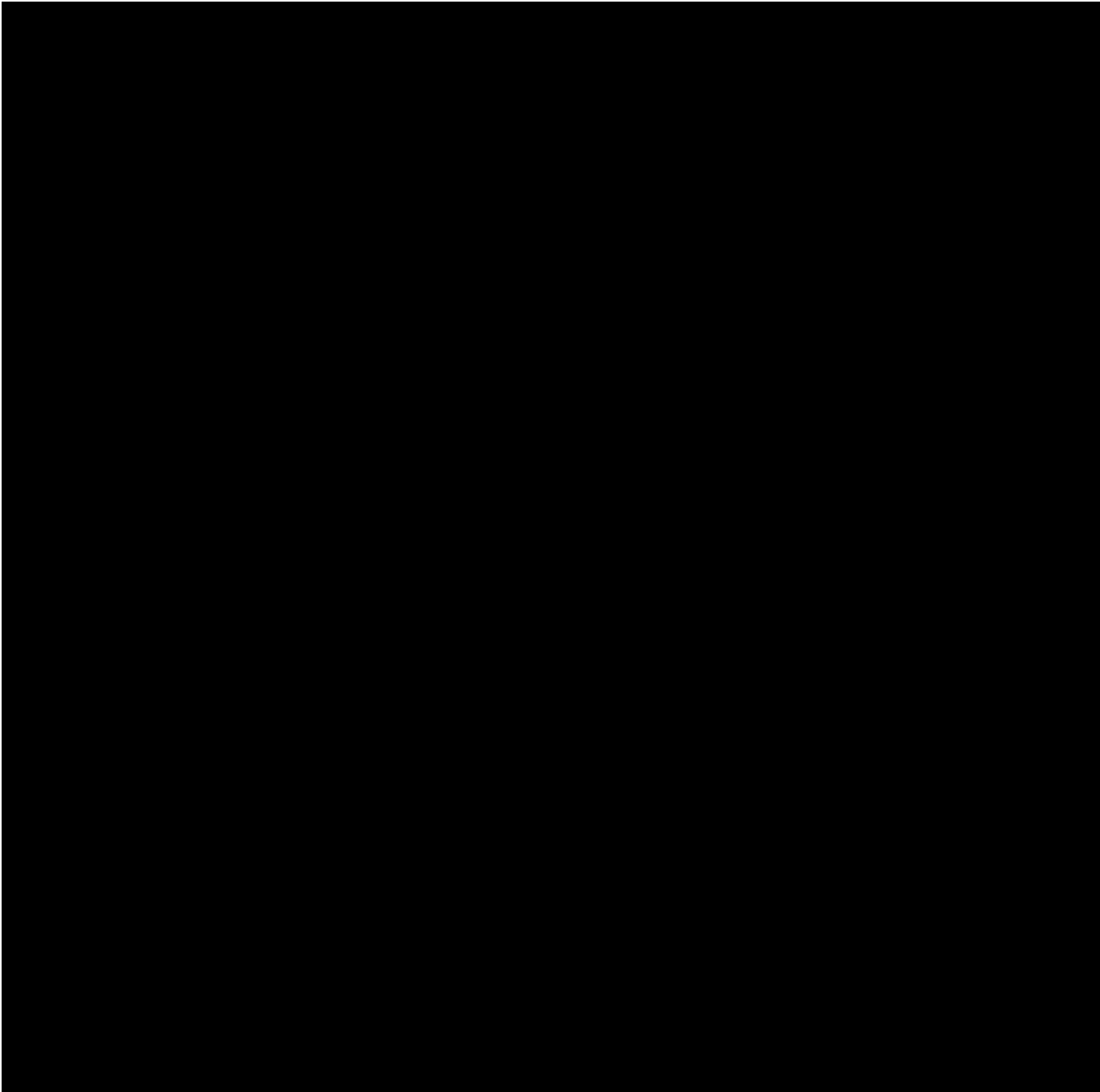
C. THE TRANSACTION ENHANCES FREEDOM’S COMPETITIVENESS UNDER VIDEOTRON

46. Videotron drove a hard bargain to secure the assets, transition services, and network access rights it considered “necessary to operate the Freedom business successfully”.²¹ This includes Freedom’s [REDACTED] million subscribers, cell sites, spectrum licences, microwave backhaul systems, fibre backhaul leases, roaming agreements, and Freedom’s brand and distribution network.

¹⁹ [“Statement from Minister Champagne on competitiveness in the telecommunications sector”](#), October 25, 2022.

²⁰ [“Pierre Karl Péladeau comments on announcement by the Minister of Innovation, Science and Industry of Canada concerning the proposed Rogers-Shaw merger”](#), October 26, 2022

²¹ Lescadres Affirmative, para. 118.



48. The Tribunal will hear from Videotron executives about the benefits of these assets [REDACTED] [REDACTED] for effective competition. It will also hear from two seasoned industry experts called by Shaw and Rogers: Dr. William Webb, the Chief Technology Officer at a leading global public policy firm focused on the technology sector, and Kenneth Martin, a

²² See Prevost Affirmative, para. 84; Lescadres Affirmative, paras. 136(a)-(c), 157(a)-(c).

²³ Affirmative Witness Statement of Paul McAleese (“**McAleese Affirmative**”), affirmed September 23, 2022, para. 370.

²⁴ McAleese Affirmative, para. 364.

leading telecommunications consultant and strategist. Each has over twenty years' experience advising wireless businesses in Canada, the United States, and internationally. They will testify to the significant technological and competitive advantages that Freedom will enjoy under Videotron, including:

- (a) [REDACTED] The right to use radio wave frequencies for the transmission of data (known as “spectrum”) is far and away the most important component of a wireless business. To deliver a “true” high-speed, data-intensive 5G experience, mid-band spectrum (generally available in frequency bands such as 3500 and 3800 MHz) is critical. In 2021, Videotron acquired valuable mid-band spectrum licences across Freedom’s network footprint for nearly \$830 million. [REDACTED]

[REDACTED]

- (b) [REDACTED]

- (c) Greater scale. These favourable transaction terms for Videotron will be coupled with the much greater scale of the combined entity. Doubling the number of subscribers (from [REDACTED] million to [REDACTED] million) will lead to superior economics, supporting future investments and increasing Videotron’s negotiating power with

²⁵ Affirmative Expert Report of William Webb (“Affirmative Webb Report”), dated September 23, 2022, paras. 99-114; Affirmative Expert Report of Kenneth J. Martin (“Affirmative Martin Report”), September 23, 2022, paras. 50-55.

²⁶ Affirmative Martin Report, paras. 56-57; Affirmative Webb Report, paras. 76-98; Lescadres Statement, paras. 171-176.

suppliers. Conservative estimates suggest these savings at [REDACTED] dollars per year;²⁷ and

- (d) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

D. FREEDOM WILL NOT BE RELIANT ON SHAW’S WIRELINE ASSETS

49. Central to the Commissioner’s request of this Tribunal to block the transaction is his argument that Freedom will be unable to remain competitive if separated from Shaw’s wireline network. This construct, at odds with market reality, rests on the false premise that owning wireline assets permits a carrier to compete more effectively in the wireless market by enabling it to:

- (a) Offer bundled discounts on wireless and wireline services; and
- (b) Self-supply fibre “backhaul”, which refers to the wireline facilities that carry voice and data from the towers (cell sites) that communicate with wireless devices and transmit them to the core network—the “brain” of the wireless network which routes traffic to their ultimate destinations.

50. The evidence at trial will not support the Commissioner’s argument. Freedom today does not engage in any meaningful bundling. It has been a successful competitor under Shaw despite never having owned *any* of the wireline assets used to deliver wireless services. There is no reason to believe Videotron cannot replicate Freedom’s prospects, [REDACTED]

[REDACTED]
[REDACTED]

²⁷ Affirmative Martin Report, paras. 34-46; Lescadres Statement, paras. 209 & 215.

A. Videotron Will Not Be Disadvantaged on Bundling

51. The Commissioner claims that “bundling is essential to compete successfully in the Canadian market”, and that wireline ownership allows for more competitive bundles compared to TPIA.²⁸ But the evidence will show that the expert on whom he relies for this point—Michael A. Davies—[REDACTED] and his opinion rests on a misunderstanding of Freedom’s business, the role of bundling in the Canadian wireless market, and the opportunities that Videotron will have if the transaction proceeds. To the contrary:

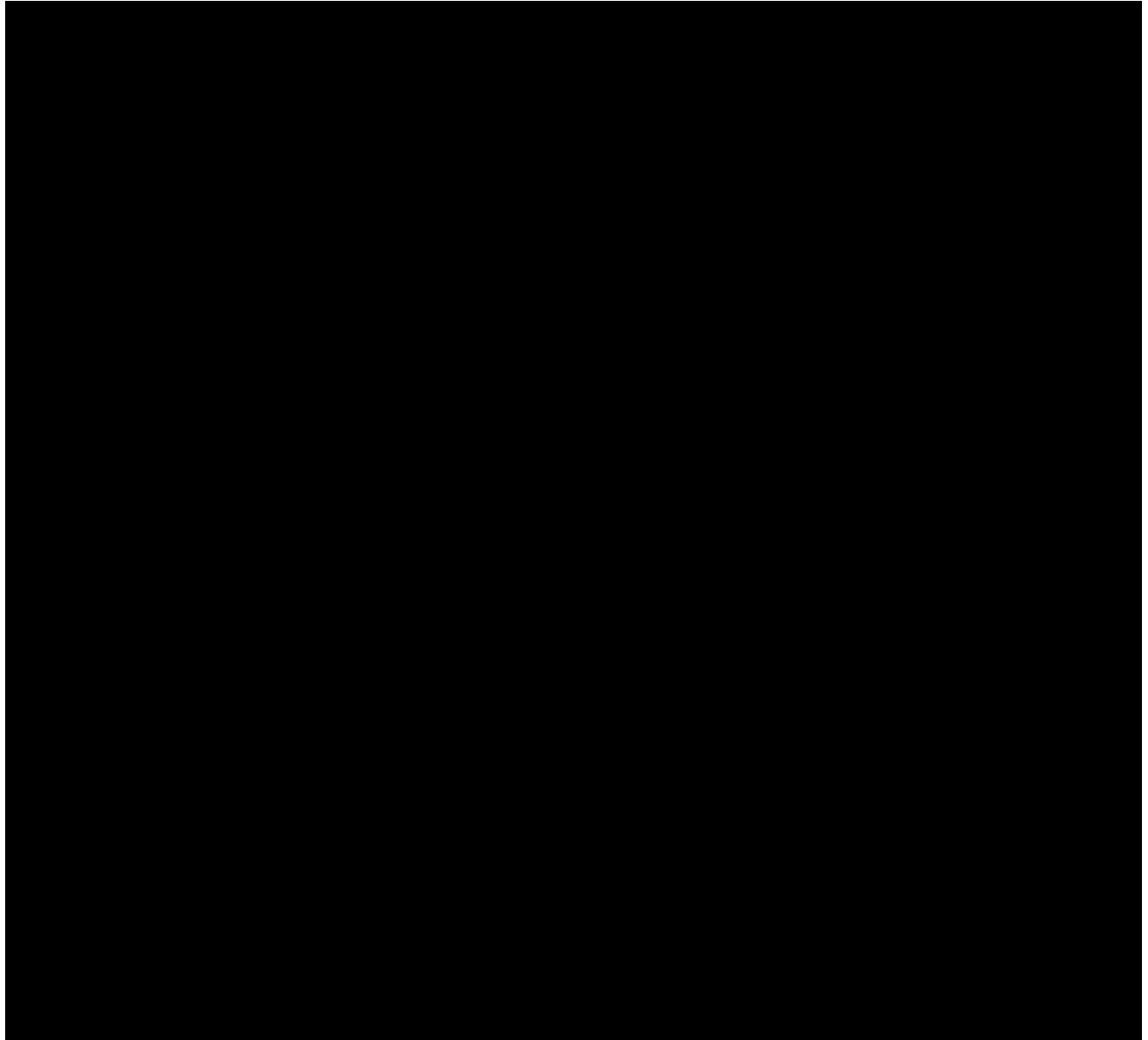
- (a) Freedom Mobile operates almost exclusively as a stand-alone wireless offering, and bundling has never been part of its competitive strategy. Less than [REDACTED] of its subscriber base purchases wireline internet through the Freedom Gateway brand. [REDACTED]
- (b) Bundling is not “essential” to effective wireless competition generally. Rogers and Bell have gained sizeable market shares in Western Canada (together, approximately [REDACTED] in British Columbia and [REDACTED] in Alberta), and Telus has in Eastern Canada (approximately [REDACTED] in Ontario and between [REDACTED] in Atlantic Canada), without the ability to cross-sell wireline and wireless services.³⁰ This is because wireless-only carriers can drive growth by competing on other dimensions—*e.g.* price, plan options, branding, and product features;
- (c) The Commissioner’s position is contradicted by his own office’s analyses on wireline/wireless bundling. In a 2019 study conducted jointly with the Ministry of Innovation, Science and Economic Development, the Competition Bureau found that only 17% of respondents bundled wireless and internet services, as opposed to the 56% that bundled internet and television, and 43% that bundled internet and home telephone. Likewise, in a study on competition in Canada’s broadband industry, the Competition Bureau found that “[b]undling can make sense from a

²⁸ Reply Expert Report of Michael A. Davies (“**Davies Reply Report**”), dated October 20, 2022, heading III.(B).

²⁹ McAleese Affirmative, paras. 12 & 350(a).

³⁰ McAleese Affirmative, para. 211.

consumer’s perspective”, but that “wireless phone services . . . are less frequently bundled with Internet service—nearly four out of five consumers who have a bundle reported that their wireless phone is not part of it”.³¹ Statistical evidence shows that Canadians place more value on selecting their service providers independently than they do on bundling;³²



³¹ Competition Bureau, “[Delivering Choice: A Study of Competition in Canada’s Broadband Industry](#)”, August 7, 2019, p. 27.

³² Martin Affirmative Report, paras. 99-101.

³³ Lescadres Affirmative, para. 181.

³⁴ Lescadres Affirmative, paras. 36-44.

³⁵ Lescadres Affirmative, paras. 182-185.

³⁶ Lescadres Affirmative, paras. 178 & 180.

[REDACTED]

[REDACTED]

53. The Commissioner will also lead evidence from Distributel Communications, which was recently acquired by Bell, that “it would not be feasible” for Distributel to use TPIA for the wireline component of an internet/mobile phone bundle.³⁷ Mr. Davies goes one step further, suggesting that Videotron is “not likely” to replicate the TPIA success in Abitibi across other markets.³⁸

54. This evidence does not square with market realities or Videotron’s proven capabilities. More than a million Canadians purchase TPIA-based internet service. The Competition Bureau itself recognized that TPIA providers have increased wireline competition.³⁹ And Videotron is not Distributel. [REDACTED]

[REDACTED] In any event, evidence from Videotron will reveal that Distributel’s financial analysis rests on several errors and incorrect assumptions which, when corrected, confirm that Videotron is able to provide bundled services at attractive prices with a healthy rate of return. It has a demonstrated history of making good on such commitments.⁴⁰

B. Videotron Will Not Be Disadvantaged Without Self-Supply of Fibre Backhaul

55. The Commissioner further asserts that “[a]ccess to robust backhaul and fibre would be lost with an independent Freedom without its own wireline network”.⁴¹ Again, this assertion glosses over market realities. His evidence ignores the manner in which Freedom actually procures its backhaul and the robust, competitive market for backhaul that all major wireless carriers participate in. It also ignores the fact that neither Bell nor Telus entirely self-supply backhaul and—like Freedom—rely on backhaul leases from third parties.

³⁷ Affirmative Witness Statement of Christopher Hickey (“**Hickey Affirmative**”), affirmed September 23, 2022, para. 15.

³⁸ Reply Davies Report, para. 34.

³⁹ McAleese Statement, at paras. 383-384.

⁴⁰ Reply Witness Statement of Jean-Francois Lescadres (“**Lescadres Reply**”), signed October 29, 2022, paras. 24-26.

⁴¹ Reply Davies Report, para. 61.

56. The Tribunal will also have the benefit of evidence from Shaw and Videotron executives, who are best placed to speak to Freedom's backhaul needs, and the expert opinions of Dr. Webb and Mr. Martin. Their evidence is that Videotron's competitiveness will not be impaired without ownership of fibre backhaul, because:

- (a) [REDACTED]
- (b) Fibre is not the only option for backhaul. Data can also be transmitted between cell sites and the core network *via* wireless microwave facilities, which accounts for [REDACTED]
- (c) Fibre leases are ubiquitous in the industry, which is served by a ready and competitive market. In densely-populated areas, carriers may have as many as six available options for fibre backhaul from sophisticated wireline operators, including Bell, Telus, Rogers, Videotron, and Shaw, as well as communications infrastructure companies like Beanfield and Zayo;⁴⁴
- (d) Backhaul lease costs represent a relatively small share of most wireless carriers' operating costs. [REDACTED]
- (e) As noted above, Canadian wireless carriers can and have succeeded in growing significant market share without ownership of any fibre backhaul assets. Internationally, T-Mobile has grown to become one of the largest and most

⁴² Affirmative Martin Report, para. 78.

⁴³ Affirmative Martin Report, para. 76.

⁴⁴ Prevost Affirmative, para. 32; Affirmative Martin Report, para. 80-81.

⁴⁵ Affirmative Martin Report, para. 77.

successful wireless providers in the United States—with over 72 million subscribers—despite having owned no wireline assets prior to 2020;⁴⁶ and

- (f) Videotron has made the careful, reasoned business judgment that it does not need to own fibre backhaul in order to compete as the new owner of Freedom, especially in light of the favourable backhaul terms that it negotiated from Rogers. Mr. Lescadres will give evidence that this “long-term transport agreement with necessary protections and favourable pricing provided the data transport [Videotron] needed for the wireless network”.⁴⁷

E. VIDEOTRON WILL NOT BE “DEPENDENT” ON ROGERS

57. The Commissioner says a Videotron-owned Freedom [REDACTED]
[REDACTED]

[REDACTED] This bald claim is without merit. Once again, it ignores the reality of network sharing and access for all operators throughout the country.

- (a) First, not a single wireless carrier in Canada has complete ownership over all the network infrastructure on which it relies. Infrastructure leases, indefeasible rights of use, and other contractual arrangements are standard and necessary in the telecommunications industry.⁴⁹ Regulators encourage these kinds of arrangements, as they reduce the barriers to entry for new participants and the cost base of existing participants;

- (b) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁴⁶ Affirmative Martin Report, para. 72.

⁴⁷ Lescadres Affirmative, para. 120.

⁴⁸ Affirmative Davies Report, para. 256.

⁴⁹ Prevost Affirmative, paras. 27-40.

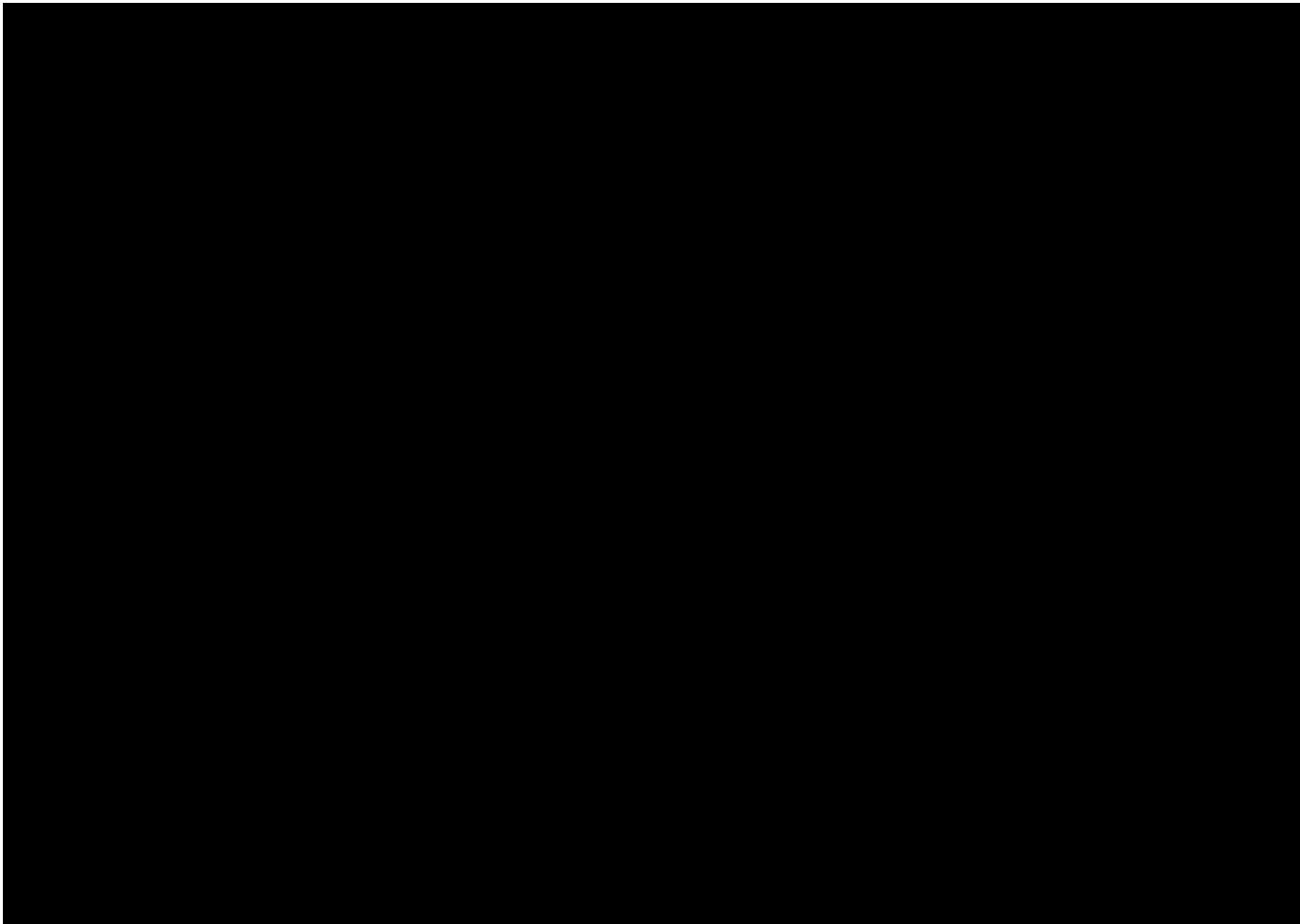
- (c) [REDACTED]
[REDACTED]
[REDACTED]
- (d) Fourth, Bell and Telus have an extensive nationwide network sharing agreement that essentially halves their cost of network investments. The Commissioner has never claimed that this agreement is anti-competitive or creates objectionable dependencies; and
- (e) Finally, Videotron and Rogers have a history of vigorous competition notwithstanding extensive network relationships. Videotron grew a sizeable share of the Quebec market at Rogers' expense, despite being initially reliant on the Rogers' network as an MVNO between 2006 and 2010. In 2013, they entered into a long-term agreement for the joint construction and operation of a wireless network in Quebec and parts of Eastern Ontario. Videotron has not shied away from asserting its legal rights under that agreement. Throughout, Videotron remained a vigorous wireless competitor, with aggressive pricing and attractive offerings [REDACTED] There is no reason to believe that Videotron will not exert the same competitive push against Rogers within Freedom's footprint.⁵⁰

F. “BUT FOR” WORLD: FREEDOM’S CHALLENGING FUTURE IF TRANSACTION IS BLOCKED

58. In the Commissioner's "but for" world, Shaw will remain a vigorous, maverick wireless and wireline competitor enabled by the most favourable terms in the industry. But his evidence mischaracterizes Shaw's place in these markets. [REDACTED]
[REDACTED]
[REDACTED]. It is a selective and backward-looking approach that bears no relation to the headwinds confronting Shaw in a highly capital-intensive and rapidly evolving marketplace.

⁵⁰ Prevost Reply, paras. 61-63; Lescadres Reply, 63-72.

59. The Tribunal will hear [REDACTED] from three of its executives—Chief Executive Officer Bradley Shaw, President Paul McAleese, and Executive Vice President Trevor English—as well as Rod Davies, the Managing Director at TD Securities Inc. who provided strategic advice to Shaw’s leadership in connection with the transaction. Mr. Shaw will testify to the difficult decision he and his advisors made to sell the business—which had been in his family for over fifty years—[REDACTED]



[REDACTED] The arrangement agreement was endorsed by over 98% of Shaw’s shareholders, and found to be fair and reasonable by the Alberta Court of King’s Bench under the *Business Corporations Act*.

63. The Commissioner’s case does not grapple with this evidence. His “but for” world is based on a curated sampling of stale-dated memos and slide decks about competitive pressures

⁵¹ Reply Witness Statement of Paul McAleese (“**McAleese Reply**”), affirmed October 20, 2022, para. 12.

exerted by Shaw and Freedom in the past—in some cases, from many years ago. But the telecommunications industry is dynamic and changing. The competitive realities that existed when Freedom entered the wireless market, when it introduced the “Big Gig” plans, and even when Shaw Mobile was launched, are not the same as they are today. The past is not a crystal ball into the future. The “but for” world requires a *forward-looking* analysis, and not a glance at the rear-view mirror. None of the Commissioner’s experts contend with Shaw’s judgment about its own competitive *future*, including that of Freedom under its ownership.

64. The Tribunal should approach the Commissioner’s predictions about Freedom’s future with caution. Freedom faces formidable challenges in two key respects if the sale to Videotron is blocked:

(a) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Granting the Commissioner’s request will set Shaw and

⁵² McAleese Affirmative, paras. 157-163.
⁵³ Notice of Application, para. 98.

Freedom back years, stifle innovation and the rollout of 5G technologies, deprive Videotron of an unprecedented opportunity for national expansion, prevent Rogers from constructing a national wireline network, and [REDACTED]

66. This is the worst possible outcome for the wireless industry and the worst possible outcome for consumers. The primary effect of the block that the Commissioner seeks will be to further entrench Bell and Telus at the expense of consumers and their competitors. Indeed, the only beneficiaries would be Bell and Telus, who have vocally opposed this transaction at every turn and before every regulatory body.

67. The role of Bell and Telus bears mention. They [REDACTED] produced five witnesses to testify on his behalf (including a representative of Distributel). These are the Commissioner's main fact witnesses.

68. Bell and Telus are not disinterested observers. [REDACTED]

Bell and Telus' evidence in support of the Commissioner will have to be viewed through that lens, with a healthy dose of skepticism.

PART V - SHAW MOBILE IS NOT A "DISRUPTIVE" WIRELESS PLAYER

69. The Commissioner's core objection to the transaction is that Shaw Mobile subscribers will be transferred to Rogers, which the Commissioner says will eliminate the "significant and growing impact" Shaw Mobile was having on the wireless market. The Commissioner's position rests on a fundamental mischaracterization of Shaw Mobile as a wireless-only product when it is in fact a bundled product; [REDACTED] of Shaw Mobile customers are also Shaw wireline customers.⁵⁴

⁵⁴ McAleese Affirmative, para. 292.

70. When properly viewed as a bundled product, Shaw Mobile was not actually offered at an aggressive discount, [REDACTED] and the transaction will increase, not decrease, competition between bundled products. Shaw Mobile was never a “highly discounted” or “maverick” competitor. It was a bundled product offered at market rates as a wireline retention tool.

A. SHAW MOBILE IS A BUNDLED WIRELINE PRODUCT, NOT A WIRELESS COMPETITOR

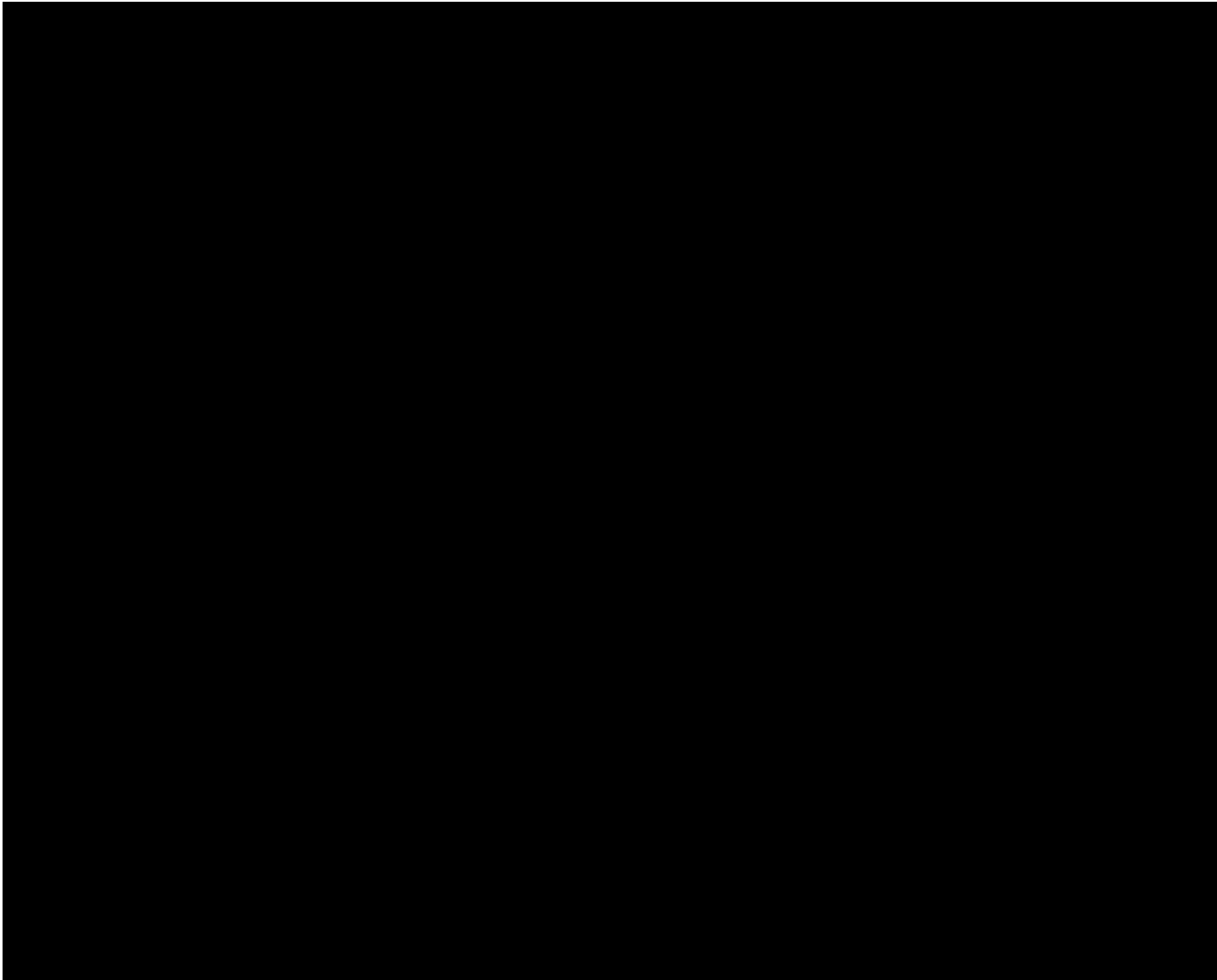
71. Shaw Mobile is not a true wireless product. It is a brand name through which Shaw offers discounted wireless plans to its internet customers in Alberta and British Columbia over the Freedom network. It does not own any physical network infrastructure or spectrum licences.

72. Shaw Mobile launched in July 2020 as a strategy to counteract aggressive competition from Telus and stem losses from Shaw’s wireline base. Consistent with this strategy, [REDACTED] [REDACTED] And it has no presence in Ontario, as Shaw does not offer residential internet in that market.

73. Although Shaw Mobile is offered on a stand-alone basis, [REDACTED] [REDACTED] pricing is the same as Bell, Telus and Rogers—but on an inferior network without 5G. It offers no value to subscribers looking for a wireless-only product.⁵⁵

	Bell	Rogers	TELUS	Shaw Mobile
Unlimited Canada talk and text, unlimited (25 GB) data	\$85 /month	\$85 /month	\$85 /month	\$85 /month

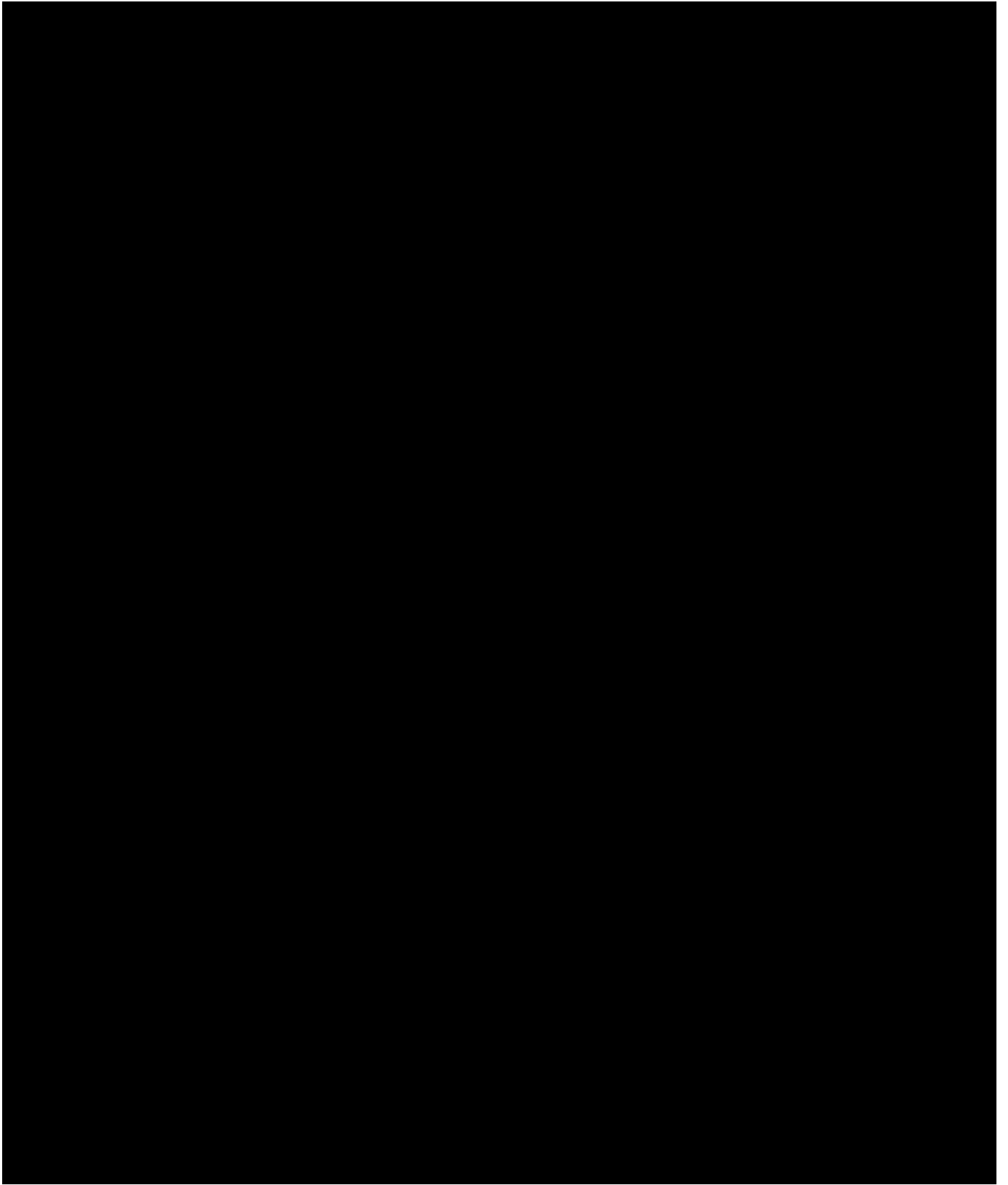
⁵⁵ McAleese Reply, paras. 131-132.



⁵⁶ Lescadres Affirmative, para. 110.

⁵⁷ McAleese Affirmative, paras. 292-293.

⁵⁸ Affirmative Expert Report of Nathan Miller (“**Affirmative Miller Report**”), dated September 21, 2022, para. 46; Reply Expert Report of Nathan Miller (“**Miller Reply Report**”), dated October 20, 2022, para. 34.



⁵⁹ McAleese Affirmative, paras. 292, 297.

⁶⁰ McAleese Affirmative, paras. 267-268.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

81. Rogers will face the same competitive pressures in Alberta and British Columbia that led Shaw to introduce Shaw Mobile. [REDACTED]

[REDACTED]

[REDACTED] Rogers will have every incentive to compete at least as vigorously as Shaw if the transaction proceeds.

⁶¹ Prevost Reply, para. 48.

⁶² Affirmative Expert Report of Mark Israel (“Affirmative Israel Report”), dated September 23, 2022, para. 163.

PART VI - THE COMMISSIONER'S ECONOMIC EVIDENCE

A. NO SUBSTANTIAL LESSENING OF COMPETITION

82. Under s. 92 of the *Act*, the Commissioner must establish a “substantial” lessening of competition. He has not done so.

83. The Commissioner’s economist, Dr. Miller, purports to model the alleged anti-competitive effects of this transaction. His model is fundamentally flawed and unreliable. But even if Dr. Miller’s model were accepted without question, the Commissioner does not meet his burden of showing a “substantial” lessening of competition resulting from the transaction.



B. COMMISSIONER'S ECONOMIC MODEL IS FLAWED AND UNRELIABLE

86. As discussed above, even if the Commissioner’s economic evidence were accepted without question, he cannot meet his burden to show a substantial lessening of competition. But that evidence is also fundamentally flawed and unreliable.

87. Dr. Miller’s September 23 report sets out an economic model intended to analyze the transaction and predict its alleged anticompetitive effects. His analysis has the same fundamental flaw as the Commissioner’s case; Dr. Miller proceeds on the basis that Shaw Mobile is a wireless

⁶³ Affirmative Miller Report, Exhibit 22, p. 110. Dr. Miller claims a price increase of 2.5% in British Columbia and 0.8% in Alberta.

⁶⁴ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, para. 46, citing *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.*, [1992] 41 C.P.R. (3d) 189 (Comp. Trib.), pp. 328-29.

product, rather than the bundled product that it is. He acknowledges that Shaw Mobile customers are tied to their Shaw wireline service, but fails to properly account for that fact in his analysis.

88. Dr. Miller's model is limited to the wireless market and he makes no attempt to model impacts in the wireline market. But this approach fails to account for what is actually happening in the transaction, namely that Shaw's *wireline* assets are transferring to Rogers while its *wireless* assets are transferring to Videotron. As a result, Dr. Miller has no model of the actual dynamics at play in the market.

89. Even setting aside this fundamental problem, Dr. Miller's analysis rests on several restrictive and unrealistic assumptions, none of which is supportable. As set out in the responding reports of Rogers' expert, Dr. Israel, partially adjusting some or all of these assumptions significantly reduces or eliminates the harm Dr. Miller predicts.

A. No Preference for Bundled Products

90. Dr. Miller does not account for the possibility that some customers have a preference for wireless-wireline bundles, versus standalone wireless products. Rather than model bundled customers as more likely to substitute to another bundled product, he assumes customers substitute between all products in proportion to their aggregate share in the market. In other words, Dr. Miller assumes that bundled customers and non-bundled customers are equally likely to switch to a given product, regardless of whether it is bundled or not.

91. As Dr. Israel explains in his October 20 reply report, if this assumption is partially adjusted, and the model is allowed to consider even a mild preference among bundled customers for bundled products, the predicted price effects are significantly reduced. Holding all other aspects of Dr. Miller's analysis constant, the predicted total consumer surplus loss drops by [REDACTED]

B. Assumed Transfer of Wireless Assets

92. Dr. Miller incorrectly assumes that all of Shaw's *wireless* assets are being transferred to Rogers, notwithstanding that the opposite is true—all of those assets are being transferred, along with Freedom, to Videotron. Specifically, Dr. Miller's model assumes that all of the assets used

to serve the Shaw Mobile customers are transferred to Rogers, which must include all Shaw's wireless assets.

93. Dr. Miller defends this aspect of his model by arguing that it is Shaw's *wireline* assets that are most important to Shaw Mobile customers, but this causes more problems for his analysis than it solves:

- (a) First, it is inconsistent with Dr. Miller's assumption that bundled customers do not have a preference for bundled products. If Shaw Mobile's bundled customers are driven to choose the product primarily by their preference for the wireline service, then they must have different product preferences from wireless-only customers at other carriers.
- (b) Second, unless Shaw Mobile customers care *only* about their wireline service and *not at all* about their wireless service, the problem remains. Dr. Miller's analysis assumes that the assets used to provide the wireless services Shaw Mobile's customers seek are being transferred to Rogers when they are not. Freedom keeping these assets means it will be a stronger competitor after the merger than Dr. Miller assumes in his model, and the effects of moving Shaw Mobile to Rogers are milder than his model predicts.

94. The underlying problem is Dr. Miller's attempt to make unrealistic simplifying assumptions that have a material impact on his analysis and bias the results towards greater predicted harm. By contrast, Dr. Israel provides the Tribunal with a range to consider between "all assets transferred" and "no assets transferred". Partially adjusting Dr. Miller's assumption again has a significant impact on the result, with the "no assets transferred" assumption generating a welfare-positive transaction.

C. Share of Gross Adds as Proxy for Market Share

95. Dr. Miller uses a measure called "share of gross adds" (SOGA) as a proxy for the market shares that his model requires. Gross adds refers to the sum of all subscribers each month who are either new to the wireless market or who switch providers. A company's SOGA refers to the percentage of all gross adds captured by that company in a given month.

96. Gross adds represent only a small fraction of the market, because it excludes all subscribers who do not switch providers. In the period Dr. Miller considers, January through April of 2021, gross adds were on average only [REDACTED] of total wireless subscribers in British Columbia and Alberta. That is a very small fraction of the market on which to base his analysis.

97. Dr. Miller acknowledges in his October 20 report that SOGA overstates the market shares that his model requires as an input, the necessary implication of which is that using SOGA biases his results upward to higher predicted welfare losses.⁶⁵ Nevertheless, Dr. Miller defends his use of SOGA on the basis that it is a reasonable proxy and better than the alternative of using each company's actual share of subscribers in the market. Dr. Miller's position does not withstand scrutiny:

- (a) Dr. Miller argues that because Shaw Mobile was a new product during the period he considered (January to April 2021), its share of total subscribers did not represent its long-term potential—it was still in growth mode. That may be true, but it also underscores the problem with his use of SOGA.

As Dr. Israel explains, a new product is expected to have an initial burst of success, followed by a steady decline in its growth rate. By using Shaw Mobile's SOGA from shortly after its launch as a proxy for its long-term market share, Dr. Miller assumes an artificially inflated competitive significance for Shaw Mobile.

[REDACTED]
[REDACTED]
[REDACTED] Yet Dr.

Miller simply takes an average of the last four of those months and assumes that average represents Shaw Mobile's long-run steady-state performance:

⁶⁵ Miller Reply Report, paras. 34, 41 & 46.



As can be seen from the period after Dr. Miller considered, [REDACTED]

[REDACTED]

[REDACTED]

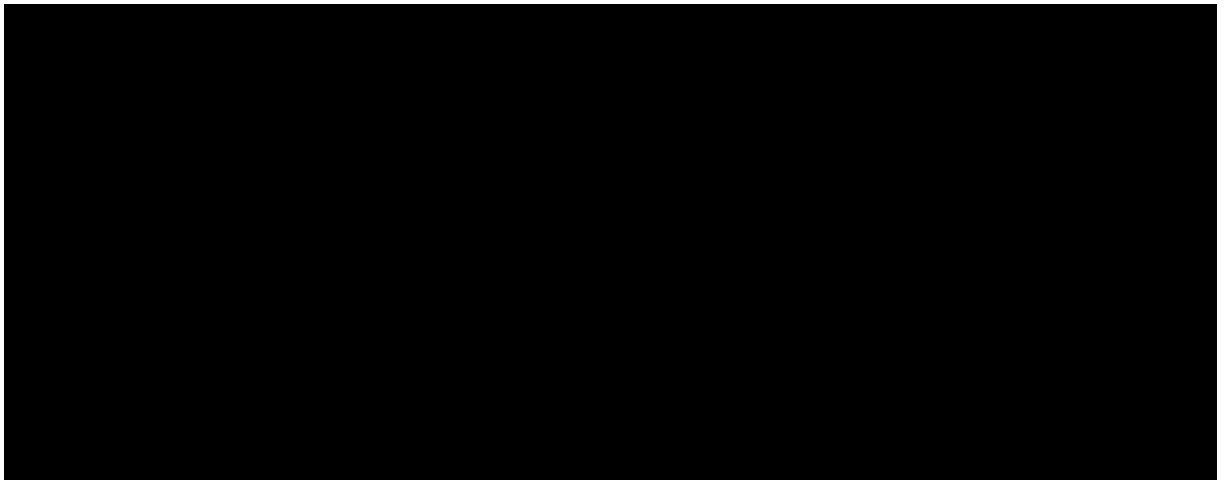
- (b) Dr. Miller argues that SOGA represents “actively shopping customers”, giving a better indication of customer preferences than overall subscriber shares. But that is not what SOGA represents—it considers only those consumers who decided to switch providers (or entered the market for the first time). It does not account for consumers who considered switching and decided not to do so.

They, too, are “actively shopping customers”, but ones that Dr. Miller’s use of SOGA does not capture. This is a significant omission, especially when considering a new product like Shaw Mobile with a small base of existing

⁶⁶ Affirmative Israel Report, para. 64, Figure 2, p. 43.

customers. Excluding existing customers who decide to stay with their current provider significantly biases the results.

There is no way to know what percentage of existing subscribers are actively shopping each month, but given the maximum contract length is two years and many subscribers will not be on contract at all, a conservative assumption is that most subscribers consider whether to switch at least once every two years. Dr. Israel calculates what Shaw Mobile’s share of “actively shopping customers” would be if that were the case, as well as under alternate scenarios of existing customers considering switching every year or every three years. In all cases, the results are significantly lower than Dr. Miller’s use of SOGA:



Using any of these shares, rather than Dr. Miller’s inflated market share based on SOGA, would, though still incorrect, significantly reduce the effects predicted by his model.

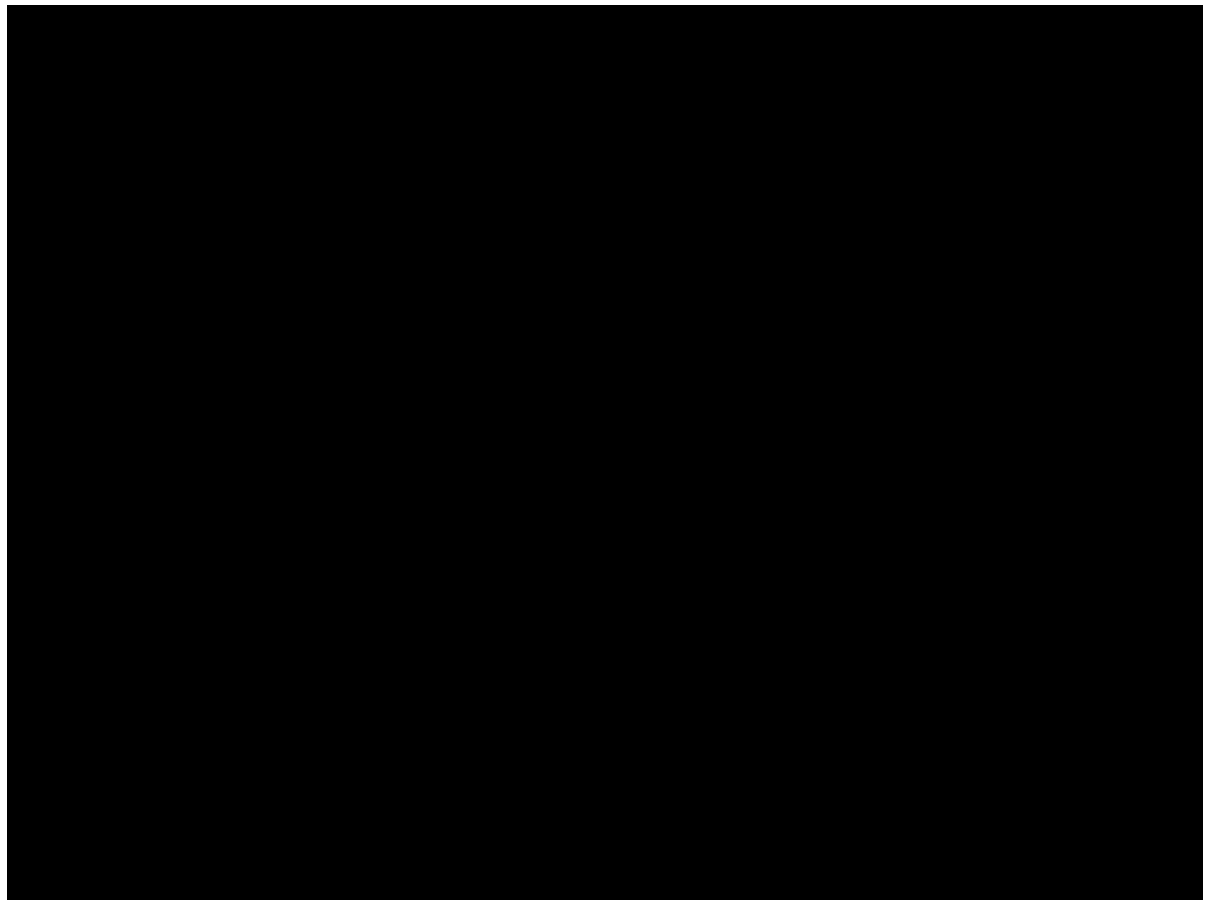
- (c) Dr. Miller argues that whatever the flaws with SOGA may be, it would be much worse to use Shaw Mobile’s market share from a period—January to April 2021—when it was still new and growing. But even this explanation (which is not correct on the facts) fails to explain why Dr. Miller does not use more recent data.

Dr. Israel used the most recent data available to calculate Shaw Mobile’s market share as at the end of March 2022—a year after the period Dr. Miller considers

⁶⁷ Affirmative Israel Report, para. 62, Figure Table 2, p. 40.

and a year and a half after Shaw Mobile's launch. This shows an average market share of [REDACTED] across BC and Alberta, as compared to Dr. Miller's assumed average market share of approximately [REDACTED].

The data also show that Shaw Mobile market share had plateaued by this point and its [REDACTED]. The following graph shows Shaw Mobile's share of subscribers in BC and Alberta (solid lines), as compared to the SOGA assumed by Dr. Miller (dashed lines):



Holding all other aspects of Dr. Miller's analysis constant, but replacing his SOGA numbers with Shaw Mobile's actual market share in March of 2022, results in the predicted total consumer surplus loss dropping by [REDACTED].

⁶⁸ Affirmative Israel Report, para. 64, Figure 3, p. 44.

D. Failure to Account for Marginal Cost Savings

98. Dr. Miller disregards the quantified marginal cost savings Freedom will realize as a result of the transaction, and the pro-competitive impact they will have on prices. These come from three sources: [REDACTED]

99. Dr. Israel calculates a range for these marginal cost savings, from [REDACTED] [REDACTED] Dr. Israel also identifies several other categories of marginal cost savings that are certain to arise but that he does not have sufficient information to quantify.⁷⁰

100. Dr. Miller dismisses all of these marginal cost savings, primarily on the basis that they are not “resources savings”, but rather “rearrangements of existing contractual agreements.”⁷¹ This misses the point. The savings Dr. Israel quantifies are not productive efficiencies under s. 96 of the *Act*. They are marginal cost savings that will give Freedom the incentive to lower prices and compete more aggressively. Because these savings impact competitive incentives, they are to be considered under s. 92.⁷²

101. Dr. Miller’s refusal to include these savings when modeling the transaction means his analysis focuses exclusively on the alleged harm while ignoring the corresponding benefits. In Dr. Miller’s October 20 report, he claims to run a version of his model incorporating marginal cost savings, but significantly discounts those savings to the point they have little impact and arbitrarily dismisses the welfare gains generated in Ontario. As a result, his harm predictions remain inflated and unreliable.

102. Holding all other aspects of Dr. Miller’s analysis constant, but incorporating the marginal cost savings quantified by Dr. Israel, results in the predicted total consumer surplus loss

⁶⁹ Affirmative Israel Report, para. 95, Table 6, p. 60.

⁷⁰ Affirmative Israel Report, paras. 96-105.

⁷¹ Reply Expert Report of Nathan Miller (“**Miller Reply Report**”), dated October 20, 2022, para. 60.

⁷² *Commissioner of Competition v. CCS Corporation*, [2012 Comp. Trib. 14](#), para. 388.

dropping by [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
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F. Dr. Miller's Model Corrected for Faulty Assumptions

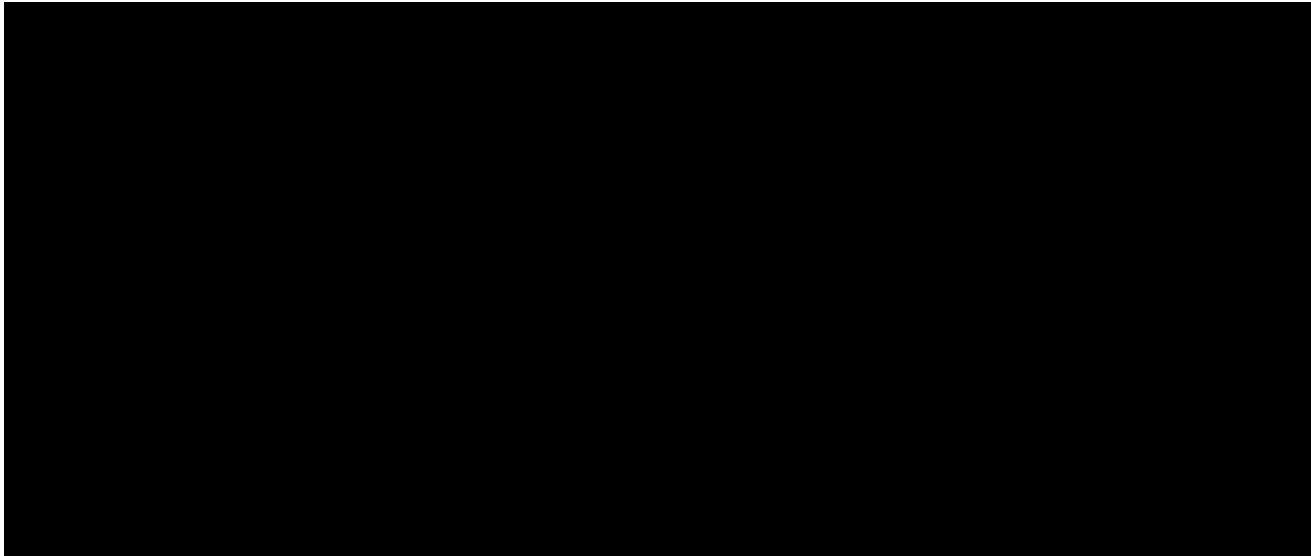
106. The preceding sections outlined the various faulty assumptions underpinning Dr. Miller's analysis of this transaction and the effect of partially adjusting each of them individually. These faulty assumptions were:

- (a) No preference among bundled customers for bundled products;
- (b) Assumed transfer of wireless assets;
- (c) Using SOGA as a proxy for market share;
- (d) Failure to consider marginal cost savings; and

(e) [REDACTED]

107. Leaving aside the second (correcting for which eliminates all harm predicted by Dr. Miller's model), partially relaxing each of Dr. Miller's assumptions at the same time reverses the harm his model predicts.

108. Dr. Israel's analysis shows that accounting for even a mild bundled preference,⁷³ [REDACTED] low-end marginal cost savings, and the most recent market share data available, the transaction is welfare-positive for both producers and consumers in each of British Columbia, Alberta, and Ontario. Assuming a moderate bundled preference and/or higher marginal cost savings only increases the transaction's benefits:



109. The Commissioner's analysis of the competitive effects of the transaction is flawed and unreliable. But even using Dr. Miller's flawed approach, partially relaxing his unrealistic assumptions completely reverses his predicted effects and shows the transaction is welfare-positive for consumers and producers in all provinces.

⁷³ Accounted for by the "nest parameter" of 0.25.

⁷⁴ Affirmative Israel Report, para. 46, Table 5, p. 29.

PART VII - TRANSACTION GENERATES SIGNIFICANT EFFICIENCIES

110. The efficiencies defence should not have to be considered in this case. As set out above, the transaction is pro-competitive.

111. But if the Tribunal were to accept Dr. Miller’s analysis in its entirety, and if the Tribunal were to conclude that the [REDACTED] increase he predicts amounts to a substantial lessening of competition, then the Tribunal would need to consider the efficiencies likely generated by the transaction. They are substantial—[REDACTED]—and they overwhelm Dr. Miller’s predicted effects.

A. EVIDENCE IN SUPPORT OF EFFICIENCIES

112. Rogers’ evidence of efficiencies comes from Dean Prevost, the president of Rogers’ integration management office (the “**IMO**”), and Marisa Fabiano, a senior vice president of Finance and head of the Value Capture Office, a workstream tasked with quantifying the synergies that are likely to be achieved by combining Rogers’ and Shaw’s respective wireline networks, operations, facilities, personnel, and systems.⁷⁵

113. Videotron’s evidence of efficiencies comes from Jean-Francois Lescadres, Videotron’s Vice-President of Finance and the lead of Videotron’s integration planning, and Mohamed Drif, Videotron’s Chief Technology Officer and lead of network integration planning.⁷⁶

114. The fact evidence in support of the efficiencies is ordinary course documentation that provides the nature, magnitude, and likelihood of the expected efficiencies. The evidence consists of accounting statements, internal studies, strategic plans, integration plans, and management consultant studies that outline expected plans to create synergies.

B. EXPERT EVIDENCE IN SUPPORT OF EFFICIENCIES

115. The productive efficiencies are quantified by Rogers’ expert, Andrew Harington of the Brattle Group. He has previously been retained as an expert by the Commissioner to quantify and evaluate the efficiencies claims of merging parties. Mr. Harington has quantified efficiencies in

⁷⁵ Witness Statement of Marisa Fabiano (“**Fabiano Affirmative**”), affirmed September 23, 2022, paras. 23-43.

⁷⁶ Affirmative Witness Statement of Mohamad Drif (“**Drif Affirmative**”), affirmed September 23, 2022, paras. 154-162.

at least 35 high-profile Canadian mergers and acquisitions, including the Bell-MTS merger. He has been qualified as an expert in efficiencies before this Tribunal on three occasions.

116. Mr. Harington concludes that the discounted net present value of the productive efficiencies that will be realized as a result of the transaction over the next 10 years is between

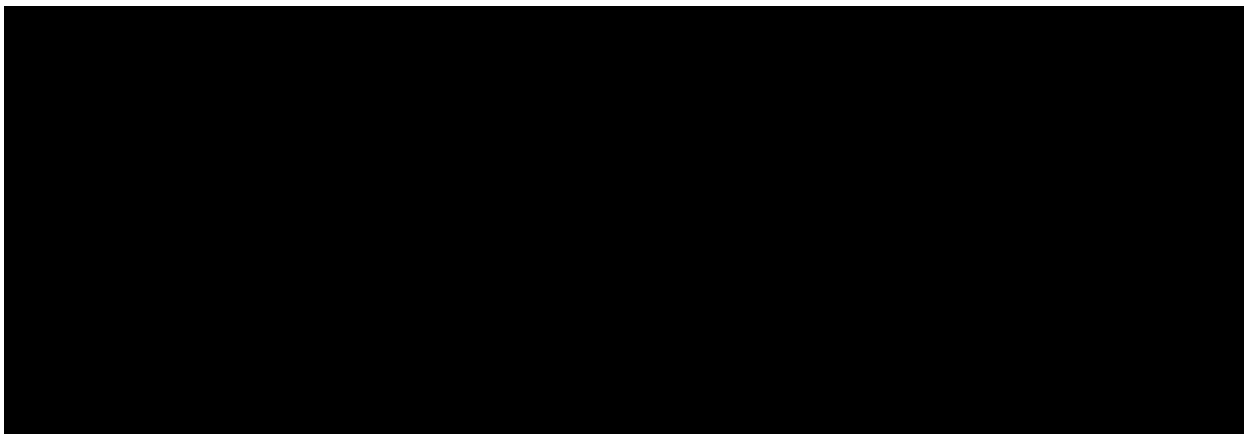
[REDACTED]

Mr. Harington's opinion is summarized in the table below:



C. ROGERS' EFFICIENCIES

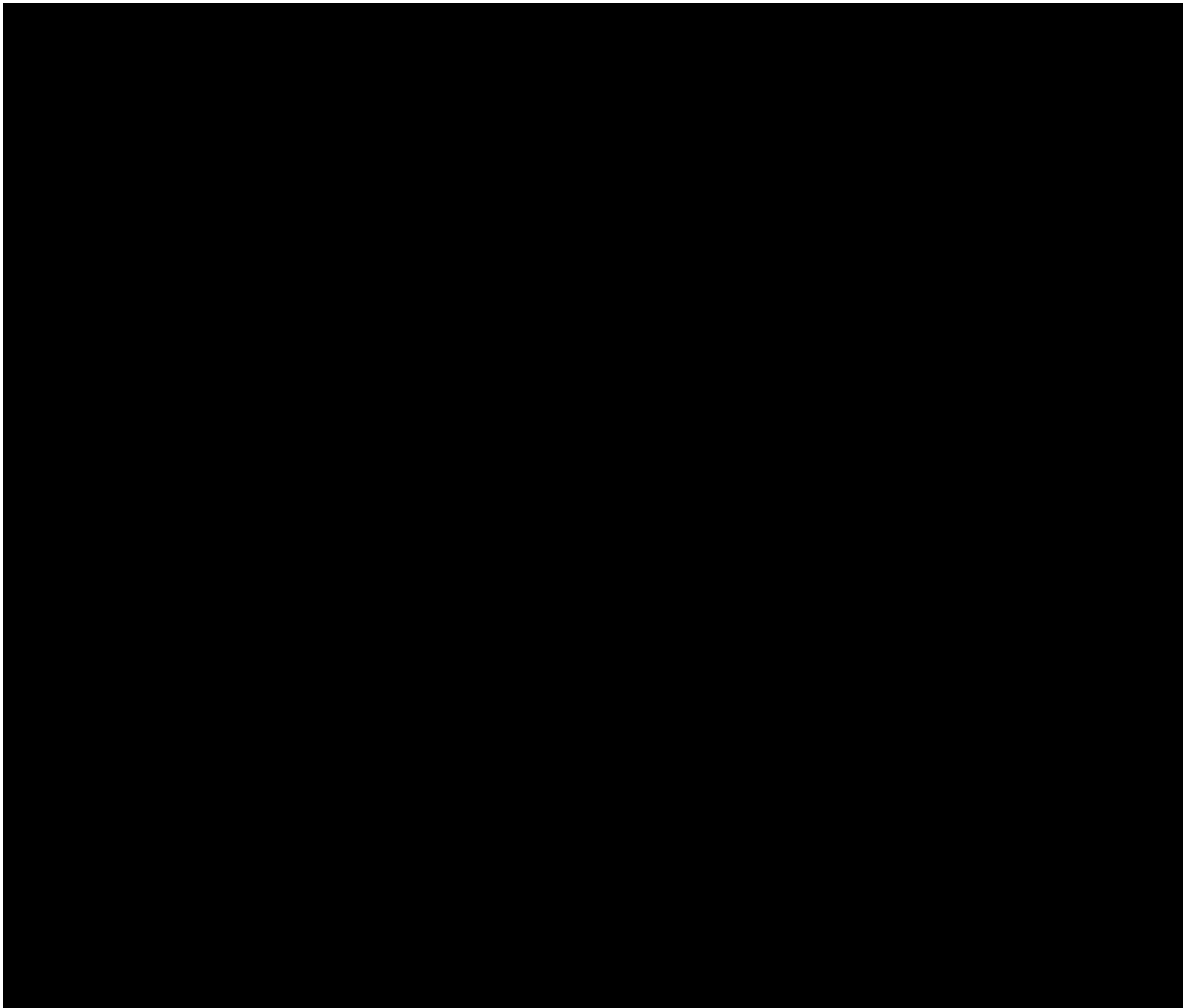
117. Mr. Harington's report identifies the efficiencies with particularity and outlines the nature, magnitude, likelihood, and expected timeframes. The detailed categories of efficiencies are as follows:



⁷⁷ Harington Affirmative Report, paras. 83-87.

⁷⁸ Harington Affirmative Report, paras. 118-127.

⁷⁹ Harington Affirmative Report, paras. 128-135. Mr. Harington's report previously contained an arithmetic error in the value of non-labour-related real estate savings, which has been corrected.



D. VIDEOTRON'S EFFICIENCIES

118. Mr. Harington also quantifies the efficiencies that result from Videotron's cost and resource savings under two scenarios:

⁸⁰ Harington Affirmative Report, para. 136

⁸¹ Harington Affirmative Report, paras. 154-156.

⁸² Harington Affirmative Report, para. 145.

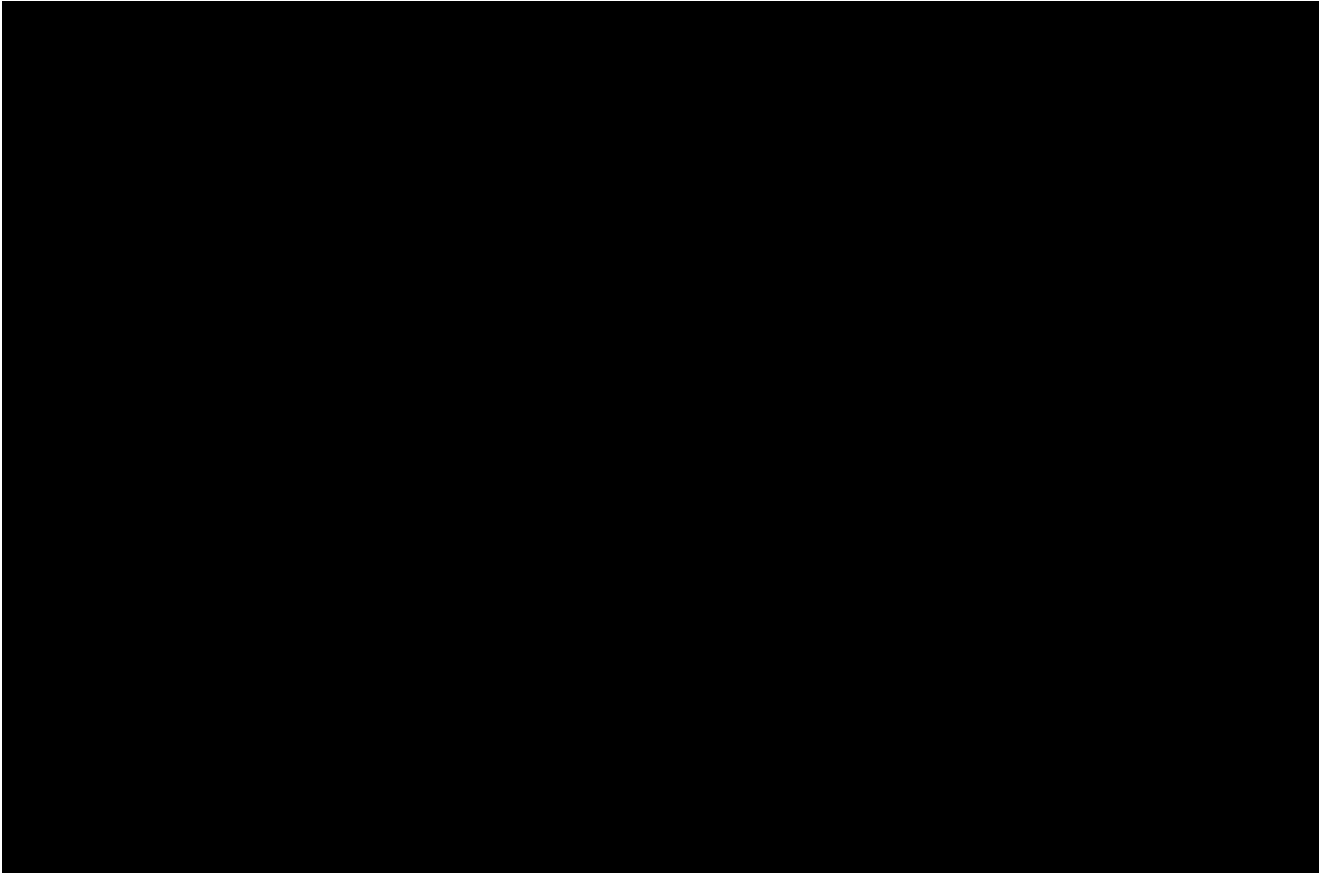
⁸³ Harington Affirmative Report, para. 157-158.

⁸⁴ Harington Affirmative Report, para. 166.

⁸⁵ Harington Affirmative Report, para. 178-182.

⁸⁶ Harington Affirmative Report, paras. 183-184.

⁸⁷ Harington Affirmative Report, paras. 185-187.



E. SPECTRAL EFFICIENCIES

119. The combination of Videotron’s 3500 MHz spectrum with Freedom’s existing network has a multiplicative effect that significantly increases Freedom’s network capacity. This additional capacity represents a more efficient use of existing resources and thus a resource saving to the economy. [REDACTED]

120. As a result of the transaction, Videotron’s 3500 MHz spectrum will be deployed much sooner than it otherwise would, creating additional capacity and allowing additional spectrum that Freedom might otherwise need to be available for other uses. This results in efficiencies both to the Canadian economy (by producing greater output with the same resources) and to Freedom itself (which will avoid the cost of purchasing additional spectrum). [REDACTED]

⁸⁸ Harington Affirmative Report, paras. 192-194.

⁸⁹ Harington Affirmative Report, paras. 242-246.

[REDACTED]

F. COMMISSIONER’S RESPONSE TO EFFICIENCIES

121. The Commissioner’s primary expert in response is Professor Zmijewski, a professor based in the United States. He has not previously been involved in any mandate relating to the evaluation of efficiencies claims under section 96, nor testified as an expert on productive efficiencies in Canada.

122. The Tribunal should approach Professor Zmijewski’s opinion with caution. It should consider the methods employed by Professor Zmijewski to rule on the sufficiency of the evidence regarding efficiencies, against the ordinary normal course documentation before it evidencing the detailed integration plans of Rogers and Videotron.

PART VIII - EFFICIENCIES OVERWHELM ALLEGED EFFECTS

123. As discussed above, the efficiencies the transaction will generate are significant— [REDACTED]
[REDACTED] They overwhelm even Dr. Miller’s alleged anti-competitive effects, regardless of whether the Tribunal adopts a Total Surplus or a Balancing Weights approach.

A. TOTAL SURPLUS STANDARD

124. The Total Surplus Standard is the default approach for conducting the trade off between efficiencies and effects. The Commissioner must demonstrate a good reason to depart from this approach and he cannot do so in this case.

125. In *Superior Propane*, the only case where a balancing weights approach was applied, it was because there were some low-income Canadians who consumed the good or service *as a necessity*. In that case, the concern was that these low-income Canadians used propane to heat their homes and would have no alternative but to pay a higher price post-transaction. There is no similar rationale in this case.

⁹⁰ Reply Expert Report of Mark Israel (“Israel Reply Report”), dated October 20, 2022, paras. 63-84.

126. Even if some measure of wireless service were essential, as Dr. Osberg contends, the price for that level of service is fixed by the CRTC and will be unaffected by the transaction. In Telecom Regulatory Policy CRTC 2021-130, the CRTC required each of the large carriers to provide a low-cost plan with a minimum set of features at a fixed price of \$35/month.⁹¹ The features included in these plans are:

- (a) Unlimited Canada-wide calling;
- (b) Unlimited text messages; and
- (c) At least 3GB of data.

127. In mandating this plan, the CRTC concluded that it would “enable Canadians to participate in the digital economy,” would allow cell phones to be “used as substitutes for landline telephones,” and would be “responsive to a consumer’s most significant needs.”⁹²

128. The regulator with both the jurisdiction and the expertise to do so has already determined the level of wireless service that can be reasonably considered necessary. And it requires the large carriers, including Rogers, to offer that service at a fixed cost. The transaction will have no impact on the availability or cost of these low-cost plans, and therefore no impact on anyone who consumes wireless service as a necessity.

129. In addition, Dr. Miller predicts [REDACTED] across British Columbia and Alberta [REDACTED]. As a result, low-income consumers in British Columbia and Alberta will have a significantly cheaper option available to them after the transaction than they did before. These consumers will have the option to choose not only the current CRTC-mandated low-cost plan, but also [REDACTED] [REDACTED] Far from being “socially adverse”, the transaction will benefit low-income consumers.

⁹¹ Rogers’ low-cost plan is offered by its Fido brand in each of British Columbia, Alberta, and Ontario: <https://www.fido.ca/phones/bring-your-own-device?icid=ba-lpmbcnac-pgpfwrls-1021206&flowType=byod>.

⁹² *Telecom Regulatory Policy CRTC 2021-130*, paras. 529-531 & 545. The same decision established fixed-price occasional use plans that will not be affected by the Transaction.

B. QUANTIFIABLE CONSUMER BENEFITS

130. If the Commissioner asks the Tribunal to give special consideration to an alleged socially adverse “wealth transfer” arising from the transaction, he must also credit the benefits to consumers arising from the transaction. These benefits arise in three ways:

(a) [REDACTED]

[REDACTED]

[REDACTED]



131. In total, then, this transaction will bring direct consumer benefits of approximately \$43 million per year, almost all of which will go directly to the lowest income consumers. This is equivalent to [REDACTED] of the *total* consumer surplus losses Dr. Miller calculates, and therefore is likely to completely offset any alleged *socially adverse* consumer surplus loss that could be said to arise. On this basis alone, the balancing weights approach favours allowing the transaction to proceed.

C. APPLYING THE BALANCING WEIGHTS

132. If the Tribunal decides to depart from the Total Surplus Standard in this case, it will need to assess the total loss of consumer surplus to be weighted and measured against the producer surplus and productive efficiencies.

133. For the reasons set out above, Dr. Miller’s analysis is flawed and unreliable and necessarily overstates the alleged harm. Nevertheless, this discussion assumes his highest quantification of consumer surplus [REDACTED]—to illustrate that taking the Commissioner’s case at its highest, the efficiencies overwhelm the effects even on a Balancing Weights approach posited by the Commissioner.

134. In *Superior III*, the Tribunal set out the framework for a Balancing Weights approach. It is represented by the following formula, where CS is the consumer surplus loss, PS is the producer surplus gain, EF is the efficiencies generated by the transaction, and w is the weighting to be applied to the loss of consumer surplus:

$$w*CS + (PS + EF) = X$$

135. If X is greater than zero, then the efficiencies are greater than the weighted effects and, pursuant to s. 96 of the *Act*, the transaction will not be blocked.

136. This Tribunal has made clear that, if the Commissioner intends to advocate for a balancing weights approach, he must adduce expert evidence on how to calculate the appropriate weight.⁹³ The Commissioner has failed to do so in this case.

137. The Commissioner’s expert, Dr. Lars Osberg, addresses the relative consumption of wireless services and predicted shareholdings in Rogers across the income distribution, but does not attempt to establish a basis for any weighting. His expert, Dr. Katherine Cuff, discusses the Canadian income tax system and its progressivity across different income groups, but does not do any analysis to derive a social weighting based on the tax system.

138. Only Rogers has adduced evidence of how the Tribunal can derive a weight from the Canadian income tax system that could be applied to the consumer surplus loss. Dr. Michael Smart, a tax economist at the University of Toronto, applies a standard “inverted optimum method” to the marginal tax rates set out in Dr. Cuff’s report to derive distributional weights on different income groups based on observed tax rates. He then combines these distributional weights with the data on the gains and losses to different income groups set out in Dr. Osberg’s report to derive the social weight applicable in this case based on the income tax system.

139. Dr. Smart concludes that if the Tribunal were to apply a balancing weight across the entire income distribution (that is, treat all consumer losses as socially adverse regardless of the incomes of the consumers in question), then the weighting derived from the tax system would be 1.06. If the Tribunal were instead to apply a weighting to only the bottom quintile of the income distribution as it did in *Superior Propane III*, then the weighting would be 1.0—that is, no weighting at all. This is because low-income Canadians consume only a small portion of total wireless services.

140. As a result, if the Tribunal were to apply a balancing weight to the entirety of the lost consumer surplus (an approach that has not previously been applied), the formula would, at most, be as follows:

$$1.06*CS + (PS + EF) = X$$

⁹³ *Commissioner of Competition v. Superior Propane Inc.*, [2002 CACT 16](#), para. 112.

141. Accepting Dr. Miller’s analysis without adjustment, ignoring the offsetting consumer surplus gains discussed above, and even assuming all consumer surplus loss should be treated as socially adverse, the formula is:

[REDACTED]

142. Setting X equal to zero, such that the transaction is welfare neutral, and solving for EF, gives the minimum efficiencies the respondents need to establish to offset the Commissioner’s highest quantification of harm:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

143. If the respondents can establish just [REDACTED] of efficiencies, then even on the Commissioner’s highest case the transaction should be allowed to proceed. The respondents’ actual efficiencies, totaling over [REDACTED], dwarf this amount. The respondents need only succeed in establishing [REDACTED] of their total efficiencies.

144. If the consumer gains from the transaction are offset against the alleged loss of consumer surplus, then the respondents need only establish [REDACTED] of their total efficiencies:

[REDACTED]

145. Whether the Tribunal applies the Total Surplus standard or the Balancing Weights approach, the transactions’ efficiencies overwhelm the alleged anti-competitive effects, even taking the Commissioner’s case at its highest. There is no reasonable basis on which to block the transaction.

PART IX - CONCLUSION

146. The evidence will demonstrate that the transaction does not give rise to a substantial lessening or prevention of competition in any market. And notwithstanding the flaws in his expert's analyses, and his inability to quantify *any* harm in relation to Freedom, the harm alleged by the Commissioner is greatly outweighed by the efficiencies that the transaction will generate. At the end of this trial, Rogers will ask that that the Commissioner's application be dismissed in its entirety, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2022



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