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Geneviève Bruneau for / pour
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THE COMPETITION TRIBUNAL

CT-2022-002

OTTAWA, ONT.

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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
SHAW COMMUNICATIONS INC.**

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PART I – OVERVIEW

A. A Once-In-A-Generation Opportunity for Competition

1. For the past 15 years, successive Canadian governments, as well as the Canadian Radio-television and Telecommunications Commission (“**CRTC**”), the federal Department of Innovation, Science and Economic Development Canada (“**ISED**”) and even the Commissioner of Competition (the “**Commissioner**”), have encouraged the emergence of a fourth national wireless carrier to compete with the “Big 3”, namely Bell, TELUS and Rogers. These efforts will finally bear fruit, after years of repeated failures, disappointments and instability, through the completion of the pending agreements between Rogers, Shaw and Videotron now before this Tribunal (the “**Proposed Transaction**”).

2. This case is not about a merger of the wireless businesses of Rogers and Shaw, because no such merger will occur. This case is not about the elimination of a maverick competitor. And this case is not about a merger to monopoly, or about a merger that will give rise to significant increases in concentration levels in any affected industry or market. It does not involve a “three-to-two” or even a “four-to-three” merger.

3. Rather, under the terms of the agreements between the parties, the Proposed Transaction will proceed in two steps, in the following order, as discussed in greater detail below:

- (a) *First*, Videotron—already Canada’s fifth-largest wireless operator and a highly successful, disruptive competitor in the wireless industry in Quebec—will acquire Freedom Mobile (“**Freedom**”) from Shaw. Freedom is Canada’s fourth-largest wireless operator that competes in the wireless industries in Ontario, British Columbia and Alberta; and
- (b) *Second*, Rogers will then acquire Shaw. That portion of the Proposed Transaction is all about the wireline business of Shaw (i.e., home phone, Internet, cable broadcasting and satellite broadcasting), which accounts for more than 83% of the revenues of Shaw and virtually all of its cash flow.

There is no competitive overlap between the wireline business of Rogers and the wireline business of Shaw. They operate in different Provinces. Moreover, after acquiring the wireline business of Shaw, Rogers will be able to compete more vigorously and effectively in the provision of wireline services to consumers in Western Canada than Shaw has been able to on a standalone basis. Thus, the acquisition by Rogers of the wireline business of Shaw is manifestly pro-competitive in nature, and does not give rise to any legitimate concerns under the merger provisions of the *Competition Act*.

4. As a result of the sequence in which these steps of the Proposed Transaction will occur, Rogers will never own or operate Freedom, which accounts for more than [REDACTED] of the revenues generated by the wireless business carried on by Shaw.¹ Through a negotiating dynamic directly caused by, and available exclusively through, the regulatory review process, Videotron has been able to reach an agreement to acquire the Freedom business for a purchase price that is approximately 50% of the value of the investments Shaw has made in the business. This alone will put Videotron in a much stronger capital position than Shaw now is to make the immediate and long-term investments in spectrum licences, the deployment of fifth-generation (“5G”) wireless services and other network evolutions that are essential to ensure the competitiveness of the business in the future.

5. Moreover, as part of the sale of Freedom to Videotron, Rogers will provide Videotron various ancillary services—[REDACTED]—to facilitate Videotron’s deployment of 5G wireless services across Canada, including with respect to [REDACTED]. In addition, [REDACTED]. [REDACTED] Videotron will be able to offer retail customers in Ontario, British Columbia and Alberta wireline Internet services, including as part of bundles with the wireless services it intends to provide. [REDACTED]

¹ Revenue for Shaw’s overall wireless business in Fiscal 2021 was \$1,272,000,000 (SJR-CCB00891559, Shaw 2021 Annual Report, p. 16). The Shaw Mobile brand and subscribers, the sole component of Shaw’s wireless business that will be acquired by Rogers, had revenue in the same period of [REDACTED]

[REDACTED]
[REDACTED]. All of these types of services agreements are common throughout Canada, and are consistent with longstanding regulatory policies promulgated by ISED and the CRTC.

6. The Proposed Transaction will not result in higher cellphone bills, poorer service or less choice for Canadian consumers. The evidence will show that “Videotron has a comprehensive and costed strategic plan for disrupting wireless services in British Columbia, Alberta, and Ontario just as it has done in Quebec”.² Under the terms of Videotron’s strategic plan, Videotron will quickly offer enhanced wireless services as well as bundled wireline/wireless plans to consumers in Ontario, British Columbia and Alberta at significant discounts to what consumers now pay.³

7. Videotron’s commitment to compete effectively and disruptively in providing wireless products and services in the Provinces in question has been confirmed by recent events. Less than one week ago, on October 25, 2022, the Minister of Innovation, Science and Industry issued a public statement indicating that he would impose two conditions on approving the transfer of Freedom’s spectrum licences to Videotron:⁴

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

² Witness Statement of Jean-Francois Lescadres sworn on September 23, 2022 (“**Lescadres Witness Statement**”) ¶7.

³ Lescadres Witness Statement ¶114, 185.

⁴ ISED, “Statement from Minister Champagne on competitiveness in the telecommunications sector” (SJR-CCB00898100).

Promoting competition to bring down prices has been at the core of policies advanced by successive governments for many years. [emphasis added]

8. Within an hour, Videotron's parent company, Quebecor Inc. ("**Quebecor**"), issued its own public statement in which it confirmed that it accepts both of the Minister's conditions:⁵

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. [emphasis added]

9. Why do Quebecers pay, on average, 20% less for wireless services than consumers in the rest of Canada?⁶ That question can be answered in one word: Videotron. Uniquely in Canada, Quebec has four wireless carriers (Videotron and the Big 3) each with approximately the same market share.⁷ Intensive competition between them has resulted in substantially lower prices in Quebec. As illustrated strikingly in the comparison of plan offers set out below, for example, Bell has advertised wireless pricing plans for consumers in Ontario, British Columbia and Alberta that cost \$10 more but offer 15 GB less data than in Quebec:⁸

⁵ Canada NewsWire, "Pierre Karl Péladeau comments on announcement by the Minister of Innovation, Science and Industry of Canada concerning the proposed Rogers-Shaw merger" (SJR-CCB00898269).

⁶ Witness Statement of Pierre Karl Péladeau sworn on September 23, 2022 ("**Péladeau Witness Statement**") ¶15-18.

⁷ Witness Statement of Paul McAleese sworn on September 23, 2022 ("**McAleese Witness Statement**"), Exhibit 64 (SJR-CCB00876771).

⁸ Péladeau Witness Statement ¶18.

**Ontario, British Columbia
and Alberta**

Quebec

The image displays two mobile service plans side-by-side. The left plan, 'Essential', is for Ontario, British Columbia, and Alberta, with an average price of \$85.00/mo. based on 1 line. It includes 25 GB of data at speeds up to 250 Mbps and unlimited data at reduced speeds, 5G network access, SD video streaming, and hotspot capabilities. The right plan, 'Ultimate 40', is for Quebec, with an average price of \$75.00/mo. based on 1 line. It includes 40 GB of data at the fastest available 5G+ speeds and unlimited data at reduced speeds, 5G network access, HD video streaming, and hotspot capabilities. A label 'ONLINE EXCLUSIVE ELIGIBLE' is present at the top of the Quebec plan card.

10. Videotron intends to expand rapidly its existing 5G wireless services across Ontario, British Columbia and Alberta, and has the resources, expertise and capability required to so do.⁹ 5G is widely acknowledged to be a wireless telecommunications game-changer that has the potential to deliver enormous benefits to Canadians, both economically and socially. 5G is expected to be different in kind, far broader in nature and scope, and more transformative than previous evolutions of wireless technology (including, for example, the evolution from third-generation (“**3G**”) wireless technology to fourth-generation (known as “long-term evolution” or “**LTE**”)).¹⁰ Freedom does not currently offer 5G services and, as discussed below, lacks critical wireless spectrum

⁹ Witness Statement of Mohamed Drif sworn on September 23, 2022 (“**Drif Witness Statement**”) ¶83.

¹⁰ McAleese Witness Statement ¶140-141.

licences required for effective 5G deployment. Videotron holds spectrum licences covering the geographical areas of Freedom's wireless network that Freedom would require to deploy 5G services. For that reason alone, the completion of the Proposed Transaction provides the most viable, timely and likely path for Freedom to offer 5G products and services to Canadians in Ontario, British Columbia and Alberta. Doing so will enable Freedom to compete vigorously and effectively with all of Bell, TELUS and Rogers in a way that Freedom will be unable to on a standalone basis under the ownership of Shaw.

11. Videotron is backing up its belief in, and commitment to, its strategic plan by paying **\$2 billion** for Freedom, assuming a further \$850 million of lease obligations, and spending [REDACTED] over the next ten years in additional planned investments and operating expenses to offer high-quality wireless services.¹¹ [REDACTED]

[REDACTED].¹²

12. Videotron is a wholly-owned subsidiary of Quebecor, a sophisticated and highly-regarded multi-billion dollar telecommunications and media company.¹³ As a public company, Quebecor is required by securities laws and the rules of the Toronto Stock Exchange to be particularly scrupulous in ensuring that its public statements are fair, accurate and timely. On July 18, 2022, Quebecor issued a statement by its President and Chief Executive Officer, Pierre-Karl Péladeau, confirming that:¹⁴

Quebecor plans to offer consumers in British Columbia, Alberta and Ontario discounted multiservice bundles and innovative products, including both mobile and Internet, at even more competitive prices. We can bundle, and we will, on better terms than what anyone else, including Shaw Mobile, is offering today. We are even strongly considering offering telecom services in Manitoba, where Internet prices are amongst the highest in Canada.

[...]

¹¹ Drif Witness Statement ¶¶96 *et seq.*

¹² Drif Witness Statement ¶¶98.

¹³ Note that in this Opening Statement, references to acts and decisions of "Videotron" include those of Quebecor, as the context dictates.

¹⁴ Press release, Statement by Pierre Karl Péladeau (VID00337485).

Quebecor has shown that it is the best player to create real competition and bring down prices, having done just that in Quebec, the first market in Canada where the Big 3 were forced to lower their prices to stay competitive. Will Quebecor be able to repeat its success in Ontario and Western Canada? In a simple word: yes.”

13. M. Péladeau has likewise expressed in his Witness Statement in this proceeding his strong support for making Videotron the fourth national wireless competitor that the Government of Canada has sought for more than 15 years:¹⁵

42. I firmly believe that affordable wireless services are essential to ensure the competitiveness and productivity of the Canadian economy. Videotron has shown that efficient competition can lower wireless service prices. Videotron desires to reproduce this result all across Canada, where Canadians pay much higher prices for wireless services than the Quebecois do. Given the numerous false starts since 2008, the plan to acquire Freedom by Videotron represents the best—and possibly the only—opportunity to attain this objective. [...]

47. Over time, Videotron expects a growth of its clientele that will justify other investments in the wireless and wired infrastructure outside of Quebec. From Videotron’s perspective, acquiring Freedom is only the start of its growth as the fourth viable and efficient national provider.

48. As the majority shareholder of Quebecor, I am personally committed to Videotron’s growth, its acquisition of Freedom, the investments that Videotron will make in Freedom and the benefits that Videotron’s national competition will provide to Canadians.

14. Highly sophisticated market participants have endorsed M. Péladeau’s vision. On June 18, 2022—the day following the announcement that a deal had been reached for Videotron to acquire Freedom—the share price of Quebecor jumped by 5.8%, reflecting the collective judgment of investors, market participants, independent analysts and others that Videotron will be able to operate Freedom viably and profitably.¹⁶

15. The Proposed Transaction will invigorate not only competition in wireless throughout much of Canada, but also competition in wireline in Western Canada. The evidence will establish that [REDACTED]

¹⁵ Péladeau Witness Statement ¶¶42, 47-48 [Certified English Translation].

¹⁶ Witness Statement of Trevor English sworn on September 23, 2022 (“**English Witness Statement**”) ¶¶154-155.

[REDACTED]

16. [REDACTED]

17. The Proposed Transaction will promote and enhance dynamic competition in both the wireline industry and the wireless industry.

18. With respect to the wireline industry, the Proposed Transaction will allow Rogers to expand its wireline business to Western Canada and use its size, scale, resources and expertise to compete vigorously and effectively against TELUS. It will also add another home Internet competitor across the entire combined wireline footprint of Rogers and Shaw (including in Ontario, British Columbia and Alberta): namely, Videotron. Videotron will be able to offer both home Internet and bundled wireline/wireless services [REDACTED], without the need to build and operate its own wireline

¹⁷ English Witness Statement ¶¶58, 99.
¹⁸ English Witness Statement ¶¶90-98; Witness Statement of Brad Shaw sworn on September 23, 2022 (“**Shaw Witness Statement**”) ¶¶21-23.
¹⁹ Shaw Witness Statement ¶¶32-35; English Witness Statement ¶¶121-130.

network in those areas. As an entirely new entrant in Western Canada and Ontario, Videotron will have the incentive and ability to offer aggressive promotions to build market share without concern about “repricing” a base of existing customers.

19. With respect to the wireless industry, the Proposed Transaction will allow Videotron to expand to Ontario and Western Canada and compete effectively and disruptively against Rogers, Bell and TELUS, emerging as Canada’s fourth national wireless carrier. The Proposed Transaction is a win for everyone, and especially for millions of Canadians who increasingly depend on wireline and wireless services in all aspects of their lives.

B. The Commissioner’s Opposition

20. The Commissioner is the only remaining obstacle to the timely emergence of the significantly enhanced wireless and wireline competition described above. Inexplicably, the Commissioner has asked this Tribunal to prohibit the *entire* Proposed Transaction. He has asked the Tribunal to grant this extraordinary relief even though the evidence will demonstrate that:

- (a) he has no legitimate basis to do so;
- (b) he risks squandering a “once-in-a-generation” opportunity to transform the telecommunications industry in Canada by preventing a transaction that will significantly enhance competition in the provision both of wireline and of wireless services in multiple Provinces; and
- (c) the primary beneficiaries of the relief the Commissioner now seeks are Bell and TELUS—direct competitors of all of Rogers, Shaw and Videotron—[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

21. Moreover, the Commissioner’s grounds for opposing the Proposed Transaction are unprecedented. Only five contested merger cases have ever been decided by the

Tribunal under section 92 of the *Competition Act*.²⁰ The facts and circumstances at issue in those cases do not bear even a faint resemblance to the facts and circumstances at issue here:

- (a) *Southam* (1990):²¹ In 1990, the Commissioner challenged a series of completed acquisitions of newspapers in the Vancouver area by Southam Inc., where Southam had already owned a number of newspapers before the completion of the acquisitions in question. The Tribunal found that the transactions had resulted in a substantial lessening or prevention of competition in only one market: the North Shore print real estate advertising market, where Southam had “merged to monopoly” by acquiring the only two publications offering print real estate advertising. The Tribunal found a substantial lessening or prevention of competition in that specific market where Southam’s acquisitions “resulted in the elimination of all existing competition”;²²
- (b) *Hillsdown* (1991):²³ Following a completed merger of two integrated meat slaughtering, processing and packaging companies in 1990, the Commissioner sought an order requiring Hillsdown to divest one of the parties’ rendering facilities that processed left-over animal waste, alleging that the merger resulted in a substantial lessening of competition in the non-captive red meat rendering market in Southern Ontario where the merging parties had roughly equal shares and together held more than 60% of productive capacity.²⁴ The Commissioner also led economic evidence to

²⁰ On October 31, 2022, the Tribunal issued a notice indicating that it had issued a decision dismissing the Commissioner’s application in *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Ltd.* (CT-2019-005). However, the decision is not yet publicly available.

²¹ *Canada (Director of Investigation and Research) v. Southam Inc.*, [1992] C.C.T.D. No. 7, rev’d [1995] 3 FC 557 (CA), rev’d [1997] 1 S.C.R. 748 (“**Southam**”).

²² *Ibid.*, p. 107 (SCC) [emphasis added].

²³ *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.*, 1992 CanLII 2092 (CT) (“**Hillsdown**”).

²⁴ *Director of Investigation and Research v. Hillsdown Holdings (Canada) Limited* (Expert Affidavit of David D. Smith, Economists Incorporated), Appendix C.

establish likely price increases of up to 347%.²⁵ However, the Tribunal was not satisfied that a substantial lessening of competition had arisen or was likely to arise, and declined to issue an order;

- (c) *Superior Propane* (1998):²⁶ In 2000, the Tribunal ruled on the Commissioner's application for an order to dissolve the completed merger of Superior Propane Inc. and ICG Propane Inc., the two largest retail distributors of propane and related equipment in Canada. Among other things, the Commissioner alleged, and the Tribunal found, that the merger was a "merger to monopoly" in numerous areas, with combined Superior/ICG market shares of greater than 95% in 16 local markets.²⁷ The Commissioner led economic evidence to establish likely price increases of over 15%.²⁸ The Tribunal found a likely substantial lessening or prevention of competition, but ultimately held that the efficiencies defence applied and thus did not order the dissolution of the merger;
- (d) *Canadian Waste* (2000):²⁹ In 2000, following the completed acquisition by Canadian Waste Services Inc. ("**CWS**"), the largest waste management company in Canada, of a substantial part of the Canadian solid waste business of Browning-Ferris Industries Ltd., the second largest waste management company in Canada, the Commissioner sought an order to divest one of the acquired assets, namely the Ridge Landfill site located in Blenheim, Ontario, where CWS already owned and operated another landfill in close proximity. The Commissioner alleged, and the Tribunal found, that the acquisition of the Ridge Landfill site constituted another

²⁵ *Director of Investigation and Research v. Hilldown Holdings (Canada) Limited* (Rebuttal Expert Affidavit of Thomas W. Ross, Carleton University) ¶45.

²⁶ *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, remitted for redetermination by the FCA, 2001 FCA 104 ("**Superior Propane #1**"), confirmed 2002 Comp. Trib. 16, aff'd 2003 FCA 53 ("**Superior Propane #2**").

²⁷ *Superior Propane #1 (CT)* ¶118.

²⁸ *Ibid.*, ¶252.

²⁹ *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3 ("**Canadian Waste (Merits)**"), aff'd 2003 FCA 131, leave to appeal to the SCC ref'd [2004] 1 S.C.R. vii.

“merger to monopoly” by resulting in CWS acquiring the only two sites for disposal of solid non-hazardous waste generated by institutional, commercial and industrial customers in the local Chatham-Kent area, and about 70% or more of the market share in other areas of Southern Ontario.³⁰

The Tribunal ordered the divestiture of the Ridge Landfill facility;³¹ and

- (e) *CCS/Tervita* (2011):³² In 2011 the Commissioner applied for an order dissolving the completed acquisition by Tervita Corporation (“**Tervita**”), then known as CCS Corporation (“**CCS**”), of Complete Environmental and its subsidiary Babkirk Land Services (“**BLS**”), or a divestiture of the shares or assets of BLS. BLS owned a property in northeastern British Columbia that had been approved for use, but was not yet operating, as a hazardous waste disposal site. CCS was “a monopolist” in that market and “was not constrained by any actual or potential competition from within or outside the market”.³³ The Commissioner led economic and other evidence to establish that, in the absence of the merger, BLS would have begun competing and decreasing prices by up to 20% or more.³⁴ The Tribunal found that the merger was likely to prevent competition substantially in the affected market area and ordered divestiture, finding that the merger would “maintain a monopolistic structure in the relevant market.”³⁵ The Tribunal’s decision was upheld by the Federal Court of Appeal, but then set aside by the Supreme Court of Canada on the grounds that the efficiencies defence applied.

³⁰ *Ibid.*, ¶¶192-193. Note that the Commissioner alleged that the merger prevented otherwise likely reductions in landfill tipping fees, however, the quantum of the alleged likely decline is not evident on the public record.

³¹ *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 34 (“**Canadian Waste (Remedy)**”), aff’d 2003 FCA 131, leave to appeal to the SCC ref’d [2004] 1 S.C.R. vii.

³² *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, aff’d (*sub nomine Tervita Corporation v. Commissioner of Competition*), 2013 FCA 28, rev’d 2015 SCC 3 (“**Tervita**”).

³³ *Ibid.*, ¶1225 (CT) [emphasis added].

³⁴ *Ibid.*, ¶159 (CT). Note that this Tribunal ultimately found that, in the absence of the merger, landfill tipping fees would have dropped by at least 10%, *ibid.*

³⁵ *Ibid.*, ¶1317 (CT).

22. Importantly, every one of those five contested cases included challenges to mergers involving extraordinary concentration levels that created or preserved market shares above 60%. Indeed, four of them involved mergers to monopolies or near monopolies.

23. In Ontario—where approximately 70% of Shaw’s wireless customers are located—Rogers will not acquire any part of Shaw’s wireless business. The Proposed Transaction will lead to no increase of market concentration in the provision of wireless products or services.

24. In British Columbia and Alberta, there is no competitive overlap between Freedom and Videotron in the supply of wireless services to consumers. Moreover, Shaw’s total market share in the provision of wireless services in British Columbia and Alberta is less than 15% in each Province.³⁶ Although Rogers will retain the customers in British Columbia and Alberta of a particular wireless brand of Shaw known as “Shaw Mobile”, even if one were to take the Commissioner’s case at its very highest (including by assuming that every single current customer of Shaw Mobile will remain with Rogers in the period following the completion of the Proposed Transaction), Rogers’ wireless share would increase marginally from [REDACTED] in British Columbia (making its share about only [REDACTED] than TELUS) and from [REDACTED] in Alberta (far behind market-leader TELUS, which has [REDACTED] share).³⁷

25. In each of Ontario, British Columbia and Alberta, there will be four major wireless competitors following the completion of the Proposed Transaction—the same as there are now. Freedom under the control of Videotron, however, will have greater scale in wireless as well as immediate access to critically important 5G wireless spectrum. As a result, Freedom under the ownership of Videotron will be a more vigorous competitor than it now is under the ownership of Shaw.

26. There is no contested section 92 case in the history of this Tribunal in which the Commissioner has established a substantial prevention or lessening of competition with

³⁶ McAleese Witness Statement, Exhibit 64 (SJR-CCB00876771).

³⁷ Witness Statement of Mark A. Israel sworn on September 23, 2022 (“**Israel Report**”), Table 3.

respect to a merger involving market shares or concentration levels as low as they are here.

27. Furthermore, the price increases the Commissioner alleges to be likely to result from the Proposed Transaction are either non-existent or much lower than those previously found by the Tribunal to be indicative of a substantial lessening of competition arising from a merger. Indeed, the econometric model produced by the Commissioner's own expert predicts that the Proposed Transaction would result in a significant reduction of prices charged by "New Freedom" (*i.e.*, Freedom following its divestiture to Videotron) in both British Columbia and Alberta.³⁸ The same econometric model suggests that overall, on all wireless brands taken collectively (excluding, as he suggests is more appropriate,³⁹ pre-paid only brands), wireless prices will be unaffected in Ontario, and will "increase on average by 0.8 percent in Alberta and by 2.5 percent in British Columbia".⁴⁰ Even if the simulation predictions of the Commissioner's economist are taken at face value (and they cannot be, given that the evidence will show they are based on flawed methodologies and assumptions and are highly exaggerated),⁴¹ they are far lower than the alleged price increases in the above-noted five contested merger proceedings before this Tribunal.⁴²

28. Rather than follow the approach that his predecessors have taken in other cases, the Commissioner has laboured to develop an argument to the effect that Videotron will not be able to compete "as effectively" as Shaw in offering wireless services because it will not acquire Shaw's wireline assets. This contention is entirely without merit. Moreover, in advancing it the Commissioner has accepted and relied upon self-serving submissions made to him by representatives of Bell and TELUS.

29. Bell and TELUS are business partners whose wireless network-sharing arrangements date back more than 20 years. Their primary competitor in wireless across

³⁸ Witness Statement of Nathan H. Miller sworn on September 21, 2022 ("**Miller Report**") ¶227.

³⁹ Miller Report ¶177.

⁴⁰ Miller Report ¶229.

⁴¹ See generally Israel Report and the Witness Statement of Paul Alan Johnson sworn on September 23, 2022 ("**Johnson Report**").

⁴² See *Hillsdown*, *supra* note 25; *Superior Propane #1*, *supra* note 26 ¶252 (CT); *Tervita*, *supra* note 32 ¶59 (CT).

Canada is Rogers, though they also compete regionally with Shaw and Videotron. In addition, the primary wireline competitor of TELUS in Western Canada is Shaw, and one of its primary wireline competitors in Eastern Quebec is Videotron. Bell's primary competitor in wireline in Ontario and portions of Atlantic Canada is Rogers, and Videotron is one of its primary competitors in wireline in Quebec.

30. In light of their adversarial competitive positions against all of Videotron, Shaw and Rogers, the heavy involvement of Bell and TELUS in this proceeding is both telling and troubling. It would be illogical and commercially irresponsible for Bell and TELUS to argue for stronger competition against themselves. They are, of course, doing no such thing. Bell and TELUS have a great deal to lose—both in the wireline business and in the wireless business—if the Proposed Transaction is allowed to proceed. They especially do not want Videotron to emerge as a newly invigorated fourth wireless carrier in Ontario and Western Canada. That is precisely why their efforts to blunt the competitive force of Videotron began well before the proposed sale of Freedom to Videotron was announced in mid-June 2022.

31. By way of example, Bell and TELUS argued last year in the Federal Court of Canada that Videotron would be such a disruptive competitor that the Court should issue an injunction barring Videotron from obtaining wireless spectrum that had been set aside by ISED for new entrants in British Columbia, Alberta and Manitoba.⁴³

32. Bell and TELUS have been fighting tooth-and-nail for over a year-and-a-half in multiple venues—political, judicial and regulatory—to block the acquisition of Shaw by Rogers and the acquisition of Freedom by Videotron. They appeared before the CRTC in an effort to prevent the transfer of Shaw's licensed broadcasting distribution undertakings to Rogers. [REDACTED]

[REDACTED]. And, crucially, [REDACTED]
[REDACTED].⁴⁴ They have since inserted themselves into

⁴³ Lescadres Witness Statement ¶¶71-75.

⁴⁴ [REDACTED]

this proceeding, including by providing affidavits in support of the Commissioner's Application under section 104 of the *Competition Act*, and by filing multiple Witness Statements in support of the Commissioner's position at trial (which they assisted in formulating).

33. This Tribunal has held repeatedly that in proceedings under the *Competition Act*, ostensibly disinterested evidence from a firm's competitors must be viewed with an appropriate degree of scepticism.⁴⁵ This Tribunal has also held that the Commissioner has an obligation to ensure that he is not "taken in" by "evidence" that has been volunteered by industry participants seeking to improve their own circumstances:

[A]ll complainants undoubtedly seek to convince the Director to adopt their view and to thereby improve their circumstances. It is up to the Director to take adequate measures to ensure that he is not taken in, since he has responsibility for the carriage of a case.⁴⁶

34. In seeking to block the Proposed Transaction, the Commissioner has adopted positions advocated by Bell and TELUS in an attempt to protect themselves from: (i) substantially increased competition in the wireline industry from Rogers; and (ii) disruptive competition in the wireless industry from Videotron that they will have no practical choice but to respond to.

35. As outlined more fully below, the Commissioner's theory that if the Proposed Transaction is allowed to proceed Videotron will be a "less effective" competitor than Shaw is based entirely on:

- (a) postulating a "but-for" version of Shaw that the evidence will show does not exist and will not come into existence even if this Tribunal were to block the Proposed Transaction;

⁴⁵ See *Superior Propane #2*, *supra* note 26 ¶289 (CT); *The Director of Investigation and Research v. Laidlaw Waste Systems Ltd.*, Competition Tribunal Docket # CT-1991-002-Doc #72, p. 101.

⁴⁶ *Canada (Director of Inv. and Research) v. A.C. Nielsen Company of Canada Ltd.*, [1994] C.C.T.D. No. 15, *aff'd (sub nomine D&B Companies of Canada v. Dir. of Investigation and Research)* 58 C.P.R. (3d) 353 (FCA), leave to appeal to the SCC *ref'd* [1995] 1 S.C.R. vi, p. 6 (CT).

- (b) incomplete or inaccurate assumptions about the history and trajectory of Shaw's business;
- (c) discounting Videotron's abilities and experience as a wireless operator based on unsubstantiated claims relating to the alleged "uniqueness" of the wireless market in Quebec;
- (d) an incomplete or inaccurate review of selected documents of the parties in an effort to support the Commissioner's narrative, and disregarding important facts, documents and evidence that establish the contrary; and
- (e) discounting or criticizing commercial arrangements that are commonplace throughout the telecommunications industry, and indeed encouraged and facilitated by the governing regulatory regimes, as supposed "behavioural remedies" that allegedly would render Videotron overly reliant on Rogers.

36. The evidence will establish that there is no substance to any of this.

37. Ultimately, the parties best placed to assess Videotron's competitive abilities, resources and prospects are Videotron and Quebecor. They are highly experienced, sophisticated and disruptive competitors in the wireless industry, and have been for well over a decade. They have an enviable track record of success. They have examined very carefully the business of Freedom as well as the market conditions in the Provinces in which Freedom carries on business. They have concluded that the Proposed Transaction will enable Videotron to expand to Ontario and Western Canada and offer consumers in those Provinces significantly lower wireless prices. They have backed up their well-considered evaluation with an immediate investment of approximately [REDACTED], as well as by placing at stake Quebecor's reputation in the capital markets. Neither the Commissioner nor his witnesses have provided any credible basis to second-guess the considered business judgment of Quebecor and Videotron in this matter. Nor should the Commissioner be permitted to do so.

38. The "business judgment rule", whereby a court accords deference to informed business decisions made by officers and directors of companies that fall within a range

of reasonableness, is a bedrock principle of corporate and commercial law in Canada. The business judgment rule reflects the fact that “Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making”.⁴⁷ This principle applies in numerous contexts, including, as the Supreme Court of Canada recently observed in *Tervita*, in the context of merger challenges under section 92 of the *Competition Act*:

[76] Business can be unpredictable and business decisions are not always based on objective facts and dispassionate logic; market conditions may change. In assessing whether a merger will likely prevent competition substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company’s circumstances.⁴⁸

39. Kevin P. McGuinness has put it this way in his prominent treatise on corporate law in Canada:

The business judgment rule applies because courts are ill-equipped to engage in an after-the-fact substantive review of business decisions. It precludes a court from imposing itself unreasonably on the business and affairs of the corporation so as to be guilty of meddling unnecessarily in its internal decision-making process. The rule does not apply where there is evidence of fraud, bad faith or self-dealing on the part of the board, or on the facts a decision cannot be attributed to any rational business purpose, or if a decision made is self-evidently uninformed, unintelligent or ill-advised. Nor does it apply where the board has acted in a clearly passive manner.⁴⁹

40. Shaw’s determination, made in the *bona fide* exercise of its informed business judgment after receiving considered advice from highly experienced and knowledgeable financial advisors, that [REDACTED]

[REDACTED], is entitled to deference from the Tribunal. Similarly, Videotron’s determination, also made in the *bona fide* exercise of its informed business

⁴⁷ *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 ¶¶67.

⁴⁸ *Tervita*, *supra* note 32 ¶¶76 (SCC).

⁴⁹ Kevin P. McGuinness, *Canadian Business Corporations Law*, 3rd ed, vol 1 (Toronto: LexisNexis Canada), §23.84.

judgment, that the Proposed Transaction affords it a viable and attractive opportunity to realize its long-awaited goal of cross-country expansion, is also entitled to deference. The business judgment rule—including as articulated by the Supreme Court of Canada in *Tervita*—stands firmly in the path of the Commissioner’s claim to understand the capabilities and prospects of Shaw and Videotron better than they do.

41. The position of the Commissioner is particularly troubling having regard to the fact that he has little to no expertise in the matters at issue. Although neither the Commissioner nor any of the employees of the Competition Bureau who reviewed the Proposed Transaction or are expected to testify at trial have ever operated a wireless business, the Commissioner seeks to: (i) substitute his views for those of Videotron; and (ii) invites this Tribunal to do the same.

42. With great respect, this is an invitation this Tribunal not only should decline, but as a matter of law must decline.

43. The Commissioner’s case is also predicated on the claim that well-documented commercial arrangements entered into by the parties at the conclusion of hard-fought negotiations are likely to make Videotron dependent on Rogers, diminish Freedom’s competitiveness, require ongoing monitoring by the Commissioner and result in Videotron having to litigate to enforce its contractual rights. None of this will be borne out by the evidence.

44. When assessing the Commissioner’s objection to the Proposed Transaction on these grounds, consideration should be given to his regulatory role as it relates to telecommunications in Canada. The Commissioner is responsible for the administration and enforcement of the *Competition Act*, a federal law of general application. He is not the principal regulator of the telecommunications industry. That role belongs to the CRTC, which regulates and supervises telecommunications in the public interest. ISED also regulates and sets policies for telecommunications in Canada, including by establishing spectrum auction rules (such as who can bid on what) and by attaching conditions to spectrum licences that mandate the provision of wholesale domestic roaming services and tower-sharing.

45. ISED and the CRTC have deep expertise in the area of telecommunications. Both are responsible for supervising telecommunications in the public interest. The carefully calibrated regulatory regime they have developed through years of careful study and analysis exists to ensure that Canadians have access to world-class communications services that are affordable, innovative and—of course—competitive. For decades, ISED and the CRTC have both advocated for—and, indeed, have mandated—the sharing of telecommunications facilities among competitors. Even though the Commissioner has consistently refrained from challenging the sharing by Bell and TELUS of their wireless networks throughout Canada for more than 20 years, he now takes the position in this proceeding that the sharing of ancillary infrastructure is a deleterious practice that constitutes a fatal flaw in Videotron’s future business model. In taking this position, the Commissioner disregards and undermines the sensible, appropriate and nuanced policy regimes developed by Canada’s main telecommunications regulators.

46. The Commissioner’s position in this regard is unsupported by law, in that it both:

- (a) disregards the fundamental principle that regulatory regimes that overlap or address related matters must, as a matter of interpretation, operate with harmony, coherency and consistency;⁵⁰ and
- (b) violates the related principle that a regulator or administrative body is not permitted to exercise its jurisdiction in a manner that impermissibly interferes with a discrete regulatory sphere.⁵¹

47. The Commissioner’s challenge to longstanding policies embraced by ISED and the CRTC also constitutes an impermissible challenge to the wisdom and efficacy of government policy.⁵² The commercial arrangements entered into between Rogers and

⁵⁰ See, *inter alia*, *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 ¶¶50-52; and *Canada v. Santawirya*, 2019 FCA 248 ¶16.

⁵¹ *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 ¶¶1, 2, 37, 60 and 61.

⁵² *Vosters v. Canada*, 2009 FC 1113 ¶¶8-11; and *Moresby Explorers Ltd. v. Canada*, [2001] F.C.J. No. 1122 (T.D.) ¶¶49-57. The use of expert witnesses to challenge the efficacy or propriety of government policy decisions is likewise improper: *Friends of Lansdowne Inc. v. Ottawa*, 2012 ONCA 273 ¶86, *affirming on this issue*, 2011 ONSC 4402 ¶¶65-67.

Videotron that the Commissioner now objects to are consistent with, and give effect to, the policies and regulations both of the CRTC and of ISED. They are also consistent with widespread and generally accepted industry practice both in Canada and globally.

48. This proceeding should not have been pursued by the Commissioner following the announcement by the parties in mid-June 2022 that Freedom would be acquired by Videotron. It is long past time for Shaw, Rogers and Videotron to be permitted to proceed with their pro-competitive transactions that will benefit Canadians. This Application should be dismissed, with costs on the highest available scale.

PART II – THE PARTIES

A. Shaw

49. Shaw is a publicly traded telecommunications company headquartered in Calgary, Alberta.⁵³ It was founded by the late JR Shaw in 1966 and conducted its initial public offering in 1972.⁵⁴

50. Shaw currently has two operating divisions: wireline and wireless.

51. Shaw's **wireline division** provides broadband (i.e., high-speed) Internet access, video services (television channels, on-demand services, including access to Netflix and other streaming platforms), home telephone services and satellite television services. Shaw's wireline division provides connectivity services to consumer and business customers in British Columbia, Alberta, Saskatchewan, Manitoba and Northern Ontario.⁵⁵ Shaw generates approximately [REDACTED] of its revenues, [REDACTED], from its wireline division.

52. Shaw's **wireless division**—which generates the rest of Shaw's revenues [REDACTED] [REDACTED]—provides wireless voice, text and data services, with the option of postpaid or prepaid billing, to consumers in parts of British Columbia, Alberta

⁵³ McAleese Witness Statement ¶¶46, 52.

⁵⁴ English Witness Statement ¶¶28-29.

⁵⁵ McAleese Witness Statement ¶¶57-68.

and Ontario. Shaw currently offers wireless services under the “Freedom Mobile” and “Shaw Mobile” brands.⁵⁶

53. Shaw has a dual-class share structure, consisting of Class A Participating Shares (Voting Shares) and Class B Non-Voting Participating Shares (Non-Voting Shares). The Voting shares are listed on the TSX Venture Exchange and the Non-Voting Shares are listed on the TSX and NYSE.⁵⁷ Descendants of JR Shaw, through the Shaw Family Living Trust (the “SFLT”), are the controlling shareholders of Shaw. The SFLT holds, or exercises control or direction over, approximately 78.5% of Shaw’s Voting Shares and approximately 7% of the Non-Voting Shares.⁵⁸

54. Based on its combined holdings of Voting Shares and Non-Voting Shares, the economic interest of the SFLT and members of the Shaw Family in Shaw is approximately 11%. The balance of the economic interest of Shaw is widely held, primarily by Canadians.⁵⁹

B. Freedom

55. The evidence will show that, unlike many other telecommunications companies, including Bell and TELUS, Shaw did not build its own wireless network in tandem with its wireline network. Rather, Shaw built its wireline network and infrastructure over 40 years prior to entering the wireless services market. Shaw entered that market in March 2016 by acquiring WIND Mobile Inc., an existing, standalone wireless business that had operations in Ontario, British Columbia and Alberta. Shaw subsequently rebranded this wireless business as “Freedom Mobile”.⁶⁰

56. Freedom is a wholly-owned subsidiary of Shaw, with its headquarters in Toronto.⁶¹

⁵⁶ McAleese Witness Statement ¶69.

⁵⁷ McAleese Witness Statement ¶52.

⁵⁸ English Witness Statement ¶31.

⁵⁹ English Witness Statement ¶32.

⁶⁰ McAleese Witness Statement ¶72.

⁶¹ McAleese Witness Statement ¶71.

57. The evidence will show that Freedom has maintained institutional independence from Shaw, with minimal overlap in terms of assets, technology and financial reporting.⁶²

The evidence will further show that [REDACTED]

[REDACTED].⁶³ The independence of Shaw's wireless network and business from its wireline network and business differentiates Shaw from other telecommunications providers, including most importantly from Bell and TELUS.

58. Freedom owns spectrum licences and other assets, properties, contracts, permits, rights, licences and other privileges that make up its wireless network.

59. As discussed below, on July 30, 2020, after the onset of the COVID-19 pandemic, Shaw launched a wireless brand called "Shaw Mobile". Shaw Mobile was launched primarily as a wireline customer retention tool, [REDACTED]

[REDACTED].⁶⁴ Drawing on the experience of Shaw's peers in the United States, the logic underlying Shaw Mobile was to offer discounted mobile services to broadband Internet customers in an effort to persuade them to stay with [REDACTED].⁶⁵ Shaw Mobile does not have its own wireless network. Rather, Shaw offers its "Shaw Mobile" branded wireless services (which are bundled with Shaw's wireline services) over Freedom's wireless network.⁶⁶ In essence, Shaw Mobile is a Mobile Virtual Network Operator through which Freedom Mobile wireless services are resold to wireline customers of Shaw in British Columbia and Alberta.

C. Rogers

60. The business of Rogers is described in Rogers' Opening Statement, which Shaw adopts and relies upon. It is important to emphasize, however, that Rogers is a large, well-capitalized company that does not currently offer wireline services to consumers in

⁶² McAleese Witness Statement ¶208.

⁶³ McAleese Witness Statement ¶¶169-216.

⁶⁴ McAleese Witness Statement ¶236-246.

⁶⁵ McAleese Witness Statement ¶237-238.

⁶⁶ McAleese Witness Statement ¶78.

British Columbia or Alberta.⁶⁷ There is no significant competitive overlap between the wireline businesses of Rogers and Shaw.

61. Consequently, the acquisition by Rogers of the wireline business of Shaw raises no competitive concerns. The opposite is true. The evidence will show that Rogers is substantially larger than Shaw, and has far greater resources at its disposal. Following its acquisition of the wireline business of Shaw, Rogers will be able to make massive investments in that business, including in the wireline network of Shaw, that will be required to enable [REDACTED]

D. Videotron

62. The business of Videotron is described in Videotron's Opening Statement, which Shaw also adopts and relies upon. Videotron is a large and sophisticated telecommunications carrier with a well-established track record as a market disruptor in wireless services in Quebec. As a result, consumers in Quebec have benefited from wireless prices that are significantly lower than those offered to consumers in other Provinces. Videotron is also a strong wireline competitor in Quebec. It is unquestionable that Videotron has significant expertise, experience and success in the provision of both wireless and wireline services.

PART III – THE LEGAL FRAMEWORK

A. The Law

63. This proceeding has been brought under section 92 of the *Competition Act*, RSC 1985, c C-34, and concerns a "proposed merger". As set out above, the "proposed merger" the parties seek to consummate is the Proposed Transaction that involves two sequential transactions: first, the sale by Shaw of the entire Freedom business to

⁶⁷ Witness Statement of Dean Prevost sworn on September 23, 2022 ("**Prevost Witness Statement**") ¶39.

Videotron; and second, the subsequent acquisition by Rogers of the wireline business of Shaw, along with the Shaw Mobile brand and subscribers.

64. The fundamental issue this Tribunal must decide is whether the Proposed Transaction is likely to prevent or lessen competition substantially.

B. The Commissioner's Onus of Proof

65. It is well established that “the Commissioner bears the onus to prove ‘that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially’ under s. 92”.⁶⁸

66. This is the first time that an *uncompleted* “proposed merger” has been reviewed by this Tribunal under section 92 of the *Competition Act*. Every other decided case under section 92 has concerned a *completed* merger that the Commissioner has impugned as anticompetitive.⁶⁹ In these cases, the Commissioner has had the onus to prove that the *completed* merger substantially lessened or prevented competition compared to what had existed before. The Commissioner also had to demonstrate that the relief sought in relation to the mergers in question was appropriate. In some of these cases the responding parties, as a defence against the order sought by the Commissioner, proposed alternative remedial orders, including proposed “remedy” transactions.⁷⁰ Where this occurred, the responding parties bore the onus of demonstrating that their proposed order was more appropriate than the remedial order proposed by the Commissioner.⁷¹

67. The procedural context in this case, however, is completely different. There is no remedial order or “remedy” transaction being proposed by the parties. The sale of Freedom to Videotron is not a “remedy” intended to address concerns of the Commissioner pertaining to the acquisition by Rogers of the entire business of Shaw.

⁶⁸ *Tervita*, *supra* note 32 ¶193 (SCC) (Karakatsanis J, dissenting, but not on this point); John S Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law, 2021), p. 197.

⁶⁹ *Southam*, *supra* note 21; *Hillsdown*, *supra* note 23; *Superior Propane #1 and #2*, *supra* note 26; *Canadian Waste*, *supra* note 29; *Tervita*, *supra* note 32.

⁷⁰ *Southam*, *supra* note 21 ¶14, 89 (SCC); *Canadian Waste (Remedy)*, *supra* note 31 ¶4 (CT).

⁷¹ *Southam*, *supra* note 21 ¶89 (SCC).

That is so because, as stated above, Rogers has no intention to and will never acquire the entire business of Shaw.

68. The only transaction the Tribunal has been asked to consider involves a three-way arrangement in which: *first*, Videotron will acquire Freedom; and *second*, Rogers will acquire the remaining wireline and other assets of Shaw. As a result, there is no world in which Rogers will ever own or operate Freedom. In making his case, the Commissioner cannot blind himself to the reality that Freedom's sale to Videotron is an integral part of the Proposed Transaction as it now stands. It follows that the "proposed merger" this Tribunal must consider is the Proposed Transaction.

69. However, the Commissioner's case, both as pleaded and as allegedly supported by his proposed evidence, is directed against a merger that is no longer proposed—and will never occur—in which Rogers would acquire Shaw *including Freedom*. Even if Rogers still sought to acquire Freedom—and it does not—it could not lawfully do so, given that doing so would be a clear breach of the Definitive Agreement between Shaw, Rogers and Videotron, and because as recently as October 25, 2022 the Minister of Innovation, Science and Industry formally rejected the transfer of Freedom's spectrum licences to Rogers.⁷²

70. In the circumstances, the Tribunal can fairly conclude that the Commissioner has erected a quintessential "straw man" for the purpose of knocking it down. He has pleaded and pursued his case in such a counterintuitive manner in a transparent attempt to reverse the applicable onus. He knows that he cannot prove that the Proposed Transaction that the parties actually intend to proceed with will result in a substantial lessening or prevention of competition. Instead, he is attempting to prove that a fictitious transaction the parties have no intention of implementing—and cannot legally implement—would be anticompetitive, and then argue that the Respondents have not met their burden of proving that the divestiture of Freedom to Videotron would remedy

⁷² ISED, "Statement from Minister Champagne on competitiveness in the telecommunications sector" (SJRБ-CCB00898100).

hypothetical anticompetitive effects that, in a theoretical world, could be associated with that fictitious transaction.

71. The Commissioner's entire approach is removed from reality. His reasoning on this point is apparently based on his misreading of cases in which the Tribunal considered applications to remedy *completed* mergers, where the respondents proposed alternative remedial orders to the one sought by the Commissioner after the Tribunal found a completed merger to be likely to prevent or lessen competition substantially. Those prior cases have no bearing on the burden of proof in this case.

72. To be clear: in this case, the Commissioner has the onus of establishing that the Proposed Transaction—namely, the *actual* two-step Proposed Transaction the parties intend to proceed with (rather than a hypothetical acquisition of Freedom by Rogers)—would substantially lessen or prevent competition in properly defined product and geographic markets. In other words, the Commissioner has the onus of proving to the satisfaction of the Tribunal that the acquisition of Shaw by Rogers following the sale of Freedom to Videotron is likely to substantially lessen or prevent competition in the provision of wireless services in Ontario, British Columbia or Alberta.

73. The Commissioner cannot discharge that onus. The evidence will make clear that the acquisition by Rogers of Shaw following the sale of Freedom to Videotron will not give rise to a substantial lessening or prevention of competition in any affected market. To the contrary, the Proposed Transaction will significantly enhance competition in the provision of both wireline and wireless services in multiple Provinces.

C. The Relevant Time Frame

74. Because the Proposed Transaction is a “proposed merger” that has yet to be completed, the Tribunal's assessment of the Proposed Transaction is necessarily a prospective, forward-looking exercise that requires comparing the situation that exists immediately prior to the implementation of the proposed merger (i.e., now or as of the date of the Tribunal's final Order in this matter) with what the situation is likely to be following the completion or failure of the Proposed Transaction.

75. The Commissioner's pleaded case and proposed evidence, however, retrospectively looks back in error to March 2021—immediately prior to the announcement of the original proposed business combination between Rogers and Shaw—and seeks to compare the situation that existed *prior to that announcement* with what the situation is likely to be following the implementation of the Proposed Transaction almost two years later.

76. There is no basis for this conceptual approach, which is self-serving and divorced from reality. The approach taken by the Commissioner would be misguided in any matter of this nature. It is particularly inappropriate in this case, however, given the rapidly evolving nature of the telecommunications industry in Canada.

77. For example, it is uncontested that:

- (a) 3500 MHz spectrum licences are critical to the effective provision of 5G services, since 3500 MHz spectrum offers a unique balance of capacity, coverage and speed that is particularly suitable for 5G;⁷³
- (b) Shaw does not possess any 3500 MHz spectrum licences; and
- (c) Videotron holds 3500 MHz licences that cover Freedom's key service areas.⁷⁴

78. Faced with these uncontested facts, the Commissioner and his witnesses have placed much emphasis on the fact that prior to the announcement of the original proposed merger with Rogers, Shaw had plans in March 2021 to participate in the 3500 MHz spectrum auction in July 2021 and to launch 5G services in key markets.⁷⁵ The Commissioner and his witnesses seem to suggest that, in determining whether the

⁷³ McAleese Witness Statement ¶¶142-143, 152-153, 156-159; Examination of Kirsten McLean, Question 723, 725.

⁷⁴ English Witness Statement ¶¶159, 179. Drif Witness Statement ¶¶55; Lescadres Witness Statement ¶¶70; Responding Witness Statement of Paul McAleese sworn on October 20, 2022 ("**McAleese Responding Witness Statement**") ¶¶77.

⁷⁵ See, e.g., the Commissioner's Notice of Application re section 92 dated May 8, 2022 ("**Notice of Application**") ¶¶2, 59, 98; Witness Statement of Michael Davies sworn on September 23, 2022, ¶¶7, 185-200; Responding Witness Statement of Michael Davies sworn on October 20, 2022, ¶¶13-14, 17.

Proposed Transaction is likely to substantially lessen or prevent competition, the point of comparison should centre on a Shaw poised to participate in the 3500 MHz spectrum auction and to launch 5G services in key markets.

79. The evidence will confirm, however, that such a Shaw no longer exists and cannot be brought back into existence through any Order of this Tribunal. The 3500 MHz auction has already taken place. Shaw did not participate in it. [REDACTED]

[REDACTED].⁷⁶ Licences to use 3500 MHz spectrum needed to launch 5G in Freedom’s key wireless markets were, in fact, acquired by Videotron⁷⁷ (over the vigorous objections of TELUS and Bell).⁷⁸ Assessments of the likely competitive impact of the Proposed Transaction as well as of any Order the Tribunal might consider granting must be based on reality, not fiction. The decision of the Tribunal in this case cannot be based on hypothetical facts from a hypothetical world that unquestionably does not and will never exist.

80. The evidence will establish that “Freedom is now two years behind its principal competitors in respect of its ability to offer 5G services [and] [REDACTED]

[REDACTED]
[REDACTED].⁷⁹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]”⁸⁰ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁸¹

⁷⁶ English Witness Statement ¶168.
⁷⁷ English Witness Statement ¶159, 179. Drif Witness Statement ¶55; Lescadres Witness Statement ¶70; McAleese Responding Witness Statement ¶77.
⁷⁸ Lescadres Witness Statement ¶71-75.
⁷⁹ McAleese Responding Witness Statement ¶76.
⁸⁰ McAleese Witness Statement ¶162-164; Responding Witness Statement of William Webb sworn on October 20, 2022 (“**Webb Responding Report**”) ¶34-36.
⁸¹ McAleese Responding Witness Statement ¶12.

81. To be clear: the Commissioner has the onus of showing that the current, two-step Proposed Transaction is likely to substantially lessen or prevent competition if it proceeds, compared to what is likely to happen if it does not proceed. In that context it is critical to assess whether Freedom is more likely to be able to launch competitive 5G immediately services on a standalone basis under Shaw's continued ownership than it will be under the ownership of Videotron. What Shaw or Freedom might have done almost two years ago if the original Transaction between Rogers and Shaw had never arisen is utterly irrelevant to the "real world" comparison this Tribunal must now perform.

D. What is a "Substantial Prevention or Lessening of Competition"?

82. According to the Commissioner's Notice of Application (paragraph 21 of Schedule "A"), the Commissioner alleges that the Proposed Transaction:

- (a) "will likely lead to a substantial *lessening* and *prevention* of competition in Wireless Services", with "Wireless Services" defined as "wireless services provided to customers other than business customers" (paragraph 3); and
- (b) "will likely lead to [...] a substantial *prevention* of competition in Business Services", with "Business Services" defined as "the provision of Wireless Services [...] to business customers" (paragraph 50).

83. As alluded to above, the Tribunal's assessment of whether a merger is likely to result in a substantial prevention or lessening of competition requires consideration of properly defined product and geographic markets. The Commissioner has pleaded, at paragraphs 53 and 58 of his Notice of Application, that:

- (a) "The relevant geographic markets for assessing the effects of the Proposed Transaction on Wireless Services are each of the provinces of B.C., Alberta and Ontario";⁸² and

⁸² Notice of Application ¶53.

- (b) “The relevant geographic markets for assessing the effects of the Proposed Transaction on Business Services are also each of the provinces of B.C., Alberta and Ontario.”⁸³

84. The distinction the Commissioner has drawn between business customers and non-business customers is apparently related to his baseless contention that Shaw aborted the launch of a new line of business services called “Shaw Mobile for Business” as a result of the announcement of the original proposed merger with Rogers in March 2021, and that but for the announcement of that Transaction, Shaw Mobile for Business would have been rolled out and succeeded. The Commissioner’s theory is unfounded. In fact, on February 9, 2021, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

.⁸⁴

85. More generally, in *Tervita*, the Supreme Court of Canada characterized the “lessen or prevent competition substantially” standard as follows:

Generally, a merger will only be found to meet the “lessen or prevent substantially” standard where it is “likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms” [...]. Market power is the ability to “profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition” [...]. Or, in other words, market power is “the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable” [...] where “price” is “generally used as shorthand for all aspects of a firm’s actions that have an impact on buyers” [...]. If a merger does not have or likely have market power effects, s. 92 will not generally be engaged.⁸⁵ [emphasis added; references omitted]

86. To discharge his onus under section 92 of the *Competition Act*, the Commissioner must demonstrate on the basis of properly admissible evidence—rather than on the basis of conjecture and speculation—that the actual merger the parties now intend to proceed

⁸³ Notice of Application ¶¶58.

⁸⁴ McAleese Witness Statement ¶¶321-326.

⁸⁵ *Tervita*, *supra* note 32 ¶44 (SCC).

with, in which Rogers will acquire the wireline business of Shaw after Freedom has already been sold to Videotron, will “create, maintain or enhance the ability” of Rogers (post-merger) “to exercise market power” in the provision of *wireless services* in Ontario, British Columbia or Alberta.

87. As stated above, this case is unique insofar as, in contrast with every other contested merger case decided by this Tribunal under section 92, the Proposed Transaction will not result in any significant increase in the market share of Rogers or concentration levels in any of the markets at issue. Nor will the Proposed Transaction reduce the number of competitors in any of those markets. Under the terms of the Proposed Transaction, all of Freedom’s approximately 1.7 million customers (who reside in Ontario, British Columbia and Alberta) will be assumed by Videotron, which currently has no customers in British Columbia and Alberta and only a nominal number in Ontario.⁸⁶

88. As explained more fully below, Shaw Mobile was designed as a wireline retention tool. The contracts of “Shaw Mobile” subscribers—virtually all of whom reside in British Columbia and Alberta—will be assumed by Rogers and thus might be expected to increase Rogers’ wireless market share (at least temporarily) in those Provinces. The evidence will show, however, that there is a limited number of Shaw Mobile subscribers—roughly 235,000 households in all⁸⁷—and that Shaw Mobile has not altered significantly the competitive dynamics or wireless prices in either Province. Assuming that in the period following the completion of the Proposed Transaction all Shaw Mobile subscribers will remain with Rogers (which, as discussed below, is a highly questionable assumption), Rogers’ *pro forma* market share would rise from approximately [REDACTED] in British Columbia (making it only [REDACTED] than TELUS) and from [REDACTED] in Alberta (far behind the market-leader TELUS, which has a [REDACTED] market share).⁸⁸

⁸⁶ Videotron has a small wireless presence in Ottawa, [REDACTED] [REDACTED] (Lescadres Witness Statement ¶24, 198; “ARC Request re Quebecor Acquisition of Freedom Mobile Inc.”, p. 12 (SJR-CCB00896530)).

⁸⁷ McAleese Witness Statement, Exhibit 119, p. 12.

⁸⁸ See sources cited *supra* note 37.

89. This Tribunal has never granted remedies in favour of the Commissioner in a contested merger case involving such modest market shares and increases in concentration levels.

90. Indeed, the Commissioner's principal economic expert—Nathan H. Miller—has put forward an econometric model of the wireless market following the implementation of the Proposed Transaction that shows that “New Freedom” (i.e., Freedom following its acquisition by Videotron) will likely lower its wireless prices by 15.1% in British Columbia and 17.3% in Alberta.⁸⁹ Although Dr. Miller's model predicts these substantial price decreases following the Proposed Transaction, his model does not capture the full extent of those decreases. As noted above, Videotron has committed publicly to meeting the requirement of the Minister of Innovation, Science and Industry that, following the Proposed Transaction, “prices for wireless services in Ontario and Western Canada [be] comparable to what Vidéotron is currently offering in Quebec, which are today on average 20 per cent lower than in the rest of Canada”.

91. Moreover, the evidence will show that because Freedom offers wireless plans that are purchased disproportionately by lower-income customers such as students and new immigrants,⁹⁰ the benefit of 20% lower “New Freedom” prices will likely accrue primarily to lower-income customers across Ontario, British Columbia and Alberta. The evidence will demonstrate that the Commissioner and his experts have failed or refused to take into account these manifestly pro-competitive impacts associated with the Proposed Transaction.

92. In his Reply Report, Dr. Miller attempts to walk back his own conclusions with respect to the extent to which “New Freedom” will charge lower prices compared with Freedom under the ownership of Shaw. He suggests that “economic theory indicates that the average price effects predicted by the model would be close to correct even if calibrated markups are overstated for some brands and understated for others but correct

⁸⁹ Miller Report ¶227.

⁹⁰ English Witness Statement ¶51; Affidavit of Sudeep Verma sworn on February 24, 2022 ¶10-14 and Exhibit A.

on average”.⁹¹ This qualification, however, does not change the fundamental fact that Dr. Miller’s model predicts that Freedom will charge *lower* prices following the Proposed Transaction.

93. Dr. Miller’s model also shows that on average, excluding pre-paid brands, wireless prices will rise by 2.5% and 0.8% in British Columbia and Alberta, respectively.⁹²

227. As shown in Exhibit 22, the 8-brand “perfect-transfer” model predicts that New Freedom decreases its price by 17.3 percent in Alberta and by 15.1 percent in British Columbia. [...]

229. As in the case with no divestiture, the 8-brand “perfect-transfer” model predicts that prices for Bell and Telus brands increase slightly, and that prices of all brands increase on average by 0.8 percent in Alberta and by 2.5 percent in British Columbia. [emphasis added; footnotes omitted]

94. Dr. Miller does not forecast any price increase or decrease in Ontario, and for good reason. Shaw Mobile is not offered there.

95. Significantly, the evidence will show that there are a number of methodological errors in Dr. Miller’s model that have inflated the expected overall effect of the Proposed Transaction on retail prices. Correction of these errors confirms that there should be no significant price increases anywhere resulting from the Proposed Transaction.⁹³ To the contrary, given that the Minister of Innovation, Science and Industry has indicated that the Proposed Transaction will only be approved if consumers in Ontario, British Columbia and Alberta can benefit from prices “comparable to what Vidéotron is currently offering in Quebec”, and that Videotron has publicly accepted that condition, it is virtually a given that the Proposed Transaction will cause prices to fall in the relevant markets.⁹⁴

96. This is the one and only contested merger case brought by the Commissioner in the history of this Tribunal in which: (i) the Commissioner has not alleged a significant increase in market shares of the merging parties or of market concentration in any

⁹¹ Miller Reply Report ¶7.

⁹² Miller Report ¶¶227-229.

⁹³ See generally Israel Report and Johnson Report.

⁹⁴ ISED, “Statement from Minister Champagne on competitiveness in the telecommunications sector” (SJR-CCB00898100).

affected market; and (ii) the Commissioner's own econometric model predicts that the merger will result in price increases of less than 3%.⁹⁵

97. Having given himself the insurmountable challenge of arguing that the Proposed Transaction is anti-competitive even though it is *not* expected to result in significant increases in market shares or concentration, and is in fact expected to result in *lower* prices being offered to the vast majority of affected consumers, the Commissioner has laboured intensely, albeit unsuccessfully, to develop a speculative theory that Videotron will be a "less effective" competitor than Shaw as the owner of Freedom.

98. This is the very sort of ephemeral and inherently uncertain approach to the enforcement of the merger provisions of the Act that the Supreme Court of Canada cautioned against and rejected in *Tervita*:

[T]o meet [his] burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed. Qualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are "incommensurable"). Due to the uncertainty inherent in economic prediction, the analysis must be as analytically rigorous as possible in order to enable the Tribunal to rely on a forward-looking approach to make a finding on a balance of probabilities⁹⁶

99. The Supreme Court of Canada emphasized in *Tervita* that even though "merger review is an inherently predictive exercise", the Tribunal is not given a "licence to speculate". The Court accepted that "objective determinations are better suited for ensuring predictability in the application of the *Competition Act* and avoiding arbitrary decisions".⁹⁷

100. Even if none of this were true, and the Commissioner's theory were considered to be correct (which it is not), it does not come close to satisfying his onus under section 92

⁹⁵ See the review of past cases at paragraph 21 above.

⁹⁶ *Tervita*, *supra* note 32 ¶125 (SCC)

⁹⁷ *Ibid.*, ¶65, 130, 131 (SCC).

to obtain an Order from this Tribunal. As explained by the Supreme Court of Canada in *Tervita*, a substantial lessening or prevention of competition requires that the merged entity (in this case, Rogers and Shaw following the sale of Freedom to Videotron) obtain from the merger the power “to maintain prices above the competitive level for a considerable period of time without such action being unprofitable”.⁹⁸ Even if Videotron somehow proves to be a “less effective” competitor than Shaw in Ontario, British Columbia and/or Alberta, it does not follow that Rogers will be able to maintain wireless prices above the competitive level for a considerable period of time in the face of continued significant competition from Bell, TELUS, Videotron and other competitors.

101. In any event, Shaw believes that the evidence will disprove conclusively the Commissioner’s theory and show that, following the completion of the Proposed Transaction, the combined Videotron–Freedom is likely to be a far stronger competitor than Freedom under the ownership of Shaw now is in the provision of wireless products and services. This is so for a host of reasons, as discussed immediately below.

**PART IV – THE NEW COMBINED VIDEOTRON:
FREEDOM WILL BE A “MORE EFFECTIVE” COMPETITOR IN WIRELESS**

102. The Commissioner’s contention that the combined Videotron–Freedom will be a “less effective” competitor than Shaw in offering wireless services in British Columbia, Alberta and Ontario rests primarily on two fundamental misconceptions:

- (a) his contention that if the Tribunal issues an order blocking the Proposed Transaction, Shaw is likely to invest the billions of dollars required to deploy 5G services and continue to disrupt the market with highly competitive wireless offerings, while simultaneously making the billions of dollars in investments required in its wireline business to compete effectively against TELUS in Western Canada; and

⁹⁸ *Ibid.*, ¶144 (SCC).

- (b) his claim that Videotron’s effectiveness as a wireless operator will be significantly impacted by the fact that, unlike Shaw, Videotron does not own and operate its own wireline network in British Columbia and Alberta.

103. Based on these two fundamental misconceptions, the Commissioner arrives at the speculative and unfounded conclusion that Shaw’s past performance is an accurate predictor of the level of success it will enjoy if this Tribunal blocks the Proposed Transaction and Shaw is forced to continue on a standalone basis.

104. The Commissioner’s position concerning the future of Shaw in the “but for” world is deeply flawed. The evidence will show that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Moreover, the evidence will show that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁹⁹

105. Contrary to the fundamental premise underlying the Commissioner’s entire case, the [REDACTED]

[REDACTED].¹⁰⁰

106. The Proposed Transaction resolves these issues. It puts each of Shaw’s businesses—wireline and wireless—in the hands of two different, highly successful and well-resourced Canadian telecommunications operators (Rogers and Videotron, respectively), both of which will be better positioned than Shaw now is to make the necessary investments in, and more competitively deploy, the wireline assets of Shaw and the wireless assets of Freedom.

⁹⁹ McAleese Responding Witness Statement, ¶12 and 19.

¹⁰⁰ McAleese Responding Witness Statement, ¶19.

A. Misconception #1: The Clock Can be Turned Back

107. The evidence will show that the Commissioner’s first misconception—namely, that if this Tribunal blocks the Proposed Transaction, [REDACTED]

[REDACTED]. The original transaction between Rogers and Shaw came about because the controlling shareholders of Shaw made the difficult decision to sell the Company—a decision that was made following [REDACTED]

[REDACTED].¹⁰¹ This trajectory has not changed in the period of more than 18 months since the announcement of the original proposed business combination between Rogers and Shaw; indeed, [REDACTED]

[REDACTED].¹⁰²

108. The evidence will demonstrate that, in the period since 2016, Shaw has invested more than [REDACTED]—including, among other things, \$1.6 billion spent to acquire WIND Mobile, \$947 million to acquire spectrum licences suitable for LTE deployment, [REDACTED]

[REDACTED].¹⁰³ [REDACTED]

[REDACTED].¹⁰⁴ [REDACTED].¹⁰⁵

109. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁰¹ English Witness Statement ¶¶121-129; McAleese Witness Statement ¶¶407; Shaw Witness Statement ¶¶60; McAleese Responding Witness Statement ¶7.

¹⁰² English Witness Statement ¶¶193-194.

¹⁰³ English Witness Statement ¶¶78, 97; McAleese Witness Statement ¶78.

¹⁰⁴ English Witness Statement ¶¶90-98.

¹⁰⁵ English Witness Statement ¶95.

mature and competitive versions, the expectations and demands of consumers have changed accordingly. As matters now stand under the ownership of Shaw, Freedom is at serious risk of being left behind.

110. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 107 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 108 [REDACTED]

[REDACTED]

[REDACTED] Videotron, critically, did participate in the 3500 MHz auction and acquired the required 3500 MHz spectrum licences in virtually all of the market areas currently served by Freedom.¹⁰⁹

111. The well-established fact that 3500 MHz spectrum licences are essential to offering a full suite of 5G services¹¹⁰—which the Commissioner does not dispute¹¹¹—is a complete response to the question of whether Shaw or Videotron is better placed to successfully operate Freedom in the future. Simply put, Videotron *has* 3500 MHz spectrum licences that will permit it to roll out 5G services in Freedom’s market areas. Shaw *does not*. It necessarily follows that Videotron has the assets and capability required for Freedom to compete effectively and immediately against Rogers, Bell and TELUS. Shaw does not. For this reason alone, Freedom is much more likely to be a stronger competitor under the ownership of Videotron than it would be if it were required to continue to operate on a standalone basis under the ownership of Shaw.¹¹²

¹⁰⁶ English Witness Statement ¶¶95, 142.

¹⁰⁷ English Witness Statement ¶168.

¹⁰⁸ English Witness Statement ¶¶170-178.

¹⁰⁹ English Witness Statement ¶¶159, 179; Drif Witness Statement ¶¶55; Lescadres Witness Statement ¶70.

¹¹⁰ McAleese Witness Statement ¶¶142-143, 152-153, 156-159.

¹¹¹ Examination of Kirsten McLean, Question 723, 725.

¹¹² Webb Responding Report ¶¶38-39.

in order “to serve new areas while they build out their networks”. This Decision is intended to ensure “that wholesale MVNO access service is as effective as possible in achieving its purpose”.¹¹⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

116. However, even if 3500 MHz spectrum licences could somehow fall into Shaw’s hands if this Proposed Transaction is blocked, it does not follow that Shaw would continue to be an effective or disruptive wireless competitor. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

117. Prior to expanding into the wireless industry with its acquisition of WIND Mobile in the Spring of 2016, Shaw was the leading wireline provider in British Columbia and Alberta, [REDACTED]¹¹⁷ TELUS is a fierce competitor with many significant, inherent advantages. In addition to being substantially larger and better resourced than Shaw, TELUS enjoys access to a large amount of infrastructure that was constructed during the lengthy period during which it operated as a government-sanctioned telephone monopoly.¹¹⁸ Starting in 2015, TELUS undertook a multi-billion-dollar project to replace its old copper wire facilities with highly advanced fiber optic cable in British Columbia, Alberta and Quebec. Significant investments made by TELUS in transforming its wireline network have enabled it to offer a wider range of high-value-added wireline products and services.¹¹⁹

¹¹⁵ Responding Witness Statement of Jean-Francois Lescadres dated October 20, 2022 (“**Lescadres Responding Witness Statement**”) ¶53 refers to Telecom Decision CRTC 2022-288.

¹¹⁶ Lescadres Responding Witness Statement ¶53-55.

¹¹⁷ English Witness Statement ¶99-102.

¹¹⁸ McAleese Witness Statement ¶55-56, 224.

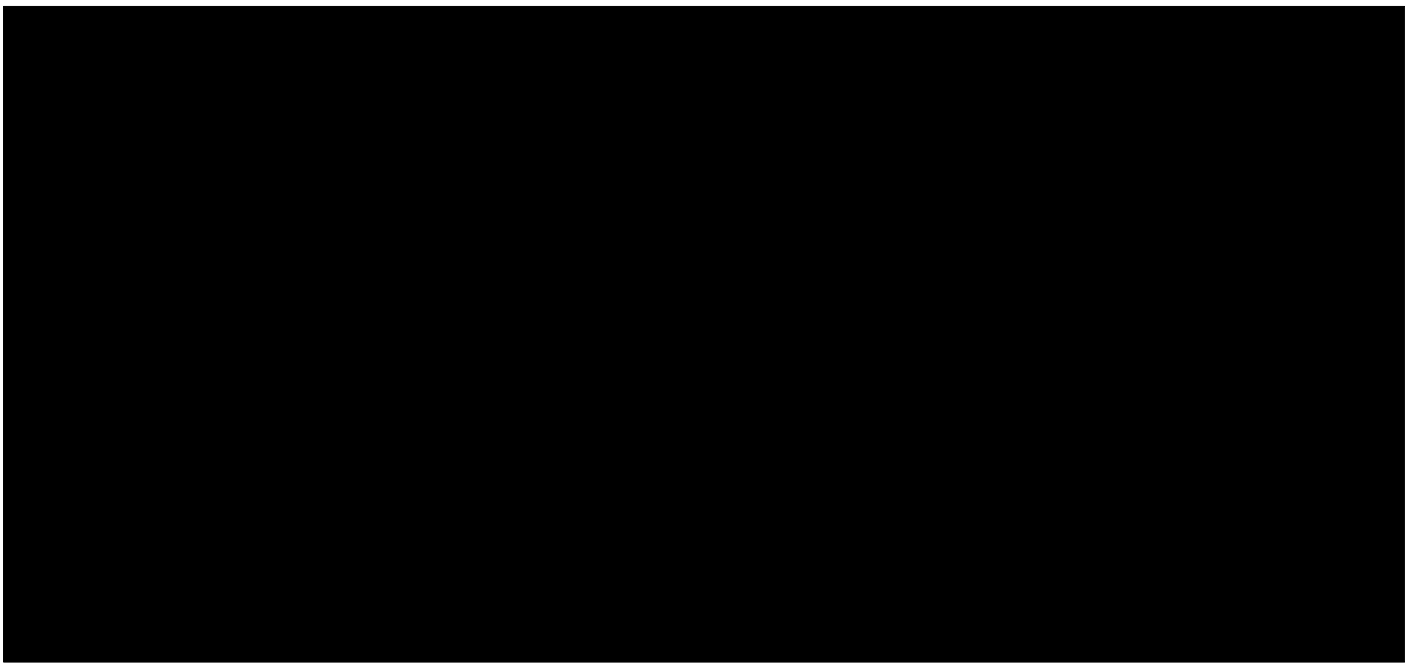
¹¹⁹ McAleese Witness Statement ¶225-230; McAleese Responding Witness Statement ¶12-14.

118. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ■ [REDACTED]
[REDACTED] ■

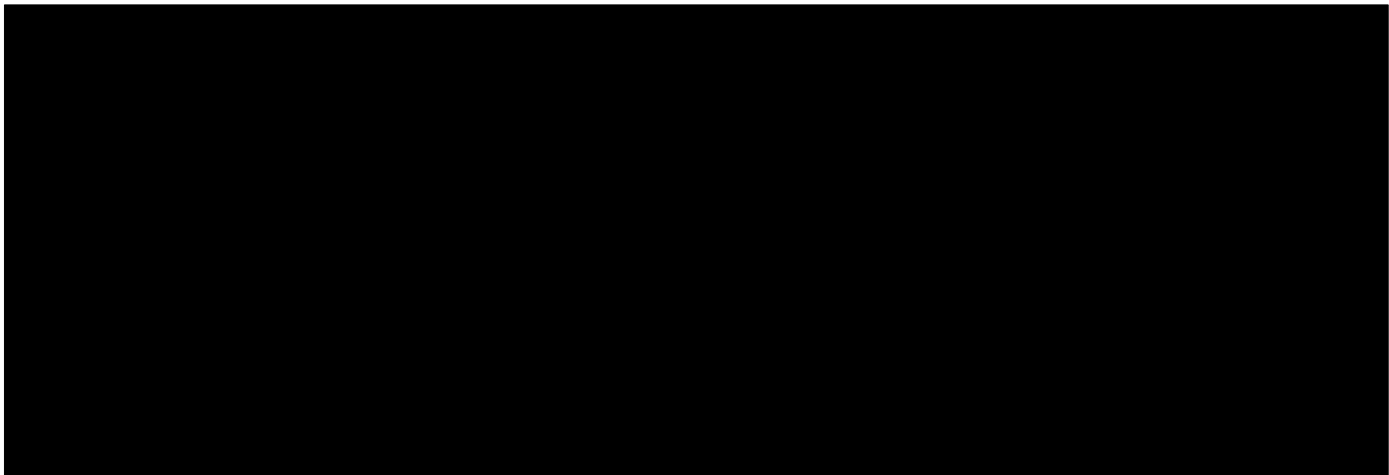
119. [REDACTED]
[REDACTED]
[REDACTED] ■

[REDACTED]

¹²⁰ English Witness Statement ¶¶48, 99-111; McAleese Witness Statement ¶¶129-131, 231-235.
¹²¹ English Witness Statement ¶¶105-106.
¹²² McAleese Responding Witness Statement ¶¶15-17.

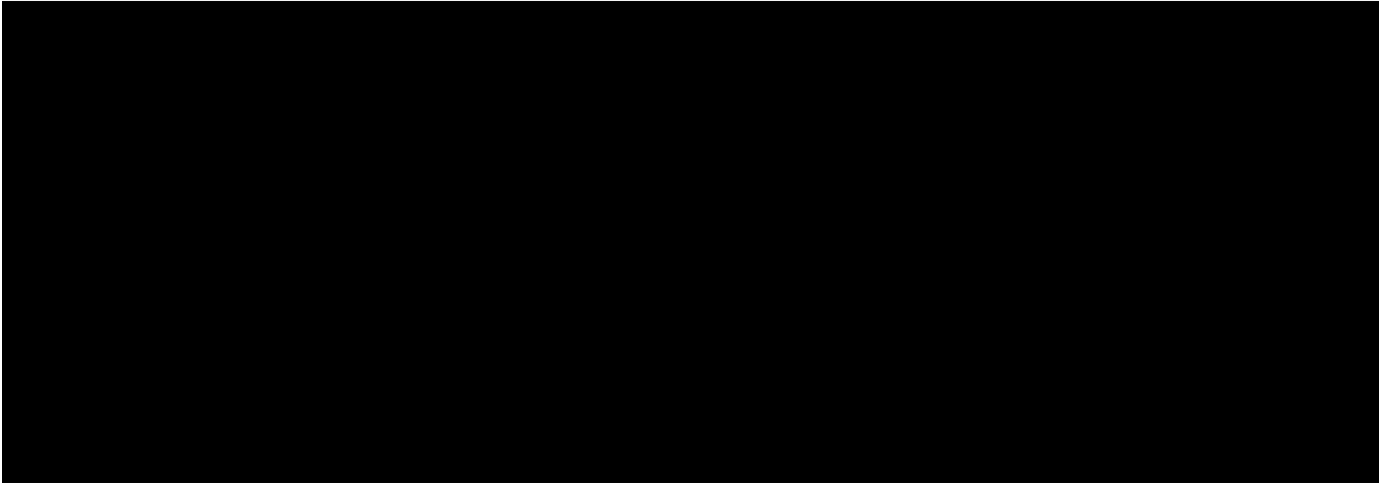


120. [Redacted]
[Redacted]



121. [Redacted]
[Redacted]
[Redacted]

¹²³ English Witness Statement ¶108 and Exhibit 28.
¹²⁴ English Witness Statement ¶108 and Exhibit 28.



122. All of these gains by TELUS in the expansion of its wireline business have come at the direct expense of Shaw. As a result, Shaw is now facing the prospect of having to make large-scale capital investments in its wireline business in order to remain competitive with its much larger and better resourced head-to-head competitor. That, for Shaw, is a daunting prospect.

123. The evidence will also show that TELUS benefits significantly from its unique nationwide wireless network reciprocity agreement with Bell, pursuant to which, among other things, Bell and TELUS build and operate wireless radio access networks (“**RANs**”) in certain regions of Canada and provide each other with reciprocal access.¹²⁵ By sharing their RANs and spectrum, TELUS and Bell have obtained for themselves a massive advantage over every other wireless carrier in Canada. In effect, they have divided the country in two and pooled their resources to provide national wireless coverage. Shaw, on the other hand, does not split the costs associated with providing wireless services with any other carrier. Even though it is a fraction of the size of both Bell and TELUS, and has substantially fewer subscribers and a much smaller share of the wireless market in each Province in which it carries on business, Shaw is required to bear on its own the significant costs associated with building and upgrading wireless infrastructure and acquiring spectrum licences.

124. 


¹²⁵ Witness Statement of Stephen Howe sworn on September 23, 2022 (“**Howe Witness Statement**”) ¶9.

[REDACTED]

[REDACTED]

[REDACTED] 126 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

125. It is important to emphasize that, although the Commissioner has pleaded a narrow case before this Tribunal focussed only on supposed anti-competitive effects the Proposed Transaction allegedly will have on Shaw's wireless business, he seeks to block the entire Transaction. His position is inimical to the interests of Canadians who increasingly depend on the availability of competitive wireless services in Alberta and British Columbia. In proceeding in the way that he has, and refusing to moderate his claim for relief in this matter (even though he has been invited to do so repeatedly by Chief Justice Crampton), the Commissioner has effectively ignored the important and unchallenged fact that Rogers has substantially greater resources available to it than Shaw now does. He has also ignored that Rogers has the willingness, expertise and capability to take the fight to TELUS in the wireline industry in Western Canada, including by making substantial investments in Shaw's wireline network that Shaw has been unable to on a standalone basis. He seems completely unmoved by the significant benefits that will inevitably flow to users of wireline products and services in Western Canada if the Proposed Transaction is allowed to proceed.

B. Misconception #2: A Wireless Operator Must Own a Wireline Network

126. The Commissioner's second misconception—namely, that a wireless operator must own and operate its own wireline network in order to compete aggressively and effectively against the Big 3 in the provision of wireless services—is also incorrect.

127. The evidence will establish that there are many successful and disruptive wireless operators that do not own or operate their own wireline networks. Perhaps the most

¹²⁶ English Witness Statement ¶¶192-196; McAleese Responding Witness Statement ¶¶7-8.

obvious and pertinent example is Freedom itself. As the Commissioner admits, Freedom has been highly successful and historically disruptive in Ontario even though neither it nor Shaw has ever owned and operated their own last-mile wireline network in the areas of Ontario in which Freedom offers wireless services.¹²⁷

128. Similarly, each of Rogers, Bell and TELUS have been successful in achieving significant market shares in parts of the country where they do not own or operate their own wireline networks, or offer wireline services.¹²⁸ Examples of this can be seen in the following table:¹²⁹

Province	Wireless Provider With No Wireline Services	Market Share
BC	Rogers	34%
	Bell	19%
AB	Rogers	20%
	Bell	24%
SK	Bell	23%
	TELUS	14%
MB	Rogers	35%
	TELUS	16%
ON	TELUS	19%
QC	Rogers	23%
NB	TELUS	27%
NS	TELUS	32%
PEI	TELUS	30%
NL	TELUS	34%

129. The evidence will show that although Bell and TELUS benefit from their wireless network reciprocity arrangement described above, that arrangement does not extend to wireless transport or core networks or to any aspect of the wireline networks of either Bell or TELUS.¹³⁰ Nor did Bell, TELUS or Rogers have a base of wireline subscribers to whom

¹²⁷ McAleese Witness Statement ¶14.

¹²⁸ Bell is the historical telecommunications company or incumbent local exchange carrier, deploying and operating its own comprehensive residential and business wireline access network, in the vast majority of communities in Manitoba (since its acquisition of Manitoba Telecommunications Services in March 2017), Ontario, Quebec, and Atlantic Canada, and TELUS operates an extensive residential wireline network in most areas in Alberta and British Columbia—See Howe Witness Statement ¶5, 10. Rogers offers wireline services in Southern and Eastern Ontario, New Brunswick and Newfoundland – See Prevost Witness Statement ¶27.

¹²⁹ Please see SJRB-CCB00876771 for market share data.

¹³⁰ Howe Witness Statement ¶9.

they could “cross sell” when they began offering wireless services outside of their respective wireline network footprints.

130. The experience of Videotron is also apposite and puts the lie to one of the central theories underlying the case of the Commissioner. The evidence will show that Videotron began offering wireline services on July 30, 2020 in the Abitibi region of Quebec, even though it does not own or operate its own wireline network there. Instead, Videotron offers wireline services as a reseller under the CRTC’s TPIA framework (which allows a party to offer wireline Internet services over another company’s wireline network at regulated cost-based prices established by the CRTC).¹³¹ In the two years following its entry into the Abitibi region, Videotron has grown its wireline market share from zero to [REDACTED] and reduced the bills of consumers in that region by 35%.¹³² Videotron’s evidence will confirm that its success in Abitibi exceeded its expectations and “has confirmed management’s belief in Videotron’s ability to provide wireline services under the TPIA framework”.¹³³ The Proposed Transaction enables Videotron to apply that track record across the **entire** wireless network of Rogers–Shaw [REDACTED]

131. The evidence will also demonstrate that one of the largest and most successful wireless carriers in the United States—T-Mobile US Inc. (“**T-Mobile**”)—has operated successfully for years in providing wireless services to more than 110 million customers¹³⁴ in the United States even though it did not own or operate its own wireline network or provide wireline services. Indeed, T-Mobile just sold a legacy wireline business it acquired as part of its merger with Sprint in 2020 for \$1.¹³⁵

132. The Commissioner acknowledges that “Shaw has made significant long-term investments to transform the Freedom network from a 3G network into a competitive LTE-Advanced network and 5G-capable network”.¹³⁶ The Commissioner nevertheless asserts that Shaw’s success in providing wireless services to consumers is attributable to

¹³¹ Lescadres Witness Statement ¶9, 23; Péladeau Witness Statement, Annexe 13.

¹³² Lescadres Witness Statement ¶9, 36-45; Péladeau Witness Statement, Annexe 13.

¹³³ Lescadres Witness Statement ¶41, 43.

¹³⁴ T-Mobile US Inc., Form 10-K (SJR-CCB00895860).

¹³⁵ McAleese Witness Statement ¶212-216.

¹³⁶ Notice of Application ¶26.

“leveraging its wireline infrastructure to decrease costs and accelerate deployment of services” by, for example, using “wireline infrastructure as a springboard to launch Shaw Mobile and spur competitiveness through innovations such as Wi-Fi hotspots”¹³⁷ as well as through its consequent ability to leverage its established brand to build and maintain a strong customer base through cross-selling and bundling opportunities.¹³⁸

133. The evidence will show that far and away the most significant value-driver in the provision of wireless services—and the highest cost associated with owning and operating a facilities-based wireless business—is spectrum. The evidence will demonstrate that spectrum licences are sold through competitive, complex and very costly auction processes overseen by ISED. Spectrum is scarce. When ISED makes new spectrum frequencies available to mobile providers through auctions, this generally follows a re-purposing exercise where spectrum is taken away from existing users, such as over-the-air broadcasters, diminishing technologies or government users. Holders of mobile spectrum licences are entitled to transmit signals across specific electromagnetic bands in particular geographic regions.¹³⁹ ISED and its predecessor, Industry Canada, have used spectrum auctions to enhance competition in the supply of wireless products and services, including by “setting aside” spectrum in auctions that only new entrants and non-Big 3 participants can bid on.¹⁴⁰

134. In 2007, the federal government initiated a concerted effort to promote wireless competition in Canada, which continues to this day. As the first and foundational step, Industry Canada adopted an extensive “set-aside” in its 2008 auction of AWS-1 spectrum (which was particularly valuable for offering 3G-level wireless services). In particular, Industry Canada set aside approximately 45% of the available spectrum for new entrants into the wireless industry.¹⁴¹ Both Freedom (then called Globalive, doing business as “WIND Mobile”) and Videotron were able to acquire and deploy that spectrum in their

¹³⁷ Notice of Application ¶¶26; see also ¶¶64.

¹³⁸ Notice of Application ¶¶64.

¹³⁹ McAleese Witness Statement ¶¶13, 42-45; Drif Witness Statement ¶¶40; Webb Witness Statement ¶¶29-32.

¹⁴⁰ Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (SJRB-CCB00896013).

¹⁴¹ English Witness Statement ¶¶36-40; Péladeau Witness Statement ¶¶9-10.

target markets (basically major centres in Ontario, British Columbia and Alberta for WIND Mobile; Quebec for Videotron).

135. The evidence will show that after Shaw acquired WIND Mobile in 2016 and rebranded it as “Freedom”, Shaw acquired and deployed— [REDACTED] —700 MHz and 2500 MHz spectrum licences that were essential to upgrade WIND Mobile’s 3G network into an LTE network.¹⁴² Videotron acquired licences for the same spectrum and conducted an analogous upgrade across its network in Quebec.¹⁴³

136. This expensive but necessary upgrade of Freedom’s wireless network to LTE enabled Freedom to seriously disrupt the wireless services industry in 2017 and 2018 by: (i) offering its unprecedented “Big Gig” pricing plans; (ii) entering into [REDACTED]

[REDACTED].¹⁴⁴ The Commissioner’s pleadings and proposed evidence speak in glowing terms about the manner in which Freedom disrupted the wireless market in 2017 and 2018 to the benefit of consumers, but fail to appreciate how Freedom made that disruption happen. The answer is simple: [REDACTED]

137. The evidence will demonstrate that if that had not occurred: (i) Freedom’s Big Gig pricing plans would not have elicited the response from consumers that they did; (ii) Freedom’s wireless network would not have had the capacity to handle properly the increased traffic these pricing plans gave rise to; (iii) Apple would not have authorized Freedom to carry and sell its products, including iPhones; and (iv) Freedom would have been unable to secure the distribution arrangements that it did with the retailers referred to above.¹⁴⁶

¹⁴² English Witness Statement ¶93.

¹⁴³ Drif Witness Statement ¶55, 147.

¹⁴⁴ McAleese Witness Statement ¶105-128.

¹⁴⁵ English Witness Statement ¶84-86; McAleese Witness Statement ¶13.

¹⁴⁶ McAleese Witness Statement ¶101-124.

138. All of Freedom’s assets will be acquired by Videotron as a consequence of the Proposed Transaction including, most notably, its spectrum. In this regard, Videotron’s evidence will show that it conducted a rigorous internal analysis of what additional assets would be “necessary to operate the Freedom business successfully”. It drew up an initial list in April 2021 that it revised periodically in light of its due diligence findings.¹⁴⁷ As finally negotiated by Videotron, the Proposed Transaction provides Videotron with everything on its wish list and more.¹⁴⁸

139. Videotron negotiated its arrangements with Rogers after this proceeding had been commenced by the Commissioner in early May 2022. There can be no doubt that Videotron was able to negotiate highly favourable “once in a lifetime” arrangements with Rogers because of the leverage it enjoyed at the time. The arrangements Videotron negotiated with Rogers were the result of exceptionally hard bargaining between highly sophisticated arms-length counterparties. The arrangements in question include various ancillary supply agreements with respect to [REDACTED]

[REDACTED].¹⁴⁹

Ultimately, Videotron obtained, among other things:

- (a) “an acceptable roaming agreement with attractive rates and seamless handoff”, including [REDACTED]
[REDACTED];¹⁵⁰
- (b) “a transport agreement to secure the fibre optic links connecting the elements of its current wireless network, as well as new additions to that network”, including [REDACTED]
[REDACTED] as well as [REDACTED] and
[REDACTED]

¹⁴⁷ Lescadres Witness Statement ¶¶118-119.

¹⁴⁸ Lescadres Witness Statement ¶¶118-119, 135.

¹⁴⁹ Lescadres Witness Statement ¶¶121-131.

¹⁵⁰ Lescadres Witness Statement ¶¶136(a).

[REDACTED]
[REDACTED]¹⁵¹ and

(c) [REDACTED]

[REDACTED]¹⁵²

140. These arrangements provide Videotron with a uniquely favourable platform that it no doubt will rely upon to compete vigorously and effectively against all of Bell, TELUS and Rogers in the supply of wireless products and services, if the Proposed Transaction is allowed to proceed.

141. [REDACTED]
[REDACTED], the ancillary agreements themselves are not. In fact, arrangements of this nature are commonplace in the telecommunications industry in Canada. They are neither complicated nor unusual from a technical or commercial perspective. Indeed, ISED and the CRTC explicitly sanction and encourage the sharing of infrastructure between competitors in Canada. They both recognize that it is neither sensible nor feasible to require that every competitor in the wireline and wireless industries in Canada build and operate every component of their own wireline and wireless networks.

142. With respect to roaming, a mandated wholesale wireless roaming regime was introduced by Industry Canada as part of the November 2007 Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2GHz Range ("**Policy Framework**").¹⁵³ This regime was implemented in November 2008 and then expanded by Industry Canada in 2013. As conditions of their spectrum licences, all wireless carriers in Canada with spectrum licences in the relevant bands must provide roaming services to any other licensee in those bands, regardless of whether the party receiving roaming services is a national carrier, regional carrier, or new entrant.¹⁵⁴

¹⁵¹ Lescadres Witness Statement ¶136(b), 152-153.

¹⁵² Lescadres Witness Statement ¶136(c).

¹⁵³ Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (SJRБ-CCB00896013).

¹⁵⁴ Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (RBCH00013_000000319, p. 14; SJRB-CCB00896014, p. 6).

Moreover, carriers must provide roaming services in all of their licensed service areas—both outside and inside geographic areas covered by spectrum licences held by the carrier receiving roaming services.¹⁵⁵

143. In the Policy Framework, Industry Canada made clear that roaming arrangements had to be offered by wireless carriers in Canada wherever it is technically feasible to do so, and that parties to roaming arrangements would be required to submit to expedited binding arbitration if they were unable to come to an agreement.¹⁵⁶ Industry Canada made clear that it “expect[ed] that roaming would be offered at commercial rates that are reasonably comparable to rates that are currently charged to others for similar services”.¹⁵⁷

144. The evidence will show that the CRTC also intervened in 2015 and now sets regulated rates, terms and conditions for the provision of roaming services by the Big 3 to newer entrants into the wireless market, such as Videotron. In the course of its decision to regulate these matters, the CRTC observed that “wireless service providers enter into a variety of wholesale mobile wireless arrangements that address commercial and technical matters, such as roaming, and tower and site sharing.”¹⁵⁸

145. With respect to transport services (which forms part of “backhaul”, discussed more fully below), in the period since 2008 there has been no mandated regime for wholesale backhaul and transport services in Canada. That is because there is a robust market with competitive supply of these services.¹⁵⁹

146. With respect to wholesale wireline services, or TPIA, the CRTC prescribes the rates, terms and conditions under which incumbent service providers are required to make available parts of their wireline networks to competitors for the provision of retail

¹⁵⁵ *Ibid.*

¹⁵⁶ Policy Framework, p. 8.

¹⁵⁷ *Ibid.*, p. 8.

¹⁵⁸ Telecom Regulatory Policy CRTC 2015-177, para. 15 (SJR-CCB00897066).

¹⁵⁹ The CRTC has forborne from regulating the prices, terms and conditions on which wireless carriers in Canada obtain backhaul services from other carriers. Telecom Decision CRTC 2008-17 ¶¶83-86 (SJR-CCB00896016). The CRTC concluded that alternative supplies of backhaul services were sufficiently plentiful that further regulation was not required (*ibid.*).

internet services to end customers. The TPIA regime is a carefully considered framework that is now well-established. Indeed, the regime was first implemented more than 20 years, in 1999,¹⁶⁰ and tariffed rates were first established by the CRTC in 2000.¹⁶¹

147. In its August 2019 report entitled “Delivering Choice: A Study of Competition in Canada’s Broadband Industry”, the Competition Bureau recognized the effectiveness of the TPIA regime. In doing so, the Bureau “underscore[d] the importance of setting wholesale access rates at the correct level to ensure that investment incentives are maintained, while at the same time ensuring sufficient scope for wholesale-based competitors to continue to offer competitive discipline in the marketplace”.¹⁶² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

148. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

149. In the result, if the Proposed Transaction is allowed to proceed, TELUS will face substantially increased competition from both Rogers and Videotron in the provision of wireline services in its “home markets” of Alberta and British Columbia, where TELUS has become increasingly dominant in recent years.

150. The Commissioner’s view that Videotron will not be as effective a competitor as Shaw in the provision of wireless services is based primarily on three aspects of Shaw’s business: (i) the Shaw Mobile brand; (ii) the Shaw Go WiFi service; and (iii) backhaul services that Shaw provides to Freedom. The evidence will show, however, that the

¹⁶⁰ Telecom Decision CRTC 99-8 (SJR-CCB00895863).

¹⁶¹ Order CRTC 2000-789 (SJR-CCB00895817).

¹⁶² Delivering Choice: A Study of Competition in Canada’s Broadband Industry, p. 8 (SJR-CCB00896147).

Commissioner's reliance on these matters is seriously misplaced, both technologically and commercially.

(i) **Shaw Mobile**

151. As noted above, Shaw Mobile is a wireless brand that Shaw launched in the middle of the COVID-19 pandemic that essentially offered low-cost (or no-cost), low-data wireless plans on Freedom's wireless network to Shaw's wireline customers in British Columbia and Alberta. As explained above, Shaw introduced Shaw Mobile as a wireline retention tool.¹⁶³ At the time of its launch on July 30, 2020, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁶⁴

152. Shaw Mobile was (and is) a new wireless *brand*, not a new wireless carrier. It was marketed almost exclusively to wireline subscribers on a bundled basis. As alluded to above, Shaw Mobile operated—and continues to operate—entirely on the wireless network of Freedom.¹⁶⁵

153. The launch of Shaw Mobile coincided with the "Back to School Season", [REDACTED]
[REDACTED].¹⁶⁶ The service was popular in its early days and, in the first several months following its launch, attracted many new subscribers.¹⁶⁷ Its data plans were particularly well-suited for customer needs given the global pandemic that was raging at the time. In the Summer and Fall of 2020, customers were rarely travelling outside of their homes. Because of unprecedented and widespread restrictions on travel, and work-from-home orders, consumers were far less

¹⁶³ McAleese Witness Statement ¶¶76, 236, 244-245.

¹⁶⁴ McAleese Witness Statement ¶245.

¹⁶⁵ McAleese Witness Statement ¶246.

¹⁶⁶ McAleese Witness Statement ¶247.

¹⁶⁷ McAleese Witness Statement ¶262-263; McAleese Responding Witness Statement ¶88-89.

concerned than they otherwise may have been about wireless data limits and roaming rates.¹⁶⁸

154. However, initial results experienced at the time of the launch of this new brand dissipated quickly and have not translated into long term business success for Shaw. The evidence will show that [REDACTED]

[REDACTED]

[REDACTED] 169 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁷⁰

155. Just as banks giving away toasters do not disrupt the market for home appliances, Shaw Mobile did not disrupt the market for wireless services. Shaw Mobile's market share stabilized shortly following its initial launch. In the period of more than two years since, Shaw Mobile has had no meaningful or sustained impact on the prices or terms charged or imposed by Shaw's principal competitors in the wireless business, either in Alberta, British Columbia or elsewhere.¹⁷¹

156. In any event, Videotron has a plan to offer bundled wireless-wireline packages (including up to four services: wireless, Internet, television and home phone) to subscribers in British Columbia and Alberta at prices up to [REDACTED] lower than what Shaw Mobile customers currently pay, starting [REDACTED] following the implementation of the Proposed Transaction.¹⁷²

157. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁶⁸ McAleese Witness Statement ¶¶260-261.

¹⁶⁹ McAleese Witness Statement ¶266.

¹⁷⁰ McAleese Witness Statement ¶¶276, 278.

¹⁷¹ McAleese Witness Statement ¶¶256-259, 266-269.

¹⁷² Lescadres Witness Statement ¶¶114, 185; Lescadres Responding Witness Statement ¶¶5, 12-26.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁷³ Videotron is by

far the party best placed to make this determination and the party with the greatest incentive to get the decision right. Neither the Commissioner nor any of his witnesses has provided any sound or legitimate basis to second-guess Videotron's informed business judgment in this regard.

158. The evidence will confirm the feasibility of Videotron's strategic plan. Perhaps the most remarkable evidence in the record thus far comes from the Commissioner's own witness, Christopher Hickey of Distributel, which Bell has now agreed to acquire. As set out in his Witness Statement, in the period following the announcement of the original proposed transaction between Rogers and Shaw in March 2021, Distributel considered acquiring Freedom. As a result, it conducted a *pro forma* assessment of the costs it would incur to offer bundled wireline-wireless services while acting as a reseller of wireline services (as Videotron now proposes to do). Distributel determined that although the costs it would incur in offering the same services as Shaw Mobile would be lower than the retail prices Shaw charges to customers of Shaw Mobile, the profit margins it could reasonably expect to earn in doing so would be insufficient to make this business venture worthwhile.¹⁷⁴ Accordingly, Distributel made the following proposal to Rogers:¹⁷⁵

45 [REDACTED]

¹⁷³ Lescadres Witness Statement ¶¶61(d), 66, 107-115.

¹⁷⁴ Hickey Witness Statement ¶25, 30-31.

¹⁷⁵ Hickey Witness Statement ¶45.

159. As discussed above, through hard bargaining [REDACTED]

160. Videotron has reviewed Distributel's calculations and has discovered that they contain a number of errors and incorrect assumptions. Correcting those errors confirms that Videotron will be able to offer the same services as those now offered under the Shaw Mobile brand, for considerably less than Shaw now charges, while still making a commercially reasonable profit.¹⁷⁶

161. The Commissioner apparently assumes that if the Tribunal were to prevent the Proposed Transaction from proceeding, Shaw will continue to enjoy significant advantages from offering wireless services to its existing wireline customer base. In making that assumption, however, the Commission has failed to take into account both

[REDACTED] as well as the inferior spectrum position of Shaw relative to the spectrum positions of each of Bell, TELUS and Rogers. The reality, as the evidence will show, is that although Shaw Mobile enjoyed success at the time of its launch, in the long run this brand failed to achieve its intended purpose.

162. If this Tribunal were to block the Proposed Transaction, the competitive alternative to services offered by TELUS to consumers in British Columbia and Alberta will continue to be Shaw's [REDACTED] as well as existing services offered by Bell and Rogers. Conversely, If this Tribunal allows the Proposed Transaction to proceed, TELUS will face increasingly intense competition from not one, but two competitors offering bundled wireless-wireline services, namely: a newly established Rogers (combining Rogers' wireless services with Shaw's wireline services), as well as Videotron (combining its own wireless services with wireline services provided over the wireline network of Rogers [REDACTED]). The evidence will establish that if the

¹⁷⁶ Lescadres Responding Witness Statement ¶¶24-26.

Proposed Transaction is allowed to proceed, consumers in British Columbia and Alberta will receive substantially better pricing, quality of service and choice than they currently do from Shaw on a standalone basis.

163. Put simply, the prospect of Shaw Mobile being replaced by a new Videotron bundled wireline-wireless product provides no legitimate basis for concluding that Videotron will somehow be a “less effective” wireless competitor than Shaw now is. The opposite is true.

(ii) ***Shaw Go WiFi***

164. Shaw Go WiFi is a legacy wireline program that allows customers of Shaw, when in the vicinity of a Shaw WiFi “hot spot”, to connect to the hotspot over WiFi.¹⁷⁷ Shaw has, in fact, two distinct WiFi networks which the Commissioner and his witnesses conflate repeatedly:¹⁷⁸

- (a) *Shaw Go WiFi*, which refers to Shaw’s network of more than 100,000 public hotspots, located in malls, restaurants and other public locations; and
- (b) *Shaw’s Home Hotspots*, which refers to modems located in the homes of Shaw’s home internet subscribers. They can be accessed via WiFi by subscribers of Freedom and Shaw Mobile when they are physically in their own homes, or are present in the home of another Shaw wireline Internet subscriber.

165. The evidence will show that Shaw Go WiFi was made available to Shaw’s home Internet customers more than a decade ago—at a time when Shaw did not offer wireless services. It was designed to allow Shaw’s wireline home Internet customers, when in the vicinity of a WiFi “hot spot”.¹⁷⁹ Shaw Go WiFi was later made available to customers of

¹⁷⁷ McAleese Witness Statement ¶¶189-190.

¹⁷⁸ McAleese Witness Statement ¶191.

¹⁷⁹ McAleese Witness Statement ¶190.

Freedom and, subsequently, to Shaw Mobile customers.¹⁸⁰ It is also now currently available to the general public.¹⁸¹

166. [REDACTED]

167. [REDACTED]

168. The Commissioner's theories about the role and importance of Shaw Go WiFi are removed from reality and not based on properly admissible evidence or meaningful data. They appear, instead, to be based largely upon speculation, supposition and his obvious misunderstanding of isolated snippets from Shaw's internal documents that he and others from the Competition Bureau have taken entirely out of context.

169. [REDACTED]

¹⁸⁰ McAleese Witness Statement ¶¶189-190;
¹⁸¹ McAleese Responding Witness Statement ¶157. Note that data limits apply to members of the public.
¹⁸² Drif Witness Statement ¶138; McAleese Witness Statement ¶192.
¹⁸³ McAleese Witness Statement ¶¶192, 194; Webb Responding Report ¶45-79; McAleese Witness Statement ¶¶158-169.
¹⁸⁴ McAleese Witness Statement ¶160.
¹⁸⁵ McAleese Responding Witness Statement ¶¶167-168.

2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁸⁷

170. In any event, under the terms of the Proposed Transaction, Rogers has agreed to continue to give all Videotron customers access to Shaw Go WiFi hotspots [REDACTED]
[REDACTED].¹⁸⁸ Videotron's evidence will show that [REDACTED]
[REDACTED]¹⁸⁹

171. With respect to Home Hotspots, Videotron will not be acquiring access as part of the Proposed Transaction since [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]¹⁹¹ In addition, since the wireless plans Videotron makes available to its subscribers tend to offer much more data than users actually require, Videotron expects [REDACTED]
[REDACTED].¹⁹² This will especially be the case once the Proposed Transaction has been completed and implemented, after Videotron deploys 5G services in British Columbia and Alberta using its 3500 MHz spectrum combined with Freedom's existing spectrum. That combination is [REDACTED]
[REDACTED]¹⁹³ Once again, Videotron is by

¹⁸⁶ Drif Witness Statement ¶¶140-141; Responding Witness Statement of Mohamed Drif sworn on October 22, 2022 (“**Drif Responding Witness Statement**”) ¶10.
¹⁸⁷ Drif Responding Witness Statement ¶8, 20 [Certified English Translation].
¹⁸⁸ Lescadres Witness Statement ¶136(d); Drif Responding Witness Statement ¶3.
¹⁸⁹ Lescadres Witness Statement ¶136(d).
¹⁹⁰ Drif Witness Statement ¶133 [Certified English Translation].
¹⁹¹ Drif Witness Statement ¶134 [Certified English Translation].
¹⁹² Drif Witness Statement ¶133.
¹⁹³ Drif Witness Statement ¶136; see also ¶149-150; Drif Responding Witness Statement ¶4-5.

far the party best placed to make these determinations and the party with the greatest incentive to get them right. Neither the Commissioner nor any of his witnesses has provided any sound basis to second-guess Videotron's informed business judgment in this regard.

172. Put simply, Videotron's supposed lack of access to Home Hotspots and the potential discontinuation of Shaw Go WiFi in the future provide no credible basis, or indeed any basis, to conclude that following the completion of the Proposed Transaction Videotron will be a "less effective" wireless competitor than Shaw now is.

(iii) **Backhaul**

173. Finally, "backhaul" in the wireless context refers to physical cables ("**fixed backhaul**") and microwave transmitters ("**wireless backhaul**") that connect cell phone towers to the "core network" of a wireless carrier. In Ontario, Freedom owns its wireless backhaul but does not have its own fixed backhaul. Instead, Freedom leases fixed backhaul from a variety of arm's-length providers—[REDACTED].¹⁹⁴ In British Columbia and Alberta, [REDACTED]

[REDACTED]

[REDACTED].¹⁹⁵

174. From a technological, engineering and commercial standpoint, it makes no difference if backhaul is owned or rented.¹⁹⁶ It is, in fact, very common throughout Canada and in other countries for wireless service providers to obtain backhaul services from third parties, including from other wireless competitors.¹⁹⁷ [REDACTED]

[REDACTED]

[REDACTED].¹⁹⁸

¹⁹⁴ McAleese Witness Statement ¶180.

¹⁹⁵ McAleese Witness Statement ¶183-184.

¹⁹⁶ Drif Witness Statement ¶115.

¹⁹⁷ McAleese Witness Statement ¶28, 187; Telecom Decision CRTC 2008-17 ¶83-86 (SJR-CCB00896016).

¹⁹⁸ McAleese Witness Statement ¶186.

175. Even if the Commissioner were correct in asserting that ownership of backhaul affords a competitive advantage to a wireless service provider, Videotron owns Fibrenoire—which deploys and operates a fibre optic network throughout Toronto, Ottawa, Montreal and Quebec City.¹⁹⁹ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]²⁰⁰

Consequently, Videotron anticipates being able to provide Freedom with its own fixed backhaul in Ontario where the overwhelming majority of Freedom’s subscribers reside.²⁰¹

176. In any event, the Commissioner is wrong in making this assertion. The evidence will show instead that backhaul services are widely and readily available in Ontario, British Columbia and Alberta at competitive prices. The evidence will also show that it is by no means necessary for a wireless provider to own and operate its own backhaul to compete viably and effectively in providing wireless products and services. Once again, the most obvious and pertinent example is Freedom itself in Ontario. In a country as vast and topographically challenging as Canada, it is neither feasible nor necessary for every wireless carrier to build and operate its own cross-country backhaul and intercity transport network. Nor would it be desirable for multiple carriers to devote large amounts of capital to build duplicative infrastructure across Canada. Among other things, such a result would be inimical to the interests of consumers. It would drive up the costs incurred by wireless services providers, and inevitably result in increases in retail prices those providers are required to charge. As a direct and sensible result, the sharing of backhaul services among telecommunications providers in Canada is familiar, commonplace and supported by the CRTC’s policies.²⁰²

¹⁹⁹ Drif Witness Statement ¶18; Lescadres Witness Statement ¶29.

²⁰⁰ Drif Witness Statement ¶127.

²⁰¹ Drif Witness Statement ¶72.

²⁰² McAleese Witness Statement ¶28, 187; Telecom Decision CRTC 2008-17 ¶83-86 (SJR-CCB00896016).

177. In British Columbia and Alberta, Videotron will have access to all the same backhaul assets and arrangements that Freedom had access to, through enforceable fixed backhaul contracts with Rogers and other third parties or through ISED microwave wireless licences. Videotron anticipates either building its own transmission network or renting the infrastructure of third parties to roll out a wireless 5G network in British Columbia, Alberta and Manitoba.²⁰³ At this time, Videotron's analyses have determined that long-term leases are preferable to building a dedicated backhaul network.²⁰⁴

178. The Commissioner apparently intends to adduce evidence from representatives of Bell and TELUS concerning the benefits they allegedly derive from owning their own backhaul. [REDACTED]

[REDACTED]. Even if this Tribunal were to accept the self-serving evidence of Bell and TELUS on this issue, that evidence would take the Commissioner nowhere. Just because Bell and TELUS might perceive some cost benefit to owning their own backhaul assets does not mean that Videotron must likewise own its own backhaul in order to compete efficiently or effectively in British Columbia or Alberta. The evidence will show that it does not, given that there are numerous alternatives readily available to Videotron—both fixed and wireless—to obtain the backhaul it needs to support its wireless networks in areas where it does not currently have its own backhaul.²⁰⁵

179. In any event, as part of the Proposed Transaction, [REDACTED]
[REDACTED]
[REDACTED].²⁰⁶ Even if one takes the Commissioner's case at its highest and assumes that Videotron will suffer some kind of disadvantage from not owning its own backhaul in British Columbia or Alberta (which is not the case), the Proposed Transaction includes more than adequate compensatory measures.

²⁰³ Drif Witness Statement ¶72; Drif Responding Witness Statement ¶15-19.

²⁰⁴ Drif Witness Statement ¶73.

²⁰⁵ Webb Responding Report ¶32-33, 81-83; McAleese Responding Witness Statement ¶134-154; Drif Responding Witness Statement ¶23-32.

²⁰⁶ Drif Witness Statement ¶117-128.

180. In the negotiations leading up to the Proposed Transaction, Rogers and Videotron discussed the possibility of Videotron taking title to key fibre assets.

Eventually, Videotron determined that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁰⁸ Videotron expects as well that its backhaul leasing costs will decline over time as it gradually builds up its own network.²⁰⁹

181. Once again, Videotron is by far the party best placed to make these determinations and the party with the greatest incentive to get these matters right. Neither the Commissioner nor any of his witnesses (especially from Bell and TELUS) offers any legitimate basis to second-guess the informed business judgment of Videotron in this regard.

182. The Commissioner's pleadings also assert that, if Videotron has to rely on other parties, like Rogers, for its backhaul, "coordination" will ensue that will be harmful to competition. The Commissioner has not proffered any properly admissible evidence to substantiate this claim. He relies, instead, on speculation and conjecture that is removed from reality and fails to take into account the extensive backhaul-sharing arrangements that already exist among the Big 3 and other wireless providers across the country. Under the terms of the Proposed Transaction, [REDACTED]

[REDACTED]
[REDACTED]²¹⁰ In addition, the evidence will show that "Videotron and Rogers have other unrelated agreements, including operating a joint network in Quebec, and those agreements have never stopped Videotron from competing aggressively against Rogers."²¹¹

²⁰⁷ Lescadres Witness Statement ¶120.

²⁰⁸ Drif Witness Statement ¶119 [Certified English Translation].

²⁰⁹ Drif Witness Statement ¶126; Drif Responding Witness Statement ¶33.

²¹⁰ Drif Witness Statement ¶120, 121.

²¹¹ Lescadres Witness Statement ¶10.

183. Put simply, the fact that Videotron may rely on third parties to provide backhaul in British Columbia and Alberta provides no credible or legitimate basis to conclude that if the Proposed Transaction is allowed to proceed, Videotron will be a “less effective” wireless competitor than Shaw now is.

PART V – SHAW’S WITNESSES

184. During the trial of this proceeding, Shaw intends to call six fact witnesses and three expert witnesses. The nature of the evidence of Shaw’s six fact witnesses is summarized briefly below:

- (a) **TREVOR ENGLISH, Executive Vice President, Chief Financial and Corporate Development Officer of Shaw.** Mr. English has delivered one Witness Statement dated September 23, 2022. Shaw expects the evidence of Mr. English to address, among other things: (i) the history, ownership and leadership of Shaw; (ii) the inception and development over time of its wireline and wireless businesses; (iii) the escalating investment needs of Shaw’s core businesses, including the intense demands of its wireline business in the face of relentless competition from TELUS; (iv) the reasons Shaw decided to sell the Company and enter into the Proposed Transaction; and (v) the future of Shaw, and how there is no world in which Shaw can or will “roll back the clock” in the event that the Proposed Transaction is blocked.

- (b) **ROD DAVIES, Managing Director and Head of the Canadian Communications, Media and Technology investment banking group, TD Securities.** Mr. Davies has delivered one Witness Statement dated September 23, 2022. Mr. Davies led the TD Securities team that advised Shaw, the SFLT and members of the Shaw family in the period leading up to the agreement with Rogers announced in March 2021. [REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED].
- (c) **PAUL McALEESE, President of Shaw.** Mr. McAleese has delivered two Witness Statements, dated September 23, 2022 and October 20, 2022. Shaw expects the evidence of Mr. McAleese to address, among other things: (i) an overview of the business of Shaw and the broader telecommunications industry in Canada; (ii) Shaw's acquisition of WIND Mobile in 2016 and its continued development by Shaw as a standalone wireless business through substantial investments in spectrum and other wireless assets; (iii) Shaw's consideration of a roll-out of 5G networks; (iv) the insignificant (and decreasing) role of Shaw Go WiFi in Freedom's wireless network and the general absence of convergence between the wireline and wireless networks of Shaw; (v) the reasons underlying the launch of Shaw Mobile and its performance in the period since; (vi) the Proposed Transaction, including its proper sequencing and anticipated benefits; (vii) Shaw's ongoing competitive efforts; and (viii) the future of Shaw if the Proposed Transaction is not approved.
- (d) **BRAD SHAW, Chief Executive Officer and Chair of the Board of Directors of Shaw.** Mr. Shaw has delivered one Witness Statement dated September 23, 2022. Shaw expects the evidence of Mr. Shaw to address, among other things: (i) a brief history of Shaw, including the Shaw family's involvement in the business; (ii) the background to the proposed merger with Rogers, including the reasons for entering into the Proposed Transaction; and (iii) the impact on Shaw associated with continued delay and uncertainty caused by this proceeding.
- (e) **DONAVAN L. ANNETT, Principal Strategist, Strategy Architecture and Engineering of Shaw.** Mr. Annett has delivered one Witness Statement dated October 20, 2022. Shaw expects the evidence of Mr. Annett to address a discrete analysis undertaken in connection with Rogers' efforts

to begin to deploy its \$1 billion Rural and Indigenous Connectivity Fund across Western Canada.

- (f) **EVAN FUEST, Certified Computer Forensic Engineer at Consillio LLC (Shaw's third-party eDiscovery vendor).** Mr. Fuest has delivered one Witness Statement dated October 20, 2022. Shaw expects the evidence of Mr. Fuest to address the narrow issue of draft (and unsent) emails included in the Commissioner's List of Documents.

185. The nature of the evidence of Shaw's three expert witnesses is briefly summarized below:

- (a) **DR. WILLIAM WEBB, Chief Technology Officer at Access Partnership.** Dr. Webb is an engineer who specializes in wireless communications. Shaw expects to tender him as an expert in telecommunications and wireless technologies. Dr. Webb has delivered two Expert Reports, dated September 24, 2022 and October 20, 2022. Shaw expects Dr. Webb to opine that if Freedom is sold to Videotron pursuant to the terms of the Proposed Transaction, Freedom would not be a less effective competitor from a technological perspective than Freedom now is on a standalone basis under the ownership of Shaw. Shaw also expects that Dr. Webb will respond from a technological perspective to the evidence of the Commissioner's industry expert, Mr. Michael Davies, as well as to the evidence of representatives of Bell and TELUS.
- (b) **DR. PAUL A. JOHNSON, former Chief Economist of the Competition Bureau and current owner of Rideau Economics.** Dr. Johnson is a well-recognized competition economist and will be tendered by Shaw as an expert in competition economics. Shaw expects that the evidence of Dr. Johnson will address the alleged competitive impact of Shaw Mobile, as well as a number of important deficiencies in the Expert Reports tendered by the Commissioner's economic expert, Dr. Miller.

- (c) **DR. DAVID S. EVANS, Chairman of Global Economics Group, LLC.** Dr. Evans is a specialist in industrial organization and antitrust economics. He will be tendered by Shaw as an expert in competition economics. Shaw expects that the evidence of Dr. Evans will address the issue of balancing weights and, in particular, the lack of a sound basis for identifying a society wide social welfare function that would justify deviating from a total welfare approach in assessing efficiencies under section 96 of the *Competition Act*.

PART VI – CONCLUDING COMMENTS

186. Shaw is grateful for the careful attention the Tribunal will undoubtedly pay to this matter during the course of trial. After the evidence of the parties has been led, Shaw will urge the Tribunal to: (i) release its Decision at the earliest possible date, potentially with brief Reasons that explain summarily the essential basis of the Tribunal's decision with longer and more complete Reasons to follow; (ii) dismiss the Commissioner's Application; and (iii) consider very carefully why the Commissioner insisted on forging ahead with this case even after Videotron agreed to acquire Freedom in June 2022 on a uniquely favourable basis that will clearly enable it to compete in the provision of wireless products and services on a substantially more vigorous and effective basis than Shaw is now able to on a standalone basis.

187. Shaw will implore the Tribunal to recognize that, as stated above, the Proposed Transaction is manifestly in the public interest. Shaw will ask the Tribunal to find that this Transaction represents a "once in a generation" opportunity to enhance and promote competition not only in the wireless industry, but also on the wireline industry to the benefit of Canadians in multiple Provinces.

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



October 31, 2022

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