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## **COMPENDIUM PUBLIC**

### **THE COMPETITION TRIBUNAL**

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

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

**AND IN THE MATTER OF** an application by the Commissioner of Competition for orders pursuant to s. 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 -

VIDEOTRON LTD.

Intervenor

**COMPENDIUM FOR ORAL ARGUMENT**

**of**

**ROGERS COMMUNICATIONS INC.**

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December 12, 2022

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**TAB 1 – COMMISSIONER’S INCOMPLETE  
AND INACCURATE STATEMENTS OF  
THE EVIDENCE**

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**EXAMPLES OF FACTUAL INACCURACIES IN COMMISSIONER’S CLOSING SUBMISSION**

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**Commissioner’s Closing Submission: “Rogers’ Acquisition of Shaw Was Driven, at Least in Part, by a Desire to Eliminate the Threat Presented by Shaw Mobile” (Heading C.2(b))**

**Trial Evidence: Rogers’ motivation for acquiring Shaw, and the extent to which it was motivated (at all) by Shaw Mobile, was not presented.**

- The proposition that Rogers was “driven” by a “desire to eliminate the threat resented by Shaw Mobile” was not put to any Rogers witness on cross-examination.
- The Commissioner did not lead any independent evidence about Rogers’ objectives or intentions when entering into the agreement to acquire Shaw.

\*\*\*\*\*

**Commissioner’s Closing Submission: “The success of Bell or Telus in wireless-only regions is not comparable to Videotron due to the existence of their network sharing arrangement which helps to enable their wireless businesses to compete more effectively *throughout their shared wireline footprint.*” (para. 79)**

**Trial Evidence: There is no support in the record to suggest that Bell and Telus share a wireline footprint.**

- This evidence was not led in-chief by any of Charlie Casey, Blaik Kirby, Stephen Howe or Nazim Benhadid.
- The only evidence put to these witnesses is that they share a *wireless* radio access network.

\*\*\*\*\*

**Commissioner’s Closing Submission: Videotron does not have brand recognition in Western Canada (para. 83).**

[83] The Shaw brand has contributed to the success of the launch of their wireless service in their wireline footprint in Western Canada. Videotron has no brand recognition outside Quebec. Shaw’s brand recognition bestows market benefits, including (a) enabling more rapid and less costly customer acquisition in Shaw’s footprint; and (b) financial benefits, such as a “brand halo” in the West [REDACTED] as compared to the standalone forecast for its predecessor WIND. Videotron will not receive the benefits of Shaw’s brand recognition. Freedom also does not have the same

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brand recognition as Shaw Mobile. Videotron is an unknown brand that has little to no recognition outside of Quebec, making it more difficult for the company to compete in the West. (Emphasis added.)

**Trial Evidence:** [REDACTED]

Witness Statement of Jean-François Lescadres, 23 September 2022, para. 170: “As described to the Case Team on June 30, 2022, Videotron plans to aggressively market two brands [REDACTED] and to price its services between [REDACTED] lower than current prices in British Columbia, Alberta and Ontario.” (Emphasis added.)

\*\*\*\*\*

**Commissioner’s Closing Submission: Videotron will suffer a “competitive disadvantage” because it** [REDACTED] (para. 97).

[97] Videotron is not acquiring all of Shaw’s retail distribution network. This creates a competitive disadvantage for Videotron under the Proposed Divestiture. Shaw services its combined wireless business through a combination of approximately [REDACTED] Shaw branded retail stores and Shaw.ca (which, together, service Shaw Mobile customers); and (b) [REDACTED] Freedom branded retail stores and Freedommobile.ca. [REDACTED] [REDACTED] These assets will instead accrue to Rogers. (Emphasis added.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Transcript, pp. 2882:5-9:

Mr. Thomson: Are the products or services of Freedom sold in the corporate stores of Shaw?

Mr. McAleese: They are not.

Mr. Thomson: Have they ever been?

Mr. McAleese: No, they have not.

\*\*\*\*\*

# COMPENDIUM PUBLIC

**Commissioner’s Closing Submission:** “The series of contractual arrangements that are part of the Proposed Divestiture Agreement put Videotron in a position of dependence and enable Rogers to protect its consumer wireless and wireline businesses from competition by raising Videotron’s costs” (para. 98).

**Trial Evidence: None.**

- The citation for this statement is an academic article written for the Yale Law Journal from 1986, which was not put to any witness or cited by any expert.
- The Commissioner did not put this proposition to any witness. Nor did he ever take the Tribunal to the actual terms of the contract to explain what he finds objectionable.
- The Commissioner’s statement is contradicted by the evidence of Mr. Lescadres, who stated in his September 23, 2022 witness statement that “Videotron would not have entered into the Ancillary Agreements if it had any concerns that the Ancillary Agreements made Videotron dependent on Rogers or would limit Videotron's ability to compete vigorously against Rogers, or anyone else.” (para. 157).

\*\*\*\*\*

**Commissioner’s Closing Submission: The Definitive Agreement and term sheets will “likely serve to heighten coordination” (para. 100).**

[100] The existence of these long-term contracts and the ability of Rogers to discipline Videotron also likely serve to heighten coordination. Under the oligopolistic market structure of the telecommunications industry in Canada, such coordination will result in a measurable softening of competition, result in information sharing, and increase the likelihood that Videotron will fall in line with the Big 3.

**Trial Evidence: None.**

- There is no footnote or other evidentiary reference for this statement.
- It was not led by any witness of the Commissioner, nor put to any representative of Bell, Telus, or Distributel.
- The Commissioner did not cross-examine any Rogers or Shaw witness on the relationship between the Definitive Agreements and the Commissioner’s allegations of “coordination”, “oligopolistic” market behaviour, “softening of competition” and the assertion that Videotron “will fall in line” with Rogers, Bell and Telus. This argument is entirely unsupported.

\*\*\*\*\*

# COMPENDIUM PUBLIC

**Commissioner’s Closing Submission: The CRTC’s TPIA framework “does not promote competition” (para. 103).**

b) The CRTC TPIA regime does not promote competition

[103] Rates set by the CRTC for aggregated TPIA will not provide the margins essential for effective competition. Mr. Hickey of Distributel testified that by entering Alberta and BC, his company would incur minimal or negative profit margins in all but one case if it were to offer, using the regulated TPIA rates, wireline internet and wireless service bundles similar to those offered by Shaw. (Emphasis added.)

**Trial Evidence: The Competition Bureau confirmed that the TPIA regime is firmly pro-competitive. Mr. Lescadres confirmed that Videotron will offer TPIA *with the intention* of using it as a wireless value-add.**

➤ Competition Bureau, “Delivering Choice: A Study of Competition in Canada’s Broadband Industry” (August 2019):

A key goal of this study is to assess the performance of Canada's wholesale access regime. In this vein, the Bureau's study found four key facts. First, wholesale-based competitors, who use the access regime to serve customers, currently provide services to more than 1,000,000 Canadian households. Second, consumers who are served by wholesale-based competitors report higher satisfaction with their provider than those who use traditional providers. Third, wholesale-based competitors act as a competitive alternative for countless other households, who use their presence to negotiate lower prices and other inducements from other competitors. And finally, several facilities-based competitors, who provide services using their own underlying physical networks, have recently launched flanker brands, at least in part as a competitive response to wholesale-based competitors. In these respects, the wholesale access regime appears to be fulfilling its promise to bring about greater consumer choice and increased levels of competition for Canadian consumers. (Emphasis added.)

➤ Transcript, pp. 384:15-385:6

Mr. Davis: The paragraph continues: “...In these respects, the wholesale access regime appears to be fulfilling its promise to bring about greater consumer choice and increased levels of competition for Canadian consumers.” Again, none of that is described in your witness statement, is it?

Mr. McCarthy: It is not described in my witness statement.

➤ Transcript, pp. 2321:19-2322:1-4; pp. 2323:5-25

Member Samrout: So you know, if -- I'm going to ask you to compare your -- the agreement you've reached with Rogers about Shaw and compare it with your existing TPIA agreements that you have in place with the other providers. And just stick to the principal points and comparison.

# COMPENDIUM PUBLIC

Did you get better terms, worse terms? How do they compare to what you're doing today?  
And how is it compared to a -- you know, I keep on thinking how is it compared to a boilerplate contract that you usually have with everybody else?

Mr. Lescadres: Thank you. So I'm going to answer that.

[REDACTED]

\*\*\*\*\*

**Commissioner's Closing Submission: "Contrary to Dr. Israel's comments about push and pull diversions, Dr. Miller is using a period of time *when porting and SOGA are stable*.<sup>391</sup>" (para. 119)**

**Trial Evidence: The passage from Dr. Israel's chief the Commissioners cites does not say that SOGA is stable during the period Dr. Miller uses, it says the opposite. Dr. Miller admitted on cross-examination that SOGA was falling both during and after the period he considered.**

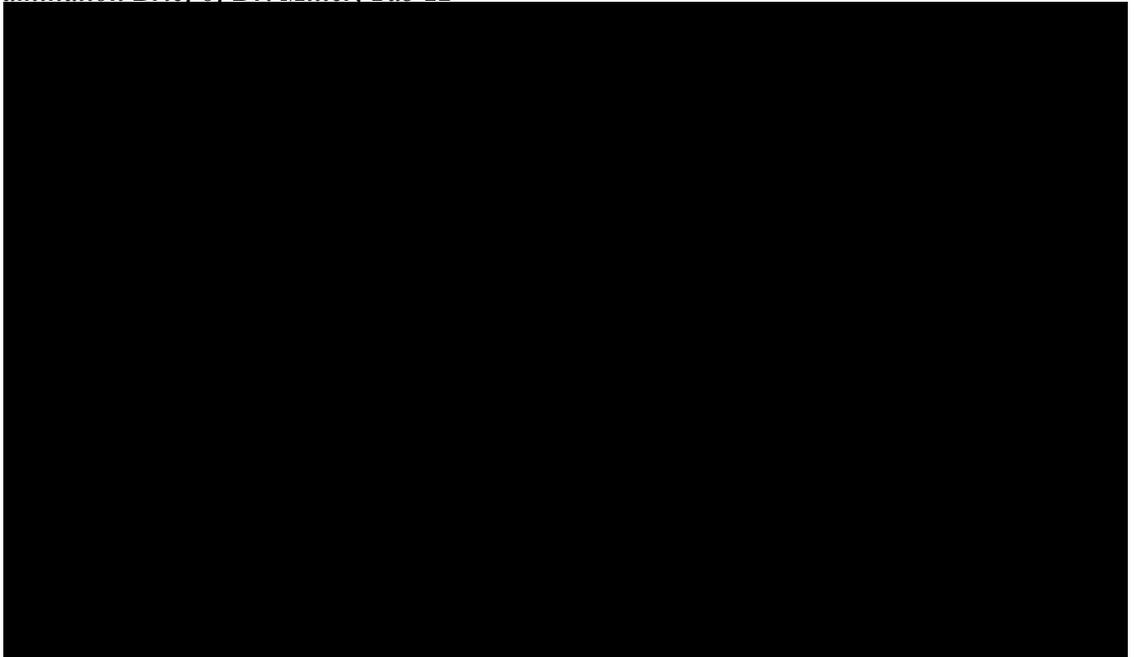
➤ *Transcript, Nov. 30 – pp. 4465:15-21 (Israel Chief, cited at footnote 391)*

Dr. Israel: ...

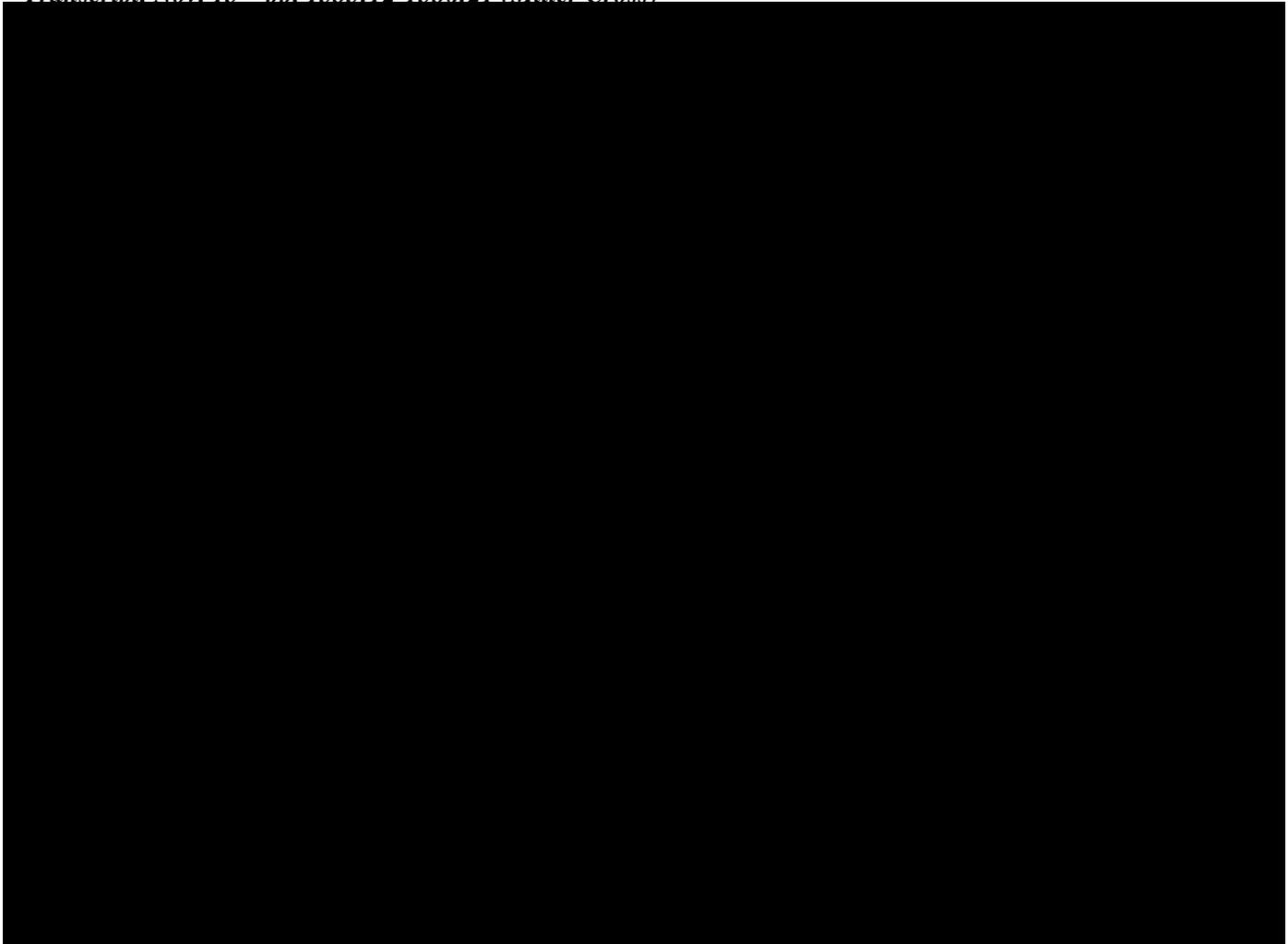
Rather than measuring what happens if you push people out of Rogers and they go where they go, you are measuring this much larger Shaw circle because it's pulling people in. That's a temporary phenomenon because Shaw is new and it's just not the right thing to measure because it's not what happens from a price increase at Rogers, it's what happens when Shaw has a new product.

# COMPENDIUM PUBLIC

➤ *Cross-Examination Brief of Dr. Miller, Tab 12*



➤ *Transcript, Nov. 15 – pp. 1535:12-1536:21 (Miller Cross)*



# COMPENDIUM PUBLIC

[REDACTED]

\*\*\*\*\*

**Commissioner’s Closing Submission: “Dr. Israel has also been involved in another wireless merger where his firm used SOGA as a *measure of market share* in a merger simulation and accepted that there are advantages and disadvantages of different measures.<sup>381</sup>” (para. 115)**

**Trial Evidence: Dr. Israel testified that Dr. Carleton used SOGA as one of a variety of measures to consider *diversion*, not *market share*.**

➤ *Transcript, Nov. 30 – pp. 4525:17-4539:8 (Israel Cross)*

Mr. Tyhurst: And you criticize Dr. Miller for using share of gross adds as a measure of market shares, correct? We've heard a lot of evidence on that already; correct?

Dr. Israel: Right. Now we're on two different topics. Share of gross adds is not market share.

...

Mr. Tyhurst: And you say that using that share of gross adds inflates welfare losses and you called -- in fact, you called the use of share of gross adds “incorrect as a matter of economics”; correct?

Dr. Israel: Yes.

Mr. Tyhurst: That's in your report -- in your reply report.

Dr. Israel: I mean, it depends on the use for which you're using share of gross adds, but certainly using it in a logit model when that logit model is designed to produce price effects on everyone purchasing the product is incorrect.

Mr. Tyhurst: Now, wouldn't you agree, though, that the share of gross adds can be a useful measure of market share that may justify its inclusion in a model estimating the potential for price increases in some circumstances, sir?

Dr. Israel: Not this model, and certainly not by itself. It's not a measure of market share.

Mr. Tyhurst: But it can be used –

Dr. Israel: Gross adds -- sorry. Gross adds along with churn, the sort of adds and deactivations, can be looked at together in certain contexts to see how things are changing, but it's not a correct measure of market share.

Mr. Tyhurst: All right. But it can be used in a model intended to calculate the potential for a price increase; correct? Gross adds can be used as a measure in that context; correct?

Dr. Israel: Not as a measure of market share.

# COMPENDIUM PUBLIC

...

Mr. Tyhurst: And your colleague at Compass Lexecon, Dr. Carlton, used a model that employed gross additions as a measure of market shares, correct? That's what this is saying.

Dr. Israel: This says he assumed diversions were proportional to gross additions, not that he plugged them in as market share.

My recollection is that what Dr. Carlton said is he looked at various measures for diversion as opposed to shares and that he got the same result in each case and then, ultimately, what was relied on was the FCC study.

...

Dr. Israel: Again, as measures of diversion, I think what he's saying is none of them are actually the price increase measure that it should be. What you're quoting from is exactly what I was remembering before because he goes on to say that "if the analysis depended on which of those you picked, I would be pretty nervous."

...

Mr. Tyhurst: All right. Just listen to the question, sir, and see if you can answer the question.

And the question is, would you agree or do you disagree with Dr. Carlton that each of these measures has advantages and disadvantages?

Dr. Israel: As measures of diversion -- we're not talking about market share here. We know what market share is. That's what the logit needs. But as measures of diversion, none of them actually measure diversion.

I agree with him, they have advantages and disadvantages and he goes on to say they are noisy measures of diversion. We talked a lot about the issues of diversion in this case.

\*\*\*\*\*

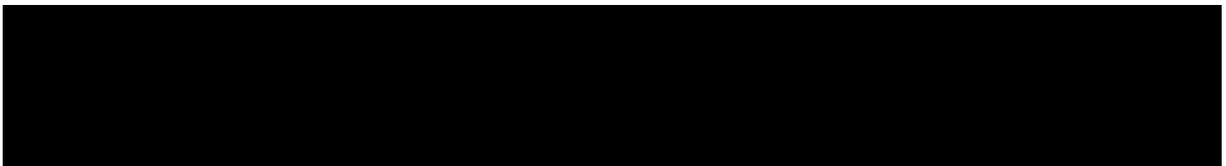
**Commissioner's Closing Submission, "Moreover, the cost projections were shown in cross-examination to be based on future data consumption that are *extremely high* and have *no factual foundation in Videotron's actual decade-long experience in the market.*"<sup>415</sup>" (para. 129)**

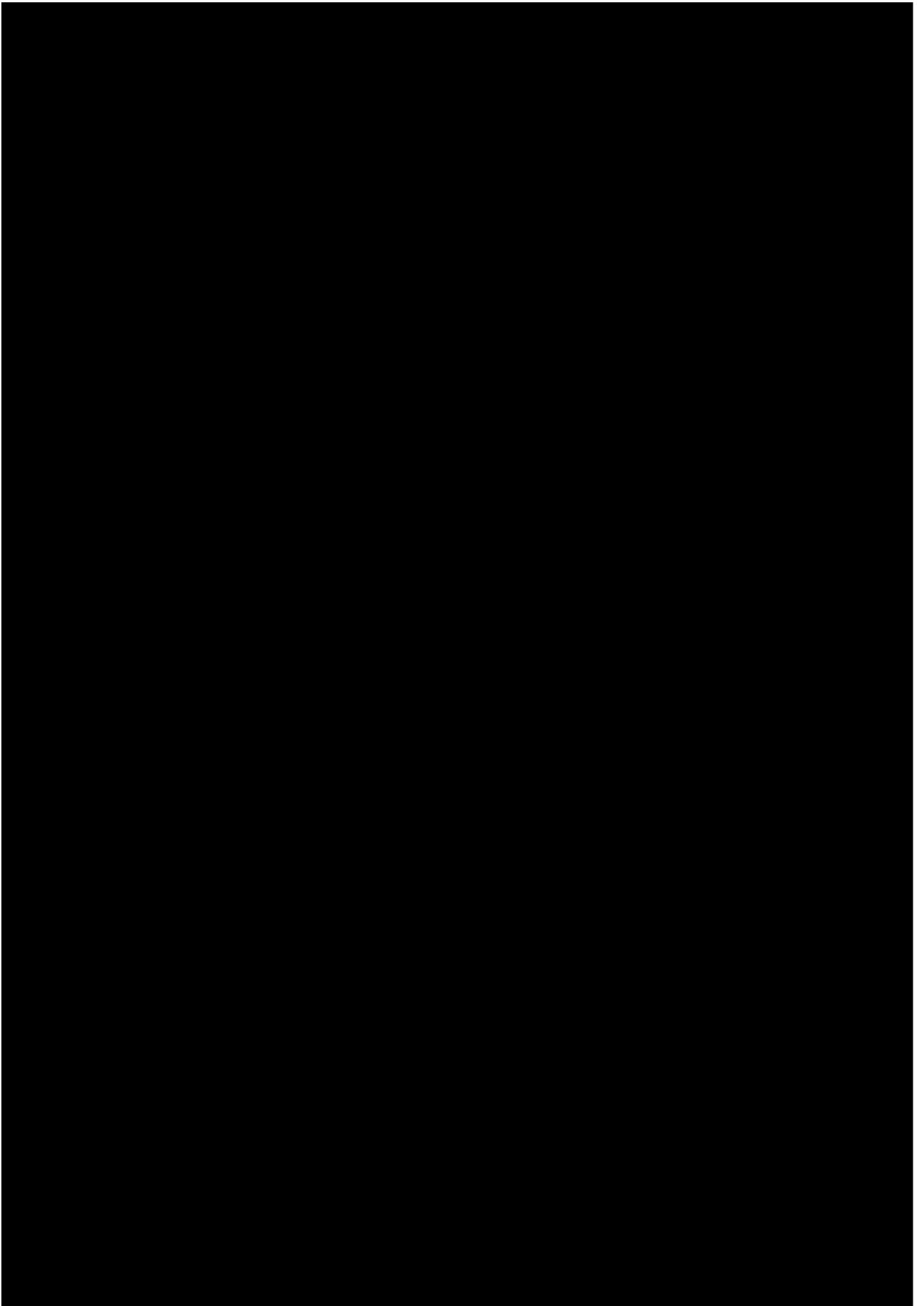
**Trial Evidence: The Commissioner's cite omits the key evidence of Dr. Israel and Mr. Lescadres, which show that the cost projections were indeed based on Videotron's actual experience.**

➤ *Transcript, Nov. 30 – pp. 4584:4-13 (Israel Cross, cited by Commissioner as footnote 415)*

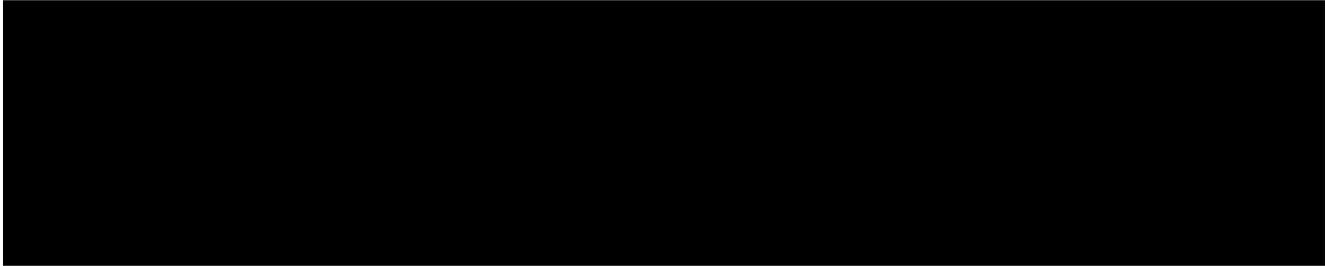


➤ *Transcript, Nov. 30 – pp. 4581:2-4584:13 (Israel Cross, full sequence – the "last answer")*





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➤ *Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 52,*



\*\*\*\*\*  
Commissioner’s Closing Submission: “Second, these projected savings apply to a [REDACTED] [REDACTED].<sup>416</sup>” (para. 129)

Trial Evidence: [REDACTED]  
[REDACTED]

➤ *Transcript, Nov. 30 – pp. 4578:8-14 (Israel Cross cited by Commissioner at ftn 416)*  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**TAB 2 – WIRELINE OWNERSHIP NOT  
NECESSARY TO COMPETE IN WIRELESS**

**TAB – 2.A**



# TELUS Market Contact Meeting

June 9, 2021

Protected under section 29 of the Competition Act and exempt from disclosure under the Access to Information Act.

**Compendium (Rogers), page 29**





**Andrea Wood**

Chief Legal & Governance Officer



**Eros Spadotto**

Executive Vice-president,  
Technology Strategy & Business Transformation



**Jim Senko**

Executive Vice-president & President,  
Mobility Solutions

**Compendium (Rogers), page 30**



# Outline

1	Rogers, Shaw and 5G wireless
2	Rogers, Shaw and rural and Indigenous communities
3	Industry consolidation
4	Pricing and retail implications

## Compendium (Rogers), page 31

# Rogers already has a leading strategic position and capabilities to deploy 5G on its own



## Spectrum

Lifeblood of wireless service

Low-band for rural  
Med-band urban / semi-urban  
High-band for ultra-speed



## Site connectivity

Radio equipment, software & connections to networks

Radio equipment  
Fibre, microwave & wireless for backhaul  
"Core" network



## Support structures

Real estate locations, suppliers & resources

Towers & small cells for coverage  
Locations for key core equipment  
Internal teams & partner ecosystem



As demonstrated by TELUS in Central and Eastern Canada, deploying a successful 5G network outside wireline incumbent territory is business as usual for TELUS, Rogers, &

# Rogers is the spectrum leader in Western Canada, including for new 5G spectrum



## Spectrum

Rogers already leads with **33%** capacity advantage vs. others

Combined would lead with **49%** capacity advantage vs. TELUS

Rogers already holds **52 MHz** new 5G spectrum vs. TELUS' 13.4 MHz

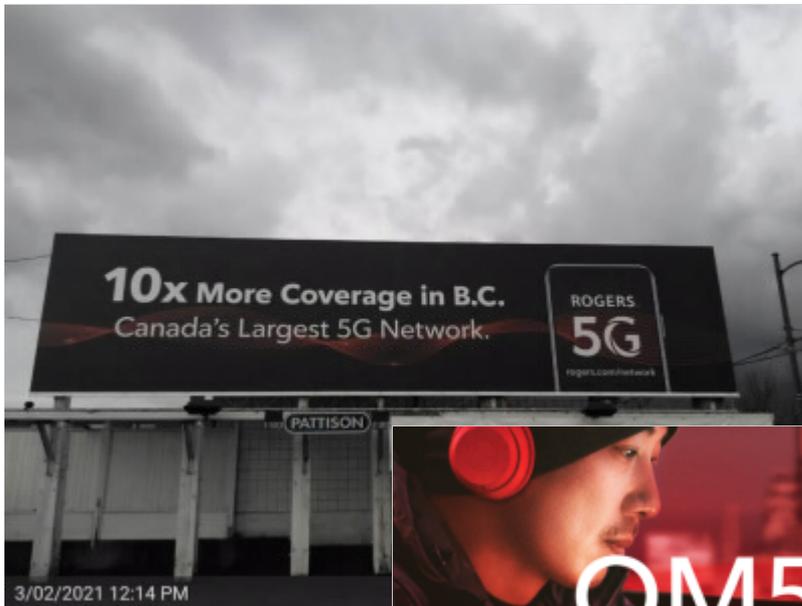
Higher mobile spectrum per subscriber is advantageous — in Shaw's wireless license areas Rogers currently has 37 MHz per 1K subscribers vs. 33 MHz for Bell and 28 MHz for TELUS







# Rogers already claims to operate Canada's largest 5G network



**Compendium (Rogers), page 36**



# Acquiring Shaw will not increase Rogers' connectivity in rural and Indigenous communities

1

Acquiring Shaw will add less than 1% to Rogers' existing wireless footprint and will not benefit rural and Indigenous communities.

2

In 50+ years of operation, neither Rogers nor Shaw have prioritized investment in rural and Indigenous communities. There is no reason to believe they will start now.

3

Instead of investing, Rogers chooses to roam on TELUS to extend their wireless service footprint in both rural and urban areas.

## Compendium (Rogers), page 38

# This acquisition will drive further industry consolidation



Accepting that Rogers must acquire Shaw to deploy 5G in the West sets the path for them to do the same in the East with Cogeco, Quebecor &

Eastlink

**Compendium (Rogers), page 39**



# Rogers is looking to eliminate its closest competitor

## Subscriber share

Reducing competition through acquisition of closest competitor

53%  
ON subscriber share

90K of 155K  
Shaw net ports are from Rogers in AB/BC\*

\*source: comlinkdata

GTA cornered by eliminating #3 carrier, Freedom

+2%  
Freedom vs. TELUS subscriber share

60%  
GTA subscriber share

## Retail dominance

Exclusive store dominance will be achieved in new entity



340  
Urban-focused Shaw stores

1,100  
Combined exclusive stores vs. TELUS 900 stores



3rd party retail imbalance will accelerate, benefiting Rogers

#1  
Price competitive channel

420  
Glentel & Costco stores, where TELUS is not sold

# Questions



**Compendium (Rogers), page 42**

## COMPENDIUM PUBLIC

Let's make the future friendly

**Compendium (Rogers), page 43**

TELUS Proprietary | Protected under section 29 of the Competition Act and exempt from disclosure under the Access to Information Act.

**TAB – 2.B**

















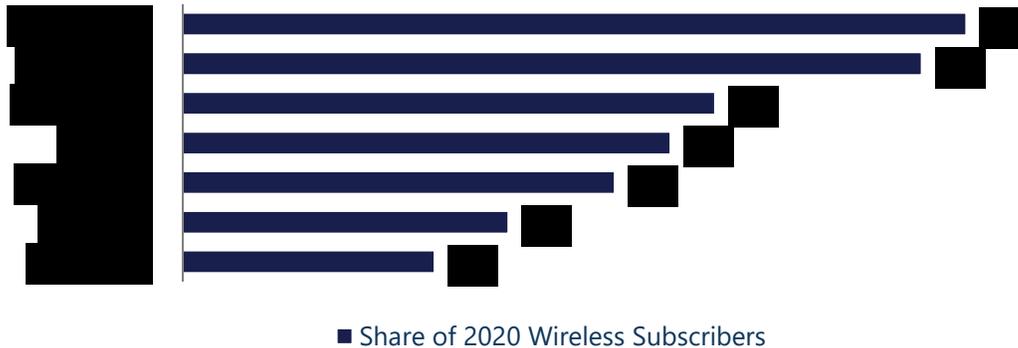


**TAB – 2.C**



# COMPENDIUM PUBLIC

**Figure 16. Provincial View of Providers with Significant Wireless Share but not Wireline<sup>89</sup>**



68. Further, an analysis of international data shows no evidence that combined wireline-wireless companies have an advantage over wireless-only companies when considering year over year market share growth.<sup>90</sup> **Figure 17** below shows average year over year change in market share for wireless-only and wireless-wireline businesses, split by market share, from 2011-2021 across 38 countries.<sup>91</sup> Among companies with wireless market shares between 10-20%, wireless-only companies had nearly the same average increase in market share the following year versus combined wireless-wireline companies. In fact, among companies with less than 10% wireless market share, wireless-only companies on average had greater increases in market share than combined wireless-wireline companies.

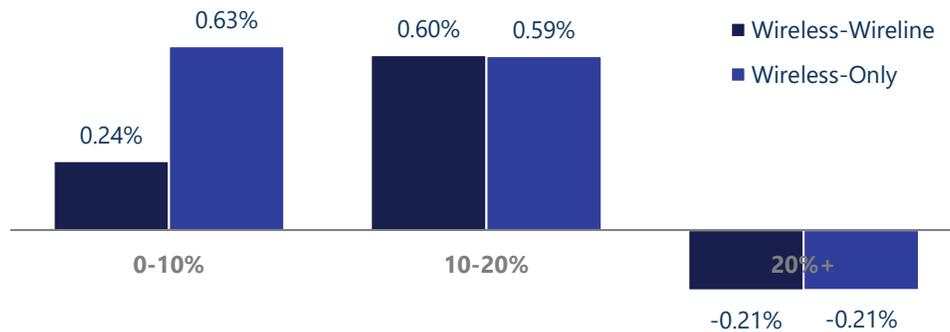
<sup>89</sup> [CRTC, Retail Mobile Industry Data, December 2021 \(data-retail-mobile-sector.xlsx\), tabs: MB-F5, MB-S7](#); Shaw, Mobile Subscriber Summary 2017-2022, April 30, 2022. (SUBSCRIBER\_SUMMARY\_0\_0\_0.snappy.parquet); Quebecor, Quebecor Subscriber Data 2017-2021 (Xplore Mobile and Quebecor Data.zip); [Government of Canada, National Broadband Data, January, 14, 2021, \(Map\\_Data\\_MapInfo.zip\)](#); [Government of Canada, Dissemination Block Boundary Files 2021 Vintage, November 17, 2021 \(lecu000e21a\\_e.zip\)](#); [Government of Canada, Geographic Attribute File 2021 Vintage, February 9, 2022 \(2021\\_92-151\\_X.zip\)](#).

<sup>90</sup> Wireless-only companies are defined as those with no more than 5% of total subscribers from a wireline business. The data analyzed consist of a panel of 145 companies operating across 38 OECD countries over 10 years.

<sup>91</sup> Omdia, 2011-2027 Total Subscribers Worldwide, July 25, 2022 (Total Subs\_2011\_2027\_Omdia\_WW.xlsx).

# COMPENDIUM PUBLIC

**Figure 17. Average Year Over Year Change in Wireless Market, by Initial Year Share<sup>92</sup>**



	0-10% Share	10-20% Share	20%+ Share
Wireless-Wireline	N=82	N=52	N=536
Wireless-Only	N=188	N=104	N=488

69. A statistical analysis of this global data also shows there is no statistically significant benefit in terms of market share growth for combined wireline-wireless companies versus wireless-only operators. In **Figure 18** below, p-values greater than 0.05 indicate the absence of a statistically significant difference. This test was run across the same 38 countries and period (2011-2021) discussed above. The study was run on two panels: first, including all companies within the 38 countries (n=1450) and second, including only the subset of (n= 426) companies who had less than 20% wireless market share in a given initial year. The full sample (n=1450) of companies and the subset (n=426) both reveal p-values higher than 0.05 indicating no statistically significant difference in market share growth for wireless companies with versus without wireline assets.<sup>93</sup>

<sup>92</sup> Omdia 2011-2027 Total Subscribers Worldwide, July 25, 2022 (Total Subs\_2011\_2027\_Omdia\_WW.xlsx).

<sup>93</sup> My team conducted an Analysis of Variance (ANOVA) test to detect whether there was a statistical significance between year over year change in market share between wireless-only and wireless-wireline companies within this panel. The ANOVA test was run across all companies in this sample, as well as for a subset of companies who had less than 20% wireless market share in their countries in a given initial year shows p-values higher than the 0.05 threshold, indicating no statistically significant difference between wireline ownership and wireless growth in market share. My team also conducted a regression analysis on the OECD data set, which also showed no statistical significance between wireline ownership and wireless market share growth. The regression looked at the impact of having wireline or being wireless-only on year over year change in market share. The impact of wireline p-value was 0.33, showing no statistical significance.

## COMPENDIUM PUBLIC

**Figure 18: ANOVA Results of Wireless-Only and Wireless-Wireline Year over Year Market Share Change**

	Wireless Only N	Wireless-Wireline N	ANOVA p- value
Full Sample (n=1450)	780	670	0.11
Under 20% share (n=426)	292	134	0.70

70. While there are many wireline companies with high wireless market share globally, this is often the result of the historical initial entry of wireline companies into wireless decades ago. An initial high share from historical entry into the wireless market does not necessarily translate into continuing structural advantages.
71. Globally, there are many examples of wireless companies that have grown market share without wireline assets, including T-Mobile US, Play Poland, and WOM Chile, to name a few.<sup>94</sup> Wireless-only operators often drive growth with challenger strategies with differentiation from incumbents along dimensions including pricing, plan options, product features, user experience, branding, advertising, and messaging. These strategies benefit consumers in ways that often trigger competitive responses by incumbents, resulting in better pricing and products for consumers.
72. **T-Mobile U.S.:** In the United States, wireless-only T-Mobile U.S. grew from 12% to 19% of total mobile subscriptions from 2013-2020 (post-MetroPCS acquisition up until Sprint merger; see **Figure 19** below). During that time, T-Mobile’s ARPU was 11-24% less than the average of AT&T and Verizon (see **Figure 20** below).<sup>95</sup> It introduced innovative product plans and offers.<sup>96</sup> T-Mobile has centered its brand around being the “Un-Carrier”, marketing customer-friendly service options including no contracts, data rollover, and unlimited plans.

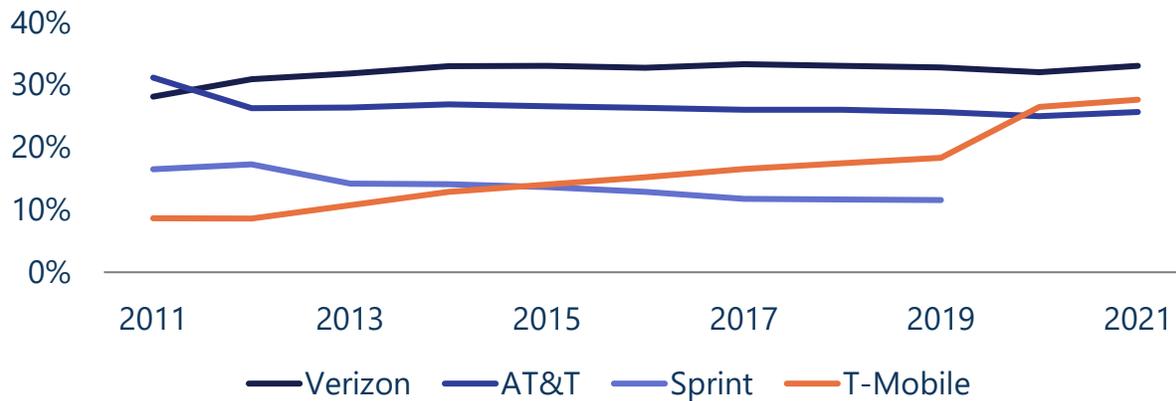
<sup>94</sup> Other notable examples from the dozens of examples of successful wireless-only operators include Iliad Italia, Masmovil (Spain), T-Mobile Netherlands, and Telefonica Germany.

<sup>95</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#).

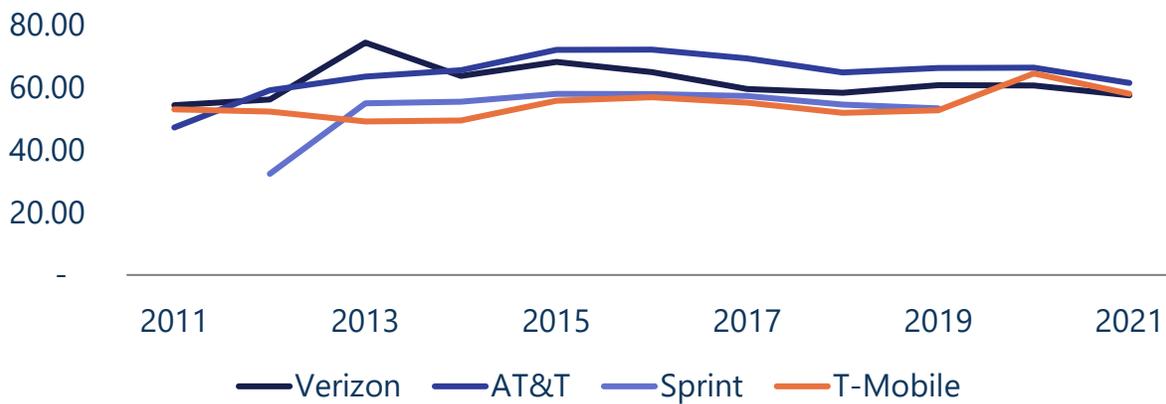
<sup>96</sup> Specific examples include: (1) pioneering no contract device plans in 2013; (2) semi-annual device upgrades in 2013; (3) data rollover in 2014; (4) no roaming fees in Canada and Mexico in 2015.

# COMPENDIUM PUBLIC

**Figure 19. Market Share by Operator – USA<sup>97</sup>**



**Figure 20. ARPU (USD) by Operator – USA<sup>98</sup>**



73. **Play Poland:** Since entering the market in 2007, wireless-only Play Poland has been able to grow to 25% market share of mobile subscriptions in Poland as of 2021 (see **Figure 21** below). From early 2011 through 2015, Play increased from 11% to 21% market share of mobile subscriptions.<sup>99</sup> During that time, Play introduced Poland's first unlimited and family plans<sup>100</sup> and ARPU was 4-31% lower than the average of the three other major carriers in Poland (see **Figure 22** below).<sup>101</sup>

<sup>97</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#). Includes prepaid, postpaid, and flanker brands.

<sup>98</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#). Inclusive of prepaid and postpaid subscribers and subscribers to flanker brands.

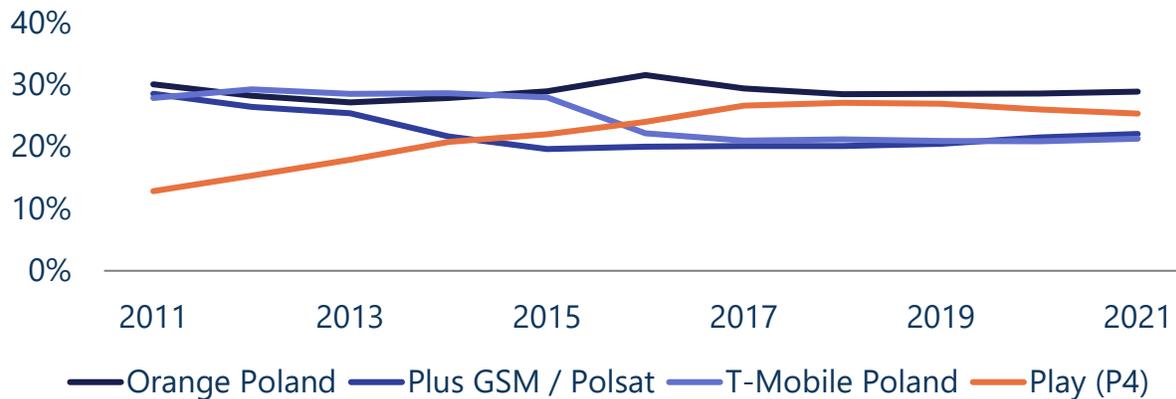
<sup>99</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#).

<sup>100</sup> [Play Communications, Pioneer of Unlimited and Family Plans, September 16, 2022 \(Play Communications Pioneer of Unlimited and Family Plans.pdf\)](#).

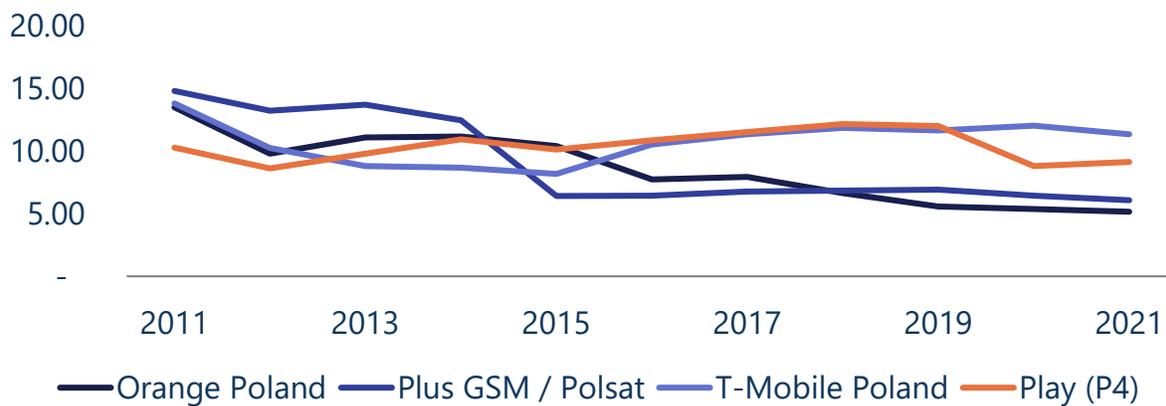
<sup>101</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#).

# COMPENDIUM PUBLIC

**Figure 21. Market Share by Operator – Poland<sup>102</sup>**



**Figure 22. ARPU (USD) by Operator – Poland<sup>103</sup>**



74. **WOM Chile:** In Chile, WOM grew from 0% to 18% market share of total mobile subscriptions from 2012-2021.<sup>104</sup> Factors that contributed to this growth include pricing, customer experience, and branding. The WOM (“Word of Mouth”) brand is positioned as “brave and honest”.<sup>105</sup> Since 2014, WOM Chile’s ARPU has declined to be in line with incumbents Claro, Entel, and Movistar, and has been lower than market leader Entel since 2017.<sup>106</sup> Additionally, WOM made its entry

<sup>102</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#). Inclusive of prepaid and postpaid subscribers and subscribers to flanker brands.

<sup>103</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#). Inclusive of prepaid and postpaid subscribers and subscribers to flanker brands.

<sup>104</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#).

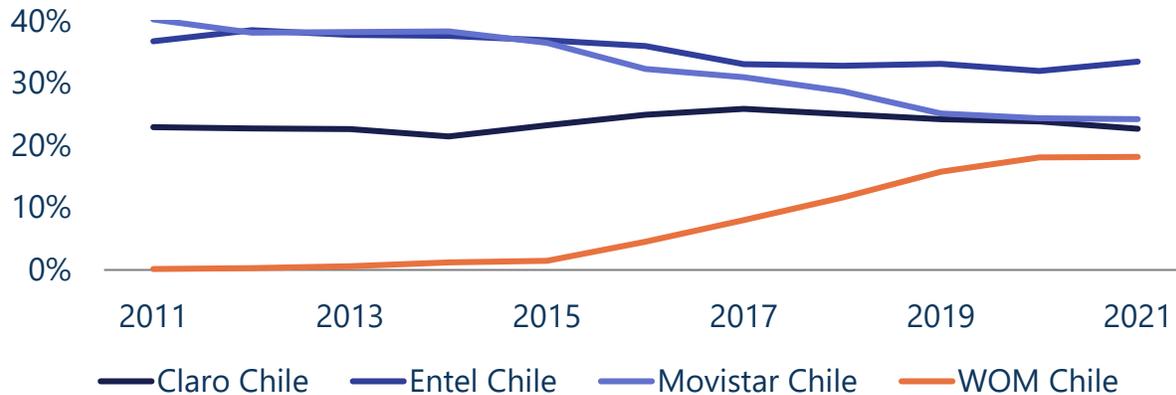
<sup>105</sup> [WOM, About WOM, September 21, 2022 \(Conoce WOM y empieza a pagar lo justo.pdf\)](#).

<sup>106</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#).

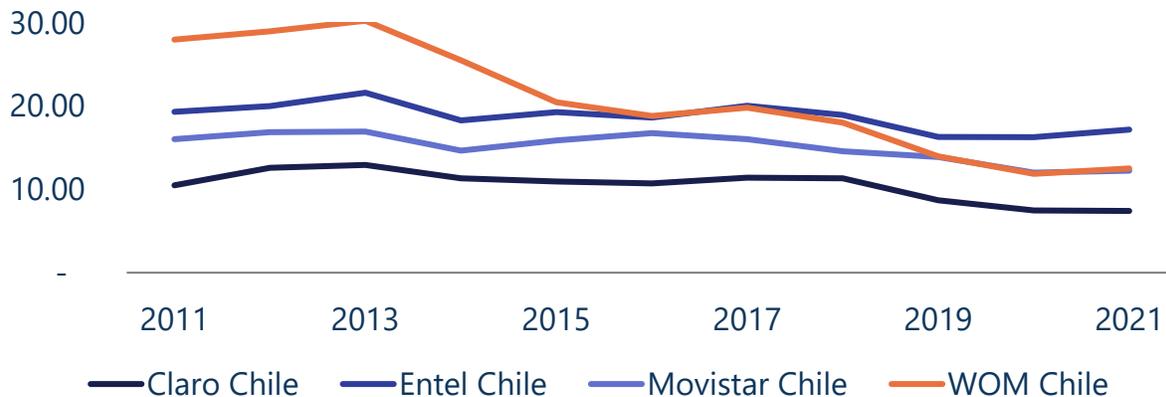
## COMPENDIUM PUBLIC

plan for consumers less costly than key competitors.<sup>107</sup> WOM Chile also had a superior customer experience.<sup>108</sup>

**Figure 23. Market Share by Operator – Chile<sup>109</sup>**



**Figure 24. ARPU (USD) by Operator – Chile<sup>110</sup>**



<sup>107</sup> [America Economia WOM Entel Basic Plans Pricing, August 7, 2015 \(America Economia WOM Entel Basic Plans Pricing.pdf\)](#). In 2015, with WOM, 1.5GB/150 minutes was CL\$10,000 (US\$15) while Entel's most basic plan was CL\$18,000.

<sup>108</sup> [Corporateit, WOM Chile Praxis Human Xperience, April, 29, 2021 \(Corporateit WOM Chile Praxis Human Xperience.pdf\)](#); [Opensignal, Chile Mobile Experience Awards, March 2022 \(Opensignal Chile Mobile Experience Awards March 2022.pdf\)](#); [Subtel, User Satisfaction and Service Quality Study, December 22, 2020 \(Informe II Encuesta de Satisfaccion de Usuarios 22 12 2020.pdf\)](#); Praxis Human Xperience ranked WOM Chile first in customer experience 2018-2021. In addition, Opensignal awarded WOM Chile joint winner or winner of 8 of 9 Mobile Experience awards in March 2022, overtaking Entel as market leader in the Opensignal rankings. Further, Subtel (Undersecretary of Telecommunications of Chile) reported 0-29% fewer customer contract problems relative to the next best competitor for 2018-2020.

<sup>109</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#). Inclusive of prepaid and postpaid subscribers and subscribers to flanker brands.

<sup>110</sup> [Dataxis, ARPU and Subs CAN US POL CHL, September 1, 2022 \(Dataxis ARPU and Subs CAN US POL CHL.xlsx\)](#). Inclusive of prepaid and postpaid subscribers and subscribers to flanker brands.

**TAB – 2.D**

# Multiple Canadian and international wireless providers have attained high market shares where they have no wireline network

## Examples of Providers with Significant Wireless Share in Provinces without Wireline

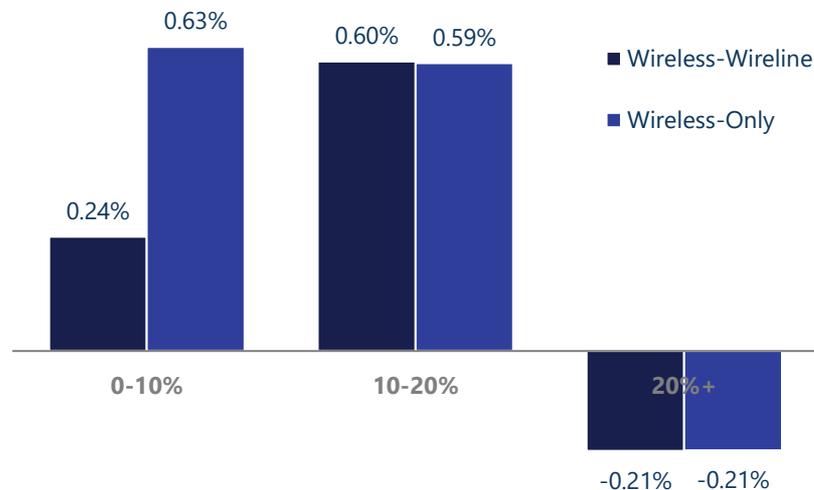


■ Share of 2020 Wireless Subscribers

Other examples: Telus has [redacted] wireless market share in Ontario, [redacted] wireless market share on average across the Atlantic regions, Bell has [redacted] wireless market share in British Columbia and [redacted] in Alberta

Summarizing and highlighting Martin Report (Sept 2022) pp. 29-35

## Average Year Over Year Change in Wireless Market, by Initial Year Share, OECD Panel



Panel of 145 companies operating across 38 OECD countries over 10 years

Across entire panel, there is no statistically significant difference between wireless operators with and without wireline in market share growth – statistically, the two groups of companies are indistinguishable in terms of market share growth

**TAB – 2.E**

**COMPENDIUM PUBLIC**

TRANSCRIPTION OF AUDIO INTERVIEW  
WITH MIRKO BIBIC  
on Thursday, March 10, 2022

## APPEARANCES:

Simon on behalf of Morgan Stanley

Arbitration Place © 2022  
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Ottawa, Ontario K1P 1J9      Toronto, Ontario M5H 2R2  
(613) 564-2727      (416) 861-8720

**COMPENDIUM PUBLIC**

TRANSCRIPTION OF AUDIO INTERVIEW WITH MIRKO BIBIC

March 10, 2022

1 it seems pretty certain that there will have to be  
2 a divestiture of some portion, if not all of the  
3 target's wireless assets, which is no surprise to  
4 me, frankly. And I don't see how that fourth  
5 player could be as strong as a competitor as Shaw  
6 Mobile -- or Freedom Mobile, if you wish -- had  
7 been in the past. So I think again that speaks to  
8 how we're going to be able to deal with this at  
9 Bell Mobility, competitively.

10 **SIMON:** What happens to  
11 competition out west when Rogers why tries to  
12 upsell mobile? We heard a lot of that from Shaw  
13 and Comcast here up selling mobile into the  
14 broadband base.

15 **MIRKO BIBIC:** We'll see.  
16 First of all you have to complete the merger.  
17 You've got to integrate the two large companies  
18 with different cultures, and then you have to  
19 execute in the marketplace.

20 Again, back from where we are  
21 at Bell Mobility, we are able to compete quite  
22 effectively in a four-player market. We have not  
23 had a wireline infrastructure in the west, so  
24 nothing changes for us competitively. We have  
25 done well in the west. We're the least exposed,

**COMPENDIUM PUBLIC**

TRANSCRIPTION OF AUDIO INTERVIEW WITH MIRKO BIBIC

March 10, 2022

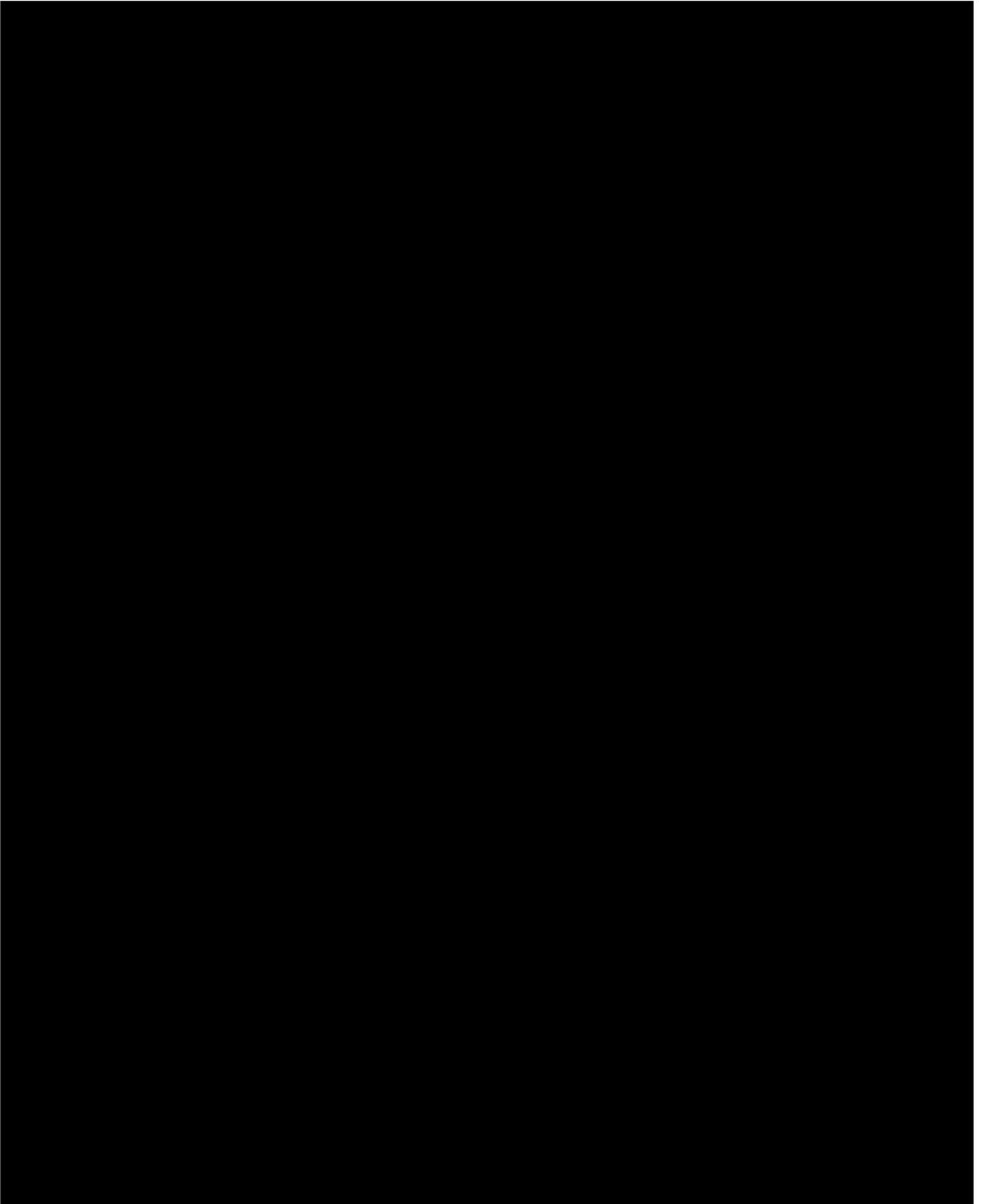
1 as well. So I think based on our track record and  
2 being able to compete in the west without wireline  
3 infrastructure, and being the least exposed, I  
4 think that again that positions us very well.

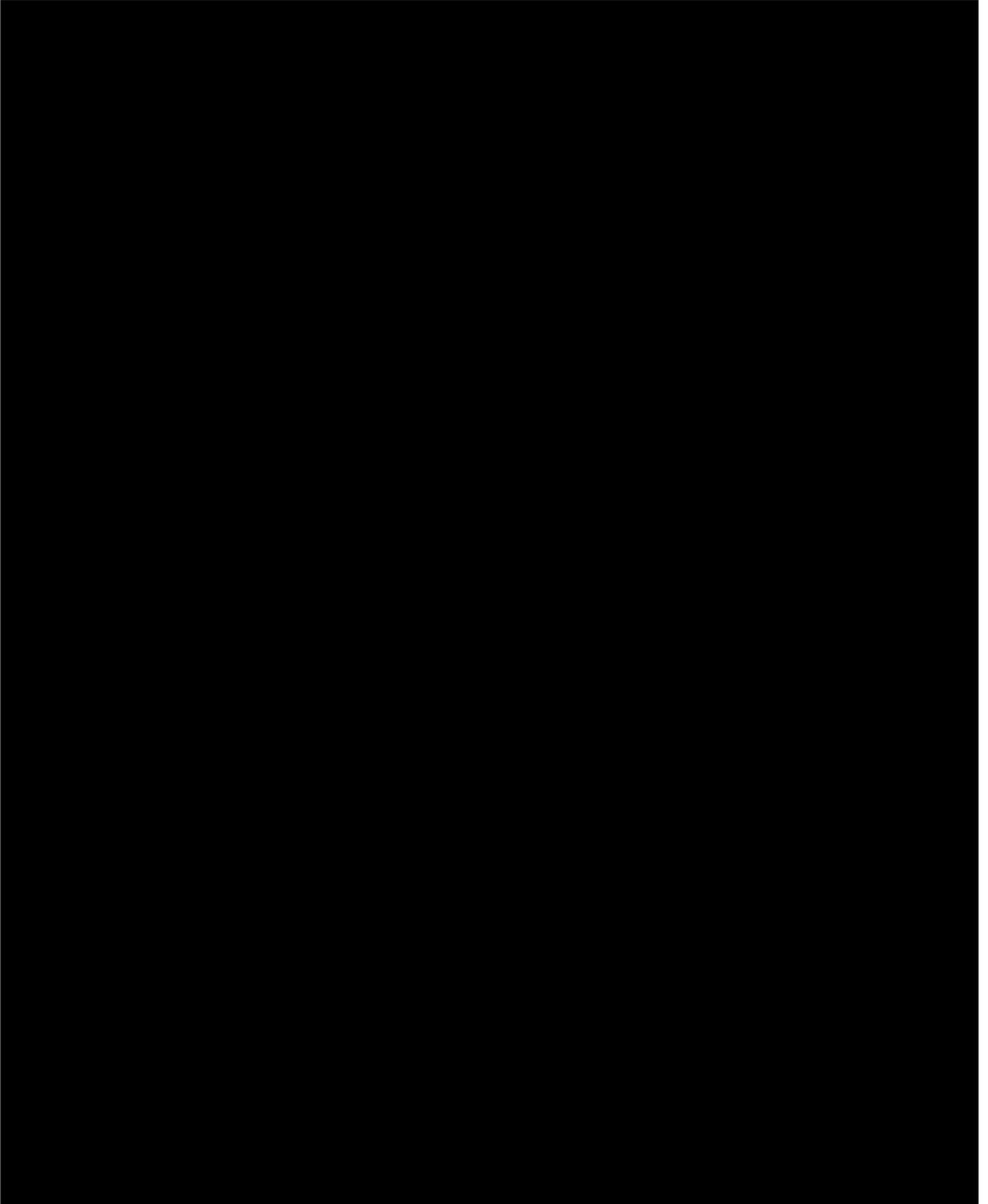
5 SIMON: Great. And you talked  
6 about the quality loading that you have had. I  
7 think the industry has had a very good year, it  
8 has had a very good year in the U.S., but I think  
9 there's concern, particularly in the U.S.  
10 penetration. But it sounds like you're pretty  
11 confident about a continuation of the strong  
12 growth, industry growth in '22 and beyond.

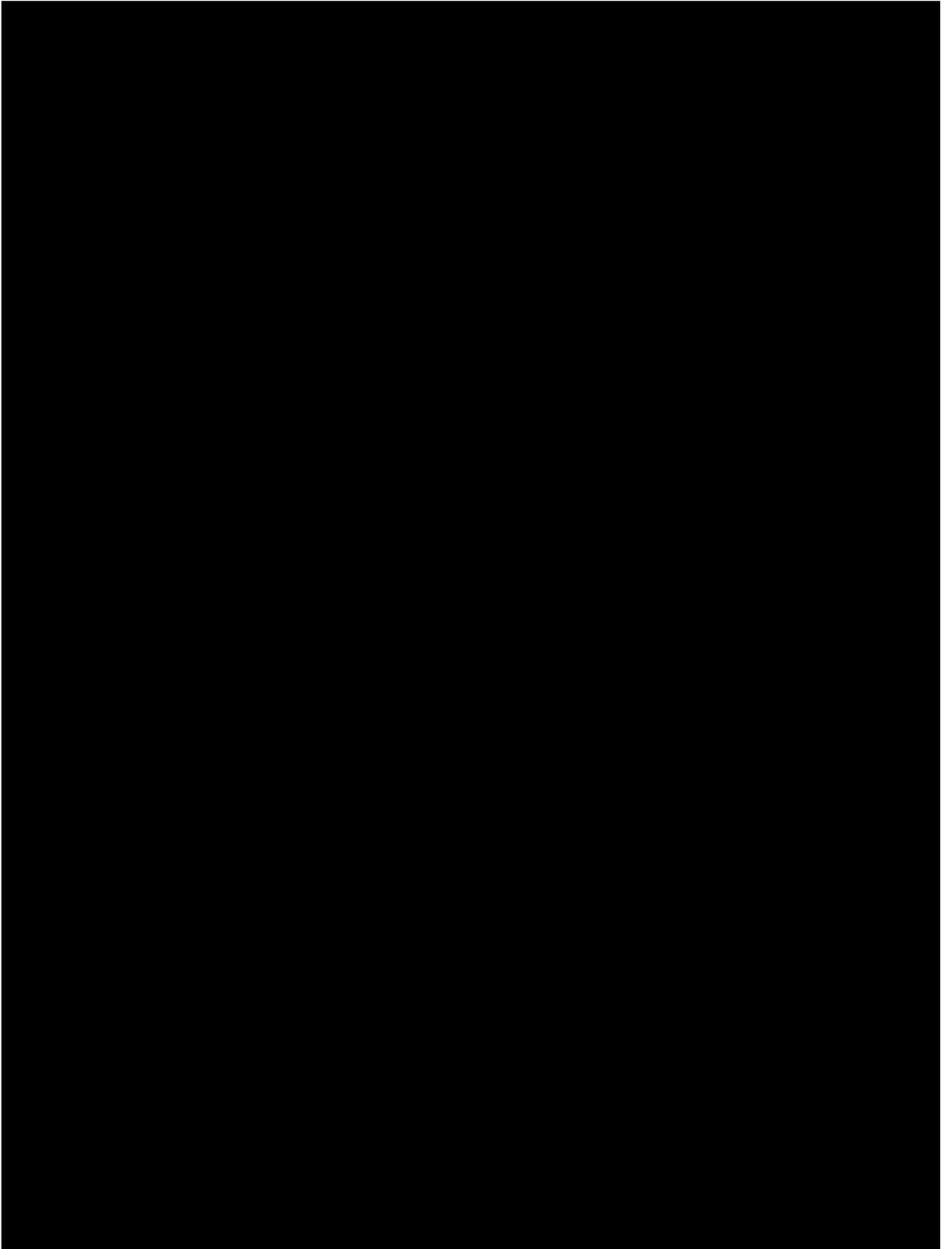
13 MIRKO BIBIC: Certainly in  
14 2022 and I also think beyond, by the way. And  
15 there's a bunch of reasons why, a number of  
16 reasons why I think there's strong growth  
17 potential for wireless in Canada and for ourselves  
18 within that.

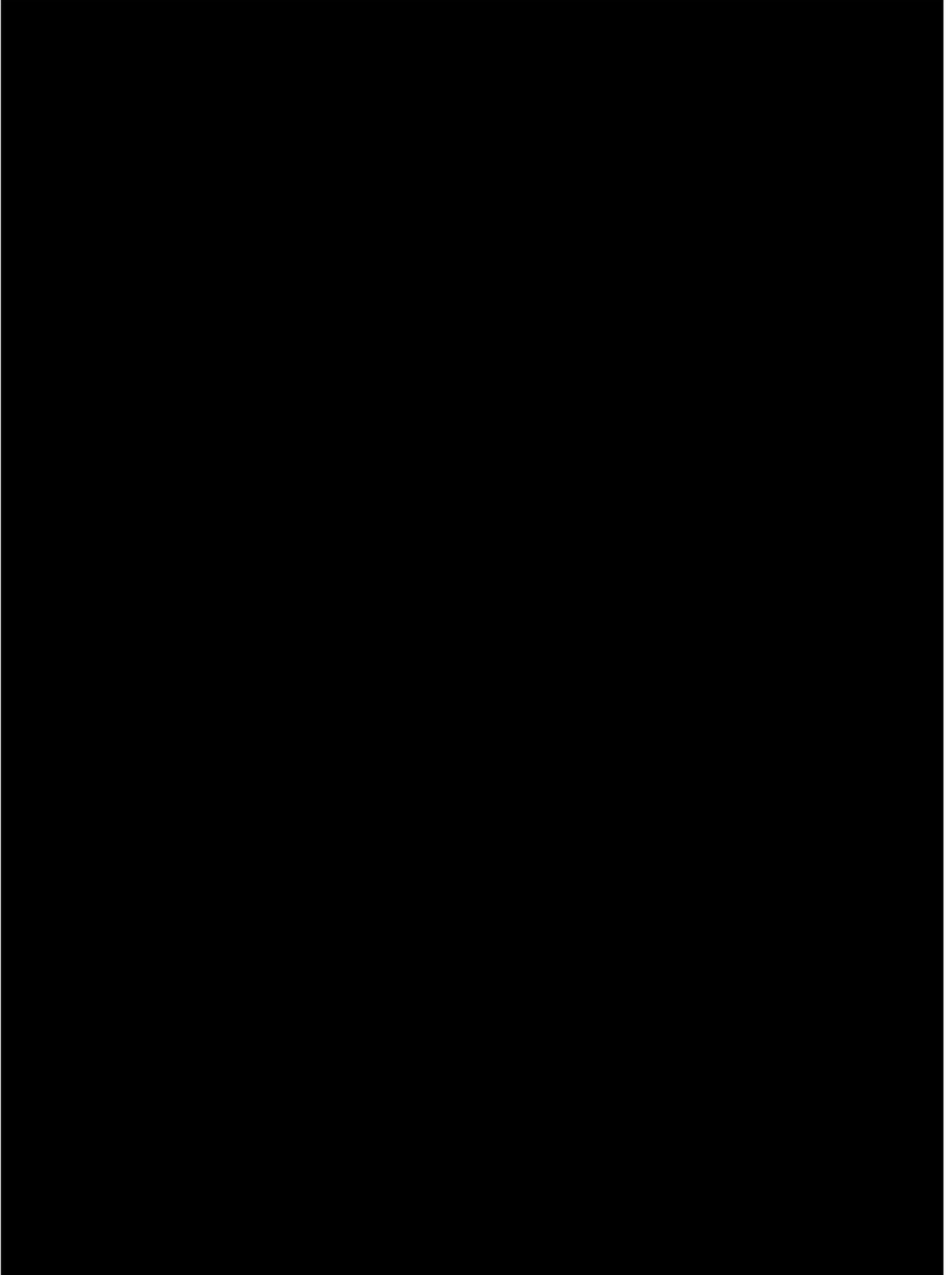
19 Retail stores being completely  
20 open, without restriction, imminently or in some  
21 cases right now, bodes well. We're at the very  
22 beginning of the 5G upgrade cycle, and I have a  
23 lot of optimism for 5G upsell -- upgrade cycle. I  
24 think it's going to drive growth. Immigration,  
25 Canadian government, indicating that it will go

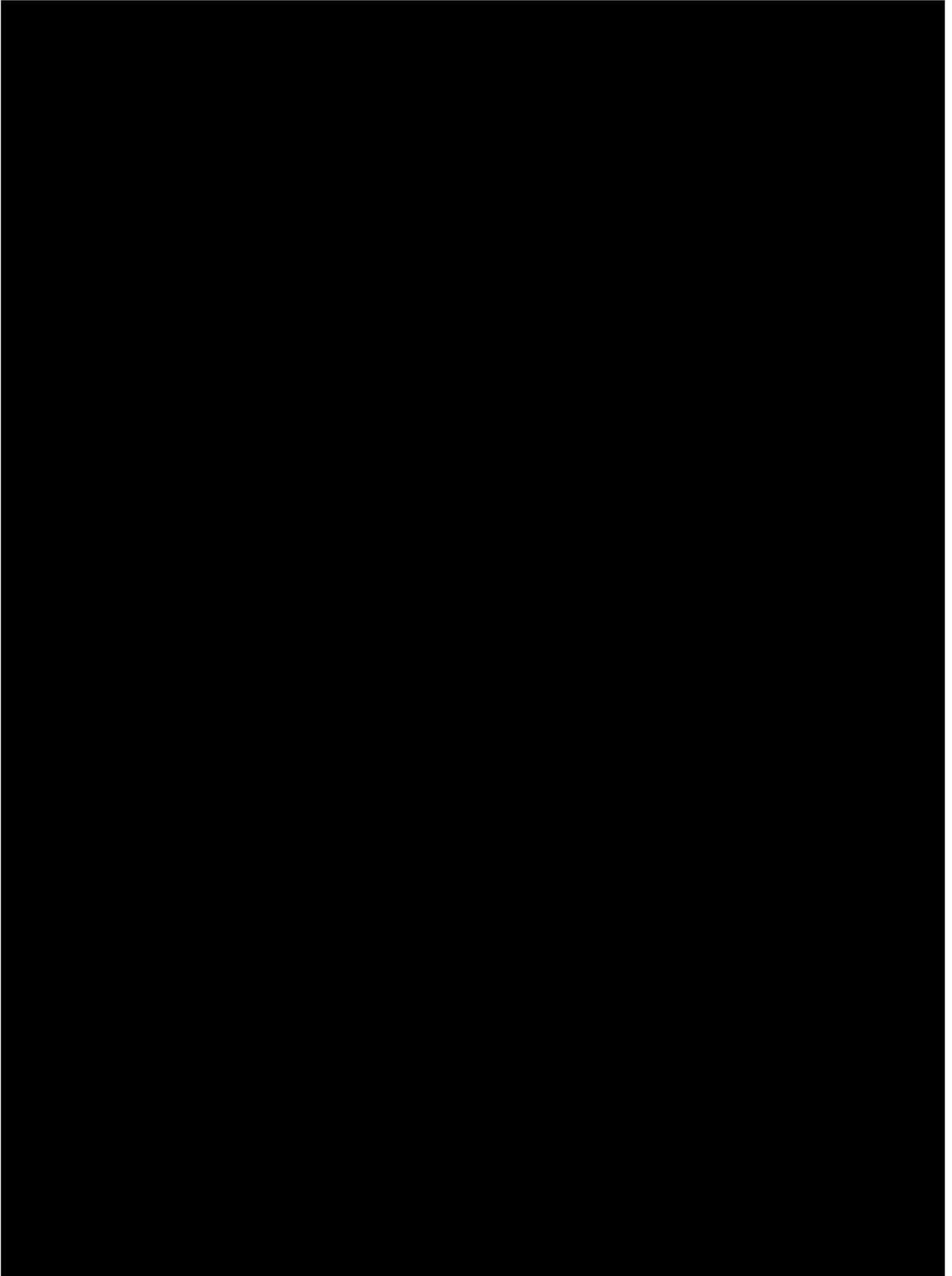
**TAB – 2.F**

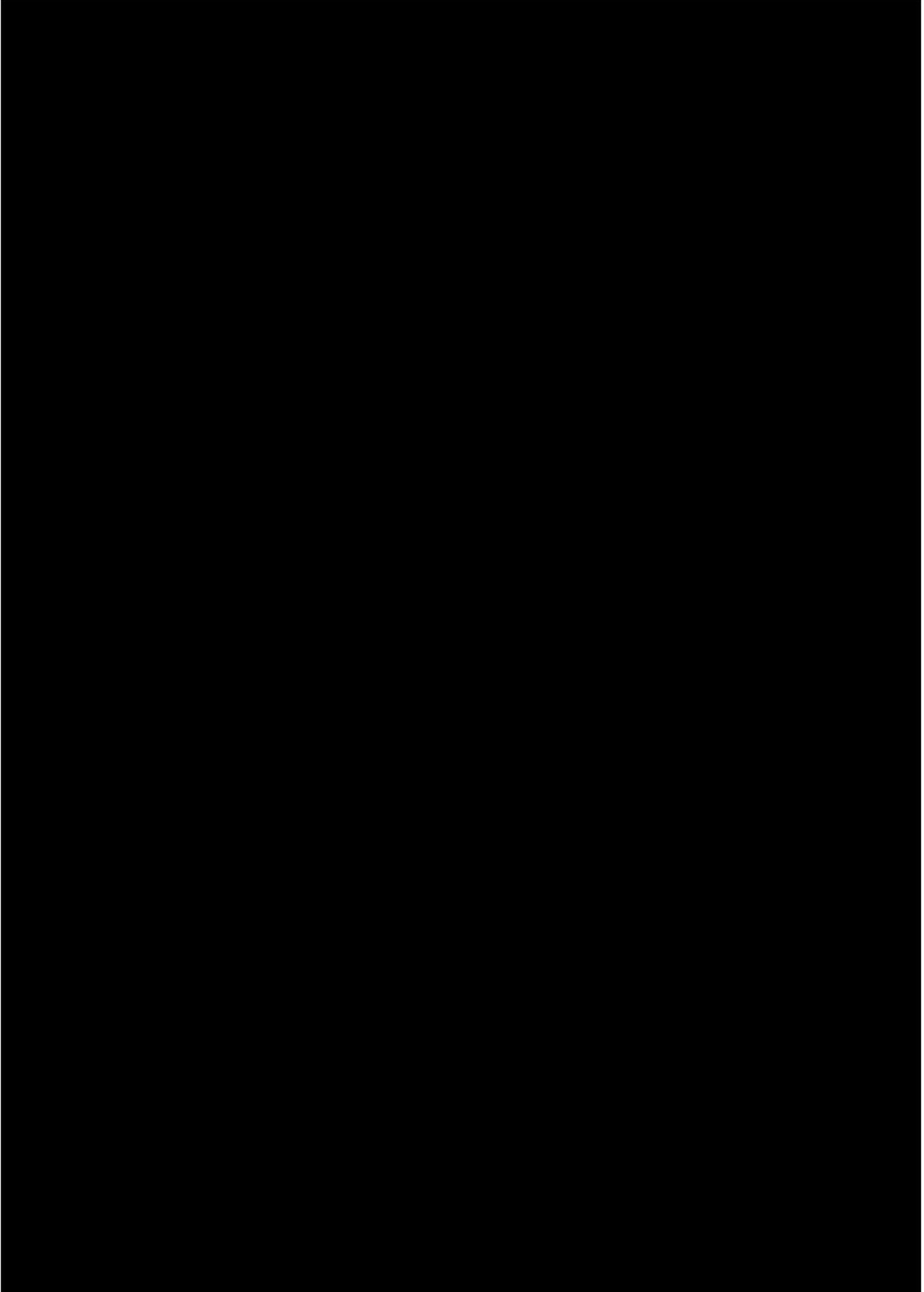


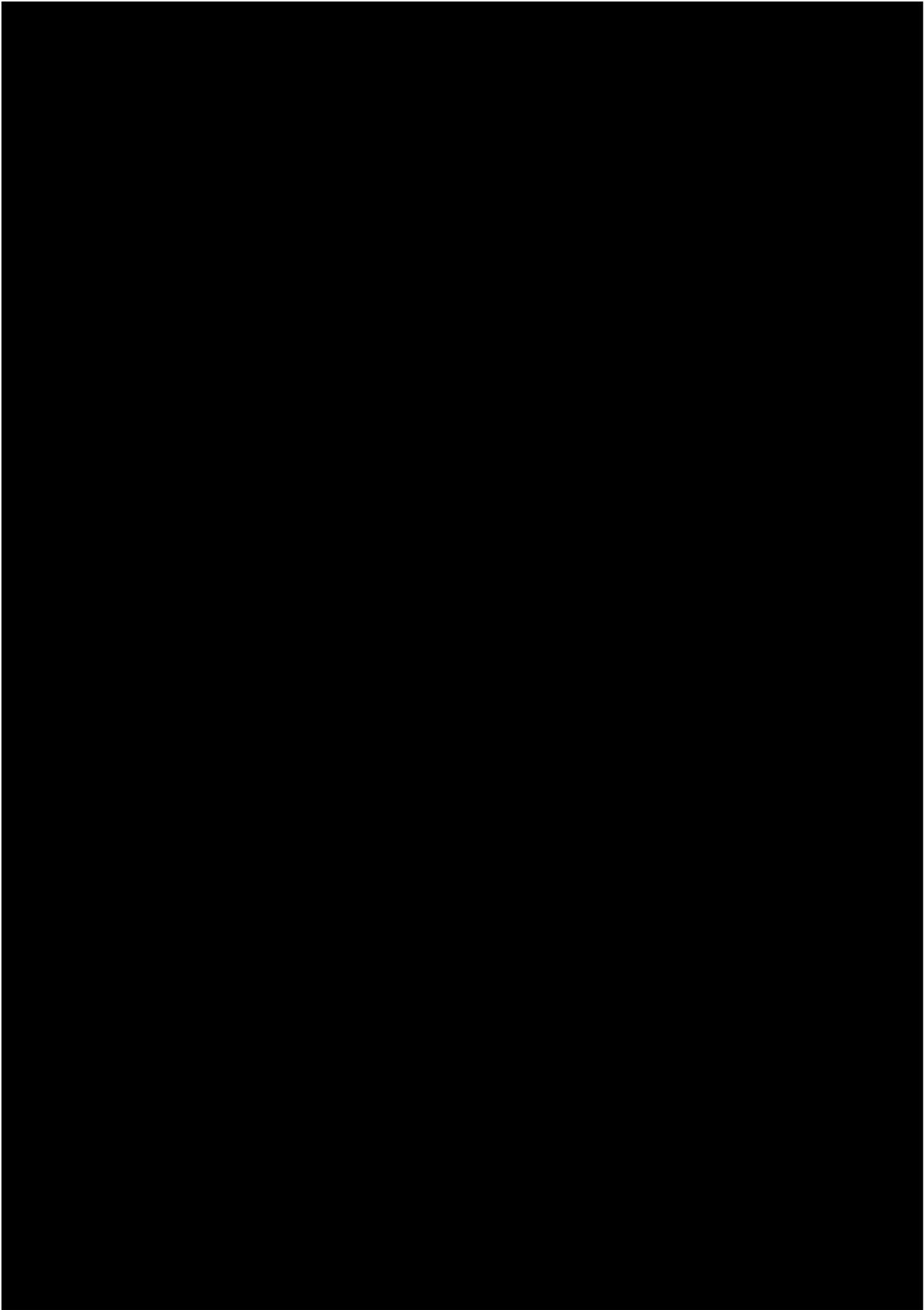


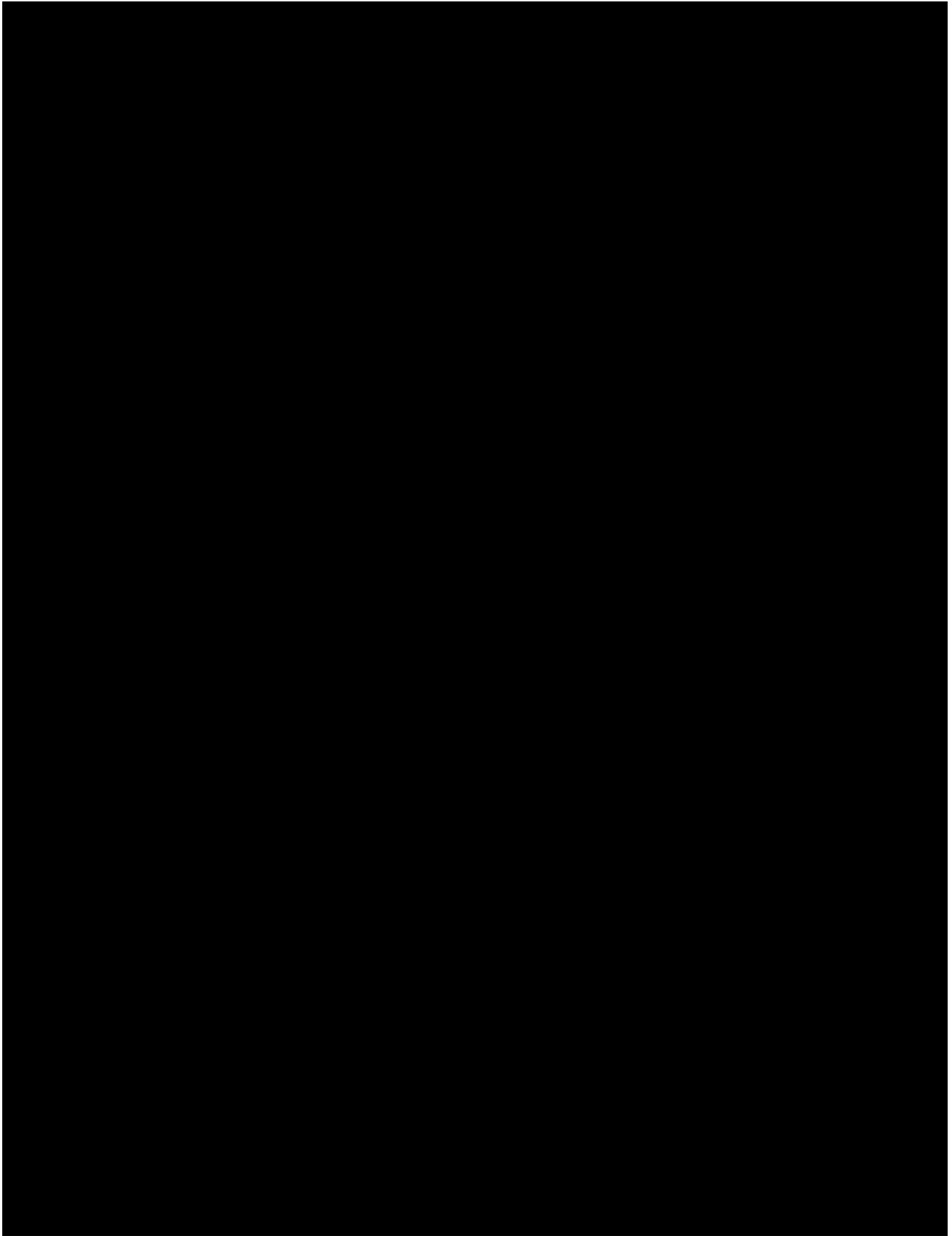


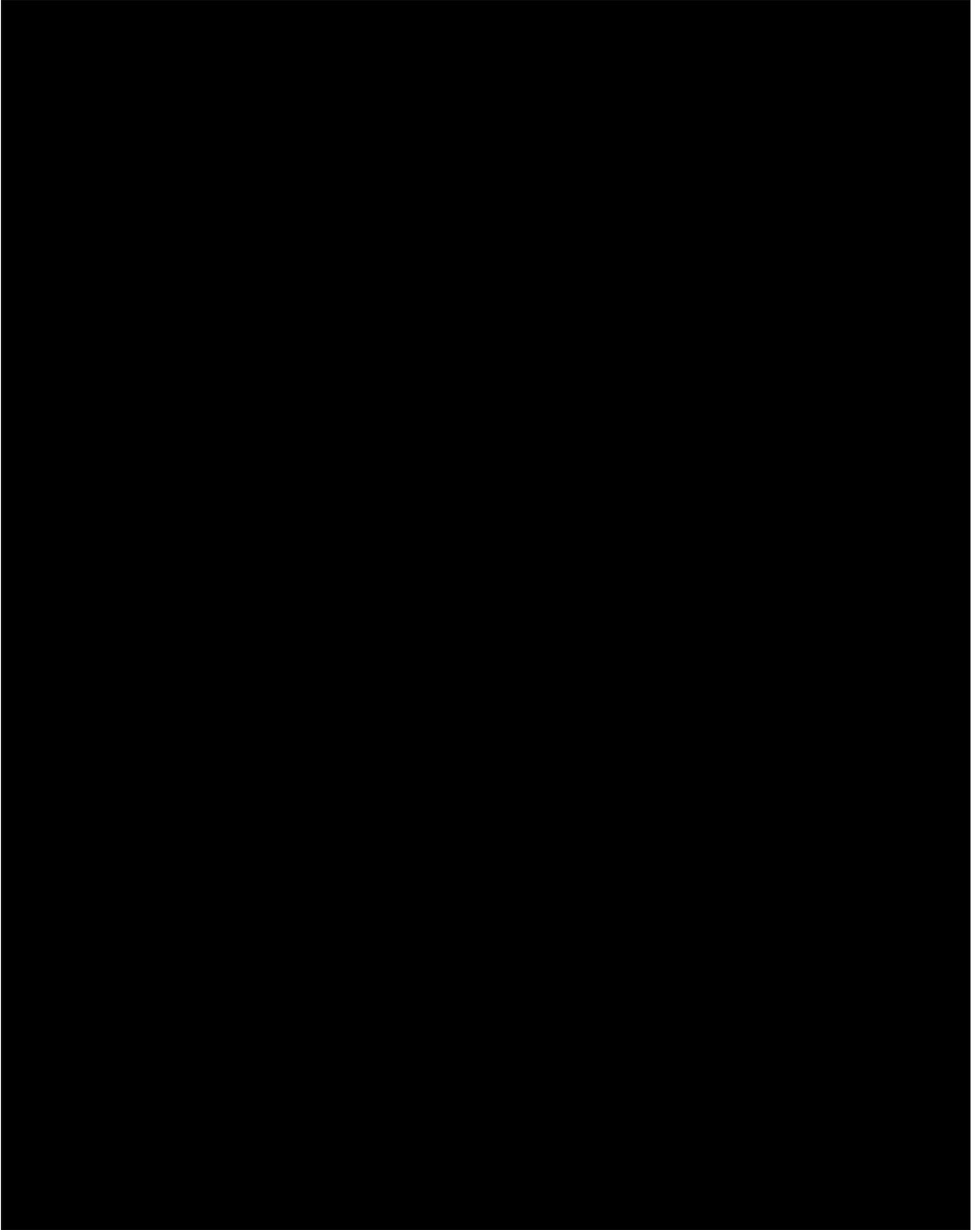












**TAB – 2.G**















































































**TAB – 2.H**







































































































































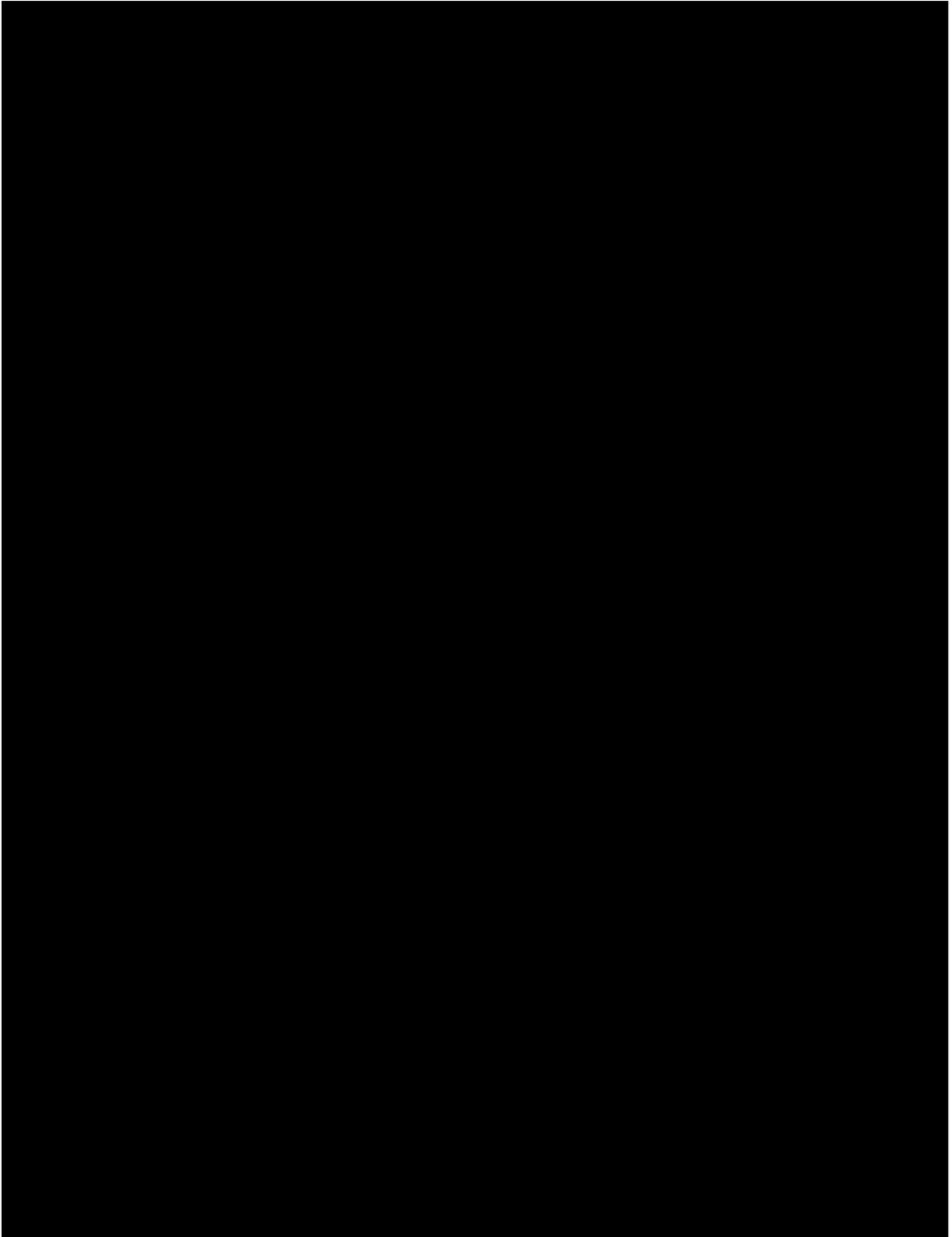
**TAB 3 – BACKHAUL**

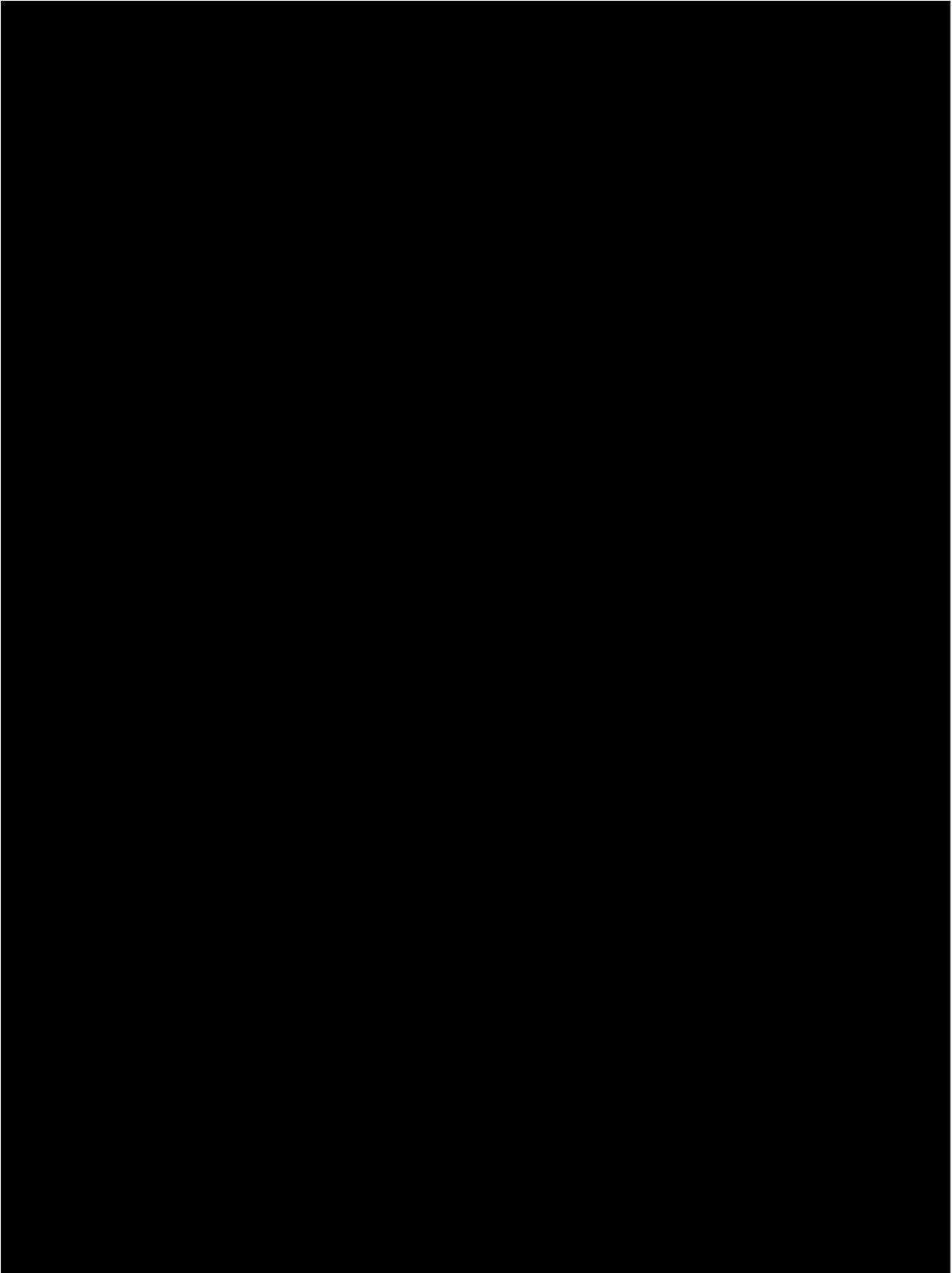
**TAB – 3.A**

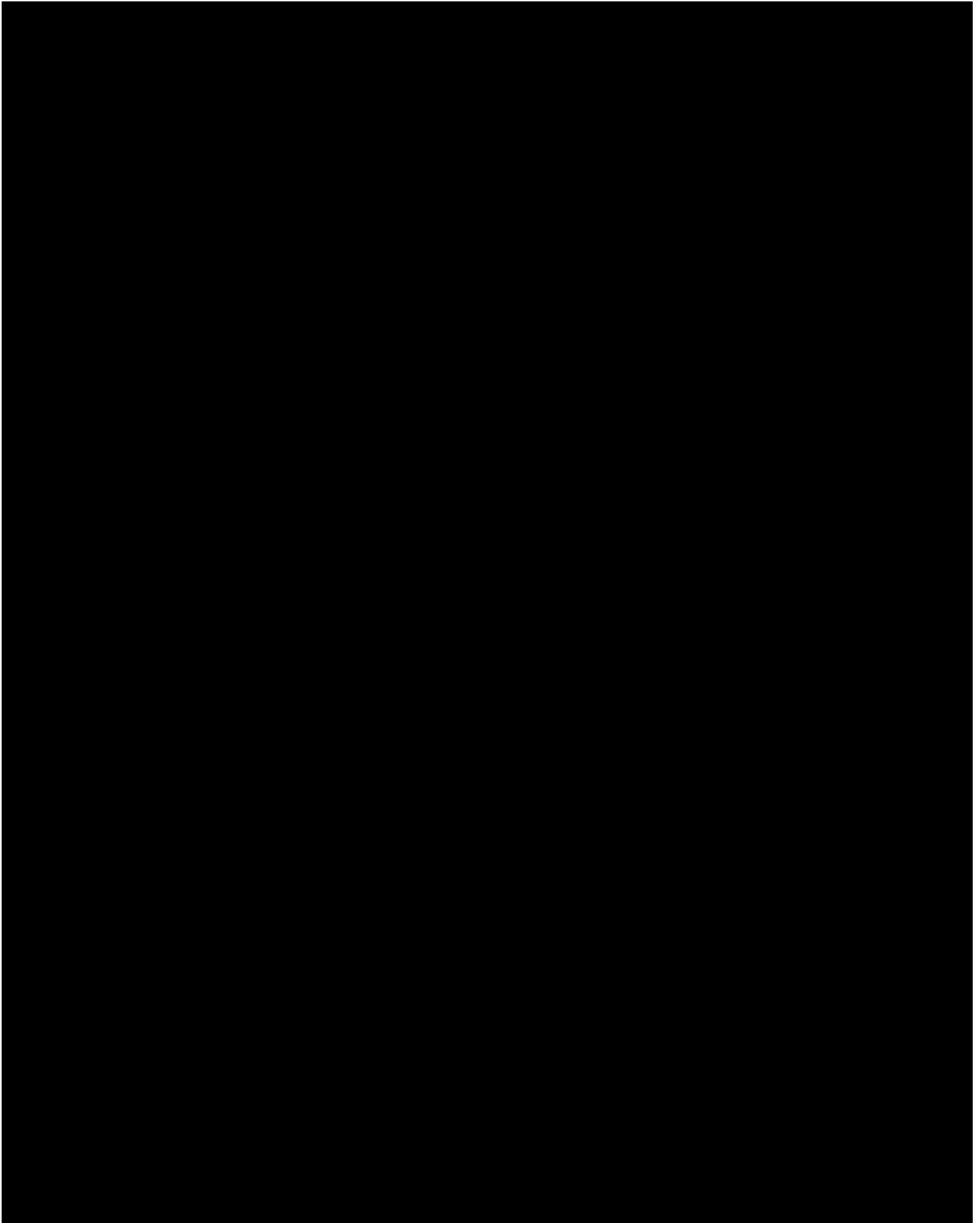


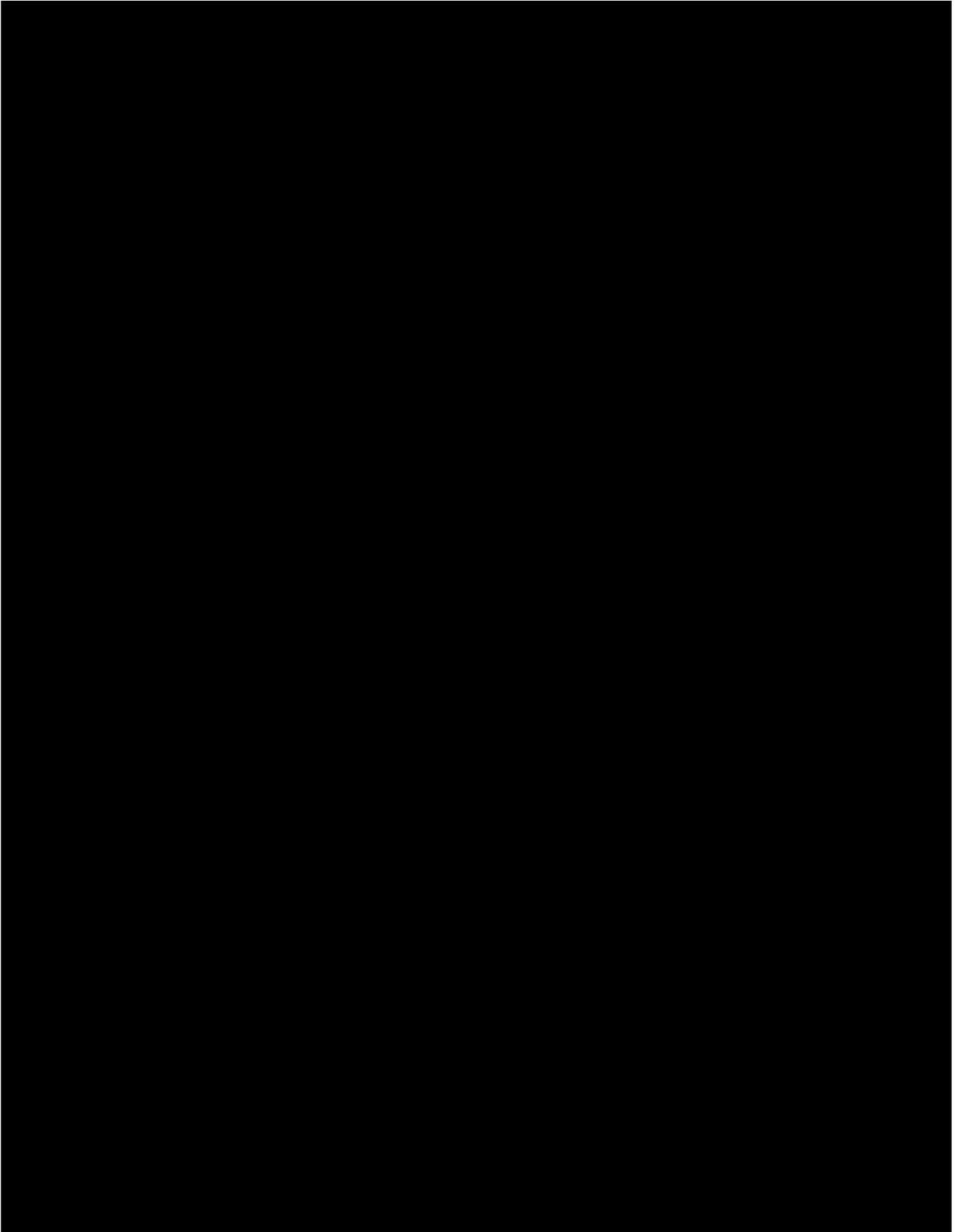


**TAB – 3.B**









**TAB – 3.C**

## COMPENDIUM PUBLIC

1                   **MR. BENHADID:** I don't know that.

2                   **MR. LISUS:** Freedom Mobile relies for 50  
3 percent of its backhaul on microwave processes -- microwave  
4 transmitters in British Columbia and Alberta; correct?

5                   **MR. BENHADID:** I don't know that. If you're  
6 telling me this information, I'll accept it.

7                   **MR. LISUS:** You haven't --

8                   **MR. BENHADID:** You're asking me -- I can't  
9 agree to something that I don't know.

10                  **MR. LISUS:** You have no idea?

11                  **MR. BENHADID:** No.

12                  **MR. LISUS:** Okay. Can we agree, sir, that  
13 Freedom Mobile runs a good wireless network in British  
14 Columbia and Alberta?

15                  **MR. BENHADID:** No, we can't. How do you define  
16 that?

17                  **MR. LISUS:** It's reliable? It's got  
18 subscribers?

19                  **MR. BENHADID:** I --

20                  **MR. LISUS:** You can't agree with that either,  
21 eh? Okay.

22                  **MR. BENHADID:** Well, your qualifying it as  
23 reliable. I mean --

24                  **MR. LISUS:** Sir, when you use "reliable" in  
25 your witness statement, what do you mean?

## COMPENDIUM PUBLIC

1                   **MR. BENHADID:** I mean that it meets  
2 availability and performance.

3                   **MR. LISUS:** Okay. Pause there, please.  
4 Freedom Mobile's wireless network in British Columbia and  
5 Alberta meets availability and performance; fair?

6                   **MR. BENHADID:** I don't know. I don't have  
7 their stats. Again, if you have the data and you're giving  
8 me this as a proposition, I'll accept it.

9                   **MR. LISUS:** If you ---

10                  **MR. BENHADID:** I will accept it so that you can  
11 go along but --

12                  **MR. LISUS:** You haven't read Mr. McAleese's  
13 witness statement, I take it?

14                  **MR. BENHADID:** No, I haven't.

15                  **MR. LISUS:** You're not aware of documents in  
16 Telus' records which identify Freedom Mobile as a  
17 competitor of it and a key market disruptor? Are you aware  
18 of that?

19                  **MR. BENHADID:** Of those documents, no. I  
20 haven't read them.

21                  **MR. LISUS:** Are you aware that the Commissioner  
22 in this case has identified Freedom Mobile as a highly  
23 effective wireless carrier and a market disruptor? Are you  
24 aware of that?

25                  **MR. BENHADID:** No, I'm not.

## COMPENDIUM PUBLIC

1                   **MR. LISUS:** No. Can you and I agree, sir, that  
2 you can't be a highly effective wireless carrier and market  
3 disruptor if you don't meet reliability standards as you  
4 have defined them?

5                   **MR. BENHADID:** No, I can't agree with that.  
6 There's different ways to --

7                   **MR. LISUS:** All right. Can you agree with me,  
8 sir, that about 75 percent of Freedom Mobile's subscriber  
9 base, its customers, are in Ontario? Do you know that?

10                  **MR. BENHADID:** No, I don't.

11                  **MR. LISUS:** Okay. Can you agree with me, sir,  
12 that Freedom Mobile has no wireline network of its own in  
13 Ontario, or you don't know that either?

14                  **MR. BENHADID:** I don't know. Is it the same  
15 case? You said earlier 50 percent of their links are  
16 microwave, and microwave is considered equivalent to  
17 wireline. So I don't know.

18                  **MR. LISUS:** Do you know that Shaw has no  
19 wireline network in Ontario?

20                  **MR. BENHADID:** I don't.

21                  **MR. LISUS:** You don't know much about --

22                  **MR. BENHADID:** Sorry. I'd have to --  
23 actually -- I'm trying to remember. I believe Shaw has  
24 wireline network in Ontario, because we -- I believe we  
25 peer with Shaw in Toronto. I'm not 100 percent sure. But,

## COMPENDIUM PUBLIC

1 again, this is why it's hard for me to answer these  
2 propositions about our competitors. I truly don't know. I  
3 have to infer, you know, answers from all kinds of  
4 anecdotal information that I have. It's not helping you  
5 and it's not helping me be helpful to you.

6 **MR. LISUS:** Sir, when you met -- when did you  
7 meet with the Commissioner to prepare your evidence for  
8 this case?

9 **MR. BENHADID:** In September.

10 **MR. LISUS:** In September. That was the first  
11 time you met with the Commissioner for the purposes of  
12 preparing your witness statement?

13 **MR. BENHADID:** Yeah. When you say the  
14 Commissioner, you're not talking about someone in  
15 particular, right? You're talking about --

16 **MR. LISUS:** I'm talking about the office.

17 **MR. BENHADID:** Yes, in September.

18 **MR. LISUS:** And was that after you had prepared  
19 your witness statement or your witness statement had been  
20 prepared for you?

21 **MR. BENHADID:** It was throughout.

22 **MR. LISUS:** So did you work with the  
23 Commissioner in preparing your witness statement dated  
24 September 20th, 2022?

25 **MR. BENHADID:** Uh --

## COMPENDIUM PUBLIC

1 wireless network; fair?

2                   **MR. BENHADID:** When you say "facilities" --  
3 well, fibre is a facility so I'm trying to understand --

4                   **MR. LISUS:** Correct.

5                   **MR. BENHADID:** -- the delineation between the  
6 two. What do you call fibre and what do you call  
7 facilities?

8                   **MR. LISUS:** Fibre is a facility; right?

9                   **MR. BENHADID:** Yes.

10                  **MR. LISUS:** A tower is a facility?

11                  **MR. BENHADID:** No, I wouldn't call them that,  
12 but, yeah.

13                  **MR. LISUS:** Are small cells a facility?

14                  **MR. BENHADID:** No, but the way they're  
15 connected is through a facility.

16                  **MR. LISUS:** Through fibre?

17                  **MR. BENHADID:** Yes.

18                  **MR. LISUS:** The way they're connected; right?

19                  **MR. BENHADID:** For the most part.

20                  **MR. LISUS:** Pardon.

21                  **MR. BENHADID:** For the most part.

22                  **MR. LISUS:** What I'm understanding, sir, from  
23 the answers you are giving me, when you use the term  
24 "facilities," you really mean fibre; right?

25                  **MR. BENHADID:** Yes, and only because of its

## COMPENDIUM PUBLIC

1 ability to carry a certain speed, you know. Ten years ago,  
2 or maybe 15 years ago, a facility would have been -- that  
3 we would have considered fibre or copper. Today we say  
4 fibre because of the levels of speed that it carries.

5 **MR. LISUS:** But you and I can agree, sir, that  
6 there is a robust market for the lease of fibre by wireless  
7 carriers for the purposes of backhaul and transport,  
8 correct?

9 **MR. BENHADID:** There's a market. I don't know  
10 if it's robust, but it exists.

11 **MR. LISUS:** There are multiple suppliers of  
12 fibre who lease fibre to wireless carriers, correct?

13 **MR. BENHADID:** Mm --

14 **MR. LISUS:** Is Zayo one?

15 **MR. BENHADID:** There's more than one,  
16 absolutely.

17 **MR. LISUS:** Is Zayo one?

18 **MR. BENHADID:** I don't know if Zayo -- what  
19 they lease or not, but they are a -- yeah.

20 **MR. LISUS:** Is Distributel one?

21 **MR. BENHADID:** I don't know if they lease to  
22 carriers, but they do lease fibre. They have a wholesale  
23 service. Maybe that's the question you're asking me.

24 **MR. LISUS:** Does Beanfield have a wholesale  
25 service through which it leases fibre to carriers?

## COMPENDIUM PUBLIC

1                   **MR. BENHADID:** I don't know if they do.

2                   **MR. LISUS:** Does Telus lease fibre to carriers  
3 for wireless --

4                   **MR. BENHADID:** We have a wholesale service,  
5 yes.

6                   **MR. LISUS:** Does Bell have a wholesale service  
7 pursuant to which it leases fibre to carriers for wireless  
8 networks?

9                   **MR. BENHADID:** They do. I mean, they do have a  
10 wholesale service. I don't know if they lease to carrier  
11 networks. Like, that's where I don't know. But they do  
12 have a wholesale service, yes.

13                   **MR. LISUS:** Many carriers, including Telus,  
14 lease fibre for the purposes of transport, right, and  
15 backhaul?

16                   **MR. BENHADID:** Yes. Fibre service, yes.

17                   **MR. LISUS:** Yes. And in fact, a wireless  
18 carrier is able to build a reliable network, wireless  
19 network, outside of its cable footprint by leasing fibre  
20 wholesale --

21                   **CHIEF JUSTICE CRAMPTON:** Sorry to interrupt.  
22 Do we really need to -- it doesn't appear to us why we need  
23 to be in Confidential A for these questions.

24                   **MR. LISUS:** I actually didn't think we were,  
25 Chief. I'm sorry. I set at the outset we can go back into

# COMPENDIUM PUBLIC

1 public to ask all these questions. I thought we had.

2 **CHIEF JUSTICE CRAMPTON:** Sorry. I thought you  
3 were about to take the witness to one of those documents,  
4 because I had suggested that we do that, but maybe there  
5 was a misunderstanding.

6 **MR. LISUS:** No, I'm trying to work around the  
7 documents.

8 **CHIEF JUSTICE CRAMPTON:** Okay. There was a  
9 misunderstanding. Let's go into public, please.

10 **DEPUTY REGISTRAR:** Thank you.

11 **MR. TYHURST:** Chief Justice, if that's going to  
12 take a moment, maybe we can mark the witness statement  
13 while we're doing that.

14 **CHIEF JUSTICE CRAMPTON:** That's a good idea.

15 **MR. TYHURST:** The Level A is TR-252.

16 **CHIEF JUSTICE CRAMPTON:** Just one second here.

17 **CHIEF JUSTICE CRAMPTON:** Tell me the number  
18 again of the record.

19 **MR. TYHURST:** TR-252 for Level A.

20 **CHIEF JUSTICE CRAMPTON:** Yes?

21 **MR. TYHURST:** TR-253 for public.

22 **EXHIBIT CA-A-100:** Witness Statement of  
23 Nazim Benhadid (Telus)  
24 (Confidential Level A)

25 **EXHIBIT P-A-101:** Witness Statement of

## COMPENDIUM PUBLIC

1 Nazim Benhadid (Telus) (Public)

2 **DEPUTY REGISTRAR:** Is there no Confidential B  
3 version?

4 **MR. TYHURST:** No.

5 **MR. LISUS:** Perhaps, Chief, we could correct  
6 this misunderstanding by having the transcript of this  
7 cross-examination sequence simply made available to the  
8 public.

9 **CHIEF JUSTICE CRAMPTON:** Right. Since the  
10 break, there's been nothing confidential.

11 **MR. LISUS:** That is right. And so this --

12 **CHIEF JUSTICE CRAMPTON:** It should all be  
13 public.

14 **MR. LISUS:** So that sequence can be made  
15 available to the public.

16 **CHIEF JUSTICE CRAMPTON:** Yes.

17 **MR. LISUS:** We had agreed, Mr. Benhadid, you  
18 and I, that there are many companies, including Telus and  
19 Bell, have wholesale services through which they lease  
20 fibre to wireless carriers; right?

21 **MR. BENHADID:** I agree that they have a  
22 wholesale service that lease fibre services to third  
23 parties. I couldn't comment on wireless carriers just  
24 because I don't have the information. But I agree that,  
25 yes, the service exists and it can be procured by somebody

## COMPENDIUM PUBLIC

1 who needs a wireless service.

2 **MR. LISUS:** Wireless carriers, you and I can  
3 agree, Mr. Benhadid, do lease fibre from companies like  
4 Bell and Telus and many others for the purposes of enabling  
5 their wireless networks; fair?

6 **MR. BENHADID:** They do.

7 **MR. LISUS:** And companies can build a wireless  
8 network or a business outside of their wireline footprint  
9 by leasing fibre from these wholesale providers; correct?

10 **MR. BENHADID:** Yes.

11 **MR. LISUS:** And in fact, they do do that;  
12 correct?

13 **MR. BENHADID:** Yes.

14 **MR. LISUS:** Telus leases fibre outside of its  
15 wireline footprint; correct?

16 **MR. BENHADID:** Yes, in some instances.

17 **MR. LISUS:** Bell leases fibre outside of its  
18 wireline footprint; correct?

19 **MR. BENHADID:** I don't know.

20 **MR. LISUS:** Where does Telus lease fibre  
21 outside of its wireline footprint, Ontario?

22 **MR. BENHADID:** Yes.

23 **MR. LISUS:** What about elsewhere?

24 **MR. BENHADID:** Do you want me to give you a  
25 view per province or --?

## COMPENDIUM PUBLIC

1                   **MR. LISUS:** Sure.

2                   **MR. BENHADID:** I may be worried that this view  
3 per province might be confidential, and I realize you guys  
4 just --

5                   **MR. LISUS:** You don't have to tell me how much.  
6 Just tell me in which provinces Telus leases fibre from a  
7 wholesale provider for the purposes of its wireless -- for  
8 use for its wireless network. You've told me Ontario.

9                   **MR. BENHADID:** Quebec.

10                  **MR. LISUS:** Quebec. Where else?

11                  **MR. BENHADID:** That's it.

12                  **MR. LISUS:** So it leases fibre in Quebec from  
13 who, Vidéotron?

14                  **MR. BENHADID:** No, that's confidential. I want  
15 to give you the answer. I think it would be helpful for  
16 you if I was to give you this answer.

17                  **MR. LISUS:** Fortunately, Mr. Benhadid, the  
18 Chief determines who -- excuse me. The Chief determines  
19 what's confidential. Unless you're stopped, why don't you  
20 just give us the answer?

21                  **CHIEF JUSTICE CRAMPTON:** Well, if he says it's  
22 confidential, I mean, I can understand why.

23                  **MR. LISUS:** All right. Why don't I keep going  
24 given the amount of time that we've lost.

25                               Are you not comfortable telling me whether it

## COMPENDIUM PUBLIC

1 leases fibre from Vidéotron in Quebec?

2 **MR. BENHADID:** It's not Vidéotron and it's not  
3 that I'm not comfortable telling you who, it's just that --  
4 who we do business with where is confidential --

5 **MR. LISUS:** All right. And let me understand  
6 this, sir. The lease of this fibre is done pursuant to a  
7 contract; right?

8 **MR. BENHADID:** Yes.

9 **MR. LISUS:** And many carriers enter into these  
10 contracts for the receipt of wholesale fibre for the  
11 purposes of enabling their wireless network; right?

12 **MR. BENHADID:** Yes.

13 **MR. LISUS:** Okay. And would you agree with me,  
14 sir, that Telus' network in Quebec and Ontario, which runs  
15 in part on leased fibre, is reliable and performs well?  
16 Would you agree with that proposition?

17 **MR. BENHADID:** Yes, I do.

18 **MR. LISUS:** Okay. Now, I take it you -- and I  
19 think you have agreed with me, sir, that these wholesale  
20 agreements pursuant to which fibre is leased, are used  
21 across the industry in Canada to allow wireless carriers to  
22 operate their wireless networks outside of their wireline  
23 footprint? We've agreed on that; right?

24 **MR. BENHADID:** Yes.

25 **MR. LISUS:** I'm happy to keep going, Chief, but

## COMPENDIUM PUBLIC

1 the Commissioner said this witness had to go at noon, and  
2 it's noon. But I'm quite happy to keep going if, Benhadid,  
3 you can stay with us.

4 **MR. BENHADID:** I've informed my inside counsel  
5 that I can stay until one. I've made arrangements.

6 **CHIEF JUSTICE CRAMPTON:** Thank you very much,  
7 Mr. Benhadid. That's very much appreciated, and I know  
8 it's not your fault that we had these delays.

9 **MR. LISUS:** If we could pull up document 100871  
10 and, Chief, I think this is a document that you identified  
11 as not being confidential.

12 **CHIEF JUSTICE CRAMPTON:** Correct.

13 **MR. HIRSH:** Chief, if I could just register my  
14 objection again here. We've had a chance just as Mr.  
15 Benhadid has been testifying, I've had a chance to look at  
16 this document more carefully and exchange emails with my  
17 client on it, and this is a document that contains  
18 confidential pricing and spend information from customers.  
19 It is not -- it's strictly confidential within Telus and as  
20 the document explicitly states, Telus is also subject to  
21 NDAs which require that Telus maintain the confidentiality  
22 of this information.

23 So respectfully, Your Honour, I'm not sure if  
24 this is -- maybe you could take another look at this  
25 document. This document contains confidential customer

# COMPENDIUM PUBLIC

1 top.

2 Yeah, 100924.

3 **MARKED ID-033 FOR IDENTIFICATION:**

4 ABD100924

5 **MR. LISUS:** Can we go, please, to 202456.

6 And I will work with the parts of this deck  
7 that you identified as being appropriate for public, Chief.

8 **CHIEF JUSTICE CRAMPTON:** Okay. Thank you.

9 **MR. LISUS:** 202456.

10 Now, sir, this is a deck dated June 9, 2021.  
11 Have you seen this deck before?

12 **MR. BENHADID:** No.

13 **MR. LISUS:** If you scroll down, please, to  
14 slide 2.

15 You told us who -- is that Eros Spadotto, who  
16 we talked about a few minutes ago?

17 **MR. BENHADID:** That is Eros Spadotto.

18 **MR. LISUS:** And beneath him is Jim Senko. I  
19 understand Mr. Senko is in charge of wireless at Telus;  
20 right?

21 **MR. BENHADID:** Yes.

22 **MR. LISUS:** And do you know, sir, my  
23 understanding from the documents is that this deck was used  
24 to assist a two-hour meeting, virtual meeting, between  
25 Telus and the Commissioner of Competition. Are you aware

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1 of that?

2 **MR. BENHADID:** Not specifically, but I know  
3 there were meetings.

4 **MR. LISUS:** You are aware that there was such a  
5 meeting because you were asked to generate information to  
6 support Telus in that meeting; correct?

7 **MR. BENHADID:** Yes, I was -- I don't know if  
8 it's this meeting or not. I'm going to trust you on this  
9 if you're telling me it is this one and, yes, I was asked  
10 to gather some data.

11 **MR. LISUS:** And the data that you were asked to  
12 gather for the purposes of this meeting was data which  
13 quantified how much fibre Telus leased to others and how  
14 much fibre Telus leased from others for the purposes of its  
15 wireless network; right?

16 **MR. BENHADID:** I don't recall it to be specific  
17 to wireless. It may have been. I don't remember. I'd  
18 have to look at my file. I thought it was wholesale in  
19 general, but I mean, if you tell me it was specific to  
20 wireless, I'll believe you.

21 **MR. LISUS:** Well, there were only -- the  
22 meeting between the Commissioner and Telus, Mr. Spadotto  
23 and Mr. Senko, was only about the wireless.

24 **MR. BENHADID:** That's possible. I wasn't at  
25 that meeting. But you asked me about the data I gathered

## COMPENDIUM PUBLIC

1 and that's where I said I'm not -- I thought it was  
2 wholesale in general, but anyway.

3 **MR. LISUS:** I'll come to the data.

4 And just talking about the context of the  
5 meeting and what was going on in June of 2021, in June of  
6 2021, the proposed merger was between Shaw and Rogers  
7 entirely; correct? Wireless and wireline; right?

8 **MR. BENHADID:** Okay.

9 **MR. LISUS:** Correct?

10 **MR. BENHADID:** Yes, if you tell me so. I'm not  
11 privy to -- like it's hard for me -- if you tell me that's  
12 what it was, I'll accept it.

13 **MR. LISUS:** Sir, in 2021, the merger that was  
14 announced was --

15 **MR. BENHADID:** You mean when it was first  
16 announced, it was only about -- yes.

17 **MR. LISUS:** Yes, it was the cable business and  
18 the wireless business of Shaw being acquired by Rogers;  
19 correct?

20 **MR. BENHADID:** Yes.

21 **MR. LISUS:** And Telus was objecting to that  
22 form of transaction at that time; correct?

23 **MR. BENHADID:** Yes.

24 **MR. LISUS:** And Telus was meeting with and  
25 speaking with the Commissioner about whether or not Rogers

## COMPENDIUM PUBLIC

1 needed Shaw's wireline network to run a successful 5G  
2 wireless rollout; right?

3 **MR. BENHADID:** I don't know what was at the  
4 meeting specifically. I wasn't there. I haven't seen the  
5 document. Hard for me to answer.

6 **MR. LISUS:** I'm not talking about the meeting  
7 specifically. I'm just talking about Telus was working to  
8 persuade the Commissioner that Rogers did not require  
9 Shaw's wireline network to roll out an effective 5G  
10 wireless network; right? Do you remember that?

11 **MR. BENHADID:** I'm going to say yes.

12 **MR. LISUS:** Okay. Telus met with the  
13 Commissioner for that purpose; correct?

14 **MR. BENHADID:** I don't know what the purpose  
15 was. Again, it's hard for me to answer that.

16 **MR. LISUS:** If we look at page 4 of the deck,  
17 and you and I -- before we look at page 4, you and I  
18 already agreed that many wireless carriers have reliable,  
19 well-performing networks outside of their wireline  
20 footprint. Do you remember us talking about that a few  
21 minutes ago?

22 **MR. BENHADID:** Yeah. I don't know that we  
23 agreed that it was reliable, but, yes. It's common in the  
24 industry. We agree that Telus does use, you know, a small  
25 portion of leased fibre for its wireless cell sites.

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1                   **MR. LISUS:** And we talked about Freedom's use  
2 of leased fibre; right?

3                   **MR. BENHADID:** Yeah.

4                   **MR. LISUS:** Okay. Now, what Telus told the  
5 Commissioner in this slide is:

6                                 "As demonstrated by Telus in Central  
7 and Eastern Canada, deploying a  
8 successful 5G network outside wireline  
9 incumbent territory is business as  
10 usual for Telus, Roger, & Bell."

11                   Right?

12                   **MR. BENHADID:** Yes.

13                   **MR. LISUS:** And that's accurate, isn't it, sir?

14                   **MR. BENHADID:** It is.

15                   **MR. LISUS:** And I don't see any reference to  
16 that accurate fact in your witness statement of September  
17 2022; do I?

18                   **MR. BENHADID:** I don't understand your comment.

19                   **MR. LISUS:** In your witness statement of  
20 September 2022, I won't see any reference to the fact that  
21 Telus, Rogers, and Bell deploy a successful 5G network, or  
22 can employ a successful 5G network, outside their wireline  
23 footprint; right? I don't see that in your statement  
24 anywhere; right?.

25                   **MR. BENHADID:** As is?

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1                   **MR. LISUS:** Pardon?

2                   **MR. BENHADID:** You don't see it specifically as  
3 is, or -- what this says is basically that you can build  
4 outside of your incumbent territory, which is what you  
5 described. And Telus has built fibre in Ontario, and  
6 Manitoba, and Quebec, which are outside of their wireline  
7 network. So I don't state it specifically in my Affidavit,  
8 but I do mention -- if you give me a second. I thought I  
9 did mention -- that's why we built fibre in the East.

10                  **MR. LISUS:** Let me help you. You also can  
11 lease fibre, as we discussed a few minutes ago; correct?

12                  **MR. BENHADID:** But in this question we're  
13 talking about building, aren't we?

14                  **MR. LISUS:** No, sir, we're not. We're talking  
15 about the use of fibre in a wireless network, and you can  
16 build it, or you can lease it. We've already agreed on  
17 that; right?

18                  **MR. BENHADID:** Yes.

19                  **MR. LISUS:** Okay. And you can have a reliable,  
20 well-performing network with leased fibre. It's done all  
21 the time. Business as usual; right? Fair?

22                  **MR. BENHADID:** I'm --

23                  **MR. LISUS:** Fair?

24                  **MR. BENHADID:** It is, yes.

25                  **MR. LISUS:** All right. Thank you.

## COMPENDIUM PUBLIC

1                   **MR. LISUS:** Thank you.

2                   Sir, let me see if I can refresh your memory  
3 about something. We just discussed a deck dated June 9,  
4 2021; right?

5                   **MR. BENHADID:** Yes.

6                   **MR. LISUS:** I want you to think back to June of  
7 2021. You were asked by Telus leadership, perhaps Mr.  
8 Senko, to prepare some data for the team that was going to  
9 inform a presentation they were going to make to the  
10 Commissioner on June 9, 2021. Do you remember that? You  
11 and Mr. Kal Amery, A-M-E-R-Y, worked together in pulling  
12 together that information?

13                  **MR. BENHADID:** I do recall asking Mr. Amery for  
14 the information. I don't recall it being at the request of  
15 Mr. Senko. I thought it would have been at the request of  
16 Mr. Spadotto.

17                  **MR. LISUS:** Fair enough.

18                  **MR. BENHADID:** I may be wrong.

19                  **MR. LISUS:** No, no. You're probably right.  
20 Fair enough.

21                  And as you and I discussed a few minutes ago,  
22 what you were trying to get at with that information was  
23 the ability of a carrier to build a wireless network  
24 outside of its ILEC or wireline footprint; right?

25                  **MR. BENHADID:** Yes.

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1                   **MR. LISUS:** Okay. And you wanted data from Mr.  
2 Amery to support the idea that Telus was able to build  
3 outside of its ILEC or wireline footprint?

4                   **MR. BENHADID:** To build?

5                   **MR. LISUS:** Was able to build outside of its  
6 wireline footprint using wholesale agreements, and Rogers  
7 could therefore do the same thing in Alberta and didn't  
8 need to acquire Shaw. Do you remember that?

9                   **MR. BENHADID:** I don't remember the details in  
10 specific, but I would agree that, you know, wholesale is an  
11 effective tool when available to provide footprint.

12                   **MR. LISUS:** Okay. And you therefore can build  
13 wireless outside of your ILEC or wireline footprint. We  
14 have discussed and agreed on that; correct?

15                   **MR. BENHADID:** Yes, through wholesale means,  
16 yes.

17                   **MR. LISUS:** Okay. And these wholesale means  
18 are reflected in contracts between buyer and seller and  
19 they're very common in the industry; correct?

20                   **MR. BENHADID:** Yes.

21                   **MR. LISUS:** And Mr. Amery, two days after you  
22 asked him on June 2nd, generated by June 4, a list which  
23 identified several dozen domestic providers for facilities  
24 to Telus for the purposes of its wireless network; right?

25                   **MR. BENHADID:** I don't know if it's several

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1 dozens, but, yes.

2 **MR. LISUS:** Okay. And at the same time Mr.  
3 Amery gave to you the data about how much Telus supplies to  
4 domestic carrier customers; right?

5 **MR. BENHADID:** For wholesale relationship, yes.

6 **MR. LISUS:** Many millions in both instances.  
7 Telus buys and sells wholesale facilities; right?

8 **MR. BENHADID:** Yeah.

9 **MR. LISUS:** And those transactions, pursuant to  
10 those contracts, demonstrate, as you have explained to me,  
11 the ability of a carrier to leverage wholesale agreements  
12 to build a wireless network outside of their wireline or  
13 ILEC footprint; fair?

14 **MR. BENHADID:** Yes.

15 **MR. LISUS:** All right.

16 And Chief, we can -- if my friend from Telus is  
17 sensitive about the numbers, we can -- even though this is  
18 now 18 months old, we can go into the confidential session.

19 **CHIEF JUSTICE CRAMPTON:** Okay. Let's try and  
20 keep it brief.

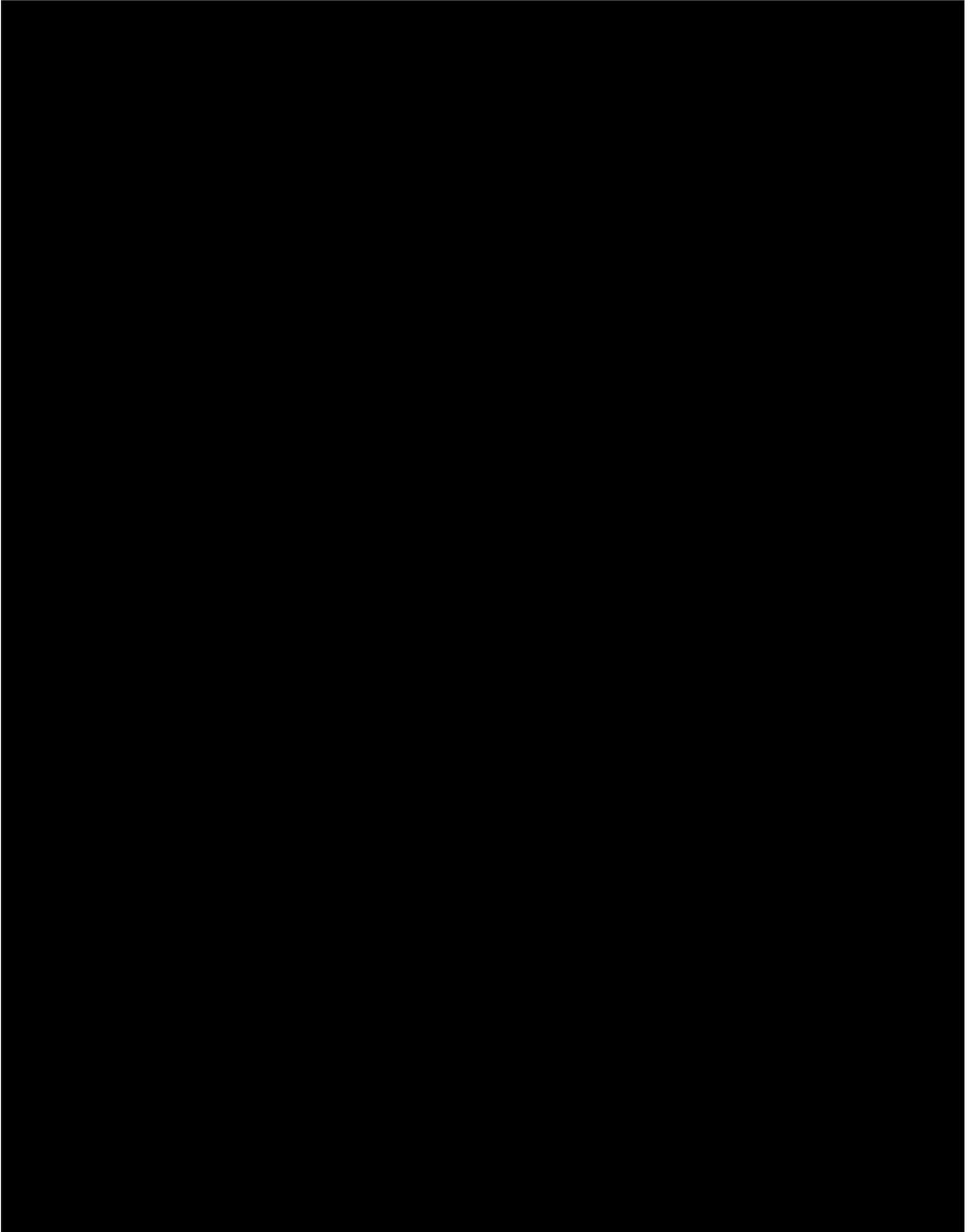
21 --- Upon recessing at 12:37 p.m., to resume

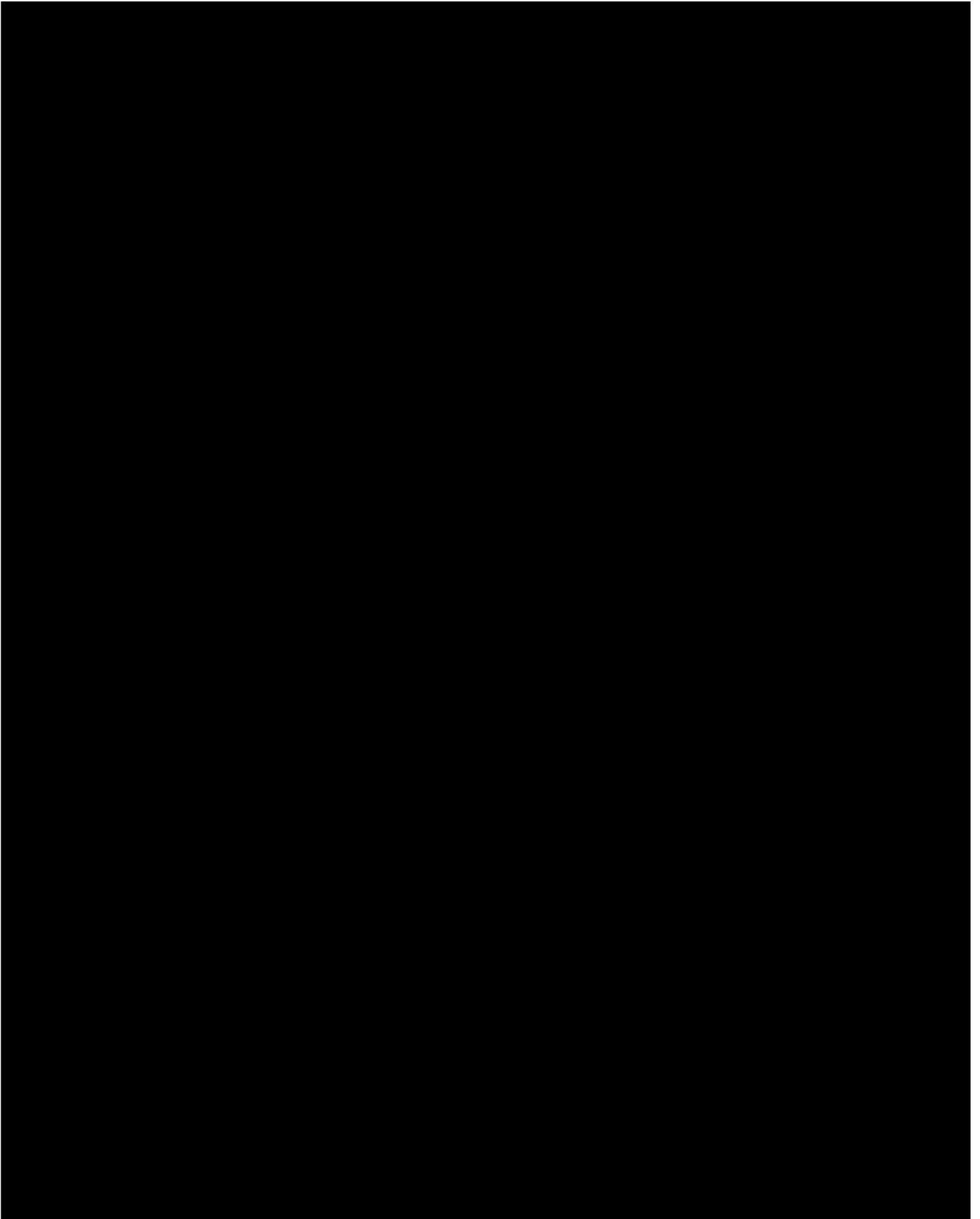
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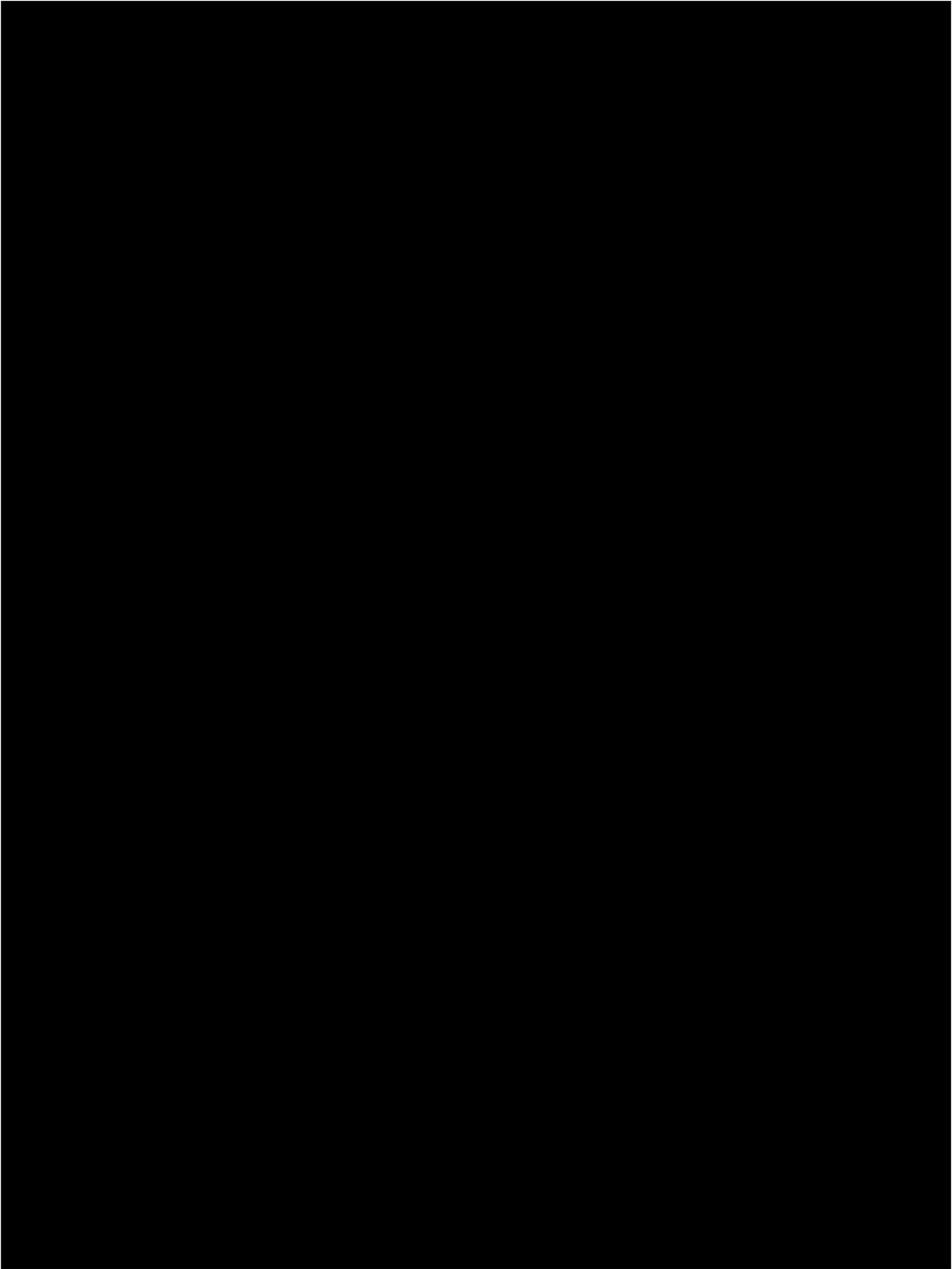
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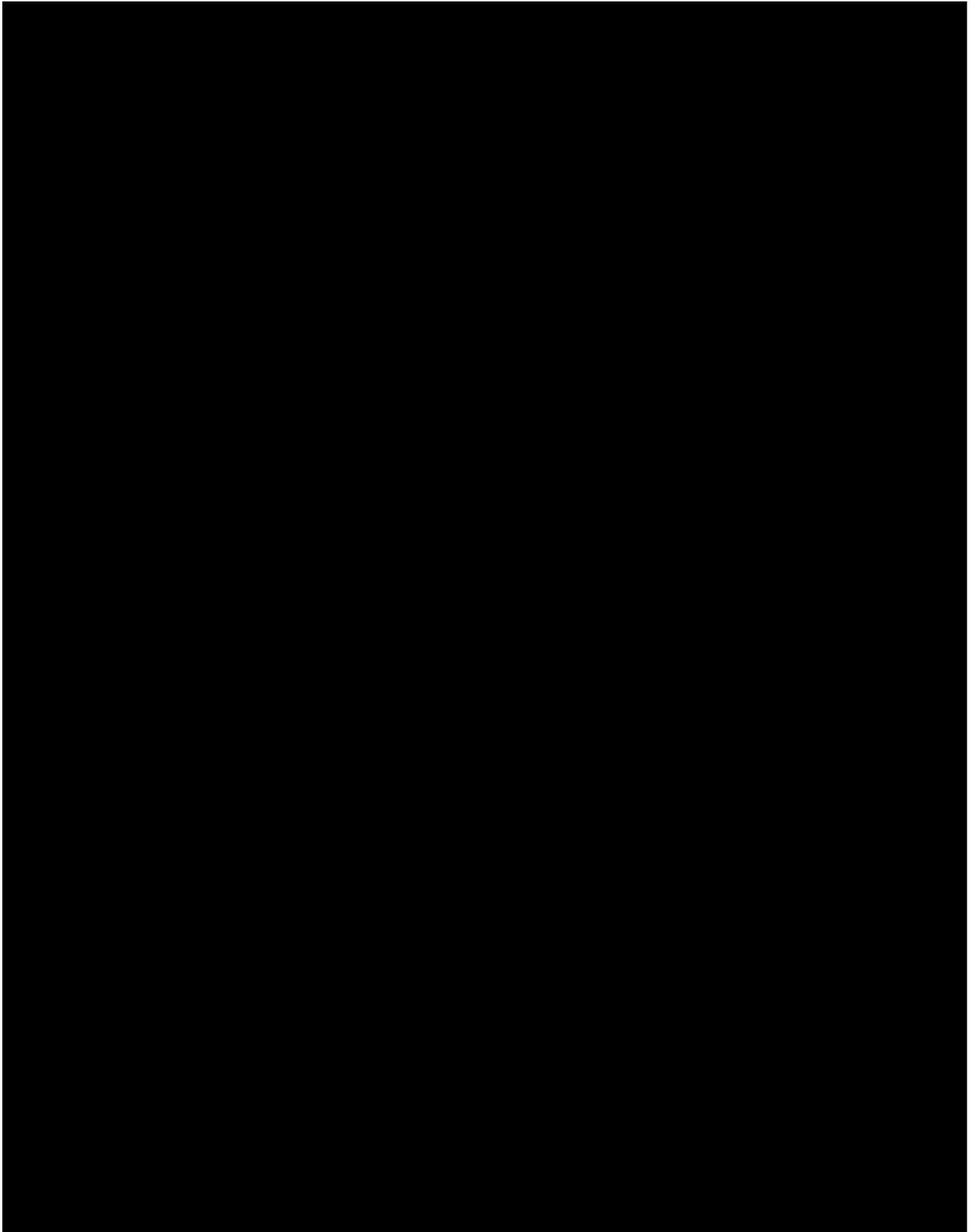
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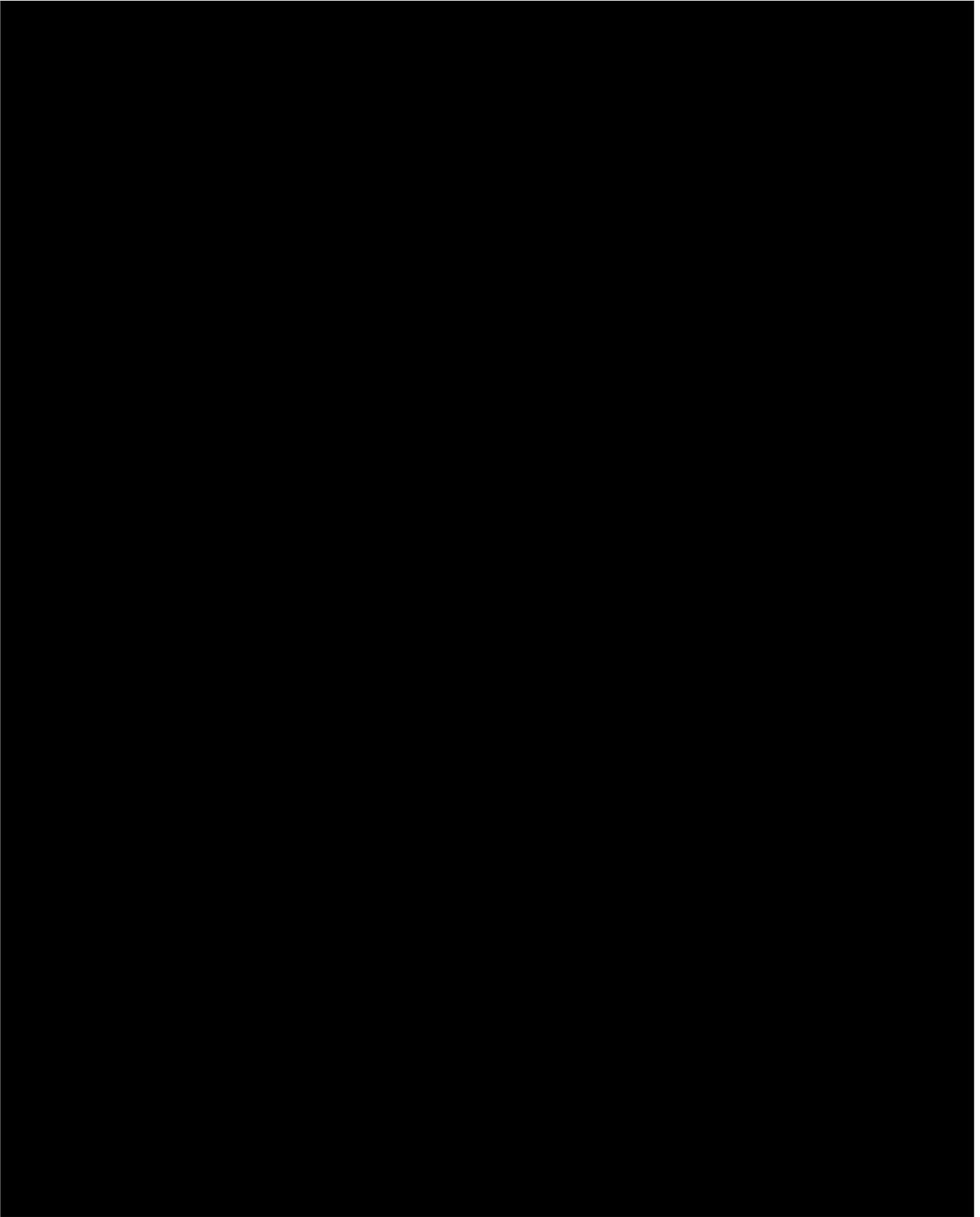
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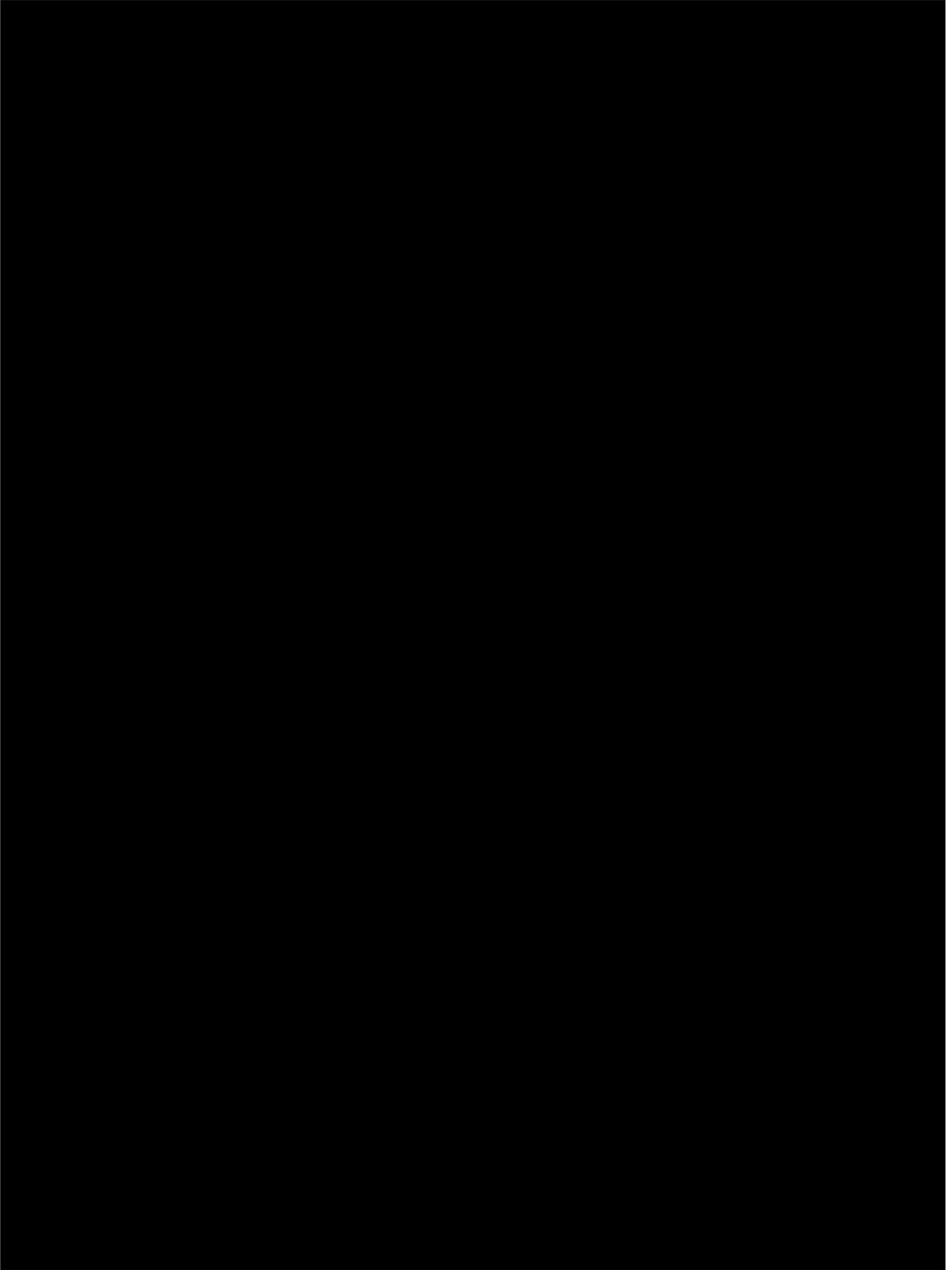


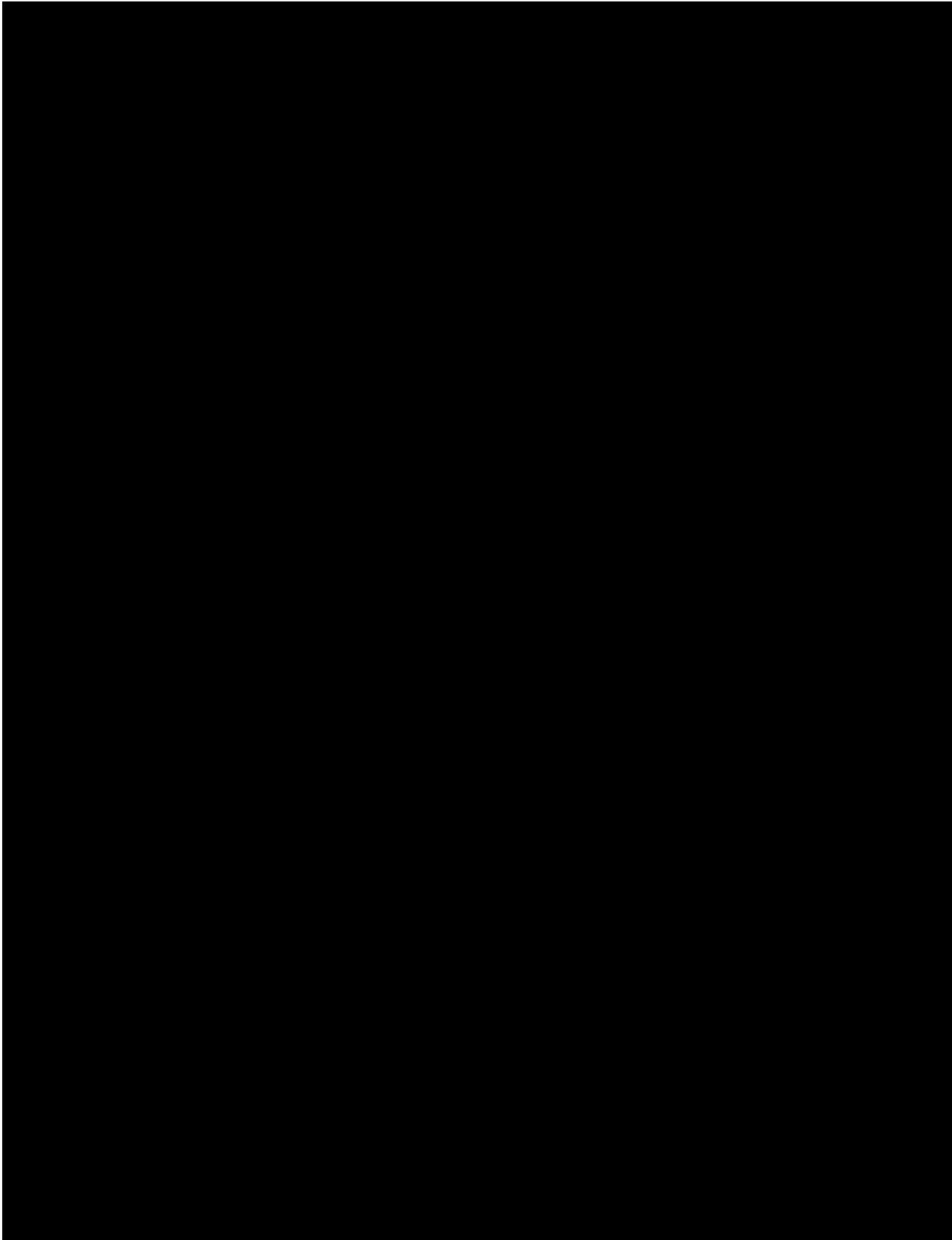


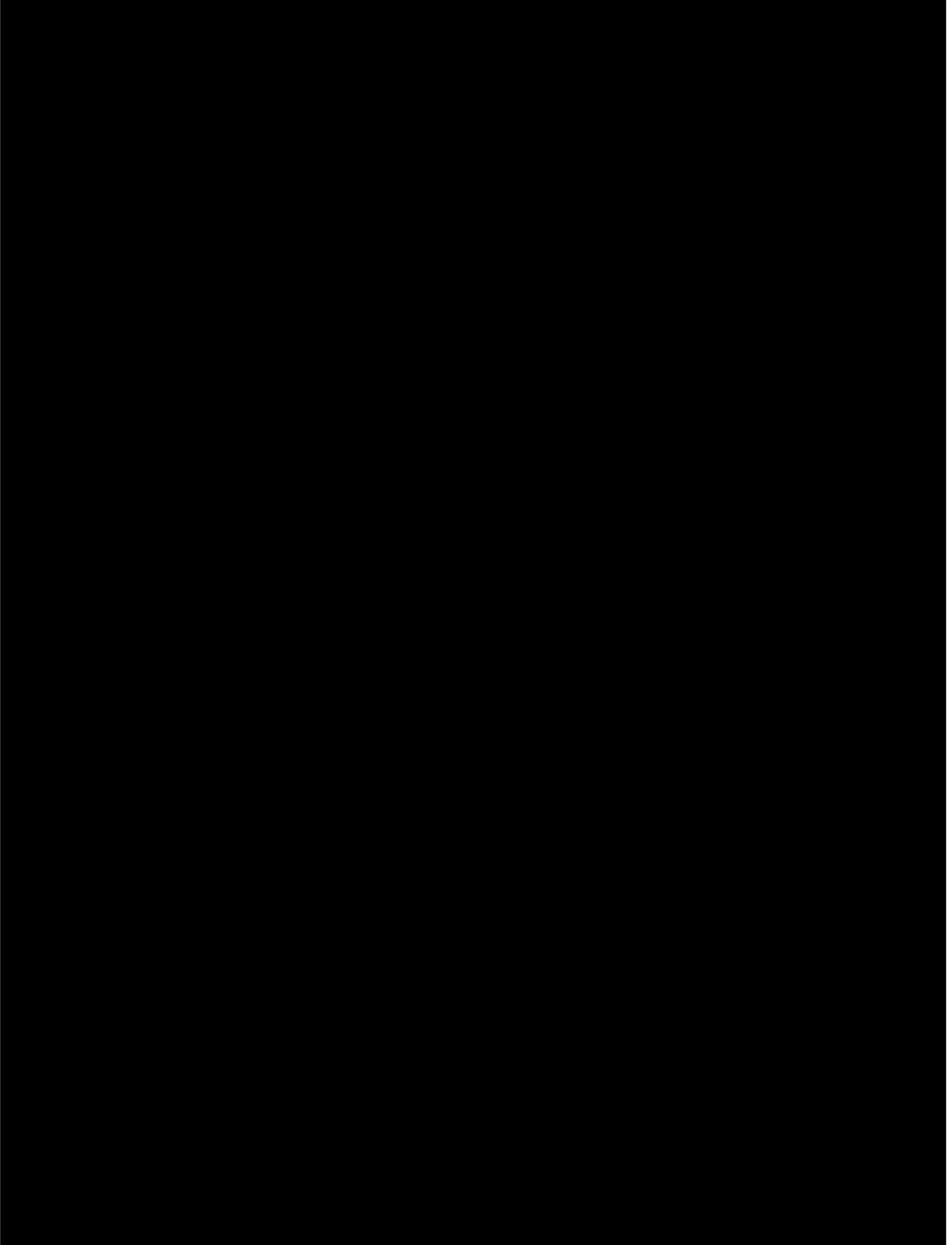


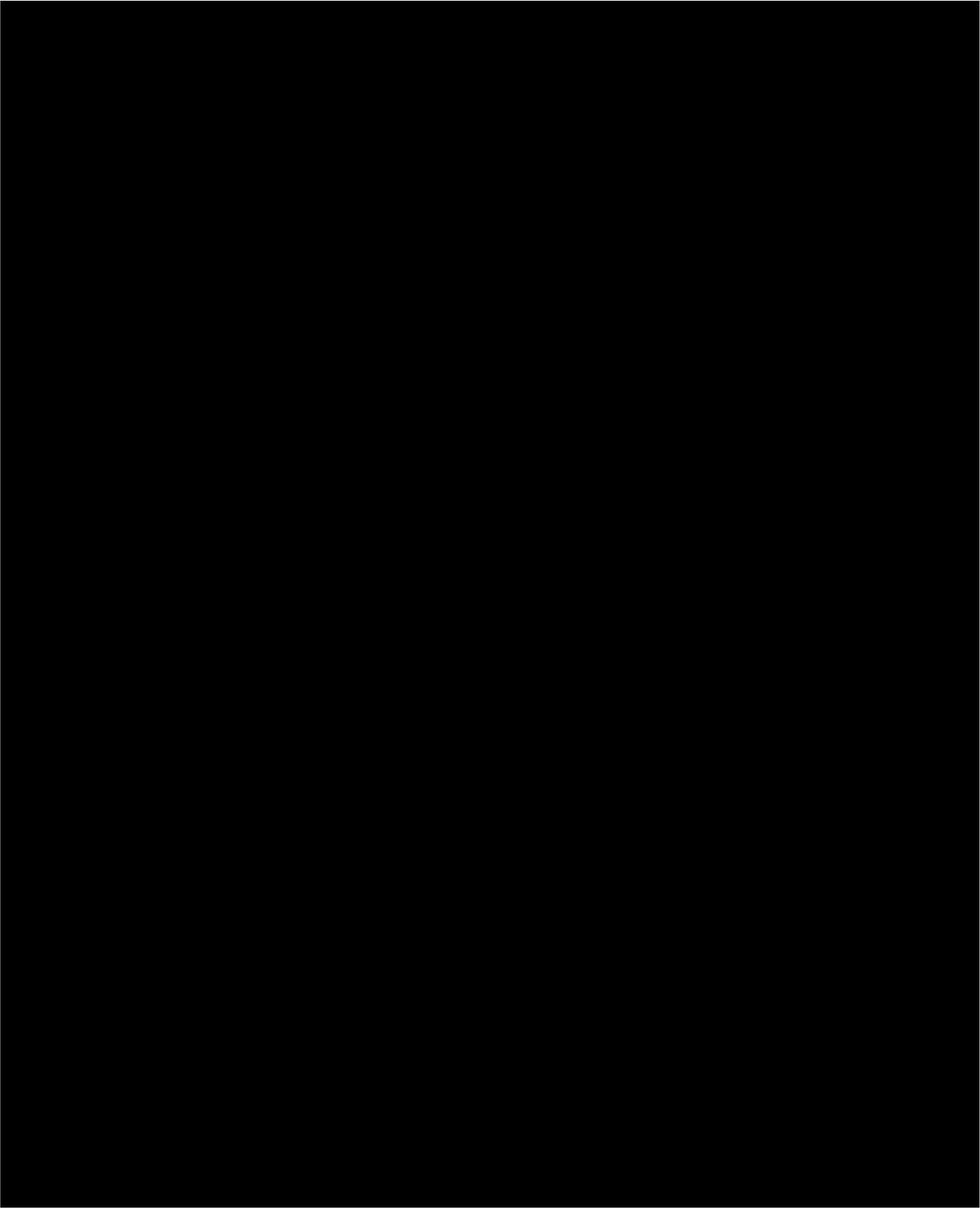


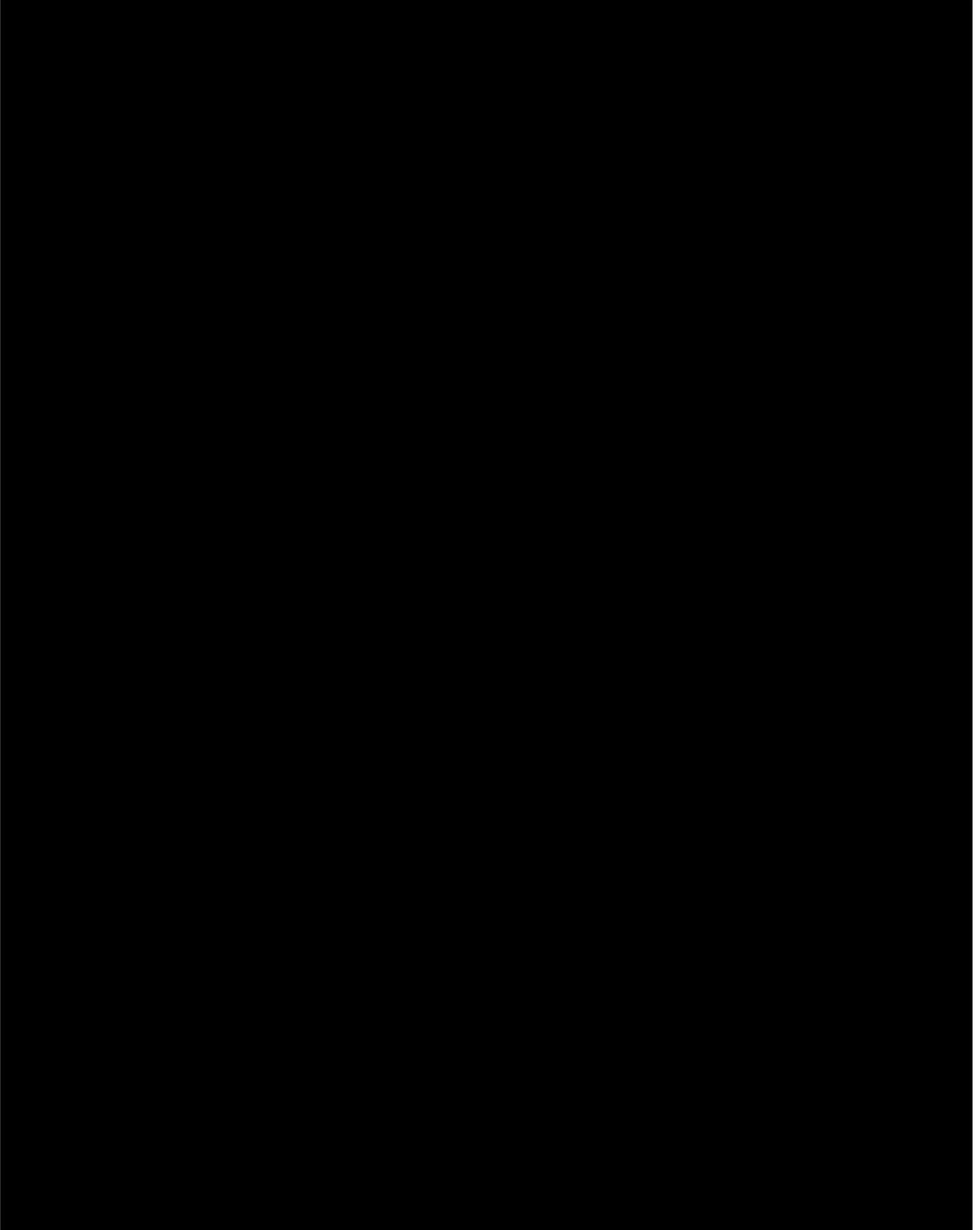


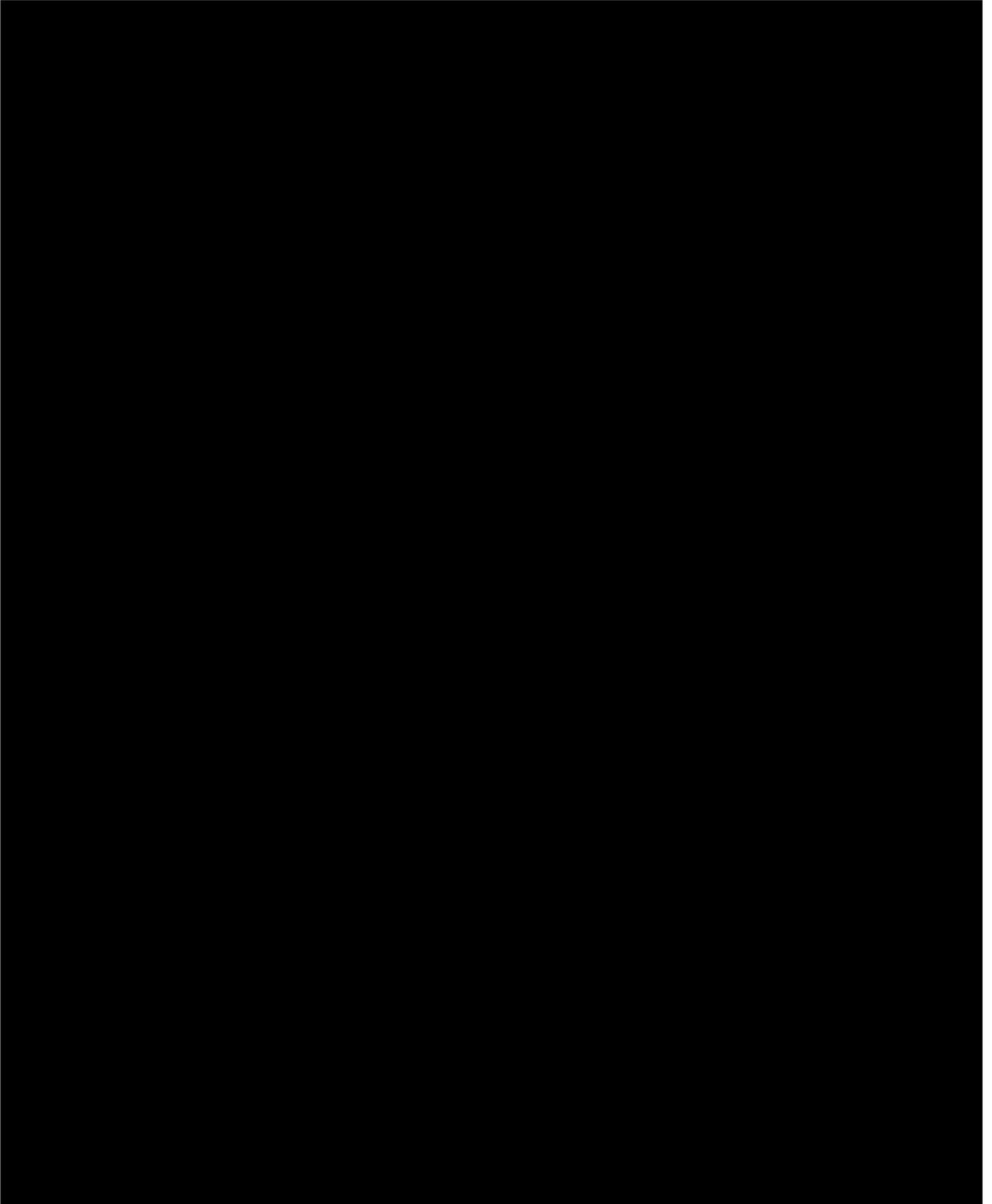


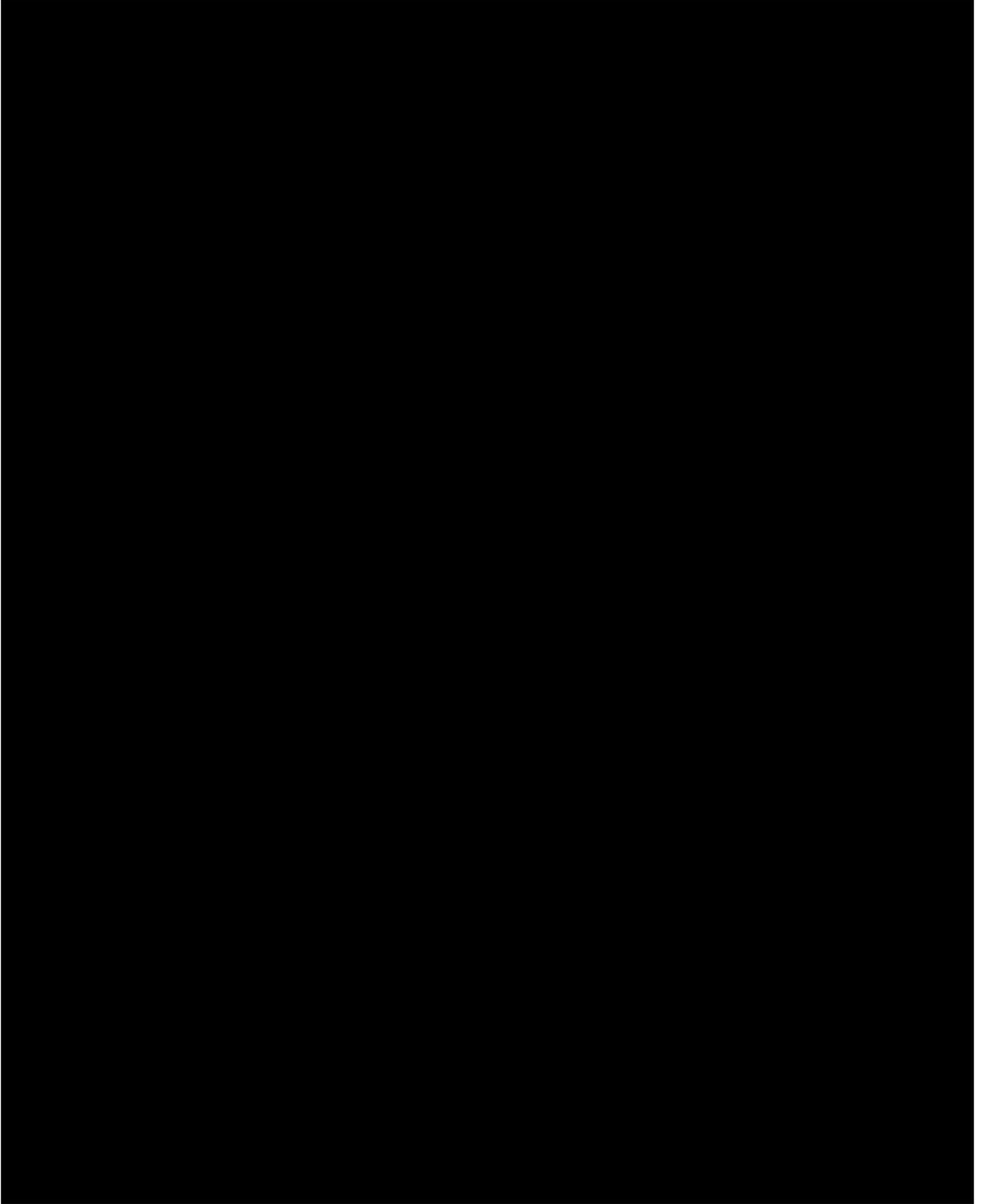












**TAB – 3.D**

- (c) a Memorandum of Understanding between telecommunications carriers that will allow them to more effectively work together in the event of an emergency, including to ensure that the 9-1-1 system is not vulnerable to an outage or other network disruption. This Memorandum of Understanding was finalized and delivered to ISED on September 7, 2022, a copy of which is attached as [Exhibit 3](#). Rogers, Videotron, Shaw, Bell and Telus are among the twelve signatories.

12. The physical and logical separation of Rogers' wireline and wireless networks is a key aspect of Rogers network resiliency plans and is unprecedented in the Canadian telecommunications industry.

13. Rogers remains committed to ensuring that we continue to provide Canadians with the fast and reliable connectivity that we have delivered over the past four decades.

**Response to Mr. Benhadid's statement**

14. At paragraph 4 to 6 of his statement Mr. Benhadid suggests that wireline network ownership is critical to wireless network performance and reliability. I disagree. And, while I understand this issue will be dealt with elsewhere in evidence, I will make two comments. First, his assertion is inconsistent with my own experience in the industry, and with the acknowledged fact that neither Bell nor Telus own a wireline network that covers the entirety of their respective wireless footprints. Second, and related, TELUS leases about [REDACTED] wireline circuits from Rogers, at a cost of about [REDACTED] per month.

**TAB – 3.E**



Canadian Radio-television and Telecommunications Commission

Home → Business → Decisions, Notices and Orders

# Telecom Decision CRTC (Canadian Radio-television and Telecommunications Commission) 2008-17

Ottawa, 3 March 2008

## Regulatory policy

### Revised regulatory framework for wholesale services and definition of essential service

Reference: 8663-C12-200614439

*In this Decision, the Commission revises the definition of an essential service, replacing the definition set out in Telecom Decision 97-8.*

*The Commission also sets out a restructured regulatory framework for wholesale services and provides rationale for the assignment of key services within each of six new service categories. It then determines, among other things, the pricing principles for each of these categories and the phase-out periods for non-essential services subject to phase-out.*

*Finally, the Commission determines that it will review the assignment of all remaining mandated wholesale services six years from the date of this Decision.*

## Introduction

1. In Telecom Public Notice 2006-14, the Commission initiated a proceeding to review its regulatory framework for wholesale services, including, in particular, a review of the definition of an essential service and the associated pricing principles for all mandated wholesale services. The Commission noted that it intended to apply its determinations to wholesale services provided by competitive local exchange carriers (CLECs), as well as to those provided by the major incumbent local exchange carriers (ILECs (incumbent local exchange carriers)), Télébec, Limited Partnership (Télébec), and the cable carriers.<sup>1</sup>

2. The Commission received written comments in response to the Public Notice, and numerous parties made oral presentations at an 11-day public hearing that began on 9 October 2007. Participating parties included the ILECs and some of their national and/or regional competitors in the

**COMPENDIUM PUBLIC**

111. Services in the non-essential subject to phase-out category are those that the Commission has determined do not meet the definition of an essential service and that have not been classified as conditional mandated non-essential, public good, or interconnection services. The term "phase-out" means phasing out mandated access at the end of the transition period.

***Low-speed CDN transport facilities***

112. Low-speed CDN transport facilities refer to DS-0 and DS-1 facilities that provide dedicated digital transport paths between ILEC central offices.

113. Bell Canada et al. and TCC submitted that the downstream market using low-speed CDN facilities is competitive and that there are numerous options available to competitors, including fibre-optic facilities, cable facilities, wireless facilities, and ILEC retail services.

114. The Commission notes that the record indicates a high incidence of competitor self-supply or alternative supply of low-speed CDN transport facilities by third parties.

115. The Commission considers that fibre optic facilities provide competitors with an alternative to low-speed CDN transport facilities because bandwidth requirements at each serving central office may be aggregated. The Commission also considers that where a competitor is co-located at an ILEC's central office, the competitor could provide other competitors with a wholesale alternative to the ILEC's low-speed CDN transport facilities.

116. Accordingly, the Commission determines that the ILECs' low-speed CDN transport facilities are to be classified as non-essential subject to phase-out.

***Fibre-based access and transport, and related services***

117. The Commission notes that fibre-based access and transport services include CDN DS-3, OC-3, OC-12, and Ethernet services.

118. The Commission notes that the record indicates a high incidence of competitor self-supply or alternative supply of fibre-based access and transport facilities. The Commission considers that the reported level of alternative supply demonstrates the existence of competition in the upstream market for such facilities.

119. Accordingly, the Commission determines that high-speed fibre-based access and transport facilities and related services are to be classified as non-essential subject to phase-out.

***Other services classified as non-essential subject to phase-out***

120. The Commission has identified various other wholesale services that it considers, based on the record of this proceeding, are duplicable by competitors, either directly by themselves or through the use of alternative services offered by third-party service providers. Examples of these other wholesale services include local number portability database services, BNS database storage, and operator services. On the other hand, certain other wholesale services may not have been duplicated by competitors - for example, card swipe and Advanced Intelligent Network interconnection. However, the Commission does not consider that withdrawing mandated access to

**TAB – 3.F**

## COMPENDIUM PUBLIC

1                   One area where we continued to be challenged is  
2 in generating free cash flow, which is a critical aspect  
3 for any business, but that's been a feature of our  
4 ownership of the Freedom wireless assets since our purchase  
5 in 2016.

6                   **MR. THOMSON:** Were any of those successes we've  
7 just talked about attributable in your view, to the  
8 ownership or the operation by Shaw of a wireline business?

9                   **MR. McALEESE:** No, not at all.

10                  **MR. THOMSON:** Is it necessary to own and  
11 operate a wireline business to compete successfully as a  
12 wireless carrier?

13                  **MR. McALEESE:** No, I think the Canadian market  
14 is broadly strong evidence of the fact that that's not  
15 necessary in any regard. In the British Columbia market,  
16 the combination of Bell and Rogers have more than 50  
17 percent market share and have for decades in British  
18 Columbia. In Alberta, the combination of BCE -- rather,  
19 Bell and Rogers, again players that don't have wireline in  
20 those two provinces, are north of 40 percent market share.  
21 Telus in the Ontario market where it owns no wireline  
22 infrastructure to speak of is about 20 percent market share  
23 player.

24                  Of course, when we bought WIND in 2016, we  
25 bought the wireless asset with just about a million

## COMPENDIUM PUBLIC

1 subscribers and no wireline infrastructure. We continued  
2 to operate that business with 70 percent of its  
3 subscribers, the Freedom subscribers in Ontario where  
4 there's no wireline.

5           And I suppose there's probably no more  
6 compelling case in North America than T-Mobile which, as a  
7 substantial player in the U.S. market, has north of 110  
8 million subscribers, I believe in their last quarter, which  
9 is something like three times the size of the Canadian  
10 market, and they have no wireline infrastructure to speak  
11 of. They had purchased some along the way since that  
12 portfolio with their acquisition of Sprint, but recently  
13 divested of that business for I believe the purchase price  
14 of a dollar. So the importance of wireline infrastructure  
15 is simply not relevant for wireline players.

16           **MR. THOMSON:** How does Freedom carry on its  
17 wireless business in Ontario without owning its own  
18 wireline network?

19           **MR. McALEESE:** We take advantage of the very  
20 competitive market for backhaul in the Ontario market,  
21 where typically in most parts of Ontario there are between  
22 five and seven players that we can choose from. It's a  
23 highly competitive, highly robust market for availability  
24 for backhaul.

25           **MR. THOMSON:** Are the backhaul arrangements

## COMPENDIUM PUBLIC

1 that Freedom has entered to in Ontario unusual in the  
2 telecom industry?

3 **MR. McALEESE:** No, they are exceedingly usual.  
4 They are how the industry has been architected over the  
5 years. In many respects it's often been mandated by the  
6 regulatory bodies to ensure that we have -- we're not  
7 overbuilding and, you know, investing in duplicate assets.  
8 There is a wide, wide portfolio of available backhaul  
9 across the country.

10 **MR. THOMSON:** What proportion of the operating  
11 expenses of Freedom is attributable to its backhaul  
12 arrangements?

13 **MR. McALEESE:** It's very modest. I believe  
14 it's in the order of 8 percent.

15 **MR. THOMSON:** Has the business of Freedom been  
16 integrated into the overall business of Shaw in the period  
17 since WIND was acquired more than six years ago?

18 **MR. McALEESE:** We've made some modest gains on  
19 things like corporate overhead. So when we acquired the  
20 WIND asset, it had its own treasure group, its own legal  
21 group, its own finance group. So with corporate overheads  
22 we've been able to bring some of those things in. But the  
23 business, unlike our peers who often grew their wireline  
24 and wireless businesses together as they were growing up  
25 through the decades, we of course acquired our wireless

## COMPENDIUM PUBLIC

1 business, and in doing so acquired a set of assets that had  
2 very different infrastructure, technical capabilities, IT  
3 stacks. So we've made no great strides in integrating the  
4 wireless asset that we acquired into our wireline business.

5 **MR. THOMSON:** Has Shaw been able to achieve  
6 meaningful synergies from owning and operating both a  
7 wireless business and a wireline business?

8 **MR. McALEESE:** Not beyond what I described on  
9 the opening slide.

10 **MR. THOMSON:** Okay. Having discussed a number  
11 of these successes enjoyed by Freedom in 2017 and 2018, let  
12 me turn briefly to four matters that appear to have had the  
13 opposite effect on its business. So let's deal with one at  
14 a time. First, the unlimited plans of Bell and Telus and  
15 Rogers, let's start with some foundational questions. What  
16 were those plans and when were they introduced?

17 **MR. McALEESE:** They were introduced in June of  
18 2019 for all three carriers within about a week of each  
19 other. And the unlimited plans were really essentially,  
20 sort of, their time had come. Canada is one of the last  
21 markets to have had the major carriers offer unlimited  
22 plans. They had been available in the U.S. market, for  
23 example, for something like a decade. Canada resisted  
24 that.

25 And the structure of these plans, Mr. Thomson,

**TAB – 3.G**

## COMPENDIUM PUBLIC

1 the corporation, said to the Competition Bureau, that's  
2 news to you. Is that correct?

3 **MR. HICKEY:** That would be news to me.

4 **MR. ROOK:** Now, can we come to your witness  
5 statement for a moment? And can you assist the Tribunal  
6 with a more fulsome description of the business of  
7 Distributel?

8 First, does Distributel carry on business as a  
9 reseller of telecommunications products and services across  
10 Canada?

11 **MR. HICKEY:** That is correct, though we prefer  
12 the term service-based competitor.

13 **MR. ROOK:** And there's been some evidence and  
14 you've used the words in your statement describing  
15 Distributel as an internet service provider and a  
16 telecommunications service provider. Is that or is that  
17 language commensurate with or different than the language  
18 "reseller" or "resale"?

19 **MR. HICKEY:** A reseller can offer both  
20 telecommunications such as telephone services or internet  
21 services as well.

22 **MR. ROOK:** And is Distributel both a reseller  
23 as well as an ISP or a TSP, to use the acronym?

24 **MR. HICKEY:** Distributel is a  
25 telecommunications service provider and an internet service

## COMPENDIUM PUBLIC

1 provider, and to provide those services we operate as a  
2 service-based competitor or, as you like to use the term,  
3 reseller.

4 **MR. ROOK:** Thank you.

5 And am I correct that Distributel maintains  
6 points of presence in Calgary, Edmonton, Montreal, Ottawa,  
7 Prince George, Toronto and Vancouver?

8 **MR. HICKEY:** At the time I swore this  
9 affidavit, that is correct.

10 **MR. ROOK:** And is that no longer the case?

11 **MR. HICKEY:** I believe we may be shutting down  
12 a POP, but I don't have any details on that.

13 **MR. ROOK:** POP being point of presence?

14 **MR. HICKEY:** Points of presence. I apologize.

15 **MR. ROOK:** And in constructing Distributel's  
16 network, do you have a national fibre backbone facility?

17 **MR. HICKEY:** That is correct, though it is  
18 leased, not owned.

19 **MR. ROOK:** And is a backbone facility a fibre  
20 optic transmission system that connects Distributel's  
21 operations to the various points of presence that you've  
22 described?

23 **MR. HICKEY:** That is a correct summary.

24 **MR. ROOK:** And am I correct that Distributel  
25 leases the fibre facilities that we are speaking about from

## COMPENDIUM PUBLIC

1 owners of fibre in Canada?

2 **MR. HICKEY:** That is correct.

3 **MR. ROOK:** And am I correct that you can  
4 purchase or lease these facilities from the so-called  
5 inter -- sorry -- so-called ILECs and the cable cones?

6 **MR. HICKEY:** That is correct, in addition to  
7 other companies such as Beanfield and those that are not  
8 incumbent telephone or cable companies.

9 **MR. ROOK:** ILEC stands for what; incumbent  
10 local exchange carrier?

11 **MR. HICKEY:** That is correct.

12 **MR. ROOK:** And the ILECs in common parlance  
13 today are the former monopoly provincial telephone  
14 companies plus Bell Canada; correct?

15 **MR. HICKEY:** Bell Canada is an ILEC, but yes,  
16 otherwise, that is correct.

17 **MR. ROOK:** Now, are these fibre transmission  
18 facilities that we're calling backbone available from,  
19 what; 10 to 12 suppliers in Canada?

20 **MR. HICKEY:** For a national backbone component?  
21 I don't have the numbers, but fibre in general would, yes,  
22 be available from each incumbent telephone and cable  
23 company.

24 **MR. ROOK:** And these facilities are not  
25 regulated, that is, the price or access to them is not

## COMPENDIUM PUBLIC

1 regulated by the CRTC; correct?

2 **MR. HICKEY:** That is correct.

3 **MR. ROOK:** And is that because, based on your  
4 knowledge and experience, the CRTC has forborne from  
5 regulating such services because, in its judgment, they are  
6 sufficiently competitive that regulation is not required?

7 **MR. HICKEY:** Well, they are not regulated as  
8 they did not satisfy the essentiality test, which includes  
9 as one prong that these facilities can be duplicated by  
10 other parties, and they are not regulated on that basis.

11 **MR. ROOK:** But has the CRTC forborne from  
12 regulating intercity or TransCanada fibre networks under  
13 section 34 of the *Telecommunications Act*?

14 **MR. HICKEY:** Yes, that's correct.

15 **MR. ROOK:** And in the localities that you've  
16 described, such as Montreal and Toronto and the others that  
17 I named and you agreed upon, do you also lease local fibre  
18 in the vicinity of your point of presence?

19 **MR. HICKEY:** Sorry; can you just define what  
20 you mean by local fibre? Usually local indicates end user  
21 relationship.

22 **MR. ROOK:** I'm referring to the fibre  
23 transmission facilities located within the communities that  
24 you serve that are connected to the national backbone  
25 network that Distributel operates.

## COMPENDIUM PUBLIC

1                   **MR. HICKEY:** Yes, we would offer -- we would  
2 lease transports to connect to our national backbone  
3 network.

4                   **MR. ROOK:** And those fibre facilities, whether  
5 they're fibre rings or the like, are also leased from  
6 various providers; correct?

7                   **MR. HICKEY:** That is correct.

8                   **MR. ROOK:** And these fibre facilities -- I'll  
9 call them fibre transmission facilities -- are readily  
10 available in the market in Canada from different suppliers;  
11 correct?

12                   **MR. HICKEY:** I can't speak to readily  
13 available. They are not regulated and available for  
14 parties, but I don't make purchase decisions with respect  
15 to that, so I cannot speak to readily available or not.

16                   **MR. ROOK:** Let's take the word "readily" out of  
17 it. Isn't it the case that Distributel purchases or leases  
18 these facilities, as opposed to constructing them itself,  
19 from other service providers?

20                   **MR. HICKEY:** That is correct.

21                   **MR. ROOK:** And there are many of them, I  
22 suggest to you, including the ILECs, the Cablecos, and  
23 companies such as Zayo, Beanfield, or whatever the proper  
24 name for that company is; correct?

25                   **MR. HICKEY:** Yes, that is correct, and again

## COMPENDIUM PUBLIC

1 provided fibre is where we require fibre to be.

2 **MR. ROOK:** And the point is that from  
3 Distributel's perspective, it's less costly to the company  
4 to lease the facilities than to construct them itself;  
5 correct?

6 **MR. HICKEY:** I can't speak to that being the  
7 only rationale, but, yes, we lease in those cases, and we  
8 do not build.

9 **MR. ROOK:** And I suggest to you that the reason  
10 for doing so is that, first of all, they are ubiquitous,  
11 that is they are readily available, and they are at a price  
12 that is satisfactory to Distributel, in contrast with the  
13 capital cost it would incur to replicate those facilities;  
14 correct?

15 **MR. HICKEY:** I would agree with the readily  
16 available in urban centres. As you move out of those  
17 centres, I believe we've raised concerns in prior CRTC  
18 proceedings about the availability of transport as it  
19 relates to the need to use disaggregated wholesale high  
20 speed access services. But in urban centres, I grant your  
21 point.

22 **MR. ROOK:** Thank you. Now, you told my friend,  
23 and you just mentioned, that the CRTC regulates what is  
24 known as high-speed access to service providers such as  
25 Distributel; correct?

## COMPENDIUM PUBLIC

1           **MR. HICKEY:** That is correct.

2           **MR. ROOK:** And if I understand your testimony  
3 correctly, you appeared on behalf of -- is there something  
4 wrong with the -- sorry. I just -- my screen went blank,  
5 Mr. Chair. I'm sorry.

6           If I understand your evidence correctly in your  
7 statement, sir, you appeared before the CRTC on behalf of  
8 CNOC in the proceeding that the CRTC held resulting in  
9 decision CRTC 215326; correct?

10           **MR. HICKEY:** That is correct. That was at the  
11 beginning of my tenure for CNOC, but that is correct.

12           **MR. ROOK:** And that decision is referenced at  
13 paragraph 18 of your statement. Do you see that?

14           **MR. HICKEY:** That is correct.

15           **MR. ROOK:** Where it states:

16                    "In Telecom Regulatory Policy 2015-325,  
17                    the Commission determined that  
18                    aggregated HSA services should be  
19                    phased-out and replaced with  
20                    'disaggregated' HSA services..." (as  
21                    read)

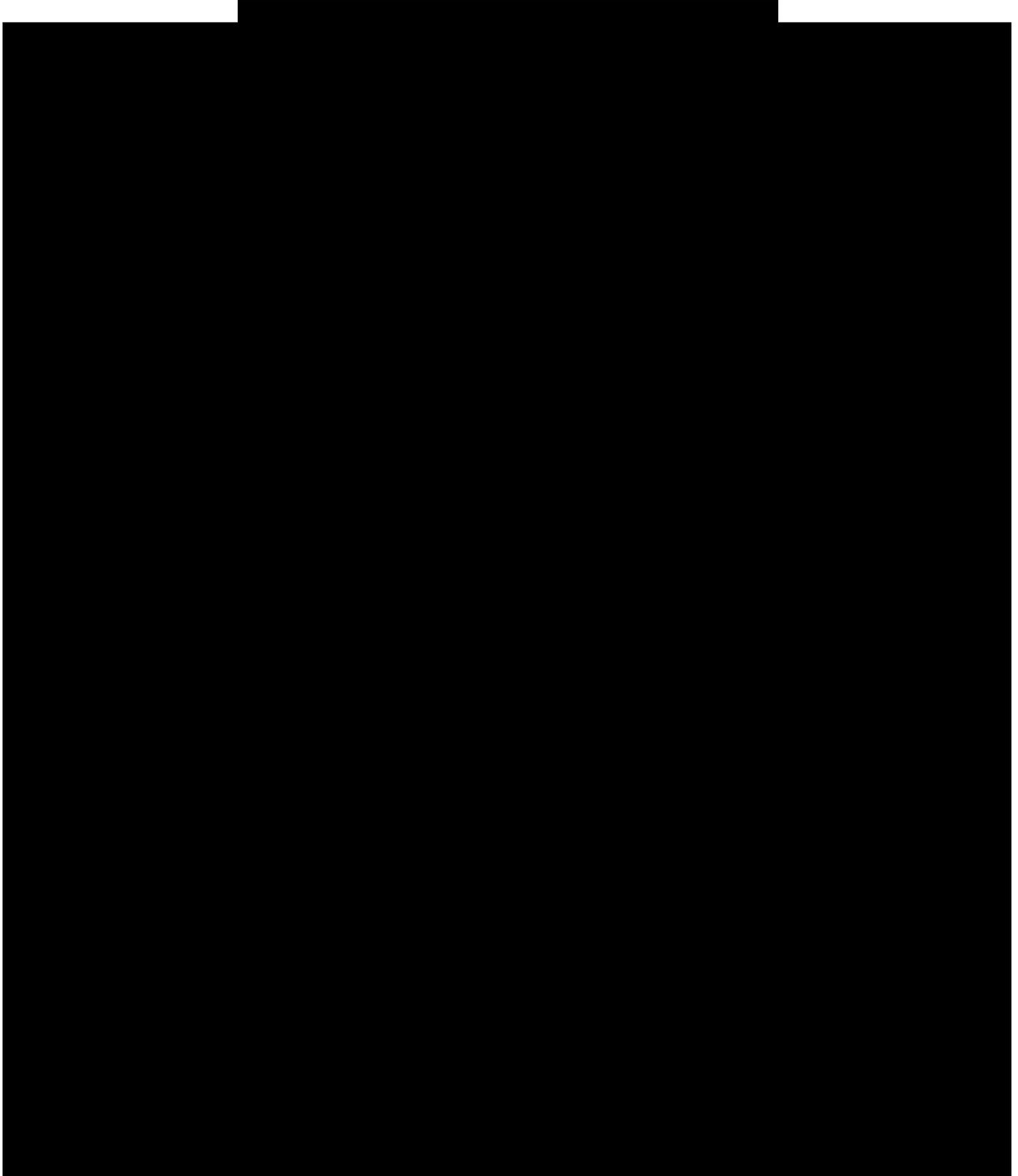
22           And that's what you were referring to a moment  
23 ago, as I understand?

24           **MR. HICKEY:** That is correct.

25           **MR. ROOK:** Now, in that -- well, before I go

**TAB – 3.H**





# COMPENDIUM PUBLIC

[REDACTED]

81. For example, [REDACTED] services British Columbia and Alberta and could be a potential alternative for Videotron-Freedom. Freedom has [REDACTED] cell sites in British Columbia and Alberta, of which [REDACTED] are non-microwave backhaul cell sites (fiber or coaxial cable). [REDACTED] % of these non-microwave backhaul sites<sup>120</sup> fall within a reasonable range for [REDACTED] to consider expanding<sup>121</sup> (one mile for urban areas, two miles for rural areas).

82. This transaction will also provide benefits that Freedom could not realize under the status quo. [REDACTED] Following the Proposed Transaction, the merged Rogers/Shaw would make available to Videotron-Freedom backhaul on favorable terms in Ontario as well, which is where approximately [REDACTED] % of Freedom's subscribers are located.<sup>123</sup>

119 [REDACTED]

120 [REDACTED]

<sup>121</sup> Leased line providers will typically do a cost-benefit analysis to determine if it is in their interest to expand wired lines to a cell site. Cost considerations include route distance to existing fiber, availability of utility poles for aerial, soil type for buried, rights of way, presence of bridges, local permitting requirements, etc. Typically, a provider will build laterals to sites within one mile of wired lines for urban areas and two to three miles for rural areas.

122 [REDACTED]

**TAB – 3.I**

**COMPENDIUM PUBLIC**

Wireless providers can partner with wireline providers for backhaul services with no significant impact to profitability

**Wireline backhaul is a small portion of Opex for Freedom**

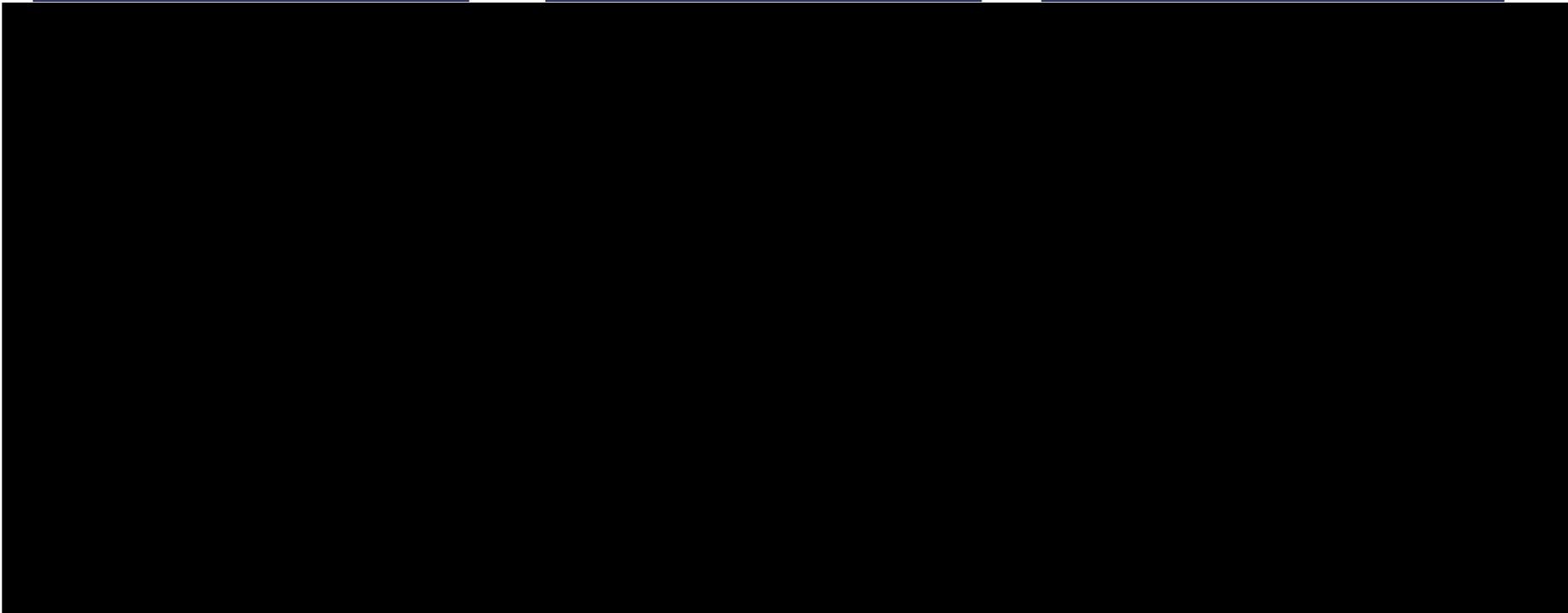
**There other commercial options for backhaul – some which are used today**

**Sites leased from Shaw are consistent with other carriers**

*Freedom Opex by category*

*Fiber (Leased Lines) Spend by Provider (2020)*

*Avg. Fiber Backhaul Cost by Capacity*



Summarizing and highlighting Martin Report (Sept 2022) pp. 36-38

**TAB – 3.J**

That may be why it [REDACTED]  
[REDACTED] We will not be constrained as Shaw was. We have no installed base to protect and every incentive to grow our market share.

116. At the same time, we need to manage our own expectations. Although we have grown our market share significantly as a TPIA in Abitibi, our planning model for Freedom (**Exhibit "66"**) conservatively forecasts that the [REDACTED]

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

117. As we gain TPIA wireline customers, [REDACTED]

[REDACTED]

**Negotiating the Critical Assets and Contracts Videotron Required to Compete**

118. Having determined that [REDACTED] we nevertheless had to negotiate an acceptable agreement with Rogers to acquire assets that we considered necessary to operate the Freedom business successfully.

119. Although almost a year had passed, our list of required assets remained essentially unchanged from our earliest assessments in April 2021: [REDACTED]

[REDACTED]

[REDACTED] Ultimately, these assets are what we agreed to acquire, but as is typical in

negotiations, we asked for more, in part, so that we had room to negotiate towards what we required.

120. One of our initial "over" asks was with respect to fibre ownership. In some early discussions with Rogers in May before we had completed due diligence, we explored the potential for Videotron to acquire fibre assets rather than just transport rights. Rogers raised issues regarding the [REDACTED] a position that our engineering teams agreed with following due diligence. We ultimately determined that [REDACTED]

[REDACTED] In contrast, a long term transport agreement with necessary protections and favourable pricing provided the data transport we needed for the wireless network but without [REDACTED]

[REDACTED] Ultimately, we secured the transport agreement that we wanted and had identified as necessary as early as April 2021.

121. On June 2, 2022, Videotron delivered a proposed Term Sheet, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

Attached as **Exhibit "50"** is a copy of the June 2 Term Sheet.

122. On June 4, 2022, Mr. Staffieri emailed Rogers' position in response to Videotron's June 2 Term Sheet. Attached as **Exhibit "51"** is a copy of Mr. Staffieri's email and attachment.

123. [REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]

124. On June 10, 2022, Rogers delivered a new proposal in [REDACTED]

[REDACTED]

[REDACTED]

125. Videotron provided a counterproposal on June 11, 2022 and Rogers responded with another proposal that same day. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

126. By Monday June 13, 2022, Videotron [REDACTED]

127. Overnight between June 14 and 15, 2022, Rogers made another proposal which [REDACTED]

[REDACTED]

128. On June 15, 2022, I and other Videotron executives, including Mr. Péladeau and Mr. Simard, met virtually with the Case Team to discuss the status of Videotron's negotiations with Rogers and to determine whether the framework of the proposed transaction would be acceptable to the Case Team or whether certain provisions and not others were important to securing regulatory approval. We described the additional terms that Videotron continued to seek in negotiations, but received no feedback from the Case Team about whether a transaction along the lines described or any particular terms would be acceptable. Attached as **Exhibit "52"** is a copy of the June 15, 2022 presentation.

**TAB – 3.K**

# COMPENDIUM PUBLIC

1 going to be need to be asked in confidential unfortunately.

2 So Annie if you can take us back, please.

3 **MEMBER ASKANAS:** May I take two minutes.

4 **CHIEF JUSTICE CRAMPTON:** Yes, absolutely.

5 Absolutely. Oh, sorry I thought he wanted to take two

6 minutes to ask him another question.

7 **DEPUTY REGISTRAR:** Please accept to be moved to

8 a breakout room Chief Justice and panel members.

9 --- Upon recessing at 5:30 p.m., to resume

10 immediately in Confidential Level A /

11 Suspension à 17 h 30 pour reprendre immédiatement

12 en session confidentielle niveau A

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# COMPENDIUM PUBLIC

1 --- Upon resuming at 5:32 p.m. /

2 Reprise à 17 h 32

3 **DEPUTY REGISTRAR:** We are in a confidential  
4 session. Thank you StenoTran.

5 **CHIEF JUSTICE CRAMPTON:** Okay. Hello again.  
6 All right. At paragraph 120.

7 **DEPUTY REGISTRAR:** Mr. Chief we will just wait  
8 for Ms. Samrout to also be in the call and Mr. Wiktor  
9 Askanas.

10 **MEMBER ASKANAS:** I am here.

11 **DEPUTY REGISTRAR:** Okay. I can't see you.  
12 Thank you. And Ms. Samrout?

13 **CHIEF JUSTICE CRAMPTON:** Ms. Samrout, are you  
14 there?

15 **REGISTRY OFFICER:** There is a transition issue.

16 **CHIEF JUSTICE CRAMPTON:** Here she comes. There  
17 she is.

18 **DEPUTY REGISTRAR:** Thank you Ms. Samrout, we  
19 thought we lost you there.

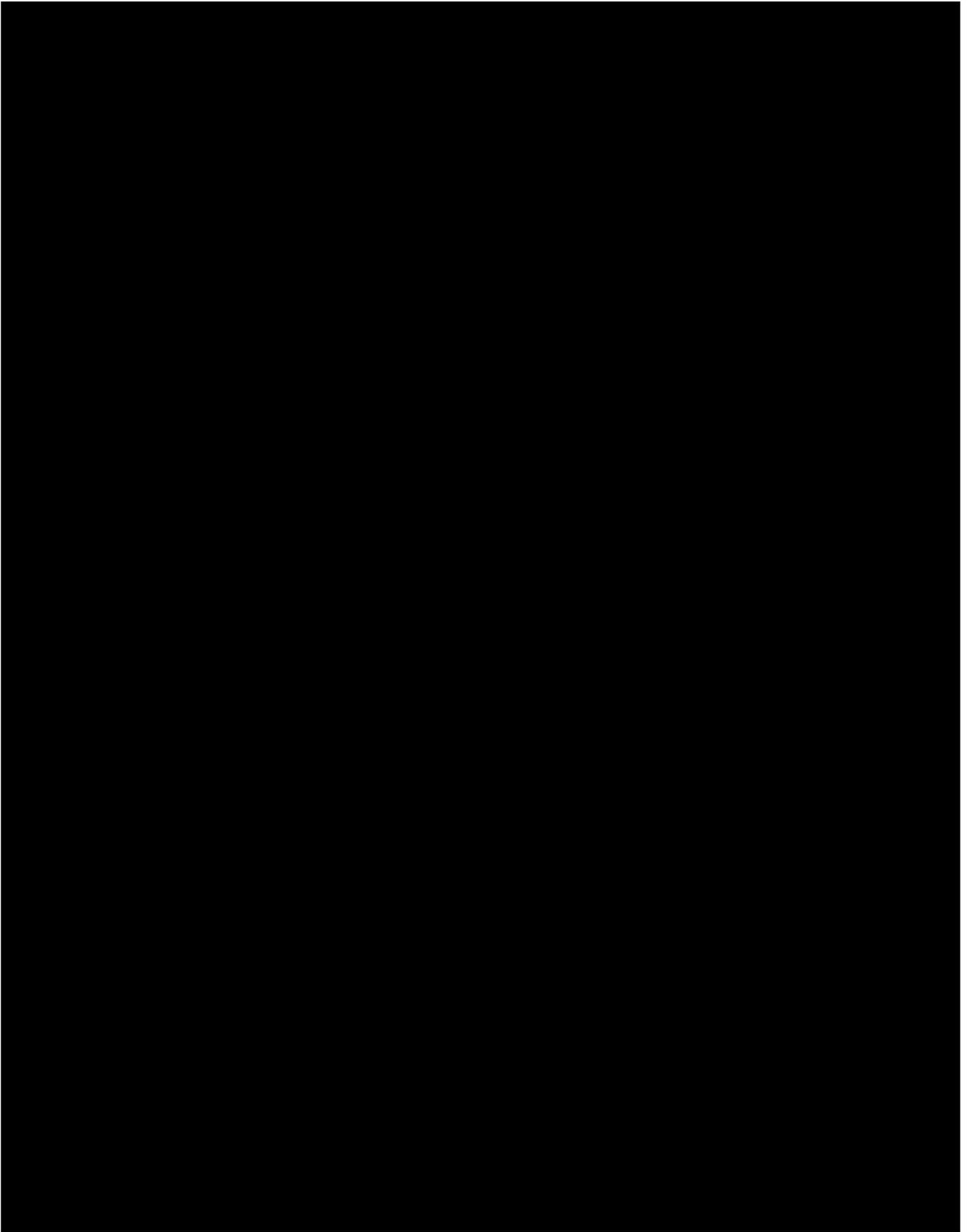
20 Thank you we're back in a confidential session,  
21 Chief Justice.

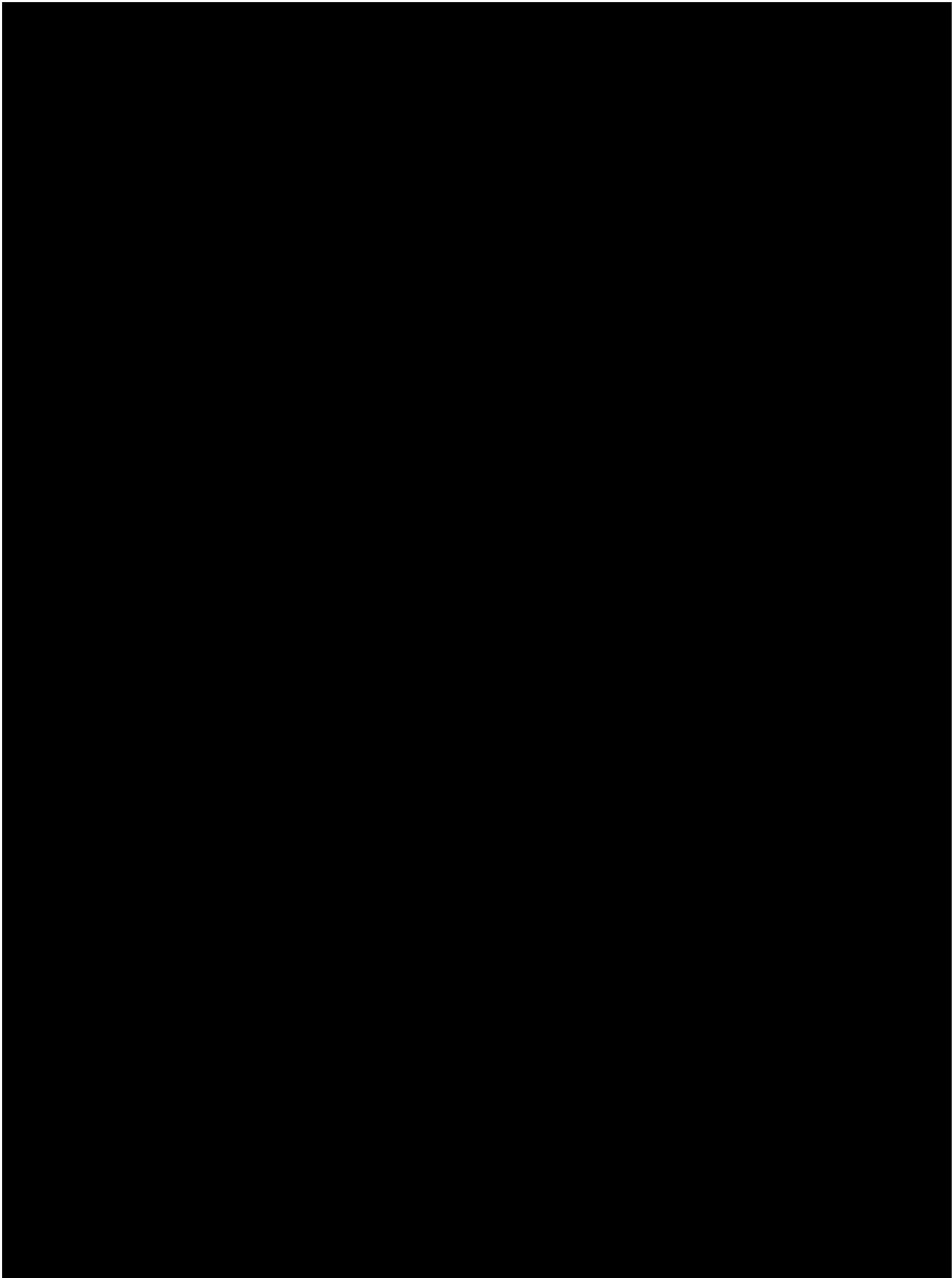
22 **CHIEF JUSTICE CRAMPTON:** Wonderful. Thank you.

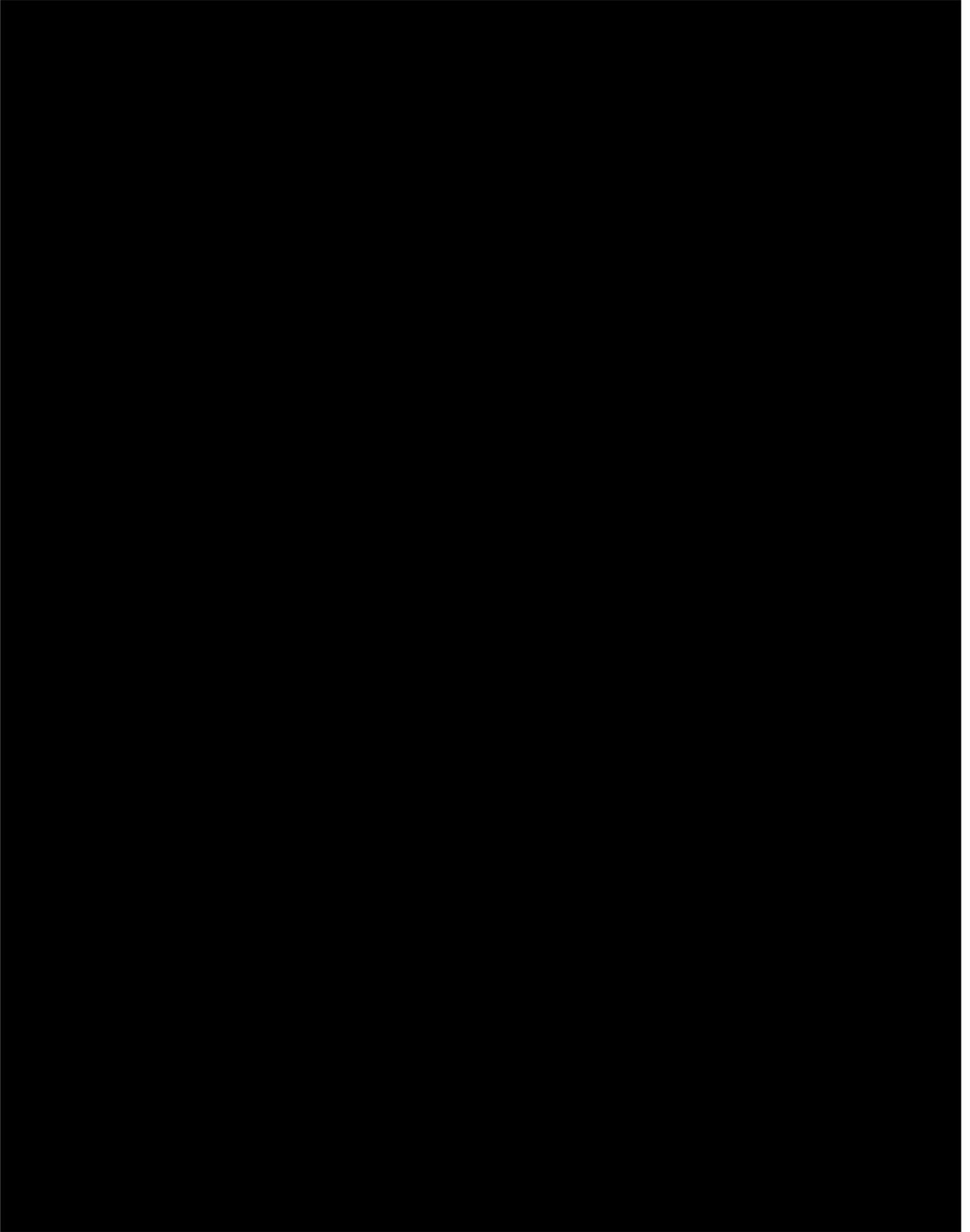
23 Okay so I'll try to be quick because I know it's getting

24 late and it's Friday.

25 So, at paragraph 120 of your witness statement,







**TAB – 3.L**

## COMPENDIUM PUBLIC

357. The **second step** of the Proposed Transaction is the purchase by Rogers of Shaw's wireline business for \$26 billion, inclusive of the assumption of debt. This step will occur immediately **following** the sale of Freedom to Videotron.

358. Pursuant to the terms of the Divestiture Agreement, the closing of the purchase and sale of Freedom will occur as early as practicable on the same day as the closing of the Rogers-Shaw merger. Accordingly, the acquisition of Shaw by Rogers as announced in March 2021 cannot be completed without first completing the divestiture of Freedom to Videotron.

359. Put simply, the divestiture of Freedom to Videotron will be completed *before* Rogers acquires Shaw. As a result, Rogers will never own or operate Freedom. The ownership of Freedom will be transferred directly from Shaw to Videotron.

360. The sequencing of the Proposed Transaction has been communicated clearly both to the Bureau and to the market, including in a joint Press Release issued by Shaw, Rogers and Quebecor upon the execution of the Divestiture Agreement on August 12, 2022.(see **Exhibit "166"** to this Witness Statement). In that Press Release, Shaw, Rogers and Quebecor announced that the sale of Freedom to Videotron would be conditional on, and would take place before, the closing of the Rogers and Shaw portion of the Proposed Transaction. The Press Release read in part as follows (with emphasis added):

### Required Approvals

The Freedom Transaction is conditional on, among other things, clearance under the Competition Act and approval of the Minister of Innovation, Science and Industry. It is also conditional on, and would close substantially concurrently with, closing of the Rogers-Shaw Transaction.

### **D. A Stronger and More Competitive Freedom**

361. The terms of the Divestiture Agreement provide Videotron with significant benefits and operational advantages relative to Freedom under Shaw's ownership. As a result, Videotron will be better placed than Shaw now is to continue as a disruptive force in the

## COMPENDIUM PUBLIC

wireless market, compete vigorously and emerge as a fourth national carrier. These benefits and advantages are significant, and include the following.

362. **Scale.** Videotron's acquisition of Freedom will result in a doubling of the wireless subscriber base to more than 3.3 million customers, giving the new business significant scale and all of the associated benefits. Those benefits include better access to equipment and devices at lower costs.

363. **Lower Cost Base.** Whereas Shaw has invested approximately \$4.5 billion into Freedom from the time that it was acquired in March 2016 (inclusive of the cost to acquire WIND), Videotron has agreed to purchase Freedom for only [REDACTED]

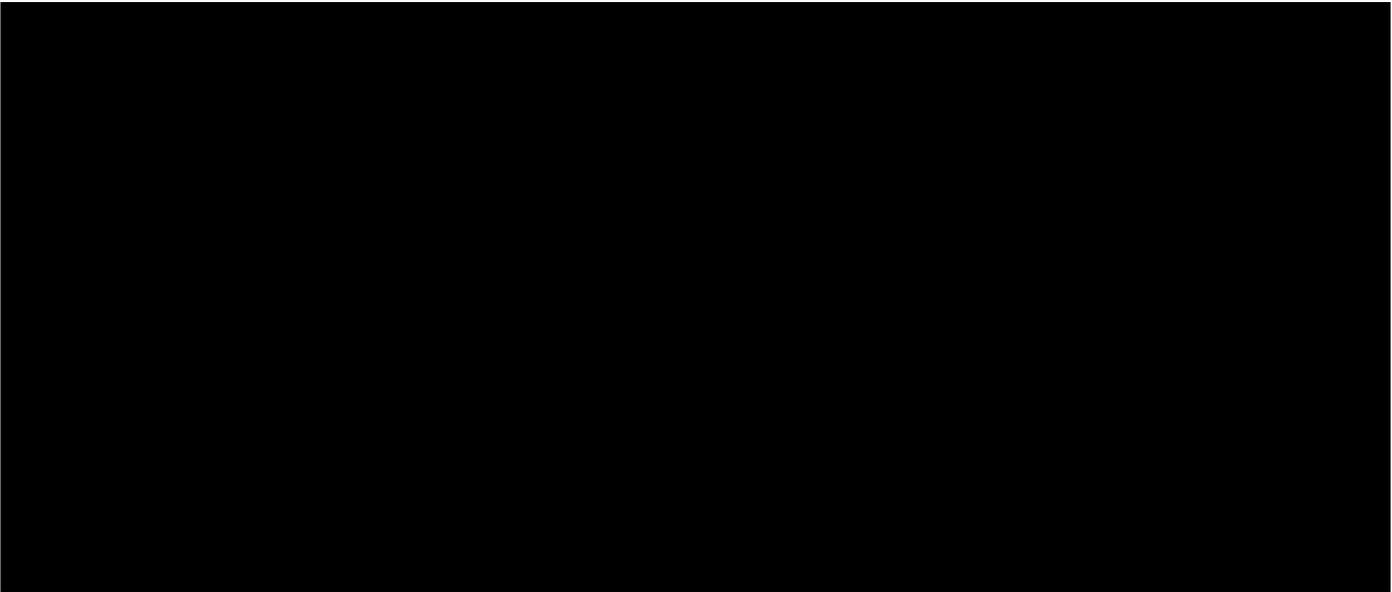
[REDACTED] This is a significant advantage; it frees up significant capital that can be used for network investments or to lower prices to Canadian consumers.

364. **Access to Cost Effective Backhaul.** Rogers has extensive wireline network assets concentrated in Southern and Eastern Ontario, New Brunswick and Newfoundland and Labrador which Shaw does not. [REDACTED]

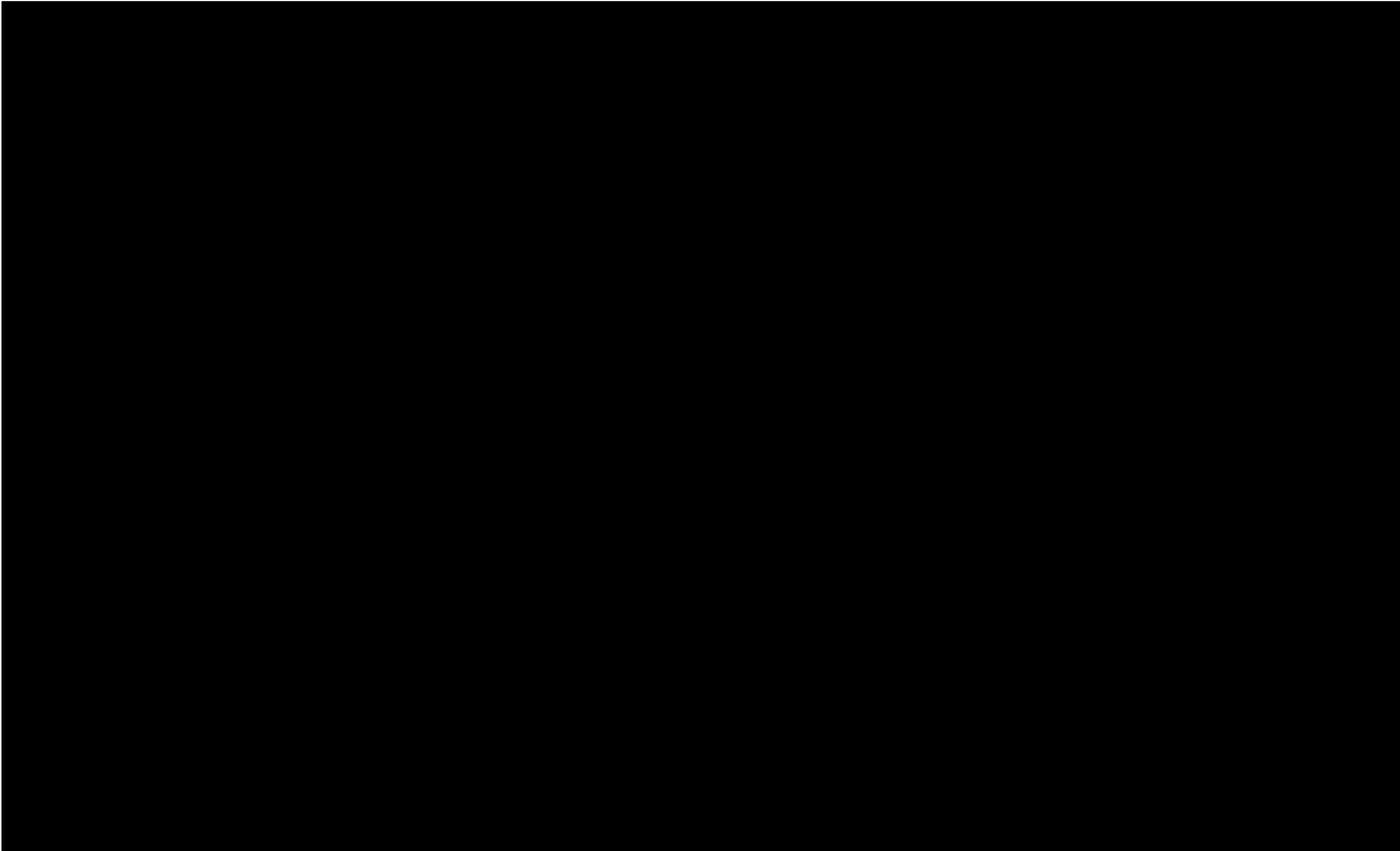
[REDACTED]

365. [REDACTED]

[REDACTED]



368. **Reduced Roaming Expenses.** Freedom currently pays [REDACTED] for wholesale domestic data roaming (so that subscribers of Freedom can roam on [REDACTED] [REDACTED] at tariffed rates set by the CRTC. [REDACTED] [REDACTED]



**TAB – 3.M**

That may be [REDACTED]  
[REDACTED] We will not be constrained as Shaw was. We have no installed base to protect and every incentive to grow our market share.

116. At the same time, we need to manage our own expectations. Although we have grown our market share significantly as a TPIA in Abitibi, our planning model for Freedom (**Exhibit "66"**) conservatively forecasts that [REDACTED]

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

117. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**Negotiating the Critical Assets and Contracts Videotron Required to Compete**

118. Having determined that [REDACTED] we nevertheless had to negotiate an acceptable agreement with Rogers to acquire assets that we considered necessary to operate the Freedom business successfully.

119. Although almost a year had passed, our list of required assets remained essentially unchanged from our earliest assessments in April 2021: [REDACTED]

[REDACTED]

[REDACTED] Ultimately, these assets are what we agreed to acquire, but as is typical in

footprint. [REDACTED]

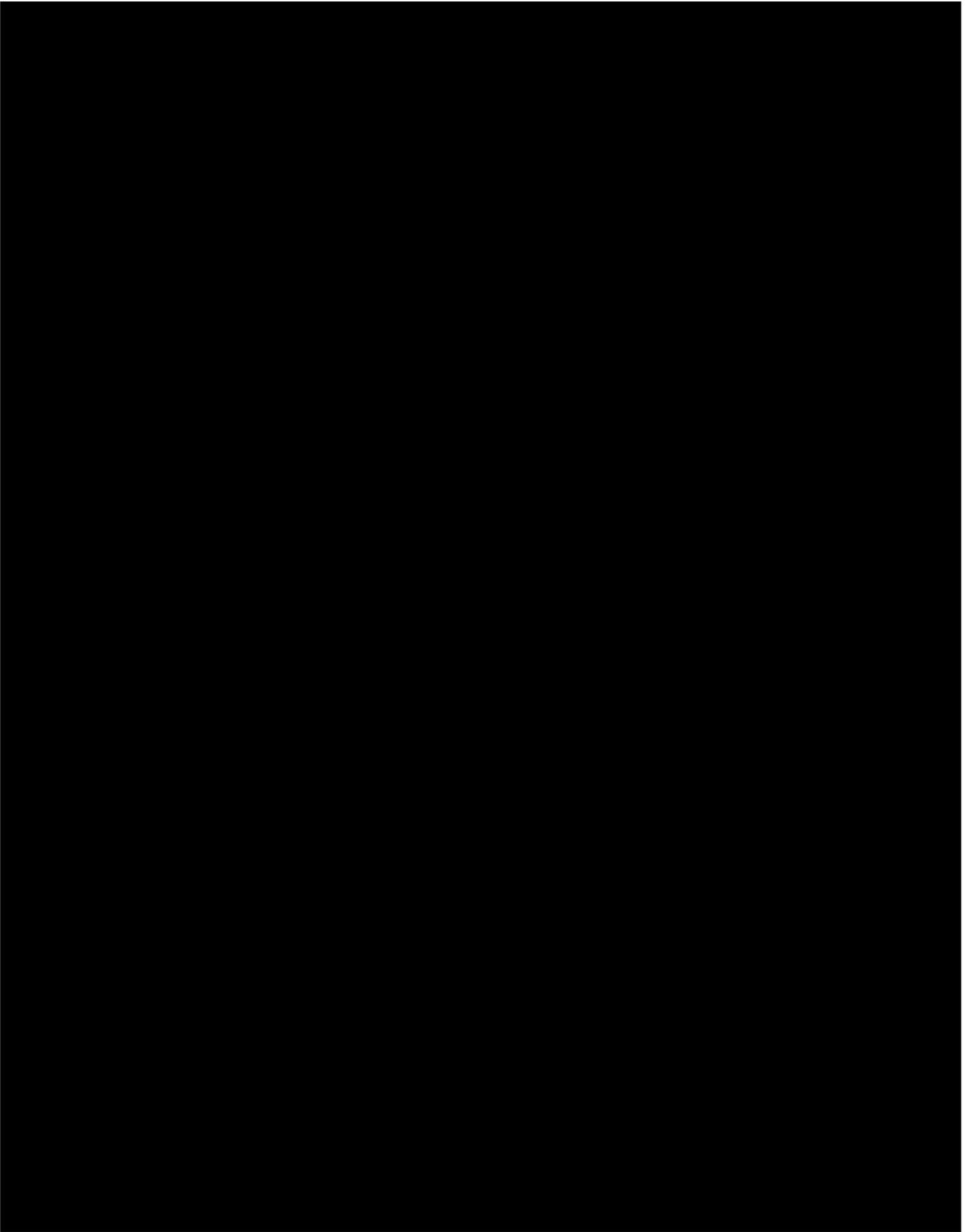
**Investing in 5G**

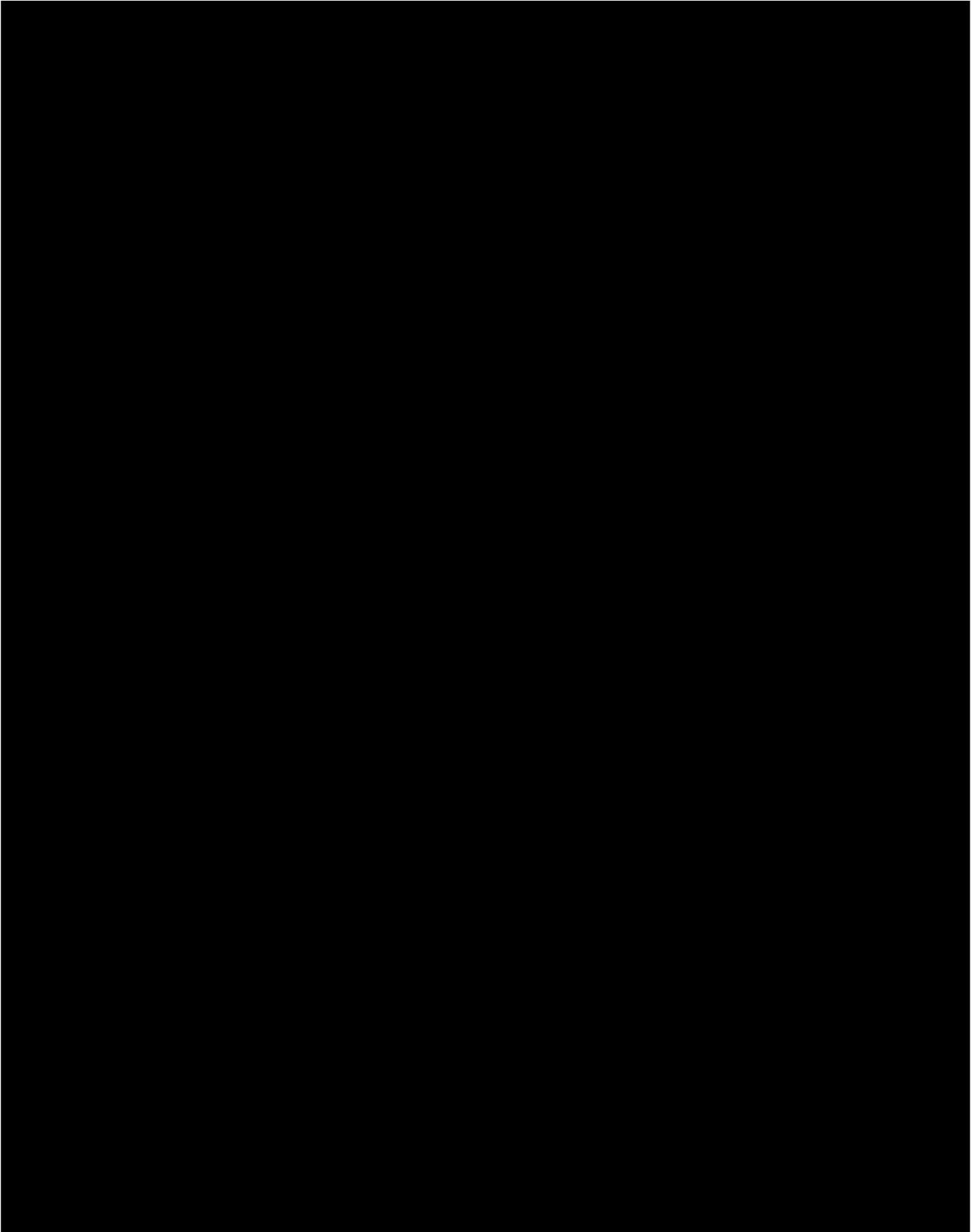
191. The Financial Plan projects investing nearly [REDACTED] billion in network improvements and spectrum over the first ten years. My team and I developed these projections with Videotron's information technology department led by Mohamed Drif. Mr. Drif describes the technology budget in his witness statement. In discussions with him and his team, we determined that some elements of his May 25, 2022 budget could be allocated to different years, so minor adjustments were made between the May 25 budget and the Capex amounts shown on the *Consolidated Summary Sheet*.

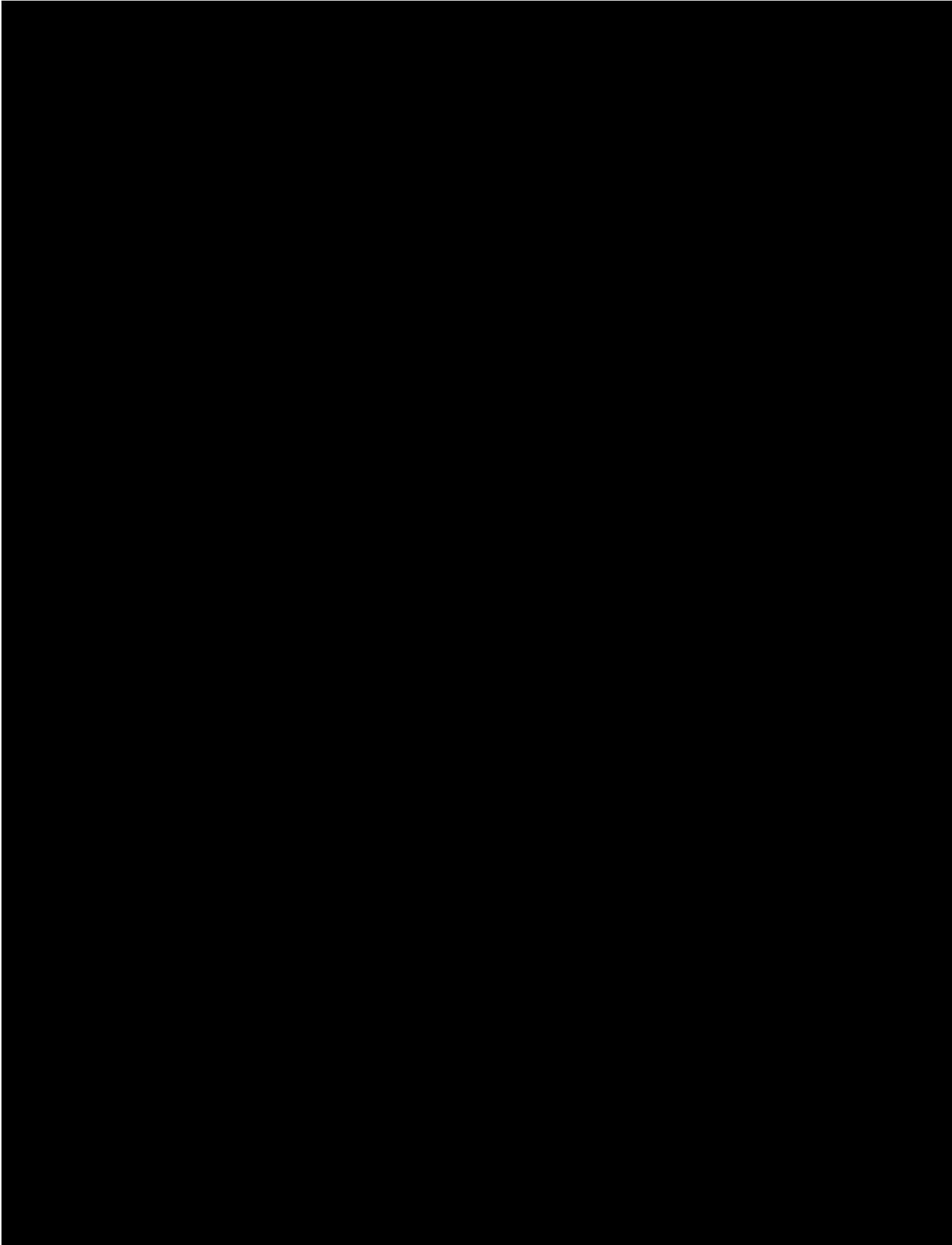
192. Rolling out 5G as soon as possible across the Freedom footprint is important from a marketing and business perspective. [REDACTED]

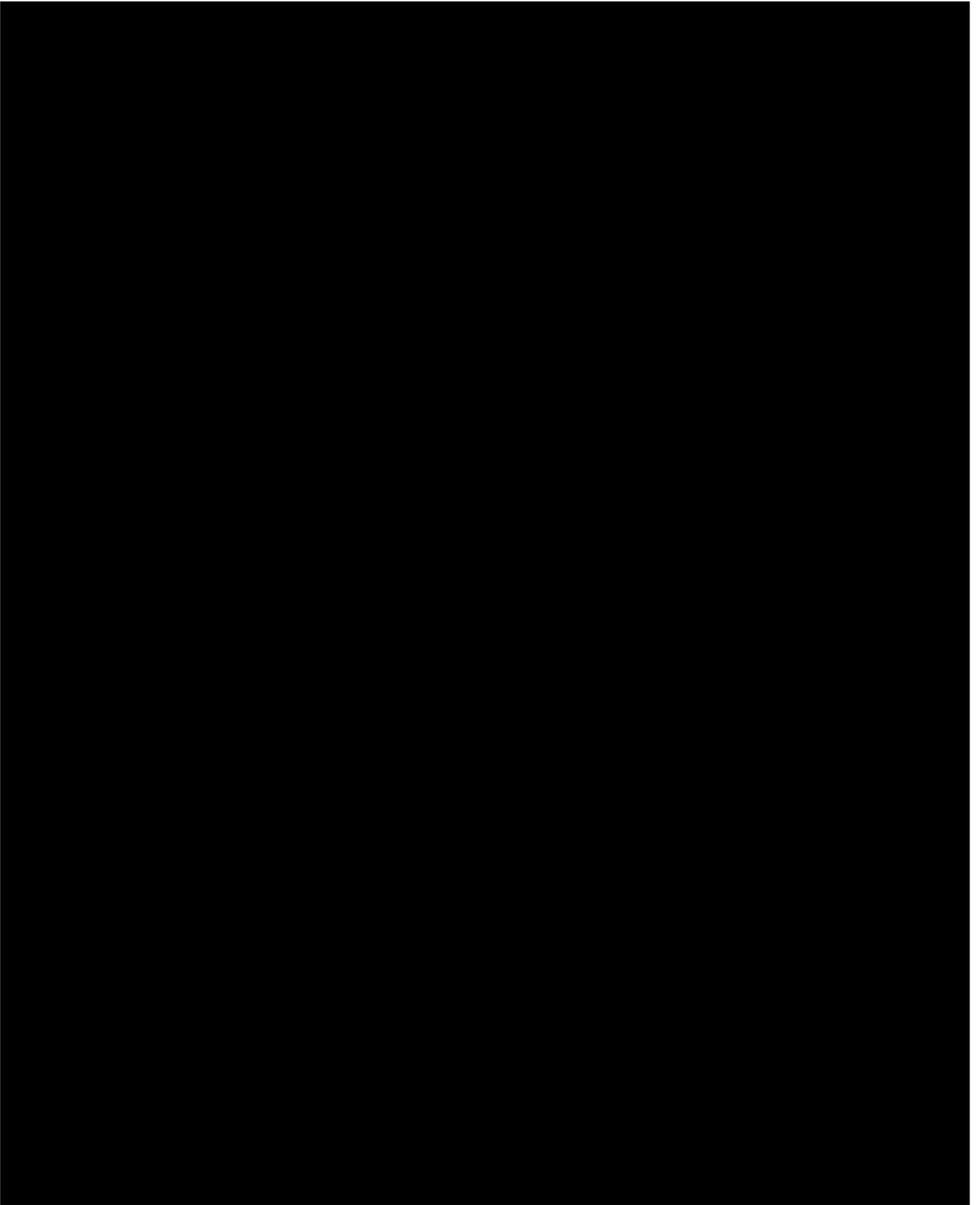
[REDACTED] To consumers today, that means offering a 5G network. Part of making a good first impression with customers requires us to begin offering 5G service as soon as possible and continuing to improve the quality of the network to deliver the full promise of 5G.

**TAB – 3.N**









**TAB – 3.0**

## COMPENDIUM PUBLIC

1 types of things you were talking about -- or some of the  
2 other types of things, spikes in demand and et cetera, the  
3 lessor could also do what you just described, they would --  
4 they could prioritize their own traffic, discriminate  
5 against the lessee's traffic?

6 **MR. BENHADID:** Yes, they could.

7 **CHIEF JUSTICE CRAMPTON:** And is this something  
8 that you've noticed as being common? Is this something  
9 that has really led to significant implications, adverse  
10 implications, or is it just something that you've noticed  
11 and --

12 **MR. BENHADID:** It's something that we know can  
13 exist, and it's something that's very difficult to prove.  
14 But it is one of their -- as I said, there is no better  
15 example that I can give other than the one from Telus where  
16 outside of our territory, even though leasing was  
17 available, we've elected to build our own fibre and invest  
18 heavily in order to do that, to have control on the  
19 experience of our customers as much as possible.

20 **CHIEF JUSTICE CRAMPTON:** Okay. Well, thank you  
21 very much. That was my question.

22 Is there any follow-up in light of the three  
23 questions from the Panel? No?

24 **MR. LISUS:** Just if I may have a minute, Chief.

25 --- Pause

## COMPENDIUM PUBLIC

1           **MR. LISUS:** Just one question.

2           And it goes back to the document CA-R-022.

3           Are we -- oh, we need to be in confidential for  
4 this, Chief.

5           **CHIEF JUSTICE CRAMPTON:** Okay. Let's go into  
6 confidential briefly and then we'll have lunch.

7           **MR. LISUS:** Maybe -- I don't know that -- let  
8 me -- it comes -- the point comes out of the question --  
9 the point comes out of a document which you have said is  
10 Level A, but it doesn't contain any -- or touch on any  
11 information that is confidential to Telus, so I'm in your  
12 hands.

13           **CHIEF JUSTICE CRAMPTON:** It's confidential to  
14 who? Are you going to refer to confidential --

15           **MR. LISUS:** No, the question is whether -- the  
16 question is the cost of building a fibre network and what  
17 Telus told the Commissioner how easily it can be done and  
18 the cost of it.

19           **CHIEF JUSTICE CRAMPTON:** As long as it's not  
20 what it costs Telus, then that's fine.

21           **MR. LISUS:** I understand.

22           I'm just looking at the notes of what the  
23 Commissioner provided in terms of the discussion with  
24 Telus, sir, and I see that the Commissioner recorded the  
25 Telus team telling it that the cost of fibre networks is de

## COMPENDIUM PUBLIC

1 *minimus*, give me 100 million and I will create fibre  
2 backhaul network. I will then use technologies to use  
3 radio, spectrum, microwave to connect micro cells. I am  
4 not going to be reliant on microwave.

5 Make sense?

6 **MR. BENHADID:** Did you read something?

7 **MR. LISUS:** Yes, I'm reading --

8 **MR. BENHADID:** Yes. I think it does, yes.

9 **MR. LISUS:** Okay. Thank you.

10 So in this case, Vidéotron, if they wanted to  
11 own a fibre network, could build a fibre network for the  
12 kind of cost that Telus was telling the Commissioner;  
13 correct?

14 **MR. BENHADID:** Vidéotron could build a fibre  
15 network, absolutely.

16 **MR. LISUS:** Thank you.

17 **CHIEF JUSTICE CRAMPTON:** Okay. Mr. Tyhurst,  
18 did you want a follow-up as a result of that?

19 **MR. TYHURST:** No, thank you.

20 **MR. LISUS:** Just one more question as a result  
21 of your question, Chief.

22 Does Telus engage in the type of  
23 discrimination, was the word that the Chief asked you  
24 about, in the -- when it provides wholesale services to  
25 customers?

## COMPENDIUM PUBLIC

1           **MR. BENHADID:** We don't discriminate traffic  
2 customer by customer, no.

3           **MR. LISUS:** So there are contractual relations  
4 or contractual arrangements that can be stipulated that  
5 there is no discrimination traffic by traffic or customer  
6 by customer. All of that can be negotiated and agreed in  
7 these contracts, and that's in fact what Telus does;  
8 correct?

9           **MR. BENHADID:** Yes, everything can be  
10 negotiated in a contract between two parties.

11          **MR. LISUS:** And that is customary in the  
12 marketplace; correct?

13          **MR. BENHADID:** I don't know if it's customary  
14 or not. I couldn't tell you.

15          **MR. LISUS:** It's what you do.

16          **MR. BENHADID:** Yes, but that's a decision  
17 independent of that, but anyway.

18          **MR. LISUS:** Thank you.

19          **CHIEF JUSTICE CRAMPTON:** Thank you very much,  
20 Mr. Benhadid. You've been extremely patient. I know you  
21 had to put off something that you were supposed to do at  
22 noon and then again at 1:00. I'm sorry we weren't able to  
23 finish before 1:00, but we are finished now. So thank you  
24 very much. You're now free to go.

25          **MR. BENHADID:** Thank you, Chief Justice. I

**TAB 4 – BELL AND TELUS  
NETWORK-SHARING AGREEMENT  
AND COMPETITIVE RESPONSE**

**TAB – 4.A**







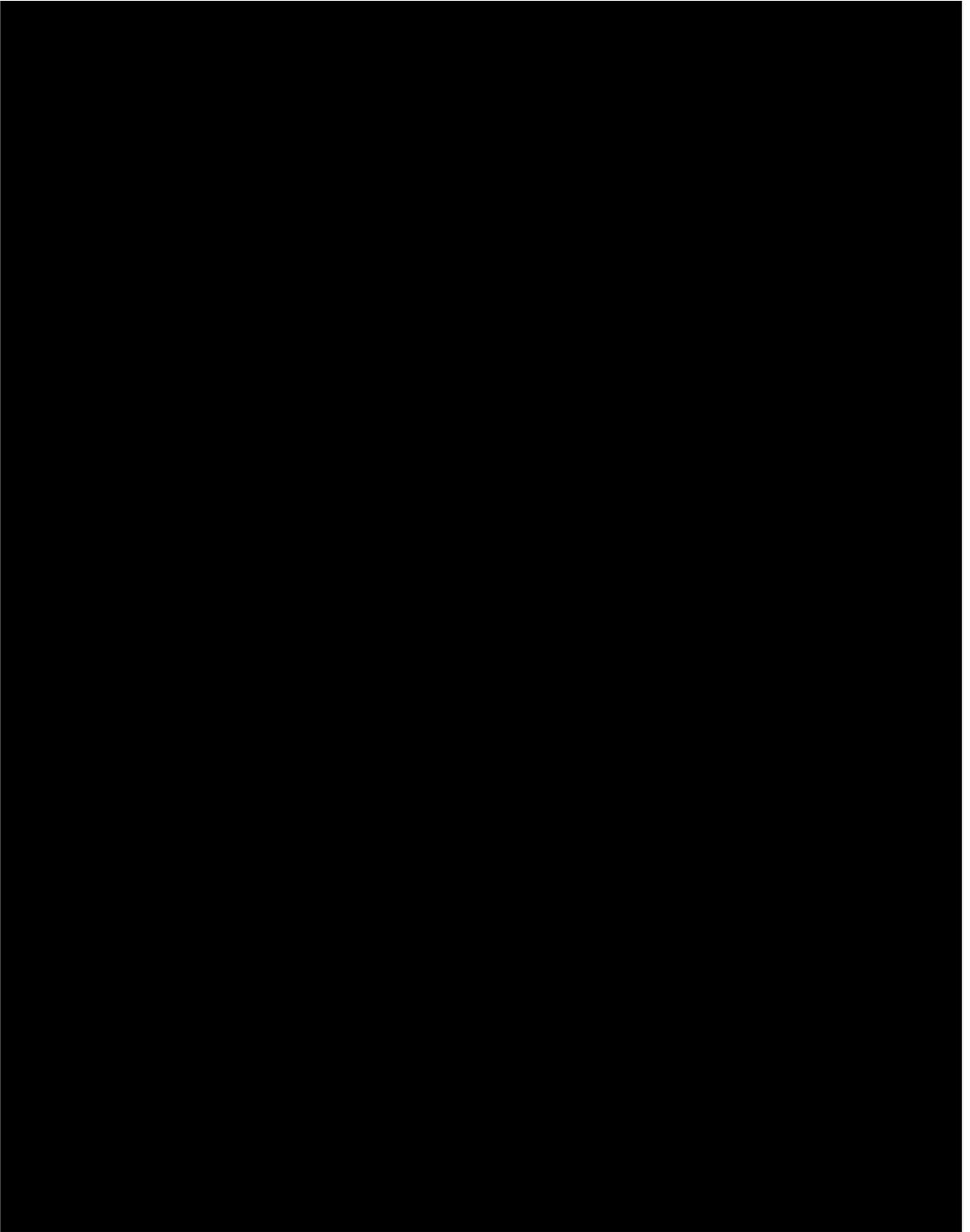


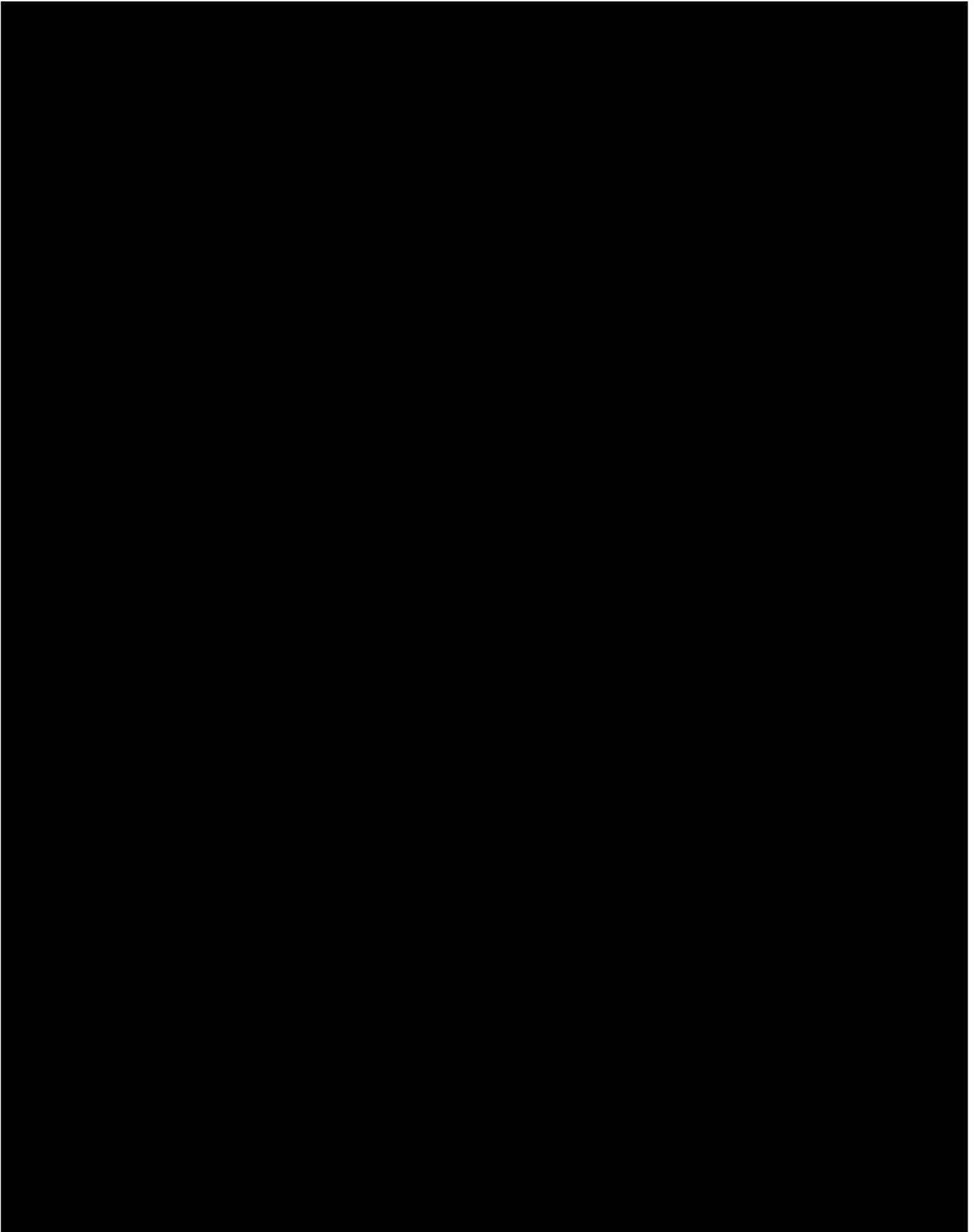


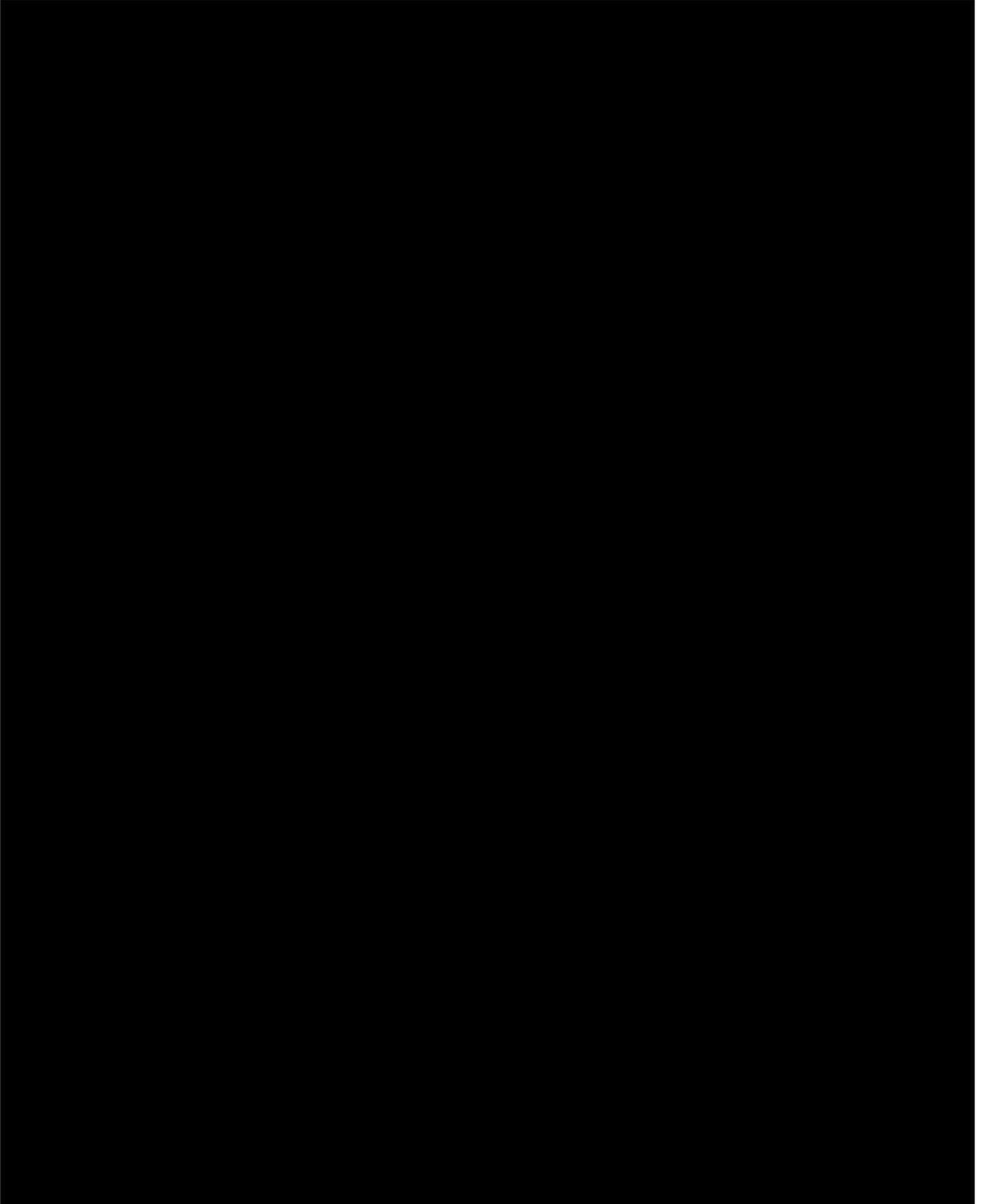


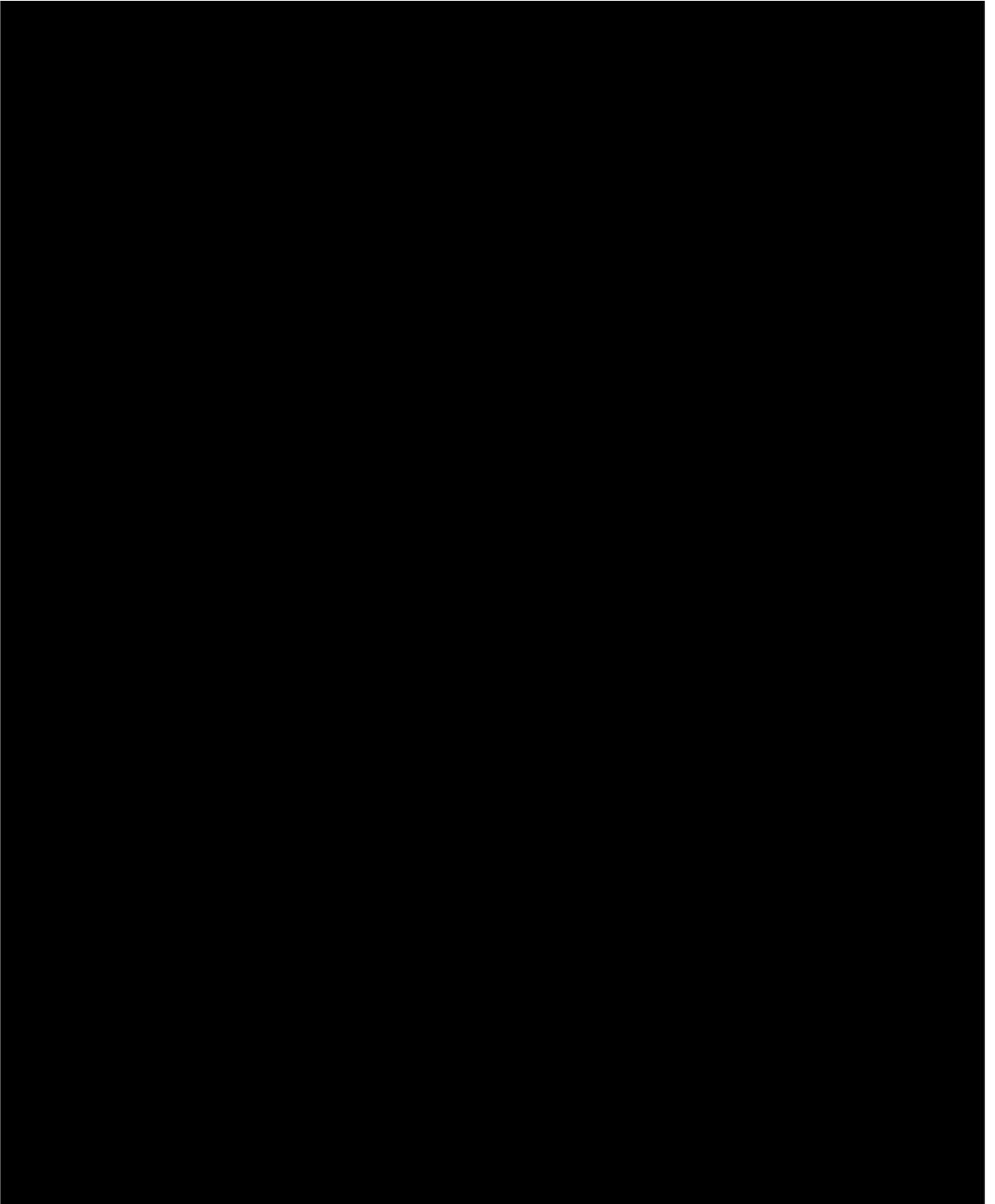


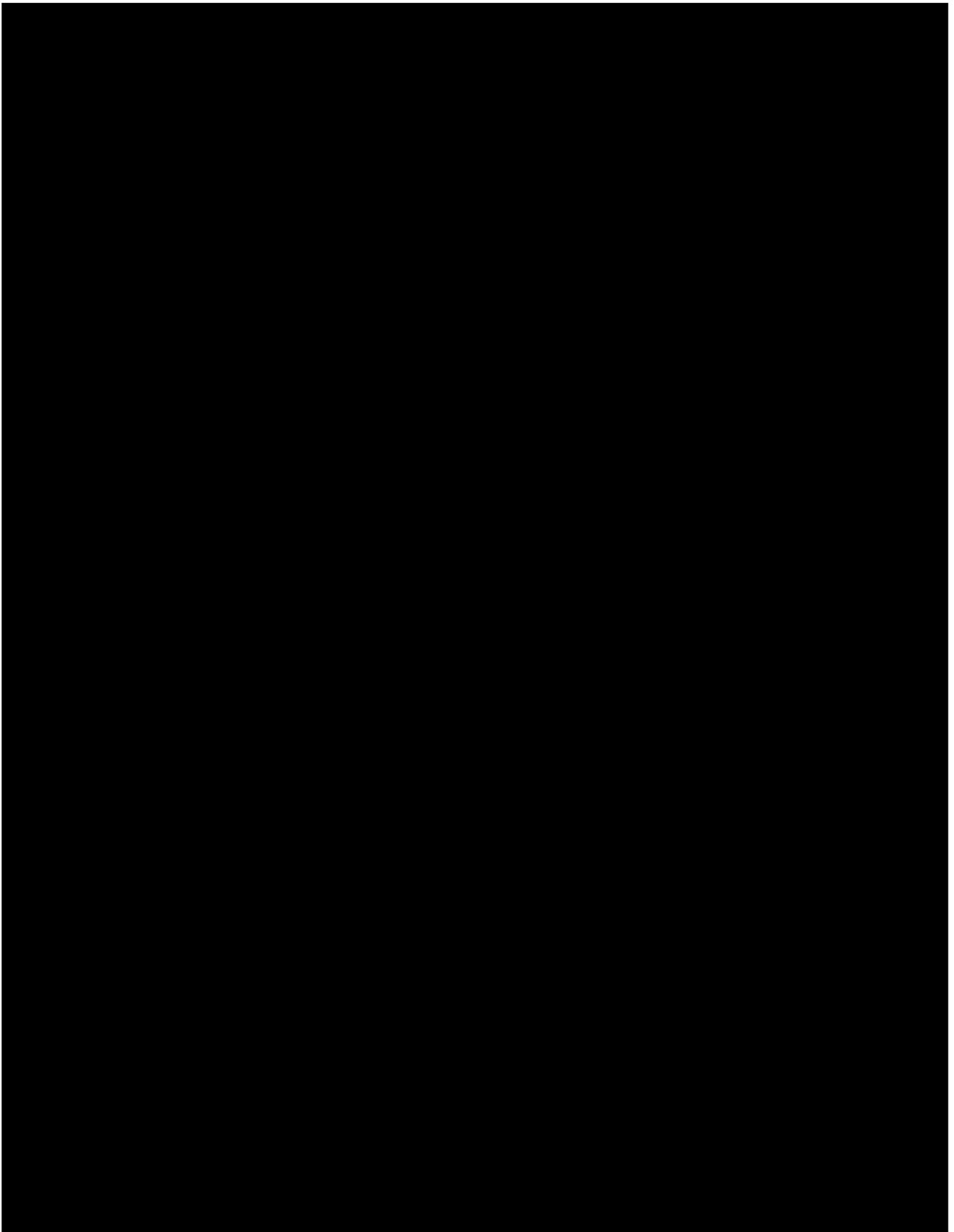
**TAB – 4.B**

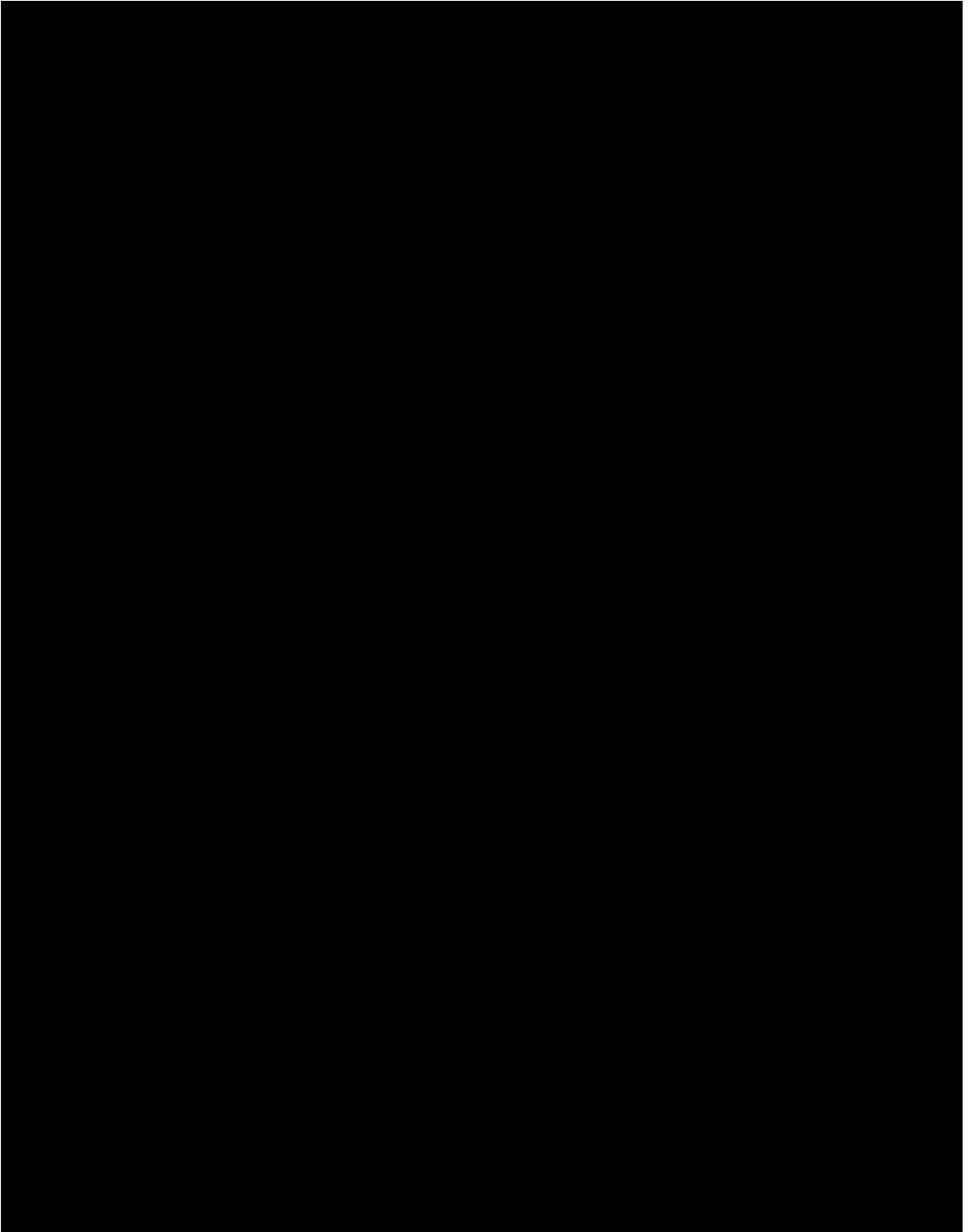


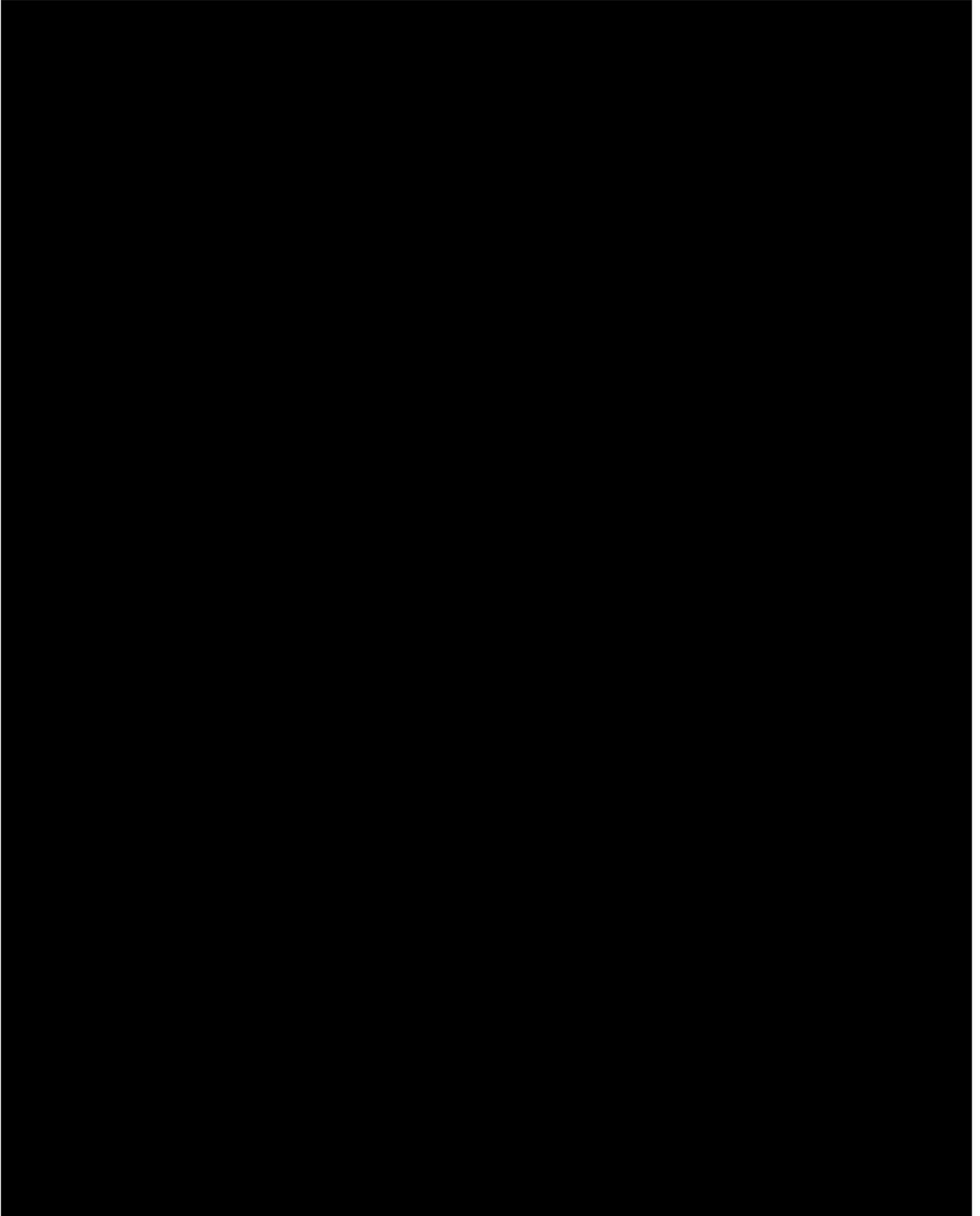


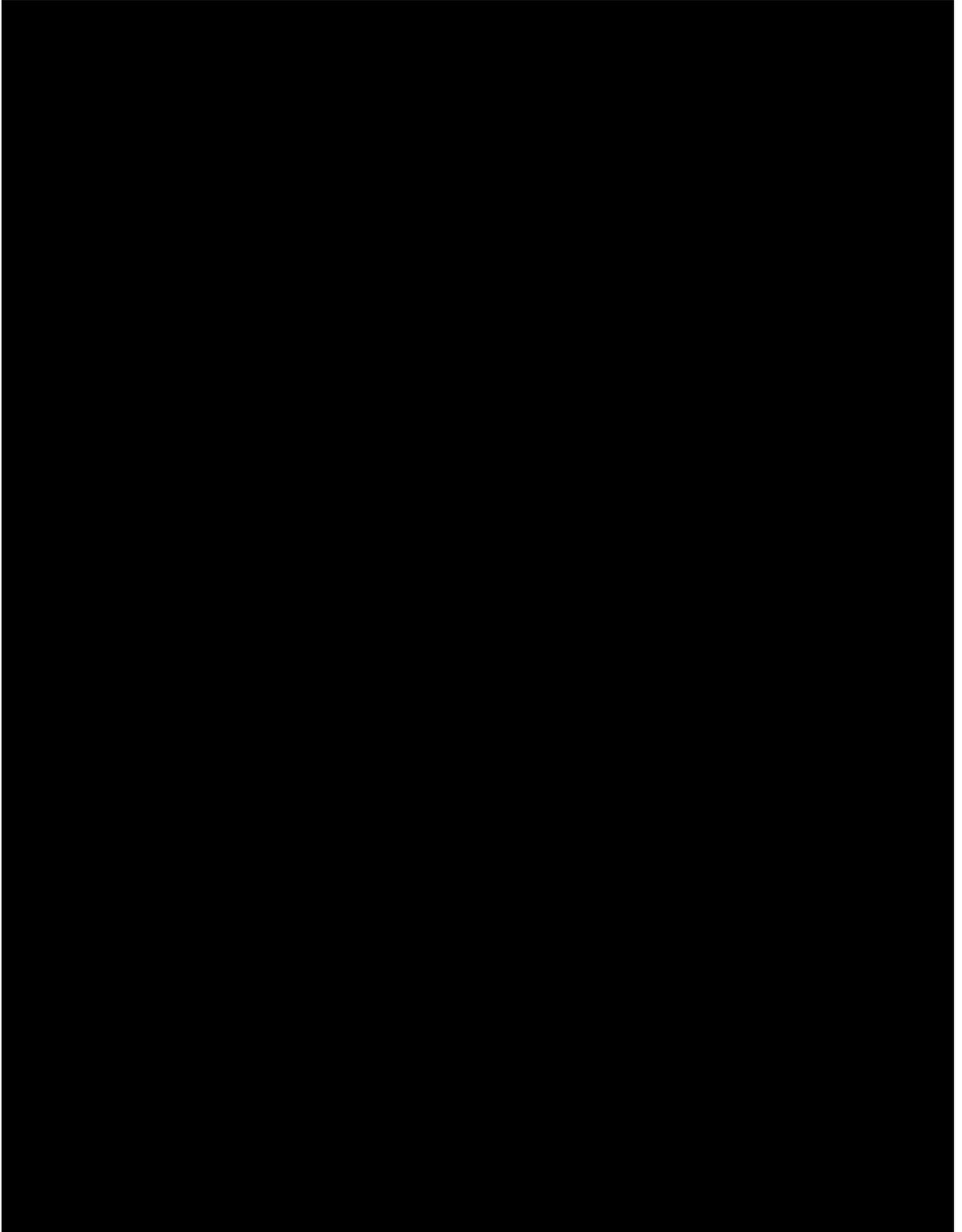












**TAB – 4.C**





































































**TAB – 4.D**



## Telecom Decision CRTC 2022-160

PDF version

Reference: 2021-132

Ottawa, 15 June 2022

*Public record: 1011-NOC2021-0132*

### **Imposition of an administrative monetary penalty on Bell Canada in relation to the processing and granting of access permit applications for support structures in accordance with its National Services Tariff**

The Commission imposes an administrative monetary penalty of \$2.5 million on Bell Canada for each of its three violations of section 24 and subsections 25(1) and 27(2) of the *Telecommunications Act*, for a total amount of \$7.5 million.

#### **Background**

1. On 16 June 2020, Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron), filed an application requesting that the Commission issue orders related to Bell Canada's processing of access permit applications and granting of access permits to its support structures in accordance with Bell Canada's National Services Tariff (the Tariff).
2. In Telecom Decision 2021-131 (the Decision), the Commission found that Bell Canada had breached clause 2.8 of its Support Structure Licence Agreement (SSLA), included in the Tariff, as well as item 901.3(h) of that tariff. The Commission found that Bell Canada had therefore breached section 24 and subsection 25(1) of the *Telecommunications Act* (the Act) by requiring Videotron to comply with construction standards that Bell Canada itself had not complied with.
3. In the Decision, the Commission also found that through the denial of access, even temporary, and unreasonable delays in processing Videotron's permit applications, managing the required make-ready work, and deploying its own fibre-to-the-home (FTTH) network on structures with irregularities, all of which caused Videotron's permit applications to be denied, Bell Canada granted itself a preference and imposed an undue and unreasonable disadvantage on Videotron, contrary to subsection 27(2) of the Act.
4. As a result of its determination that Bell Canada had breached section 24 and subsections 25(1) and 27(2) of the Act, and as a result of the impact of Bell Canada's actions on end-users, the Commission stated in the Decision its preliminary view that an administrative monetary penalty (AMP) should be imposed on Bell Canada, and

# COMPENDIUM PUBLIC

indicated that it would initiate a follow-up proceeding through a notice of consultation to determine whether it would be appropriate to impose an AMP, and, if so, the amount of the AMP.

## Proceeding

5. On 16 April 2021, the Commission initiated Telecom Notice of Consultation 2021-132 (the Notice), in which it reiterated its preliminary view that it would be appropriate to impose an AMP on Bell Canada and invited interested persons to comment on this preliminary view and on what the AMP should be, if an AMP was deemed appropriate. As part of the Notice, the Commission also requested that parties provide supporting rationale and all evidence on which they relied to formulate their position by addressing, among other things, the criteria for a penalty set out in subsections 72.002(1) and 72.002(2) of the Act.
6. The Commission received interventions from the Canadian Communication Systems Alliance (CCSA), the Community Fibre Company (CFC), the Independent Telecommunications Providers Association (ITPA), Rogers Communications Canada Inc. (RCCI), TekSavvy Solutions Inc. (TekSavvy),<sup>1</sup> and Videotron. Bell Canada provided comments and replied to the interventions.

## Background on the general AMP regime

7. Since 2014, the Act has included a general AMP regime. Pursuant to section 72.001 of the Act, the Commission may impose an AMP for contraventions of the Act and contraventions of a regulation or decision made by the Commission under the Act. However, subsection 72.002(2) of the Act qualifies this authority by prescribing that the purpose of the general AMP regime is to promote compliance and not to punish. As a result, in determining whether or not to impose an AMP in a given case, the Commission must consider whether the imposition of an AMP would ensure the regulatory purpose of promoting compliance and deterring future non-compliance, and not seek to punish a person for its violations.

## Issues

8. The Commission has identified the following issues to be addressed in this decision:
  - Is it appropriate to impose an AMP on Bell Canada?
  - If it is appropriate to impose an AMP on Bell Canada, what should the amount of the AMP be?

---

<sup>1</sup> TekSavvy filed an intervention to become a party to the proceeding but did not provide comments.

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## *Factors established by any regulations*

71. At this time, no such factors have been established.

## *Other relevant factors*

72. Bell Canada has implemented measures to streamline access to its support structures and further minimize the potential of its FTTH deployment being completed in non-compliance with applicable construction standards. Despite having some concerns as to the efficacy of these measures, the Commission considers that they should, at least in some cases, reduce delays in accessing poles and reduce, to some extent, the likelihood of future non-compliance.

73. Accordingly, the measures implemented by Bell Canada suggest that a lower AMP amount would be appropriate.

74. The Commission considers that it should arrive at an AMP amount that would be sufficient to promote compliance and deter future non-compliance. Therefore, in light of the above factors, the Commission considers that an AMP of \$2.5 million for each of Bell Canada's three violations would be appropriate, for a total AMP amount of \$7.5 million.

## **Conclusion**

75. The Commission determines that it is appropriate to impose an AMP on Bell Canada for its violations of section 24 and subsections 25(1) and 27(2) of the Act, and imposes a total AMP amount of \$7.5 million on Bell Canada (\$2.5 million for each of its three violations).

76. This AMP amount will ensure that Bell Canada, in collaboration with other service providers, establishes further measures to prevent future instances of non-compliance and continues to streamline its pole access procedures to reduce delays to a minimum.

77. While the Commission expects that the imposition of an AMP on Bell Canada will promote compliance and deter future non-compliance in the granting of access permits to Bell Canada's support structures, in accordance with applicable construction standards, the Commission will continue to monitor the situation and, if necessary, take appropriate action in the event of any future non-compliance.

## **Policy Directions**

78. The Commission is required, in exercising its powers and performing its duties under the Act, to implement the policy objectives set out in section 7 of the Act, in accordance with the Policy Directions. The Commission considers that its determinations in this decision are consistent with the Policy Directions for the reasons stated below.

79. The Commission considers that its determinations in this decision advance the Canadian telecommunications policy objectives set out in paragraphs 7(a), (b), (c),

**TAB – 4.E**

# Board of Directors Regulatory Update

Q2 2022



# GRA Update: Q2 2022

## Project Fox

Redacted - Solicitor-Client Privileged



Redacted - Non-Responsive

Redacted - Non-Responsive

*Momentum against the deal building across government and public*

Redacted - Non-Responsive

**Key GRA actions to support TELUS' strategic imperatives**





## Q2 2022 Board Update

### Project Fox

- Redacted - Solicitor-Client Privileged :
- CRTC: TELUS, Bell, and others filed written support of consumer group's petition to Cabinet to overturn CRTC decision; Cabinet dismissed the petition on jurisdictional grounds
- Bureau: Freedom Mobile sale to Quebecor announced for \$2.85B - conditional on Bureau and ISED approval
- ISED: TELUS advocacy highlights danger of PKP as remedy partner; requests Minister not transfer spectrum licences
- TELUS-Globalive network and spectrum sharing agreement announced to boost Globalive's bid to purchase Freedom Mobile
- Parliamentary Heritage Committee report released opposing the merger
- To leverage the Rogers outage, we have written to the Bureau to reiterate the security risks resulting from the elimination of redundancy; updated public opinion polling to leverage with UCP; engaged in direct advocacy with ISED about the importance of network diversity; and influenced invitation lists to House committee hearing on the outage

Redacted - Non-Responsive

- Redacted - Non-Responsive

# Q2 2022 Board Update - cont.



Redacted - Non-Responsive

- Redacted - Non-Responsive

# Board of Directors Regulatory Update

Q2 2022

This document contains a brief overview of Redkey government and regulatory affairs files (Project Fox, Redacted - Solicitor-Client Privileged) and the actions we are taking to support TELUS' strategic imperatives and to deliver the best services for our customers.

## 1. Project Fox

- Redacted - Solicitor-Client Privileged
  - CRTC: Following the decision approving the transfer of BDU licenses with conditions, consumer group (PIAC) petitioned Cabinet to overturn the ruling – TELUS, Bell, other stakeholders including academics, think tanks, consumer groups and other BDUs, filed written support following outreach to 70+ stakeholders. On 23 June, Cabinet dismissed the petition on jurisdictional grounds.
  - The Competition Bureau: Rogers/Shaw announced the sale of Freedom Mobile to Quebecor on 17 June for \$2.85B. The sale is conditional on Bureau and ISED approval. Should the sale not be approved, the Bureau will proceed with its application to block the merger filed on 9 May, which will be heard on an expedited basis beginning in Q4 2022.
  - ISED: TELUS advocacy requests that the Minister not transfer the spectrum licenses and highlights danger of PKP as remedy partner; ISED's decision will likely follow Bureau's settlement or Tribunal's decision (if litigated).
- Continue negotiations with potential divestiture buyers of Freedom Mobile; network and spectrum sharing agreement with Globalive announced on 19 May in an effort to boost its bid to purchase Freedom Mobile.
- On 17 May, the Standing Committee on Canadian Heritage released its report on the transaction's impact on local news. The report makes 11 recommendations, the first of which is "that the Government of Canada reject the Rogers-Shaw proposed merger".
- Continued execution of our "top-of-house" strategy, where our ELT meet with political leaders to kill, shape and slow the deal. Throughout Q2, NDP leader, Jagmeet Singh, repeatedly asked PM Trudeau during Question Period to block the merger, using TELUS talking points. (N.B. The PM responded by acknowledging that wireless prices are declining, based on StatsCan data).

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- To leverage the 8 July Rogers outage, we have written to the Bureau to reiterate the security risks resulting from the elimination of redundancy; updated public opinion polling to leverage with UCP; engaged in direct advocacy with ISED about the importance of network diversity; and influenced invitation lists to House committee hearing on the outage.

## 2. Redacted - Non-Responsive

- Redacted - Non-Responsive

## 3. Redacted - Non-Responsive

- Redacted - Non-Responsive

# COMPENDIUM PUBLIC



4. Redacted - Non-Responsive

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**5.** Redacted - Non-Responsive

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**6.** Redacted - Non-Responsive

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# COMPENDIUM PUBLIC



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**TAB – 4.F**











**TAB – 4.G**











**TAB – 4.H**







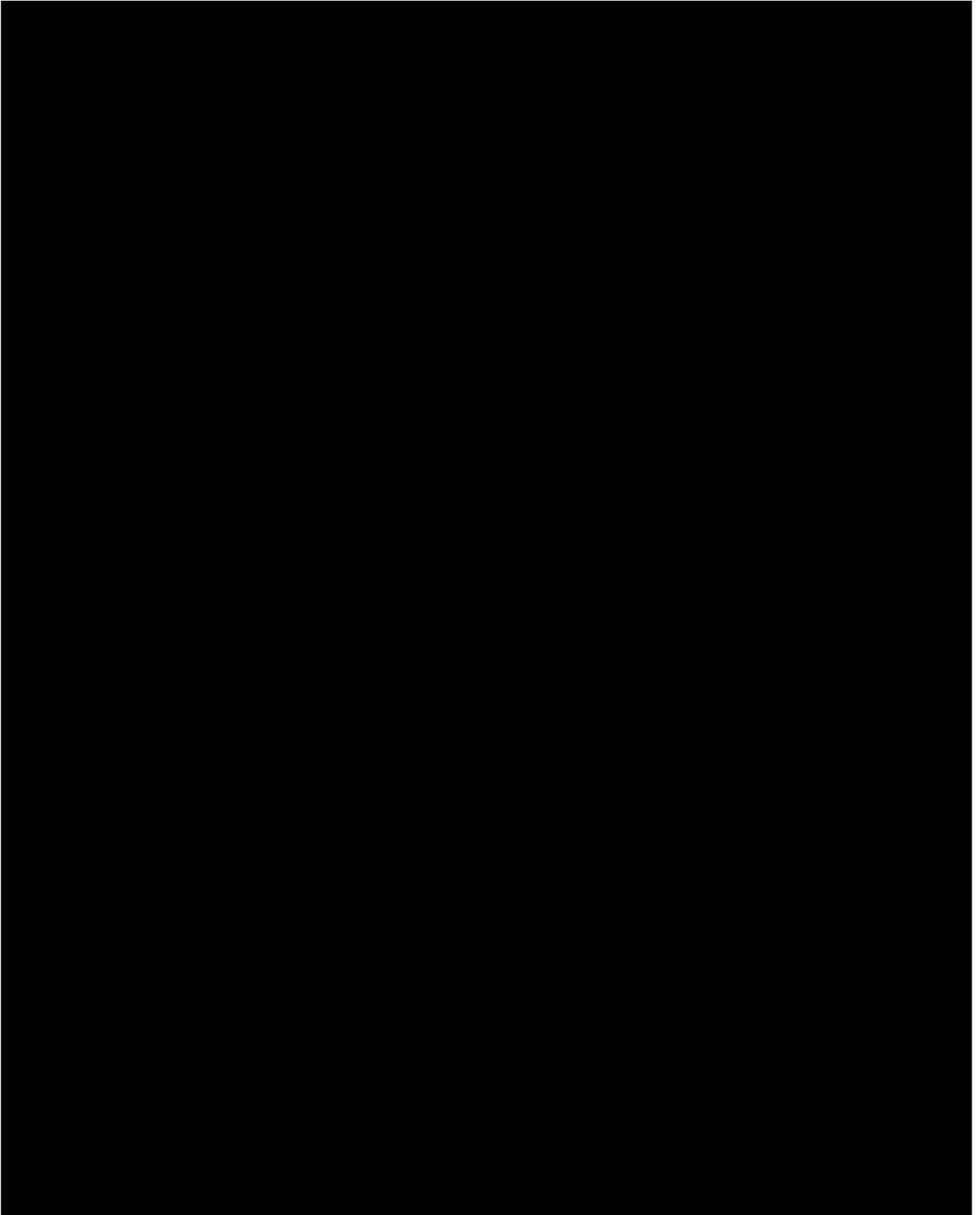


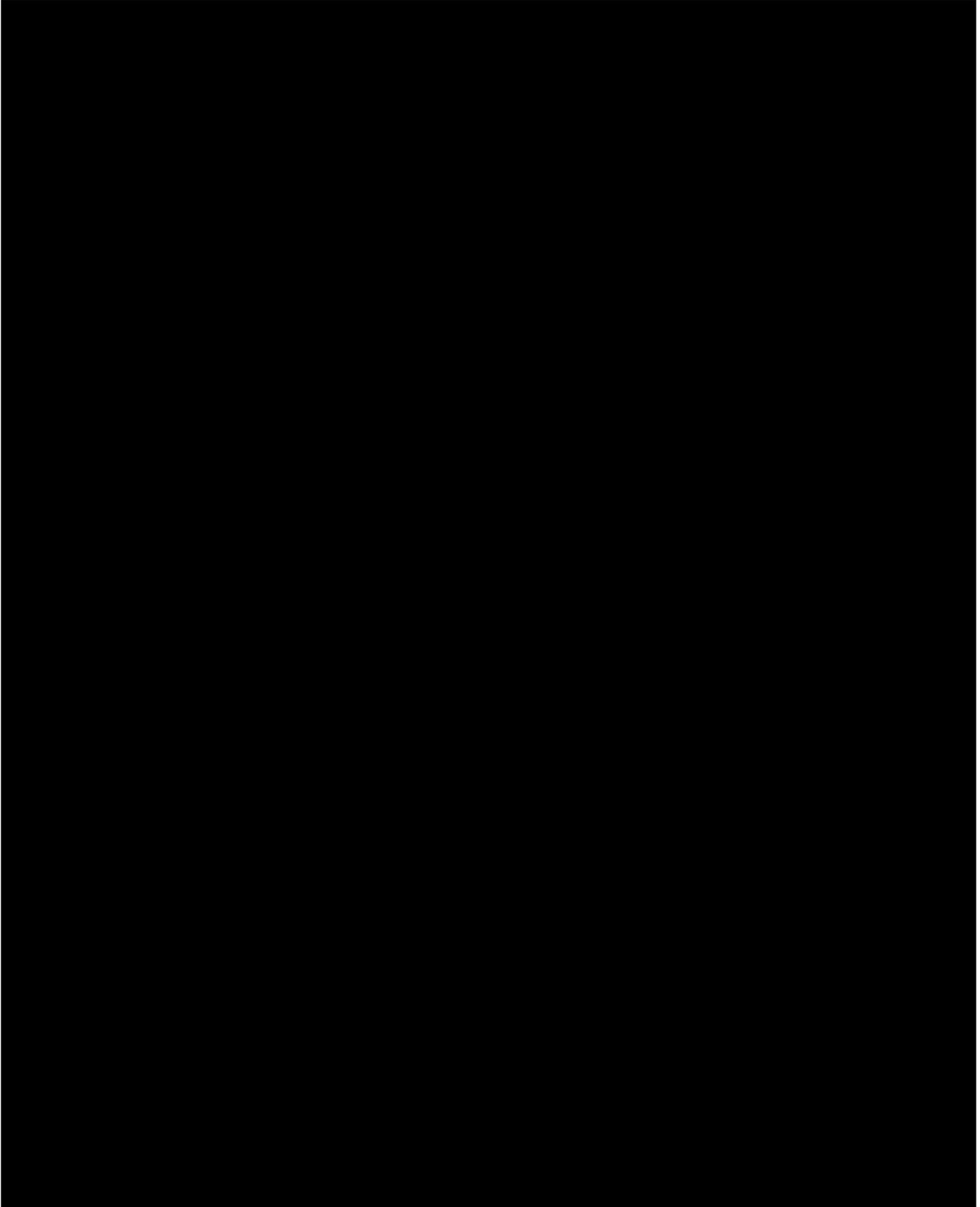


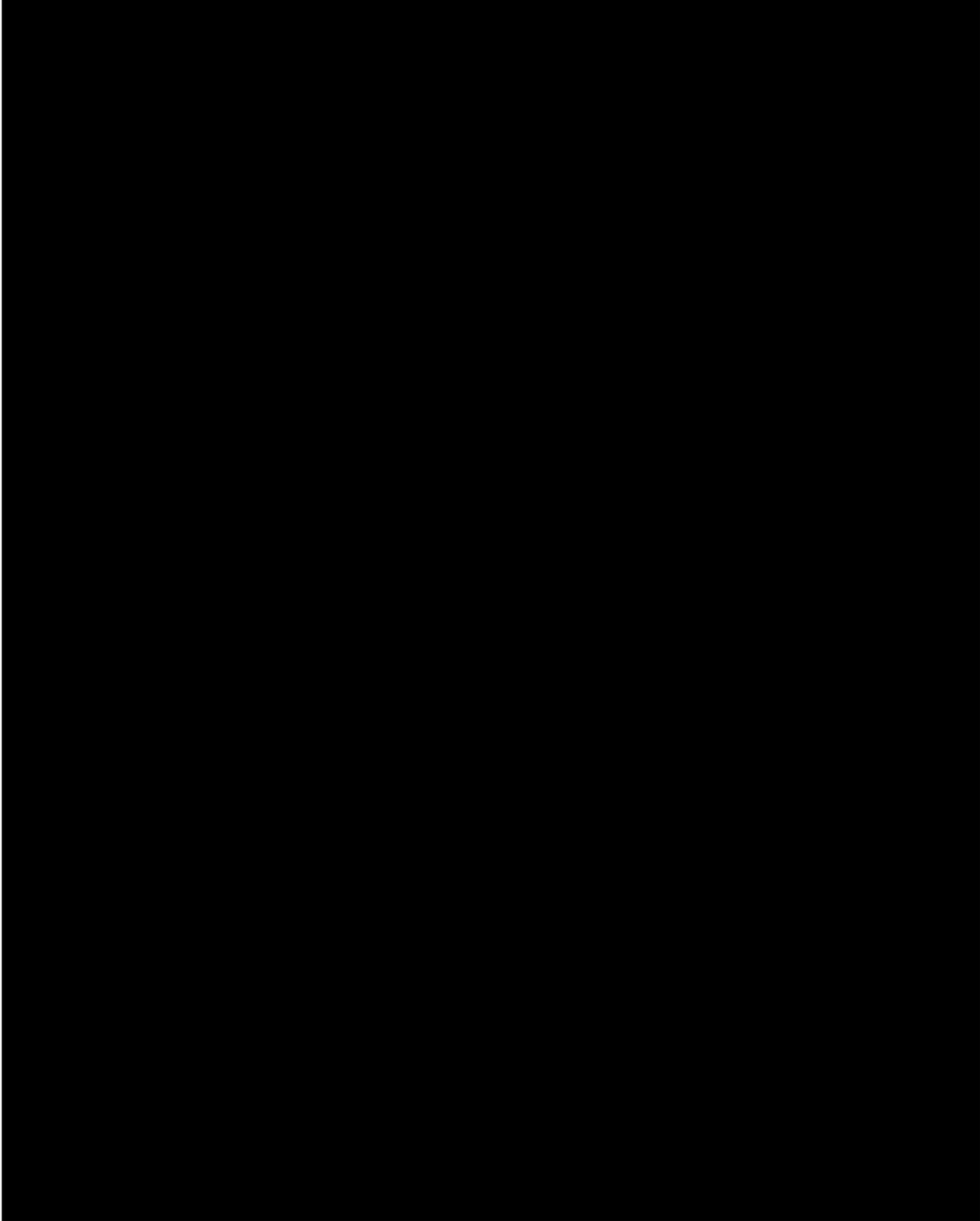




**TAB – 4.I**







**TAB – 4.J**

**COMPENDIUM PUBLIC****Media Release**

March 31, 2021

**TELUS announces closing of C\$1.3 billion equity offering**

**Vancouver, B.C.** – TELUS Corporation (“TELUS” or the “Company”) (TSX-T, NYSE-TU) announced today the closing of its bought deal offering (the “Offering”) of common shares (the “Common Shares”) announced on March 25, 2021. The Company sold an aggregate of 51,300,000 Common Shares for total gross proceeds of C\$1.3 billion. The Common Shares were offered through a syndicate of underwriters led by RBC Capital Markets and CIBC Capital Markets, together with BMO Capital Markets, Scotiabank and TD Securities Inc. as joint bookrunners.

Proceeds of the Offering will be used to further strengthen the Company’s balance sheet and, principally, to capitalize on a unique strategic opportunity to accelerate its broadband capital investment program, including the substantial advancement of the build-out of TELUS PureFibre infrastructure in Alberta, British Columbia and Eastern Quebec, as well as an accelerated roll-out of the Company’s national 5G network.

This media release does not constitute an offer to sell or the solicitation of an offer to buy the Common Shares, nor shall there be any sale of these securities in any state or jurisdiction in which such an offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state or jurisdiction.

**About TELUS**

TELUS (TSX: T, NYSE: TU) is a dynamic, world-leading communications technology company with \$16 billion in annual revenue and 16 million customer connections spanning wireless, data, IP, voice, television, entertainment, video, and security. We leverage our global-leading technology and compassion to enable remarkable human outcomes. Our longstanding commitment to putting our customers first fuels every aspect of our business, making us a distinct leader in customer service excellence and loyalty. In 2020, TELUS was recognized as having the fastest wireless network in the world, reinforcing our commitment to provide Canadians with access to superior technology that connects us to the people, resources and information that make our lives better. TELUS Health is Canada’s leader in digital health technology, improving access to health and wellness services and revolutionizing the flow of health information across the continuum of care. TELUS Agriculture provides innovative digital solutions throughout the agriculture value chain, supporting better food outcomes from improved agri-business data insights and processes. TELUS International (TSX and NYSE: TIXT) is a leading digital customer experience innovator that delivers next-generation AI and content management solutions for global brands across the technology and games, ecommerce and FinTech, communications and media, healthcare, travel and hospitality sectors. TELUS and TELUS International operate in 25+ countries around the world.

**COMPENDIUM PUBLIC**

**For more information, please contact:**

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**Media Relations**

Steve Beisswanger

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**TAB – 4.K**

## COMPENDIUM PUBLIC

- (b) on April 5, 2021, SaskTel announced a capital investment of \$323 million in 2021-2022, and over \$1.4 billion over the next five years, to expand its network coverage and improve its broadband infrastructure. A copy of SaskTel’s press release is attached as [Exhibit 42](#); and
- (c) on May 31, 2021, Bell announced its “biggest ever” network acceleration plans, with an investment of \$1.7 billion for 2021-2022. Bell says that this investment “will significantly increase the number of wireline and wireless connections in Canada’s rural areas and urban centres alike over the next 2 years, including significantly expanded plans for all-fibre connections, while creating additional employment as network construction activity speeds up”. A copy of Bell’s press release is attached as [Exhibit 43](#).
- (d) On September 2, 2022, Bell announced that it would acquire Distributel, one of Canada’s largest independent wireline service providers. Distributel purchases the internet services that it makes available to subscribers on a wholesale basis. A copy of Bell’s press release is attached as [Exhibit 44](#).

88. More recently, Bell’s President and CEO, Mirko Bibic, stated during a Morgan Stanley conference in March 2022 that by the time the Proposed Transaction closes (assuming regulatory permissions are secured), Bell will have built out an additional 1.5 million locations (for the portion of the network that it shares with Telus) with fibre, which he says will place Bell “in a tremendous position strategically and competitively”. The full audio/webcast of the Morgan Stanley conference is available at the following link: <https://www.bce.ca/investors/events-and-presentations/2022-jp-morgan-may-24-audio-file.mp3>. Mr. Bibic made similar comments at a JP

# COMPENDIUM PUBLIC

This is Exhibit “43” referred to in the Affidavit of Dean Prevost sworn by Dean Prevost at the City of Toronto, in the Province of Ontario, before me on September 23, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

*Commissioner for Taking Affidavits (or as may be)*

**JOHN CARLO MASTRANGELO**



## Bell's biggest-ever network acceleration plan gets bigger with additional investment now up to \$1.7 billion over the next 2 years

- Greater regulatory certainty and positive investment climate supports increased capital investment in Canada's network infrastructure, including expansion rollouts
- Builds on Bell's historic plan announced earlier this year to invest in Canada's COVID-19 recovery, growing employment and the country's leadership in broadband communications
- With additional network investment in 2020 to manage unprecedented usage increases during the COVID crisis, Bell's 2020-2022 capital investment plan will reach up to approximately \$14 billion – almost \$2 billion more than originally planned

MONTRÉAL, May 31, 2021 /CNW/ - Bell today announced that its [accelerated capital investment plan](#) announced earlier this year will now increase by up to \$1.7 billion, or as much as \$500 million more, in response to the support for infrastructure investment reflected in recent federal regulatory and policy decisions.

This \$1.7 billion in accelerated Bell investment for 2021 and 2022 is in addition to the approximately \$4 billion in capital that Bell has typically invested each year in network expansion over the last decade. With an additional \$200 million also invested in capacity and coverage in 2020 to respond to the unprecedented usage demands of the COVID crisis, Bell's total capital investment from 2020-2022 will be as high as \$14 billion.

"Since 1880, the Bell team has ensured Canadians have the critical network infrastructure necessary to build a prosperous society and a sustainable economy and we're accelerating our commitment as we all look forward to our country's future beyond COVID-19," said Mirko Bibic, President and CEO of BCE Inc. and Bell Canada. "The unprecedented impacts of the crisis have necessitated a bold response from all stakeholders in Canada's economy, and Bell is responding with the largest capital acceleration project in our company's 141-year history. Now, with greater regulatory stability fostering an improved investment climate, we're proud to take our plan even further by growing our investment to advance how Canadians in communities large and small connect with each other and the world."

Bell's accelerated capital investment plan announced in February 2021 originally consisted of \$1 billion to \$1.2 billion in additional network funding to help Canada's recovery from the COVID crisis. With the CRTC's recent decision and ongoing government policy support for facilities-based competition and investment, Bell has now increased the amount of accelerated funding to \$1.5 billion to \$1.7 billion. This investment will significantly increase the number of wireline and wireless connections in Canada's rural and urban centres alike over the next 2 years, including significantly expanded plans for all-fibre connections while creating additional employment as network construction activity speeds up.

"The policy approach of the federal government and the CRTC is an expression of confidence in our country's future and the importance of network investment to ensure consumers and businesses have access to next-generation communications services in a digital economy. We expect communications providers to also step up with investments and innovations of their own to drive competition and deliver outstanding value to Canadians nationwide," said Mr. Bibic. "World-leading network investment by Canada's communications providers has played a key role in seeing the country through COVID-19 and laying the foundation for recovery. The Bell team is proud to have been here to support our customers and communities through the challenges of the past year and by what the future has in store."

With 5G coverage now at approximately 35% of the Canadian population, Bell recently announced the [expansion of Canada's fastest-ranked and most-advanced 5G network](#) to a further 23 cities and towns in Québec, Ontario and Manitoba, on track to reach up to 70% national 5G coverage this year.

### About Bell

The Bell team builds world-leading broadband wireless and fibre networks, provides innovative mobile, TV, Internet and business communications services and delivers the most compelling content with premier television, radio, out of home and digital media brands. With a goal to advance how Canadians connect each other and the world, Bell serves more than 22 million consumer and business customer connections across every province and territory. Founded in Montréal in 1880, Bell is wholly owned by BCE Inc. (TSX, NYSE: BCE). To learn more, please visit [Bell.ca](#) or [BCE.ca](#).

Bell supports the social and economic prosperity of our communities with a commitment to the highest environmental, social and governance (ESG) standards. We measure our progress in increasing environmental sustainability, achieving a diverse and inclusive workplace, leading data governance and protection, and building stronger and healthier communities. This includes confronting the challenge of mental illness with the [Bell Let's Talk](#) initiative, which drives mental health awareness and action with programs like the annual Bell Let's Talk Day and Bell funding for community care, research and workplace programs nationwide year round.

### Media inquiries:

Caroline Audet  
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## COMPENDIUM PUBLIC

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[@Bell\\_News](#)

### Investor inquiries:

Thane Fotopoulous

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[Thane.fotopoulous@bell.ca](mailto:Thane.fotopoulous@bell.ca)

### Caution Concerning Forward-Looking Statements

Certain statements made in this news release are forward-looking statements, including statements relating to our anticipated capital expenditures and the benefits expected to result therefrom, including our two-year increased capital investment program to accelerate broadband network and 5G footprint expansion, our business outlook, objectives, plans and strategic priorities, and other statements that are not historical facts. All such forward-looking statements are made pursuant to the "safe harbour" provisions of applicable Canadian securities laws and of the United States *Private Securities Litigation Reform Act of 1995*. Forward-looking statements are subject to inherent risks and uncertainties and are based on several assumptions which give rise to the possibility that actual results or events could differ materially from our expectations. These statements are not guarantees of future performance or events, and we caution you against relying on any of these forward-looking statements. The forward-looking statements contained in this news release describe our expectations at the date of this news release and, accordingly, are subject to change after such date. Except as may be required by applicable securities laws, we do not undertake any obligation to update or revise any forward-looking statements contained in this news release, whether as a result of new information, future events or otherwise. Our capital investment and network deployment plans and the benefits expected to result therefrom are subject to risks and, accordingly, there can be no assurance that our capital investment and network deployment plans will be completed or that the benefits expected to result therefrom will be realized. The value of the planned investment assumes our ability to access or generate the necessary sources of capital. However, there can be no certainty that the necessary sources of capital will be available with the result that the actual investment made by us could materially differ from current expectations. For additional information on assumptions and risks underlying certain of our forward-looking statements made in this news release, please consult BCE Inc.'s (BCE) 2021 Annual MD&A dated March 4, 2021, BCE's 2021 First Quarter MD&A dated April 28, 2021 and BCE's news release dated April 29, 2021 announcing its first quarter results for the first quarter of 2021, filed by BCE with the Canadian provincial securities regulatory authorities (available at [Sedar.com](https://www.sedar.com)) and with the U.S. Securities and Exchange Commission (available at [SEC.gov](https://www.sec.gov)). These documents are also available at [BCE.ca](https://www.bce.ca).

SOURCE Bell Canada

**TAB 5 – OUTAGE**

**TAB – 5.A**

**Telecommunications Act (S.C. (Statutes of Canada) 1993, c. 38)**

Act current to 2022-11-28 and on 2021-06-29.

**Telecommunications Act**

**S.C. (Statutes of Canada) 1993, c. 38**

Assented to 1993-06-23

An Act respecting telecommunications

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

## Short Title

### Short title

1 This Act may be cited as the *Telecommunications Act*.

## PART I

## General

## Interpretation

### Definitions

2 (1) In this Act,

***broadcasting undertaking*** has the same meaning as in subsection 2(1) of the *Broadcasting Act*; (*entreprise de radiodiffusion*)

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**Canadian carrier** means a telecommunications common carrier that is subject to the legislative authority of Parliament; (*entreprise canadienne*)

**Canadian telecommunications policy objectives** means the objectives set out in section 7; (*Version anglaise seulement*)

**charge** includes to receive in payment; (*Version anglaise seulement*)

**Commission** means the Canadian Radio-television and Telecommunications Commission; (*Conseil*)

**control** means control in any manner that results in control in fact, whether directly through the ownership of securities or indirectly through a trust, agreement or arrangement, the ownership of any body corporate or otherwise; (*contrôle*)

**decision** includes a determination made by the Commission in any form; (*décision*)

**exempt transmission apparatus** means any apparatus whose functions are limited to one or more of the following:

- (a) the switching of telecommunications,
- (b) the input, capture, storage, organization, modification, retrieval, output or other processing of intelligence, or
- (c) control of the speed, code, protocol, content, format, routing or similar aspects of the transmission of intelligence; (*appareil de transmission exclu*)

**intelligence** means signs, signals, writing, images, sounds or intelligence of any nature; (*information*)

**international submarine cable** means a submarine telecommunications line that extends between Canada and any place outside Canada, or between places outside Canada through Canada, other than a line situated entirely under fresh water; (*câble sous-marin international*)

**international submarine cable licence** means a licence issued under section 19; (*licence de câble sous-marin international*)

**Minister** means the Minister of Industry; (*ministre*)

**person** includes any individual, partnership, body corporate, unincorporated organization, government, government agency and any other person or entity that acts in the name of or for the benefit of another, including a trustee, executor, administrator, liquidator of the succession, guardian, curator or tutor; (*personne*)

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**prescribed** means prescribed by regulation; (*Version anglaise seulement*)

**public authority** includes Her Majesty in right of Canada or a province; (*administration publique*)

**rate** means an amount of money or other consideration and includes zero consideration; (*tarif*)

**special Act** means an Act of Parliament respecting the operations of a particular Canadian carrier; (*loi spéciale*)

**telecommunications** means the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system; (*télécommunication*)

**telecommunications common carrier** means a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation; (*entreprise de télécommunication*)

**telecommunications facility** means any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a transmission facility; (*installation de télécommunication*)

**telecommunications service** means a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise; (*service de télécommunication*)

**telecommunications service provider** means a person who provides basic telecommunications services, including by exempt transmission apparatus; (*fournisseur de services de télécommunication*)

**transmission facility** means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus. (*installation de transmission*)

**Definition of *network termination point***

(2) The Commission may define the expression *network termination point* for purposes of the definition *transmission facility* in subsection (1).

1993, c. 38, s. 2; 1995, c. 1, s. 62; 1998, c. 8, s. 1; 2004, c. 25, s. 174.

# Her Majesty

## Act binding on Her Majesty

**3** This Act is binding on Her Majesty in right of Canada or a province.

# Application

## Broadcasting excluded

**4** This Act does not apply in respect of broadcasting by a broadcasting undertaking.

## Application

**5** A trustee, trustee in bankruptcy, receiver, sequestrator, manager, administrator of the property of another or any other person who, under the authority of any court, or any legal instrument or act, operates any transmission facility of a Canadian carrier is subject to this Act.

1993, c. 38, s. 5; 2004, c. 25, s. 175.

## Special Acts

**6** The provisions of this Act prevail over the provisions of any special Act to the extent that they are inconsistent.

# Canadian Telecommunications Policy

## Objectives

**7** It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

**(a)** to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

**(b)** to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

**(c)** to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

**COMPENDIUM PUBLIC**

- (d)** to promote the ownership and control of Canadian carriers by Canadians;
- (e)** to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
- (f)** to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
- (g)** to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
- (h)** to respond to the economic and social requirements of users of telecommunications services; and
- (i)** to contribute to the protection of the privacy of persons.

## Powers of Governor in Council, Commission and Minister

### Directions

**8** The Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives.

### Exemptions

**9 (1)** The Commission may, by order, exempt any class of Canadian carriers from the application of this Act, subject to any conditions contained in the order, where the Commission, after holding a public hearing in relation to the exemption, is satisfied that the exemption is consistent with the Canadian telecommunications policy objectives.

### Inquiry and determination

**(2)** The Commission may, on application by any interested person or on its own motion, inquire into and determine whether any condition of an exemption order has been complied with.

### Interested persons

**(3)** The decision of the Commission that a person is or is not an interested person is binding and conclusive.

1993, c. 38, s. 9; 1999, c. 31, s. 196(F).

**TAB – 5.B**

# COMPENDIUM PUBLIC

This is **Exhibit “1”** referred to in the Affidavit of Ron McKenzie affirmed by Ron McKenzie at the City of Toronto, in the Province of Ontario, before me on October 20, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

*Commissioner for Taking Affidavits (or as may be)*

**BRADLEY VERMEERSCH**

# COMPENDIUM PUBLIC

## Abridged

July 22, 2022

Filed via GCKey

Mr. Claude Doucet  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
1 Promenade du Portage  
Ottawa, ON K1A 0N2

Dear Mr. Doucet:

**RE: Rogers Canada-wide service outage of July 2022**

---

Rogers Communications Canada Inc. (“Rogers”) is in receipt of a letter containing Requests for Information (“RFIs”) from the Canadian Radio-television and Telecommunications Commission (“CRTC” or the “Commission”), dated July 12, 2022, concerning the above-mentioned subject. Attached, please find our Response to that letter.

At the outset, Rogers appreciates the opportunity to explain to the Commission, the Government of Canada and all Canadians what transpired on July 8<sup>th</sup>, 2022. The network outage experienced by Rogers was simply not acceptable. We failed in our commitment to be Canada’s most reliable network. We know how much our customers rely on our networks and we sincerely apologize. Rogers is particularly troubled that some customers could not reach emergency services or receive alerts during that outage.

We have identified the cause of the outage to a network system failure following an update in our core IP network during the early morning of Friday July 8<sup>th</sup>. This caused our IP routing network to malfunction. To mitigate this, we re-established management connectivity with the routing network, disconnected the routers that were the source of the outage, resolved the errors caused by the update and redirected traffic, which allowed our network and services to progressively come back online later that day. While the network issue that caused the full-service outage had largely been resolved by the end of Friday, some minor instability issues persisted over the weekend. The network is now fully operational and working to the high standards that our customers expect.

This outage caused real pain and significant frustration for everyone. Canadians were not able to reach their families. Businesses were unable to complete transactions. And critically, some emergency and essential calls could not be completed. We let people down and we are crediting all our customers the equivalent of five (5) days of service. This credit will be automatically applied to all customer accounts.

Since the outage, our customer service representatives have been working around the clock and have caught up on the backlog of issues. We are also proactively reaching out to the major organizations that depend on our services, including governments, public institutions and corporate enterprises, in order to answer their questions.

It is clear that what matters most is that Rogers ensures this does not happen again. We are conducting

## COMPENDIUM PUBLIC

a full review of the outage. Our engineers and technical experts have been and are continuing to work alongside our global equipment vendors to fully explore the root cause and its effects. We will also increase resiliency in our networks and systems which will include fully segregating our wireless and wireline core networks. Lastly, we have additionally hired an external review team to further assess and provide insights into the outage. This will involve a complete evaluation of all our processes, including the performance of network upgrades, disaster recovery procedures, and communication with the public.

Additionally, Rogers will work with governmental agencies and our industry peers to further strengthen the resiliency of our network and improve communication and co-operation during events like this. Most importantly, we will explore additional measures to maintain or transfer to other networks 9-1-1 and other essential services during events like these.

In order to regain the trust of Canadians, it is important that we provide open answers to the questions that they have about the outage. That is why when answering the CRTC RFIs, Rogers is being as transparent as possible. However, with that being said, Rogers must also ensure that all commercially and operationally sensitive information remains confidential. This is particularly true for systems designs and network operations that could be exploited by malicious actors who seek to disrupt our systems.

Rogers therefore requests that the CRTC treat certain information contained in this Response as **confidential**, pursuant to subsection 20(1)(b) of the *Access to Information Act*, and sections 38 and 39 of the *Telecommunications Act*. For competitive reasons, and also to protect our customers as well as our networks and vendors, Rogers would never publicly disclose some of the information contained in this Response other than to the Commission. Some of the information submitted contains highly sensitive information about Rogers' networks and operations. Rogers submits that any possible public interest in disclosure of the information in this Response is greatly outweighed by the specific direct harm that would flow to Rogers and to its customers. Rogers is also filing an abridged version of this Response, except for six appendices since they are confidential in their entirety.

Below, Rogers will address in detail each of the individual requests for information posed by the CRTC.

Sincerely,



Ted Woodhead  
Chief Regulatory Officer & Government Affairs

Attach.

cc: Fiona Gilfillan, CRTC, [fiona.gilfillan@crtc.gc.ca](mailto:fiona.gilfillan@crtc.gc.ca)  
Michel Murray, CRTC, [michel.murray@crtc.gc.ca](mailto:michel.murray@crtc.gc.ca)

**TAB – 5.C**

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1           **MR. MCKENZIE:** They do. They typically have  
2 service-level agreements, response, and financial penalties  
3 if you don't achieve or deliver those service level  
4 agreements.

5           **MR. LISUS:** And approximately how many are  
6 there with 2,250 wireline circuits leased?

7           **MR. MCKENZIE:** Those are the actual circuit,  
8 that's the actual number of customers just within our  
9 footprint that we currently contract today with Telus.

10          **MR. LISUS:** Let me ask you, sir, to take a look  
11 at paragraphs 9 and 11 of your witness statement.

12          **MR. MCKENZIE:** Okay.

13          **MR. LISUS:** We've heard some evidence about a  
14 Commons Committee hearing held on July 25, 2002, discussed  
15 that briefly with Mr. Howe. Did you attend those hearings?

16          **MR. MCKENZIE:** I did.

17          **MR. LISUS:** Did you speak to the Commons  
18 Committee?

19          **MR. MCKENZIE:** I did, yes.

20          **MR. LISUS:** Did you speak to the Commons  
21 Committee about the July outage?

22          **MR. MCKENZIE:** I did.

23          **MR. LISUS:** Are you aware whether or not the  
24 Commissioner of the Canadian Radio Telecommunications  
25 Commission attended and testified?

## COMPENDIUM PUBLIC

1                   **MR. MCKENZIE:** He did. Yes, he spoke to our  
2 portion of the testimony.

3                   **MR. LISUS:** We heard from Mr. Howe that the  
4 CRTC has authority and responsibility for ensuring that  
5 carriers have reliable networks. Are you aware of that?

6                   **MR. MCKENZIE:** Yes, they are a regulator for  
7 the industry.

8                   **MR. LISUS:** Now, in paragraph 9 of your  
9 statement, sir, if I could direct you there?

10                  **MR. MCKENZIE:** Okay.

11                  **MR. LISUS:** You refer to a redacted copy of  
12 Rogers' first letter to the CRTC describing the outage. Do  
13 you see that?

14                  **MR. MCKENZIE:** I do, yes.

15                  **MR. LISUS:** And the redacted letter is attached  
16 to your witness statement, right?

17                  **MR. MCKENZIE:** Yes.

18                  **MR. LISUS:** Now, you say "first letter", was  
19 there subsequent communications in response to inquiries  
20 from the CRTC?

21                  **MR. MCKENZIE:** There were. There was a  
22 follow-on letter with additional clarification and  
23 questions which we responded to as well.

24                  **MR. LISUS:** And are the CRTC's requests and  
25 Rogers' response to them available for review by the public

# COMPENDIUM PUBLIC

1 on the CRTC's website?

2 **MR. MCKENZIE:** They are, yes.

3 **MR. LISUS:** Following its requests for  
4 information and Rogers' responses, has CRTC taken any steps  
5 in respect of Rogers' network?

6 **MR. MCKENZIE:** No. We've had no further  
7 inquiries.

8 **MR. LISUS:** Chief, the last little sequence, I  
9 should probably in deference to my friends at Bell, do in  
10 confidential session.

11 **CHIEF JUSTICE CRAMPTON:** That's fine. Please  
12 proceed, Annie.

13 **DEPUTY REGISTRAR:** Confidential Level A, Mr.  
14 Lisus?

15 **MR. LISUS:** Thank you.

16 **DEPUTY REGISTRAR:** Yes. One moment, please.

17 **CHIEF JUSTICE CRAMPTON:** Is it A or B?

18 **MR. LISUS:** I think it's A because it pertains  
19 to Bell's information, Chief.

20 **CHIEF JUSTICE CRAMPTON:** Okay.

21 --- Upon recessing at 3:02 p.m., to resume  
22 immediately in Confidential Level A /  
23 Suspension à 15 h 02 pour reprendre immédiatement  
24 en session confidentielle niveau A

25

**TAB – 5.D**

# COMPENDIUM PUBLIC

1                   **CHIEF JUSTICE CRAMPTON:** Okay.

2                   **RE-EXAMINATION BY MR. KLIPPENSTEIN**

3                   **MR. KLIPPENSTEIN:** Mr. Davies, you recall that  
4 Mr. Smith took you to a document entitled "5 Myths about 5G  
5 Transport" and took you to a segment that suggested that  
6 microwave is a viable transport media. Do you recall that  
7 question?

8                   **MR. M. DAVIES:** Yes, I do.

9                   **MR. KLIPPENSTEIN:** And do you recall that you  
10 answered that, under some circumstances, it is possible  
11 with significant adaptation?

12                   **MR. M. DAVIES:** Yes, I do.

13                   **MR. KLIPPENSTEIN:** And do you recall that you  
14 referred also to another paper that laid out some  
15 limitations?

16                   **MR. M. DAVIES:** Yes, I do.

17                   **MR. KLIPPENSTEIN:** And so my question is, what  
18 circumstances is it possible and what are the limitations?

19                   **MR. SMITH:** I'm sorry. This is not appropriate  
20 either.

21                   I asked my -- I asked the witness very directly  
22 whether any of the evidence he's now offering to provide  
23 through re-examination was included in the witness's expert  
24 report. The answer to that was no.

25                   He obviously had an opportunity to give

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1 whatever explanation he wanted at the time. We would have  
2 then had an opportunity to cross-examine on it.  
3 Respectfully, it's not appropriate to bring it up in  
4 re-examination.

5 **CHIEF JUSTICE CRAMPTON:** Well, this is  
6 clarifying what he meant by "under some circumstances", so  
7 let's find out what he meant.

8 **MR. M. DAVIES:** Yes, you can sometimes still  
9 use microwave but you're going to have to change it. You  
10 can't use it unchanged. You're going to have to either  
11 shorten the length of the link and/or put bigger antennas  
12 on it and/or change the topology of the network.

13 So yes, it's the same equipment, but under  
14 certain narrow circumstances with significant adaptation.  
15 Shorter links, bigger antennas, different topologies.

16 **CHIEF JUSTICE CRAMPTON:** Thank you.

17 **MR. KLIPPENSTEIN:** Thank you. Those are my  
18 questions.

19 **CHIEF JUSTICE CRAMPTON:** All right, thank you.  
20 The Panel has a small number of questions.

21 Dr. Askanas?

22 **MEMBER ASKANAS:** Good evening. I've got just  
23 the message a second ago that we have a huge outage that  
24 actually closed Berlin, Bremen, Hamburg and all the  
25 emergency numbers in Germany are down. So we have those

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1 situations despite the fact that our technology is moving  
2 forward.

3 So why we should pay any attention to the black  
4 swan scenario which you are referring to quite extensively?

5 **MR. M. DAVIES:** It's not a black swan scenario.  
6 Even though outages occur, it is possible, with good  
7 network design, as embraced and explained specifically by  
8 the testimony of Mr. Howe and Mr. Bell, to define a network  
9 which minimizes those occurrences.

10 **MEMBER ASKANAS:** Are you claiming that the  
11 German system is badly designed?

12 **MR. M. DAVIES:** No, I'm not. I'm saying that,  
13 in general, good network design can reduce the likelihood  
14 of that happening and, when they do happen, their scope and  
15 extent.

16 Now, I don't know the specifics of the German  
17 network. My particular concern in this instance was, given  
18 that the outage happened, there is significant changes that  
19 Rogers has committed to making to its network, so it will  
20 be a different network. And that has big implications for  
21 the extent of the savings that it will be able to achieve.

22 There's two letters, the Woodhead letters,  
23 which set out the commitments that it's making to change  
24 its network to make it more resilient. We're on the public  
25 record, so I can't speak to the specifics. But if you go

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1 to the --

2 **MEMBER ASKANAS:** I remember the slide. I

3 remember --

4 **MR. M. DAVIES:** Sure. There's four points and  
5 three. Those are big changes to the network.

6 I don't know why the German network is out.

7 Yes, we will still have outages. But the better job you do  
8 of doing this, including the sort of changes which Rogers  
9 is planning to make, which I applaud and embrace and regard  
10 as good practice and bring it much more in line with where  
11 Bell is, can have a big impact on reliability.

12 **MEMBER ASKANAS:** Okay. Two more questions.

13 How long it takes -- in your view and how you  
14 incorporate this into your analysis, how long it will take  
15 to establish brand without buying an existing company?

16 **MR. M. DAVIES:** That's a good question. I  
17 presume we're talking about in the mobile services space?

18 **MEMBER ASKANAS:** Yes, obviously. Yes.

19 **MR. M. DAVIES:** Can I ask a follow-up question  
20 on your hypothetical?

21 **MEMBER ASKANAS:** Okay.

22 **MR. M. DAVIES:** Do I have -- am I looking for a  
23 large-scale presence or a targeted presence, and do I have  
24 an established brand that I can leverage?

25 **MEMBER ASKANAS:** Look, you've done your

## COMPENDIUM PUBLIC

1 analysis in a particular context, so I'm obviously asking  
2 about the context in which those things are happening.

3 **MR. M. DAVIES:** Sure. Months to years.

4 I worked on the launch of Virgin Mobile, which  
5 was a completely new brand in the United Kingdom. There we  
6 had the advantage of leveraging the Virgin brand as a whole  
7 and that certainly helped a great deal.

8 I also worked on the entry and launch in the  
9 United States where we couldn't leverage the brand and it  
10 took significantly longer. It was a couple of years before  
11 we were getting significant awareness. So somewhere  
12 between a few months to get that sort of awareness and a  
13 couple of years.

14 **MEMBER ASKANAS:** Okay. The last little -- no,  
15 maybe two.

16 In your slide 38, you're presenting all kinds  
17 of reasons that the consolidation is not rational. So how  
18 you can explain the fact that, through the industry, we  
19 have incredible dynamics of actual consolidation going on  
20 between different companies across the world?

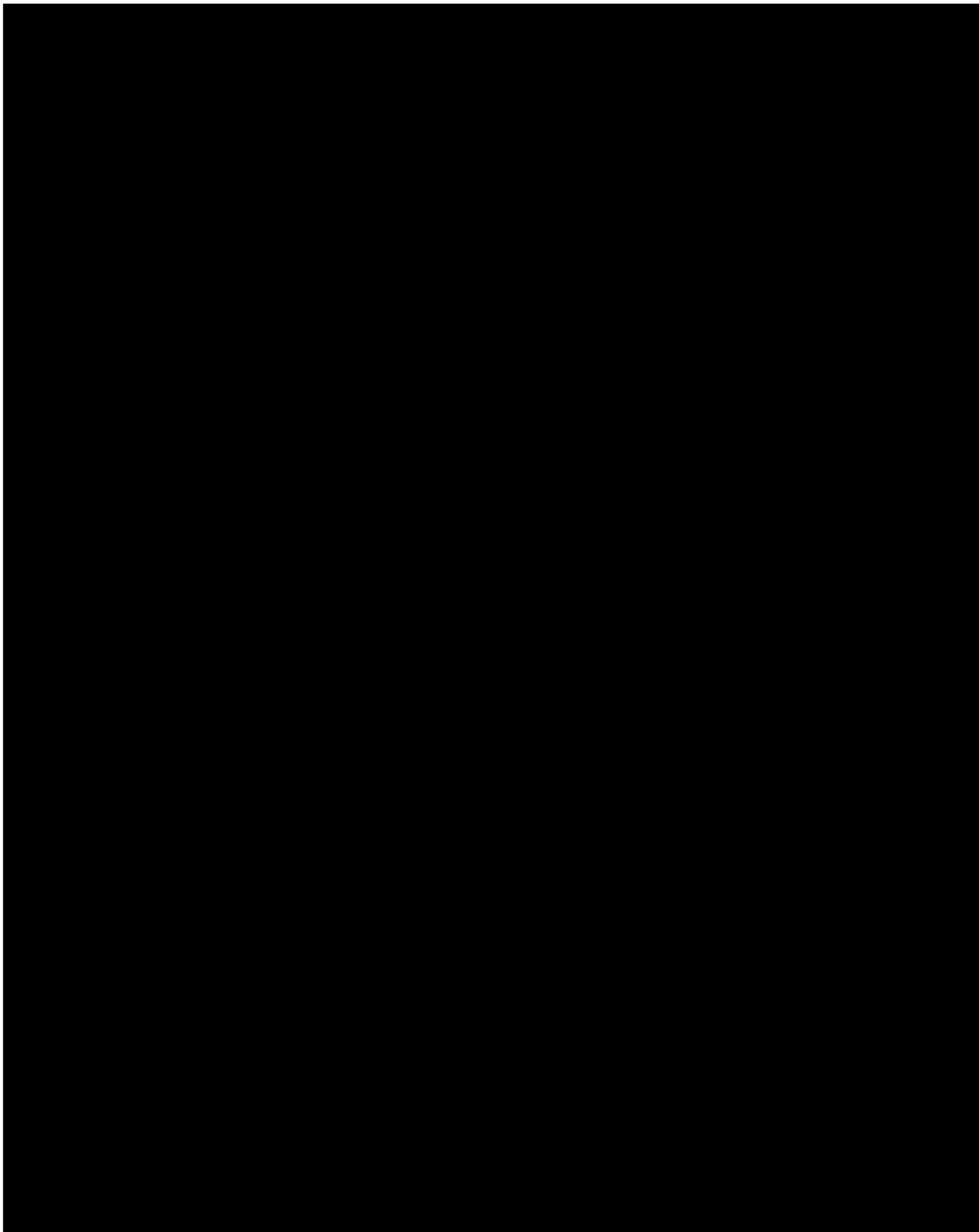
21 **MR. M. DAVIES:** In slide 38, if we're looking  
22 at the same thing --

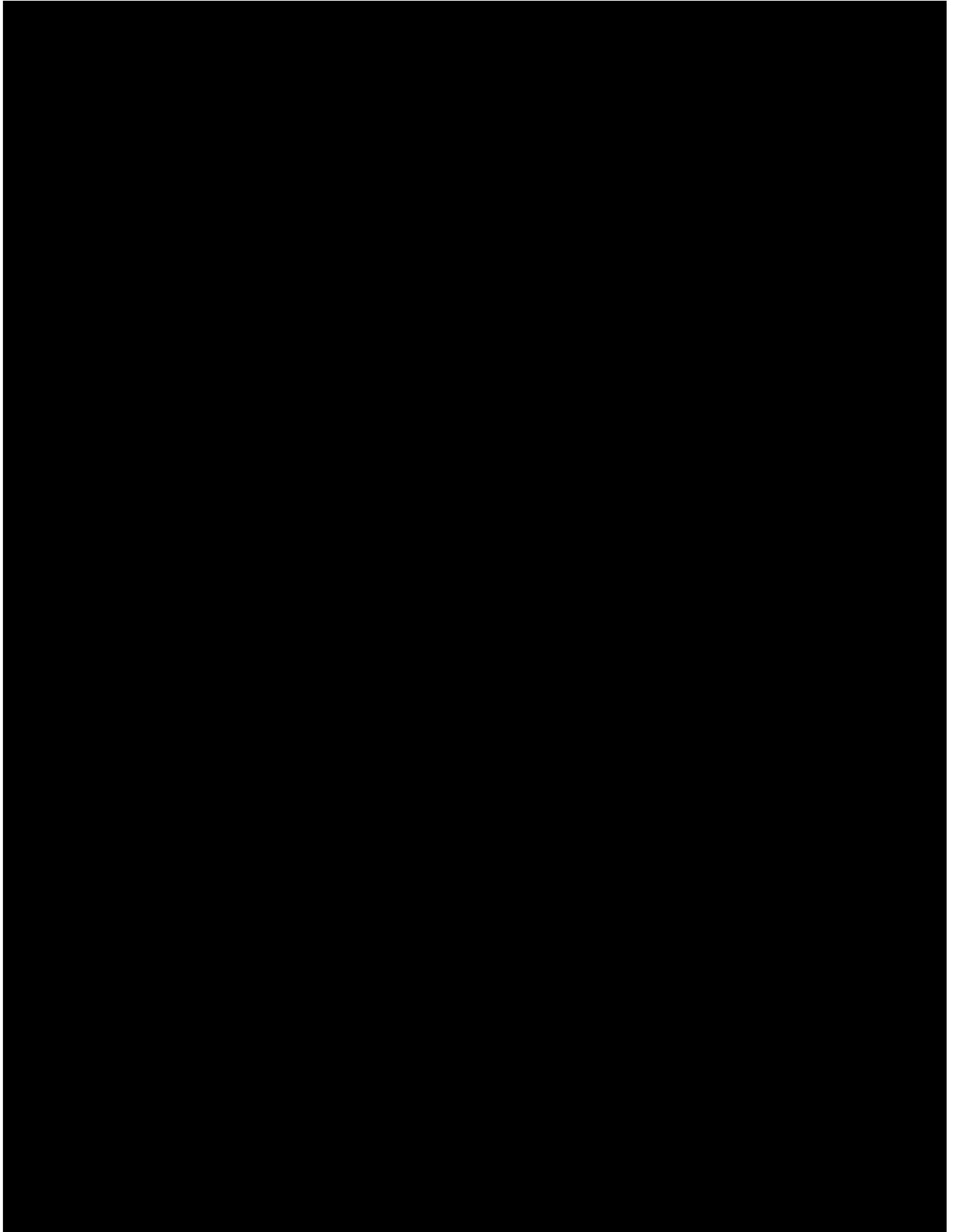
23 **MEMBER ASKANAS:** Thirty-eight (38), yeah.

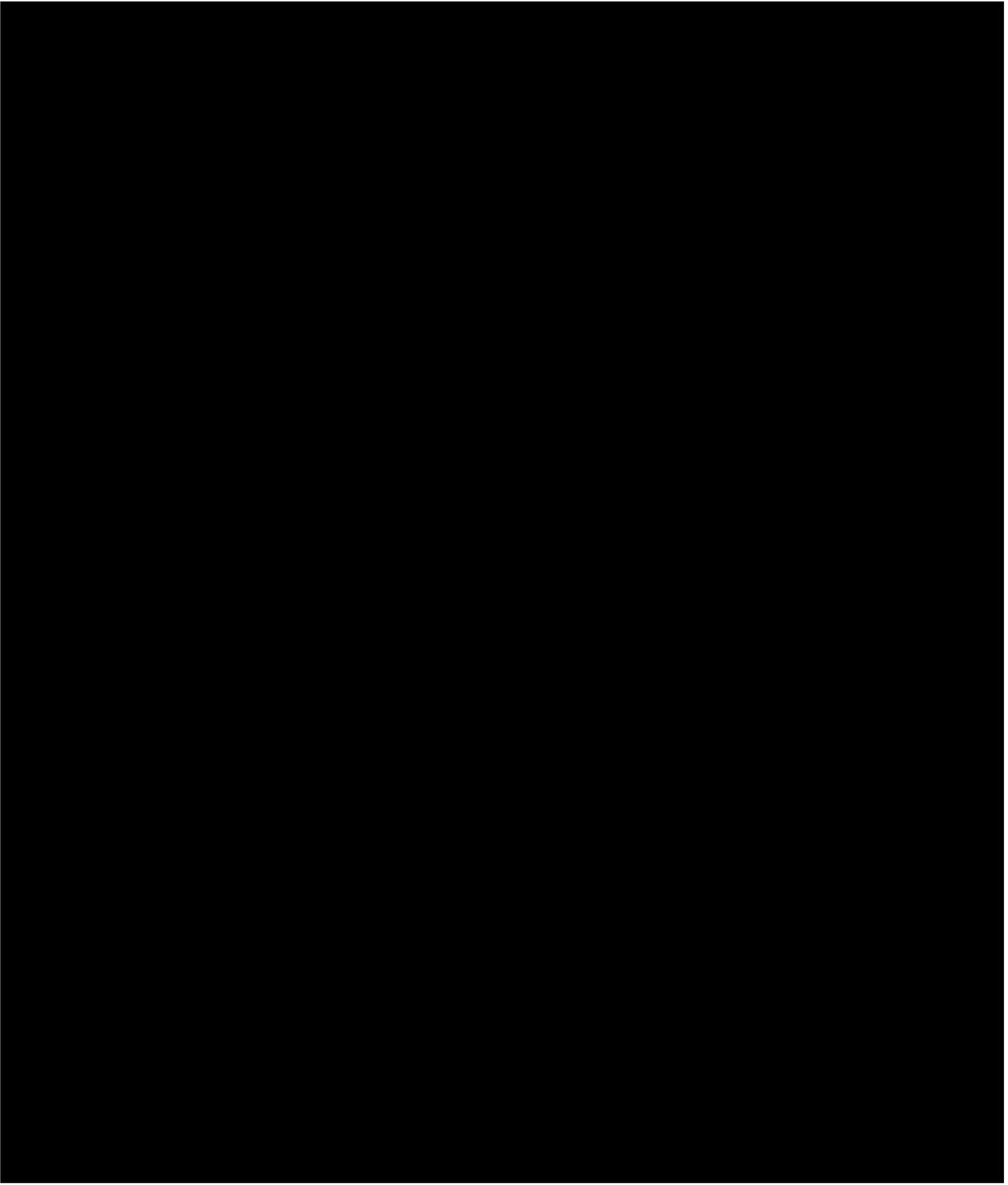
24 **MR. M. DAVIES:** Yes.

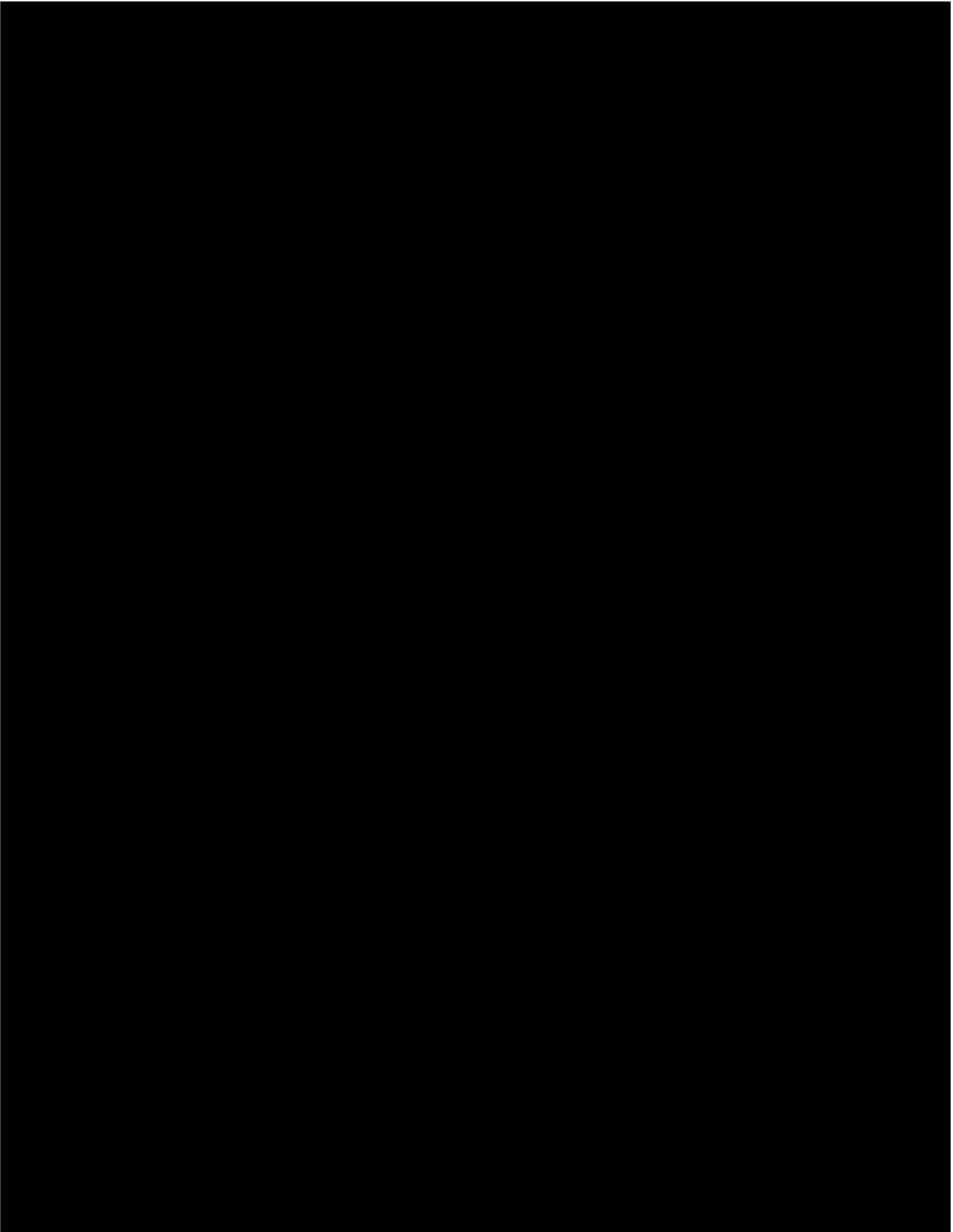
25 **MEMBER ASKANAS:** You put all those reasons why

**TAB – 5.E**









**TAB – 5.F**

## COMPENDIUM PUBLIC

1 --- Upon resuming at 11:49 a.m. /

2 Reprise à 11 h 49

3 **DEPUTY REGISTRAR:** So I've closed the breakout  
4 rooms to allow the Panel Members to join us. I will now  
5 have to reopen them to go back into a confidential session,  
6 so I ask that you wait a moment and I will confirm when we  
7 are ready to proceed in a confidential session.

8 **CHIEF JUSTICE CRAMPTON:** Why are we going back  
9 into "A"? I thought we were done.

10 **MR. LISUS:** There's one more document issue,  
11 Chief, that's a hybrid. And just because of timing, I'm  
12 going to suggest that -- I guess we could say this  
13 publicly, but we just do it in "A" so I can move through it  
14 and then aspects that are not confidential of the document  
15 and the testimony can be made public, but I'm in your  
16 hands. It's the last document.

17 **CHIEF JUSTICE CRAMPTON:** Let's go ahead. This  
18 is, as I said, hand-to-hand combat right now, but let's do  
19 it.

20 **MR. LISUS:** Yeah. Thank you.

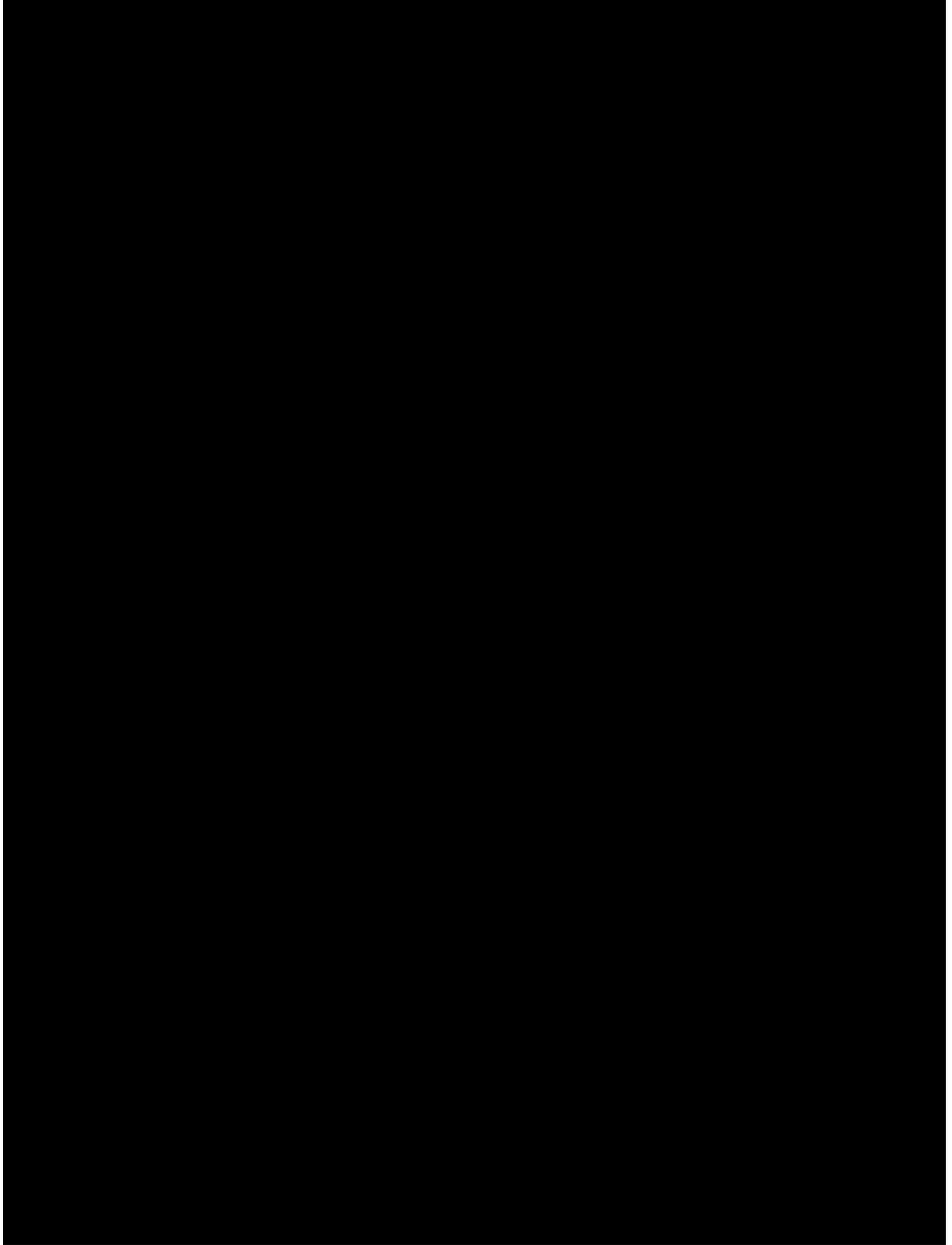
21 **DEPUTY REGISTRAR:** Please wait a moment.

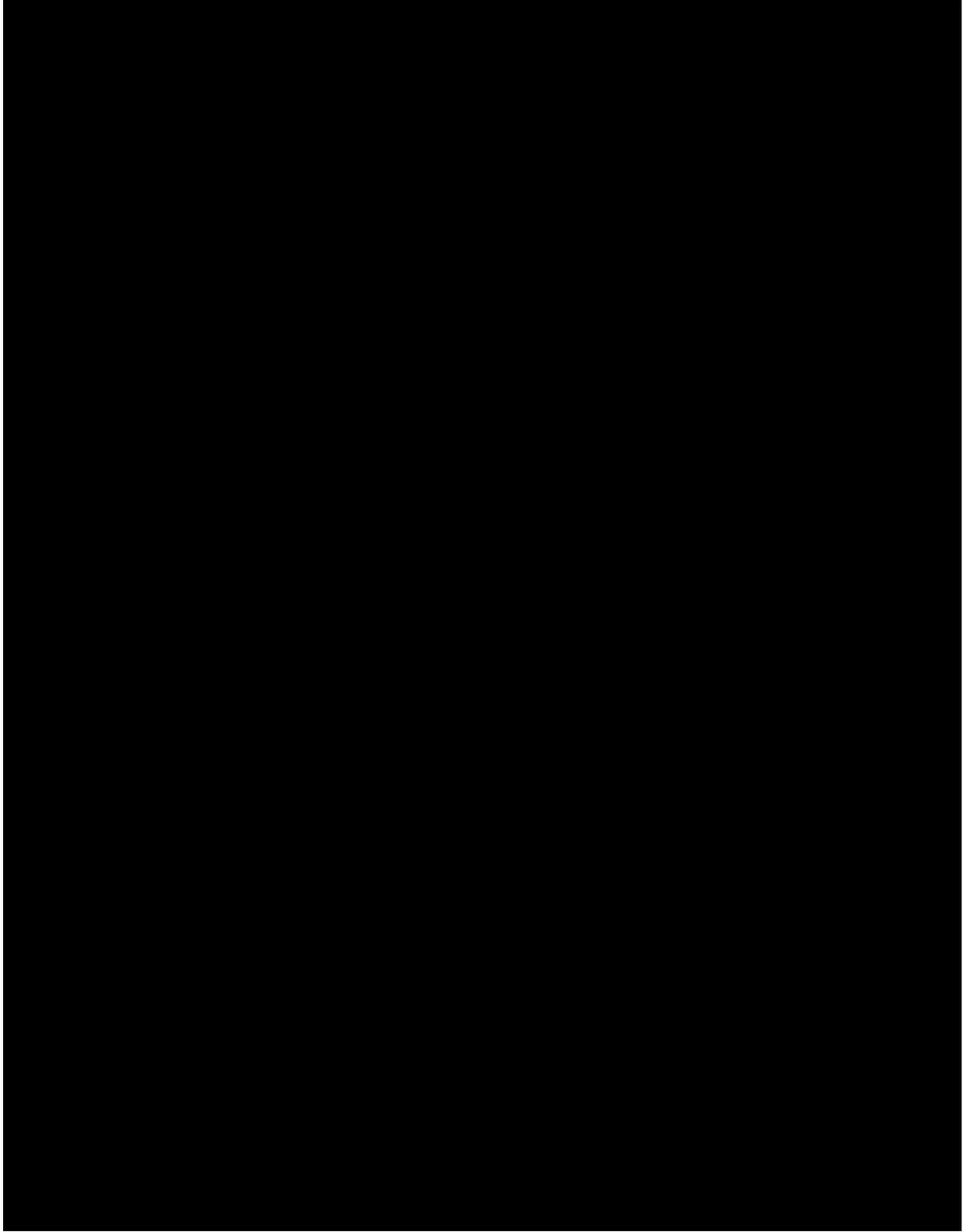
22 --- Upon recessing at 11:50 a.m., to resume

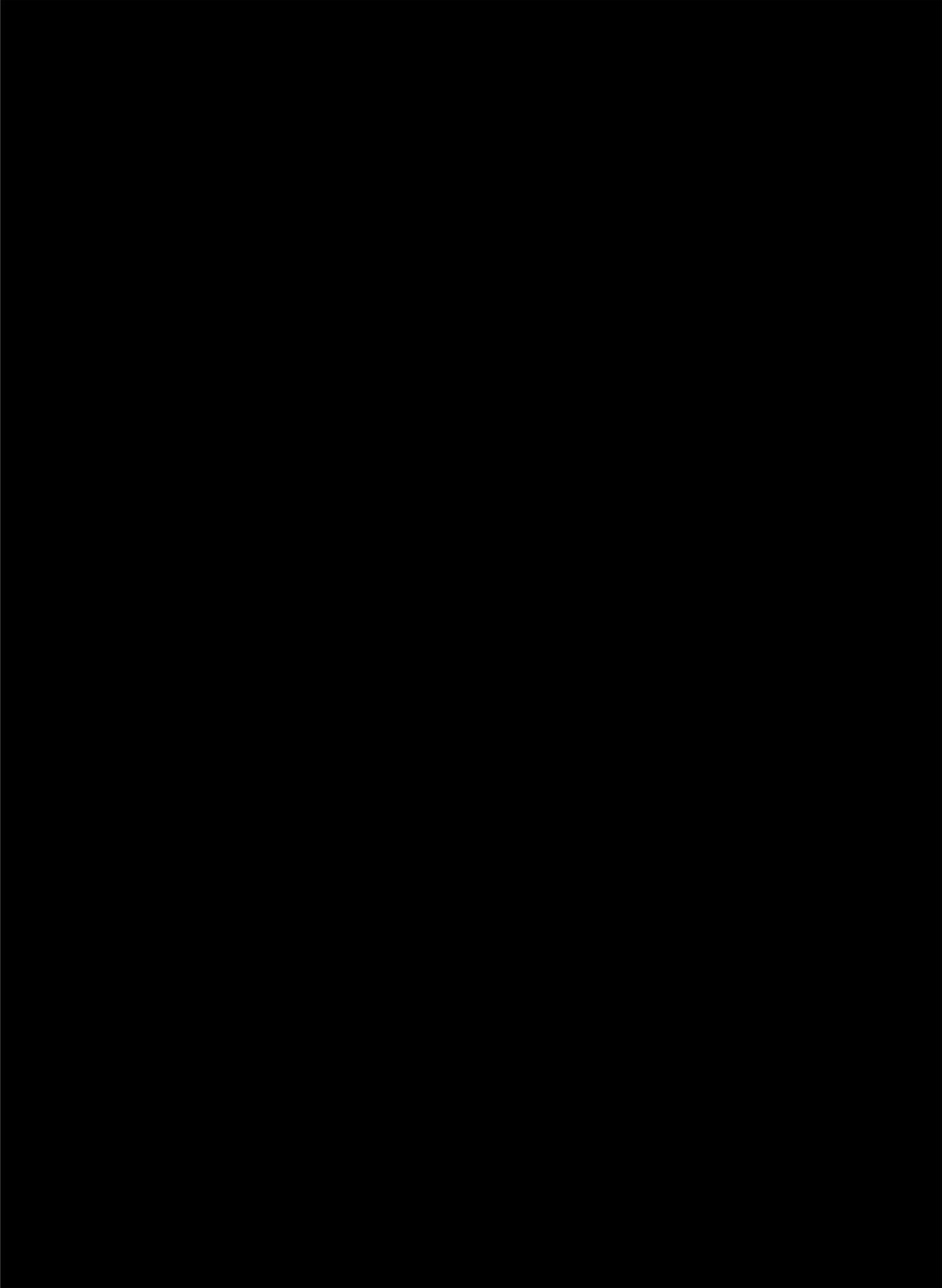
23 immediately in Confidential Level A /

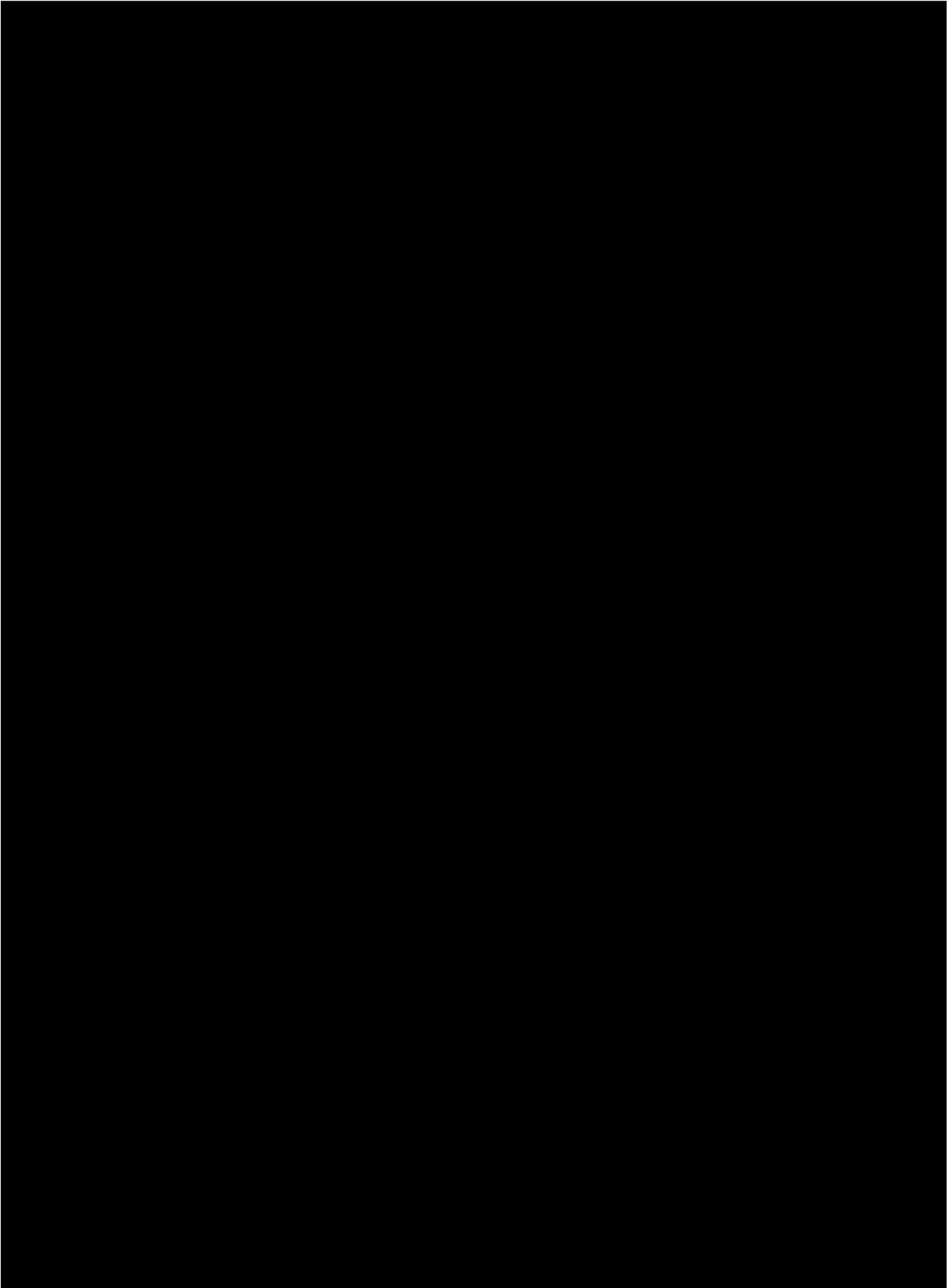
24 Suspension à 11 h 50 pour reprendre immédiatement

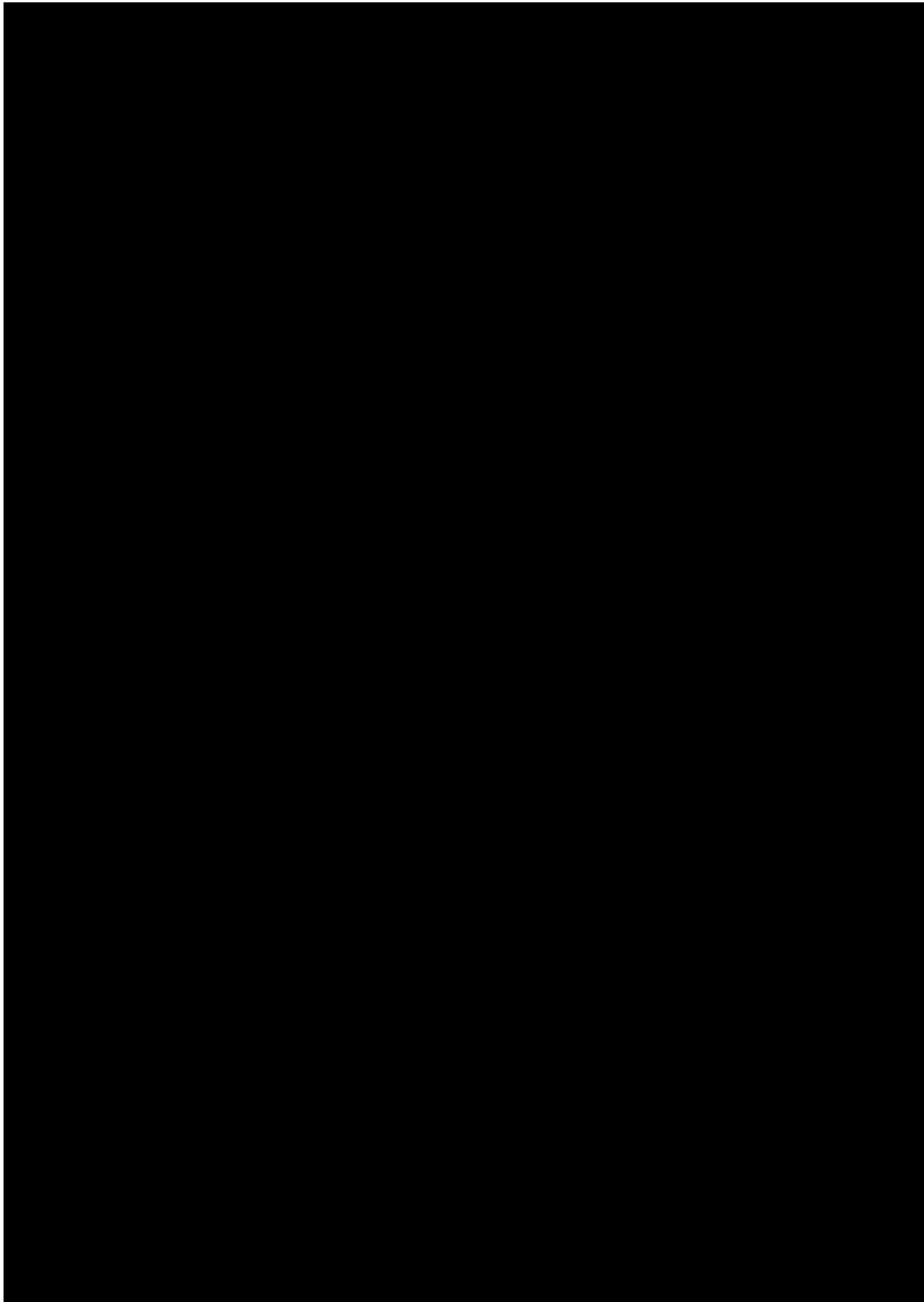
25 en session confidentielle niveau A

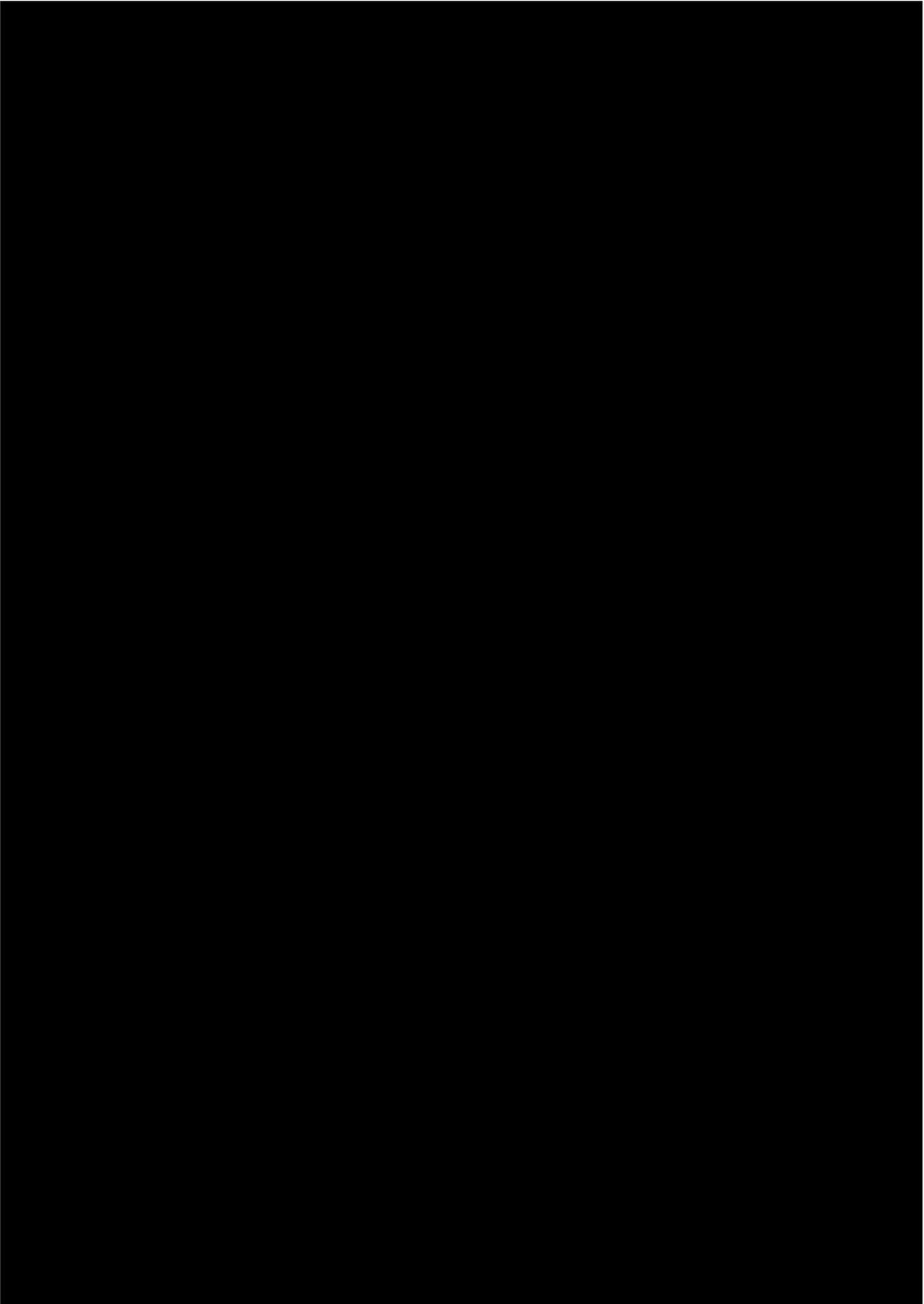


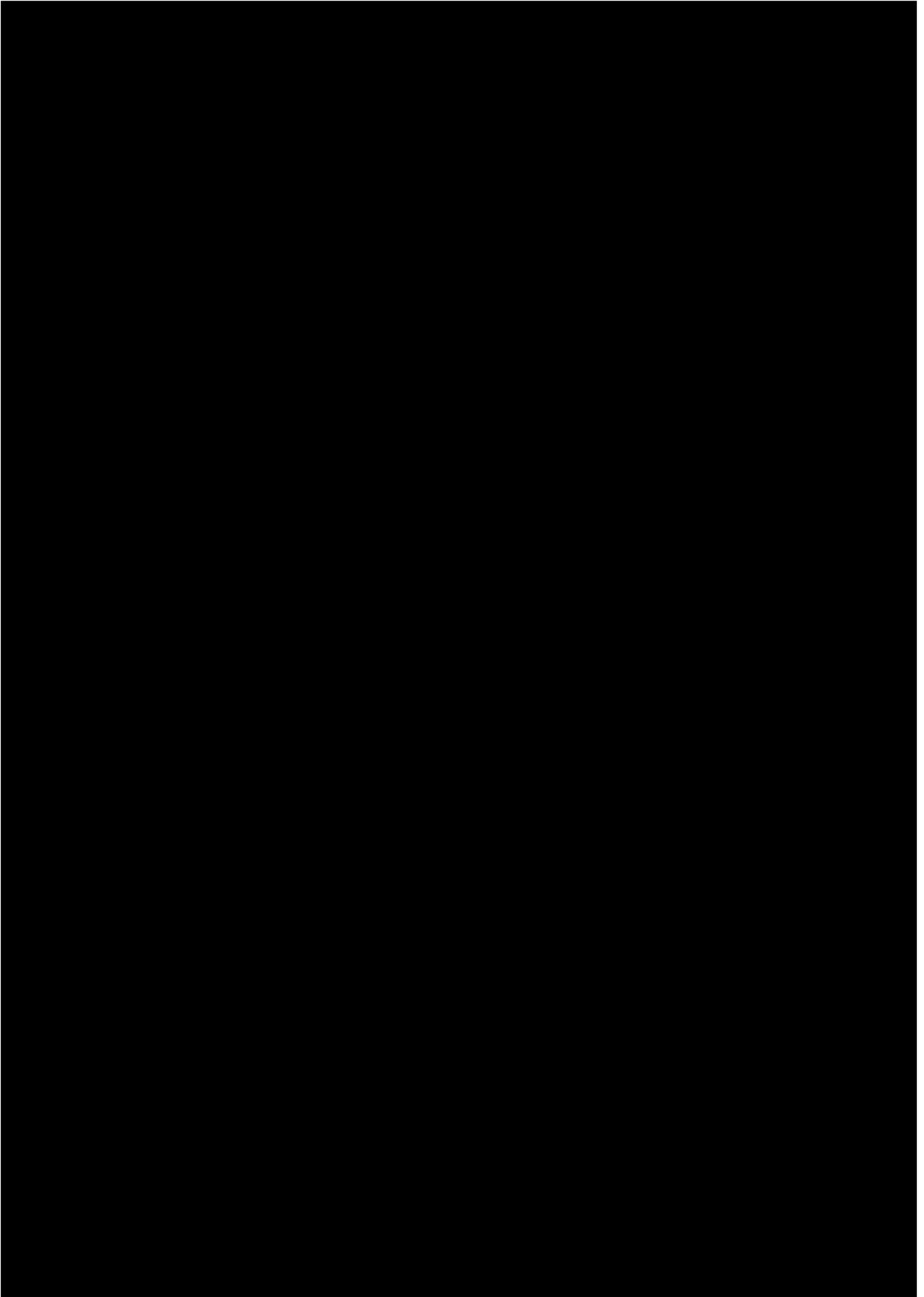


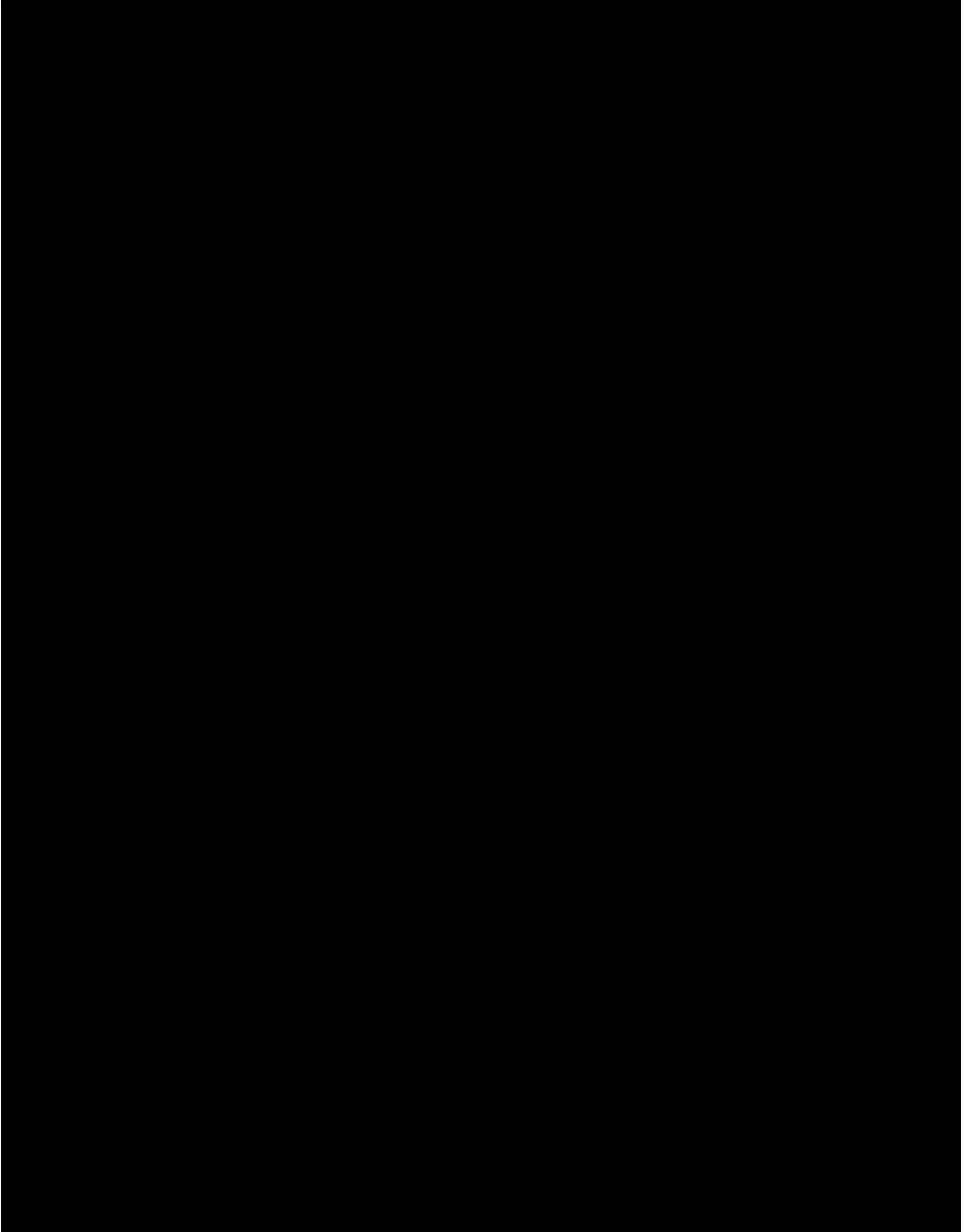


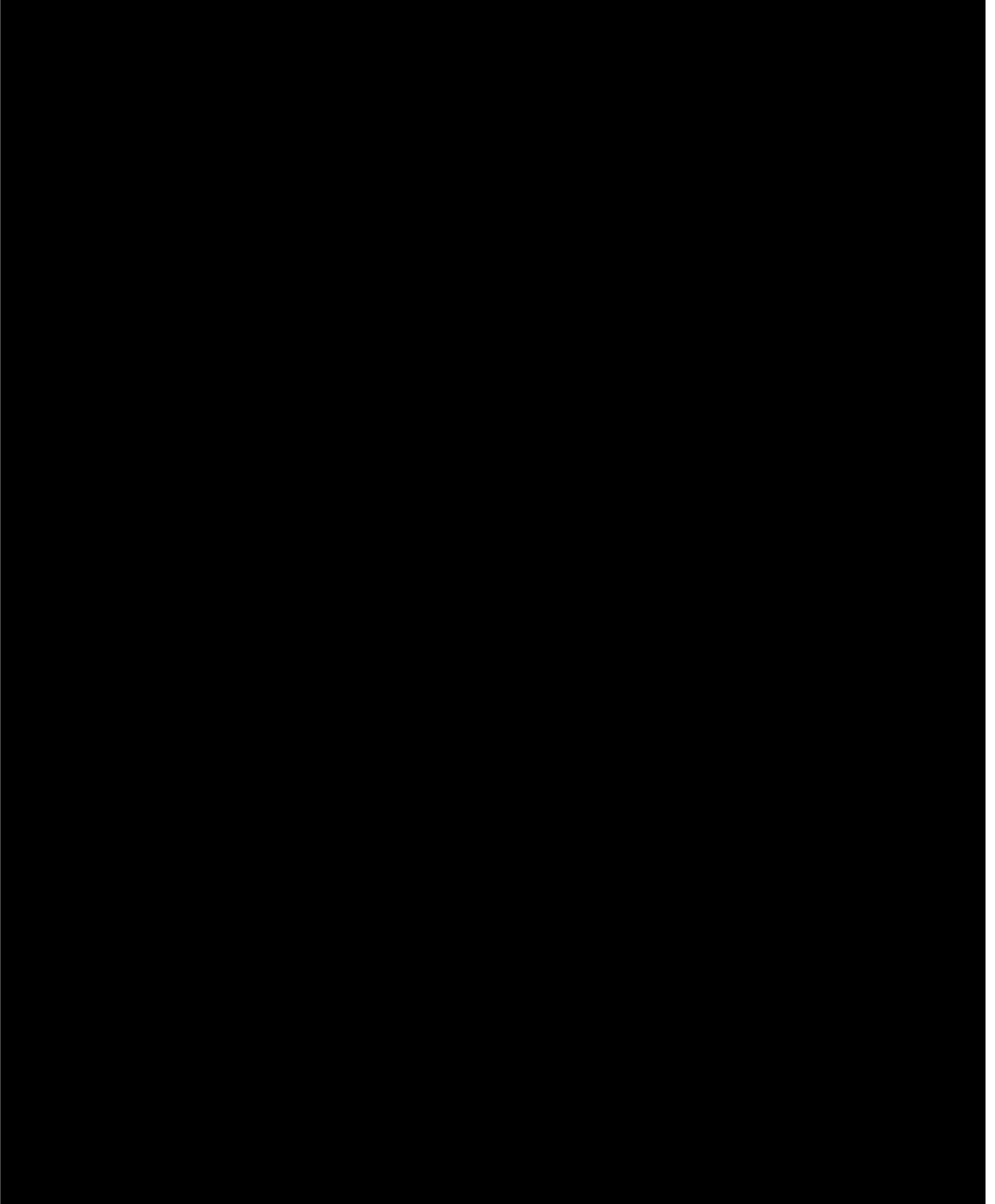












**TAB – 5.G**











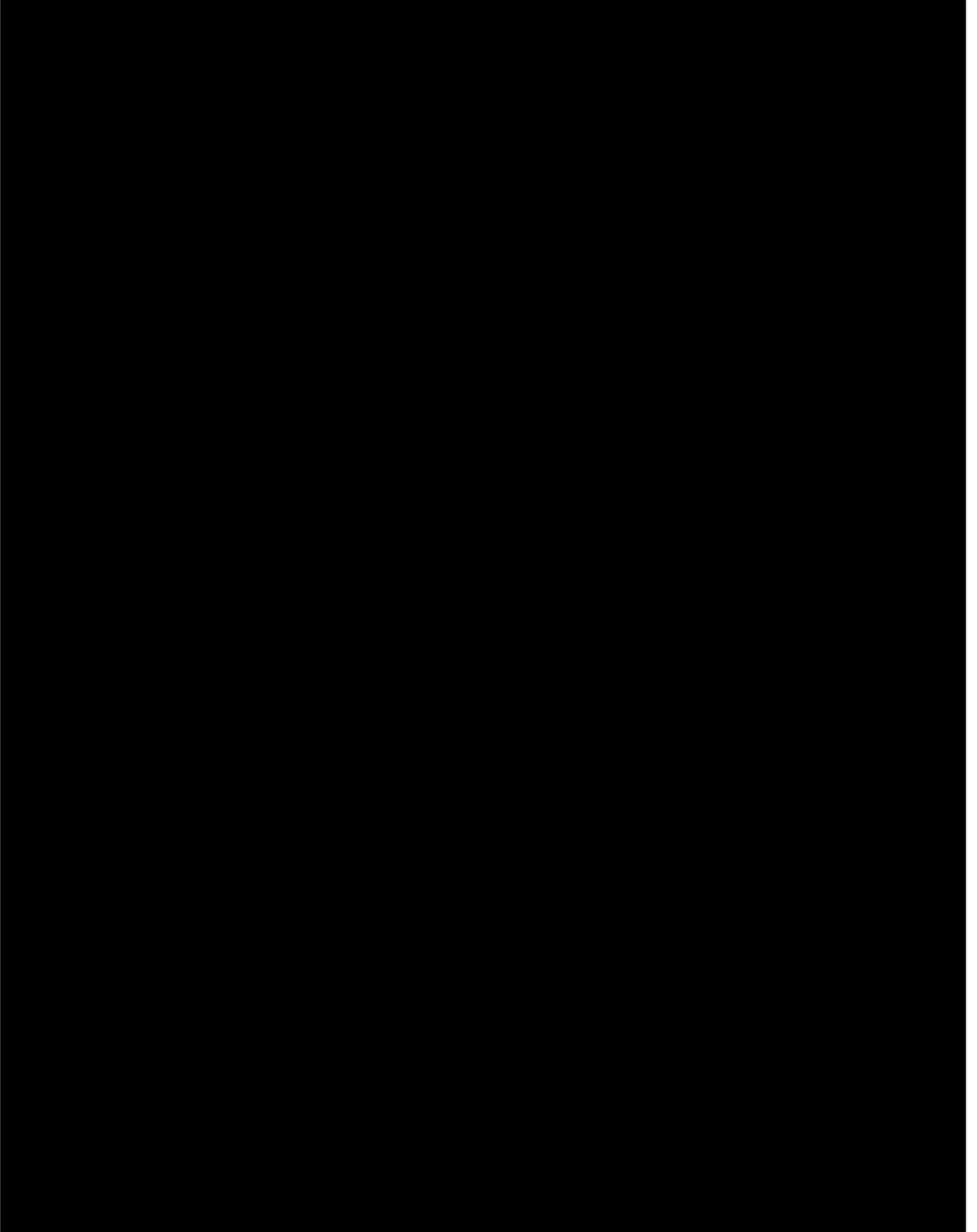








**TAB – 5.H**



## COMPENDIUM PUBLIC

1 --- Upon resuming at 3:50 p.m. /

2 Reprise à 15 h 30

3 **DEPUTY REGISTRAR:** We are back in a public  
4 session.

5 **CROSS-EXAMINATION BY MR. LIPPÉ (Cont'd)**

6 **MR. LIPPÉ:** Thank you very much.

7 Mr. McKenzie, in paragraph 7 of your witness  
8 statement, you mention that the features of network  
9 resiliency that Rogers have and had at the time and your  
10 network architecture would not have prevented the July 8<sup>th</sup>  
11 outage. Is that correct?

12 **MR. MCKENZIE:** That is correct.

13 **MR. LIPPÉ:** And in the paragraph 6, so just  
14 prior to this one, you mentioned that all telecommunication  
15 providers in Canada operate on the same basis of a  
16 converged wireless and wireline core. Is that correct?

17 **MR. MCKENZIE:** That is correct.

18 **MR. LIPPÉ:** All right. My question to you, Mr.  
19 McKenzie, is that if all telecommunication providers  
20 operate the same way, isn't that proof that your features  
21 were inadequate for redundancy and resiliency since the  
22 other providers don't experience the depth and breadth of  
23 the July 8<sup>th</sup> outage?

24 **MR. MCKENZIE:** No, and we'll explain.

25 So once again, the common design that has been

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1 in place for years is completely separate access. So the  
2 access network -- Rogers completely separate wireless and  
3 wireline in our access network very similar to Bell. We  
4 all converge to a common IP core.

5 What happened in our instance on July 8<sup>th</sup> was an  
6 unprecedented event. My point being, there was a filter  
7 that was removed. It was the result of a change. And it  
8 essentially created a flood scenario into the core of the  
9 network.

10 What is unique about the failure is the way the  
11 equipment manufacturer operated, and it failed. For  
12 clarity, there are three manufacturers in the world that  
13 have the scale to build a network of our size similar to  
14 Bell and similar to Telus. Those three vendors are the  
15 only vendors that actually you can build this scale of  
16 network.

17 In this particular case, the interoperability  
18 between two vendors and the way they implemented created  
19 that scenario that the vendor in the core of the network,  
20 the actual devices went into a failure mode that caused a  
21 propagation.

22 The reason that that's so important is that  
23 same scenario can absolutely happen in any converged  
24 network, whether it was, in our case, a coding error,  
25 whether it's malicious, or whether it's a threat actor from

## COMPENDIUM PUBLIC

1 the outside. The point being, when you have a common  
2 converged point in the network, and in this case in the  
3 core of the network, we now know and what we've learned  
4 through this the failure mode of the equipment is where the  
5 root cause was as a result of the coding change.

6 That can happen in any service provider network  
7 with a common converged core. That's what was  
8 unprecedented about this particular instance and why it is  
9 so -- so much a black swan or whatever we wish to call it.  
10 It was a very unique unprecedented situation.

11 MR. LIPPÉ: Very well. You also reference a  
12 little bit later the paragraph 16 of Mr. Howe's witness  
13 statement. I think you address that at paragraph 5 of your  
14 own witness statement.

15 MR. MCKENZIE: That's correct.

16 MR. LIPPÉ: Is that correct?

17 MR. MCKENZIE: That's correct, yes.

18 MR. LIPPÉ: Madam Registrar, could we please  
19 bring to the screen P-A-112? It's the public version of  
20 Mr. Howe's witness statement, and more particularly,  
21 paragraph 16.

22 All right. So Mr. McKenzie, I trust that you  
23 recall having seen this paragraph?

24 MR. MCKENZIE: Yes.

25 MR. LIPPÉ: Very well.

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1                   So Mr. Howe suggests a number of things of how  
2 they do things, and he says:

3                   "First, our wireline and wireless  
4 networks use different network  
5 infrastructure so that a major  
6 disruption on the wireline network will  
7 not create an outage on the national  
8 wireless network."

9                   Isn't it correct to say, Mr. McKenzie, that  
10 Rogers is committed to do that in the future? And I'm  
11 referencing Mr. Woodhead's letter.

12                   **MR. MCKENZIE:** No. What Mr. Howe's referring  
13 to here is identical to our network, which is you have to  
14 separate the access layer of the network. The access layer  
15 of both our networks are completely separate wireless and  
16 wireline, and what was missing in here was that where the  
17 common converged point was, Mr. Howe missed explaining that  
18 is what we call the IP core.

19                   So the way I would describe, you have two  
20 separate networks, wireless and wireline. They flow  
21 traffic through a converged IP core.

22                   What we've committed to do and what we  
23 committed to the CRTC is to actually segment the core of  
24 the network, the IP core, so that I have a dedicated core  
25 for wireless and a dedicated core for wireline. That does

**TAB – 5.1**

## COMPENDIUM PUBLIC

1 ones you just quoted are from one of the networks that we  
2 weren't looking at in terms of our examination.

3           So prior to this outage and the information  
4 that became available as a result of it, there was no  
5 reason to think that it was an important factor that we  
6 should take into account.

7           **MR. SMITH:** Okay. Sir, you've had three and a  
8 half months since July 8<sup>th</sup> to do an analysis and it's not in  
9 your report; correct?

10           **MR. M. DAVIES:** I've done an analysis of the  
11 impact of it, but you're now asking a very specific  
12 empirical analysis.

13           **MR. SMITH:** Yes. An empirical analysis that --  
14 an empirical --

15           **MR. M. DAVIES:** Could I finish?

16           **MR. SMITH:** Go ahead.

17           **MR. M. DAVIES:** You made a specific request for  
18 an empirical analysis of the future impact on subscribers  
19 of what an outage would have been. In order to do such a  
20 prediction, I would have needed to do an enormous amount of  
21 primary customer research involving thousands or tens of  
22 thousands of subscribers as they started to churn because,  
23 for instance, churn takes a while. So we're now looking at  
24 the next time somebody considers their purchase, what is  
25 the likelihood that that outage will lead them to

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1 subsequently switch carriers, taking into a variety -- a d  
2 whole variety of other confounding factors.

3 **MR. SMITH:** Right. And your --

4 **MR. M. DAVIES:** That's an extraordinarily  
5 time-consuming, difficult and expensive analysis involving  
6 at least hundreds and probably thousands of hours of  
7 effort.

8 **MR. SMITH:** And you didn't do it.

9 **MR. M. DAVIES:** I didn't do it.

10 **MR. SMITH:** Okay. Now, sir, as I understood  
11 your testimony earlier today, you say you look -- it's your  
12 practice to look for confirmatory and non-confirmatory  
13 evidence after you've put together a report; is that  
14 correct?

15 **MR. M. DAVIES:** Yes.

16 **MR. SMITH:** Okay. And you are aware, sir, that  
17 Rogers reports its financial results publicly? You're  
18 aware of that?

19 **MR. M. DAVIES:** Yes.

20 **MR. SMITH:** And you're aware that there is a  
21 very large -- there is a community of financial analysts  
22 who are responsible for reviewing those financial reports  
23 and reporting their views to the investing public?

24 **MR. M. DAVIES:** I'm aware that such a community  
25 exists, but I place almost no credence in anything they

## COMPENDIUM PUBLIC

1 have to say.

2 **MR. SMITH:** Okay. So the answer to my question  
3 is you are aware that there are financial analysts that  
4 review and report on Rogers' financial reporting; correct?

5 **MR. M. DAVIES:** Yes, and unless they are  
6 independent analysts such as Arete Research in the U.K., I  
7 place no credence on their analysis.

8 **MR. SMITH:** Sir, can we please pull up  
9 ABD101190. Can we go to the PDF page 2?

10 This is a report from -- this is a report from  
11 November 9, 2022, and it's from BMO Capital Markets, Tim  
12 Casey, chartered financial analyst. And if you look at the  
13 bottom, forecasts and valuation:

14 "Our forecasts are substantively  
15 unchanged. We do not expect any  
16 lingering issues from the outage."

17 Do you see that?

18 **MR. M. DAVIES:** I do.

19 **MR. SMITH:** Okay. Let's turn to PDF page 15,  
20 please? And this is a report from Canaccord Canadian  
21 Equity Research, please look at the highlighted portion:

22 "The impact on its [Rogers wireless  
23 brand]...is fading, essentially  
24 allaying fears of more sustained damage  
25 to the brand/pricing economics."

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1 Do you see that as well?

2 **MR. M. DAVIES:** I understand that's the opinion  
3 of a financial analyst.

4 **MR. SMITH:** Okay. Page 29 of the PDF, please?  
5 This is a research report, same day -- they all came out  
6 the same day as Rogers reporting comes out.

7 If you look down the page:

8 "No lingering effect from the outage:  
9 The network outage appeared to have had  
10 an isolated effect during Q3, with the  
11 company rebounding to the wireless  
12 trends observed prior to the outage and  
13 no lingering effects...in either the  
14 consumer or business segments."

15 Do you see that?

16 **MR. M. DAVIES:** I do. That is that analyst's  
17 opinion.

18 **MR. SMITH:** And you're aware, sir, that that  
19 report is based on Rogers' reporting with respect to its  
20 growth in net adds? You're aware of that?

21 **MR. M. DAVIES:** Yes, I am.

22 **MR. SMITH:** Okay. Let's go to the next page,  
23 39.

24 With the July outage -- this is a report,  
25 sorry, for the record, from Desjardins dated November 10:

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1 "With the July outage in the rearview  
2 mirror, we see the RCI story as a  
3 cleaner and more derisked story than  
4 before earnings..."

5 And again, this is an opinion of a financial  
6 analyst having regard to Rogers' net adds in its wireless  
7 business; correct?

8 **MR. M. DAVIES:** Presumptively they're replying  
9 from the same underlying information from Rogers.

10 **MR. SMITH:** And you're aware, sir, that Rogers  
11 had positive net adds in the quarter? You're aware of  
12 that?

13 **MR. M. DAVIES:** Yes, I was aware the business  
14 was growing, I don't recall by how much.

15 **MR. SMITH:** All right, sir. Page 47 of the  
16 PDF. And this is an opinion, this is an analyst report  
17 from Mr. McReynolds dated November 9, 2022. We look down,  
18 Q4. Here we are:

19 "Q4/22 is tracking to our expectations  
20 with YoY growth across each of the  
21 three segments...[including] growth in  
22 the wireless network revenues and  
23 EBITDA...Bigger picture, we believe the  
24 Q4/22 outlook is indicative of Q3/22  
25 outage impacts that were largely

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1 contained to the quarter.”

2 Do you see that as well?

3 **MR. M. DAVIES:** I do indeed.

4 **MR. SMITH:** And again, positive net adds.

5 **MR. M. DAVIES:** Yes, indeed.

6 **MR. SMITH:** And, sir, you didn't refer to any  
7 of these analyst reports in your examination-in-chief, did  
8 you?

9 **MR. M. DAVIES:** No, and they're not  
10 inconsistent with my view, that competition and reliability  
11 became more salient, although the direct impact on Shaw  
12 appears to be fading, it's continuing, and that looking  
13 forward, the proposed merger reduces the potential  
14 competition on the basis of reliability. Everything that's  
15 said there is not inconsistent with what I said in my --

16 **MR. SMITH:** And consumers are coming to Rogers  
17 wireless business notwithstanding the outage you've  
18 referred to; correct?

19 **MR. M. DAVIES:** Correct. I understand amongst  
20 other things because Shaw has rebalanced its own degree of  
21 competitive intensity, and it has, as I understand, moved  
22 towards more of a profit maximizing and less of a  
23 growth-driving outlook, and that may impact on this as  
24 well.

25 **MR. SMITH:** Okay. Sir, setting aside your

**TAB – 5.J**

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to identify and address the root causes and to mitigate the impact to the customer base (e.g., through consumer credits).<sup>31</sup> Further, Mr. Davies does not note the publicly reported network outages that Bell and Telus had between 2019 and 2022.<sup>32</sup>

22. It is my understanding that Rogers took rapid actions to address the unexpected July 8, 2022 outage and did not experience significant consumer impacts. When asked about the July 8, 2022 outage's effect on Rogers' churn in the Q2 2022 earnings call, Rogers' CEO, Tony Staffieri, said that while there was an immediate impact on subscriber numbers following the outage, churn seemed to improve daily and Rogers did not feel the need to revise its initial earnings guidance for the year.<sup>33</sup> Had the outage been as "salient" to consumers as Mr. Davies suggests, one would expect to see a significant and sustained negative impact on Rogers' subscriber numbers and therefore revisions to end-of-year guidance.

23. Second, Mr. Davies speculates about the potential impact of the outage on Freedom, assuming the Proposed Transaction is approved. He writes that

[REDACTED]

Mr. Davies goes on to note that "Rogers' plan to attempt to mitigate future outages is insufficient in the face of the additional risk that comes from eliminating a separate independent network that could have and would have inherently provided redundancy."<sup>35</sup> Although Mr. Davies deems Rogers' plan "insufficient," he does not review, consider, or comment on the details of the plan nor how it is "insufficient."

<sup>31</sup> Rogers Q2 2022 Earnings Call, starting at p. 20 (Rogers Q2 2022 Earnings Call - Rogers-Q2-2022-Earnings-Call-Transcript.pdf). Rogers CFO, Glenn Brandt, noted that while call center volume was high immediately following the outage, Rogers was "quick to respond with customers on the five-day service credit" which allowed call center volume to "settle off." Rogers' experience would appear to be consistent with temporary, as opposed to sustained, impacts from an outage.

<sup>32</sup> [Daily Hive News, Telus internet outage affects 1,300 customers across parts of Metro Vancouver September 16, 2019, \(Telus internet outage affects 1,300 customers across parts of Metro Vancouver News.pdf\)](#); [BlogTO, Bell and Telus suffer massive network and service outage in Ontario, August 6, 2020, \(Bell and Telus suffer massive network and service outage in Ontario.pdf\)](#); [Victoria Buzz, Telus and Bell customers across Western Canada reported cell service outages this morning, September 2, 2021, \(Telus and Bell customers across Western Canada reported cell service outages this morning.pdf\)](#); [MobileSyrup, Telus confirms eastern Canada network outage restored \[Update\], October 6, 2021, \(Telus confirms eastern Canada network outage restored \[Update\].pdf\)](#); [Penticton Herald, Governments call out telecom giant Bell: Frustration continues over company's failure in rural N.S., October 12, 2022, \(Governments call out telecom giant Bell, Frustration continues over company's failure in rural N.S. - Spare News - pentictonherald.ca.pdf\)](#)

<sup>33</sup> Rogers Q2 2022 Earnings Call, p. 9 (Rogers Q2 2022 Earnings Call - Rogers-Q2-2022-Earnings-Call-Transcript.pdf)

<sup>34</sup> Davies Report (Sept. 23), ¶ 218

<sup>35</sup> Davies Report (Sept. 23), ¶ 222

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24. Additionally, while Mr. Davies argues that the outage “will have made the reliability of wireless networks a more salient factors in the choices that customers make about their wireless service providers,”<sup>36</sup> it is not typical for consumers to make purchasing decisions based on (much less be aware of) the relationship between wireless providers and their wireline backhaul providers; it would therefore be unlikely that wireless consumers would reconsider subscribing to Freedom under Videotron because Videotron receives much of its backhaul from Rogers.

25. Importantly, Mr. Davies does not comment at all on the following steps that have been taken in relation to the outage to mitigate the risk of future network disruption:

- a. In response to the outage, Canada’s Minister of Innovation, Science and Industry, stated that the major Canadian wireless providers reached a Memorandum of Understanding to allow them to work more effectively together in the event of an emergency to “ensure that the 9-1-1 system is not vulnerable to an outage or other network disruption.”<sup>37</sup>
- b. Rogers is also taking the following network resiliency measures:
  - a. A [REDACTED] separation of Rogers’ wireless and wireline networks; and
  - b. Reviewing internal processes for reviewing, testing and implementing code during network maintenance updates.<sup>38</sup>

26. Based on my industry experience and my understanding of Roger’s mitigating measures, the outage has very little relevance on competitive dynamics in the market.

#### **4. Mr. Davies’ opinion overstates the benefits of Freedom with Shaw and understates the benefits of Freedom with Videotron**

27. Mr. Davies states “the competitive strength of the proposed divested Freedom Mobile entity if acquired by Videotron will be greatly reduced.”<sup>39</sup> He opines that this disadvantage will arise as a result of: [REDACTED]

[REDACTED]<sup>40</sup> I do not agree with Mr. Davies’ views and analysis on each of these points, as discussed below.

<sup>36</sup> Davies Report (Sept. 23), ¶ 216

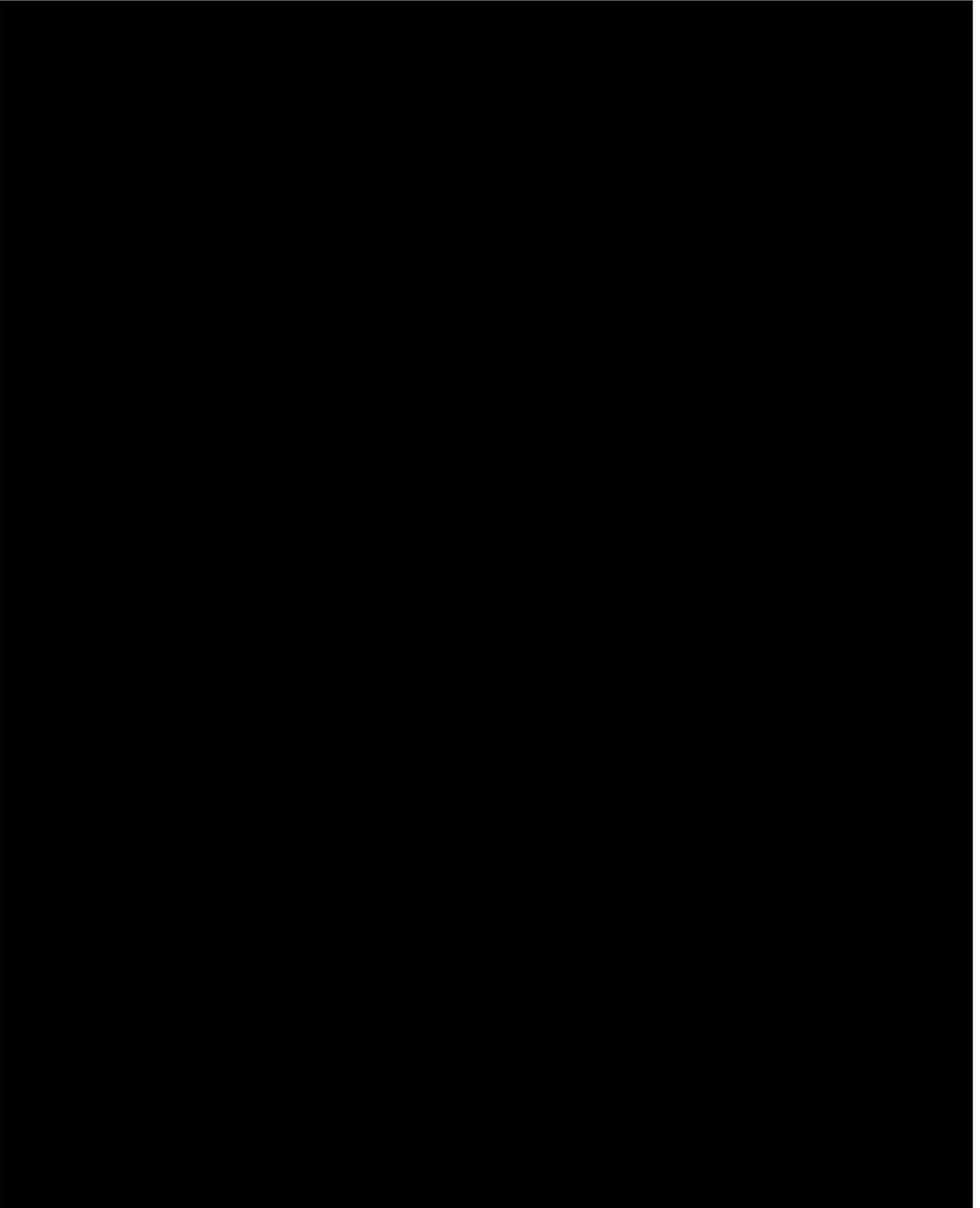
<sup>37</sup> Affidavit of Ron McKenzie, October 20, 2022 (Affidavit of Ron McKenzie October 20, 2022.docx), ¶ 11; [ISED, Statement from Minister Champagne on Canada’s Telecommunications Reliability Agenda following Rogers’ outage on July 8, 2022, September 7, 2022 \(Statement from Minister Champagne on Canada’s Telecommunications Reliability Agenda following Rogers’ outage on July 8, 2022 - Canada.ca.pdf\)](#)

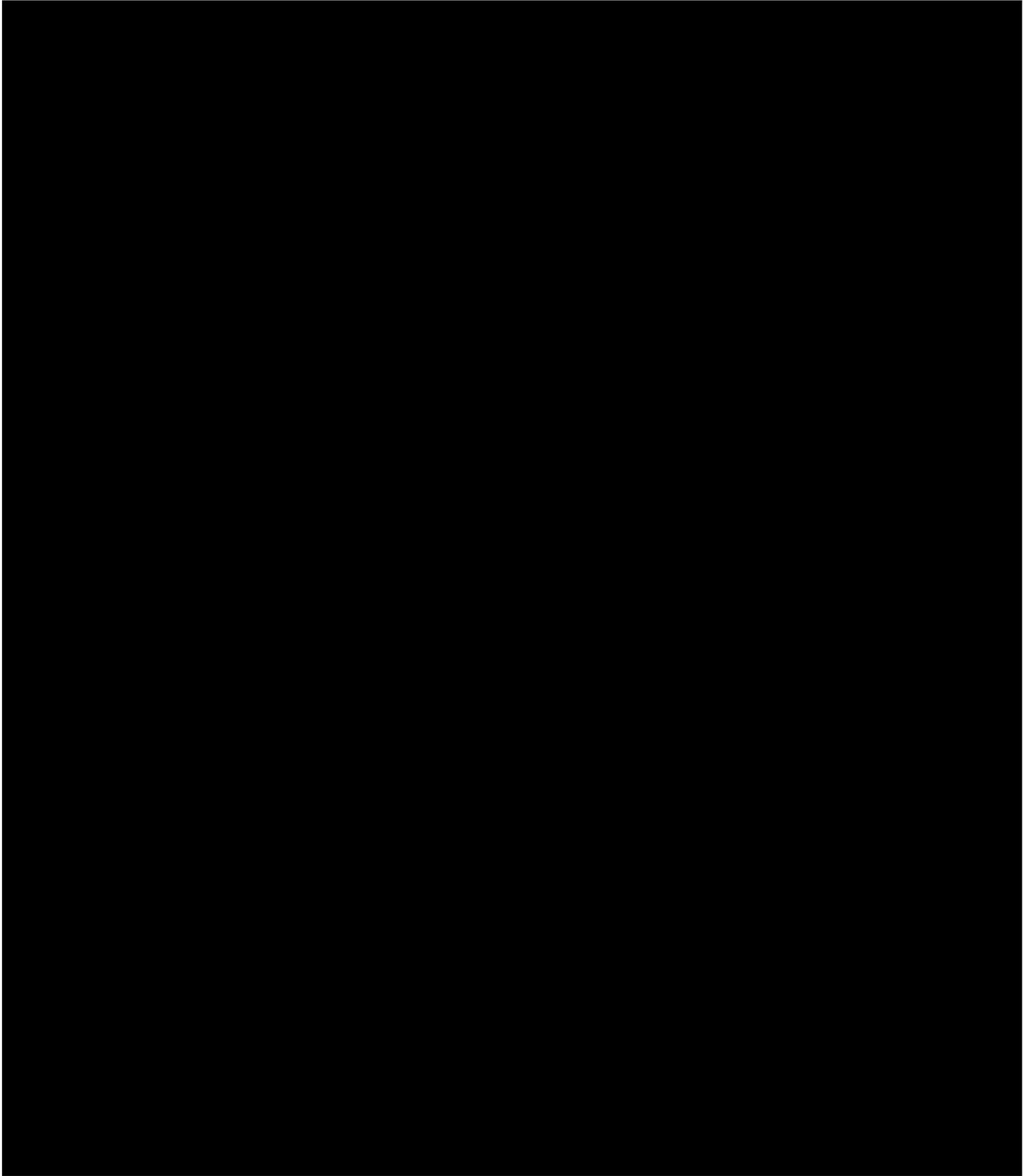
<sup>38</sup> Rogers Q2 2022 Earnings Call, pp. 13-14 (Rogers Q2 2022 Earnings Call - Rogers-Q2-2022-Earnings-Call-Transcript.pdf); Affidavit of Ron McKenzie, October 20, 2022 (Affidavit of Ron McKenzie October 20, 2022.docx), ¶ 11

<sup>39</sup> Davies Report (Sept. 23), ¶ 259

<sup>40</sup> Davies Report (Sept. 23), ¶¶ 228-230

**TAB – 5.K**





**TAB 6 – ECONOMIC EVIDENCE**

**TAB – 6.A**

# COMPENDIUM PUBLIC

Competition Tribunal



Tribunal de la concurrence

**PUBLIC VERSION**

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18

File No.: CT-2019-005

Registry Document No.: 296

**IN THE MATTER OF** an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

**Commissioner of Competition**  
(applicant)

and

**Parrish & Heimbecker, Limited**  
(respondent)



Dates of hearing: January 6-7, 11-15, 19-21, and 25 and February 3-4, 2021

Before: D. Gascon J. (Chairperson), A.D. Little J. and Ms. R. Samrout

Date of Reasons for Order and Order: October 31, 2022

**REASONS FOR ORDER AND ORDER**

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[15] Subsection 92(2) provides that the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially “solely on the basis of evidence of concentration or market share.” However, the Tribunal has found that these two factors nonetheless may help in assessing whether or not a merger or proposed merger could result in a substantial lessening or prevention of competition (*The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 (“*Tervita CT*”) at para 360, rev’d 2013 FCA 28, rev’d 2015 SCC 3; *The Commissioner of Competition v Superior Propane Inc*, 2000 Comp Trib 15 (“*Superior Propane I*”) at paras 126, 304–313; *Director of Investigation and Research v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289 (Comp Trib) (“*Hillsdown*”) at pp 315–316, 318).

[16] Section 93 sets out a non-exhaustive list of market-specific factors that the Tribunal may consider in determining whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. These factors include the following: foreign products as effective competition; failing firm considerations; availability of acceptable substitutes; removal of a vigorous and effective competitor; barriers to entry; remaining effective competitors; and change and innovation. The list is open-ended, as it includes at paragraph (h) “any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.”

[17] The Act also carves out certain exceptions to the application of the Tribunal’s section 92 remedial powers. One such exception, which is relevant in this case, is what is commonly named the “efficiencies defence,” in section 96 of the Act. This exception provides that the Tribunal shall not make an order under section 92 if it finds that the merger in respect of which the application is made is likely to bring about efficiency gains which are greater than and likely to offset the anti-competitive effects resulting from the merger.

[18] The Commissioner bears the burden of satisfying the elements of section 92, and the Tribunal must make a positive determination in respect of those elements before it may issue a remedial order. However, as will be discussed in more detail below, P&H bears most of the burden of proof under the efficiencies defence in section 96.

[19] The burden of proof is the civil standard, that is, the balance of probabilities. In that respect, the Tribunal remains guided by the principles established in *FH v McDougall*, 2008 SCC 53 (“*McDougall*”), where the Supreme Court of Canada (“SCC”) held that there is only one civil standard of proof in Canada, the balance of probabilities (see also *Tervita SCC* at para 66). Speaking for a unanimous court, Justice Rothstein stated in his reasons that the only legal rule in all cases is that “evidence must be scrutinized with care by the trial judge” and that “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test” (*McDougall* at paras 45–46). In all civil cases, the trier of fact “must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred” (*McDougall* at para 49).

[20] The full text of the relevant provisions of the Act is reproduced in Schedule “A” to these Reasons.

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report to be filed later and that otherwise, no substantive answers would be provided at discovery;

- Mr. Heimbecker repeated that position in his subsequent responses to undertakings and questions taken under advisement;
- However, P&H did not file an expert report concerning efficiencies;
- Mr. Heimbecker's reply witness statement, delivered over two months before the hearing started, set out evidence to advance P&H's position on efficiencies. However, it made no reference to any need for variable operating costs data from rival Elevators;
- P&H also did not raise any need for data after it received a copy of Mr. Harington Report, also more than two months before the hearing commenced. As noted above, this expert report referred directly to variable operating costs of other entities;
- P&H did not file a motion to the Tribunal seeking an order to compel the Commissioner to obtain the data; and
- The issue did not come to light until Mr. Harington's cross-examination, near the end of the hearing.

[175] In these circumstances, the Tribunal finds it unrealistic to expect that the Commissioner would be or could have been aware that P&H required variable operating costs data of rival Elevators for its efficiencies defence. It was equally unrealistic to expect the Commissioner to be aware that P&H expected him to attempt to obtain that data either by request or under section 11 of the Act. Rather, the Tribunal finds P&H's position on the need for this data to be late-blooming and tactical, rather than based on a substantive need to support its position on efficiencies arising at the Virden Elevator.

[176] Exercising its discretion based on the evidence and arguments made, the Tribunal therefore declines to make any specific adverse inferences on issues related to efficiencies. To draw an adverse inference against the Commissioner in the present circumstances would be demonstrably unfair.

### C. Legal and evidentiary burden applicable to sections 92 and 96 of the Act

[177] The last preliminary issue that needs to be briefly addressed is the legal burden of proof in this Application. In its submissions, P&H suggested that the allocation of the burden of proof established by the SCC in *Tervita SCC* has left some questions unanswered regarding the Commissioner's burden under section 96 of the Act.

[178] With respect, the Tribunal disagrees.

[179] It is not disputed that, under section 92, the Commissioner bears the burden of proving that the merger will create, maintain, or enhance market power through the merged entity's ability to profitably influence price, quality, service, or other dimensions of competition. However, there is

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no requirement for the Commissioner to prove that the merged entity will, in fact, exercise these powers (*The Commissioner of Competition v Canadian Waste Services Holdings Inc*, 2001 Comp Trib 3 (“*Canadian Waste*”) at para 108, aff’d 2003 FCA 131, leave to appeal refused, [2004] 1 SCR vii; *Superior Propane I* at para 258). In determining whether the Commissioner has met his burden on this point, a forward-looking analysis of whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark — or “but for” world — must be conducted (*Tervita SCC* at para 51).

[180] With respect to section 96, Justice Rothstein in *Tervita SCC* clearly stated that “the [*Superior Propane* cases] established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects” of a merger (*Tervita SCC* at para 122). Conversely, the merging parties bear the onus of establishing all the other elements of the efficiencies defence, including the extent of the efficiency gains and whether the gains are greater than and offset the merger’s anti-competitive effects (*Tervita SCC* at para 122). To meet his burden, the Commissioner must quantify the quantifiable anti-competitive effects he relies upon. Where these effects are measurable, they must be calculated or at least estimated, and a failure to quantify quantifiable effects will not result in such effects being considered qualitatively or remaining undetermined (*Tervita SCC* at paras 125–133). Justice Rothstein explained that an approach that would permit the Commissioner to meet his burden without at least establishing estimates of the quantifiable anti-competitive effects would fail to provide the merging parties with the information they need to know the case they have to meet (*Tervita SCC* at para 124). Qualitative anti-competitive effects which are not quantifiable can also be taken into account, provided they are supported by the evidence and the reasoning for the reliance on the qualitative aspects is clearly articulated by the Tribunal (*Tervita SCC* at para 147).

[181] In the Tribunal’s view, there is at present no legal precedent for the Commissioner to have any additional burden under section 96 beyond that established by the SCC in *Tervita SCC*. P&H has not provided any argument or sufficient supporting evidence that could allow the Tribunal to revisit, revise or enlarge the clear standard set out in *Tervita SCC* on the legal and evidentiary burden of the Commissioner under the merger provisions of the Act.

### VI. ISSUES

[182] The following broad issues are raised in this proceeding:

- What is or are the relevant product market(s) for the purposes of this proceeding?;
- What is or are the relevant geographic market(s) for the purposes of this proceeding?;
- Has the Commissioner established, on a balance of probabilities, that the Virden Acquisition lessens, or is likely to lessen, competition substantially?;
- If the Commissioner has established that the Virden Acquisition lessens, or is likely to lessen, competition substantially, what is the remedy to be ordered?;

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opposed to the absolute state of competition at those two points in time. In a case involving an alleged likely substantial lessening of competition, the Tribunal will assess whether the merger is likely to enable the merged entity to exercise new or enhanced market power (*Tervita SCC* at para 55, citing *Tervita CT* at para 368). That is, the Tribunal will consider whether the merger has likely created a new ability to exercise market power, or enhanced the merged entity's existing ability to exercise market power.

[465] In the second part of its analysis, the Tribunal determines whether the difference between the level of competition in the presence of the merger, and the level that would have existed “but for” the merger, is substantial. The extent of a merger's likely effect on market power is what determines whether its effect on competition is likely to be “substantial” (*Tervita SCC* at para 45; *TREB FCA* at paras 82, 86–92). The issue is whether competition would likely be substantially greater, “but for” the implementation of the merger or proposed merger, through the merged entity's ability to profitably influence price, quality, service, advertising, innovation, or other dimensions of competition (*Canadian Waste* at paras 7, 108; *Di Domenico* at p 554). For a merger to be subject to a remedial order by the Tribunal, it is not enough to demonstrate that an actual or likely lessening of competition will result, or the mere creation or enhancement of market power. In a merger review, the Tribunal's assessment focuses on “whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger” [emphasis added] (*Tervita SCC* at para 54, citing *Tervita CT* at para 367).

[466] Again, the test is relative and requires an assessment of the difference between the level of competition in the actual world and in the “but for” world (*TREB FCA* at para 90). What is substantial is not defined in the Act. The Tribunal may consider evidence of market shares and concentration levels, together with the factors listed in paragraphs 93(a) to (g.3) of the Act and, under paragraph 93(h), “any other factor” relevant to competition in a market that is or would be affected by the merger or proposed merger. In each given case, all relevant indicators of market power need to be considered, but the relevance and weight to be assigned to each indicator will vary with the factual context. There is no precise scale by which to measure what is substantial, and this determination will be “highly contextual” (*Facey and Brown* at p 184).

[467] In conducting its assessment of substantiality, the Tribunal will look at three key components, namely, the degree, scope, and duration of the lessening of competition (*Tervita SCC* at para 45; *VAA CT* at para 640).

[468] With respect to degree, or magnitude, the Tribunal assesses whether the impugned merger is enabling or is likely to enable the merged entity respondent to exercise materially greater market power than in the absence of the merger (*Tervita SCC* at paras 50–51, 54). When assessing whether competition with respect to prices is or is likely to be lessened substantially, the test applied by the Tribunal is to determine whether prices are or likely would be materially higher than in the absence of the merger. With respect to non-price dimensions of competition, such as quality, variety, service, or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition is or likely would be materially lower than in the absence of the merger (*Tervita SCC* at para 80; *TREB FCA* at paras 89–92; *Tervita CT* at paras 123–125, 376–377; *VAA CT* at para 642).

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[469] In assessing whether the degree, or magnitude, of lessening of competition is sufficient to be considered “substantial,” the Tribunal will consider the overall economic impact of a merger in the relevant market. Proof of a likely post-merger price increase must be assessed in relation to its materiality in the specific market at issue, the nature and extent of pre- and post-merger competition, and the rest of all the quantitative and qualitative evidence related to the affected dimensions of competition.

[470] On the price dimension of competition, the Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. In short, there is no specific quantum of price variation implying that a merger lessens competition substantially. The Tribunal agrees with the 2011 MEGs that there is no rigid “numerical threshold” for a material price increase (2011 MEGs at para 2.14; see also *Hillsdown* at p 329). The Tribunal pauses to underline that the use of a 5% increase in price for the purposes of the HMT analysis must not be confused with the materiality of a price increase under the substantial lessening of competition analysis. The conceptual SSNIP threshold of 5% in the HMT analysis for market definition purposes is distinct from the assessment of substantiality of anti-competitive effects. It is therefore incorrect to state that the Commissioner must adduce quantitative evidence showing a 5% variation in post-merger prices in order to establish a lessening of competition that is “substantial.” The required magnitude of a “substantial” price increase will instead vary from case to case and will depend on the facts of each case (*Tervita SCC* at para 46; *TREB FCA* at para 88; *Hillsdown* at pp 328–329). A substantial price variation can be less than 5%.

[471] In fact, as Chief Justice Crampton explained in his concurring opinion in *Tervita CT*, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downward when a 5% price increase is used to assess the degree of market power held by a hypothetical monopolist for the purposes of the HMT analysis and the SSNIP threshold. At paragraphs 376–377 of *Tervita CT*, he said:

[376] [...] However, given that the Tribunal has now embraced the hypothetical monopolist framework and the SSNIP test for market definition, it is necessary to revisit this definition of substantiality. This is because if the degree of market power used to define relevant markets is the same as the degree of market power used to assess competitive effects, a merger would not be found to be likely to prevent or lessen competition substantially unless the degree of new, enhanced or maintained market power of the merged entity is the same degree of market power held by as [*sic*] the hypothetical monopolist that was conceptualized for the purposes of market definition.

[377] Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger. [...]

[Emphasis in original.]

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[472] In sum, the substantiality level contemplated by the “substantial lessening of competition” analysis can be lower than the level under the HMT analysis and the SSNIP threshold.

[473] It must also be emphasized that there is no requirement for the Tribunal to find a likely increase in price; it is sufficient for the Tribunal to conclude that the merged entity has the ability to increase price or to reduce quality, service, or product choice.

[474] Turning to scope, the assessment involves determining whether the lessening of competition affects the entire relevant market or a material part of it. If the alleged anti-competitive effects do not extend throughout the totality of the relevant market, the Tribunal will assess their scope and whether they extend throughout a “material” part of the market, or in respect to a material volume of sales / business (*Tervita FCA* at para 108; *Tervita CT* at paras 375, 378).

[475] With respect to duration, the test applied by the Tribunal is whether a material increase in price or material reduction in non-price dimensions of competition resulting from a merger is likely to be maintained for approximately two years (*Tervita SCC* at para 80; *Tervita CT* at para 123).

[476] In assessing substantiality and its various components, the Tribunal considers quantitative evidence, qualitative evidence, or both, related to the price and non-price dimensions of competition (*TREB FCA* at para 16; *VAA CT* at paras 124, 639; *TREB CT* at paras 469–471). In *Tervita SCC*, the SCC held that the Commissioner was not, in law, required to quantify any anti-competitive effects under section 92 (*Tervita SCC* at paras 121–122, 166; *TREB FCA* at paras 99–100; *TREB CT* at para 469). That said, in all situations, the Commissioner must always adduce sufficiently clear and convincing evidence, and he bears the burden to demonstrate, on a balance of probabilities, that the merger lessens or is likely to lessen competition substantially, as well as the basic facts of the “but for” scenario that are required to make that demonstration (*Tervita SCC* at paras 65–66; *TREB FCA* at paras 87; *Tervita FCA* at paras 107–108; *VAA CT* at para 644).

### (2) Parties’ positions

#### (a) The Commissioner

[477] The Commissioner submits that the Virden Acquisition is likely to cause a substantial lessening of competition in the relevant markets owing to the elimination of a vigorous and effective competitor, namely, the Virden Elevator. The Commissioner claims that both the quantitative and qualitative evidence demonstrates that farmers in the relevant markets will pay materially more for GHS for wheat and canola over the next two years and will lose other impactful aspects of competition. With the control of the Virden Elevator, says the Commissioner, P&H has the ability and incentive to unilaterally exercise market power in the relevant markets. The Commissioner contends that the lessening of competition is substantial in terms of magnitude, duration, and scope: it adversely impacts competition to a degree that is material, the duration of the anti-competitive effects is substantial, and the anti-competitive effects extend to a substantial part of the relevant markets.

[478] In his final submissions, the Commissioner argued that the substantial lessening of competition is demonstrated by the following elements, which echo many of the factors listed in

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in terms of percentage. Hence, the Commissioner's focus on the absolute values of the predicted price changes, to which the Tribunal will turn below.

[517] The Tribunal accepts that the Basis plays a certain role in the competition between Elevators at the local level. The evidence indicates that there can be adjustments to the Basis or to the Cash Price after or in addition to changes in the Futures Price. In some cases, the Basis fluctuates for reasons other than a change in the Futures Price, such as negotiations between farms and Elevators or limited-tonne and limited-time specials offered by the Elevators. The Tribunal also accepts that the price variation threshold can certainly be lower than 5% (contrary to P&H's argument) in order to meet the substantiality level. The Tribunal is further mindful of the fact that, when a firm has high pre-existing market power, smaller impacts on competition can be enough to meet the test of substantiality (*Tele-Direct* at para 758). The Tribunal pauses to note that, while it finds that P&H had "some pre-existing market power" in this case, the facts do not support a conclusion that P&H had "high" market power and certainly not "overwhelming" market power as in *Tele-Direct*.

[518] However, the Commissioner has not presented any compelling argument nor any clear and convincing evidence regarding the materiality level (in terms of percentage) that should apply to the substantial lessening of competition analysis in this case. More specifically, the Commissioner has not made submissions regarding the relative materiality level that should apply in a case where competition allegedly takes place on one component of the final price for wheat or canola, namely, the Basis. Similarly, the Commissioner has submitted no analysis nor any evidence to demonstrate that, in the particular circumstances of this case, the acceptable materiality level for a price decrease could be as low as around 1% or less.

[519] In fact, the Tribunal is not aware of any merger cases, in Canada or in any other jurisdiction, where a court or tribunal has recognized that a predicted price effect revolving around 1% could be enough to meet the test of substantiality. Indeed, since merger simulation models predict price increases (as discussed above), the Tribunal is of the view that, absent expert evidence allowing it to conclude differently, relative price variations predicted by a merger simulation model have to be more than 1% in order to have any significance or materiality.

[520] For all the above reasons, the Tribunal agrees with P&H and Ms. Sanderson that the relative effect of the Virden Acquisition on the Cash Prices paid by P&H for wheat or canola is not material.

### (ii) *Absolute measures*

[521] The Commissioner also takes the position that the absolute price variations observed by Dr. Miller are material. In his submissions, the Commissioner relied on the absolute magnitude of Dr. Miller's predicted price increases and what he claimed was their resulting materiality. The Commissioner argued that, in this case, the Tribunal should prefer and adopt an absolute notion of materiality with respect to the price effects and consider the impact that the Acquisition will have on farmers, in terms of changes in "cents per bushel" they will pay for GHS or receive for their grain. The Commissioner submits that the absolute amount of the effects measured by Dr. Miller is evidence of a substantial lessening of competition. The price increases projected by Dr. Miller,

**TAB – 6.B**

**Tervita Corporation,  
Complete Environmental Inc. and  
Babkirk Land Services Inc.** *Appellants*

*v.*

**Commissioner of Competition** *Respondent*

**INDEXED AS: TERVITA CORP. v. CANADA  
(COMMISSIONER OF COMPETITION)**

**2015 SCC 3**

File No.: 35314.

2014: March 27; 2015: January 22.

Present: McLachlin C.J. and Abella, Rothstein,  
Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**ON APPEAL FROM THE FEDERAL COURT OF  
APPEAL**

*Competition — Mergers — Review — Commissioner of Competition opposing merger on ground that merger likely to prevent competition substantially — Merged parties raising statutory efficiencies defence — Competition Tribunal rejecting defence and making divestiture order — Proper legal test for determining when merger gives rise to substantial prevention of competition under Competition Act — Proper approach to statutory efficiencies defence — Content of Commissioner's burden for purposes of efficiencies defence — Whether merger likely to prevent competition substantially — Whether gains in efficiency resulting from merger greater than and offset anti-competitive effects of merger — Competition Act, R.S.C. 1985, c. C-34, ss. 92, 96.*

*Administrative law — Appeals — Standard of review — Competition Tribunal — Standard of review applicable to tribunal's determinations of questions of law arising under Competition Act, R.S.C. 1985, c. C-34 — Whether statutory language in appeal provision rebuts presumption that standard of reasonableness applies to tribunal's interpretation of own statute — Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1).*

**Tervita Corporation,  
Complete Environmental Inc. et  
Babkirk Land Services Inc.** *Appelantes*

*c.*

**Commissaire de la concurrence** *Intimé*

**RÉPERTORIÉ : TERVITA CORP. c. CANADA  
(COMMISSAIRE DE LA CONCURRENCE)**

**2015 CSC 3**

N° du greffe : 35314.

2014 : 27 mars; 2015 : 22 janvier.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

**EN APPEL DE LA COUR D'APPEL FÉDÉRALE**

*Concurrence — Fusionnements — Examen — Opposition de la commissaire de la concurrence à un fusionnement au motif qu'il aura vraisemblablement pour effet d'empêcher sensiblement la concurrence — Défense fondée sur les gains en efficacité prévue par la loi invoquée par les parties fusionnées — Rejet de la défense par le Tribunal de la concurrence et prononcé d'une ordonnance de dessaisissement — Quel est le bon critère juridique pour déterminer si le fusionnement empêche sensiblement la concurrence aux termes de la Loi sur la concurrence? — Comment faut-il envisager la défense fondée sur les gains en efficacité prévue par la loi? — En quoi consiste le fardeau qui incombe à la commissaire relativement à la défense fondée sur les gains en efficacité? — Le fusionnement aura-t-il vraisemblablement pour effet d'empêcher sensiblement la concurrence? — Les gains en efficacité résultant du fusionnement surpassent-ils et neutralisent-ils les effets anticoncurrentiels du fusionnement? — Loi sur la concurrence, L.R.C. 1985, c. C-34, art. 92, 96.*

*Droit administratif — Appels — Norme de contrôle — Tribunal de la concurrence — Norme de contrôle applicable aux décisions du tribunal sur des questions de droit qui concernent la Loi sur la concurrence, L.R.C. 1985, c. C-34 — Le libellé de la disposition d'appel réfute-t-il la présomption selon laquelle la norme de la décision raisonnable s'applique à l'interprétation par le tribunal de sa loi constitutive? — Loi sur le Tribunal de la concurrence, L.R.C. 1985, c. 19 (2<sup>e</sup> suppl.), art. 13(1).*

attributable to higher prices paid by low-income households, may be taken into account as an anti-competitive effect, while components of the wealth transfer that are not socially adverse may be treated as neutral (*Superior Propane III*, at para. 333).

[99] However, there is no mandated “correct” methodology for the s. 96 analysis (*Superior Propane II*, at paras. 139-42). The statute does not set out which standard should be used. From an economic perspective, there are arguments in favour of the total surplus standard (see M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002), at pp. 146-51). However, that is not the issue before this Court and, for the purpose of this case, it suffices to say that *Superior Propane II* established that the Tribunal has the flexibility to make the ultimate choice of methodology in view of the particular circumstances of each merger.

[100] The Tribunal should consider all available quantitative and qualitative evidence (*Superior Propane I*, at para. 461; *Superior Propane III*, at para. 335). While quantitative aspects of a merger are those which can be measured and reduced to dollar amounts, qualitative elements of a merger, including in some cases such things as better or worse service or lower or higher quality, may not be measurable as they are dependent on individual preferences in the market (see *Superior Propane I*, at paras. 459-60). Effects that can be quantified should be quantified, even as estimates. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis (*Superior Propane III*, at para. 233; *Superior Propane IV*, at para. 35).

[101] The above principles developed in the *Superior Propane* series of cases provide the foundation for the analysis of the s. 96 efficiencies defence. These principles serve as the backdrop to the legal issues in the present case: consideration of whether specific efficiencies are valid efficiencies for the purposes of the defence and the proper approach to the balancing exercise under s. 96.

de la richesse qui est attribuable aux prix plus élevés payés par les ménages à faible revenu, peuvent être considérés comme des effets anticoncurrentiels, tandis que les éléments du transfert de la richesse qui ne sont pas socialement défavorables peuvent être considérés comme neutres (*Supérieur Propane III*, par. 333).

[99] Cependant, aucune méthode « correcte » n’est prescrite pour l’analyse qu’appelle l’art. 96 (*Supérieur Propane II*, par. 139-142). La loi ne précise pas le critère à appliquer. Certains arguments économiques militent en faveur du critère du surplus total (voir M. Trebilcock et autres, *The Law and Economics of Canadian Competition Policy* (2002), p. 146-151). Or, là n’est pas la question dont notre Cour est saisie et, pour nos fins, il suffit de dire que l’affaire *Supérieur Propane II* a permis d’établir que le Tribunal jouit de la latitude requise pour décider en bout de ligne de la méthode à la lumière des circonstances propres à chaque fusionnement.

[100] Le Tribunal devrait prendre en considération tous les éléments quantitatifs et qualitatifs à sa disposition (*Supérieur Propane I*, par. 461; *Supérieur Propane III*, par. 335). Si les aspects quantitatifs d’un fusionnement sont ceux qui peuvent être mesurés et exprimés en dollars, les éléments qualitatifs, y compris dans certains cas les facteurs comme l’amélioration ou la diminution du service ou de la qualité, peuvent ne pas être mesurables, puisqu’ils dépendent des préférences individuelles dans le marché (voir *Supérieur Propane I*, par. 459-460). Les effets qui peuvent être quantifiés devraient l’être, ou à tout le moins être estimés. L’omission d’en donner au moins une estimation quantitative, lorsqu’il est réalistement possible de le faire, ne donnera pas lieu à une analyse qualitative de ces effets (*Supérieur Propane III*, par. 233; *Supérieur Propane IV*, par. 35).

[101] Élaborés dans la série *Supérieur Propane*, les principes qui précèdent étayent l’analyse de la défense fondée sur les gains en efficacité prévue à l’art. 96. Ils sous-tendent les questions juridiques soulevées en l’espèce, à savoir l’admissibilité de certains gains en efficacité pour l’application de la défense et la manière de procéder à la pondération qu’appelle l’art. 96.

the Commissioner’s failure to quantify the quantifiable anti-competitive effects — specifically, the failure to quantify the deadweight loss. This raises the specific questions of what content there is to the Commissioner’s burden under s. 96 and what consequences flow from a failure to meet the burden. More generally, Tervita’s argument requires consideration of the overall balancing approach under s. 96.

(a) *The Commissioner’s Burden*

[122] As explained above, the *Superior Propane* series established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects. The merging parties bear the onus of establishing all other elements of the defence, including the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects (see *Superior Propane I*, at paras. 399 and 403; *Superior Propane II*, at para. 154; and *Superior Propane IV*, at para. 64). The parties do not take issue with this allocation of onus.

(i) The Content of the Commissioner’s Burden

[123] Tervita argues that the Commissioner’s onus is to quantify all anti-competitive effects which can be quantified. In this case, the Commissioner did not do so.

[124] The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., at paras. 84 and 88). On the contrary, the Commissioner’s legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would

qu’appelle l’art. 96. Son argument repose sur l’omission par la commissaire de quantifier les effets anticoncurrentiels quantifiables, tout particulièrement la perte sèche, et soulève le fardeau que l’art. 96 impose à la commissaire et les conséquences du défaut de s’en acquitter. Plus généralement, l’argument de Tervita nous invite à examiner la méthode de pondération globale qu’exige l’art. 96.

a) *Fardeau de la commissaire*

[122] Comme nous l’avons vu, la série *Supérieur Propane* a établi que la commissaire a le fardeau, aux termes de l’art. 96, de prouver l’existence d’effets anticoncurrentiels. En revanche, il incombe aux parties au fusionnement d’établir les autres éléments de la défense, y compris la valeur des gains en efficacité et si ceux-ci surpassent et neutralisent les effets anticoncurrentiels (voir *Supérieur Propane I*, par. 399 et 403; *Supérieur Propane II*, par. 154; et *Supérieur Propane IV*, par. 64). Les parties ne contestent pas cette répartition du fardeau de la preuve.

(i) Teneur du fardeau de la commissaire

[123] Tervita soutient qu’il incombe à la commissaire de quantifier tous les effets anticoncurrentiels qui peuvent l’être. Or, dans la présente affaire, la commissaire ne s’est pas acquittée de ce fardeau.

[124] La commissaire fait valoir que la quantification n’est pas une condition préalable en droit à l’examen des effets anticoncurrentiels (m.i., par. 84 et 88). Au contraire, elle est tenue en droit de quantifier les effets anticoncurrentiels quantifiables qui serviront de fondement à la décision. Dans les cas où les effets peuvent être mesurés, ils doivent être estimés. Seuls les effets ne pouvant être estimés sur le plan quantitatif seront pris en considération sur le plan qualitatif. L’absence de mesure des effets quantifiables ne saurait se traduire par l’attribution d’une valeur qualitative (*Supérieur Propane IV*, par. 35). Cette méthode réduit au minimum le jugement subjectif nécessaire dans l’analyse et permet au Tribunal d’effectuer l’évaluation la plus objective possible dans les circonstances (*Supérieur Propane IV*,

permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.

[125] The Commissioner's burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger. The Tribunal accepts estimates because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history. However, to meet her 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 probabilities.

[126] In this case, the Commissioner did not quantify quantifiable anti-competitive effects and therefore failed to meet her burden under s. 96.

(ii) What Consequences Flow From a Failure to Meet the Burden?

[127] The question concerns the legal implications of a failure by the Commissioner to quantify quantifiable anti-competitive effects. The Federal Court of Appeal recognized that "[a] quantitative effect which has not in fact been quantified should not be considered as a qualitative effect" (para. 158) but went on to hold that the non-quantified deadweight loss should be assigned a weight of "undetermined" (paras. 130 and 167).

par. 38). Une approche selon laquelle la commissaire pourrait s'acquitter de son obligation sans avoir donné au moins une estimation des effets anticoncurrentiels quantifiables ne permettrait pas aux parties au fusionnement de connaître la preuve qui leur est opposée.

[125] Le fardeau de la commissaire consiste à quantifier au moyen d'estimations tous les effets anticoncurrentiels quantifiables. Les estimations sont acceptables, car l'analyse est prospective et s'intéresse aux effets anticoncurrentiels qui résulteront ou résulteront vraisemblablement du fusionnement. En outre, le calcul des effets anticoncurrentiels qu'exige l'art. 96 n'a pas la précision avec laquelle on peut examiner un fait survenu. Toutefois, pour s'acquitter de son fardeau, la commissaire doit fonder ses estimations sur une preuve qui peut être attaquée et soupesée. Les effets anticoncurrentiels qualitatifs, dont la diminution du service ou de la qualité, ne sont appréciés que sur un fondement subjectif, car une telle analyse fait appel à l'examen de considérations qui ne peuvent être quantifiées parce qu'elles n'ont aucune commune unité de mesure (à savoir elles sont « incommensurables »). En raison de l'incertitude inhérente aux prédictions économiques, l'analyse doit être aussi rigoureuse que possible du point de vue analytique afin de permettre au Tribunal de tirer une conclusion prospective selon la prépondérance des probabilités.

[126] Dans le présent pourvoi, la commissaire n'a pas quantifié les effets anticoncurrentiels quantifiables et, partant, elle ne s'est pas acquittée du fardeau que lui impose l'art. 96.

(ii) Quelles sont les conséquences de l'omission de s'acquitter du fardeau?

[127] La question touche aux conséquences juridiques de l'omission par la commissaire de quantifier les effets anticoncurrentiels quantifiables. La Cour d'appel fédérale a reconnu qu'un « effet quantitatif qui n'a pas été en réalité quantifié ne devrait pas être considéré comme un effet qualitatif » (par. 158), mais elle a ensuite conclu qu'il y a lieu de donner une valeur « indéterminée » à la perte sèche non quantifiée (par. 130).

[128] With respect, I cannot agree. As explained above, the Commissioner’s burden is to quantify all quantifiable anti-competitive effects. The failure to do so is a failure to meet this legal burden and, as a result, the quantifiable anti-competitive effects should be fixed at zero. Quite simply, where the burden is not met, there are no proven quantifiable anti-competitive effects.

[129] As Tervita submits, this approach is consistent with that in civil proceedings where a party has failed to discharge its burden of proof with respect to loss (see S. M. Waddams, *The Law of Damages* (5th ed. 2012), at paras. 10.10 to 10.30). In addition, setting the effects at zero where the Commissioner has failed to meet her legal burden is consistent with taking an approach to the balancing analysis that is objectively reasonable. In setting the weight at undetermined, the Federal Court of Appeal allowed for subjective judgment to overtake the analysis. Undetermined effects were weighed against the proven overhead gains in efficiency, which were described by the court as “marginal” and “insignificant” (para. 174). Nonetheless, it is not clear how the Federal Court of Appeal — or any court — could weigh undetermined effects.

[130] The jurisprudence has consistently recognized the importance of an objective approach to the balancing analysis (see *Superior Propane IV*, at para. 38). As the Federal Court of Appeal recognized in this case:

Objective determinations are better suited for ensuring predictability in the application of the *Competition Act* and avoiding arbitrary decisions. Predictability is particularly important in merger reviews since most merger transactions are reviewed only by the Commissioner and rarely reach the Tribunal. A methodology which favours objective determinations whenever possible allows the parties to merger transactions and the Commissioner to more readily predict the impacts of a merger, discourages the use of arbitrary judgment in the process, and reduces overall uncertainty in the Canadian business community. [para. 152]

[128] Je ne puis malheureusement me rallier à cette opinion. Comme nous l’avons vu, il incombe à la commissaire de quantifier tous les effets anti-concurrentiels quantifiables. Une omission à cet égard est une omission en droit, de sorte que les effets anticoncurrentiels quantifiables doivent alors être jugés nuls. En termes très simples, dans les cas où ce fardeau n’est pas acquitté, aucun effet anti-concurrentiel quantifiable n’est prouvé.

[129] Ainsi que Tervita le fait valoir, une telle démarche est compatible avec celle qui vaut dans une instance civile où une partie ne s’est pas acquittée du fardeau de preuve qui lui incombe au chapitre des pertes (voir S. M. Waddams, *The Law of Damages* (5<sup>e</sup> éd. 2012), par. 10.10 à 10.30). De plus, indiquer des effets nuls dans le cas où la commissaire ne s’est pas acquittée de son fardeau en droit vaut, à l’égard de l’exercice de pondération, une démarche qui est objectivement raisonnable. En concluant à une valeur indéterminée, la Cour d’appel fédérale a permis qu’un jugement subjectif dicte l’analyse. Les effets indéterminés ont été comparés aux gains en efficience liés à la baisse des coûts indirects qui ont été établis, et que la cour a qualifiés de « secondaires » et « négligeables » (par. 174). Or, comment la Cour d’appel fédérale — ou n’importe quelle cour — pourrait-elle soupeser des effets indéterminés?

[130] La jurisprudence a, dans tous les cas, reconnu l’importance d’une démarche objective dans la pondération (voir *Supérieur Propane IV*, par. 38). Ainsi que la Cour d’appel fédérale l’a reconnu dans la présente affaire :

L’appréciation objective favorise davantage la prévisibilité lorsqu’il s’agit d’appliquer la *Loi sur la concurrence* et d’éviter des décisions arbitraires. La prévisibilité revêt une importance particulière dans le cas de l’examen des fusionnements, étant donné que la plupart des fusionnements ne sont examinés que par le commissaire et qu’ils sont rarement soumis à l’examen du Tribunal. Une méthodologie qui favorise une appréciation objective dans tous les cas possibles permet aux parties à une opération de fusionnement et au commissaire de prédire plus aisément les répercussions d’un fusionnement, en plus de dissuader les jugements arbitraires et de diminuer l’incertitude générale dans le monde canadien des affaires. [par. 152]

I agree with these reasons for favouring an objective approach. Although the Federal Court of Appeal recognized the importance of an objective analysis, in assigning the quantifiable but non-quantified effects a weight of “undetermined”, its analysis did not meet the necessary objective standard.

[131] The Federal Court of Appeal’s “undetermined” approach also raises concerns of fairness to the merging parties. The court recognized that a “proper interpretation of section 96 of the *Competition Act* requires that the [merging parties] must still demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects” (para. 167). The difficulty with assigning non-quantified quantifiable effects a weight of “undetermined” is that it places the merging parties in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. Under this approach, to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as the merging parties do not know the case they have to meet.

[132] The Commissioner argues that, although the anti-competitive effects in this case were not quantified, they could be inferred as a result of the Tribunal’s finding that competition from the Babkirk site would have led to an average price decrease of at least 10 percent (Tribunal decision, at para. 297; R.F., at paras. 89-91). However, the 10 percent amount is not enough to calculate the dead-weight loss as the Commissioner did not establish the price elasticity of demand. The proven facts demonstrated the size of the Contestable Area and the potential tonnes of waste per year. Without a calculation of the actual loss, all that is known is that there was a certain amount of potential waste subject to the effect of the elasticity. In other words, the 10 percent calculation is not enough to determine the extent of any anti-competitive effect. As the Federal Court of Appeal noted:

Je souscris à ces motifs, car ils favorisent une démarche objective. Si la Cour d’appel fédérale a reconnu l’importance d’une analyse objective, en donnant une valeur « indéterminée » aux effets quantifiables non quantifiés, elle n’a pas respecté la norme d’objectivité applicable.

[131] La démarche de la Cour d’appel fédérale, qui a attribué une valeur « indéterminée », soulève aussi des questions d’équité à l’égard des parties au fusionnement. La cour a reconnu que, pour « bien interpréter l’article 96 de la *Loi sur la concurrence*, il faut que [les parties au fusionnement] démontre[nt], selon la prépondérance des probabilités, que les gains en efficience neutralisent les effets anticoncurrentiels » (par. 167). En accordant une valeur « indéterminée » à des effets quantifiables, mais non quantifiés, on met les parties au fusionnement dans une situation insoutenable : démontrer que les gains en efficience surpassent et neutralisent une somme indéterminée. Ainsi, prouver les autres éléments de la défense selon la prépondérance des probabilités devient un exercice inéquitable, car les parties au fusionnement ignorent la preuve qui leur est opposée.

[132] La commissaire fait valoir que, bien que les effets anticoncurrentiels dans la présente affaire n’aient pas été quantifiés, ils pourraient être inférés de la conclusion du Tribunal selon laquelle la concurrence du site Babkirk aurait mené à une baisse moyenne du prix d’au moins 10 p. 100 (décision du Tribunal, par. 297; m.i., par. 89-91). Toutefois, ce pourcentage ne permet pas de calculer la perte sèche étant donné que la commissaire n’a pas établi l’élasticité de la demande par rapport au prix. Les faits prouvés ont démontré la taille de la zone contestable et les déchets susceptibles d’être produits par année. Sans un calcul de la perte véritable, tout ce que l’on sait, c’est qu’une certaine quantité de déchets potentiels était soumise à l’effet de l’élasticité. Autrement dit, le calcul ayant donné pour résultat 10 p. 100 n’est pas suffisant pour déterminer la mesure des effets anticoncurrentiels, si tant est qu’il y en ait. Ainsi que la Cour d’appel fédérale l’a signalé :

**TAB – 6.C**

## COMPENDIUM PUBLIC

# The Transaction Will Enhance Wireless Competition

	Before		After
<b>Number of wireless competitors</b>	4 (Rogers, Telus, Bell, Shaw)	=	4 (Rogers, Telus, Bell, Videotron)
<b>Number of national-scale wireless competitors</b>	3 (Rogers, Telus, Bell)	↑	4 (Rogers, Telus, Bell, Videotron)
<b>Number of competitors offering wireline-wireless bundles</b>	2 (Telus and Shaw in AB/BC, Rogers and Bell in ON)	↑	3 (Telus, Rogers and Videotron in AB/BC; Rogers, Bell and Videotron in ON)

**TAB – 6.D**





**TAB – 6.E**

## COMPENDIUM PUBLIC

1                   **MR. TYHURST:** I realize for your own purposes  
2 you want to create a division like that, sir. But the  
3 reality is the facts speak for themselves in terms of the  
4 use of these assets, so we'll proceed. But --

5                   **MR. SMITH:** Sorry.

6                   **MR. TYHURST:** -- the use of the --

7                   **MR. SMITH:** Sorry. Chief -- sorry. Chief  
8 Justice, my friend should not editorialize. It's not  
9 evidence.

10                   If my friend has a question, he should ask the  
11 question and let the witness answer the question.

12                   **MR. TYHURST:** Well, it's highly ironic that Mr.  
13 Smith and his colleagues would make such an objection,  
14 Chief Justice, but I'm prepared to proceed. I think --

15                   **CHIEF JUSTICE CRAMPTON:** Right. I think we  
16 have seen some degree of editorializing, I think, maybe on  
17 both sides. I think we should just try to keep it to a  
18 minimum and use this remaining time that we have to focus  
19 on getting answers to whatever questions you have and  
20 others have when it's their turn.

21                   **MR. TYHURST:** Understood.

22                   Now, aside from the factual issue of whether  
23 assets are being transferred that we've been discussing,  
24 sir, your reason for raising this issue is because you  
25 believe that Professor Miller's model, as you put it,

## COMPENDIUM PUBLIC

1 "implies that Shaw Mobile subscribers will revert back to  
2 Quebecor after the transaction, avoiding any adverse  
3 effects that might otherwise have occurred." Is that  
4 correct?

5 **DR. ISRAEL:** I don't believe that's what will  
6 happen, but I don't believe that a model that does not  
7 explicitly model bundled competition can explain why it  
8 won't happen.

9 My point is that if you want to model the  
10 assets that are actually being transferred and the  
11 competition that's being affected, that relates to the sale  
12 of bundles, and that you need to model explicitly.  
13 Otherwise, you don't have an explanation for the change in  
14 competition.

15 **MR. TYHURST:** Well, we'll get to bundling in a  
16 minute. But you go on to say:

17 "There's nothing in his model  
18 preventing transferred customers from  
19 reverting back immediately, thus  
20 undoing any effects from the  
21 transaction."

22 That's the nature of your concern, isn't it,  
23 sir?

24 **DR. ISRAEL:** That's not the nature of my  
25 concern. The nature of my concern is that this isn't an

## COMPENDIUM PUBLIC

1 adequate way to model bundle competition.

2 MR. TYHURST: Right. You're --

3 DR. ISRAEL: I agree with the statement that if  
4 you try to do that in a model that is wireless only, you  
5 can't explain what it is that the Shaw Mobile subscribers  
6 are now getting at Rogers, including a superior network and  
7 so on. That requires a model that explicitly incorporates  
8 and takes seriously bundle competition.

9 MR. TYHURST: All right. But your concern that  
10 there's nothing in the model preventing transferred  
11 customers from reverting back results in your stating that  
12 his model overstates the welfare effects; correct?

13 DR. ISRAEL: I certainly think his model  
14 overstates the welfare effects, and one of the reasons is  
15 that it acts as though the entirety of the Shaw Mobile  
16 wireless business moves over and it doesn't think about  
17 the --

18 MR. TYHURST: Sir, you're not answering the  
19 question.

20 So the question related to whether your concern  
21 about the model preventing customers from transferring.  
22 That's what we're focused on right now, sir. And that is  
23 one of the things that you say results in your concern that  
24 the model overstates the welfare effect; correct?

25 DR. ISRAEL: I don't agree with the way you put

## COMPENDIUM PUBLIC

1 it. I was trying to answer before.

2 My conclusion that one of the reasons it  
3 overstates the welfare effect is that it acts as though all  
4 of the wireless assets that are used in producing Shaw  
5 Mobile transfer, and that's not true.

6 MR. TYHURST: Right. And your concern as well  
7 is that there's nothing to stop the so-called transferred  
8 customers from reverting back. That's why you don't want  
9 to give that asset change or the change any weight, do you,  
10 sir, to Shaw Mobile?

11 DR. ISRAEL: I don't agree with the way you're  
12 characterizing it. That second point that you're bringing  
13 up about the wireless customers reverting back is just an  
14 implication in Professor Miller's model if you don't  
15 incorporate bundle competition and what it is that people  
16 are actually choosing to purchase.

17 MR. TYHURST: All right. And that implication  
18 is something you use as a critique for his model, correct,  
19 your concern about the fact that there's nothing in his  
20 model that relates to the lack of preventing transferred  
21 customers from reverting back immediately? That's the  
22 nature of your concern.

23 Let's just -- those are your words, sir.  
24 That's what you say in your report; correct?

25 DR. ISRAEL: I use those words to illustrate a

## COMPENDIUM PUBLIC

1 logical weakness in his model. That is not -- that does  
2 not summarize my concern about why that weakness matters.

3 **MR. TYHURST:** All right. Let's just go with  
4 the logical weakness that you pointed out because that is  
5 the nature of your report. You poke a lot of holes, and  
6 let's just see if this holds any water in terms of a  
7 concern.

8 So it is that the lack of asset transfer means  
9 that, in fact, customers will follow the assets, as I  
10 understand it. That's what you're saying, "and there will  
11 not be such a big impact from the transfer of subscribers";  
12 correct?

13 **DR. ISRAEL:** Just to be very clear, I'm not  
14 saying that this will actually happen. That is the nature  
15 of the criticism and the making of --

16 **MR. TYHURST:** Fair enough, sir. Let's just go  
17 with -- let's just establish what your criticism is and  
18 then we'll talk about it, okay, without going on into long  
19 unrelated answers to my questions, please, okay?

20 Can we keep the -- just listen to the question  
21 and answer it, please.

22 **DR. ISRAEL:** I'm doing my best.

23 **MR. TYHURST:** All right. Now, if there were  
24 evidence of whether transferred subscribers were, in fact,  
25 likely to revert after the divestiture, that would be

**TAB - 6.F**

## COMPENDIUM PUBLIC

1 any restrictions on it, I would defer to others. But my  
2 general understanding is it's a condition of not closing.

3 **MEMBER ASKANAS:** Thank you.

4 **CHIEF JUSTICE CRAMPTON:** Thank you very much.  
5 I too just have a few quick questions.

6 I just wanted to clarify. In your Table 1,  
7 you've got there on page 11 --

8 **DR. ISRAEL:** From the first report? Sorry,  
9 just let me just get it.

10 **CHIEF JUSTICE CRAMPTON:** Correct. Your initial  
11 report.

12 **DR. ISRAEL:** Yes.

13 **CHIEF JUSTICE CRAMPTON:** What market shares did  
14 you use? Were those share of gross adds or were those  
15 share of subscribers when you were calculating total  
16 surplus and consumer surplus?

17 **DR. ISRAEL:** I believe these are all share --  
18 no, that's not -- these are with share of subscribers. The  
19 beginning of the bullet on page 10 that leads into this,  
20 says when using the most recent market shares.

21 **CHIEF JUSTICE CRAMPTON:** Okay. Thank you.

22 **And if you just go to the first bullet on page**  
23 **24, one, two, third full sentence, you say:**

24 **"Prof. Miller's model, if applied in an**  
25 **internally consistent way, implies that**

## COMPENDIUM PUBLIC

1                   Shaw Mobile's customers will simply  
2                   revert back to Quebecor after the  
3                   transaction..."

4                   Can you please explain that or maybe elaborate?

5                   **DR. ISRAEL:** Yeah. I mean, this was the  
6                   question that was asked earlier, so maybe this isn't as  
7                   clear. The very first thing I think I said yesterday is if  
8                   this was just a wireless transaction, then the -- and we  
9                   weren't modelling wireline or bundles, which we should be  
10                  in a full model, but Professor Miller's model is just a  
11                  wireless model. Then in a wireless model, a Logit model on  
12                  the wireless network, it says people would just choose the  
13                  wireless provider they prefer.

14                  And as I said in my experience, if you're just  
15                  choosing a wireless provider, it's mostly based on network  
16                  and price. So if you've chosen to be a subscriber of the  
17                  Freedom/Shaw network, that's -- my experience is that you  
18                  would just revert back to that. You would just choose to  
19                  be a subscriber of the network that worked for you.

20                  **CHIEF JUSTICE CRAMPTON:** All right.

21                  **DR. ISRAEL:** To be clear, that's not what I  
22                  believe will happen in practice because wireline and  
23                  bundles matter. So what I think will happen in practice is  
24                  that Shaw Mobile subs will stick with Rogers and be  
25                  competed for, but they'll probably stick with Rogers

## COMPENDIUM PUBLIC

1 because they can be Shaw Mobile subs now, have their  
2 wireline service and be on a better wireless network. But  
3 to explain why they would stay with Rogers, you need to  
4 think about the wireline part too.

5                   **CHIEF JUSTICE CRAMPTON:** Right. Thank you. I  
6 do recall you saying that.

7                   On the next page -- this is kind of the same  
8 point -- okay. I think you've answered that.

9                   On page 67, last sentence in paragraph 114, and  
10 you got into this to some extent with Ms. Samrout and I do  
11 recall you speaking to this, but can you elaborate? So:

12                                 "Once marginal cost savings are  
13                                 accounted for, the model...necessarily  
14                                 shows consumer [welfare] and total  
15                                 welfare gains."

16                   **DR. ISRAEL:** This would only be of a pure  
17 wireless model. Again, I think the right models are the  
18 other ones I've shown. I'm making more a point about his  
19 model that doesn't account for bundles and the improvement  
20 in bundles and so on. And this really goes back to my very  
21 beginning slides. If this was a pure wireless transaction,  
22 if that's all we thought about, so effectively it's selling  
23 Shaw's wireless service to Vidéotron and there's no  
24 overlap, then models of pure wireless wouldn't find harm  
25 from that, in my opinion, because there's not wireless

**TAB - 6.G**

## COMPENDIUM PUBLIC

1 --- Upon resuming at 10:20 a.m. /

2 Reprise à 10 h 20

3 **MR. SMITH:** Now, sir, going back to the model  
4 inputs, I take it you would agree with me, sir, that if we  
5 were talking about a market in a long run, steady state of  
6 equilibrium, you would use each products' market share as  
7 the input; correct?

8 **DR. MILLER:** I use market shares as inputs now,  
9 which is the share of gross adds. I think -- are you  
10 asking coy use share of subscribers in that situation?

11 **MR. SMITH:** Yes. You would use each products'  
12 share of total subscribers; correct?

13 **DR. MILLER:** That would be one way to go about  
14 it and that sort of setting if you use share of gross adds  
15 or share of subscribers you would likely obtain similar  
16 results.

17 **MR. SMITH:** Okay. Sir, if we were talking  
18 about a market in a long run, steady state equilibrium, you  
19 would use each product's share of total subscribers;  
20 correct?

21 **DR. MILLER:** I would probably do it both ways.

22 **MR. SMITH:** Okay. And so the implication of  
23 your evidence is that share of gross adds should converge  
24 in the long run, with share of total subscribers?

25 **DR. MILLER:** Yes, I believe that's likely to

## COMPENDIUM PUBLIC

1 happen.

2 MR. SMITH: Okay. Now, you say sir, in this  
3 case that it's not appropriate to use share of subscribers  
4 as the input because Shaw Mobile was a new product?

5 DR. MILLER: And a growing one, but yes.

6 MR. SMITH: Okay. And as a result, you say  
7 Shaw Mobile's share of subscribers during the period you  
8 considered, that January to April period, is not  
9 representative of its long-run position in the marketplace;  
10 correct?

11 DR. MILLER: Yeah, it's almost doubled even  
12 three or four months later.

13 MR. SMITH: Okay, sir, that's the reason.

14 DR. MILLER: Correct.

15 MR. SMITH: Yes, let's stick with my questions.  
16 And in particular, sir, one of your criticisms of Dr.  
17 Israel that you make is you criticize Dr. Israel for using  
18 share of subscribers, because as you put it, most  
19 subscribers made their choice of service provider at a time  
20 when Shaw Mobile was not an available option. Do you  
21 recall that criticism?

22 DR. MILLER: Yes.

23 MR. SMITH: Okay. And that's because, as you  
24 say, Shaw Mobile was launched in late July 2020, but by  
25 January of 2021, it had only been in the market for five

## COMPENDIUM PUBLIC

1 months; correct?

2 **DR. MILLER:** That's correct.

3 **MR. SMITH:** Right, okay. But you also  
4 acknowledge, sir, that using share of gross adds from a  
5 period when Shaw Mobile was experiencing particularly high  
6 subscriber adds, would not reflect its ongoing competitive  
7 significance. Do you recall that evidence?

8 **DR. MILLER:** I think you are referring to the  
9 first couple of months that I view is appropriate to  
10 exclude.

11 **MR. SMITH:** Right.

12 And now, sir -- let's just go to your paragraph  
13 299 again, so that we're all clear on this.

14 **REGISTRY OFFICER:** Could you remind me which  
15 document that should be?

16 **MR. SMITH:** Twenty-eight (28), please. Tab 28,  
17 sorry, of the book we were just in.

18 **REGISTRY OFFICER:** Okay, thank you. Coming up.

19 **MR. SMITH:** Paragraph 299. And it's going to  
20 be a bit tricky, but if we just stop there and go right --  
21 look at the very bottom of the page, "second".

22 **DR. MILLER:** Yes.

23 **MR. SMITH:** Second and then I'll just read it  
24 to you we don't need to go to it:

25 "Second, considering gross adds

## COMPENDIUM PUBLIC

1                   obtained in or after January of 2021  
2                   allows me to exclude the first few  
3                   months after Shaw Mobile's launch in  
4                   July 2020, to better reflect Shaw's  
5                   ongoing competitive significance after  
6                   the initial months of particularly high  
7                   subscriber additions."

8                   Do you see that evidence?

9                   **DR. MILLER:** Yes, I do.

10                  **MR. SMITH:** Okay. Now, sir, what point in time  
11                  does Dr. Israel use for his market shares?

12                  **DR. MILLER:** I don't recall specifically. I  
13                  could look it up here, I have his report.

14                  **MR. SMITH:** Okay. Let me help you. Let's turn  
15                  to Tab 29. Ms. Pelletier, if we can turn to Tab 29,  
16                  please? Let's look at paragraph 116 of Dr. Israel's first  
17                  report.

18                  He doesn't use early 2021. He uses the most  
19                  recently available data he was able to get, which was the  
20                  end of March 2022. Do you see that in paragraph 116?

21                  **DR. MILLER:** I believe he is -- for clarity, I  
22                  believe when he says market shares here he is referring to  
23                  shares of subscribers. Is that your understanding as well?

24                  **MR. SMITH:** He uses share of subscribers for  
25                  March 2022; correct?

## COMPENDIUM PUBLIC

1                   **DR. MILLER:** Yes, I do see that.

2                   **MR. SMITH:** And sir, I take it we can agree,  
3 that by March of 2022, Shaw Mobile had been in the market  
4 for 20 full months?

5                   **DR. MILLER:** That sounds right.

6                   **MR. SMITH:** July is the seventh month, March is  
7 the third month. It's been two years.

8                   **DR. MILLER:** Okay. I try not to do too much  
9 math on the stand. I'll take your word it's not far off  
10 and may be exactly right.

11                  **MR. SMITH:** Okay. So that's more than a year  
12 and a half obviously?

13                  **DR. MILLER:** Yes.

14                  **MR. SMITH:** Okay. And the vast majority of  
15 consumers would have had the opportunity to switch to Shaw  
16 Mobile if they had wanted to by March of 2022; correct?

17                  **DR. MILLER:** The opportunity to is sort of a  
18 particular word. Churn suggests that the typical  
19 subscriber lasts for eight years. So, again this is sort  
20 of an abstract notion of how customers make decisions that  
21 I don't think we have good information on. I don't have  
22 good information on.

23                  **MR. SMITH:** Okay. Well, we'll come to that.  
24 But sir, in your report, you cite to Rogers' information  
25 that 50 percent of customers have a two-year contract. Do

**TAB - 6.H**









**TAB - 6.I**

## COMPENDIUM PUBLIC

transfers to firms offset the larger losses of consumer surplus, resulting in lower deadweight loss than in the version of the model reported in Section 6.2.6.

296. The model calibrated to an elasticity of 0.1 still predicts that the proposed acquisition will result in competitive harm. The deadweight loss across all provinces is no less than \$182 million per year and the associated decrease in consumer surplus is no less than \$1,062 million per year, with an associated transfer from consumers to producers of no less than \$971 million per year.

### ***8.3. Calibration inputs***

297. In this appendix I discuss how I obtain from data produced by the Rogers and Shaw, as well as Bell and Telus, three of the inputs required to calibrate the Logit-Bertrand model: gross adds for the brands' market shares, ARPU used as brand prices, and markups. In this appendix, I also describe how I obtain subscriber counts, which I use to calculate the size of the market—an input to the calculation of the deadweight loss and other welfare metrics.<sup>349</sup> One additional calibration input, the market elasticity, is discussed in a dedicated appendix.<sup>350</sup>

298. In what follows I describe how I construct these inputs from the information that Rogers, Shaw, Bell, and Telus provided to the Competition Bureau in response to the Supplementary Information Requests (“SIRs”), orders pursuant to section 11 of the Competition Act (“Section 11 Orders”) in connection with the Bureau’s review of the proposed acquisition, as well as in discovery.

299. I calculate all inputs required to calibrate the Logit-Bertrand model over the period January 2021 – April 2021. I chose this time period for two reasons. First, I use April 2021 as the end period because it is the last month for which the data required is consistently available across carriers between the data produced in response to the SIR and data produced in discovery.<sup>351</sup> Second,

<sup>349</sup> See Appendix 8.6.

<sup>350</sup> See Appendix 8.2.



*8.3.1. Gross adds*

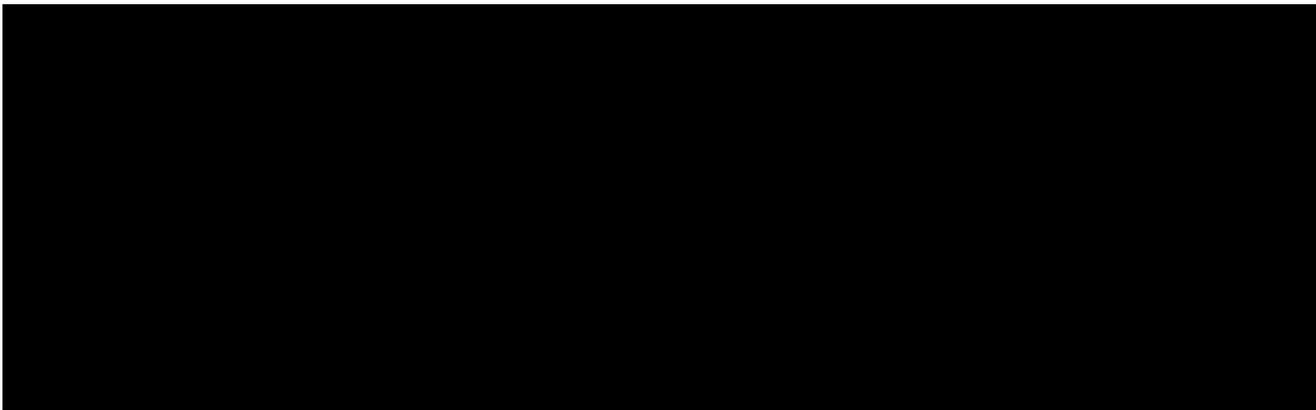
300. For each of the relevant provinces, a brand's share of gross adds is calculated as that brand's gross adds in that province divided by the total gross adds in that province for all brands considered in the model.

301. For each province I consider the total gross adds of consumer mobile phone service that a brand obtained over the period January 2021 – April 2021. I exclude the non-phone gross adds to allow for the possibility that adding a device to an existing consumer account may not reflect the same competitive situation as a new phone subscription for a consumer.<sup>353</sup> 



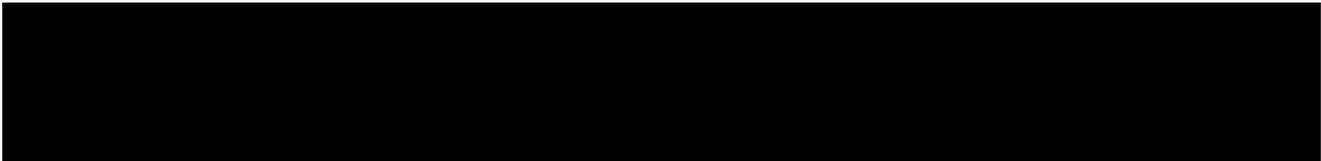
 I also exclude new subscriptions for business accounts that are distinguished from consumer accounts to reflect the fact that competition for these accounts is considered to occur in a distinct market with different competitive conditions.

*(1) Gross adds for Rogers brands*

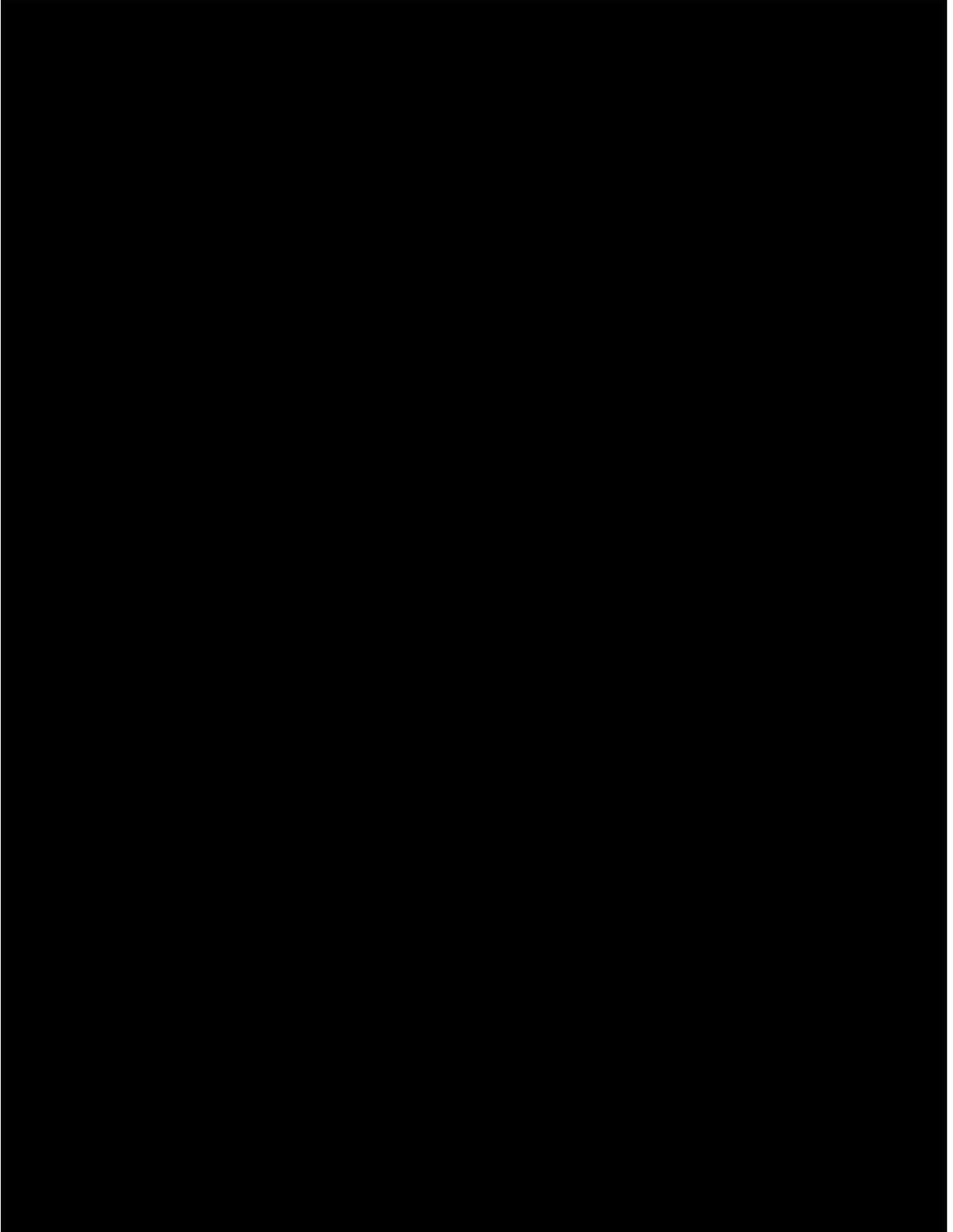


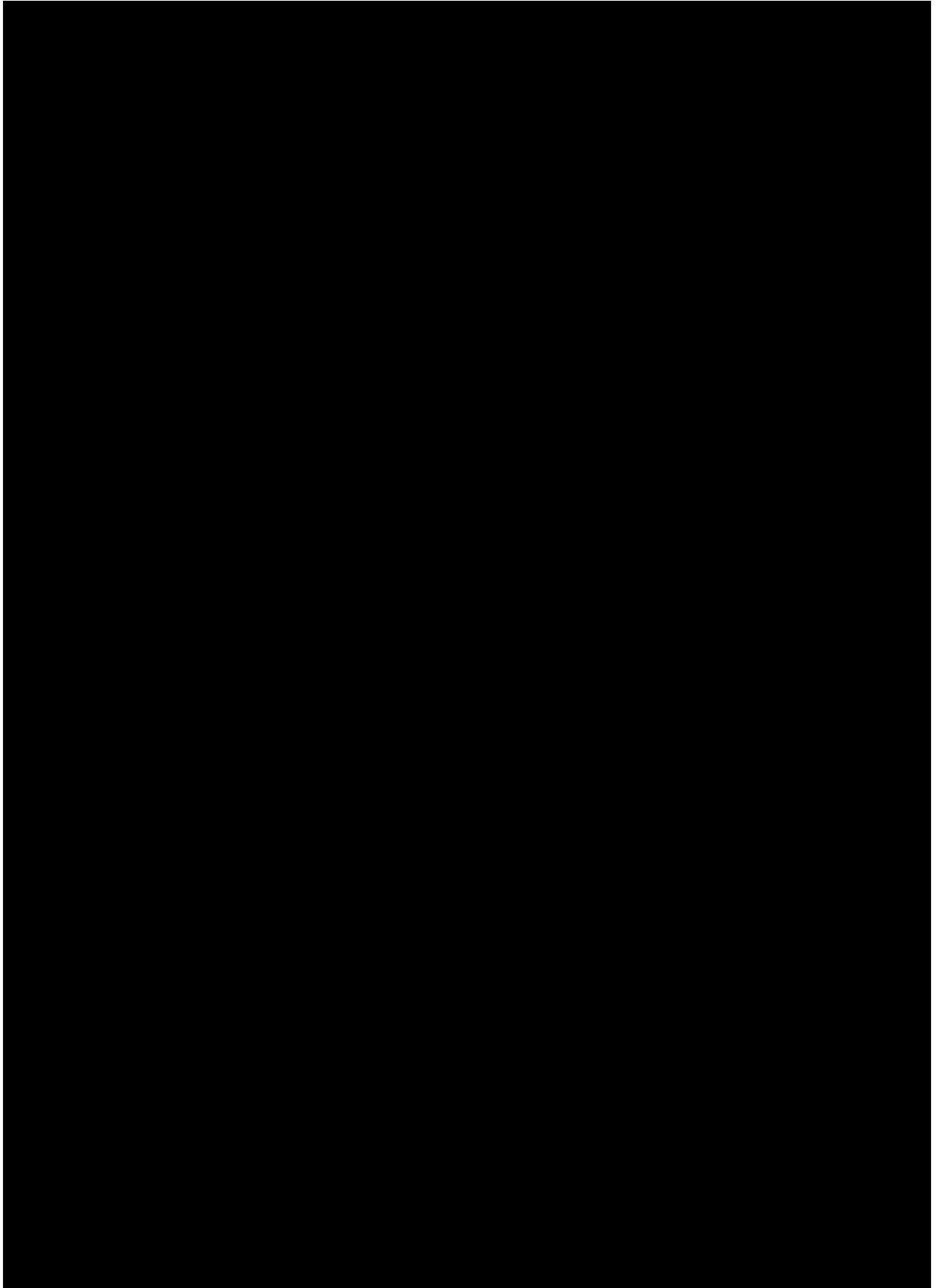
<sup>352</sup> See Section 6.2.4.

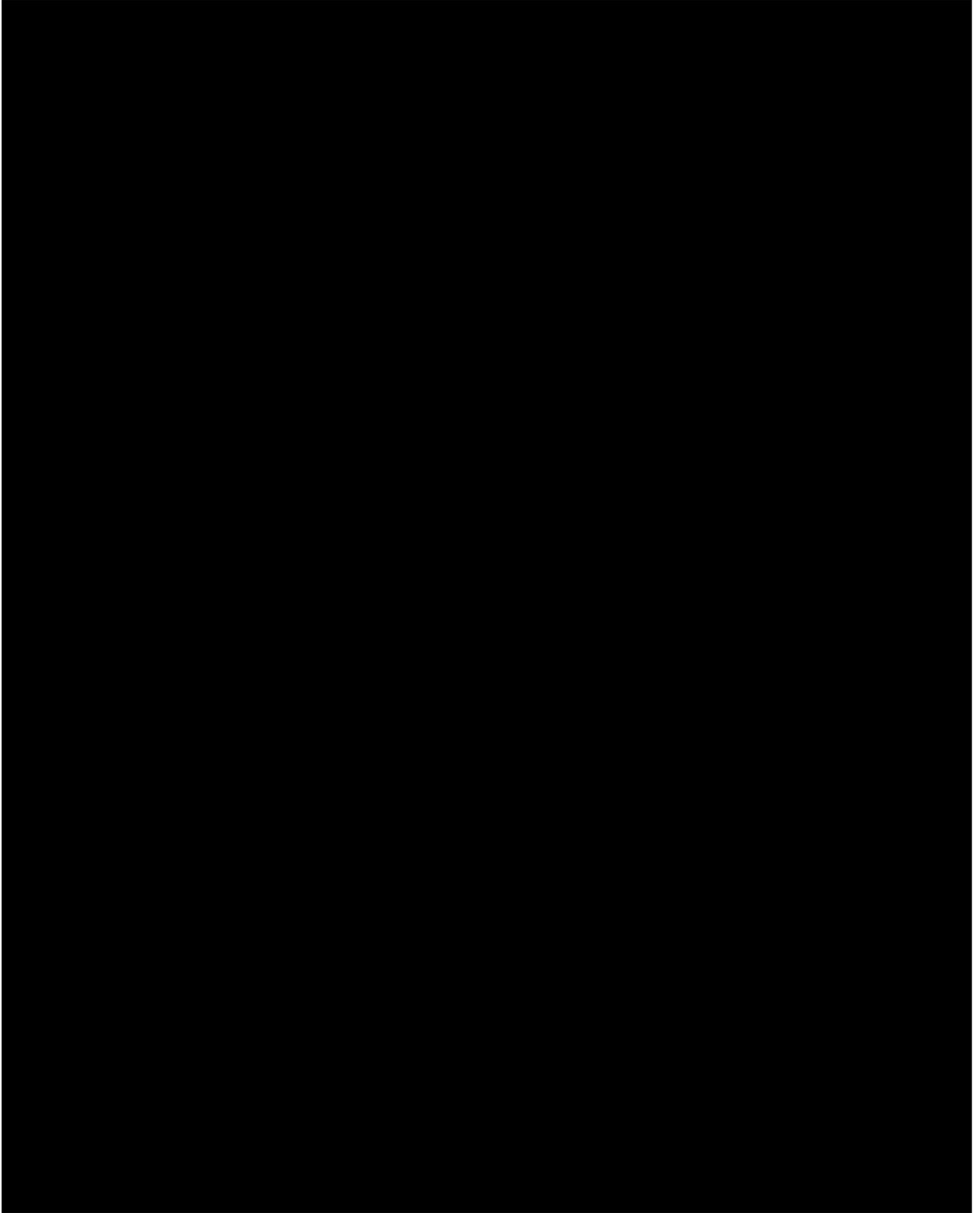
<sup>353</sup> See Sections 5.1, 5.3.

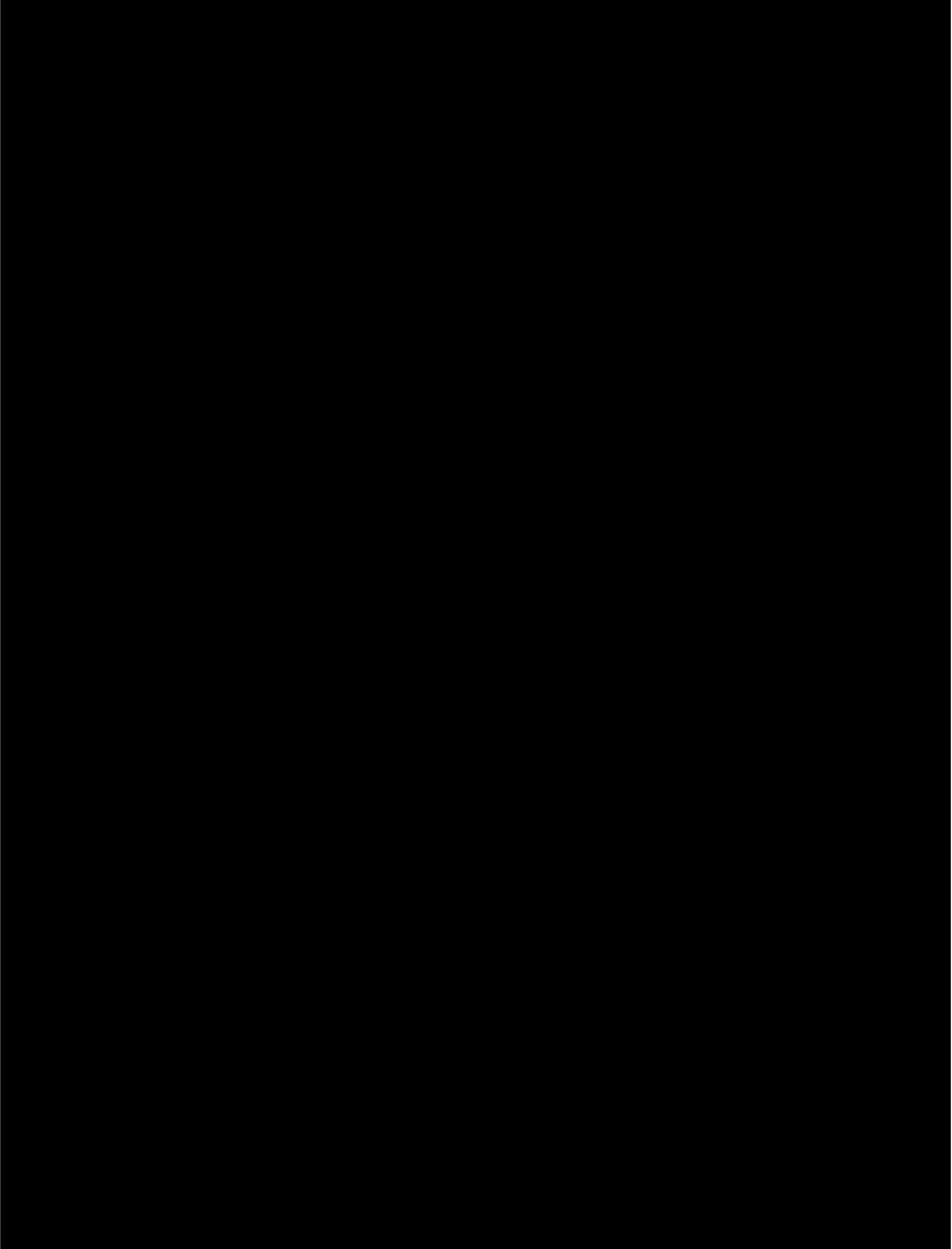


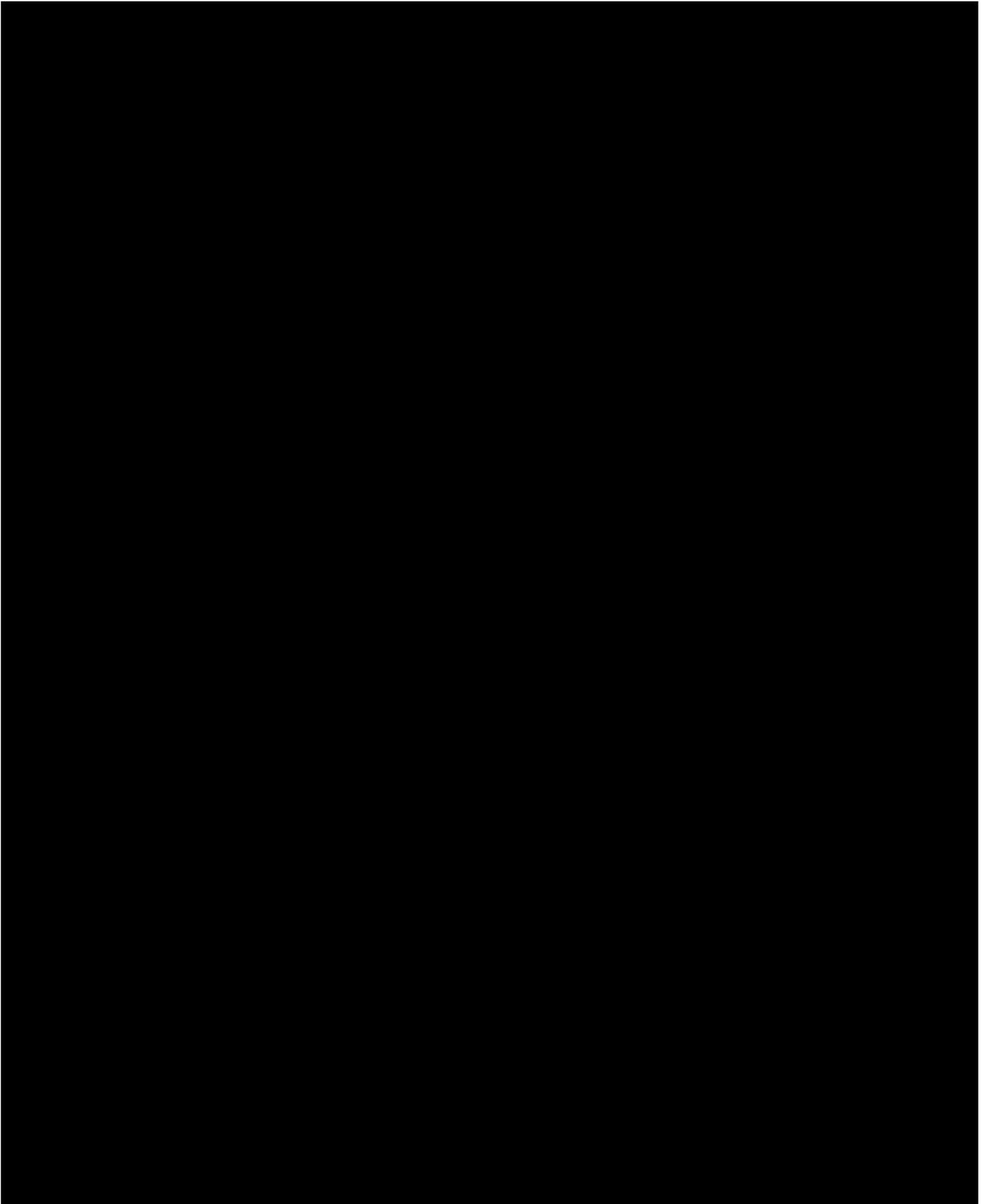
**TAB - 6.J**

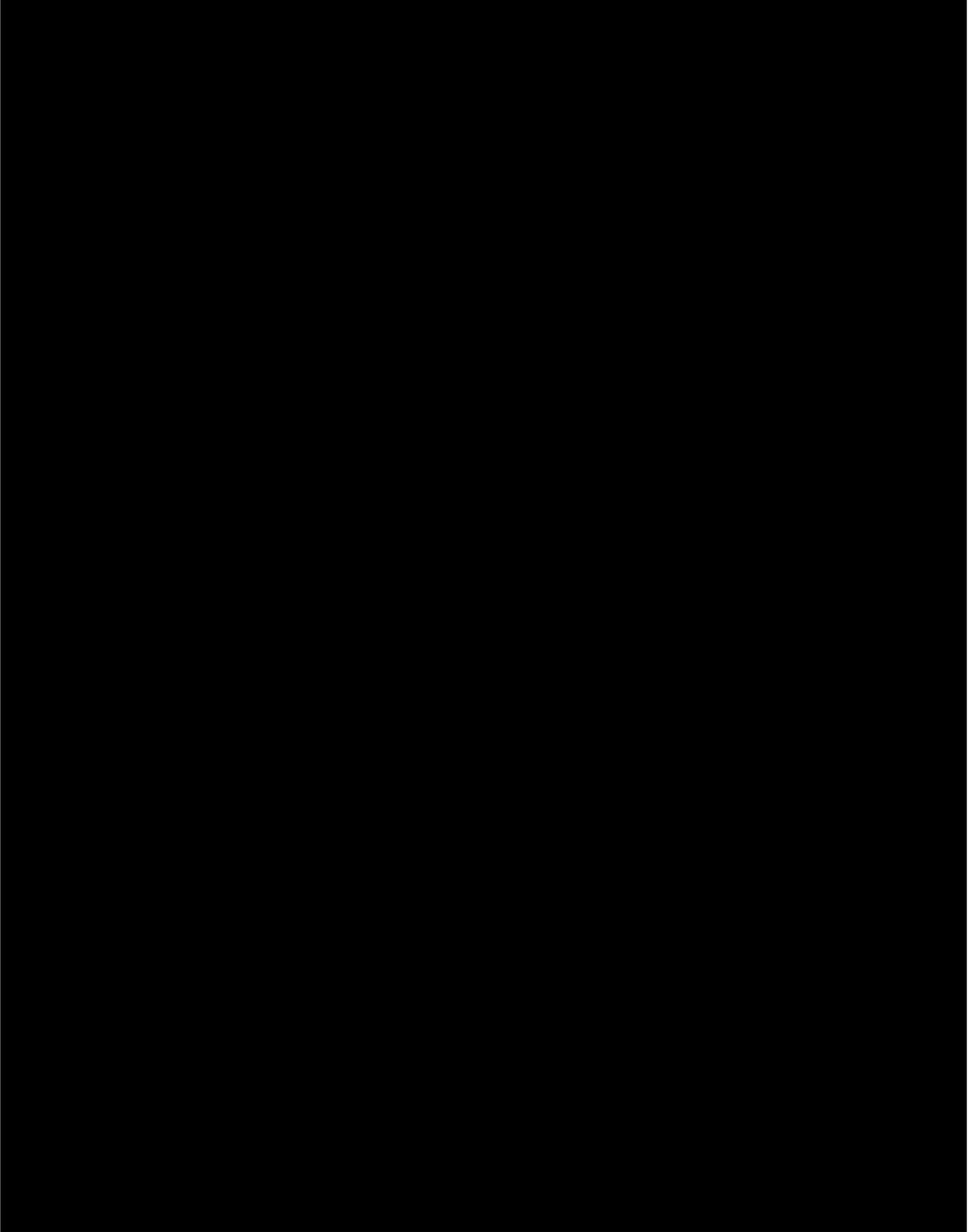












**TAB - 6.K**

## COMPENDIUM PUBLIC

1 --- Upon resuming at 1:11 p.m. /

2 Reprise à 13 h 11

3 **DEPUTY REGISTRAR:** We are now in a public  
4 session.

5 **CHIEF JUSTICE CRAMPTON:** I'll just confirm for  
6 members the public that we will be breaking now for lunch  
7 and getting back together at 2:25. Thank you.

8 **MR. SMITH:** Thank you.

9 **DEPUTY REGISTRAR:** The hearing will resume at  
10 2:25 this afternoon. Thank you.

11 --- Upon recessing at 1:11 p.m. /

12 Suspension à 13 h 11

13 --- Upon resuming at 2:26 p.m. /

14 Reprise à 14 h 26

15 **DEPUTY REGISTRAR:** Good afternoon, Chief  
16 Justice. We are ready to proceed in a public session.  
17 Thank you.

18 **CHIEF JUSTICE CRAMPTON:** Thank you.

19 Okay, Mr. Smith, back to you.

20 **MR. SMITH:** Thank you very much, Chief Justice.  
21 Just a couple of questions.

22 Dr. Miller, can you hear me okay?

23 **DR. MILLER:** Yes, I can. Good afternoon.

24 **MR. SMITH:** Good afternoon. Dr. Miller, do you  
25 cite to any document in which Shaw says the November price

## COMPENDIUM PUBLIC

1 increase will be unprofitable?

2 **DR. MILLER:** No, I don't believe that I do.

3 **MR. SMITH:** And every document that considers  
4 the profitability of the November price change says it will  
5 be profitable.

6 **DR. MILLER:** Among those in my report, I think  
7 that may be true.

8 **MR. SMITH:** And the ones we looked at before  
9 the lunch break; correct?

10 **DR. MILLER:** Yes.

11 **MR. SMITH:** And sir, and Members of the  
12 Tribunal, if you have from my book Tab 18.

13 Ms. Ruhlmann, there's no need to turn it up so  
14 we can avoid a confidential session.

15 But Dr. Miller, you'll recall this is Figure 3  
16 from Dr. Israel's report. It shows the share of  
17 subscribers on the bottom and your share of SOGA on the  
18 top. You remember --

19 **DR. MILLER:** Just give me a moment. I don't  
20 recall it.

21 Let me just be sure. I think I know what  
22 you're talking about.

23 Do you remember what page it is on in this  
24 report?

25 **MR. SMITH:** Sure. I can get that for you.

**TAB - 6.L**

## COMPENDIUM PUBLIC

1                   **DR. MILLER:** No, that would be the wrong  
2 answer. I think you're saying in a way that would be  
3 relevant here, and I agree with that.

4                   **MR. SMITH:** You haven't worked in the private  
5 sector in a way that would be relevant here?

6                   **DR. MILLER:** I agree.

7                   **MR. SMITH:** So if the decision to increase  
8 prices, sir, was made as an ordinary course decision by  
9 Shaw, I take it, sir, that that decision is the decision  
10 you would expect Shaw to make regardless of the  
11 transaction?

12                   **DR. MILLER:** No, I disagree. We're talking  
13 about a situation in which at this point, at the point it's  
14 implemented, the transaction had already been announced  
15 for -- I'm always careful about months -- seven to eight  
16 months, it was under antitrust review. I view data as  
17 difficult to interpret in general once you enter after the  
18 merger review -- or the merger is announced, and so my  
19 preference is to use pre-merger data. So I don't normally  
20 interpret this as ordinary course in this context.

21                   **MR. SMITH:** Let's just take it in pieces. You  
22 expect firms to make profit-maximizing decisions; correct?

23                   **DR. MILLER:** They try to. That's my  
24 expectation.

25                   **MR. SMITH:** Right. And if this was a

## COMPENDIUM PUBLIC

1 profit-maximizing decision, it's a decision that Shaw would  
2 make regardless of whether the transaction was happening or  
3 not?

4 **DR. MILLER:** I agree with that. There's an  
5 incentive to do it.

6 **MR. SMITH:** And therefore, sir, if it was a  
7 profit-maximizing decision and a decision that Shaw would  
8 have made regardless of whether or not the transaction was  
9 going ahead, it is a decision that should have factored  
10 into your model. You agree with that?

11 **DR. MILLER:** Yes, I could have considered it in  
12 the model.

13 **MR. SMITH:** In fact, it's not just that you  
14 could have, sir. You should have considered it.

15 **DR. MILLER:** Well, I don't have the data for  
16 that time period to do so, first of all.

17 **MR. SMITH:** And that's because you didn't get  
18 it from Bell and Telus, even though you asked for it;  
19 correct?

20 **DR. MILLER:** I don't know that -- I guess --  
21 there's a range of data that I use in the report. Some of  
22 it might be possible to extend. Others -- this is well  
23 beyond the range of the data that I considered.

24 **MR. SMITH:** Right. But this would be picked up  
25 in the SOGA data?

**TAB - 6.M**

## COMPENDIUM PUBLIC

1                   And the issue is that -- so it's a seasonality  
2 thing we see. So first of all, any hump there for share of  
3 gross adds or gross adds reflects back to school. But you  
4 can see -- and an easy way to see this is that it's  
5 happening for not just Shaw Mobile, it's happening even  
6 more clearly on this picture for Fido. It's happening for  
7 Chatr. Basically, you see these humps happening for other  
8 carriers. We can tell it's a seasonal effect not the end  
9 of the trend. We can also -- it doesn't even really tell  
10 us the share of gross adds is going up then, because gross  
11 adds are going up for multiple carriers.

12                   In fact, what this picture should tell you if  
13 you look at it, and Professor Miller had the data to do, is  
14 that in the period he is studying that Shaw Mobile line is  
15 far above the other lines. But by the time we get out into  
16 March of 2022, the Shaw Mobile line has fallen below  
17 Freedom, right? Remember Freedom was a product that had  
18 the much lower share similar to where Shaw Mobile ends up.  
19 Well, this picture tells you that if you run out the gross  
20 adds farther the gross adds at Shaw Mobile look a lot like  
21 Freedom, not the larger number Professor Miller is using.

22                   Go down one more slide and would I just note  
23 quickly that Professor Miller had the data from slide 55.  
24 He could have calibrated his model using share of  
25 subscribers from March of 2022, as I have shown you what

## COMPENDIUM PUBLIC

1 happens. That when you share correctly, and it would miss  
2 this newness issue. He made a comment just quickly that he  
3 couldn't do this because he didn't have data. He was  
4 missing Bell and Telus data. I understand he could have  
5 asked for those data.

6 He also indicated that the Rogers price data  
7 that was more current had a little wrinkle in that it only  
8 covered phones, rather than phones and connected devices  
9 combined, like other data. But connected devices are very  
10 small and in fact, you can look at the national Rogers data  
11 and see what -- if that connected devices data make any  
12 difference. So he could have easily made an adjustment.  
13 So he had plenty of data to use this more current period  
14 and just didn't. He used the much higher number.

15 **MR. SMITH:** And is that data, the national data  
16 you referred to, is that data that Dr. Miller had?

17 **DR. ISRAEL:** Yes, it's the data that's been  
18 produced here. You would have to put together the revenue  
19 data and do the division, revenue divided by subscribers,  
20 but you could have computed therefore the average price for  
21 phones and connect devices, the average price for just  
22 phones, seen the ratio and used that to adjust all of the  
23 data.

24 **MR. SMITH:** Very good.

25 **DR. ISRAEL:** Moving on, to slide 57, the final

**TAB - 6.N**

## COMPENDIUM PUBLIC

1                   can go through each one of them, some  
2                   benefits and some relative  
3                   disadvantages."

4                   So do you disagree with Dr. Carlton that these  
5                   measures have advantages and disadvantages, each of these  
6                   measures, Dr. Israel?

7                   **DR. ISRAEL:** Again, as measures of diversion, I  
8                   think what he's saying is none of them are actually the  
9                   price increase measure that it should be. What you're  
10                  quoting from is exactly what I was remembering before  
11                  because he goes on to say that "if the analysis depended on  
12                  which of those you picked, I would be pretty nervous."

13                  I was remembering --

14                  **MR. TYHURST:** So I'm just going to --

15                  **DR. ISRAEL:** -- him saying he looked at a  
16                  variety of them and they all got under the same place and  
17                  then, ultimately, the FCC came up with a true measure of  
18                  diversion and that's what was used.

19                  **MR. TYHURST:** All right. Just listen to the  
20                  question, sir, and see if you can answer the question.

21                  And the question is, would you agree or do you  
22                  disagree with Dr. Carlton that each of these measures has  
23                  advantages and disadvantages?

24                  **DR. ISRAEL:** As measures of diversion -- we're  
25                  not talking about market share here. We know what market

## COMPENDIUM PUBLIC

1 share is. That's what the logit needs. But as measures of  
2 diversion, none of them actually measure diversion.

3 I agree with him, they have advantages and  
4 disadvantages and he goes on to say they are noisy measures  
5 of diversion. We talked a lot about --

6 **MR. TYHURST:** And one --

7 **DR. ISRAEL:** -- the issues of diversion in this  
8 case.

9 **MR. TYHURST:** And one of the disadvantages,  
10 sir, of share of subscribers, isn't this true, is that it  
11 includes embedded customers who don't care to switch?  
12 That's what Dr. Carlton is saying in the middle of the  
13 paragraph on the page, sir. Isn't that correct?

14 **DR. ISRAEL:** He's saying that for sure. If you  
15 believe that, you shouldn't use a logit model because it  
16 embeds the assumption that share drives diversion.

17 **MR. TYHURST:** All right. You haven't made that  
18 criticism, have you, of the logit model in your report?

19 **DR. ISRAEL:** I don't know if I'd describe it as  
20 a criticism. I think I was quite clear that that's the  
21 core assumption of the logit model.

22 **MR. TYHURST:** All right. Fair enough. That's  
23 a core assumption, but you're not criticizing that core  
24 assumption?

25 **DR. ISRAEL:** I'm criticizing Dr. Miller for

## COMPENDIUM PUBLIC

1 saying that he can justify using something other than share  
2 in a logit model based on --

3 MR. TYHURST: We understand your evidence, sir.  
4 Just answer the question.

5 MR. SMITH: Sorry, he is answering the  
6 question, Mr. Tyhurst.

7 MR. TYHURST: Well, you keep saying that, Mr.  
8 Smith, but of course he isn't. I'll move along here.  
9 Let's move along to the --

10 MR. SMITH: Sorry, sorry.

11 MR. TYHURST: -- to the porting data --

12 MR. SMITH: Sorry. Mr. Tyhurst, you can't  
13 disagree with me and then move on and not allow the witness  
14 to answer the question.

15 MR. TYHURST: Fair enough.

16 DR. ISRAEL: I don't remember the question.

17 MR. TYHURST: Good. Let's move along.

18 Porting data. In your report, you also  
19 criticize Dr. Miller's reference to porting data as a  
20 cross-check against the diversion ratios provided by gross  
21 adds; correct?

22 DR. ISRAEL: I don't know if I used those  
23 words, but yeah, I went through that in my chief, the  
24 porting and diversion being two different things.

25 MR. TYHURST: Now, the FCC in their analysis in

**TAB - 6.0**

### [End Confidential Information]

33. This critical flaw results from a lack of feedback between the two Models. The Engineering Model estimates the annual incremental costs of building enough capacity to meet demand on the basis of exogenous network demand assumptions.<sup>50</sup> The Economic Model then predicts what network demand would be on the basis of these costs and predicts the far lower demand shown in Table 6. If these estimates were then fed back into the Engineering Model, a much lower network demand assumption would result in far lower marginal cost predictions. As implemented by the Applicants, their Engineering Model predicts that marginal network costs would be very high in 2014 and 2015 without the transaction and the Economic Model predicts they would be zero. This discrepancy makes the benefits of the transaction indeterminate since the latter case would imply that the public interest benefits due to network cost savings would be zero.

34. The Economic Model also only accounts for unilateral pricing effects in retail wireless markets and ignores the potential for coordinated effects in those markets, harms in the enterprise and government services market, or the harms involving roaming, wholesale services, backhaul, and handsets we considered.<sup>51</sup> In addition, the Applicants chose input parameters that generally lead to understated potential harms in their implementation of the Economic Model.

35. Even without accounting for all of these deficiencies in the Economic Model, we show that by only using a more reasonable marginal cost input from the Engineering Model (but not correcting that input for every problem we have identified) and AT&T's Long Term Evolution ("LTE") percentage, the Applicants' Economic Model predicts higher industry prices and lower output for every year after the transaction in nearly all CMAs and a weighted average price increase across the CMAs of one percent in 2014 and 0.7 percent in 2015.<sup>52</sup> This implies that even after accounting for the Applicants' projected network efficiencies, mobile wireless prices would still be higher with the transaction than without. Given the Engineering Model marginal cost issue along with all of the other problems highlighted above, we find that the Applicants' Economic Model is insufficient to support their claims because it is materially unreliable for predicting the outcome of this transaction. In the following sections, we present the predictions of a modified version of the Economic Model only to show that the evidence the Applicants submitted does not affirmatively show the transaction is in the public interest, and actually supports a conclusion that the transaction would likely result in competitive harms.

#### a. Model Derivation

36. Below, we explain mathematically the structure of the Applicants' Economic Model that assumes Bertrand differentiated products competition where each of the five firms is assumed to produce a single good in each period at constant marginal cost.<sup>53</sup> Demand is assumed to be linear so that the quantity sold,  $X_i$ , for firm  $i$  is given by:

$$X_i = a_i + \sum_j b_{ij} * P_j$$

---

<sup>50</sup> See Applicants' Economic Model (Aug. 19, 2011) at 110811 MultiYearModelv3 0.xlsx at cells I-M 13:19.

<sup>51</sup> See Staff Analysis.

<sup>52</sup> Specifically, we implement the correction to the cell-splitting algorithm described in Appendix D and set the AT&T LTE penetration rate in the Engineering Model to **[Begin Confidential Information]** **[End Confidential Information]** but conservatively leave the T-Mobile LTE assumption unchanged. See Engineering Analysis, Appendix D. If we only correct for the cell-splitting error and do not adjust the LTE penetration, the weighted average price increase is still positive in both 2014 and 2015.

<sup>53</sup> The five firms in the Economic Model are AT&T, T-Mobile, Verizon Wireless, Sprint and a firm composed of all other firms and denoted as "Other". Our derivation of the Economic Model closely follows that of the Applicants. See Explanation of the Compass Lexecon Merger Simulation Model (Aug. 23, 2011).

# COMPENDIUM PUBLIC

## Federal Communications Commission

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where  $a_i$  is the intercept,  $b_{ij}$  is the slope parameter on the price of good  $j$  in the demand equation of firm  $i$ , and  $P_j$  is the price of good  $j$ .

Firm  $i$ 's profit function can be written as:

$$\Pi_i = [P_i - C_i] * X_i$$

where  $C_i$  is the marginal cost of producing the product of firm  $i$ . To solve for the optimal price for firm  $i$  we substitute the equation for  $X_i$  into the profit function and differentiate with respect to  $P_i$  to obtain the following first order condition of profit maximization:

$$0 = X_i + b_{ii} * [P_i - C_i]$$

which can be rewritten as:

$$M_i = -1 / \varepsilon_{ii}$$

where  $M_i$  is the margin for firm  $i$  and  $\varepsilon_{ii}$  is the own-price elasticity of the product sold by firm  $i$ .<sup>54</sup> From the above equation, we can solve for the own-price elasticities from the assumed profit margins for each firm.

The firm specific demand parameters can be solved from the cross-price elasticities ( $\varepsilon_{ij}$ ) using the following relationship:

$$\begin{aligned} \varepsilon_{ij} &= \partial X_i / \partial P_j * P_j / X_i \\ &= b_{ij} * P_j / X_i \end{aligned}$$

solving for  $b_{ij}$  we have:

$$b_{ij} = \varepsilon_{ij} * X_i / P_j$$

To obtain estimates of  $b_{ij}$  we need estimates of the cross-price elasticities, which can be obtained from observed diversion ratios. By definition, the diversion ratio from product  $i$  to  $j$  is given by:

$$\begin{aligned} D_{ji} &= \partial X_j / \partial P_i / \partial X_i / \partial P_i \\ &= \varepsilon_{ji} * X_j / \varepsilon_{ii} * X_i \end{aligned}$$

Solving for  $\varepsilon_{ji}$  we have the following expression for the cross-price elasticities:

$$\varepsilon_{ji} = D_{ji} * X_i / X_j * \varepsilon_{ii}$$

or equivalently:

$$\varepsilon_{ij} = D_{ij} * X_j / X_i * \varepsilon_{jj}$$

However, we do not observe diversion out of the market from price changes. Therefore, we assume a recapture rate of **[Begin Confidential Information]** **[End Confidential Information]** and adjust the diversion ratios calculated from the porting data accordingly. Finally, we can solve for the  $a_i$  parameters from the equation below:

$$a_i = X_i - \sum_j b_{ij} * P_j$$

37. Post-transaction, the combined firm would choose prices for AT&T and T-Mobile to

---

<sup>54</sup> The own-price elasticity is defined as:  $\partial X_i / \partial P_i * P_i / X_i$ , or the derivative of own quantity with respect to own-price multiplied by the ratio of own-price to own-quantity. In other words, the percent change in own-quantity divided by the percent change in own-price.

<sup>55</sup> See *supra* ¶ 15.

**TAB - 6.P**

# Prof. Miller Acknowledges that His Model is Meant to Balance Firms' Pricing Incentives

CONFIDENTIAL - LEVEL A

78

- I explain how I incorporate data on consumers' choices of wireless brand and carriers' prices and markups into the model in order to generate predictions about the likely effect of the merger (Section 6.2.4).
- I describe carrier affiliation (Section 6.2.1).
- I describe and transmit services to result in a profit.
- I describe surplus, a sensitivity elasticity.

6.2.1. A merger by the market for mobile

139. As discussed to which the merger Economic theory and Shaw's wireless consumers of wireless discuss in detail

140. In the market deciding whether revenue earned from the other hand, a

consumption as a result of the higher prices. The carrier loses all profit associated with subscribers that switch away and incremental profit associated

140. In the market for wireless services, a carrier faces a trade-off when deciding whether to raise its prices. On the one hand, higher prices increase revenue earned from subscribers that continue to purchase from the carrier. On the other hand, some subscribers will switch to other carriers or reduce their consumption as a result of the higher prices. The carrier loses all profit associated with subscribers that switch away and incremental profit associated with subscribers who use their phone less. A profit-maximizing firm balances these considerations when setting prices.<sup>221</sup>

<sup>221</sup> "Market power of sellers is the ability of a firm or group of firms to profitably maintain prices above the competitive level for a significant period of time." See Merger Enforcement Guidelines, ¶ 2.1, 2-3.  
<sup>222</sup> Merger Enforcement Guidelines, ¶ 2.9.

# Correct Balancing *Requires* Share of Subscribers; Using Share of Gross Adds is Incorrect

256. For example, if there are only two firms, each selling one product in the market, 1 and 2, they solve:

$$\max_{p_1} m \cdot s_1(p_1, p_2) \cdot (p_1 - c_1),$$

$$\max_{p_2} m \cdot s_2(p_1, p_2) \cdot (p_2 - c_2),$$

where **s** are market shares,  $p$  are prices,  $c$  are marginal costs,  $(p - c)$  are markups, and  $m$  is the market size.<sup>325</sup> The solution to these profit-maximization problems is given by the following system of first-order conditions:

$$s_1(p_1, p_2) + \frac{\partial s_1(p_1, p_2)}{\partial p_1} (p_1 - c_1) = 0,$$

$$s_2(p_1, p_2) + \frac{\partial s_2(p_1, p_2)}{\partial p_2} (p_2 - c_2) = 0.$$



By using SOGA and **ignoring** SOS, Prof. Miller's model puts incorrect weight on the increased revenue from the subscribers who continue to purchase the product.

Gains from price increase to *subscribers* who **do not** switch

Losses from *subscribers* who **do** switch

Miller Initial Report, ¶ 256

**TAB - 6.Q**

## COMPENDIUM PUBLIC

1 mispredictions, and that's the way it uses SoGA, share of  
2 gross adds, and the way that it uses porting data, as I'll  
3 talk about later, that just -- that overstate by a large  
4 amount any prediction of harm.

5           So I'll talk about why SoGA is not a valid  
6 measure of share to use in the model, why SoGA in this case  
7 is particularly poor because it's just reflecting the  
8 newness of the Shaw Mobile product, particularly at the  
9 dates that Professor Miller uses.

10           I'll talk about why his argument that the fact  
11 that his model can match porting data is actually a  
12 problem, not a feature. And then I'll talk about why his  
13 claim that SoGA is a measure of share of shoppers is both  
14 not relevant and not correct.

15           So quickly on share of SoGA not as a measure of  
16 share of subscribers, so I'll have to get a little  
17 technical for a bit, but I'll try to be as clear as I can.  
18 If you go down one slide.

19           Professor Miller acknowledges, and I think he  
20 said it clearly, that these models -- what they're trying  
21 to do to think about price changes is trade off -- if you  
22 raise your price, you could make some more money on your  
23 existing subscribers, but you lose some money if people  
24 switch. But the base of that calculation is your existing  
25 subscribers. You have to have a measure of share that

## COMPENDIUM PUBLIC

1 reflects how many subscribers you have, right.

2 In this industry, unlike other industries,  
3 everybody who gets the wireless product pays for it every  
4 month. So all subscribers are contributing revenue. So  
5 when you're thinking about the price effects, you need to  
6 think about all subscribers because they all contribute  
7 revenue.

8 And if you go down one more slide, you'll see  
9 that even in his -- in 38, even in his math, Professor  
10 Miller agrees that you need to trade off the subscribers  
11 who do or don't switch. And the little S in his math is  
12 share of subscribers because you need to tell the model how  
13 many subscribers do people have, what's the share of  
14 subscribers, right.

15 Another way to say this is the welfare  
16 calculations, the deadweight loss that Professor Miller has  
17 shown, that deadweight loss is applied to everybody, all  
18 wireless subscribers in Canada, so you need to know the  
19 total number of subscribers affected. You need a share of  
20 those subscribers that each firm has.

21 Professor Miller does not do that. He feeds  
22 into his model the share of gross adds.

23 So if there's millions of subscribers in a  
24 given month, there could be just thousands of people who  
25 switch, and all he's doing is taking the share of those

## COMPENDIUM PUBLIC

1 switchers. He's telling the model the share of switchers  
2 even though, by his own math, the model must know, it has  
3 to know the share of subscribers or it can't do the math  
4 right. You can't feed it share of gross adds and have it  
5 think that that share of subscribers or it can't get this  
6 trade-off right to figure out the price effects.

7           So that's -- everything else I'll say is really  
8 secondary to that. You just -- you cannot give the  
9 model -- it needs to compute price increases across all  
10 subscribers. The numbers are just a much smaller set of  
11 gross adds. It's being given the wrong input and the model  
12 has no way to know that and it will compute the wrong  
13 result.

14           If we go down to slide 39, you can see the  
15 effect of that in Professor Miller's analysis.  
16 Particularly for Shaw Mobile, you see the highlighted line  
17 for the January to April 2021 period where Professor Miller  
18 measures share of gross adds. You'll see he gets a share  
19 of gross adds that is just markedly four times, roughly,  
20 higher than the Shaw Mobile share of subscribers. And to  
21 be clear, that share of subscribers that I'm showing on the  
22 page, that's all the way out to March of 2022 so that's  
23 nearly two years after Shaw Mobile has launched, right. By  
24 being two years out, it's really after people who are on a  
25 contract, say a two-year contract, have all had time to

**TAB - 6.R.A**

# COMPENDIUM PUBLIC

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 22

File No.: CT-2022-002

Registry Document No.: 641

**IN THE MATTER OF** an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the Competition Act, RSC 1985, c C-34 as amended;

BETWEEN:

**Commissioner of Competition**  
(applicant)

and

**Rogers Communications Inc.**  
**Shaw Communications Inc.**  
(respondents)

and

**Attorney General of Alberta**  
**Videotron Ltd.**  
(intervenor)



**ORDER**

**(Motion to Strike Portions of Witness Statements Delivered by the Commissioner)**

# COMPENDIUM PUBLIC

UPON considering the materials filed by the respondents and the applicant on this Motion;

AND UPON having had an initial conversation with counsel to the parties about this Motion earlier this week, during the hearing of a related Motion;

AND UPON considering a letter dated November 3, 2022 on behalf of the respondents, stating that the respondents have unilaterally decided to narrow the issues in dispute to the 10 items addressed below, in request of which they request a ruling;

AND UPON considering that the requested ruling relates solely to the portions of the paragraphs mentioned below that were underlined in charts appended to the parties' Motion materials;

## THE TRIBUNAL ORDERS THAT:

1. The underlined portions of the following paragraphs of the following witness statements shall be struck, unless otherwise indicated:

Witness Statement of Blaik Kirby

- a. Page 10, paragraph 21 (only the second sentence);
- b. Page 12, paragraph 26 (only the last sentence);
- c. Page 14, paragraph 34;
- d. Pages 16 – 17, paragraphs 39, 40 (only the second sentence) and 41;
- e. Page 19, paragraph 48;

Witness Statement of Charlie Casey

- f. Page 4, the second sentence in paragraph 8 as well as the entire contents of subparagraph 8(a);

Witness Statement of Sameer Dhamani

- g. Page 4, paragraph 15;

Witness Statement of Stephanie Assad

- h. The following words in paragraph 8: “copies of which are included under separate cover as Exhibit ‘C’”, as well as Exhibit C itself;

2. Each party shall bear its own costs in respect of this Motion.

# **COMPENDIUM PUBLIC**

DATED at Ottawa, this 4th day of November, 2022

SIGNED on behalf of the Tribunal by the Presiding Member.

(s) Paul S. Crampton

**COMPENDIUM PUBLIC**

subscribers and it informs TELUS' actions during the time period of such campaigns. For example, in Q3 and Q4 2020 TELUS launched Operation Freedom which included: (a) win back offers targeting subscribers who ported out from TELUS to Shaw; and (b) promotions to win share against Shaw by offering Shaw subscribers incentives to port-in (i.e., switch) to TELUS.

**CHANGES IN SHAW'S COMPETITIVE INTENSITY SINCE ROGERS ANNOUNCED ITS PROPOSED ACQUISITION OF SHAW**

8. I believe that Shaw's competitive intensity in Alberta, British Columbia and in Ontario has decreased materially since the announcement of the Proposed Transaction on March 15, 2021. My belief is based on a number of data points and observations, including the following:

a) The Comlink data: Attached to my witness statement as Exhibit A are true copies of three Comlink reports which show the net ports for Shaw on a monthly basis for the period commencing January 1, 2021 (prior to the announcement of the Proposed Transaction) and ending August 31, 2022, on a national basis, on a combined Alberta and British Columbia basis; and on an Ontario only basis. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] More specifically,

- i. The national report shows that Shaw gained [REDACTED] net ports in April 2021 and lost [REDACTED] net ports in December 2021. This is an approximate 235% decrease in the number of net ports. This trend has continued throughout 2022. Shaw commenced 2022 by losing [REDACTED] net ports and in August lost [REDACTED] net ports.
- ii. The combined Alberta and British Columbia report shows that Shaw gained [REDACTED] net ports in April 2021 and lost [REDACTED] net ports in December 2021. This is an approximate 103% decrease in net ports. Shaw has experienced a drastic decline in net ports in 2022. It commenced the year by gaining [REDACTED]

**COMPENDIUM PUBLIC**

net ports and then the decline commenced and in August it lost [REDACTED] net ports.

iii. [REDACTED]  
[REDACTED] since the Proposed Transaction was announced. Shaw lost [REDACTED] net ports in April 2021 and lost [REDACTED] net ports in December 2021. This is an approximate 374% decrease in net ports. This trend has continued throughout 2022. Shaw lost [REDACTED] net ports in January 2022 and in August it lost [REDACTED] net ports.

iv. A common element of each of these reports, each of which covers a time period after the announcement of the Proposed Transaction, is Shaw's substantial loss of net ports in the Black Friday-Cyber Monday period (late November) and the Boxing Week period (late December) which suggests that Shaw was not competing vigorously for subscribers during these heavy price promotional periods.

b) TELUS' review of Shaw's Third Quarter Results for the three-month periods ending May 31, 2021, and May 31, 2022 shows, among other matters, that in Q3 2021, immediately after the Merger was announced, Shaw reported 46,604 postpaid net adds. In Q3 2022, approximately a year after the Merger was announced, Shaw reported 19,392 postpaid net adds, less than 50% of the net adds in the quarter immediately following the announcement of the Merger. This activity occurred despite the fact that the number of wireless subscribers in each of British Columbia, Alberta, and Ontario (being the provinces in which Shaw competes) increased in Q3 2022 relative to Q3 2021.

c) TELUS' own internal porting data shows that in the three quarters between April 1, 2020 and December 31, 2020 Shaw won 1 [REDACTED] net ports from TELUS and in the three quarters in 2021 following the announcement of the Proposed Transaction, being April 1 2021 to December 31, 2021, Shaw only won [REDACTED] net ports from TELUS, a decrease of over 90%. From January 1, 2022 to August 31,

**TAB - 6.R-B**

## COMPENDIUM PUBLIC

competitive conditions. This deficiency also means that SOS will underestimate the importance of new products such as Shaw Mobile as it includes consumer purchase decisions that were made when Shaw Mobile was not even available.<sup>385</sup>

118. SOS will understate the importance of new products. This point is well demonstrated by comparing British Columbia and Alberta, where Shaw Mobile recently entered, to Ontario, where it did not. In all three provinces, Freedom is an established carrier. In British Columbia and Alberta, SOGA matches the porting data better than SOS.<sup>386</sup> In Ontario, SOGA and SOS match the porting data similarly well.<sup>387</sup> Consistent with the MEGs, it is important to use SOGA when there are new competitive options in the market.<sup>388</sup>

119. Dr. Miller is careful to avoid the initial “spike” in Shaw Mobile’s gross adds following its entry and the decline in Shaw Mobile gross adds following the Arrangement Agreement (linked to subsequent price increases).<sup>389</sup> Once again, Dr. Miller corroborates his analysis with porting data, which show a similar pattern.<sup>390</sup> Contrary to Dr. Israel’s comments about push and pull diversions, Dr. Miller is using a period of time when porting and SOGA are stable.<sup>391</sup>

120. SOS ignores the fact that new entrants like Shaw Mobile can continue to grow subscriber share toward a steady-state level for a long time. Even Videotron, which launched wireless services as an MVNO in 2006 and deployed its own network in 2010, has a current SOS [REDACTED] well below its SOGA [REDACTED].<sup>392</sup>

### c) The merger simulation generates sensible results

121. Dr. Miller uses two versions of his model, an 8-brand model and an 11-brand model. The 8-brand model includes premium (e.g., Rogers) and flanker (e.g., Fido) brands while the 11-brand model adds the prepaid (e.g., chatr) brands. As Dr. Miller notes, the 8-brand model appears to

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<sup>385</sup> CA-A-0125, Rebuttal Miller Report, p 20, para 37; Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1435:9 – p 1436:16.

<sup>386</sup> CA-A-0122, Miller Report, p 91, para 178; Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1462:20 – p 1463:3; CA-A-0304, Shaw Mobile Response Strategy dated Aug 14, 2020, pp 7-9.

<sup>387</sup> CA-A-0122, Miller Report, p 91, para 178; CA-A-0304, Shaw Mobile Response Strategy dated Aug 14, 2020, pp 7-9.

<sup>388</sup> MEGs, at 21 para 5.4.

<sup>389</sup> CA-A-0125, Miller Rebuttal Report, pp 24-25, paras 47-48; CA-A-127, Expert Presentation of Dr. N Miller, slide 37; CA-A-0122, Miller Report, p 163, Exhibit 31. See also: Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4544:18–p 4545:10.

<sup>390</sup> CA-A-0122, Miller Report, pp 166-167, para 352 and Exhibit 33.

<sup>391</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4465:1–p 4466:5.

<sup>392</sup> CA-A-0125, Miller Rebuttal Report, p 24 para 46; CA-I-0144, Lescadres Statement, Exhibit 57, pp 1193-1195 [REDACTED]

[REDACTED] CA-R-1851, Israel Report, p 52 para 69, footnote 50.

**TAB - 6.R.C**

## COMPENDIUM PUBLIC

177. The 8-brand model, which focuses on premium and flanker brands, appears to better match the data inputs as it is not required to reconcile the prices, market shares, and markups for an additional group of brands (the prepaid brands) that is somewhat differentiated from the other two groups (premium and flanker brands). Accordingly, the 8-brand model is likely to deliver more informative predictions about the merger of Rogers with a competitor that does not operate a prepaid brand. Nevertheless, I continue to report the predictions of both models in my discussion of the merger simulations results below. As the results indicate, the predictions of the two models are consistent with one another.

178. Finally, I also confirmed that, in Alberta and British Columbia, the model calibrated to market shares based on gross adds matches substitution patterns observed in porting data better than the model calibrated to the percentages of subscribers.<sup>242</sup> Therefore, in Alberta and British Columbia, where the recent entry of the Shaw Mobile brand makes the difference relevant to assessing the competitive effects of the proposed acquisition, I expect the model calibrated to market shares based on gross adds to provide more accurate predictions about the effects of the merger than the model calibrated to the percentage of subscribers. In Ontario, the model matches substitution patterns observed in porting data similarly well whether it is calibrated with market shares based on gross adds or the percentages of subscribers.<sup>243</sup>

***8.5. Comparison of model predicted diversions to porting data***

355. Diversion ratios can be used to quantify how much consumers substitute between different brands. The diversion ratio between brand  $i$  and brand  $j$  is equal to the share of consumers who switch to brand  $j$  from brand  $i$ , out of all consumers which leave brand  $i$ , in response to  $i$  raising its price. Diversion ratios are important to predict the competitive effects of a merger: the higher the diversion ratio between the merging brands, the more consumers the merged firm would be able to recapture as it raises its prices. This implies that a model that better fits substitution patterns (as measured by diversions) will provide more accurate predictions on the competitive effects of the merger. In the logit model, the diversion ratios are given by the conditional shares of the brands considered. In other words, consumers switch to the brands in the same proportion as given by these brands' shares:

$$D_{ij} = s_{j|i} / \sum_k s_{k \neq i|i}$$

356. Therefore, I can calculate the diversions predicted by the model—either calibrated to market shares or calibrated to subscriber percentages—using only the shares of gross adds and subscribers. Porting data from Comlink may be used to approximate “empirical” diversion ratios. Porting data track the number of customers who switch between brands of different carriers (for any reason). Thus, while they not provide perfect experiments in which one brand changes its price, and the other market conditions are held constant, porting data still include useful information on substitution patterns between brands.

357. I calculate the “empirical” diversion ratio between brand  $i$  and brand  $j$  by counting the consumers who port from brand  $i$  to brand  $j$ , and then dividing by

<sup>442</sup> SJRB-CCB00814711, at p. 22.

## COMPENDIUM PUBLIC

consumers who port out from brand *i* to any of the competitor's brands. With rare exceptions, Comlink does not track migrations (i.e., switches between brands of the same carrier), so I do not use diversions between brands of the same carrier in this exercise. Comlink does not report Freedom separately from Shaw Mobile. I split the port-ins to Shaw brands from each brand using the ratio of ports to Freedom and Shaw Mobile from that brand in the porting data that Shaw produced. I do not have information that would allow me to apportion port-outs from Shaw brands between Freedom and Shaw Mobile. Therefore, I calculate the diversion ratios from Shaw overall and assume the diversion ratios from Freedom and Shaw Mobile are the same.

358. Having calculated “empirical” diversions from porting data and diversion predicted by the model—either calibrated to market shares or to subscriber percentages, I evaluate how much they differ from each other on average. I do so by computing a statistic called mean square error (“MSE”). Porting data may not reflect flows to prepaid brands as well as to main/flanker brands, as I understand that consumers who switch to prepaid brands are likely to do so with a new phone number, as opposed to porting an existing number, and, thus, such flows are not captured by the porting data. Accordingly, I focus my comparison on premium and flanker brands.

359. I report the calculated MSEs in Exhibit 34 below. The diversions based on the gross adds are much closer to the actual diversions than the ones based on the subscriber shares in Alberta and British Columbia, as evidenced by lower MSEs. Additionally, the difference is even larger when the set of errors is restricted to the merging carriers' brands (which is especially important in order to calculate predictions about the effects of the merger). In Ontario, the diversions based on the subscriber shares reflect the actual diversions better. However, the difference is not as high as it is in the other direction for Alberta and British Columbia. In other words, the diversions in Ontario are similar, whether one uses subscriber shares or gross adds shares.

---

**Exhibit 34**

***Mean Squared Error between Diversions Predicted by the Model and the Actual Diversions,  
January – April 2021***



Note: Diversions are calculated using eight premium and flanker brands of Rogers, Shaw, Bell, and Telus. Only diversions to external brands are included (e.g., there are no diversions from Rogers to Fido in this analysis). Actual diversions are calculated from Comlink data. Comlink data do not separate between Freedom and Shaw Mobile brands. Produced Shaw data are used to divide port-ins to Shaw from external brands between Freedom and Shaw Mobile. Produced Shaw data do not contain a brand-level breakdown of port-outs, so diversions from both Shaw Mobile and Freedom to each external brand are assumed to have the same proportions. Predicted diversions are based on gross adds shares and subscriber shares as given by the logit formula. The error term for brand pair within a province is the difference between the actual and the predicted diversion. Each error term within a province is squared and the average of error terms is calculated for each province. The panel with only Rogers' and Shaw's brands reports the MSE using the same errors which are in the all brands calculation, but subset to those between Rogers' and Shaw's brands (as opposed to recalculating diversions and the errors for this subset of brands).

---

***8.6. Deadweight loss calculation***

360. The deadweight loss following the merger is equal to the total welfare after the merger minus the total welfare before the merger. From the merger simulation model I obtain the welfare loss per unit of quantity per month for each of the provinces I consider. I therefore rescale the model output to capture the total annualized welfare loss for the entire province. I do so by multiplying the model output by the market size in each province and 12, the number of months in a year.

361. Specifically, for each province  $p$  the deadweight loss  $DWL_p$  is the product of three components: the deadweight loss per unit of quantity per month,

**TAB - 6.R.D**

## What is a Diversion Ratio?

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169

### 8.5. Comparison of models

355. Diversion ratios can be used to predict the effects of a price change between different brands. The diversion ratio between brand  $i$  and brand  $j$  is equal to the share of consumers who switch to brand  $j$  from brand  $i$ , out of all consumers which leave brand  $i$ , in response to  $i$  raising its price. Diversion ratios are important to predict the competitive effects of a merger: the higher the diversion ratio between the merging brands, the more consumers the merged firm would be able to recapture as it raises its prices. Diversion ratios provide more accurate predictions than the logit model, the diversion ratios considered. In other words, the proportion as given by these

between different brands. The diversion ratio between brand  $i$  and brand  $j$  is equal to the share of consumers who switch to brand  $j$  from brand  $i$ , out of all consumers which leave brand  $i$ , in response to  $i$  raising its price. Diversion

consumers which leave brand  $i$ , in response to  $i$  raising its price. Diversion ratios are important to predict the competitive effects of a merger: the higher the diversion ratio between the merging brands, the more consumers the merged firm would be able to recapture as it raises its prices. This implies that a

356. Therefore, I can calculate the diversion ratios by calibrating the model to market shares of gross adds and subscribers. Porting data from Comlink may be used to approximate "empirical" diversion ratios. Porting data track the number of customers who switch between brands of different carriers (for any reason). Thus, while they not provide perfect experiments in which one brand changes its price, and the other market conditions are held constant, porting data still include useful information on substitution patterns between brands.

357. I calculate the "empirical" diversion ratio between brand  $i$  and brand  $j$  by counting the consumers who port from brand  $i$  to brand  $j$ , and then dividing by

<sup>44</sup> SJRB-CCB00814711, at p. 22.

## **Shaw Mobile Port-Outs Do Not Measure Shaw Mobile Diversion**

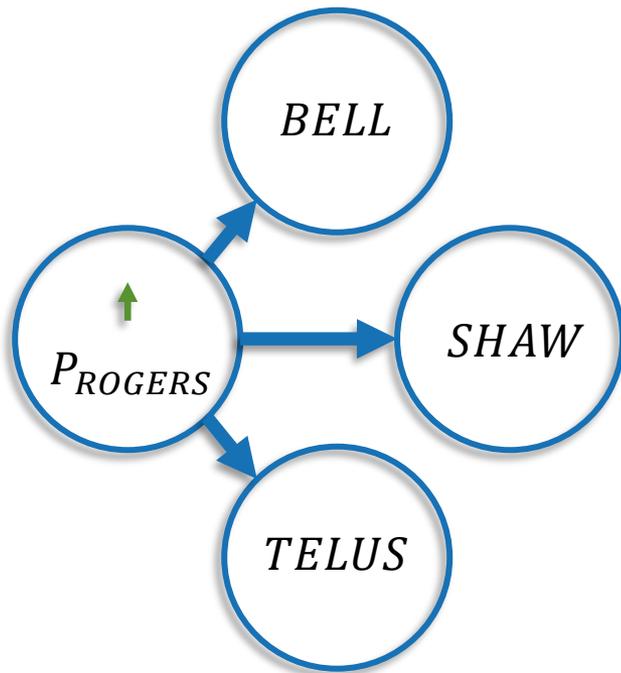
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To approximate Shaw Mobile's diversion ratio to Rogers, Prof. Miller uses Shaw Mobile's port-out rate to Rogers from January to April of 2021. This is wrong for the following reasons:

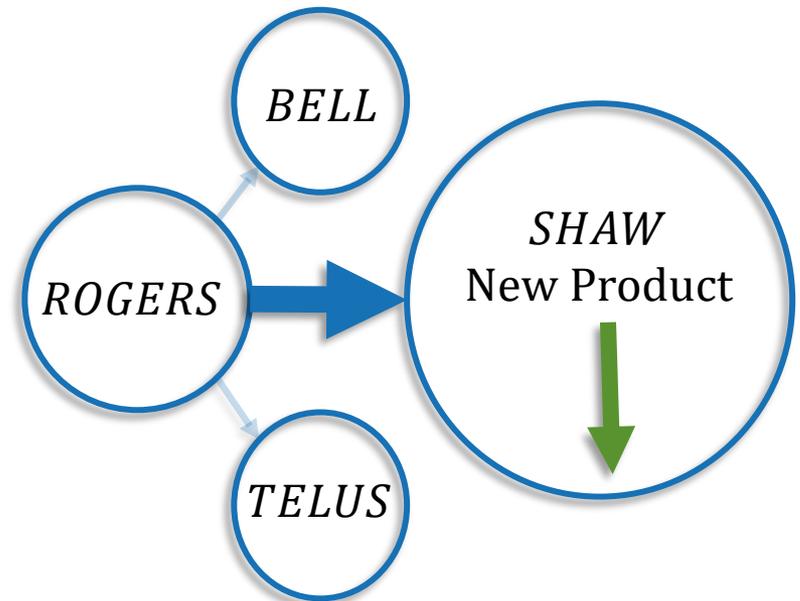
1. The diversion ratio for Shaw Mobile must reflect consumer choices in response to a change in Shaw Mobile's price (or quality), not a change in Rogers' price (or quality)
  - a) Port-outs away from Shaw Mobile are unlikely to be driven by the introduction of Shaw Mobile, so the port-outs are not reflecting consumer choices as a result of a change in Shaw Mobile—instead, one driver of Shaw port-outs is win-back efforts by Rogers
2. The Shaw Mobile-to-Rogers port-out rate is distorted by people who initially moved from Rogers switching back, which is primarily about consumer information (learning the quality of Shaw's network) and therefore not representative of diversion

# Prof. Miller's Port-out Rates Do Not Measure Diversion Ratios

## Diversion Ratio



≠



$$\text{Diversion} = \frac{(\partial Q_{Shaw} / \partial P_{Rogers})}{(\partial Q_{Rogers} / \partial P_{Rogers})}$$

$$\text{PortOut} = \frac{(\Delta Q_{Shaw} / \Delta P_{Shaw})}{(\Delta Q_{Rogers} / \Delta P_{Shaw})}$$

Note:  $-\partial Q_{Rogers} = +\partial Q_{Bell+Shaw+Telus}$

**TAB - 6.S**

## COMPENDIUM PUBLIC

1                   The first thing to understand is that argument  
2 doesn't work. You can't give a logit model SoGA and  
3 pretend it's share. It needs share. If you give it share  
4 and you think that the diversion ratios, the substitution  
5 patterns it's predicting, are wrong, you need a different  
6 model that solves that. You can't just give it the wrong  
7 input.

8                   That said, it actually also is a bug not a  
9 feature that he finds when he uses SoGA, he finds diversion  
10 ratios that match porting. And I want to explain why. And  
11 I'll try to do it efficiently. But step one is you need to  
12 think about what a diversion ratio is and why we use it.  
13 And here I quote from Professor Miller, the diversion ratio  
14 is defined very precisely. It is, if you raise the price  
15 on brand  $i$ , raise the price on a given brand, you are  
16 raising the price of brand  $i$ , what percentage of the people  
17 who leave, go to brand  $j$ , brand  $k$ , brand  $l$ , what -- if you  
18 raise the price at Rogers, what percentage of people go to  
19 Bell? What percentage of people go to Telus. What  
20 percentage of people go to Shaw? That's a diversion ratio.

21                   And the reason that's the thing that you need  
22 is because the whole exercise here is to try to figure out  
23 would Rogers want to raise the price post transaction,  
24 right? And so what you need to say is, well, if the logic  
25 would be if they raise the price post transaction, some of

## COMPENDIUM PUBLIC

1 those people would have gone to Shaw Mobile. Now they own  
2 Shaw Mobile, so those people would still be in-house. So  
3 the logic is you can raise the price, some of those people  
4 go to Shaw Mobile, post transaction, those are our  
5 customers, we're not worried about it. So you need to  
6 measure a price increase and what happens.

7           If we go down under -- Professor Miller says on  
8 the next slide down what I said on 45, he says -- I'm going  
9 use my model with SoGA, compute these diversion ratios and  
10 compare them to porting. If that matches I'm going to tell  
11 me that gives me a reason to use SoGA.

12           The problem he has is explained on slide 46.  
13 Is that porting ratios, although it's -- remember, a port  
14 is somebody moves to a different carrier and they take  
15 their phone number with them. So if you go down to 46, the  
16 problem is port ratio is not a diversion ratio because the  
17 port ratios are people who are moving for any reason. And  
18 in particular, in the time period that we're studying, they  
19 include people who are going to Shaw Mobile just because  
20 it's new. Shaw Mobile appears, as we have seen from the  
21 other data for a little while, a lot of people go to Shaw  
22 Mobile, they take their phone number with them, it looks  
23 like a lot of ports are going to Shaw Mobile. Right. But  
24 that's not a price increase at Rogers that's driving them.  
25 That's Shaw Mobile is new.

## COMPENDIUM PUBLIC

1                   So if you can go down to 49 I'll try to tie  
2 this together into the problem. So you want to measure  
3 what's on the left. Rogers raises its price. Obviously,  
4 some lot of people are going to go to Bell, a lot of people  
5 will go to Telus, some people are going to go to Shaw.  
6 That's what you need to measure, to think about when they  
7 raise the price post-merger.

8                   What you get in porting data is the picture on  
9 the right. Especially in this time period where Shaw is  
10 new. Shaw is a new product. My big down arrow says  
11 introducing a new product is kind of like a giant price  
12 decrease. So if it was infinitely priced before and now it  
13 has a price, but it's a new product so it's pulling people  
14 in.

15                  Rather than measuring what happens if you push  
16 people out of Rogers and they go where they go, you are  
17 measuring this much larger Shaw circle because it's pulling  
18 people in. That's a temporary phenomenon because Shaw is  
19 new and it's just not the right thing to measure because  
20 it's not what happens from a price increase at Rogers, it's  
21 what happens when Shaw has a new product.

22                  And so the fact that Professor Miller's  
23 diversion ratios match those porting ratios, is not a good  
24 thing, it's telling him he is using a SoGA that's too high,  
25 and therefore he is matching this big circle pull effect.

## COMPENDIUM PUBLIC

1 He is measuring the wrong thing when he compares what you  
2 would want as a diversion ratio and he can't get that from  
3 the porting data. He can get the Shaw pull effect, the  
4 fact that he matches it is another way to see that by using  
5 SoGA he is using something that's too big.

6                   Maybe we can go down to slide 60 and this is  
7 the last time that I will jump. And we are getting close  
8 to the end of my topics. And this one is simpler than the  
9 last one, so I'll be quicker, and I know it's already been  
10 discussed. Professor Miller's -- again, for all the  
11 reasons I have just said you can't use SoGA in the model  
12 and the indicators on porting and so on, reveal that it's a  
13 problem. But, just to take on the last point that  
14 Professor Miller says, he explicitly says he is using share  
15 of gross adds to approximate share of shoppers, right? So  
16 he is very clear and I think he was clear with the Tribunal  
17 that he thinks of share of gross adds as an approximation  
18 for share of shoppers.

19                   The problem with that and I know this has been  
20 discussed some, if you go down a slide, the share of gross  
21 adds is not share of shoppers it's share of switchers. So,  
22 clearly a lot of people have this experience in our own  
23 lives. You will shop, you will think should I -- you know,  
24 maybe every time your contract comes up you think, or every  
25 year, whenever you do it, you think should I go to a

**TAB - 6.T**

## COMPENDIUM PUBLIC

*3.2.2. Dr. Israel's preferred metric, percentage of subscribers, is a worse metric than share of gross adds because it largely reflects choices made by consumers when Shaw Mobile was not an available option in the marketplace*

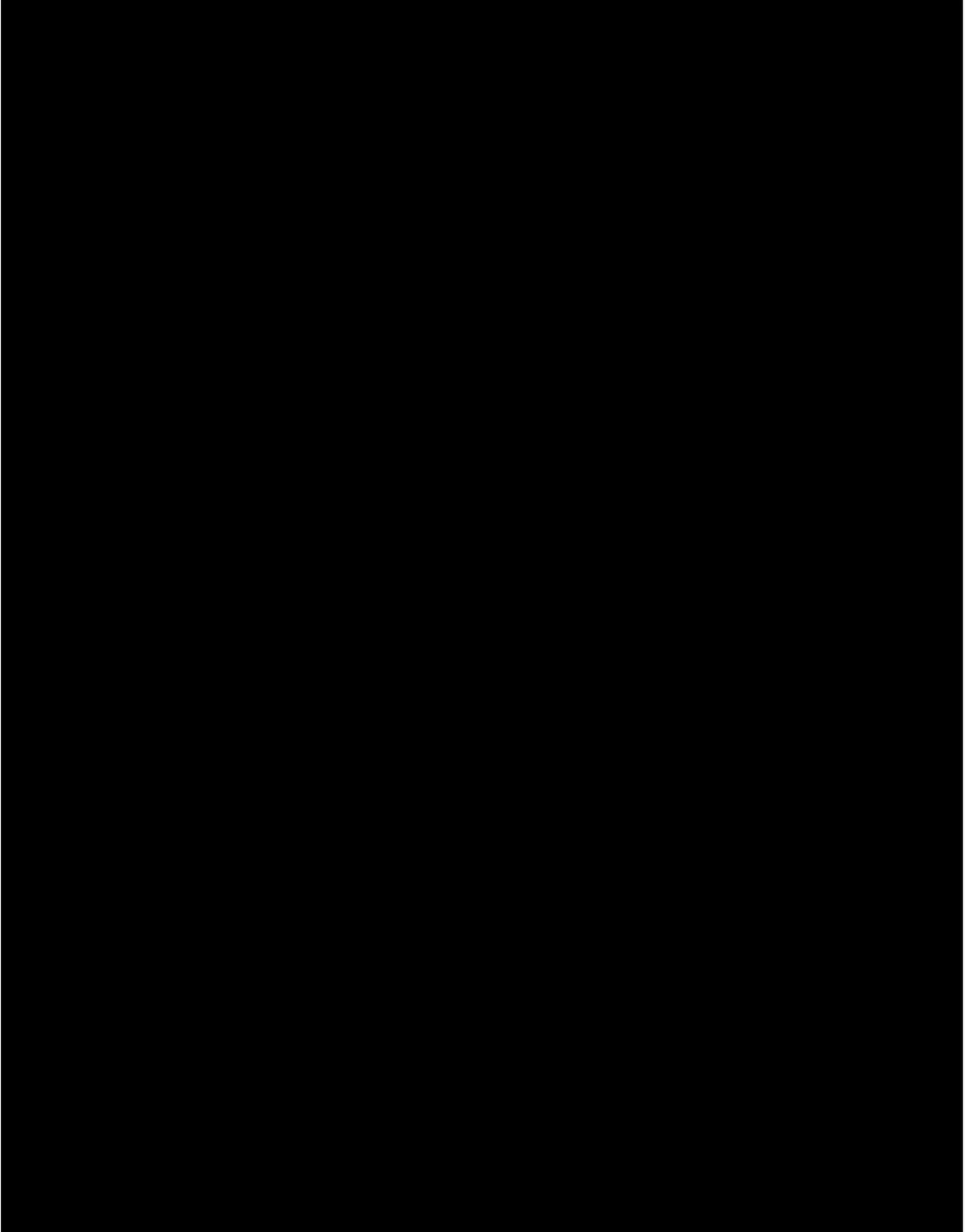
39. Dr. Israel also asserts that share of gross adds does not appropriately measure the shares of actively shopping subscribers because it may not fully reflect the choices of shoppers that decided to remain with their current provider.<sup>53</sup> As I explained in my Opening Report, gross adds are indeed an approximation, the best available, of the percentage of all customers who are shopping, and they do not include a measurement of customers that may engage in some shopping and then decide to stay with their current provider.<sup>54</sup> This can lead the share of gross adds to overstate the competitive significance of a newer firm, like Shaw, if, as Dr. Israel assumes, the established firms such as Rogers, Bell, and Telus, have a base of customers whose loyalty to those firms makes them more likely to choose their current provider than the customers seen in the gross adds figures. In that case, the inability to observe how often these sorts of customers go to the market and choose to stay with their current provider omits their particular preference from the overall probability of a customer choosing these carriers. However, Dr. Israel does not establish that this is the case nor that there is a large enough group of such subscribers with such different preferences that it would meaningfully affect the extent to which share of gross adds measures competitive significance.

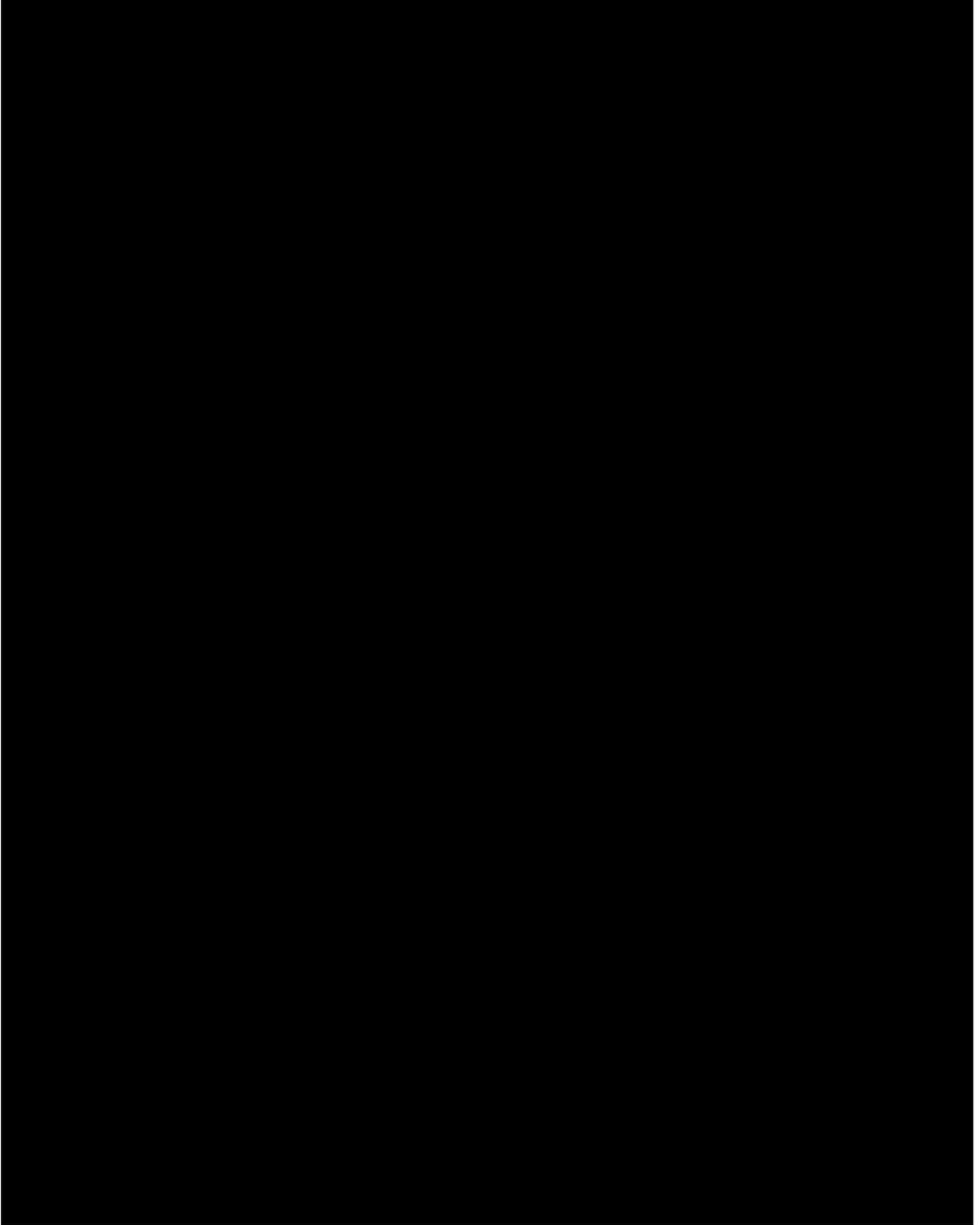
40. While the share of gross adds is limited to the customers that are known to be actively shopping, Dr. Israel does not articulate why this share would be worse than a share calculated from the percentage of subscribers—particularly in terms of measuring the competitive significance of a new product such as Shaw Mobile. The shares of gross adds that I calculated reflect the choices of consumers that all had Shaw Mobile as an available option as well as all of the other brands. Shaw Mobile and other brands' percentage of all subscribers, conversely, would largely reflect the choices of consumers that were actively shopping when Shaw Mobile was *not* available as an option. Dr. Israel does not explain why a metric that largely reflects choices made when Shaw Mobile was

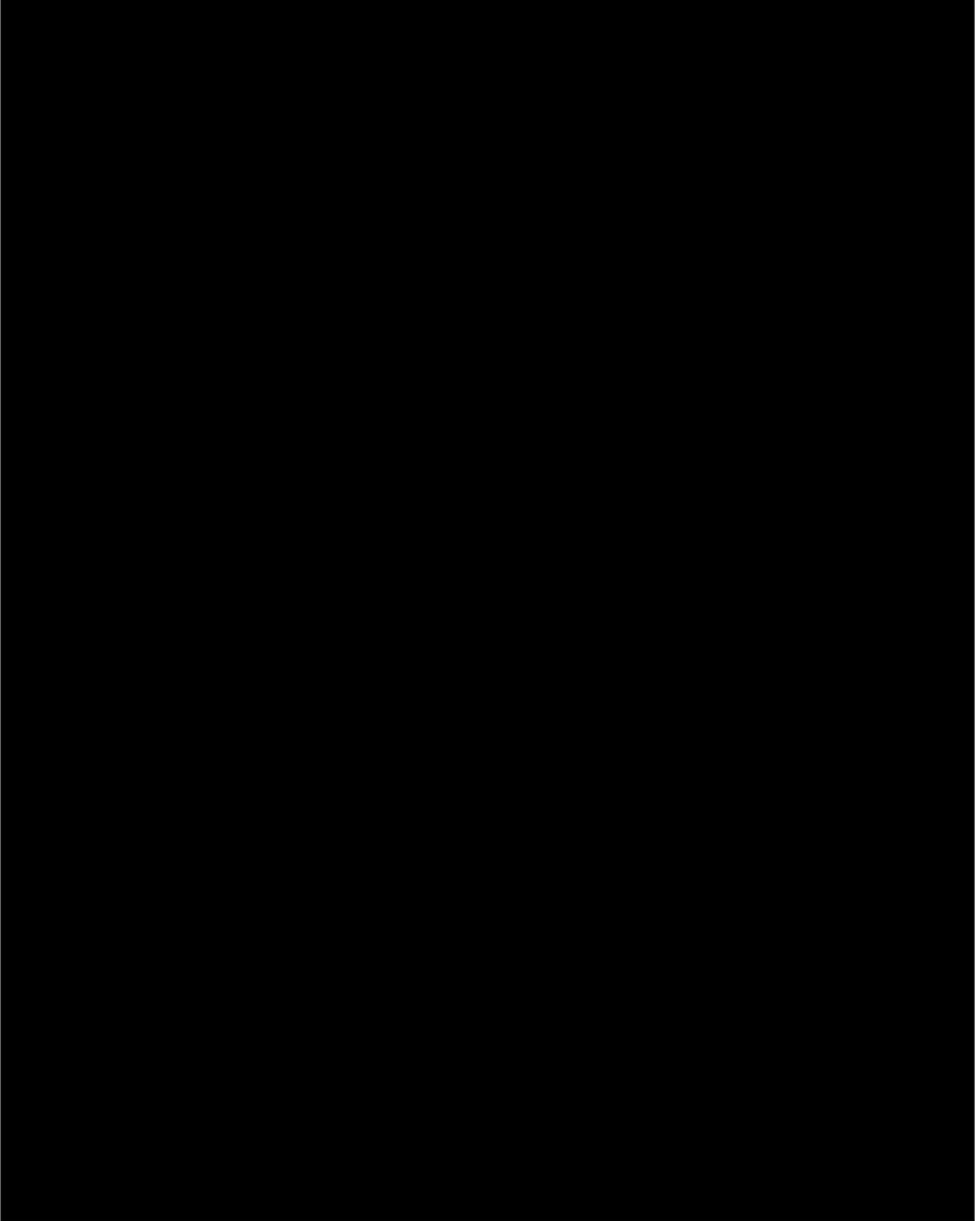
Israel Report, ¶¶ 59, 61.

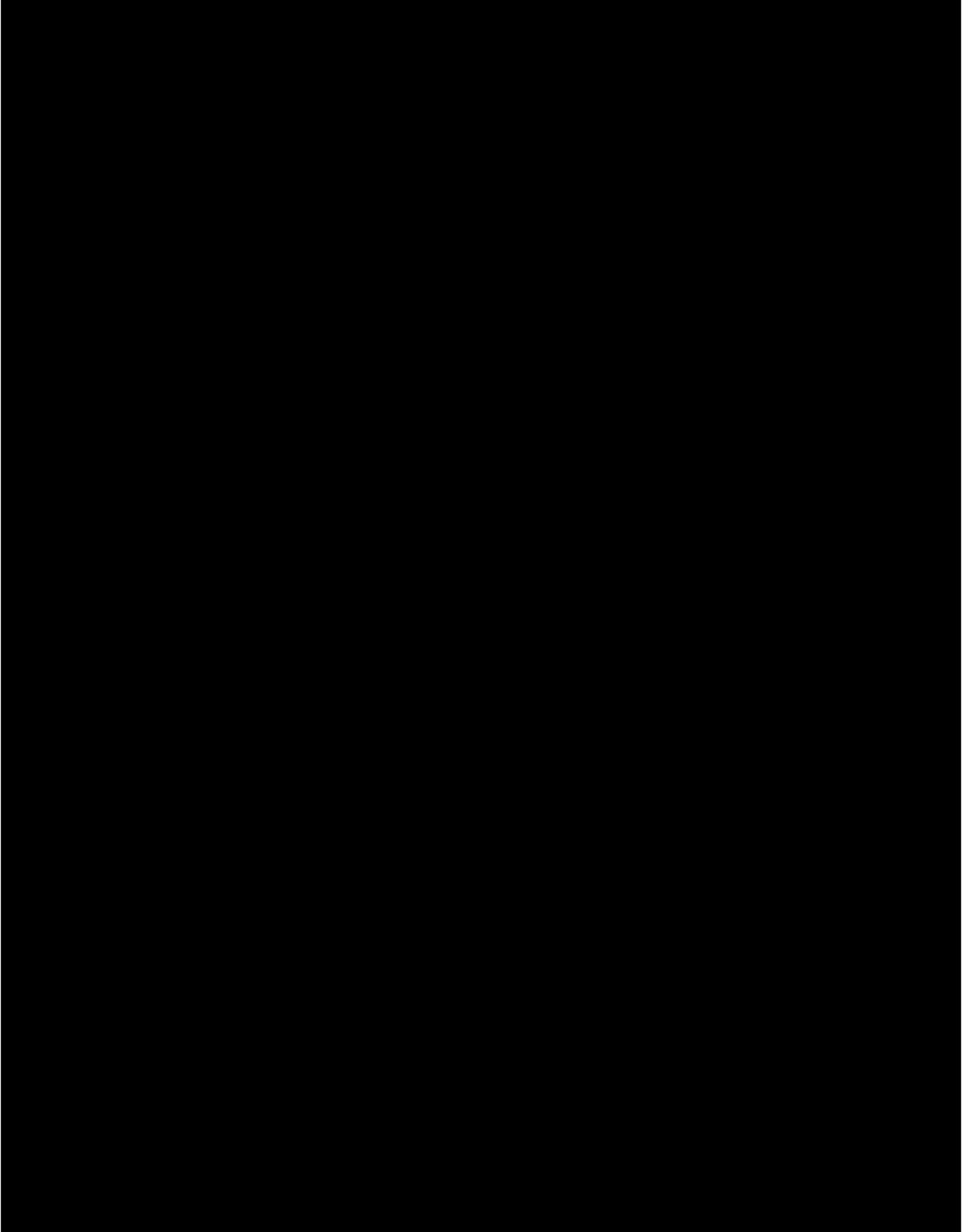
<sup>54</sup> Opening Report, footnote 114.

**TAB - 6.U**









**TAB - 6.V**

## COMPENDIUM PUBLIC

# A High Ratio of “Stayers” to “Leavers” Indicates that Shaw Mobile’s SOGA will Substantially Overstate Its Share of Shoppers

A high ratio of “stayers” to “leavers” (e.g., 3:1) implies that Shaw Mobile’s share of shoppers is substantially smaller than its SOGA because it has a small subscriber base of potential “stayers” relative to other carriers.

**TAB - 6.W**

to the newness of Shaw Mobile, not its competitive significance (or closeness between the Shaw Mobile and Rogers products, as I explained above).

**3. SOGA cannot appropriately measure the shares of “actively shopping” subscribers as Prof. Miller claims**

59. Even if one (wrongly in a flat logit) wanted to study the preferences of “actively shopping” subscribers, looking at SOGA would not be a valid way to do so and would, again, likely overstate Shaw Mobile’s share. This is because SOGA observes the choices of not all shoppers, but rather just those shoppers who ultimately make a decision to switch brands—that is the set captured in gross adds. In reality, many actively shopping subscribers likely choose to stay with their existing brands, and these are not accounted for by SOGA. In other words, the set of “switchers” is a non-random sample of the set of all “shoppers,” and so measuring shares just among switchers cannot even provide a reliable measure of share among all shoppers, let alone all subscribers. Moreover, looking just at switchers, rather than all shoppers, is likely to bias the results toward substantially overstated shares for brands with few current subscribers, such as Shaw Mobile.

60. To demonstrate this, consider the case where there are two wireless brands, Brand A with 800 existing subscribers and Brand B with 200 existing subscribers. Also assume that for each brand, 10 percent are shoppers (*i.e.*, have expired contracts and consider their options), and that 10 percent of shoppers decide to switch. Therefore, out of Brand A’s 800 subscribers, 80 are shoppers and 8 switch to Brand B, and out of Brand B’s 200 subscribers, 20 are shoppers and 2 switch to Brand A. In total, there are 100 shoppers, of which, 74 chose Brand A (72 of its own shoppers who decided to stay and 2 of Brand B’s shoppers who decided to switch), and 26 choose Brand B (18 of its own shoppers that decided to stay and 8 of Brand A’s shoppers who

decided to switch). The shares of shoppers are therefore 74 percent for Brand A and only 26 percent for Brand B. However, Prof. Miller's use of SOGA will look only at the 10 switchers, of which only 2 chose Brand A and 8 chose Brand B. Thus, he would use SOGA of 20 percent for Brand A and a SOGA of 80% for Brand B. This is very far from being a good proxy of the preferences of shoppers.

61. This example demonstrates a general principle: Using SOGA, which is based on switcher shares, as a proxy for shopper shares, is likely to inflate the shares of small firms compared to big ones, as larger firms likely have a larger pool of non-switching shoppers who are not counted.

62. This can be further demonstrated by combining actual wireless subscriber data from the time period used by Prof. Miller to calculate SOGA (January 2021 – April 2021) with alternative illustrative assumptions on the frequency with which existing subscribers “actively shop” for a wireless plan.<sup>48</sup> In

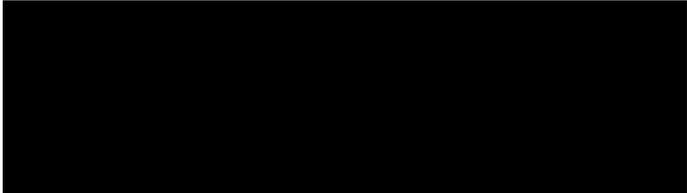
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<sup>48</sup> Given data limitations, I only consider in this illustrative example existing subscribers and not new customers joining the market.

## **COMPENDIUM PUBLIC**

[Table 2](#) below, I calculate Shaw Mobile’s “share of active shoppers” in AB and BC under three alternative assumptions: that all wireless subscribers shop every 12 months, that all wireless subscribers shop every 24 months, and that all wireless subscribers shop every 36 months. In each case, I include in a brand’s share its current subscribers who are active shoppers but who decided not to switch brands.

**Table 2: Illustration of Shaw Mobile Share of Shoppers Under Alternative Assumptions for Frequency of Subscriber Shopping**

Frequency of Shopping by Existing Subscribers	Shaw Mobile Share of Active Shoppers	
	AB	BC
		

Source: Prof. Miller’s backup materials.

63. This illustrative calculation shows that Shaw Mobile’s share of active shoppers is very different from the SOGA share used by Prof. Miller for the same period (26.7% for AB and 25.5% for BC), even though he claims to capture the share of shoppers. It shows that his SOGA figures are not measuring what he claims they are. *i.e.*, decisions by “actively shopping” subscribers.

**4. More up-to date data refute the SOGA numbers that Prof. Miller uses**

64. Trends in gross adds after the time period used by Prof. Miller to calibrate his model both demonstrate the flaws in his approach and *directly refute* the key SOGA inputs he used for his model. [Figure 1](#) below shows gross adds for Shaw Mobile, Freedom, Rogers, Fido, and Chatr in AB and BC before, during and after the time period used by Prof. Miller and until the latest data available.<sup>49</sup> [Figure 2](#) shows Shaw Mobile’s monthly growth in market share over time, in percentage points. [Figure 3](#) shows the evolution of Shaw Mobile’s market share over time (until

<sup>49</sup> I do not have access to Bell and Telus gross add data required for calculating SOGA for a later period than Prof. Miller did in his report.

**TAB - 6.X**

## COMPENDIUM PUBLIC

1 He is measuring the wrong thing when he compares what you  
2 would want as a diversion ratio and he can't get that from  
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22 clearly a lot of people have this experience in our own  
23 lives. You will shop, you will think should I -- you know,  
24 maybe every time your contract comes up you think, or every  
25 year, whenever you do it, you think should I go to a

## COMPENDIUM PUBLIC

1 different firm? And you say no, I'll stay, it's easier to  
2 stay. So there is a lot of shoppers who stay.

3 And all I have done on this slide is start from  
4 Professor Miller's SoGA for Shaw Mobile, but then ask --  
5 just ask the question, what if people are shopping on  
6 various increments to illustrate what happens. So let's --  
7 I'll look at the middle line because it's very natural.  
8 What if people are shopping every 24 months? Every time  
9 they have a contract come up they shop, right?

10 So then all I have done is a just his number.  
11 Define -- every month, 1/24th of the people are shoppers.  
12 That's the denominator, 1/24th of the people shop every  
13 month. What is Shaw Mobile's share of shoppers? It's its  
14 gross adds that we have in the data plus its stayers. The  
15 people who choose to stay, to complete that math.

16 And so you can see that if you just add those  
17 stayers into the denominator, the Shaw Mobile share of  
18 shoppers falls again much closer to the actual share  
19 numbers that I use.

20 If we go down one more slide, another way to  
21 think about the same issue is -- and I know this has been  
22 in testimony, in the case -- testimony from Mr. Kirby, who  
23 gives an indication that a lot of people who think -- who  
24 called the help the save desk because they are upset and  
25 thinking about leaving, most of them stay.

## COMPENDIUM PUBLIC

1                   As I show in the box on the right-hand side, if  
2 something like 3/4ths of people who call choose to stay,  
3 that means a lot of the shoppers are stayers. And if a lot  
4 of the shoppers are stayers, then the share of shoppers  
5 will look a lot more like the overall market share than  
6 it's going to look like SoGA, right? Because the firms  
7 that have more subs are going to have more shoppers, they  
8 are going to have more stayers, so their share of shoppers  
9 is going to look a lot like their market share.

10                   **MR. SMITH:** Very good.

11                   **DR. ISRAEL:** Just a couple more topics --

12                   **MR. SMITH:** Slide 63?

13                   **DR. ISRAEL:** -- before lunch. Yeah, so we can  
14 jump to slide 64. And this is really changing course to a  
15 different topic that I mentioned earlier, which is --  
16 Professor Miller in a lot of discussion is about -- and a  
17 theory of harm to Shaw Mobile is about bundle competition.  
18 But Professor Miller's model doesn't allow for bundle on  
19 bundle competition as a closer thing.

20                   And so I just have a statement here, even from  
21 Professor Miller's report, it's in the documents, indicate  
22 that Shaw Mobile was primarily competing with Telus. That  
23 means that the competition is bundle on bundle, heavily.  
24 Not entirely but heavily bundle on bundle.

25                   The way you would -- the way you allow for

**TAB - 6.Y**

## COMPENDIUM PUBLIC

1 plan every eight years? Is that your evidence?

2 **DR. MILLER:** No. What I calculated based on  
3 the 1 percent churn rate is that the average tenure of a  
4 customer at say, Rogers or whoever else this churn rate  
5 would apply to, would be roughly eight years. It's eight  
6 and a third years.

7 **MR. SMITH:** Respectfully sir, those aren't the  
8 same things are they. The churn rate -- the churn rate and  
9 the rate at which people shop, is not the same thing?

10 **DR. MILLER:** It explains why a company takes so  
11 long to accumulate subscribers in telecommunications  
12 industry so it's a pretty important point here.

13 **MR. SMITH:** Sir -- sir, I need you to focus on  
14 my questions so that the record is clear for the Tribunal.  
15 The churn rate and the rate at which people shop are not  
16 the same thing; are they?

17 **DR. MILLER:** I agree with that.

18 **MR. SMITH:** Okay. All right. And if we take  
19 your example of a churn rate of 1 percent, and we think  
20 back to Mr. Kirby's evidence, that for every person who  
21 leaves, we have three who stays, that means that we have 4  
22 percent of people who are shopping every month; doesn't it?

23 **DR. MILLER:** You've asked me this question  
24 before. I don't believe Mr. Kirby's testimony can be  
25 represented to infer this.

## COMPENDIUM PUBLIC

1                   **MR. SMITH:** Okay. Let's just assume that Mr.  
2 Kirby's testimony is as I have put it to you. That means  
3 that 4 percent of customers are shopping every month;  
4 doesn't it?

5                   **DR. MILLER:** This would be your assumption,  
6 that's correct.

7                   **MR. SMITH:** Okay. And if we divide 100 percent  
8 by 4 percent we get 25 months; correct?

9                   **DR. MILLER:** You mean 25 percent?

10                  **MR. SMITH:** Yes, 25 percent. These are all  
11 months sorry, 25 months.

12                  **DR. MILLER:** You asked me to divide --

13                  **MR. SMITH:** It's the same -- 100 percent by 4  
14 percent gives us 25 percent; right?

15                  **DR. MILLER:** Yes, I agree with that.

16                  **MR. SMITH:** And then if we turn that into a  
17 period of time over which somebody shops, that leads to  
18 just over two years; correct?

19                  **DR. MILLER:** Yes, that's correct.

20                  **MR. SMITH:** Okay. So, if this Tribunal were to  
21 conclude that Mr. Kirby's evidence should be accepted as I  
22 put it, that means that somebody is shopping every two  
23 years; correct?

24                  **DR. MILLER:** For Bell, that may be a fair  
25 interpretation.

## COMPENDIUM PUBLIC

1                   **MR. SMITH:** And you have no reason to believe  
2 that the rate at which people shop at Bell, Telus and  
3 Rogers, is any different; do you?

4                   **DR. MILLER:** No. I think we don't have much  
5 information on this at all.

6                   **MR. SMITH:** You don't have any; correct?

7                   **DR. MILLER:** Yes, this is not something I have  
8 been able to measure.

9                   **MR. SMITH:** Okay.

10                   Now, sir, as I understand -- as I understand  
11 the model, you are modelling the transfer of ownership of  
12 the Shaw Mobile product from Shaw to Rogers; correct?

13                   **DR. MILLER:** That is correct.

14                   **MR. SMITH:** And in your model a product is  
15 characterized by a price parameter and a quality parameter;  
16 correct?

17                   **DR. MILLER:** As well as -- no. It would be  
18 characterized by cost and quality.

19                   **MR. SMITH:** Okay. And -- I'm focusing on the  
20 quality -- let's focus on the quality parameter. The  
21 quality parameter reflects a product's non-price  
22 attributes; correct?

23                   **DR. MILLER:** That is correct.

24                   **MR. SMITH:** Right. And that is the term -- I'm  
25 going to get this wrong but  $v_j$  in your model; correct?

**TAB - 6.Z**

# Shaw Mobile Launch: Prof. Miller's Testimony Refutes His Own Analysis

CONFIDENTIAL - LEVEL A 63

115. In the following paragraphs, I analyze the effect that the launch of the Shaw Mobile brand had on the market for wireless services in Alberta, British Columbia, and Ontario using the same wireless subscriber billing data and reporting data for Shaw, Bell, and Telus previously described in Section 6.1.2.<sup>193</sup> Evidence from these data indicate that consumers responded strongly to the introduction of the Shaw Mobile brand and the associated promotions offered by Shaw and its competitors: Many more newly added data subscribers joined after the launch of Shaw Mobile than in the months prior at each carrier for which I have data. These newly added subscribers benefitted from lower prices for mobile data and consumed more data than subscribers who joined before the launch of the Shaw Mobile brand.

116. I start by analyzing the introduction of the Shaw Mobile brand and its impact on the market for mobile data and consumed more data than subscribers who joined before the launch of the Shaw Mobile brand.

117. Shaw Mobile launched on July 30, 2020 and added [REDACTED] data subscribers by the end of August, as well as [REDACTED] subscribers to its By-

<sup>193</sup> SJRB-CC800421464.  
<sup>194</sup> While Rogers also produced billing data, [REDACTED] made a similar analysis infeasible. The format of the data provided by Telus does not allow me to report a statistic that is directly comparable to Shaw and Bell. [REDACTED]  
<sup>195</sup> Exhibit 11 considers specifically the subset of added subscribers who purchase a data plan and appear in the billing data. Gross adds as reported at the brand level will differ as they contain subscribers without data plans and may contain subscribers who do not appear in the billing data.  
<sup>196</sup> SJRB-CC800421464.

60 of 177

1453

1 In my view, it mischaracterizes to some degree  
 2 the role of data in my analysis. I mean, what we have with  
 3 each of these events is essentially, you know, a before  
 4 period and an after period. And what my analysis does is  
 5 it looks sort of, before and after to see how prices  
 6 changed, how usage change and this sort of thing. You  
 7 know, in that sort of setting is difficult to isolate the  
 8 competitive effect of why conditions change from point A to  
 9 point B. It's just too much of an ask of data of this  
 10 type.

11 In my view, it mischaracterizes to some degree  
 12 the role of data in my analysis. I mean, what we have with  
 13 each of these events is essentially, you know, a before  
 14 period and an after period. And what my analysis does is  
 15 it looks sort of, before and after to see how prices  
 16 changed, how usage change and this sort of thing. You  
 17 know, in that sort of setting is difficult to isolate the  
 18 competitive effect of why conditions change from point A to  
 19 point B. It's just too much of an ask of data of this  
 20 type.

21 Dr. Israel and Dr. Johnson suggest alternative  
 22 approaches, and they go off on different directions. Dr.  
 23 Israel has a regression analysis and Dr. Johnson makes  
 24 comparisons between 2019 and 2020 and 2021. And with both  
 25 of those approaches what they indicate is that data alone  
 aren't really sufficient to pin down the draw of Shaw  
 mobile in the market, and that doesn't surprise me for the

613.521.0703 StenoTran Lee Services StenoTran Services Inc. www.stenotran.com

Miller Testimony, Nov. 15, 2022, p. 1453

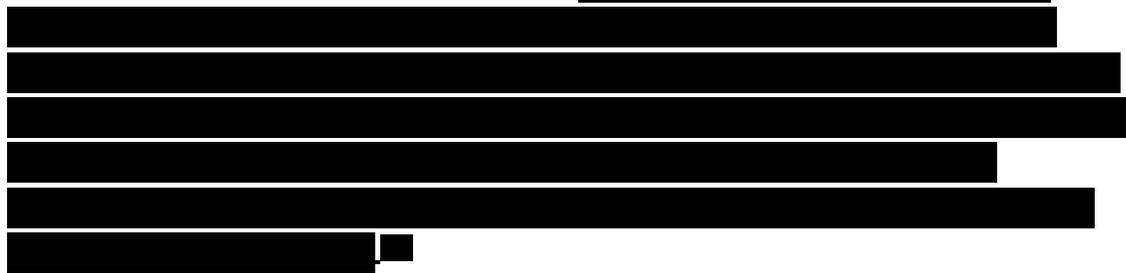
**TAB - 6.AA**

# COMPENDIUM PUBLIC

- [REDACTED]

115. In the following paragraphs, I analyze the effect that the launch of the Shaw Mobile brand had on the market for wireless services in Alberta, British Columbia, and Ontario using the same wireless subscriber billing data and porting data for Shaw, Bell, and Telus previously described in Section 6.1.2.<sup>193</sup> Evidence from these data indicate that consumers responded strongly to the introduction of the Shaw Mobile brand and the associated promotions offered by Shaw and its competitors: Many more newly added data subscribers joined after the launch of Shaw Mobile than in the months prior at each carrier for which I have data. These newly added subscribers benefitted from lower prices for mobile data and consumed more data than subscribers who joined before the launch of the Shaw Mobile brand.

116. I start by analyzing the effect of the introduction of the Shaw Mobile brand and the associated price promotions on each carriers' addition of new data subscribers.<sup>194</sup> Exhibit 11 below shows the number of added Freedom and Shaw Mobile data subscribers each month between March 2020 and February 2021 in each of Alberta, British Columbia, and Ontario (for Freedom) and Alberta and British Columbia (for Shaw Mobile). [REDACTED]



117. Shaw Mobile launched on July 30, 2020 and added [REDACTED] data subscribers by the end of August, as well as [REDACTED] subscribers to its By-

<sup>192</sup> SJRB-CCB00421464.

<sup>193</sup> While Rogers also produced billing data, [REDACTED] made a similar analysis infeasible. The format of the data provided by Telus does not allow me to report a statistic that is directly comparable to Shaw and Bell. [REDACTED]

<sup>194</sup> Exhibit 11 considers specifically the subset of added subscribers who purchase a data plan and appear in the billing data. Gross adds as reported at the brand level will differ as they contain subscribers without data plans and may contain subscribers who do not appear in the billing data.

<sup>195</sup> SJRB-CCB00421464 [REDACTED]

**TAB - 6.BB**

## COMPENDIUM PUBLIC

1                   In my view, it mischaracterizes to some degree  
2 the role of data in my analysis. I mean, what we have with  
3 each of these events is essentially, you know, a before  
4 period and an after period. And what my analysis does is  
5 it looks sort of, before and after to see how prices  
6 changed, how usage change and this sort of thing. You  
7 know, in that sort of setting is difficult to isolate the  
8 competitive effect of why conditions change from point A to  
9 point B. It's just too much of an ask of data of this  
10 type.

11                   In my view, the documents and the witness  
12 testimony give context to the data. They help understand  
13 sort of, what's going on, why the data are moving the way  
14 that they move. So the data gives -- the documents give --  
15 the documents demonstrate the competitive response and I  
16 uses the data to illustrate impacts to customers even  
17 though other things are contributing to the numbers that I  
18 show.

19                   Dr. Israel and Dr. Johnson suggest alternative  
20 approaches, and they go off on different directions. Dr.  
21 Israel has a regression analysis and Dr. Johnson makes  
22 comparisons between 2019 and 2020 and 2021. And with both  
23 of those approaches what they indicate is that data alone  
24 aren't really sufficient to pin down the draw of Shaw  
25 mobile in the market, and that doesn't surprise me for the

## COMPENDIUM PUBLIC

1 same reason I have already described. I view their  
2 exercise is mainly to demonstrate -- demonstrating the  
3 limitations of what we can learn from the data here.

4 But, if you look at the wholistic picture, what  
5 I see, what I have done is I've looked at documents from  
6 industry participants, market participants that indicate  
7 that Shaw Mobile had a substantial effect, that indicate  
8 that Freedom's Big Gigs had a substantial effect. I see it  
9 in the porting data, how it affected consumer switching  
10 decisions. I see the prices are down, I see that usage is  
11 up, and putting that together as a holistic whole, what I  
12 infer is that these competitive initiatives that Shaw  
13 undertook were meaningful for customers and important in  
14 the market.

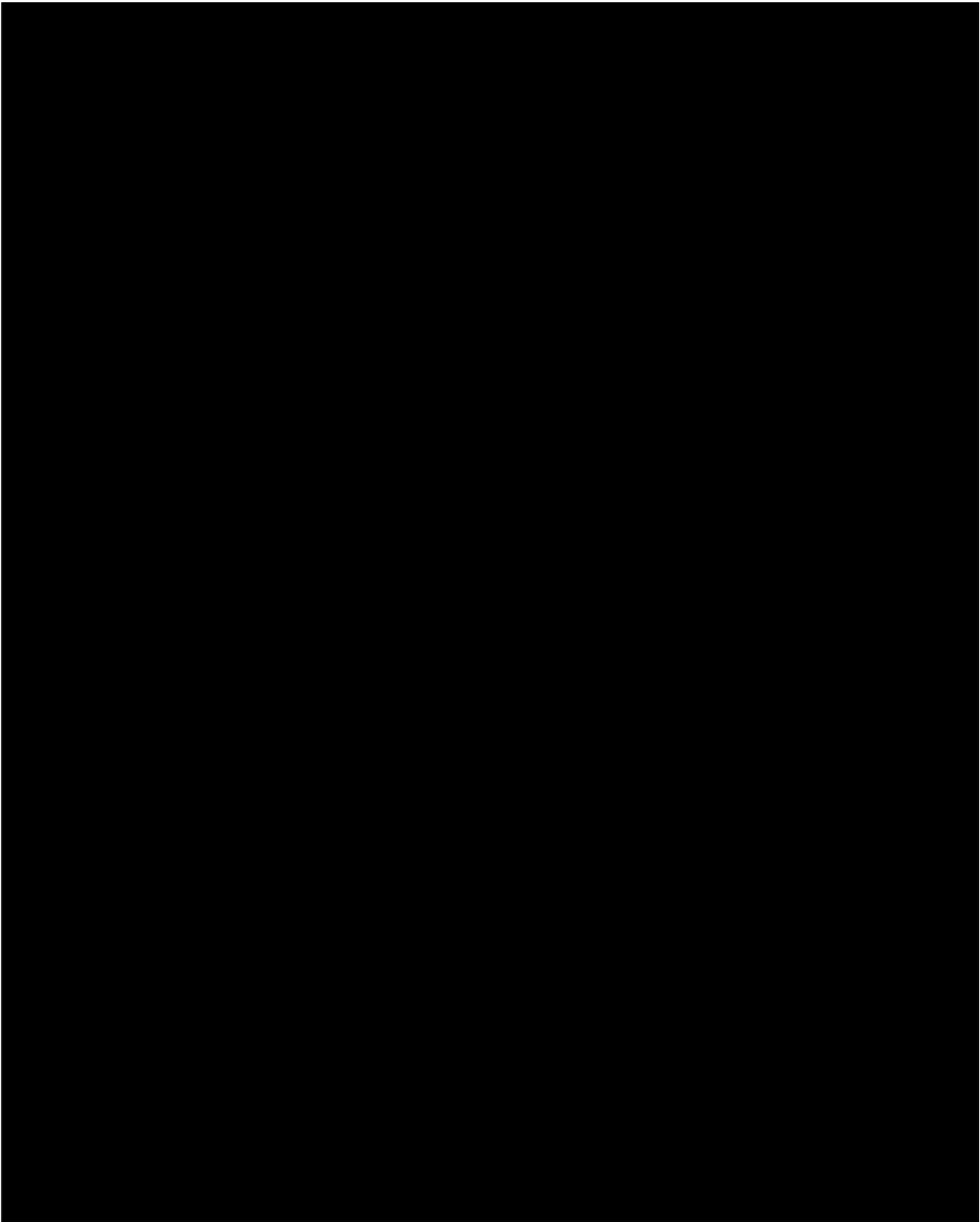
15 Next slide, please.

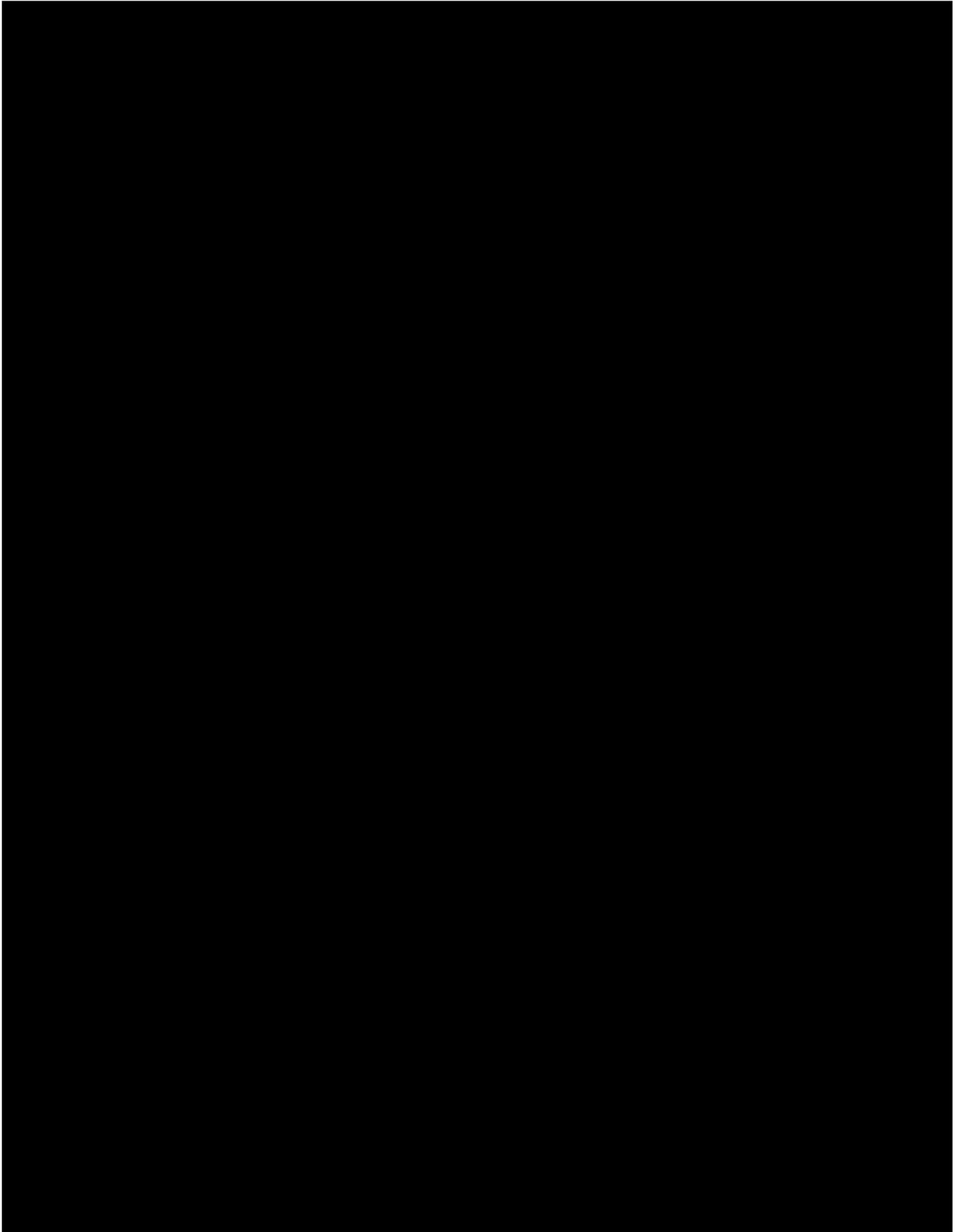
16 **MR. TYHURST:** So can you just summarize the  
17 kind of overall takeaways to this point of the discussion?

18 **DR. MILLER:** Yes, I can. Next slide.

19 I view Shaw as an emerging and important player  
20 in the market, and I view the competition between Rogers  
21 and Shaw as meaningful and playing out to the benefit of  
22 consumers. In Canada, it appears that market participants  
23 observe or perceive this sort of fourth strong carrier  
24 mattering for competition and I believe that's what Shaw  
25 was providing or starting to provide. I observed that

**TAB - 6.CC**





**TAB - 6.DD**

## COMPENDIUM PUBLIC

### c) Marginal cost reductions are unsupported and incomplete; marginal costs could rise

129. The Respondents have failed to establish that Videotron is likely to achieve any material marginal cost reductions. Dr. Israel simply incorporated Videotron's estimates of its roaming savings as marginal cost savings, without verifying them.<sup>412</sup> Dr. Israel incorporates future projections of roaming cost savings, which is inappropriate for two reasons.<sup>413</sup> First, these projections are taken from unsupported Videotron assumptions about roaming traffic growth.<sup>414</sup> Moreover, the cost projections were shown in cross-examination to be based on future data consumption that are extremely high and have no factual foundation in Videotron's actual decade-long experience in the market.<sup>415</sup> Second, these projected savings apply to a [REDACTED] [REDACTED].<sup>416</sup> Additionally, Dr. Israel does not consider sources of marginal cost increases such as [REDACTED]. The true change in Freedom's marginal costs is unknown and may increase.

130. In any event, Dr. Israel finds small marginal cost savings.<sup>417</sup>

### d) Videotron Bundle

131. While Dr. Israel suggest a benefit of the Proposed Merger and Proposed Divestiture is that Videotron will introduce an additional wireless-wireline bundled product,<sup>418</sup> he ignores the existing Freedom wireless-wireline bundled product.<sup>419</sup> Freedom has bundled internet services with approximately [REDACTED] of its wireless subscribers.<sup>420</sup> In spite of this, he accepted without question Videotron's estimate that *one third* of Freedom subscribers will bundle internet with Videotron.<sup>421</sup> Dr. Israel applies his assumed 33% bundle rate to post-divestiture Freedom immediately upon closing. However, Videotron projects a Freedom bundle rate of about [REDACTED] in 2023.<sup>422</sup> Dr. Israel assumes the Videotron bundle is new when it is not, and he assumes it will be at least [REDACTED] times more popular than Freedom's current product or Videotron's 2023 estimate. This implausible assertion makes his results unreliable.

<sup>412</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, [p 4575:11–p 4577:23](#).

<sup>413</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, [p 4565:3–9](#).

<sup>414</sup> CA-A-0125, Rebuttal Witness Statement of N Miller, [p 31 and 32, para 64 and 69](#).

<sup>415</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, [p 4584:4–11](#).

<sup>416</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, [p 4578:8–14](#).

<sup>417</sup> CA-R-1851, Israel Report, [p 66, Table 6](#); CA-A-0125, Rebuttal Miller Report, [p 33 para 70](#).

<sup>418</sup> CA-R-1854, Israel Reply Report, [p 33 para 44](#).

<sup>419</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, [p 4522:4–22](#).

<sup>420</sup> CA-I-0144, Lescadres Statement, [Exhibit 57, pp1193-1195](#).

<sup>421</sup> CA-R-1854, Israel Reply Report, [p 33, para 44](#).

<sup>422</sup> CA-I-0144, Lescadres Statement, [Exhibit 66, Tab "Wireline", row 46](#). [Note: Tab "Dashboard", Cell F8 = 'Management'.]

**TAB - 6.EE**

## COMPENDIUM PUBLIC

1 with Shaw, so it still wouldn't be a third bundle provider.  
2 But you're right that Shaw has a -- Freedom has a very  
3 small bundled product today, and that is not in the model.

4 **MR. TYHURST:** So you have not included the  
5 existing Freedom bundled product in your model; correct?

6 **DR. ISRAEL:** Right. That's correct.

7 I mean, it's very small. You could add it and  
8 then Vidéotron would become still the third provider and  
9 the fourth bundle, which would still benefit competition.  
10 But I have not included it because my understanding is its  
11 share is extremely small.

12 **MR. TYHURST:** What is your understanding of  
13 that share, sir?

14 **DR. ISRAEL:** I don't remember the exact number.

15 **MR. TYHURST:** You don't have any idea?

16 **DR. ISRAEL:** I don't remember that number. I  
17 remember documents indicating the product, given its  
18 positioning in the market, had generally not been  
19 successful. I don't recall the number.

20 Again, that wouldn't change the conclusion  
21 because that's another bundle by one competitor. The key  
22 here is a third competitor offering a bundle.

23 **MR. TYHURST:** All right. But the fact that the  
24 bundling rate gained by Freedom pre-emerger is extremely  
25 low, don't you think that's a relevant factor in assessing

**TAB - 6.FF**

## COMPENDIUM PUBLIC

1 gross adds out-perform share subscribers in the context of  
2 the modelling. I'll give you a flavour later on for how  
3 I'm able to make that comparison.

4 I measure prices with the average revenue per  
5 user, that's sometimes known as ARPU. I'll obtain mark ups  
6 using the responses of Rogers and Shaw to the SIR. When I  
7 calculate mark ups, I'll focus particularly on price minus  
8 variable cost excluding fixed cost, and the reason is that  
9 economic theory tells us that fixed cost doesn't matter for  
10 pricing analysis. The reason is that you can set a higher  
11 price or a lower price, sell more or less, but the fixed  
12 cost doesn't change. And so for the purposes of  
13 understanding price incentives, the fixed costs don't enter  
14 that calculation. So the markups are variable cost  
15 markups.

16 The fourth element that I use in the model is a  
17 market elasticity that I'm able to measure from consumer  
18 responses to price changes in the market, particularly  
19 exploiting changes in usage among Bell customers with  
20 the -- with initiatives launched in 2019.

21 Okay. So for the markups, I use data  
22 specifically in calibration for Rogers Wireless, Fido,  
23 which is the flanker brand of Rogers, and Freedom. And  
24 with those three margins, I matched them on average. So  
25 what do I mean by that?

## COMPENDIUM PUBLIC

1                   There's sort of a luxury here that I've got  
2 more margins than the model needs. One can calibrate the  
3 model with only a single margin. I'm going to use three.

4                   I prefer to use three because there's more  
5 information there. But the model is not going to match  
6 three exactly, and so it will match them on average.

7                   When you have a model that's called  
8 over-identified in this fashion, if you match the margins  
9 on average, the price effects are correct on average.  
10 Roughly correct on average.

11                  Okay. Next slide, please.

12                  Okay. So in the calibration, I do not use the  
13 Shaw Mobile markup, okay. And the reason is that Shaw  
14 gains wireline revenue when it sells wireless service in a  
15 bundle as part of Shaw Mobile for the reasons that I  
16 already explained. And what that means is that measuring  
17 the Shaw Mobile markup using accounting data doesn't  
18 capture the full gain or the full benefit or the full  
19 incentive of Shaw Mobile to sell -- of Shaw to sell to a  
20 Shaw Mobile subscriber, all right.

21                  So instead, what I'll do is I'll use the model  
22 to infer the Shaw Mobile markup. The markup that I obtain  
23 is commensurate with the share of Shaw Mobile and it  
24 indicates that, consistent with my view of the market, that  
25 Shaw does gain on the wireline side of the business. And I

**TAB - 6.GG**

## COMPENDIUM PUBLIC

177. The 8-brand model, which focuses on premium and flanker brands, appears to better match the data inputs as it is not required to reconcile the prices, market shares, and markups for an additional group of brands (the prepaid brands) that is somewhat differentiated from the other two groups (premium and flanker brands). Accordingly, the 8-brand model is likely to deliver more informative predictions about the merger of Rogers with a competitor that does not operate a prepaid brand. Nevertheless, I continue to report the predictions of both models in my discussion of the merger simulations results below. As the results indicate, the predictions of the two models are consistent with one another.

178. Finally, I also confirmed that, in Alberta and British Columbia, the model calibrated to market shares based on gross adds matches substitution patterns observed in porting data better than the model calibrated to the percentages of subscribers.<sup>242</sup> Therefore, in Alberta and British Columbia, where the recent entry of the Shaw Mobile brand makes the difference relevant to assessing the competitive effects of the proposed acquisition, I expect the model calibrated to market shares based on gross adds to provide more accurate predictions about the effects of the merger than the model calibrated to the percentage of subscribers. In Ontario, the model matches substitution patterns observed in porting data similarly well whether it is calibrated with market shares based on gross adds or the percentages of subscribers.<sup>243</sup>

**TAB - 6.HH**

## COMPENDIUM PUBLIC

competitive conditions. This deficiency also means that SOS will underestimate the importance of new products such as Shaw Mobile as it includes consumer purchase decisions that were made when Shaw Mobile was not even available.<sup>385</sup>

118. SOS will understate the importance of new products. This point is well demonstrated by comparing British Columbia and Alberta, where Shaw Mobile recently entered, to Ontario, where it did not. In all three provinces, Freedom is an established carrier. In British Columbia and Alberta, SOGA matches the porting data better than SOS.<sup>386</sup> In Ontario, SOGA and SOS match the porting data similarly well.<sup>387</sup> Consistent with the MEGs, it is important to use SOGA when there are new competitive options in the market.<sup>388</sup>

119. Dr. Miller is careful to avoid the initial “spike” in Shaw Mobile’s gross adds following its entry and the decline in Shaw Mobile gross adds following the Arrangement Agreement (linked to subsequent price increases).<sup>389</sup> Once again, Dr. Miller corroborates his analysis with porting data, which show a similar pattern.<sup>390</sup> Contrary to Dr. Israel’s comments about push and pull diversions, Dr. Miller is using a period of time when porting and SOGA are stable.<sup>391</sup>

120. SOS ignores the fact that new entrants like Shaw Mobile can continue to grow subscriber share toward a steady-state level for a long time. Even Videotron, which launched wireless services as an MVNO in 2006 and deployed its own network in 2010, has a current SOS (██████) well below its SOGA (██████).<sup>392</sup>

### c) The merger simulation generates sensible results

121. Dr. Miller uses two versions of his model, an 8-brand model and an 11-brand model. The 8-brand model includes premium (e.g., Rogers) and flanker (e.g., Fido) brands while the 11-brand model adds the prepaid (e.g., chatr) brands. As Dr. Miller notes, the 8-brand model appears to

<sup>385</sup> CA-A-0125, Rebuttal Miller Report, [p 20, para 37](#); Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, [p 1435:9 – p 1436:16](#).

<sup>386</sup> CA-A-0122, Miller Report, [p 91, para 178](#); Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, [p 1462:20 – p 1463:3](#); CA-A-0304, Shaw Mobile Response Strategy dated Aug 14, 2020, pp 7-9.

<sup>387</sup> CA-A-0122, Miller Report, [p 91, para 178](#); CA-A-0304, Shaw Mobile Response Strategy dated Aug 14, 2020, [pp 7-9](#).

<sup>388</sup> MEGs, at 21 para 5.4.

<sup>389</sup> CA-A-0125, Miller Rebuttal Report, [pp 24-25, paras 47-48](#); CA-A-127, Expert Presentation of Dr. N Miller, [slide 37](#); CA-A-0122, Miller Report, [p 163, Exhibit 31](#). See also: Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, [p 4544:18–p 4545:10](#).

<sup>390</sup> CA-A-0122, Miller Report, [pp 166-167, para 352 and Exhibit 33](#).

<sup>391</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, [p 4465:1–p 4466:5](#).

## COMPENDIUM PUBLIC

better match the data inputs and is likely to deliver more informative predictions about the Proposed Merger.<sup>393</sup>

122. Consistent with the qualitative evidence and event studies, the merger simulation predicts significant price effects from the Proposed Merger, with market wide price increases in the range of 7.1- 10%,<sup>394</sup> and of 0.8-5% for a “Perfect Transfer” divestiture to Videotron (a “lower bound” range).<sup>395</sup> These price effects would be felt by the entirety of the relevant markets. Post-divestiture, prices would increase 7.1-16.8% for identified Rogers brands and Shaw Mobile.<sup>396</sup> The affected volume of commerce is large given the high penetration and prices of wireless service, resulting in significant welfare effects.<sup>397</sup> The increases would also persist for an indefinite period given the extraordinarily high barriers to entry. These price increases do not include any additional qualitative anticompetitive effects<sup>398</sup> discussed below.

### **2. Dr. Israel Responding Evidence Demonstrated no “Flaws” in the Model**

123. Dr. Israel’s evidence involved multiple inconsistencies with his reports and earlier statements in his testimony. For these reasons, it is submitted that Dr. Miller’s evidence should be preferred in areas of conflict. Appendix E sets out a summary of these inconsistencies.

#### **a) Rogers is actually acquiring Shaw Mobile**

124. Dr. Israel wrongly claims that Dr. Miller’s model implies that current Shaw Mobile customers are going to switch back to Freedom given that the wireless assets are not transferred to Rogers.<sup>399</sup> Dr. Israel incorrectly presents a merger simulation model in which Rogers does not acquire Shaw Mobile assets, but only subscribers.<sup>400</sup> Dr. Israel distanced himself from this assumption in cross-examination, given the evident contrary facts.<sup>401</sup>

125. Dr. Miller’s model is “agnostic” as to which assets Rogers will use to offer services to the current Shaw Mobile customers.<sup>402</sup> Given that Rogers will be in a better position than Videotron-

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<sup>393</sup> CA-A-0122, Miller Report, [p 91 para 177](#).

<sup>394</sup> CA-A-0122, Miller Report, [p 93 Exhibit 20](#).

<sup>395</sup> CA-A-0122, Miller Report, [p 113 Exhibit 22](#)

<sup>396</sup> CA-A-0122, Miller Report, [p 113 Exhibit 22](#)

<sup>397</sup> CA-A-0122, Miller Report, [pp 95 and 115, Exhibits 21 and 23](#).

<sup>398</sup> CA-A-0122, Miller Report, [p 99 paras 195-197](#).

<sup>399</sup> CA-R-1851, Israel Report, [p 35-36 paras 45-46](#).

<sup>400</sup> CA-R-1851, Israel Report, [p 73 para 114](#).

<sup>401</sup> Testimony of M Israel, Transcript, Vol 1, Nov 30, 2022, [p 4501:5-15](#).

<sup>402</sup> CA-A-0125, Miller Rebuttal Report, [pp 16-17 para 29](#).

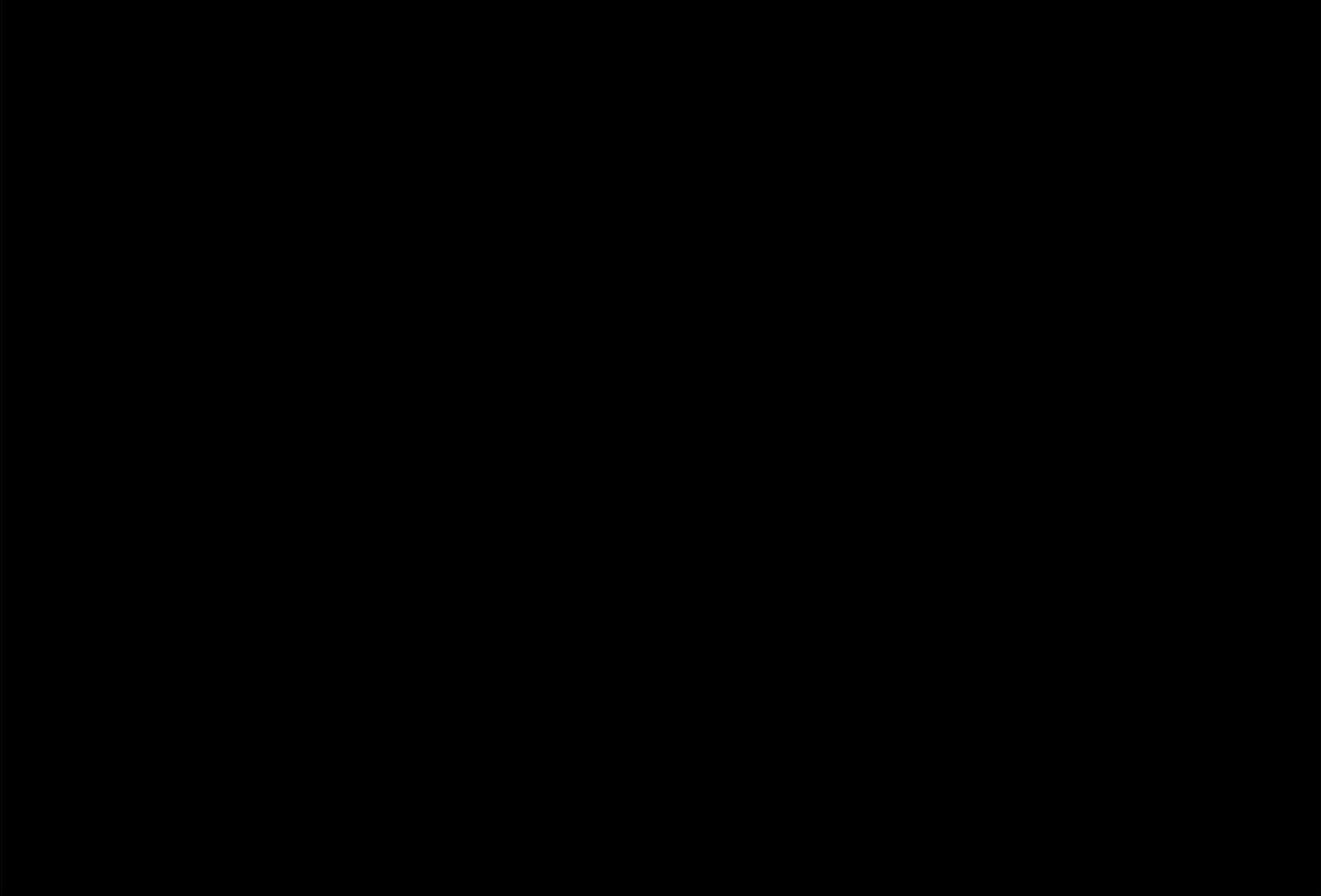
**TAB - 6.II**

# COMPENDIUM PUBLIC

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## Exhibit 22

### *Percent Price Increases for the Parties' Brands Predicted by the Model with a "Perfect*



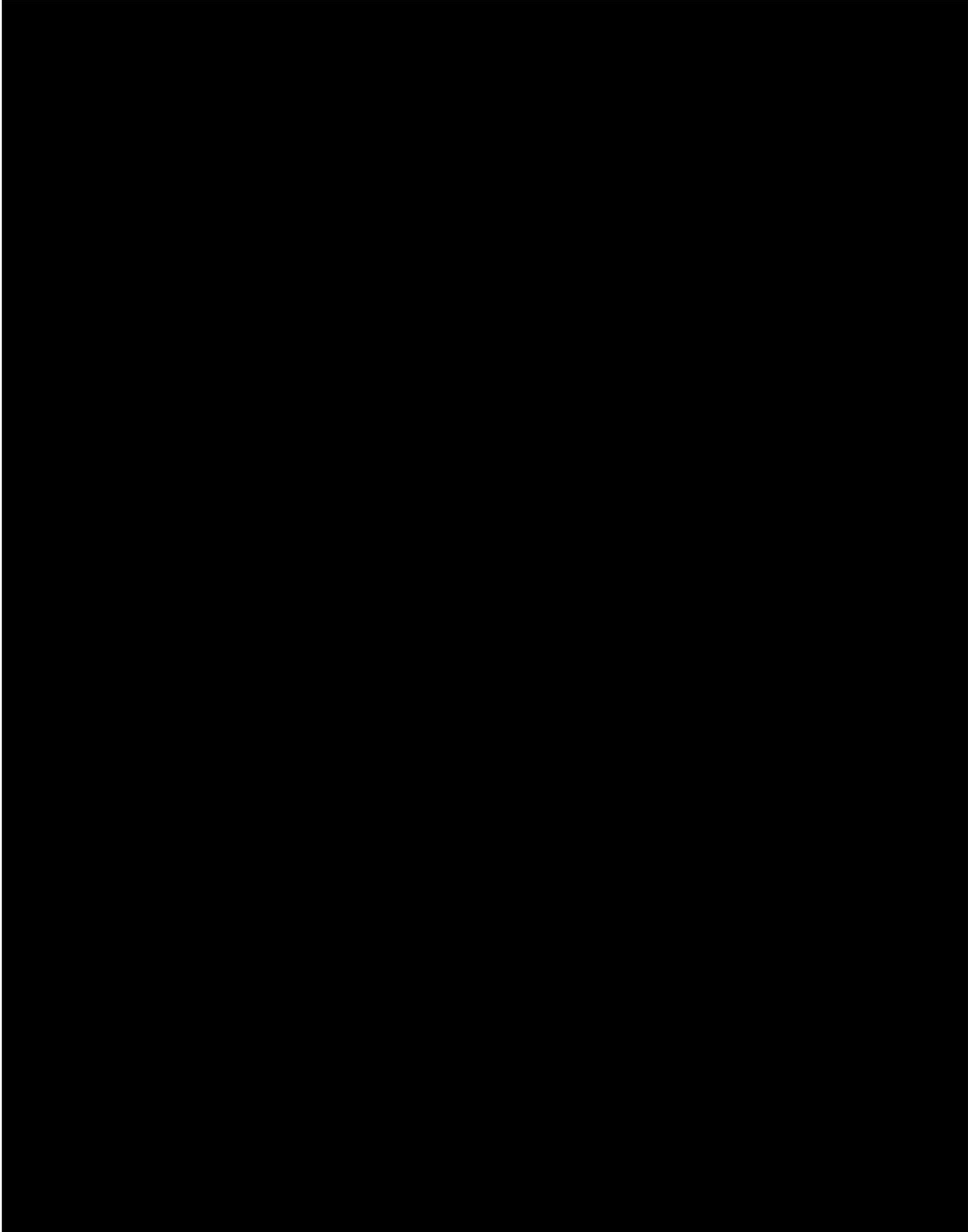
Note: This analysis uses data ranging from January 2021 through April 2021. The 8-brand model includes Rogers Wireless, Fido, Chatr, Freedom, Shaw Mobile, Bell Mobility, Virgin Mobile, Telus Mobility, and Koodo Mobile. The 11-brand model includes those brands as well as the prepaid brands: Chatr, Lucky Mobile, and Public Mobile. Both models are calibrated using market elasticities of [REDACTED] in Alberta, and [REDACTED] in British Columbia. See Appendices 8.1 and 8.3 for additional information on the data inputs, the calibration procedure, and the simulation procedure.

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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.<sup>303</sup> Because New Freedom no longer owns two brands and cannot recapture customers that may switch to Shaw Mobile in response to an increase in the price of Freedom, it finds it profitable to decrease prices of

<sup>303</sup> In the 11-brand version of the model which also includes prepaid brands, the “perfect transfer” prediction is a price decrease for Freedom of 13.8 percent in Alberta and 11.1 percent in British Columbia. In the context of these “perfect-transfer” scenarios, the effects of separating Freedom from Shaw Mobile are equivalent to reversing a merger between the two which is likely to be smaller when the divested Freedom has smaller significance as it competes with ten brands as opposed to only seven brands.

**TAB - 6.JJ**



**TAB 7 - EFFICIENCIES**

**TAB - 7.A B**

# COMPENDIUM PUBLIC

4812

1 along. For some reason, the system doesn't seem to be able  
2 to transmit that to me. But everybody else has it and I'll  
3 just take good notes. So let's just proceed.

## 4 **CROSS-EXAMINATION BY MR. VERMEERSCH**

5 **MR. VERMEERSCH:** Thank you, Chief Justice.

6 Professor, did you provide the Commissioner  
7 with any analysis that is not contained in your report?

8 **DR. ZMIJEWSKI:** No.

9 **MR. VERMEERSCH:** You have a list of documents  
10 relied on at Exhibit D of your report; correct?

11 **DR. ZMIJEWSKI:** I do.

12 **MR. VERMEERSCH:** Is this a complete list of  
13 what you relied on in completing your report?

14 **DR. ZMIJEWSKI:** To the best of my knowledge, it  
15 is. But anything relied on is in footnotes to tables and  
16 exhibits in the report itself.

17 **MR. VERMEERSCH:** And your CV, you attach a copy  
18 of your CV to the report?

19 **DR. ZMIJEWSKI:** Yes.

20 **MR. VERMEERSCH:** It's a complete list of the  
21 relevant experience you have in respect of this mandate;  
22 fair?

23 **DR. ZMIJEWSKI:** No, it's just the consulting  
24 that I've done over the last I don't know how many years,  
25 it's four or five years.

# COMPENDIUM PUBLIC

4813

1           **MR. VERMEERSCH:** Sure. But if you didn't list  
2 something on there, it wasn't relevant to this mandate; is  
3 that fair?

4           **DR. ZMIJEWSKI:** No. No, I've done this type of  
5 work for going on 20 years, so I didn't list everything for  
6 20 years.

7           **MR. VERMEERSCH:** I see. Outside of today,  
8 though, you've never testified in a proceeding before this  
9 Tribunal, is that correct?

10          **DR. ZMIJEWSKI:** That's correct.

11          **MR. VERMEERSCH:** You've never been qualified as  
12 an expert in efficiencies in Canada; correct?

13          **DR. ZMIJEWSKI:** I've actually never been  
14 qualified as an efficiencies expert anywhere. It's  
15 valuation, financial analysis, and securities litigation is  
16 where I've been qualified.

17          **MR. VERMEERSCH:** Okay. You testified in  
18 applications brought by the Federal Trade Commission in the  
19 United States; correct?

20          **DR. ZMIJEWSKI:** That's correct, yes.

21          **MR. VERMEERSCH:** In all of the applications  
22 where you've testified, you've done so on behalf of the  
23 FTC; correct?

24          **DR. ZMIJEWSKI:** No. As I said in my direct  
25 testimony, it's either the Federal Trade Commission or the

# COMPENDIUM PUBLIC

4814

1 Department of Justice.

2 **MR. VERMEERSCH:** I see. So in both -- you've  
3 only testified on behalf of the FTC or the Department of  
4 Justice; fair?

5 **DR. ZMIJEWSKI:** That's correct, sir, yes.

6 **MR. VERMEERSCH:** Okay. You've never testified  
7 on behalf of a party claiming efficiencies; correct?

8 **DR. ZMIJEWSKI:** No. The farthest we've ever  
9 gone with the parties was to make a presentation to the  
10 FTC, and then they allowed the merger.

11 **MR. VERMEERSCH:** When were you retained by the  
12 Commissioner in respect of this transaction?

13 **DR. ZMIJEWSKI:** Gees, I don't recall. A few  
14 months before Mr. Harington's initial report.

15 **MR. VERMEERSCH:** The initial report in 2021?

16 **DR. ZMIJEWSKI:** Yes, sir.

17 **MR. VERMEERSCH:** So you've been involved in  
18 this transaction or in the Commissioner's review of this  
19 transaction since 2021?

20 **DR. ZMIJEWSKI:** I believe that's correct, sir.  
21 I'd have to go to billing records to know. It's been a  
22 long time, yes.

23 **MR. VERMEERSCH:** Okay. But before the  
24 litigation started, you were involved; correct?

25 **DR. ZMIJEWSKI:** That's correct, for sure.

**TAB - 7.C**









**TAB - 7.D**

# COMPENDIUM PUBLIC

4817

1 DR. ZMIJEWSKI: Yes.

2 MR. VERMEERSCH: And if we just scroll down the  
3 page.

4 You assess whether the analysis in the Brattle  
5 report substantiates the claimed efficiencies?

6 DR. ZMIJEWSKI: Yes.

7 MR. VERMEERSCH: And you do so by assessing  
8 whether there -- whether or not there is adequate  
9 documentation to support each of the efficiencies; correct?

10 DR. ZMIJEWSKI: Are you speaking of the first  
11 bullet, sir?

12 MR. VERMEERSCH: Yes.

13 DR. ZMIJEWSKI: The first bullet is, as I  
14 explained on my direct testimony, you start with the  
15 efficiency itself, what is it, what's the nature of it and  
16 how is it going to be attained. That's the first thing you  
17 do, just so you are familiar with what -- what is happening  
18 or what is expected to happen.

19 MR. VERMEERSCH: Sir, look at the page. This  
20 paragraph 34 is the methodology you employed in your  
21 evaluation of the efficiencies in the Brattle report. Is  
22 that correct?

23 DR. ZMIJEWSKI: Yes. It's right out of one of  
24 my slides, yes.

25 MR. VERMEERSCH: Right. So I'm just reading to

# COMPENDIUM PUBLIC

4818

1 you what you've written there, sir. You assess whether  
2 there is adequate documentation to support and explain the  
3 claimed efficiencies. Do you see that there?

4 **DR. ZMIJEWSKI:** Yes.

5 **MR. VERMEERSCH:** You use facts and data, the  
6 foundation of any economic analysis, to support the inputs  
7 and assumptions. You evaluated those; right?

8 **DR. ZMIJEWSKI:** Yes, absolutely.

9 **MR. VERMEERSCH:** And you use -- you checked to  
10 substantiate whether they use standard, widely accepted and  
11 reliable principles, methods and analysis to measure the  
12 claimed efficiencies and employ them, "them" being the  
13 methods, principles and analysis, appropriately; correct?

14 **DR. ZMIJEWSKI:** Yes, sir.

15 **MR. VERMEERSCH:** Right. That was the  
16 methodology you applied to evaluate each of the  
17 efficiencies that you analyze in your report; right?

18 **DR. ZMIJEWSKI:** That's correct, with the  
19 qualifications that I give for different efficiencies. For  
20 example, for the -- what I just, as a shorthand, call  
21 engineering opinions, I -- you know, I believe I'm explicit  
22 that I don't have an opinion on any of the engineering  
23 claimed efficiencies.

24 **MR. VERMEERSCH:** I understand that, sir. But  
25 you use your methodology to determine that something is an

# COMPENDIUM PUBLIC

4819

1 engineering input that you decide you're not going to  
2 evaluate; correct? You've applied this methodology in  
3 order to come to that conclusion; right?

4 **DR. ZMIJEWSKI:** No. Regarding the engineering,  
5 it's -- it's not accounting finance or economics, and it is  
6 something else that's scientific technology or engineering  
7 that I don't have the qualifications to evaluate. So it is  
8 related to, do I have the expertise or don't I have the  
9 expertise.

10 **MR. VERMEERSCH:** Okay. So for those items, the  
11 engineering inputs, you didn't apply this methodology;  
12 correct?

13 **DR. ZMIJEWSKI:** That's correct because I don't  
14 have the expertise to do so.

15 **MR. VERMEERSCH:** Okay. The methodology we see  
16 here on the screen, sir, you developed your methodology to  
17 be consistent with the Horizontal Merger Guidelines;  
18 correct?

19 **DR. ZMIJEWSKI:** This methodology I developed,  
20 you know, in the early 2000s, and it was based on the  
21 stated merger guidelines back then, yes. But in this  
22 particular case, as I explain, I was directed and  
23 instructed to use the Merger Enforcement Guidelines and I  
24 determine, based on my reading of those guidelines, that  
25 this criteria that I use here is consistent with the Merger

# COMPENDIUM PUBLIC

4820

1 Enforcement Guidelines.

2 **MR. VERMEERSCH:** The criteria we're looking at  
3 on the screen, sir, you developed your methodology to be  
4 consistent with the Horizontal Merger Guidelines. Do you  
5 agree with that proposition, sir?

6 **DR. ZMIJEWSKI:** I think I just said yes, yes.

7 **MR. VERMEERSCH:** Okay. And when I say the  
8 Horizontal Merger Guidelines, we agree that those are the  
9 U.S. Department of Justice and Federal Trade Commission's  
10 merger guidelines; correct?

11 **DR. ZMIJEWSKI:** That's the document to which I  
12 thought you were referring, yes.

13 **MR. VERMEERSCH:** You also developed this  
14 methodology that we see on the screen using the commentary  
15 on the Horizontal Merger Guidelines; correct?

16 **DR. ZMIJEWSKI:** That's correct.

17 **MR. VERMEERSCH:** And although the Horizontal  
18 Merger Guidelines have changed a little bit since you  
19 started using this methodology, on the point of  
20 efficiencies, they have not changed regarding verification  
21 and merger specificity of efficiencies; correct?

22 **DR. ZMIJEWSKI:** You know, I really don't know.  
23 If they changed, they didn't change greatly. But if there  
24 was changes, I'm sorry, I just don't recall. But it's not  
25 going to be big changes.

# COMPENDIUM PUBLIC

4821

1                   **MR. VERMEERSCH:** Sir, you were called as an  
2 expert in a case named FTC versus Peabody Energy  
3 Corporation and Arch Coal; correct?

4                   **DR. ZMIJEWSKI:** Yes, that's the -- I was, yes.

5                   **MR. VERMEERSCH:** And on July 24<sup>th</sup>, 2020, you  
6 gave sworn evidence in that proceeding; correct?

7                   **DR. ZMIJEWSKI:** I did, yes.

8                   **MR. VERMEERSCH:** Let's pull that up. We'll go  
9 to ABD101192 and PDF page 165.

10                   All right. Sir, this Mark E. Zmijewski --  
11 sorry, I really apologize, that is not the correct  
12 pronunciation of your name. I struggle with names.

13                   **DR. ZMIJEWSKI:** I'm accustomed to a lot of  
14 different pronunciations. so not a problem at all.

15                   **MR. VERMEERSCH:** As am I.

16                   **DR. ZMIJEWSKI:** I feel no ill will.

17                   **MR. VERMEERSCH:** Understood.

18                   But this is you, sir, that's being sworn in;  
19 correct?

20                   **DR. ZMIJEWSKI:** Yes, sir.

21                   **MR. VERMEERSCH:** All right. And if we go to  
22 PDF page 167.

23                   All right. And this is you giving an answer.  
24 You're asked -- this is in direct examination.

25                   "Q. And you have used that methodology

# COMPENDIUM PUBLIC

4822

1 consistently since that time?  
2 [Your answer] Yes. It's the same  
3 methodology that I used for a long time  
4 now. The merger guidelines have  
5 changed a little bit, but regarding  
6 efficiencies, they ... haven't changed  
7 regarding the verification and merger  
8 specificity of efficiencies."

9 Those are your words, right, sir?

10 **DR. ZMIJEWSKI:** There's a word, "really haven't  
11 changed".

12 So in some -- as I said, I don't know if they  
13 changed or not. If they did change, they didn't change  
14 substantially, and I just don't recall. I said that here  
15 and I still, as I read that, they really haven't changed.

16 You know, do any words have changed? I'm not  
17 quite sure. I just don't know.

18 **MR. VERMEERSCH:** Right. We can agree --

19 **DR. ZMIJEWSKI:** But I'm not suggesting that  
20 they changed a great deal. I never -- and I've used the  
21 same methodology. So it's -- you know, I'm not sure what  
22 your question is.

23 **MR. VERMEERSCH:** I understand, sir.

24 I'm saying with respect to verification and  
25 merger specificity of efficiencies, the Merger Horizontal

# COMPENDIUM PUBLIC

4823

1 Guidelines [*sic*] haven't changed and your methodology has  
2 remained consistent as a result; right?

3 **DR. ZMIJEWSKI:** They haven't really changed,  
4 and I have used the same methodology, absolutely.

5 **MR. VERMEERSCH:** Now, we can agree, sir, that  
6 if I take a look at all of the footnotes in your report and  
7 the list of documents relied on, I won't see the Horizontal  
8 Merger Guidelines mentioned; correct?

9 **DR. ZMIJEWSKI:** That's correct.

10 **MR. VERMEERSCH:** I won't see the commentary on  
11 the Horizontal Merger Guidelines mentioned in your report;  
12 correct?

13 **DR. ZMIJEWSKI:** That's correct. Yes, of  
14 course.

15 **MR. VERMEERSCH:** Right. And when you told --  
16 my friend asked you in direct examination, he said you set  
17 out in your report a methodology for assessing merger  
18 efficiencies. "Can you talk about the framework you used  
19 to up with that methodology?". You responded:

20 "Yes. You instructed me that the  
21 Merger Enforcement Guidelines were  
22 reasonable guidelines to use to  
23 evaluate my criteria that I use to  
24 evaluate claimed efficiencies."

25 I'm going to suggest to you, sir, you didn't

**TAB - 7.E**

# COMPENDIUM PUBLIC

4823

1 Guidelines [sic] haven't changed and your methodology has  
2 remained consistent as a result; right?

3 **DR. ZMIJEWSKI:** They haven't really changed,  
4 and I have used the same methodology, absolutely.

5 **MR. VERMEERSCH:** Now, we can agree, sir, that  
6 if I take a look at all of the footnotes in your report and  
7 the list of documents relied on, I won't see the Horizontal  
8 Merger Guidelines mentioned; correct?

9 **DR. ZMIJEWSKI:** That's correct.

10 **MR. VERMEERSCH:** I won't see the commentary on  
11 the Horizontal Merger Guidelines mentioned in your report;  
12 correct?

13 **DR. ZMIJEWSKI:** That's correct. Yes, of  
14 course.

15 **MR. VERMEERSCH:** Right. And when you told --  
16 my friend asked you in direct examination, he said you set  
17 out in your report a methodology for assessing merger  
18 efficiencies. "Can you talk about the framework you used  
19 to up with that methodology?". You responded:

20 "Yes. You instructed me that the  
21 Merger Enforcement Guidelines were  
22 reasonable guidelines to use to  
23 evaluate my criteria that I use to  
24 evaluate claimed efficiencies."

25 I'm going to suggest to you, sir, you didn't

# COMPENDIUM PUBLIC

4824

1 use the Merger Enforcement Guidelines to come up with your  
2 methodology; correct?

3 **DR. ZMIJEWSKI:** Could you read what I said  
4 again?

5 **MR. VERMEERSCH:** This is the real-time  
6 transcript, so you say:

7 "Yes. You instructed me that the  
8 Merger Enforcement Guidelines were  
9 reasonable guidelines to use to  
10 evaluate my criteria that I use to  
11 evaluate claimed efficiencies."

12 **DR. ZMIJEWSKI:** That's correct. That's exactly  
13 what I did.

14 I was instructed that whatever criteria that I  
15 use, I should be consistent with the Merger Enforcement  
16 Guidelines. That's what I did.

17 I evaluated my criteria, which you saw in the  
18 report and you saw on my slides. I evaluated those  
19 criteria relative to the Merger Enforcement Guidelines. If  
20 the Merger Enforcement Guidelines were different and  
21 directing me to do something different, I would have  
22 changed my approach, but it didn't. I believe my criteria  
23 are consistent.

24 **MR. VERMEERSCH:** Sir, your criteria, your  
25 methodology was developed to be consistent with the

# COMPENDIUM PUBLIC

4825

1 Horizontal Merger Guidelines. We can agree, that's  
2 different than the Merger Enforcement Guidelines in effect  
3 here in Canada; correct?

4 **DR. ZMIJEWSKI:** You're absolutely correct.  
5 Those are not the same. However, the question is, for  
6 verification or substantiation or validation, whatever word  
7 you want to use, the question is, are those criteria  
8 applicable and consistent with the Merger Enforcement  
9 Guidelines and, based on my reading, they are.

10 **MR. VERMEERSCH:** I see. So you, sir, have  
11 decided that the Horizontal Merger Guidelines are the same  
12 as the Merger Enforcement Guidelines here in Canada on  
13 these points?

14 **DR. ZMIJEWSKI:** I don't believe I said that,  
15 and if I did, I misspoke.

16 What I said was, I have a set of criteria that  
17 I developed, and those criteria, then, for this particular  
18 matter I evaluated those criteria which are based on  
19 principles of economics and finance and accounting -- I  
20 evaluated those criteria relative to the Merger Enforcement  
21 Guidelines and they were consistent so I didn't change  
22 them.

23 **MR. VERMEERSCH:** Well, sir, you go through four  
24 pages in your report and three slides that we just walked  
25 through this morning -- or this afternoon about the Merger

# COMPENDIUM PUBLIC

4826

1 Enforcement Guidelines to suggest that those are the  
2 origins of your methodology. But they're not, sir;  
3 correct?

4 **DR. ZMIJEWSKI:** I didn't -- now, based on what  
5 you read regarding my testimony, I believe what my  
6 testimony was, and if I misspoke, I misspoke, but I had a  
7 set of criteria that I have used and I was instructed to  
8 make sure that the criteria that I used was consistent with  
9 the Merger Enforcement Guidelines. I thought I said that,  
10 and I didn't mean to imply anything else.

11 **MR. VERMEERSCH:** Well, sir --

12 **DR. ZMIJEWSKI:** For the clarity, for the  
13 Tribunal, I've used these criteria for almost 20 years and  
14 they're just basic criteria. I mean, they're just sensible  
15 things to do if you have to independently verify, or  
16 substantiate, or validate somebody else's calculation.

17 **MR. VERMEERSCH:** Well, sir, looking at what's  
18 on the screen here, this is your testimony. You say in  
19 answer:

20 "It's the same methodology I've used  
21 for a long time now. The merger  
22 guidelines have changed a little bit,  
23 but regarding efficiencies, they  
24 haven't really changed regarding the  
25 verification and merger specificity of

# COMPENDIUM PUBLIC

4827

1                                   efficiencies.”

2                                   I'm going to suggest to you that if these  
3                                   propositions are so basic that it doesn't matter what the  
4                                   guidelines are, you wouldn't have given that evidence  
5                                   before the U.S. District Court, sir; correct?

6                                   **DR. ZMIJEWSKI:** No, I don't understand why you  
7                                   would think that. I'm just -- I apologize. I'm just  
8                                   confused why you would even think that. I gave this  
9                                   testimony explaining what these criteria are, where they  
10                                   came from, and today I gave testimony explaining the  
11                                   criteria that I have used are, based on my reading of the  
12                                   Merger Enforcement Guidelines, consistent with the Merger  
13                                   Enforcement Guidelines.

14                                   **MR. VERMEERSCH:** Right. And the methodology is  
15                                   exactly the same, right, sir?

16                                   **DR. ZMIJEWSKI:** Identical, yeah, you're  
17                                   absolutely correct. Because based on my reading of the  
18                                   Merger Enforcement Guidelines, I didn't believe they need  
19                                   to be changed. If there was something in the Merger  
20                                   Enforcement Guidelines that indicated I should have used a  
21                                   different methodology, a different criteria, I would have  
22                                   done so.

23                                   **MR. VERMEERSCH:** Okay. If we go to paragraph  
24                                   39 to 41 of your public report, sir, you have a section  
25                                   here about business judgment. Do you recall that, sir?

# COMPENDIUM PUBLIC

4828

1 DR. ZMIJEWSKI: Yes.

2 MR. VERMEERSCH: Okay. And on the slide that  
3 you pulled up, or Mr. Klippenstein pulled up, when we were  
4 talking about business judgment, you've got a quote from  
5 the MEGs at the top. And this principle, this business  
6 judgment concept, that informed your analysis; correct?

7 DR. ZMIJEWSKI: You're saying on the slide?

8 MR. VERMEERSCH: We can pull up the slide but  
9 I'm saying --

10 DR. ZMIJEWSKI: I can just look at it. You  
11 don't have to pull it up. Or you can, whatever you'd  
12 like --

13 MR. VERMEERSCH: Sir, the principle of business  
14 judgment that you've described here in paragraph 39 to 41,  
15 that informed your analysis; correct?

16 DR. ZMIJEWSKI: Again, what I -- the entire  
17 Merger Enforcement Guidelines that were relevant to  
18 assessing merger efficiencies, claimed efficiencies, is  
19 what informed my judgment. That's what informed my  
20 judgment.

21 MR. VERMEERSCH: Sir, the word business  
22 judgment doesn't appear anywhere in the Merger Enforcement  
23 Guidelines; does it?

24 DR. ZMIJEWSKI: Not to the best of my  
25 knowledge. I'd have to go search the document, but I don't

**TAB - 7.F**

# COMPENDIUM PUBLIC

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1                   **DR. ZMIJEWSKI:** But if you read what I wrote, I  
2 wrote about merger specificity. I said if they're not  
3 merger-specific, right -- if we could go back to my report  
4 or of the slide, whichever it is.

5                   **MR. VERMEERSCH:** We'll go to paragraph 42 of  
6 your report.

7                   **DR. ZMIJEWSKI:** Thank you.

8                   So if you read, it says the sentence that you  
9 read:

10                                   "However, it's often likely that best  
11                                   practices not protected by intellectual  
12                                   property could be achieved without the  
13                                   proposed merger."

14                   So if it's not merger related, if it's not  
15 merger specific -- the Merger Enforcement Guidelines deal  
16 with merger specificity, and if it's not merger specific,  
17 it wouldn't count. And that's all that paragraph says.

18                   **MR. VERMEERSCH:** I understand, sir. But we can  
19 agree that nothing in the Merger Enforcement Guidelines  
20 mentions intellectual property, be it with respect to  
21 merger specificity or not; right?

22                   **DR. ZMIJEWSKI:** Well, the point is if there's  
23 intellectual property rights, you couldn't. It has to be  
24 merger specific because the other company couldn't. So  
25 this is concerning -- if it's not protected intellectual

# COMPENDIUM PUBLIC

4837

1 property, then how can a best practice be adopted?

2 Well, if there's some technology, Company A has  
3 it, Company B is planning to develop that same technology  
4 or buy that technology, well, that's not merger specific.  
5 And if it's not merger specific, based on my understanding  
6 of the Merger Enforcement Guidelines, it wouldn't be  
7 included.

8 **MR. VERMEERSCH:** Sir --

9 **DR. ZMIJEWSKI:** That's what I'm saying. That's  
10 what that sentence means.

11 **MR. VERMEERSCH:** Sir, did the Commissioner tell  
12 you that this Tribunal has considered the applicability of  
13 the American circumstances, policies and judicial  
14 interpretation of the pertinent statutes related to  
15 efficiencies as they apply to Canadian cases? Did they  
16 tell you anything about that?

17 **DR. ZMIJEWSKI:** No.

18 **MR. VERMEERSCH:** They didn't tell you that this  
19 Tribunal ruled that the adoption of the American approach  
20 to efficiencies would introduce the hostility characterized  
21 by that approach? They didn't tell you that.

22 **DR. ZMIJEWSKI:** I -- no, I did not hear that,  
23 no.

24 **MR. VERMEERSCH:** You weren't aware of that when  
25 you conducted your analysis.

# COMPENDIUM PUBLIC

4838

1           **DR. ZMIJEWSKI:** I conducted my analysis based  
2 on a set of criteria that I believe are consistent with the  
3 Merger Enforcement Guidelines.

4           **MR. VERMEERSCH:** And happen to be consistent  
5 with the Horizontal Merger Guidelines in the United States;  
6 correct?

7           **DR. ZMIJEWSKI:** That's correct because they're  
8 just basic sensible criteria one would use as an  
9 independent third party to verify or substantiate or  
10 validate a calculation by somebody else.

11           **MR. VERMEERSCH:** Mr. -- sorry, Professor, you  
12 considered the report of Mr. Harington?

13           **DR. ZMIJEWSKI:** I did.

14           **MR. VERMEERSCH:** You reviewed his experience  
15 listed in his report?

16           **DR. ZMIJEWSKI:** Yes.

17           **MR. VERMEERSCH:** Would you agree with me, sir,  
18 that Mr. Harington is well qualified?

19           **DR. ZMIJEWSKI:** For -- qualified for?

20           **MR. VERMEERSCH:** To give the opinion that he  
21 gave, sir.

22           **DR. ZMIJEWSKI:** He has qualifications -- I  
23 believe his qualifications are adequate for doing the work  
24 he's doing. I don't agree with his opinions.

25           **MR. VERMEERSCH:** Right. But we can agree that

**TAB - 7.G**

# COMPENDIUM PUBLIC

Reference: *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 16

File no.: CT1998002

Registry document no.: 238a

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/94-290, as amended;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b) of the *Competition Act* relating to the proposed acquisition of ICG Propane Inc. by Superior Propane Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition under section 92 of the *Competition Act*.

B E T W E E N :

## COMPENDIUM PUBLIC

[137] In addition, some commentators in the United States have expressed surprise at the interpretation of section 96 adopted in the *MEG*. See, for example, J.F. Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress, (1987) 62 *N.Y.U. L. Rev.* 1020, at 1035-36; S.F. Ross, "Afterword-Did the Canadian Parliament Really Permit Mergers That Exploit Canadian Consumers So the World Can Be More Efficient?" (1997) 65 *Antitrust Law Journal* 641...

(Appeal Judgment, at 52-53)

[115] It is clear that the Court has placed weight on the treatment of efficiencies under U.S. antitrust law and has used it as the benchmark to evaluate the Tribunal's assessment under the Act. In the Tribunal's view, the differences between the American and Canadian approaches to merger review and efficiencies are very significant and cannot be appreciated without some knowledge of the history of American antitrust. (The Tribunal relies on two publications of the American Bar Association, Section of Antitrust Law: Monograph 12, *Horizontal Mergers: Law and Policy* (1986) and *Mergers and Acquisitions: Understanding the Antitrust Issues*, Robert S. Schlossberg and Clifford H. Aronson, eds. (2000) for its review of the American approach to efficiencies.)

[116] The Price Standard guided courts in the United States for much of the past century and created judicial hostility toward efficiency evidence and arguments. In *Brown Shoe* (*United States v. Brown Shoe Co.*, 179 F. Supp. 721, *aff'd* 370 U.S. 294 (1962)), the district court agreed with the government that certain advantages to Brown Shoe as a result of the acquisition would actually lower the price or raise product quality; however, the independent retailer would be less able to compete with the more efficient merged firm.

[117] On appeal to the United States Supreme Court, Brown Shoe strongly denied that the merger would produce any cost savings, while the government, believing that such savings existed, attacked the alleged efficiency gains, charging that they would allow Brown Shoe to lower its prices. The United States Supreme Court recognized that consumers might benefit from the merger, and further noted that the law protected competition, not competitors. Nonetheless, it was primarily concerned that American antitrust law protected viable, small, locally-owned businesses and resolved the

# COMPENDIUM PUBLIC

...These economic objectives can be implemented by placing greater emphasis on stability and predictability of antitrust rules, preventing exclusionary conduct that threatens production efficiency, and recognizing a limited efficiencies defense when otherwise restrictive conduct would enhance production or innovation efficiency. (Brodley, at 1053)

Professor Brodley's article serves as a reminder of the debate within American antitrust law as it adapts to economic conditions a century after the antitrust laws were first introduced. It discusses Canada's approach not at all.

[158] The Tribunal does not criticize the American antitrust regime, but it notes that it is the result of circumstances, policies, and judicial interpretation of the pertinent statutes that are unique to the United States. The opinions of American commentators on Canada's Act, whether cited by the Court or by the Commissioner, should be seen in the context of historical and continuing hostility toward efficiencies in merger review in the United States.

[159] In the Tribunal's view, the prevailing hostile approach to efficiencies in American antitrust law derives from the primary focus of that regime on consumer protection. The adoption of the American approach to efficiencies under the Act would, without question, introduce the hostility that characterizes that approach. As noted above, the amendments in 1986 to the merger provisions of the *Combines Investigation Act* were primarily focussed on economic efficiency.

## J. DOES THE TOTAL SURPLUS STANDARD VITIATE SECTION 92?

[160] In its Reasons, the Tribunal emphasized that the Consumer Surplus Standard could not be correct in law because it frustrates the attainment of efficiency that was

**TAB - 7.H**

**COMPENDIUM PUBLIC**

CT-2022-002

**THE COMPETITION TRIBUNAL**

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

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

**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 -

THE ATTORNEY GENERAL OF ALBERTA AND VIDEOTRON LTD.

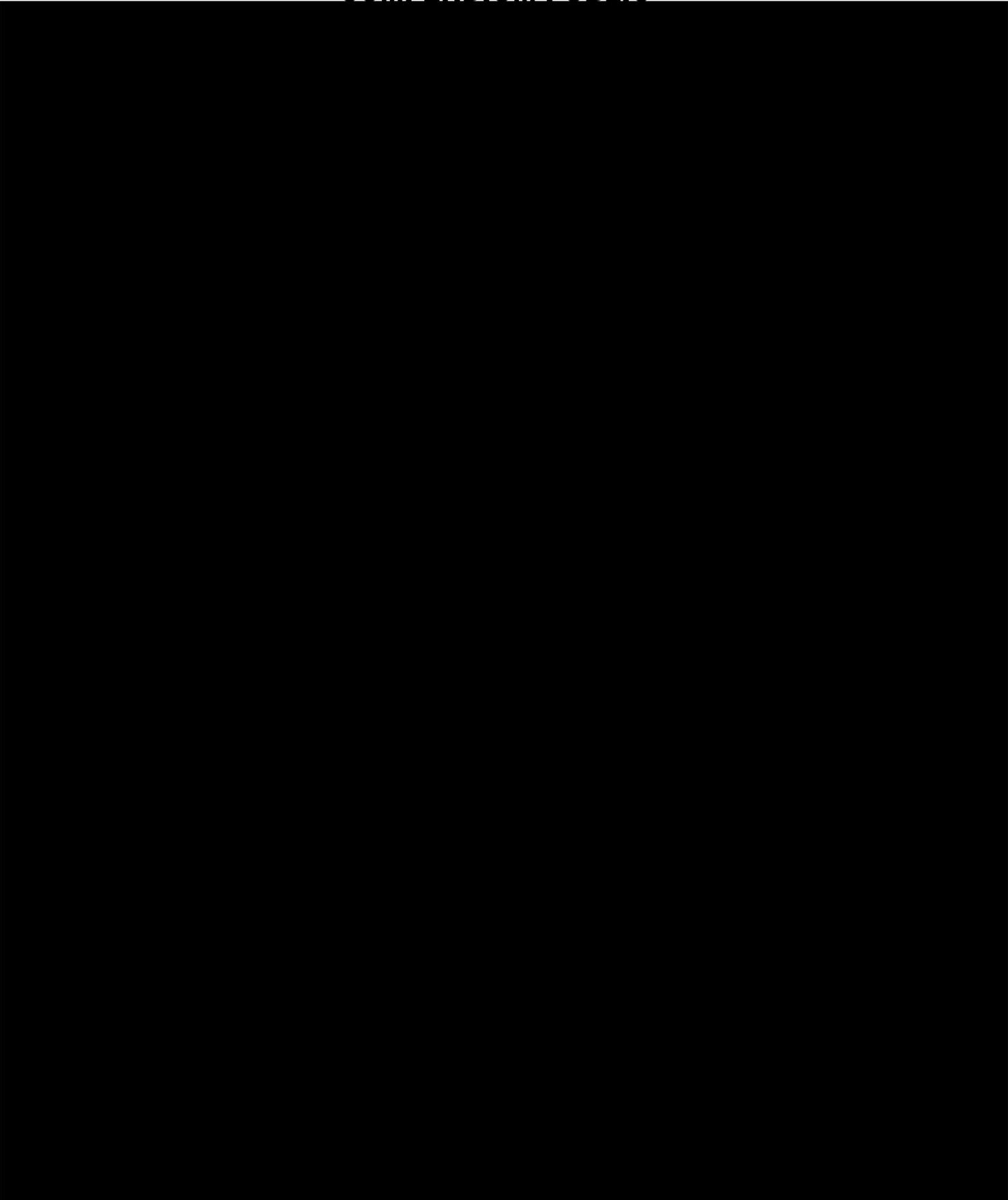
Intervenors

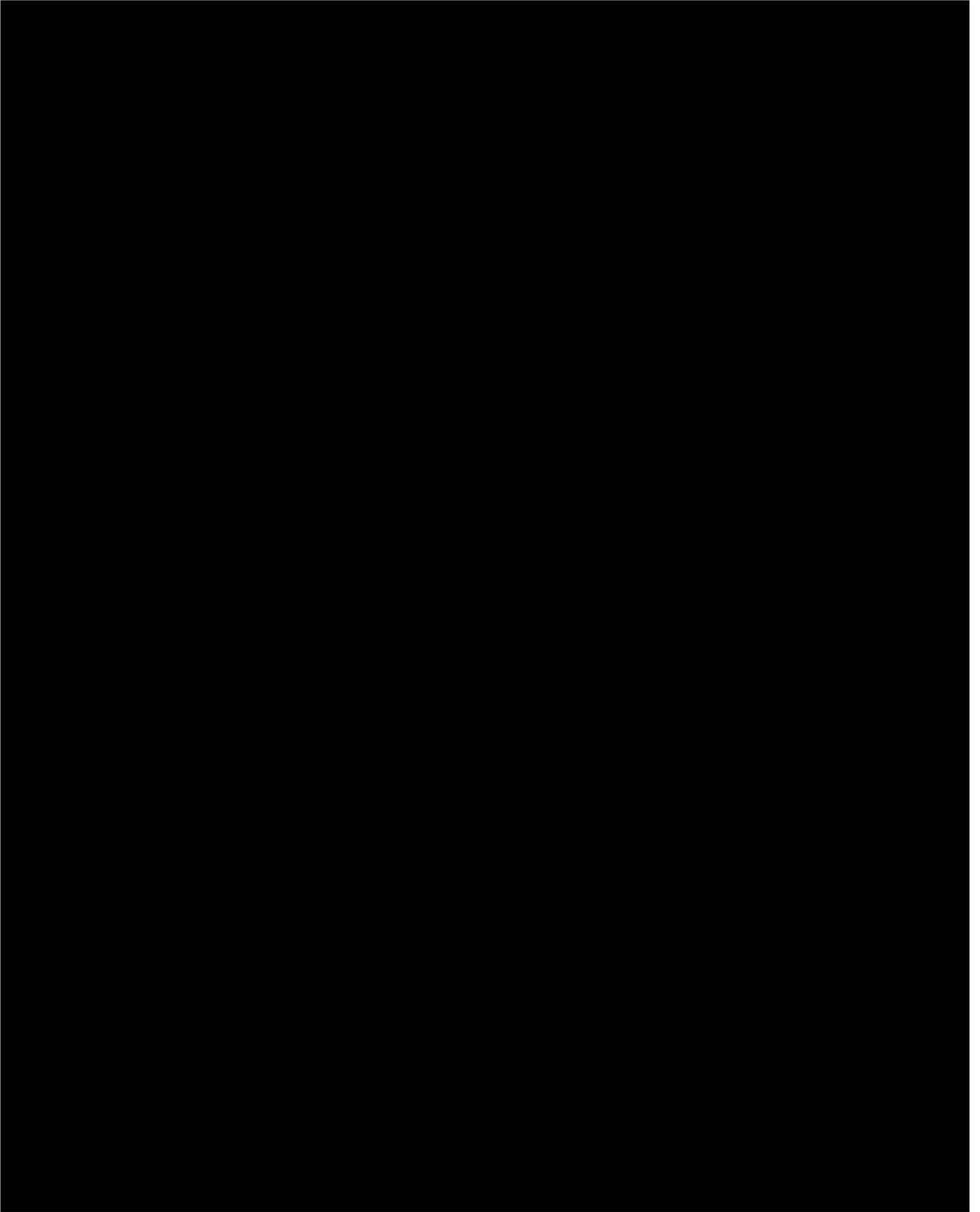
**WITNESS STATEMENT OF MARISA FABIANO**

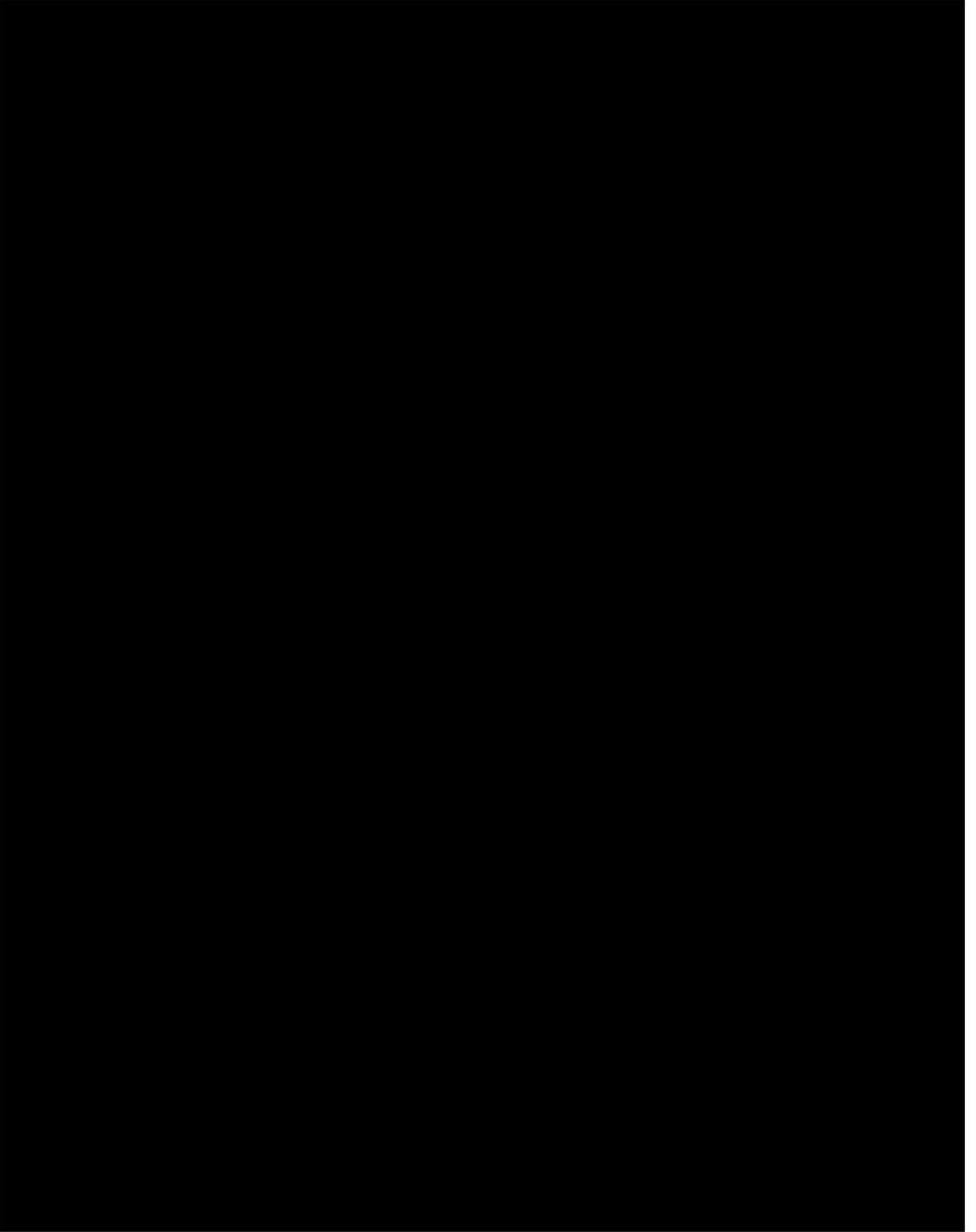
I, Marisa Fabiano, of the City of Toronto, in the Province of Ontario, state as follows:

1. I am the Senior Vice President of Finance at Rogers Communications Inc. (“**Rogers**”), and make this witness statement in support of Rogers’s response to an application commenced by the Commissioner of Competition (the “**Commissioner**”) under s. 92 of the *Competition Act* for various orders in connection with a proposed transaction (the “**Proposed Transaction**”) between Rogers, Shaw Communications Inc. (“**Shaw**”) and Videotron Ltd. (“**Videotron**”).

2. I have personal knowledge of the matters set out in this witness statement, and where my evidence is based on information, I set out the source of that information and believe it to be true.







**TAB - 7.1**







**TAB - 7.J**











**TAB - 7.K**















**TAB - 7.L**

















**TAB - 7.M**

# COMPENDIUM PUBLIC

3856

1 Exhibit 1,798.

2 **CHIEF JUSTICE CRAMPTON:** 1,798. And you want  
3 us to do all 10 of them now; do you?

4 **DEPUTY REGISTRAR:** I can feel that you don't.  
5 So why don't you send me the list, Mr. Vermeersch --

6 **MR. VERMEERSCH:** I will.

7 **DEPUTY REGISTRAR:** -- and let me -- send it to  
8 me right now by email and hopefully we have a chance to  
9 mark them down before the filing of the next exhibit, okay?

10 **MR. VERMEERSCH:** I will do that.

11 **CHIEF JUSTICE CRAMPTON:** So that's going to  
12 take us 1798, 99, all the way up to 1808. Is that right,  
13 Annie?

14 **DEPUTY REGISTRAR:** Well, I don't know how many  
15 documents they want to file as exhibits, so.

16 **CHIEF JUSTICE CRAMPTON:** Well, there's 20 more  
17 to go.

18 **MR. VERMEERSCH:** Yeah.

19 **CHIEF JUSTICE CRAMPTON:** So it will be 1798 to  
20 1818. So the next exhibit would be 1819; right? Do you  
21 follow me?

22 **DEPUTY REGISTRAR:** So we have 10 or 11 exhibits  
23 or 10 exhibits?

24 **CHIEF JUSTICE CRAMPTON:** There's 10 times two  
25 to come.

# COMPENDIUM PUBLIC

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1                   **DEPUTY REGISTRAR:** So the following one would  
2 be 1810. Is that what you have?

3                   **CHIEF JUSTICE CRAMPTON:** Yeah, it'll be 1818.  
4 So the next exhibit that somebody will get will be  
5 something 1818.

6                   **DEPUTY REGISTRAR:** I have 1810.

7                   You have 10 exhibits, Mr. Vermeersch, so that's  
8 20 documents?

9                   **MR. VERMEERSCH:** That's right. And we started  
10 from 1798. 1798, right.

11                   **CHIEF JUSTICE CRAMPTON:** Maybe I should have  
12 just continued going on

13                   **DEPUTY REGISTRAR:** Yeah, that's what I was  
14 thinking.

15                   Okay. So just send it to me and we'll work it  
16 out, okay? I will revert to the Tribunal soon.

17                   **CHIEF JUSTICE CRAMPTON:** Okay. Sorry, Annie.

18                   **DEPUTY REGISTRAR:** No worries.

19                   **CHIEF JUSTICE CRAMPTON:** I'm trying to be  
20 helpful.

21                   All right. So back to where we were.

22                   **MR. VERMEERSCH:** Right.

23                   So Ms. Fabiano, those 14 documents, what  
24 relationship, if any, do those have to Exhibit 8 to your  
25 witness statement?

# COMPENDIUM PUBLIC

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1                   **MS. FABIANO:** Those -- Exhibit 8, as we talked  
2 about, was the file that we summarized into wireless,  
3 wireline and corporate. Those were the source documents  
4 that would have started all of the work around that file,  
5 Exhibit 8.

6                   **MR. VERMEERSCH:** Thank you.

7                   Those are my questions, Chief.

8                   **CHIEF JUSTICE CRAMPTON:** Thank you very much,  
9 Mr. Vermeersch.

10                  So over to you, Mr. Klippenstein.

11                  **MR. KLIPPENSTEIN:** Thank you, Chief Justice. I  
12 think my questions are straightforward, but they are about  
13 the content of those confidential documents, so I'll have  
14 to ask us to switch to Confidential A.

15                  **CHIEF JUSTICE CRAMPTON:** All right.

16                  Back to you, Annie. We're keeping you busy.

17                  **DEPUTY REGISTRAR:** Always.

18                  **MR. KLIPPENSTEIN:** And when we're there, I'll  
19 ask you to call up a document. I've got the ABD number.  
20 I'm sorry, I didn't catch the exhibit number in all that  
21 was going on just now.

22                  The ABD will be 100082, and that's the Level A  
23 version, once we're in confidential mode.

24                  **DEPUTY REGISTRAR:** Can we please confirm that  
25 Dean Shaikh, Paul Cowling are okay to be in this

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1 confidential session? I would appreciate that.

2 **MR. RICCI:** Dean Shaikh and Paul Cowling are  
3 representatives of Shaw, Ms. Ruhlmann. I haven't seen  
4 these documents, but I believe they are Rogers' documents,  
5 with the result they should not be in the confidential  
6 session.

7 **DEPUTY REGISTRAR:** Thank you for clarifying.  
8 This is not easy for us, so I appreciate that very much.

9 **MR. RICCI:** No problem at all.

10 --- Upon recessing at 1:16 p.m., to resume  
11 immediately in Confidential Level A /  
12 Suspension à 13 h 16 pour reprendre immédiatement  
13 en session confidentielle niveau A

14  
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**TAB - 7.N**









**TAB – 7.0**



















**TAB – 7.P**













**TAB 8 – BALANCING WEIGHTS**

**TAB – 8.A**

# COMPENDIUM PUBLIC

Reference: *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 16

File no.: CT1998002

Registry document no.: 238a

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/94-290, as amended;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b) of the *Competition Act* relating to the proposed acquisition of ICG Propane Inc. by Superior Propane Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition under section 92 of the *Competition Act*.

B E T W E E N :

[107] It is not entirely clear to the Tribunal what the Commissioner is seeking here. In particular, Professor Townley did not indicate that the computed balancing weight should be assessed in light of information that is not relevant to the consideration of equity between consumers and shareholders (Townley report, exhibit A-2081 at 33).

[108] Moreover, Professor Townley advocates assigning the same weight to all consumers only because information on individual consumers is lacking. Since Professor Townley is concerned with welfare-maximizing mergers, where such information is available and describes significant differences among consumers, he would presumably want to take it into consideration.

[109]

Using the Balancing Weights Approach to assess the distributional concerns in the instant case, the Tribunal must find that the weight that properly reflects the consumer loss is at least 60 percent higher than the weight on shareholder gains, assuming again that the consumer and shareholder groups are distinct and reasonably internally homogeneous. If it can so find, then that is a factor that counts against the merger, and must be considered with all other factors required to be considered. Indeed, if estimates of A, B, and C accurately described all of the effects of a merger, the appropriateness of the balancing weight would be determinative. Accordingly, if the Tribunal knew, or could derive, the correct weight, it would be able to determine whether or not that weight exceeded the balancing weight.

#### **F. SOURCES OF THE CORRECT WEIGHT**

[110] In the Tribunal's view, the correct weight should be established by society or should reflect social attitudes toward equity among different income classes. There may be several sources from which the proper weighting can be inferred, one such being the

## COMPENDIUM PUBLIC

tax system, which is explicitly, although not solely, concerned with equity. It is clear that the prevailing system of taxation in Canada does reflect a social consensus about the desirability of imposing burdens on different income classes. If tax rates are progressive with respect to income, then society has decided that the marginal dollar of income is worth less to the high-income taxpayer than it is to the low-income taxpayer. If, for example, the lowest tax rate is 20 percent and the highest is 50 percent, there is clear indication that low-income individuals are favoured over high-income individuals; assigning a weight of 1.0 to the latter group, the corresponding weight on the former would be 2.5.

[111] Based on their recent review of the literature for the Canadian Tax Foundation, Professors Boadway and Kitchen conclude that:

...Taken overall, the tax system seems to be roughly proportional to income. This does not imply that government policy considered more generally is not redistributive. Much of what governments do on the expenditure side of the budget appears to be motivated by redistributive objectives, and it seems that a substantial amount of redistribution does, in fact, take place through expenditure programs - a consideration that further weakens the case for a highly progressive income tax structure.

(See R. Boadway and H. Kitchen, *Canadian Tax Policy*, Paper No. 103, 3<sup>rd</sup> edition, Canadian Tax Foundation, 1999 at 45.)

[112] It appears to the Tribunal that if the proper weight is to be inferred from the tax system alone, then it is unlikely to be as high as 1.6 given the general proportionality of effective tax rates. However, the Tribunal would expect to have the benefit of expert opinion in matters as specialized as this.

[113] Having regard to the combined system of taxes and public expenditures in Canada, there appears to be a basis for attaching a greater weight to the income groups that could be described as poor or needy than to shareholders assuming they are neither. Professor

# COMPENDIUM PUBLIC

Townley's report presents certain information in this regard which the Tribunal examines below.

## G. STANDARD FOR EVALUATING EFFICIENCY GAINS IN THE UNITED STATES

[114] Commenting on the Total Surplus Standard, the Court writes as follows:

[134] Finally, it was suggested in argument that the Tribunal's interpretation had the support of all economists who had studied the issue. I do not dispute that an impressive array of economists, and law and economic specialists, both in Canada and the United States, have argued that the total surplus standard is the appropriate basis for determining whether an anti-competitive merger that produces efficiency gains should be permitted.

[135] Nonetheless, the *Horizontal Merger Guidelines, supra*, in the United States continue to treat the exercise of market power leading to an increase in price above the competitive level as the most important anti-competitive effect of a merger, and the resulting wealth transfer from the consumers to the producers, as a misallocation of resources...

[136] Of course, as I have already noted, since there is no specific efficiency defence in the United States' legislation, the approach of the Federal Trade Commission to efficiency gains when considering the approval of anti-competitive mergers has limited relevance to the problem before us. Nonetheless, it is interesting to note that efficiency gains are generally most likely to make a difference in merger review when the likely adverse effects of the merger are not great, and will almost never justify a merger to monopoly or near monopoly: *Horizontal Merger Guidelines, supra*, at page 150.

**TAB – 8.B**

# COMPENDIUM PUBLIC

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1 weights that would have been calculated.

2 My understanding from the Smart report is that  
3 within his report he applies a distributional weight on  
4 shareholders to the \$100, as well as the average  
5 distributional weight to the \$25. So that effectively  
6 amounts to double counting the tax revenue.

7 **MR. LESCHINSKY:** In terms of Dr. Smart's model,  
8 what is the significance of the double counting?

9 **DR. CUFF:** Well, it changes the relative weight  
10 on any potential gains in producer surplus because, again,  
11 you're sort of -- you're counting the \$25 in the hands of  
12 the shareholder, as well as the \$25 in the hands of the  
13 government.

14 **MR. LESCHINSKY:** Thank you. May we turn to the  
15 next slide, please?

16 So this is I think the last and concluding  
17 remark or portion of your presentation, Dr. Cuff. I was  
18 wondering if you could simply walk us through this last  
19 slide?

20 **DR. CUFF:** Yes. So I just -- Dr. Smart's  
21 report had an Excel file which I was sent. So I just  
22 worked through the fact that the tax revenue is a transfer  
23 from shareholders to the government, and therefore should  
24 either be counted in the hands of one or the other. And if  
25 you do that, then the weight that's calculated for the

# COMPENDIUM PUBLIC

2139

1 producer surplus, based on the data in the Excel sheet,  
2 would go from 130 to 103, and that therefore increases the  
3 weight on consumer surplus relative to producer surplus  
4 from 1.06 to 1.33.

5 **MR. LESCHINSKY:** Thank you very much. Those  
6 are my questions.

7 **CHIEF JUSTICE CRAMPTON:** Okay. Thank you, Mr.  
8 Leschinsky.

9 Over to you, Mr. Law.

## 10 **CROSS-EXAMINATION BY MR. LAW**

11 **MR. LAW:** Thank you, Chief Justice.

12 Good morning -- oh, only just barely good  
13 morning, Dr. Cuff.

14 So, Dr. Cuff, my name is Matthew Law, I'm one  
15 of the lawyers for Rogers Communications, which is one of  
16 the Respondents in this proceeding. I'm going to try to  
17 keep my questions for you fairly brief.

18 My first question, Dr. Cuff, so we can turn up  
19 paragraph 1 of your report, if necessary -- not an issue.  
20 But I just wanted to be clear. As I read it you were asked  
21 to provide a description of the approach taken -- that  
22 would be, Ms. Ruhlmann, paragraph 1, so it's page 5 of the  
23 report, actually.

24 You were asked to provide a description of the  
25 approach taken in the income tax system in determining how

# COMPENDIUM PUBLIC

2140

1 the tax burden is allocated amongst different groups in  
2 society? That's 1(a)? I apologize, Dr. Cuff. You just  
3 need to say yes for the transcript.

4 **DR. CUFF:** Yes.

5 **MR. LAW:** Thank you. And in 1(b), you were  
6 asked to describe the public policy or social welfare  
7 rationales for the approach taken in the income tax system?

8 **DR. CUFF:** Yes.

9 **MR. LAW:** Okay. And just to be clear, in your  
10 report you were not asked to provide, nor did you provide,  
11 an analysis of how any particular distributional weights  
12 could be inferred from the income tax system? Is that  
13 right?

14 **DR. CUFF:** I'm sorry. Could you just repeat  
15 the question? I want to make sure I understood.

16 **MR. LAW:** Of course.

17 So in your report, you were not asked to  
18 provide -- we just went through what you were asked to  
19 provide. You were not asked to provide nor did you provide  
20 an analysis of how any particular distributional weights  
21 could be inferred from the income tax system. Is that  
22 fair?

23 **DR. CUFF:** That's correct. That's fair.

24 **MR. LAW:** Okay. Thank you.

25 Now, Dr. Cuff, going back to slide 10 of your

# COMPENDIUM PUBLIC

2141

1 presentation, that's the one we just finished with, you say  
2 they're accounting for this issue that you find in Dr.  
3 Smart's analysis. You conclude that the weight on producer  
4 surplus would go down from 130 percent, as calculated by  
5 Dr. Smart, to 103 percent; yes?

6 **DR. CUFF:** Yes.

7 **MR. LAW:** And I just want to be clear. You  
8 haven't given us the analysis or calculations to back up  
9 that conclusion; fair?

10 **DR. CUFF:** That's fair.

11 **MR. LAW:** Thank you.

12 I apologize, Ms. Ruhlmann. If we could go back  
13 to Dr. Cuff's report for a moment. And if we could go to  
14 page 64 of the report.

15 Dr. Cuff, this is your Exhibit D: Sources and  
16 Documents Relied Upon?

17 **DR. CUFF:** It is.

18 **MR. LAW:** If we could scroll down a little bit.  
19 That's great. Thank you.

20 The second article -- first, let me ask, is  
21 this a chapter or article in a book? It wasn't quite clear  
22 to me.

23 **DR. CUFF:** They're sort of like mini-books, if  
24 that makes sense. It's a series of -- I guess a monologue  
25 might be the easiest way to think about it.

**TAB – 8.C**

# COMPENDIUM PUBLIC

2141

1 presentation, that's the one we just finished with, you say  
2 they're accounting for this issue that you find in Dr.  
3 Smart's analysis. You conclude that the weight on producer  
4 surplus would go down from 130 percent, as calculated by  
5 Dr. Smart, to 103 percent; yes?

6 **DR. CUFF:** Yes.

7 **MR. LAW:** And I just want to be clear. You  
8 haven't given us the analysis or calculations to back up  
9 that conclusion; fair?

10 **DR. CUFF:** That's fair.

11 **MR. LAW:** Thank you.

12 I apologize, Ms. Ruhlmann. If we could go back  
13 to Dr. Cuff's report for a moment. And if we could go to  
14 page 64 of the report.

15 Dr. Cuff, this is your Exhibit D: Sources and  
16 Documents Relied Upon?

17 **DR. CUFF:** It is.

18 **MR. LAW:** If we could scroll down a little bit.

19 That's great. Thank you.

20 The second article -- first, let me ask, is  
21 this a chapter or article in a book? It wasn't quite clear  
22 to me.

23 **DR. CUFF:** They're sort of like mini-books, if  
24 that makes sense. It's a series of -- I guess a monologue  
25 might be the easiest way to think about it.

# COMPENDIUM PUBLIC

2142

1                   **MR. LAW:** If you don't mind, I'll refer to it  
2 as an article so I don't make myself sound silly.

3                   This is an article you co-authored with Robin  
4 Boadway. And I believe he's a Professor Emeritus of  
5 Economics at Queen's University?

6                   **DR. CUFF:** Yes.

7                   **MR. LAW:** And yhis was published this year in  
8 2022; correct?

9                   **DR. CUFF:** Correct.

10                  **MR. LAW:** And in that paper, article, you  
11 discuss how social welfare functions can be inferred from  
12 the income tax system; right?

13                  **DR. CUFF:** Yes.

14                  **MR. LAW:** And you note that there are two main  
15 approaches to doing this. The first is the optimal inverse  
16 approach?

17                  **DR. CUFF:** Yes.

18                  **MR. LAW:** And that's the approach Dr. Smart  
19 used in his report?

20                  **DR. CUFF:** Yes.

21                  **MR. LAW:** And the second you describe as the  
22 stated preference approach?

23                  **DR. CUFF:** That's correct.

24                  **MR. LAW:** And that approach hasn't been applied  
25 by any of the experts in this case.

# COMPENDIUM PUBLIC

2143

1 **DR. CUFF:** That's correct.

2 **MR. LAW:** Thank you. Those are all my  
3 questions.

4 **CHIEF JUSTICE CRAMPTON:** Thank you very much,  
5 Mr. Law.

6 Mr. Leschinsky, did you have any re-direct?

7 **MR. LESCHINSKY:** No, Chief Justice.

8 **CHIEF JUSTICE CRAMPTON:** All right. Do either  
9 of my co-panelists have any questions for Dr. Cuff? No?  
10 Neither do I. So thank you very much, Dr.  
11 Cuff. You are now free to disconnect.

12 **DR. CUFF:** Thank you.

13 **CHIEF JUSTICE CRAMPTON:** All right. So Mr.  
14 Rook, is Mr. Lescadres ready?

15 **MR. ROOK:** He is, and Mr. Davis will lead his  
16 evidence in-chief.

17 Before he assumes the podium, so to speak, is  
18 my friend going to close his case?

19 **MR. LESCHINSKY:** No, Mr. Rook. We have reply  
20 evidence. It's in the schedule as well.

21 This would include the testimony of the Booth  
22 Professor, which is noted later in the schedule. I should  
23 also note that we are in the process, as we spoke to  
24 yesterday, of providing discovery read-ins, information  
25 under section 69, et cetera. But this does conclude,

**TAB – 8.D**

# COMPENDIUM PUBLIC

## Testimony of Michael Smart

Professor of Economics  
University of Toronto

1 / 11

# COMPENDIUM PUBLIC

## The inverted optimum method

- In setting tax rates, government “trades off” after-tax incomes of each income group against tax revenues received
  - so tax rate choices are informative about welfare weight on each income group
- Heuristic example:
  - Suppose government increased top tax rate from 33% to 38%
  - Cost to top bracket taxpayers about \$5 billion
    - 5% of \$100 billion in top bracket incomes
  - Higher rate would cause additional tax avoidance
  - So tax revenues would only increase by about \$4 billion
- Implies incomes of top taxpayers have 80% of average welfare weight
  - If lower, then government would increase top tax rate above 33%
- Inverted optimum method extends this logic to all income groups, based on observed tax rates and estimated tax avoidance responses

4 / 11

**TAB – 8.E**

**THE COMPETITION TRIBUNAL**

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

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

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

**B E T W E E N:**

**COMMISSIONER OF COMPETITION**

Applicant

- and -

**ROGERS COMMUNICATIONS INC. and  
SHAW COMMUNICATIONS INC.**

Respondents

- and -

**ATTORNEY GENERAL OF ALBERTA  
and VIDEOTRON INC.**

Intervenors

**WITNESS STATEMENT OF DAVID S. EVANS, PHD**

I, DAVID S. EVANS, of the City of Boston, in Essex County, Massachusetts, MAKE OATH

AND SAY:

1. I am the Chairman of Global Economics Group, LLC, based in Boston. I have taught classes on antitrust economics and related topics at various universities over the last 30 years. I have conducted extensive research concerning industrial organization and industrial economics. I have testified before federal courts in the United States, the European General Court, and the Supreme People's Court of China. My work was cited extensively by the Supreme Court of the United States.

71. The third footnote cites Professor John Rawls, a famous 20<sup>th</sup> century American political philosopher, who was not an economist. Professor Rawls advocated that social welfare should be measured on the welfare of the worst-off individual in society and that, to maximize social welfare, one should seek to maximize the utility of the worst-off individual.<sup>68</sup> These are value judgments by a moral philosopher. Professor Osberg, however, does not show that the Rawlsian approach has been widely adopted by economists, that it is possible to estimate balancing weights based on it, or that it is used in practice.

72. Professor Cuff's report contains a footnote that references the optimal taxation literature,<sup>69</sup> but cites to nothing that would establish that there is any consensus for using relative marginal tax rates as social-welfare weights or that this approach is commonly used in practice.

73. I understand that counsel to the Commissioner has provided a spreadsheet advising of alleged socially adverse wealth transfers likely to arise from the challenged transaction, the weight the Commissioner alleges the transfer of wealth should be given, and the total amount

---

ordering of pairs of average and minimum utilities that can be used to rank utility vectors. Using this observation, the main result of the paper establishes that the utilitarian–maximin social welfare orderings are characterized by adding the axiom of cardinal full comparability. In addition, we examine the consequences of replacing cardinal full comparability with ratio-scale full comparability and translation-scale full comparability, respectively. We also discuss the classes of normative inequality measures corresponding to our social welfare orderings.” Walter Bossert and Kohei Kamaga, “An axiomatization of the mixed utilitarian–maximin social welfare orderings,” *Economic Theory* 69 no. 2 (2020): 451–473.

<sup>68</sup> John Rawls, “Social Unity and Primary Goods,” in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (Cambridge, UK: Cambridge University Press, 1982), 159–186 and John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). The Rawlsian approach results in a SWF that is a “maximin.” For a formal discussion see Andreu Mas-Colell, Michael D. Whinston, and Jerry R. Green, *Microeconomic Theory* (New York: Oxford University Press, 1995), 827–828.

<sup>69</sup> See Expert Report of Katherine Cuff, September 21, 2022 at n. 106.

of anticompetitive effects that the Commissioner is alleging.<sup>70</sup> That spreadsheet includes tabs calculating a “Socially Adverse Transfer” and a “Weighted Surplus.”

74. In their expert reports, Professors Osberg and Cuff do not provide any support for the proposition that the derivation and use of the particular balancing weights advocated by the Commissioner in such “Social Adverse Transfer” or “Weighted Surplus” calculations are based on generally accepted methods in economics or a generally accepted practice of evaluating proposed government policies. Those balancing weights may reflect a value judgment on how to weight different members of society, but those weights are not based on sound economics.

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<sup>70</sup> Email from John Tyhurst to Crawford Smith, October 12, 2022, Subject: RE: Commissioner of Competition v. Rogers and Shaw/CT-2002-002, attaching spreadsheet titled “2022-10-12-anticompetitive effects.xlsx.”

**TAB – 8.F**

# COMPENDIUM PUBLIC

2103

1 program is.

2 Can we agree, sir, that the creation of that  
3 program, not just in western Canada but also nationally,  
4 will be a benefit to low-income consumers who are in the  
5 market today? Is that fair?

6 **DR. OSBERG:** That's a good thing, yes.

7 **MR. LAW:** Okay. And again, as we talked about  
8 with the Freedom price reduction, it is also likely to  
9 bring additional low-income consumers into the market;  
10 fair?

11 **DR. OSBERG:** It seems like a good thing.

12 **MR. LAW:** Right, sir. Sorry. My question was,  
13 it is likely to bring new low-income consumers into the  
14 market who currently cannot afford to be in the market;  
15 fair?

16 **DR. OSBERG:** I would expect it to bring some  
17 new low-income consumers in. I would not have any way of  
18 judging the number.

19 **MR. LAW:** Fair enough. And I take it that you  
20 would agree that that is an unequivocal benefit to  
21 low-income consumers.

22 **DR. OSBERG:** It is certainly a benefit, yes.

23 **MR. LAW:** You wouldn't agree with me that it's  
24 an unequivocal benefit?

25 **DR. OSBERG:** Well, unequivocal is like a great

# COMPENDIUM PUBLIC

2104

1 big word. It's certainly a benefit.

2 **MR. LAW:** Okay, sir.

3 **DR. OSBERG:** I don't know about unequivocal,  
4 but it --

5 **MR. LAW:** Fair enough. Now, in fairness to  
6 you, sir, you didn't have Mr. Prevost's witness statement  
7 at the time you wrote your report. I understand because it  
8 wasn't sworn until after you wrote your report.

9 But I take it you would agree that in assessing  
10 the effects of this transaction on low-income consumers,  
11 the Tribunal should have regard to the various benefits to  
12 low-income consumers we've just been discussing; fair?

13 **DR. OSBERG:** The -- what exactly is the  
14 question you're asking me?

15 **MR. LAW:** Sir, in considering the effect of  
16 this transaction on low-income Canadians, I take it you  
17 would agree with me that the benefits we've just been  
18 talking about from Freedom lowering its prices, from the  
19 wireline Connected for Success program, from the wireless  
20 Connected for Success program, those benefits to low-income  
21 Canadians should also be taken into account; fair?

22 **DR. OSBERG:** To the extent they are manifested,  
23 yes.

24 **MR. LAW:** Thank you, sir. Those are my  
25 questions.

# COMPENDIUM PUBLIC

2105

1                   **CHIEF JUSTICE CRAMPTON:** All right. Thank you,  
2 Mr. Law.

3                   Was anyone else going to be cross-examining Dr.  
4 Osberg this morning?

5                   **MR. FRANKEL:** Chief Justice, I am not.

6                   **CHIEF JUSTICE CRAMPTON:** All right. Mr. Rook?

7                   **MR. ROOK:** I have no questions.

8                   **CHIEF JUSTICE CRAMPTON:** Okay. Mr. Leschinsky,  
9 do you have any --

## 10 **RE-EXAMINATION BY MR. LESCHINSKY**

11                   **MR. LESCHINSKY:** I do have just a couple of  
12 questions for Dr. Osberg on re-direct. And the first  
13 relates to Agreed Book of Documents number 100432. Just  
14 wondering if you could bring this document up?

15                   **DR. OSBERG:** Okay.

16                   **MR. LESCHINSKY:** Doctor Osberg, the Tribunal  
17 should do this for you.

18                   **DR. OSBERG:** All right.

19                   **MR. LESCHINSKY:** Can we turn to page 2 of this  
20 document?

21                   **DR. OSBERG:** What am I looking at here.

22                   **MR. LESCHINSKY:** Towards the bottom of the  
23 page, please.

24                   So Dr. Osberg, this is the CRTC policy that Mr.  
25 Law took you to in the course of your examination, where he

**TAB – 8.G**

# **COMPENDIUM PUBLIC**

## **THE COMPETITION TRIBUNAL**

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

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

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B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

VIDEOTRON LTD.

Intervenor

## **CLOSING SUBMISSIONS**

of

**ROGERS COMMUNICATIONS INC.,  
SHAW COMMUNICATIONS INC. and VIDEOTRON LTD.**

*ii. The Appropriate Weight*

265. The Commissioner appears to take the position that the weighting on consumer surplus should apply across the entire income distribution, as opposed to only low-income consumers. There is no precedent or support for the Commissioner's approach and it invites the Tribunal to engage in a micro-redistribution exercise that ignores income mobility over time.

266. There is no basis to depart from the approach in *Superior III*, which applied the weighting only to the bottom 20% of the income distribution. This yields an overall weight on consumer surplus of 1.23. If the entire income distribution is considered, the weight rises slightly to 1.32.

*iii. Applying the Weight*

267. Dr. Osberg acknowledged that the balancing weights exercise should take into account the benefits to consumers the Transaction will generate.<sup>307</sup> [REDACTED]

[REDACTED]

268. Taking the Commissioner's case at its highest and applying it to the formula yields:

[REDACTED]

269. As a result, the respondents need only establish [REDACTED] million in efficiencies for the Transaction to be allowed, or [REDACTED] million if the higher weight of 1.32 is used. Both are well below the amount of efficiencies *conceded* by Dr. Zmijewski of [REDACTED] million per year.<sup>308</sup> If the Total Surplus Standard is used, no efficiencies are needed at all. Calculations using different inputs are set out in **Appendix 5**.



**TAB – 8.H**

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1 specific discussion with Mr. Leschinsky. So forgive me if  
2 I'm not quite responding the way you want, but I'll be  
3 brief.

4 Tax avoidance considerations do not enter into  
5 the Commissioner's calculations at all. Mr. Leschinsky  
6 asked me, is it true that the Commissioner uses tax rate  
7 data, and do the tax rate data reflect the impacts of  
8 people's decisions around tax avoidance? That's correct.  
9 But the problem is, given that the data reflect tax  
10 avoidance, when we go to interpret the data and learn about  
11 what the government cares about -- the extent to which the  
12 government has distributional preferences -- when we go to  
13 interpret those data in that way, we must take into account  
14 tax avoidance that's reflected in the data and which puts  
15 constraints on the ability of the government to use the tax  
16 system to redistribute. It's a square peg in a round hole,  
17 in effect. The data reflected tax avoidance, so our models  
18 have to reflect it as well.

19 **MR. LAW:** Thank you, sir. Those are all of my  
20 questions on re-examination.

21 **CHIEF JUSTICE CRAMPTON:** Thank you very much.

22 **MR. LESCHINSKY:** I just have one follow-up in  
23 response to Mr. Law's question about footnote at 27. I'll  
24 be very, very brief.

25 **FURTHER CROSS-EXAMINATION BY MR. LESCHINSKY**

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1           **MR. LESCHINSKY:** Dr. Smart, Mr. Law took you to  
2 footnote 27 and referenced matters in respect to the  
3 provinces, and my question to you is simply, do you agree  
4 that the average tax rate used in your report, and by the  
5 Commissioner, includes provincial and federal taxes paid?

6           **DR. SMART:** The numerator is the total income  
7 of payroll taxes paid -- numerator -- yes. It goes into  
8 the calculation.

9           **MR. LESCHINSKY:** Thank you.

10          **CHIEF JUSTICE CRAMPTON:** Thank you very much.  
11 Do either of my co-panelists have any questions?

12          **MEMBER SAMROUT:** Yes, Justice.

13          **CHIEF JUSTICE CRAMPTON:** I see they both do.  
14 Please proceed, Ms. Samrout.

15          **MEMBER SAMROUT:** Hello, Professor Smart.

16          **DR. SMART:** Hello.

17          **MEMBER SAMROUT:** Regarding the discussion about  
18 shareholders' taxes and you did not adjust your model for  
19 shareholders' taxes, and I'm trying to understand the data  
20 you got from Statistics Canada, how it's reported.

21          **DR. SMART:** Yeah.

22          **MEMBER SAMROUT:** And if I understood this  
23 correctly, that you wouldn't adjust shareholders' taxes  
24 because they would be included in the total income of  
25 taxpayers, right, and not corporate? So it would be, as a

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1 shareholder, I'm reporting my taxes as my total income.

2 Would that be the reason? I'm just trying to make sure I

3 have that right understanding, and you took a total --

4 total incomes from Statistics Canada's reporting?

5 **DR. SMART:** Yes, ma'am. And so these average

6 tax rates are taxes divided by income. The data that

7 Statistics Canada provides, the taxes include any taxes

8 that are paid on dividend income, any taxes that are paid

9 on capital gains income, other forms of investment income.

10 Taxpayers report that to the government and then they pay

11 taxes on it under our tax system. That's in my

12 calculation. And so is the income, right? So it's a

13 percentage of income paid in taxes. I include personal

14 capital income of all those kinds in the calculation and

15 the taxes that get assessed through the personal tax system

16 on that. The only thing I'm excluding that is not part of

17 that dataset is corporate taxes. Of course, corporate

18 taxes are not paid by individual shareholders, they're paid

19 by the corporations.

20 So then the economic question, the kind of

21 deeper question is, should we do an imputation? Should we

22 attach those taxes paid by corporations and impute them,

23 attach them to individuals within the personal tax system?

24 And I have not done that and I explained why I didn't do

25 that.

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1                   **MEMBER SAMROUT:** Okay. And then the data you  
2 get, you're able to break down the capital gains from like  
3 regular payroll income, or you get them in aggregates from  
4 Stats Canada?

5                   **DR. SMART:** It's just the aggregate in the  
6 data. They don't break it down by effective tax rate on  
7 each different source the way you just described. So  
8 you're exactly right. It's just an overall aggregate  
9 average effective tax rate, total percentage of tax and  
10 total income.

11                   **MEMBER SAMROUT:** So we look at substantial  
12 lessening of competition and we look for the period of two  
13 years or longer to be substantial, and that's more or less  
14 a short-term effect of prices. So when we talk -- you  
15 know, when we talk long term and short-term adjustments in  
16 taxes, do you think there should be an adjustment for  
17 short-term implications in taxes for that transition  
18 period?

19                   **DR. SMART:** Well, I believe there should be.  
20 Whether -- so let us suppose that producer surplus is to  
21 rise for any reason. Whether that's a one-time increase or  
22 a stream of smaller increases over many years, we can  
23 calculate the total value. We can calculate a present  
24 value, if you understand -- of course you understand what I  
25 mean.

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1           **MEMBER SAMROUT:** Yeah.

2           **DR. SMART:** We can put a one-time equivalent  
3 number on that. And there will be some taxes paid on that  
4 additional amount, whether it's all happening in one year,  
5 or it's happening over a sequence of years, there will be  
6 some taxes associated with that. And those extra taxes  
7 should be incorporated into this analysis.

8           **MEMBER SAMROUT:** Tax reductions or tax  
9 increases, whatever is happening in that transition.

10          **DR. SMART:** Well, I want to be clear. Perhaps  
11 I'm misunderstanding. So we're not talking about any  
12 changes in the tax policies of the government.

13          **MEMBER SAMROUT:** No.

14          **DR. SMART:** We're simply saying if there were  
15 \$100 million in additional profits, whether it's a one-time  
16 effect or a stream of benefits over time, \$100 million or  
17 whatever of additional profits, there would be some  
18 additional taxes paid. That's all it is.

19          **MEMBER SAMROUT:** Okay. Let me re-ask my  
20 question, and I'm mostly talking about deployment of  
21 resources. And most -- you know, the economic theory --  
22 mostly we focus on long-term effects, and then the  
23 redeployment of resources, they don't happen in a year or  
24 two, sometimes it takes longer. So my question to that, do  
25 you think that the short-term -- there should be a

**TAB – 8.I**

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1 says there in the paragraph at the end. Did you consider  
2 the sensitivity of your analysis to this issue?

3 **DR. SMART:** Yes. So I did this alternative  
4 calculation, so-called sensitivity analysis, in which I  
5 increased the tax rates on the high-income groups in a way  
6 that was meant to reflect a possibility that they are  
7 bearing the burden of these other taxes, the corporate  
8 taxes.

9 And it does have an impact on these  
10 calculations, and that sentence -- just reading that out,  
11 if I were to do that, if corporate taxes were borne by  
12 shareholders despite the evidence that I've cited here, my  
13 research and that of others, to suggest otherwise, if the  
14 corporate taxes are borne by shareholders, then the implied  
15 distributional weights on these groups would fall by as  
16 much as 20 percent. So that's my sensitivity analysis.

17 **MR. LAW:** And what do you conclude regarding  
18 the sensitivity of your analysis?

19 **DR. SMART:** Well, that would be an extreme  
20 change in the assumptions to move away from what I think is  
21 the correct conclusion about who pays corporate taxes based  
22 on the evidence for Canada. It would be an extreme change  
23 in the assumptions, and it would only affect the  
24 distributional weight by 20 percent. I regard that as  
25 relatively insensitive. It's not zero. Certainly it's 20

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1 percent lower weight on those groups and, therefore, a  
2 higher weight on consumer surplus in this matter.

3           Again, I prefer not to say an effect is large  
4 or small. I'm telling you that it would be 20 percent even  
5 if we made the polar opposite assumption about the burden  
6 of corporate taxes, polar opposite from the one that I  
7 think is correct.

8           **MR. LAW:** Thank you, sir.

9           You were also -- I'm actually not sure if Mr.  
10 Leschinsky took you to footnote 27, but this was the issue  
11 that he discussed of the provincial ETIs that you had  
12 calculated in a previous paper.

13           If we could perhaps just put footnote 27 up on  
14 the screen, which you certainly referred to in your  
15 response.

16           Thank you.

17           And so Professor Smart, you recall Mr.  
18 Leschinsky asked you specifically about these calculations  
19 of provincial ETIs of 0.6 and 0.7?

20           **DR. SMART:** Yes.

21           **MR. LAW:** In your view, would it be appropriate  
22 to use those ETIs in this case?

23           **DR. SMART:** It's not appropriate. The  
24 provincial -- the ETI from the perspective of one province  
25 raising its own tax rate is conceptually different. There

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1 are different kinds of tax avoidance that apply in that  
2 context. In the paper cited in this footnote, we were  
3 studying provincial tax avoidance responses, that is, the  
4 response of taxpayers to an increase in taxes in one  
5 province, and one province only. This is a different  
6 question before us today.

7 **MR. LAW:** And can you explain for the Tribunal  
8 what those ETIs were based on, the 0.6 and 0.7, in that  
9 analysis and whether those, you expect, would still hold  
10 true today?

11 **DR. SMART:** By based on, I think you're asking,  
12 sir, for some sense of what those province-specific tax  
13 avoidance opportunities are. And you know, there are a  
14 number of them. There are a number of ways in which a  
15 taxpayer seeing a high tax rate in her or his own province  
16 can move income to a different province in Canada. That's  
17 something that is much harder to do on the international  
18 scale. It's hard for a Canadian taxpayer to shift income  
19 to avoid paying federal taxes because they're the same  
20 across the country. We believe it's much easier for a  
21 taxpayer to avoid provincial taxes because it's easy to  
22 move income across provinces.

23 I will very briefly conclude by saying, the  
24 paper cited here and discussed with Mr. Leschinsky, it's in  
25 particular focused on a period when Alberta had a much

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1 lower tax rate on high income people than the rest of the  
2 country. And the Canada Revenue Agency had a very lax  
3 approach to determining province of residence, which led to  
4 certain high-income individuals and their lawyers  
5 exploiting those provisions in order to move tax residency  
6 through trust vehicles to the Province of Alberta and two  
7 things have changed since then.

8 The first is the top tax rates in Alberta are  
9 higher, vastly reducing the rewards to such a transaction.  
10 And second, the Courts and CRA have tightened up in terms  
11 of the definitions of residency for tax purposes so that  
12 those particular transactions we were studying in that  
13 paper are no longer available to the same extent.

14 **MR. LAW:** Thank you, sir. And my last  
15 question. You'll recall Mr. Leschinsky asked you a series  
16 of questions about whether average tax rates reflect tax  
17 avoidance?

18 **DR. SMART:** Yes.

19 **MR. LAW:** And specifically, sir, you said to  
20 Mr. Leschinsky that while the average tax rate includes tax  
21 avoidance, the Commissioner's calculations do not. Do you  
22 recall giving that answer?

23 **DR. SMART:** Yes.

24 **MR. LAW:** Could you just explain why that is?

25 **DR. SMART:** Well, it was in the context of a

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2 I'm not quite responding the way you want, but I'll be  
3 brief.

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