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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. and SHAW COMMUNICATIONS INC.

Respondents

- and -

VIDEOTRON LTD.

Intervenor

ORAL COMPENDIUM OF SHAW COMMUNICATIONS INC.

December 12, 2022

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C. Shaw's Key Operating Divisions

57. Shaw currently has two key operating divisions, namely: wireline and wireless. Shaw and other telecommunications companies provide their customers with access to home Internet, television and digital landline home phone services through "wireline" networks, which are distinct from "wireless" networks that depend primarily on radio frequencies to provide customers with access to mobile data and voice services.

(i) Shaw's Wireline Division

58. Shaw generates the substantial majority of its revenues and earnings from its **wireline division**. Shaw's wireline division consists of both Consumer and Business services, and provides connectivity services to customers in British Columbia, Alberta, Saskatchewan, Manitoba and Northern Ontario.

59. In Fiscal 2021, Shaw's wireline division accounted for:

(a) approximately 83% of the Company's "services revenues" (which is a key performance metric, and refers to revenues excluding sales of mobile devices and other equipment which are generally sold below cost);

(b) approximately 84% of the Company's "Adjusted EBITDA" (or earnings before interest, taxes, depreciation and amortization, which is another key performance metric that essentially excludes capital spending, spectrum purchases, financing costs and taxes); and

(c) effectively all of the Company's free cash flow (or "**FCF**"), another key performance metric that represents cash available for expansion, as well as to repay creditors and pay out dividends).

60. As of August 31, 2021, Shaw's wireline division had over 5,000,000 subscribers compared to just 2,100,000 subscribers in its wireless business. These figures can be found in Shaw's 2021 Annual Report, which is attached to my Witness Statement as **Exhibit "7"**.

that they didn't keep those in the market very long. My sense is that they were concerned about implications for their existing subscriber base. But we did see a very quick in-kind response.

MR. THOMSON: In the period since, has any initiative or promotional campaign of Freedom had a similar impact on competition in the wireless industry either in B.C., Alberta, or Ontario?

MR. McALEESE: It has not. Not even close.

MR. THOMSON: Let me take you to the second matter I wanted to chat about, the national retail program. First of all, what is the national retail program of Freedom?

MR. McALEESE: The national retail program is the inclusion or the listing of Freedom products in national retailers like Best Buy, Walmart, and Loblaws, which operates a wireless specialty kiosk called the mobile shop.

MR. THOMSON: What role did you play in the establishment of the national retail program?

MR. McALEESE: Working with our sales team, we recognized early on that we were not being available for sale in those retail points, which constituted about 20 percent of the sales in the Canadian market. So in order to continue to generate fair market share for Freedom, we

is very simple. There is a bucket size of available data I think in the instance back then it was 10 gigs, and then unlike what the Big Three had previously done, there was no penalty for going over that bucket size. You simply slowed down the speed of your data, but you were no longer charged for anything in excess of that. That was a different structure. So it was essentially the first time where the Big Three started to wean off these overage payments, which for them constituted a fairly significant revenue source, hundreds of millions between the three of them. So this was essentially the first shot fired in the Big Three joining kind of, their peers globally on providing large-scale bucket sizes to their consumers.

MR. THOMSON: Were those unlimited plans introduced in direct response to the Big Gig promotion of Freedom that had been launched roughly 20 months before in October of 2017?

MR. McALEESE: No, no. We operate -- you saw in 2017, we operate in a very fluid, dynamic market where if something is a threat to one of the incumbents we know about it fairly quickly, they tend to match it or respond in kind very quickly, as they did in December 2017. I would strongly reject the idea that something that would happen 20 months later was in response to the gig.

MR. THOMSON: What impact did the unlimited

plans have on the business of Freedom?

MR. McALEESE: As I said, really as they were the first availability of unlimited data. They started to compress our pricing umbrella. So what's important to remember, Mr. Thomson, is that Freedom is a value brand. We have a less mature network. We have lower spectrum holdings and lower spectrum density than our peers, substantially lower. So while our technical teams have done a fantastic job of building out our LT network, the reality of that is that we are simply operating a lower standard of quality network in terms of breadth and depth, and that's simply spectral physics in play. There's only so much that we have compared to our peers.

What we saw happen in 2019 with the availability of unlimited plans, was the beginning of really sort of a compression down of what had been previously been, very, very unaffordable large scale buckets from the Big Three, getting closer and closer to our pricing structure. And it was sort of the first time that I started to feel like the pricing proposition that we had been running since the Big Gig launched about 18 months prior to that, we were starting to feel competitive heat. So we had had a fairly good run, but it was certainly starting to compress against us.

MR. THOMSON: Let me turn to the second matter,

Witness Statement of Paul McAleese, Exhibit 174, News release titled "Government of Canada takes action to offer more affordable options for wireless services dated March 5, 2020

Innovation, Science and Economic Development Canada

News Release
For Immediate Release

Government of Canada takes action to offer more affordable options for wireless services

Minister Bains announces next steps to help reduce wireless prices and promote competition

March 5, 2020 – Toronto, Ontario – Innovation, Science and Economic Development Canada

More than ever, Canadians are relying on wireless services for their everyday needs, making access to high quality and affordable wireless services absolutely essential. That is why the Government of Canada is offering Canadian consumers more affordable options by helping to reduce the cost of mid-range wireless services by 25 percent and further increasing competition.

Today, the Honourable Navdeep Bains, Minister of Innovation, Science and Industry, took the opportunity to highlight the progress made to date to help reduce prices. He announced the release of the 2019 Price Comparison Study [Link to 2019 study]. The study shows that average prices from regional providers were up to 45 percent lower than plans provided by the three big national carriers. While this progress is promising, the prices for mid-range plans have not moved.

To that end, Minister Bains presented the next steps to lower prices for telecom services and promote competition. To track progress of a 25 percent reduction, the Government will report on wireless pricing quarterly by establishing a clear benchmark [Link to new benchmark webpage]. This will also increase transparency. For cellphone plans that offer 2 GB to 6 GB of data, the three big national carriers—Bell Canada, Rogers Communications Canada and Telus Communications—are expected to lower their prices by 25 percent in the next two years.

If these targets are not met within two years, the Government will take action with other regulatory tools to further increase competition and help reduce prices.

To promote greater regional competition and lower prices, Minister Bains also announced the rules for the 3500 MHz spectrum auction [Link to new 3500 webpage]. In the past, pro-competitive auction rules have allowed regional providers to more than double their share of low-band spectrum, creating more competition in the marketplace and lowering prices as a result. That is why this auction will reserve 50 MHz for small and regional telecom companies, encouraging more competition in the wireless market and ensuring they are on a more equal footing with the three big national carriers. The 3500 MHz bands are recognized around the world as one of the key spectrum bands for 5G technologies. This spectrum will support higher speeds, increased data usage and new applications.

Quote

"Canada is at an exciting turning point in the future of connectivity. Wireless services are no longer a luxury. They are a critical necessity—for working, for learning at school and for engaging in modern society. We heard Canadians when they asked for more affordable options for their wireless services, and we have delivered. Canadians shouldn't have to choose between having a cellphone or heating their home. These new tools build on a number of initiatives we already set in place to help lower prices, improve access and ensure affordable, high-quality wireless services in every corner of our country."

– The Honourable Navdeep Bains, Minister of Innovation, Science and Industry

Quick facts

- The 2019 Price Comparison Study also shows that Canadians have been paying more overall compared to consumers in other G7 countries and Australia.

Government of Canada | Gouvernement du Canada

Responding Witness Statement of Paul McAleese, Exhibit 19, News release titled "Government of Canada delivers on committment to reduce cell phone wireless plans by 25%"

Canada.ca

Government of Canada delivers on commitment to reduce cell phone wireless plans by 25%

From: Innovation, Science and Economic Development Canada

News release

Reductions were achieved across the country three months before the target date

January 28, 2022 – Ottawa, Ontario

Canadians are more connected than ever before. They rely daily on telecommunications services to work, study, shop and play. Access to affordable high-quality services is essential in their day-to-day life, which is why the Government of Canada has introduced aggressive measures to reduce the cost of wireless services. The commitment made in March 2020 to track and reduce the costs of mid-range wireless plans by 25% over two years is a central part of these efforts.

Today, the Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry, announced that the government has met its target three months ahead of schedule. Prices for all tracked mid-range plans have decreased by 25% compared to the benchmark prices collected in early 2020, according to the newly published data for the latest quarter of wireless pricing, which cover the period from October to December 2021.

The government's policies to promote competition have contributed to better prices for consumers. Steps taken to enhance competition include, among others:

- setting out pro-competition rules for the 600 MHz band spectrum auction that led to regional providers more than doubling their share of low-band spectrum
- issuing a policy direction to the Canadian Radio-television and Telecommunications Commission (CRTC) that requires the Commission to consider how its decisions can promote competition, affordability, consumer interests and innovation
- reserving 50 MHz in the 3500 MHz spectrum auction for small and regional telecom companies
- regulating roaming rates through the CRTC to help small and regional telecom companies compete via access to incumbent networks in certain circumstances

which is the Government of Canada. Did the Government of Canada make an announcement concerning pricing in the wireless industry in March of 2020?

MR. McALEESE: They did. The government had signalled that prior autumn that they were looking for support from the Big Three on affordability, and they codified that in March of '20, just coincidently roughly with the beginning of Covid. And this was singularly the most traumatic event for the Freedom pricing construct.

Just for the benefit of the group, this was a mandate that the Big Three would need to reduce their prices on plans that offered between two and six gigabytes per month. To be clear, that was the average of our user base at that point, I think it covered about seven deciles of our user. Our user base sat squarely in the middle of that.

What it created and it took a little time to come through to fruition, I think the government declared that as a victory and as complete in January of 2022, just earlier this year. But what we saw was the compression of the pricing umbrella right on top of us.

Our discount in exchange for the less mature network had historically been around 25 or 30 percent. Suddenly we found ourselves, you know, the earlier part of this year, with very little discount, if any, compared to

the availability of a broader, higher quality national network. So it had significant and detrimental effects to Freedom.

MR. THOMSON: Let me turn to the third matter, which is Covid-19. Tell the Panel how Freedom's products and services are sold to members of the public?

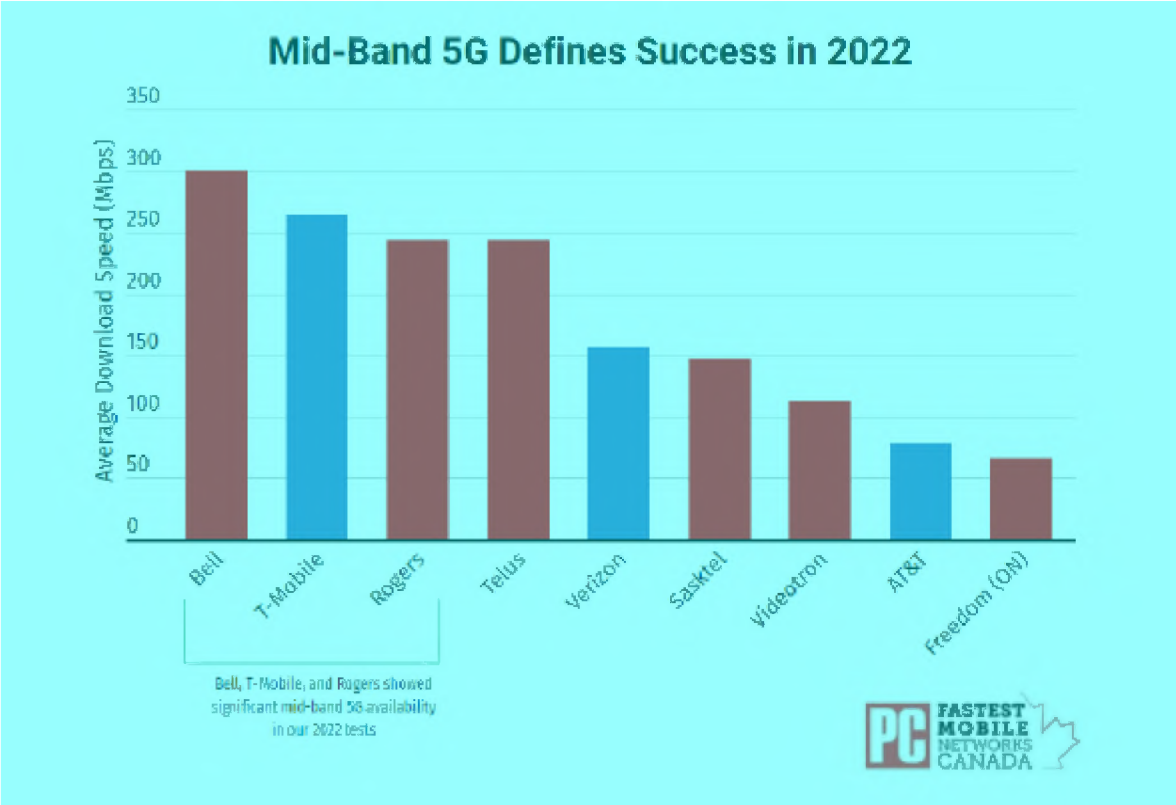
MR. McALEESE: About 99 percent of Freedom's monthly gross additions are sold through brick-and-mortar locations, either our own corporate stores, our dealer partner stores, or national retail partners.

Covid, of course, you will all be familiar with the significant closures that happened immediately upon Covid, and sort of worked their way through up and down as we saw different strains come through the Canadian economy. We were immediately affected in terms of not just closures, but where there were openings reduced footfall, with Canadian consumers choosing not to necessarily congregate in areas where they previously would have done so, like malls.

I think over the immediate period of Covid we saw a 60, 65 percent reduction in footfall. Eventually that translates strictly to sales. You can't sell when there's no one there.

Unfortunately, compared to our peers, we had less advanced digital capabilities. Something that

74. In my experience over many years in the telecommunications industry, it has been made clear that consumers consider the strength and speed of wireless networks to be important differentiators of wireless carriers. Unfortunately, the download speeds Freedom is able to offer pale in comparison to the 5G download speeds of its principal competitors. Consumer publications have advised potential Freedom subscribers of this fact in various head-to-head speed test comparisons. For example, I show a chart below from a recent PCMag article entitled, "Fastest Mobile Networks Canada 2022". This chart shows that Freedom offers lower average download speeds than each of Bell, Rogers, TELUS, Sasktel and Videotron (and also includes a comparison to certain U.S. wireless providers). This article is attached to my September Witness Statement as **Exhibit "51"**.



75. With regard to speed test comparisons, I understand that both Shaw and our competitors regularly rely upon industry and consumer reports to assess comparative network performance. For example, Ookla, a Seattle-based company, is widely regarded by industry participants as a reliable authority on the relative speeds offered by different wireless and wireline carriers in Canada, the United States and internationally. As noted by Mr. Benhadid of TELUS at paragraph 10 of his Witness Statement, Ookla's Speedtest Awards "represent real world network performance and the internet speeds and coverage provided to customers". Like TELUS and others, Shaw has relied on Ookla's analyses in the ordinary course of its business.

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I think over the immediate period of Covid we saw a 60, 65 percent reduction in footfall. Eventually that translates strictly to sales. You can't sell when there's no one there.

Unfortunately, compared to our peers, we had less advanced digital capabilities. Something that

unfortunately is a by-product of investment. We simply hadn't got to that yet, the ability to have consumers or prospective consumers transact effectively on our websites or over our mobile applications. Our peers who had spent more time and had of course, larger scale, had been more robust in the development of those. So when retail stores closed, they were able to back up to their digital capabilities and still service the needs of their customers and prospective customers. So it had a significant market share implication for us really immediately upon the declaration of Covid.

MR. THOMSON: We turn to the last of the four matters and that is 5G. First of all, how important are 5G services in the wireless industry in Canada?

MR. McALEESE: You know, I've been in this business now for about 30 years, and for the last decade that the industry has talked up 5G, appropriately so, as almost the beginning of a new industrial frontier, a new industrial era.

You know, for a long time, mobile devices were handy. The degree of utility that's going to come from 5G is a complete level different than what we've been able to experience on prior 4G or earlier networks. You know, the development of things like the internet, or things, advanced telemetry, auto driving cars, remote surgery, all

of these require the speed and the latency, the signalling speed back and forth through the network that 5G brings. And there have been hundreds of millions of dollars spent globally on the development of this capability and network infrastructure.

This is the promise of a new day. And you needn't look any further than -- you probably watch two periods of hockey game, and you have everyone in terms of the major carriers telling you that they're on the dawn of a new threshold with 5G. Major manufacturers are now two generations of phones into 5G, the iPhone 13 and the iPhone 14 which have been launched over the last 14, 15 months, our 5G phones. The last two Samsung phones are 5G capable phones. And consumers are increasingly walking in the door of retail expecting to have both a 5G device and a 5G network to marry to that device. It is the promise of many, many great things to come, and it is a genuine step function forward in terms of network capability.

MR. THOMSON: In the period before the transaction between Rogers and Shaw was announced in March of 2021, did Freedom plan to launch 5G services in Canada?

MR. McALEESE: We did.

MR. THOMSON: And did Freedom actually take steps to prepare and distribute materials associated with this anticipated launch of 5G?

152. As reflected on slide 18, we considered whether we should wait to launch 5G until after Shaw had acquired and deployed 3500 MHz spectrum in Fiscal 2022, to ensure that our customers would receive the best possible 5G experience, or whether we should instead proceed to launch an initial phase of 5G services using 600 MHz spectrum. Those

"5G lite" services would only have been able to be offered at slightly higher speeds than those already available on our LTE wireless network.

153. By October 2020, based on Shaw's successful participation in the 600 MHz auction the previous year, as well as the expectation that Shaw would be able to acquire 3500 MHz spectrum in the upcoming auction in June 2021, we chose to launch an initial phase of 5G. Our anticipated ability to acquire 3500 MHz spectrum soon thereafter was key to our decision in this regard. An important reason we were relatively confident about our ability to acquire 3500 MHz spectrum is that ISED had confirmed in March of 2020 the availability of a set-aside (for exclusive bidding by non-incumbents) in the 3500 MHz auction. We expected that we would be able to launch a "5G lite" experience using our 600 MHz spectrum and then quickly transition to more robust (*i.e.*, "true") 5G services once the 3500 MHz spectrum had been acquired, thereby ensuring our competitiveness as the market evolved.

MR. McALEESE: We did.

MR. THOMSON: What did you do?

MR. McALEESE: We took significant steps over the prior year or more, but we were -- we were well-prepared to follow what our peers had done, which is to launch a 5G network, in the first instance using our recently acquired 600 band spectrum -- megahertz spectrum, which is how our peers had done it. With the expectation that they would validate the 5G experience with what's known as the speed band, the 3,500-spectrum band, which all of us were going to be participating in an auction in the spring of 2021. So it was our expectation that we would proceed with the launch under that formula.

MR. THOMSON: Did Freedom actually launch 5G services?

MR. McALEESE: We did not.

MR. THOMSON: Why not?

MR. McALEESE: Upon signing the arrangement agreement with Rogers in March of 2021, we were then ineligible to participate under ISED rules in the 3,500 auction, and we believed that the credible experience for 5G needed this speed band, and that not having a credible path to that speed band, since we would be required to sit out the auction, would put us in a position where we would not be frankly, as candid as we could be with our

customers. We didn't want them to buy a product that was never going to step up the way our peers' experience was going to do. So as a leadership team, we made the decision to stand down on the launch and pause it until we established what might happen in the future.

MR. THOMSON: Have 5G services become more or less prevalent and important in the period since of March of 2021?

MR. McALEESE: Substantially more prevalent. As I said, whether it's the Big Three and their trumpeting of the, I think they're now about 75 percent 5G covered across this country, and the benefits that's bringing to consumers in terms of speed and latency. The major manufacturers are all speaking about 5G in broad terms with the launch of their new devices. We are an outlier in not having 5G capability.

MR. THOMSON: Are you able to compare the quality and region and performance of the wireless network of Freedom to the quality and region and performance of the wireless networks of Bell, and Telus, and Rogers?

MR. McALEESE: I am. You know, the primary driver of the quality of a wireless network is in its spectrum holdings and, as I said earlier, the stark reality of the Canadian industry is that we are something like 25 years behind our Big Three peers, in terms of the election

(ii) Freedom Under Shaw's Ownership Has No Feasible Roadmap To Offer Competitive 5G

71. The recent challenges Shaw's wireless business has encountered are also attributable to its inability to offer true 5G services to existing and potential customers in circumstances where: (i) all of its principal competitors are able to do so, including Bell, Rogers and TELUS; (ii) 5G services have become increasingly ubiquitous; (iii) the ability to offer and provide 5G services has become increasingly important to consumers; and (iv) comparative performance-based advertising and promotion in the wireless industry has a direct and important impact on decision making by many consumers as to which products and services they will purchase and utilize.

72. Each of Bell, Rogers and TELUS celebrated the launch of their new 5G-capable networks and services some two years ago, in 2020. I have paid careful attention not only to their launch of 5G products and services, but also to efforts they have made in the period since to advertise and promote their 5G products and services. In an industry such

as this one where businesses regularly advertise differences in network speed and quality to gain a competitive advantage, the Big 3 wasted no time launching heavily marketed promotional campaigns regarding 5G. I am further aware that with each release of a new iPhone model that has occurred since 2020, customers have lined up to purchase iPhones from 5G-capable providers—but not from Freedom. In this context, Freedom's inability both to provide 5G services or to tell customers with certainty that it will do so in the immediate future have placed it at a significant disadvantage relative to its principal competitors.

17. In addition, during this most recent round of back-to-school promotions, the unavailability of 5G network for Freedom served as a significant competitive deterrent to other brands and networks. As I described in my earlier affidavit, Freedom's promotional roll-out of 5G was cancelled and Freedom is unable to offer 5G services to its customers. Dealers cannot tell customers that Freedom will eventually offer 5G, because there is no indication that it ever will. This has been a significant deterrent in attracting back-to-school customers, particularly when the devices that dealers sell are 5G capable.

received any written communication from Shaw or Freedom unpausing the proposed launch of 5G?

MR. VERMA: Can you rephrase your question?

MR. RICCI: Let me try it a different way, Mr. Verma.

I take it you've been given no timeline or plan for a rollout of 5G by Freedom under Shaw's continued ownership; is that fair?

MR. VERMA: That is correct.

MR. RICCI: And I gathered from your witness statement that the unavailability of 5G for Freedom has served, to use your words, as a significant competitive deterrent to other brands and networks. Correct?

MR. VERMA: That is correct too.

MR. RICCI: And one of the problems you've been having is you can't tell customers that Freedom will eventually offer 5G because there has been no indication from Shaw that it ever will; correct?

MR. VERMA: I mean, we have no line of sight.

MR. RICCI: Am I right that, from your vantage point, Freedom's competitors are using this 5G delay at Freedom as an opportunity to aggressively compete with Freedom?

MR. VERMA: Possibly. I mean...

MR. RICCI: That's what you said in your

witness statement. Do we need to pull it up?

MR. VERMA: No. I don't know what the competitors -- how they are drumming it up. I mean, I don't go to Fido or Virgin stores to see what story they are telling their customers with regard to Freedom not being technologically competent, right, so...

But it is a disadvantage nevertheless. That's all I would say.

MR. RICCI: All right. Let me ask you about Apple and the iPhone. You describe this in your testimony in chief and in your witness statement. I take it Freedom began offering iPhones to its customers in or about December of 2017; is that fair?

MR. VERMA: That is fair.

MR. RICCI: That was a significant development for the business; correct?

MR. VERMA: Absolutely.

MR. RICCI: Are you aware that, at the time Freedom first began offering iPhones, there were lineups outside many Freedom stores?

MR. VERMA: Fair to say that.

MR. RICCI: Were you among the Freedom dealers with lineups?

MR. VERMA: Yes.

MR. RICCI: Are you aware, Mr. Verma, that

is more important than ownership.

So in Ontario, we do not have any wireline assets and we've had no issues expanding our network or building out a business in Ontario because there's plenty of access to fibre.

Not surprising in the west, we have used a fibre backbone to our advantage. However, even to this day, 50 percent of our backhaul requirements in Alberta and B.C. that's required for a wireless business is procured from third parties. Have we used some of our Wi-Fi -- pardon me, our wireline network backhaul to the benefit of our wireless operations? Yes, but it's, again, been fairly immaterial.

MR. THOMSON: Let's turn to financial performance of Freedom. Has Shaw been able to realize a reasonable return on its $4.5 billion investment in the business of WIND?

MR. ENGLISH: Not to date.

MR. THOMSON: And what have the financial results been?

MR. ENGLISH: Well, to date on our wireless business alone, while we've invested $5 billion roughly in our wireless business, the cumulative net investment when you look at the revenue and EBITDA that we've generated from our wireless business is still net negative by about

$3.3 billion.

MR. THOMSON: What about free cash flows?

MR. ENGLISH: Free cash flows is very important to the company. However, we have not generated any free cash flow from our wireless operations.

MR. THOMSON: Why are free cash flows important to a public company like Shaw?

MR. ENGLISH: Well, for Shaw -- just to be clear, Mr. Thomson, free cash flow is not a GAAP defined measure, but it's an important metric for us. And what it represents is the dollars left over after you've covered all of your operating costs, covered all of your capital costs, covered the servicing of your debt as well from an interest perspective, cash, taxes, and what you have left over is what's available to return of capital to shareholders.

And just to be clear, not only are we competing for customers every day, we're also competing for investors considering that we're a public company. And with our free cash flow, that's roughly averaged $800 million over the last number of years. Our dividend obligation is about $600 million and we have not been able to increase our dividend since 2016 when we made the investment into WIND and the super cycle investments, and that's been another source of contention amongst our shareholders, I would say.

Brad Shaw (Public)

DEPUTY REGISTRAR: Thank you.

CHIEF JUSTICE CRAMPTON: Thank you.

MR. THOMSON: May I proceed?

CHIEF JUSTICE CRAMPTON: Absolutely.

MR. THOMSON: Thank you, Chief Justice.

Mr. Shaw, you are the chief executive officer and Executive Chair of the Board of Directors at Shaw Communications?

MR. SHAW: Correct.

MR. THOMSON: You served as the company's Chief Executive Officer for more than a decade since 2010?

MR. SHAW: Correct.

MR. THOMSON: Am I right you became the Executive Chair more recently in the Spring of 2020 after your father J.R. Shaw passed away in late March of 2020?

MR. SHAW: That is correct.

MR. THOMSON: I understand from your witness statement that you've been involved in the business of Shaw in various roles for more than 35 years since 1987.

MR. SHAW: That's right.

MR. THOMSON: I'm going to take you to the sale to Rogers. Would you please explain to the Tribunal in your own words why you and other members of your family considered selling Shaw in late 2020 and early 2021?

MR. SHAW: Great. Thank you for the question. Well, you know, we look at that time frame and we had been outspent by Telus by $7 billion the last five years. We were losing market share to them in wireline. And we had been in a spot where we had lost $5 billion in wireless -- had invested $5 billion in wireless and not made $1 free cash flow.

And, you know, when you look at it and my role as Executive Chair and CEO, it's not looking at today -- and right now today Shaw would be fine, like 2020. But we look out two, four, six years and the required investment, it's going to take for us to be able to compete. And when we looked at that and we also looked at the challenges of making sure, being outspent by Telus, we both had wireline and wireless to support, and believe we don't have the scale and size to make the investments to truly innovate, to truly give customers the services and products they want. So thus, we made the decision to sell.

MR. THOMSON: Why did you decide to focus your efforts on a potential strategic buyer rather than on a financial buyer such as a private equity firm?

MR. SHAW: Well, I think a couple of things. First the strategic buyer would make more sense, and it's all about scale and opportunity to invest over the long term to enable long-term competition. That's really what

is important in our business. It's a very capital-intensive business and dollars spent today is what ensures future competition.

MR. THOMSON: How do the investments made by Telus in its wireline business compare to the investments of Shaw?

MR. ENGLISH: Well, Telus has been very aggressive as per our evidence and it's well known in the market in terms of they were the leader in terms of fibre to the home deployment in North America. So they now have deployed fibre roughly across our entire footprint. They've already talked about it on their last analyst call that they're essentially done. And that fibre investment has been significant, and they started that investment since 2016. And during that time period, I would say, on average, they outspent us. You know, for every dollar that we were spending, they were spending two.

MR. THOMSON: How have investments made by Shaw in its wireless business of Freedom impacted on the ability of Shaw to investment in the company's core wireline business?

MR. ENGLISH: Considering the size of Shaw -- you know, capital is a finite resource. I think it's a finite resource for most public companies. But for us, considering our size and scale, you know, we -- one of our

B. Shaw Mobile

(i) Shaw Faces Intense Wireline Competition From TELUS

223. Shaw's primary competitor on the wireline side of our business in Western Canada has long been TELUS. Shaw and TELUS have been each other's closest competitors in the wireline business in Alberta and British Columbia for many years, including long before I joined Shaw in 2017.

224. TELUS is a fierce competitor with many significant, inherent advantages over Shaw. In addition to being substantially larger than Shaw, TELUS also enjoys numerous strategic and operational advantages over Shaw. As explained above, TELUS' advantages over Shaw are rooted in its history as the successor to dominant telephone monopolies in Alberta and British Columbia (Alberta Government Telephones and BC Telecom). Because of its unique history, TELUS enjoys access to a large amount of

infrastructure that was constructed during the lengthy period in which it operated as a government-sanctioned monopoly.

225. Starting in 2015, TELUS undertook a multi-billion-dollar expansion of its "PureFibre" FTTH network in British Columbia, Alberta and Quebec. This expansion included an extraordinary investment of over $1 billion to build out its fibre to the home (or FTTH) network in each of Edmonton, Alberta and Vancouver, British Columbia, as well as hundreds of millions of dollars to build out its wireline network in other regions of these same Provinces. TELUS' 2015 MD&A and 2018 Annual Information Form detailing these investments is attached to my Witness Statement as **Exhibits "75"** and **"76"**.

226. In its 2016 MD&A, TELUS attributed its market share gains in the provision of consumer high-speed Internet services to the expansion of its fibre-optic wireline network. The 2016 MD&A of TELUS is attached to my Witness Statement as **Exhibit "77"**.

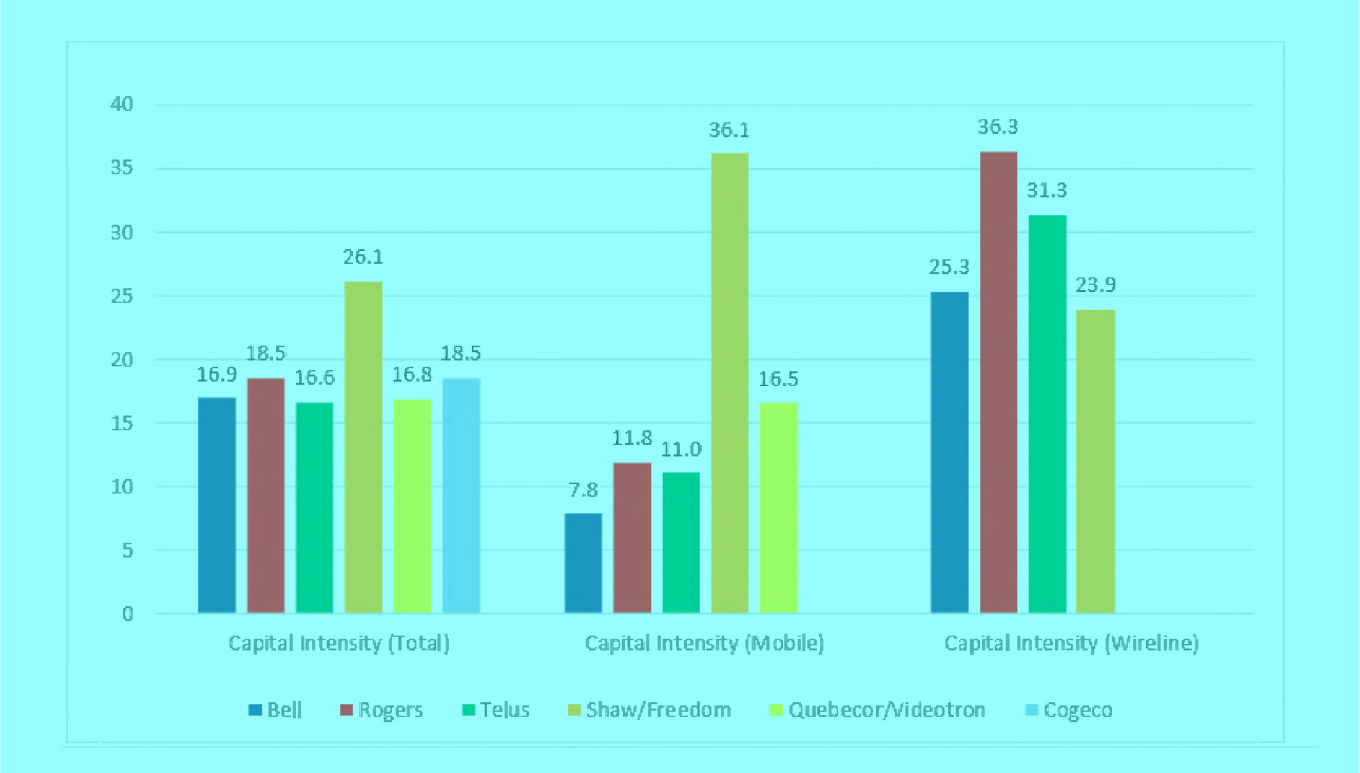
227. Between 2015 and 2020, TELUS reported wireline capital expenditures of more than $11.5 billion, as it continued to expand its broadband infrastructure, including in connecting more homes and businesses directly to TELUS PureFibre FTTH wireline network. TELUS' Annual Reports for the years from 2015 to 2020 are attached to my Witness Statement collectively as **Exhibit "78"**. According to a Scotiabank Report published on June 10, 2020, TELUS is the leader in FTTH investments among U.S. and Canadian Telcos with over 70% of its targeted broadband footprint upgraded to FTTH technology. As stated in the report, TELUS' investments in FTTH "have paid a significant dividend". This Report is attached to my Witness Statement as **Exhibit "79"**.

228. In December 2018, TELUS launched Gigabit Internet and Internet 750/750, offering 1 Gbps download and 940 Mbps upload speeds, as well as 750 Mbps symmetrical download and upload speeds. These home Internet plans were made available to all TELUS PureFibre customers in Western Canada. TELUS' 2018 Annual Report, which describes these plans, is attached to my Witness Statement as **Exhibit "78"**.

229. In June 2021, following announcement of the Arrangement Agreement, TELUS announced that it was launching "PureFibre X", which it described as "Canada's fastest Internet speed tier, with upload and download speeds of 2.5 Gbps", a product for which Shaw has no competitive response. TELUS indicated that it would first launch the service in Calgary, and then expand to PureFibre communities across Alberta and British Columbia. A copy of TELUS' press release entitled "TELUS unleashes Canada's fastest Internet speeds and invests $2 billion to expand its fibre optic network in Calgary" is attached to my Witness Statement as **Exhibit "80"**.

230. [redacted]

231. Shaw has not kept pace with TELUS in terms of investments in the wireline business. This is illustrated in Submissions made by the Competition Bureau to the CRTC, entitled "Telecom Notice of Consultation CRTC 2019-57 — Further Comments of the Competition Bureau". A copy of these Submissions is attached to my Witness Statement as **Exhibit "82"**. Figure 4 in this Submission, excerpted below, demonstrates that Shaw has the lowest wireline capital intensity of Canadian carriers. In contrast, TELUS has the second highest wireline capital intensity.



232. [redacted]

233. [redacted] TELUS offers a higher (meaning faster) 2.5 Gig tier, as compared to Shaw's 1.5 Gig. Moreover, TELUS also tries to differentiate itself in the market by advertising a much faster upload speed capacity than Shaw. As but one example, on its website TELUS makes the point that its 2.5 Gig tier offers not only a higher download speed (which is what plans or tiers are typically associated with), but a symmetrical upload speed that is also significantly higher than what Shaw's highest speed plan offers. In this regard, the TELUS website (https://www.telus.com/en/internet/fibre?linktype=subnav), a copy of which is attached to my Witness Statement as **Exhibit "83"**, currently trumpets the following:

Exhibit P-R-071

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.

13. Currently, Shaw invests approximately $1.1 billion in capital expenditures each year, as shown in the chart below. However, as the simultaneous demands of both our wireline and wireless businesses have become clearer to us over the years, our capital spending has turned into a zero-sum game, with every dollar allocated to one business being a dollar taken from the other. [redacted] our wireline rival TELUS poured billions into expanding its "PureFibre" FTTH network. TELUS has been very successful in exploiting its network investments—and resulting enhancements in the performance of its wireline business—to compete aggressively against Shaw in Western Canada.

	Fiscal Year						
	2016	**2017**	**2018**	**2019**	**2020**	**2021**	
Wireline Capex	$928	$970	$1,018	$827	$815	$723	[redacted]
Wireless Capex[1]	$121	$255	$343	$385	$296	$280	
Total Capex	**$1,049**	**$1,225**	**$1,361**	**$1,212**	**$1,111**	**$1,003**	

14. [redacted]

1 Does not include spectrum purchases.

2 "F22O" refers to the outlook for Fiscal 2022, as Shaw's financial reports for that year have not been finalized. "F23B" refers to the budget for Fiscal 2023.

15. The decline in the performance of Shaw's wireline business in the period since 2018 is directly attributable to the fact that Shaw has consistently lost wireline market share to TELUS over the last five years, and has struggled to maintain its overall subscriber levels. Shaw's loss of market share to TELUS began well before the Merger Announcement in March 2021 and has continued apace in the period since, as shown in the charts below. These charts are also drawn from the slide deck attached as **Exhibit "1"**.

[redacted]

16. [redacted]

17. [redacted].

18. [redacted]

19. [redacted]

main jobs is to be an effective steward of capital and it's been difficult as we've invested significant money to upgrade and reshape the WIND business, which we knew we had to.

That being said, it's cost us a lot more than what we initially envisioned in 2016 when we bought that business. If you go back and compare our business plan to the original one, which is part of the evidence that we filed, it's cost us substantially more dollars than we originally envisioned.

It's probably caused some tension -- it has caused some tension, Mr. Thomson, in terms of being able to keep pace with Telus' investments on the wireline side of things as we've directed more capital towards our wireless business.

MR. THOMSON: How has the wireline business of Shaw performed relative to the wireline business of Telus in the period since Shaw acquired WIND in 2016?

MR. ENGLISH: Unfortunately, I mean, that's -- it's a difficult one for me to answer considering the underperformance on pretty much every metric, but I think it's important that the Tribunal understand that.

Since 2016, we've lost over 15 percent of our wireline consumer base and the majority of that loss has been to Telus, specifically on internet and video. They

now have exceeded us in terms of market share on some of our core products. So our consumer business has been under pressure since 2016. Our revenue, our consumer revenue, has continued to remain somewhat flat, if not decline a little bit.

We've been able to maintain our EBITDA, but most of that has been done through cost-cutting and cost savings initiatives, including the successful execution of our voluntary departure program from 2018 to 2020. And most importantly on the broadband side of things. I mean, they now have a market share that's greater than ours, and broadband is really the only product that's growing within the wireline suite of products that we offer. It's not traditional home phone, it's not a video cable subscription, there's cord cutting, cord shaving happening every day in that sector.

So on the broadband side of things, the growth has been -- we've been fairly flat. Over the -- fairly flat. Over the last three years, you know, beginning in 2020 we lost roughly 8,000 broadband customers, in 2021 we lost 15,000 broadband customers, and in 2022 we had a net addition, but that was only 8,000 roughly broadband customers. During the same time period, Telus has added on average over 130,000 broadband customers each year.

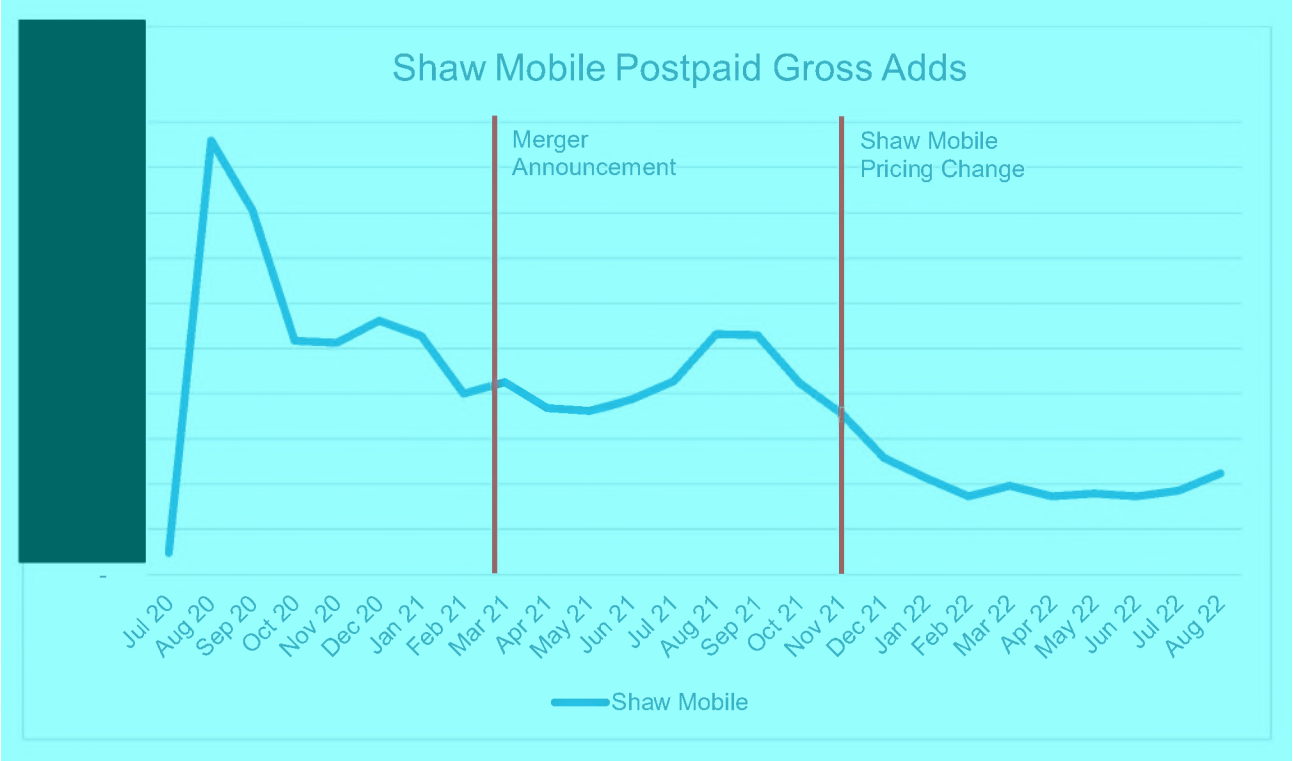
So, unfortunately, Mr. Thomson, while we've

A. SHAW MOBILE'S GROWTH SLOWED BEFORE THE NOVEMBER 2021 PRICING CHANGE

87. Paragraph 343 of the Miller Report asserts that Shaw Mobile's subscriber numbers—measured in "gross adds", meaning the addition of new subscribers—began declining "[a]t the same time" that Shaw Mobile implemented its 12-Box Pricing change in November 2021. Dr. Miller's assertion is both unsupported and factually incorrect.

88. We launched Shaw Mobile on July 30, 2020 with the primary goal of reducing our losses to TELUS of customers of our ***wireline*** business in Western Canada. The initial launch period was successful, but only from the singular perspective of building subscriber share, which is not the only relevant criterion in defining success. In the three month period following the launch of Shaw Mobile (August 2020 to October 2020), which included the important back-to-school-season at the height of the COVID-19 pandemic, Shaw was able to penetrate approximately [redacted] of the Company's existing wireline Internet households using extremely low introductory pricing. On average, each household signed up for approximately [redacted] lines. These statistics are reflected in materials prepared for a Virtual Retreat of Shaw's Senior Leadership Team held on November 4, 2020, attached to my September Witness Statement as **Exhibit "104"**.

89. As it turns out, however, Shaw Mobile's early success in subscriber growth during the 2020 back-to-school season was the peak and only element of its success. Thereafter, Shaw Mobile continued to add new subscribers, but on a steady downward trajectory. Shaw Mobile experienced minor upticks from time-to-time primarily during the back-to-school seasons in 2021 and 2022. These trends are reflected in Shaw's Excel Workbook summarizing subscriber growth associated with Shaw Mobile, attached to my September Witness Statement as **Exhibit "105"**, and illustrated in the graph set out below.



90. As the illustration above makes clear, and contrary to the assertion of Dr. Miller in paragraph 343 of his Report, Shaw Mobile's decline in the rate of gross adds manifestly did ***not*** coincide with the change in pricing implemented by Shaw Mobile in November 2021. Rather, Shaw Mobile's decline in the rate of adding new subscribers began almost immediately following the initial launch period and continued thereafter. That decline continued throughout nearly all of 2021, with the exception of the important back-to-school period in and around August 2021 in which market participants typically report elevated gross adds, due to elevated levels of purchase activity during that time period.

91. Based on his interpretation of isolated extracts from a handful of Shaw documents that he has taken out of context, Dr. Miller claims in paragraph 344 of his Report that "no reduction in gross adds was expected" prior to the pricing change implemented by Shaw Mobile in November 2021. That claim is also incorrect. As the graph set out above makes clear, reductions in the rate at which Shaw Mobile added new subscribers were already in full swing at the time Shaw elected to adjust its introductory pricing in November 2021.

10. In both 2019 and 2020, our focus began to shift and our LRPs recognized the threat of [redacted] as a potential key development in the market.[7] [redacted] Considering those developments, our LRP documents in these years variously refer to:

a) [redacted]

b) [redacted] and

c) [redacted]

11. We have observed, directly in our business, that the competitive performance of Shaw's wireless business has consistently increased over time. Our data show that, since at least the acquisition of Wind Mobile by Shaw in 2016, there has been [redacted]

[7] See Bell0365765, slide 5, attached to my witness statement as Exhibit "H"; and Bell0856841, slide 6, attached to my witness statement as Exhibit "I".

[8] See Bell0765850, slide 5, attached to my witness statement as Exhibit "J"; Bell0856841, slide 6, attached to my witness statement as Exhibit "I"; Bell0537518, slide 9, attached to my witness statement as Exhibit "K"; and Bell0365765, slide 5, attached to my witness statement as Exhibit "H".

[9] See Bell0856841, slide 6, attached to my witness statement as Exhibit "I".

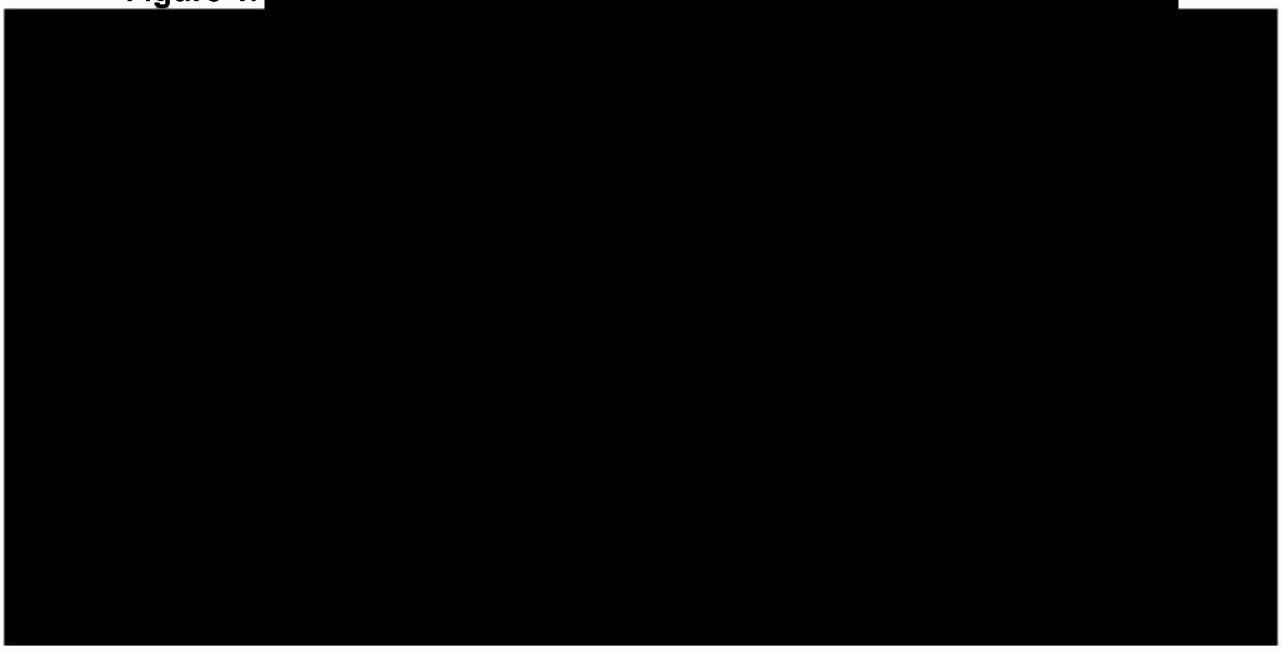
[10] See Bell0765850, slide 5, attached to my witness statement as Exhibit "J".

[11] See Bell0537518, slide 9, attached to my witness statement as Exhibit "K".

[12] [redacted]

[redacted]

Figure 1. [redacted]



Freedom Mobile

12. The Freedom wireless brand operated by Shaw originated as an independent wireless operator, Wind Mobile, which launched in 2009. Wind Mobile was acquired by Shaw in 2016 and subsequently rebranded to Freedom. Following the acquisition, Shaw made significant improvements to the wireless network, secured the ability to offer the iPhone to subscribers, and launched new wireless plans with large data buckets.

13. In response to these "Big Gig" plans launched in 2017, Rogers and the other national wireless carriers introduced significant discounts and promotions on their own wireless plans throughout 2018 and into 2019.[13] In our case, these included 10 GB plans (which was then the largest data bucket typically offered in the Canadian market) launched broadly for a brief time in December 2017 at prices $60 lower than those available before the Big Gig plans had been launched, [redacted]

[13] See for example, Bell0244334, Bell0583281, Bell0497033, and Bell0400993, attached as Exhibits "L", "M", "N", and "F" to my witness statement, respectively.

Alberta (AB). **The introductory launch price** for Shaw broadband subscribers is $50/month ($45 with pre-authorized payment) for 25GB of data and unlimited talk and text within Shaw's wireless coverage area and 2GB of data when outside" (emphasis added).

(c) **Scotiabank Equity Research Report** (**Exhibit "98"** at page 1): "We think **the introductory $45/25GB offer** is very attractive for Shaw Internet customers in AB and BC and that it will drive wireless subscriber share growth and improve Internet net additions" and "SJR noted that the pricing is introductory and is subject to change based on customer reaction. Changes could include the actual prices and/or Internet plan eligibility" (emphasis added).

(d) **BMO Capital Markets** (**Exhibit "99"** at page 1): "Shaw introduced the 'Shaw Mobile' brand in B.C. and Alberta with innovative offers tied to new or existing Internet subscribers. We view the offer as primarily a retention tool for wireline Internet subscribers, although the wireless packages will appeal to some segments. The introductory offers consist of a $0bundled Internet/WiFi mobile package with pay-as-go data options and a $45 'unlimited' mobile plan (25GB data). **We expect prices and bundles will change after an introductory period**" (emphasis added).

(e) **CIBC Equity Research Report** (**Exhibit "100"** at page 1): "The **introductory price** offer of Shaw Mobile is aggressive at launch" (emphasis added).

(f) **Desjardins** (**Exhibit "101"** at page 1): "The company announced the **initial pricing of its plans**" (emphasis added).

256. Contemporaneous reports from a number of market analysts predicted accurately the lack of any sustained competitive response to the launch of Shaw Mobile. For example, on July 30, 2020, Maher Yaghi and Jerome Dubreuil at Desjardins noted that

Shaw Mobile's offer was aimed at protecting its Internet customer base, and predicted that it would *not* be a "major market mover". This report is attached to my Witness Statement as **Exhibit "101"**. On the same day, Robert Beck at CIBC stated that Shaw Mobile was "unlikely to materially disrupt" the bundle offering at TELUS, in a report attached to my Witness Statement as **Exhibit "100"**. On August 4, 2020, roughly a week after launch, Jeff Fan at Scotiabank predicted that a sudden reaction from the Big 3 was unlikely, and that the incumbents were more likely to adopt a "wait-and-see" approach. That report is attached to my Witness Statement as **Exhibit "102"**.

257. These projections turned out to be prescient. Throughout July and August, the competitive response to Shaw Mobile was minimal, at best. There was ordinary course promotional activity from our wireline and wireless competitors that may or may not have been intended as a response to Shaw Mobile. For example:

(a) at the end of July, TELUS removed its 20GB unlimited data plan from its base "Peace of Mind" tier (previously offered at $80/20GB promotional pricing), and began offering it at minimum at the "Peace of Mind Connect" tier (which includes access for connected devices);

(b) the refurbished iPhone 11 was offered on discount ($520 off) by the incumbent operators on unlimited plans;

(c) in mid-August, promotional $80/20GB unlimited plans were briefly increased to $85/20GB by BCE and Rogers;

(d) in mid-August, TELUS launched its 'Great Big Sale' offering 10GB of bonus data for a limited time on its base "Peace of Mind" plan translating to $75/20GB as well as promotional pricing of $85/20GB on its "Peace of Mind Connect" plan and discounts on premium handsets and accessories;

(e) BCE and Rogers also briefly offered promotional $75/20GB unlimited plans as well as discounts on premium handsets and accessories; and

(f) BCE and its flanker brand Virgin Mobile provided 10GB of free monthly data to current subscribers, set to remain until a change was made to the rate plan.

258. These promotions were detailed by Drew McReynolds in an RBC analyst report dated August 21, 2020, attached to my Witness Statement as **Exhibit "103"**.

259. These time-limited promotional responses are hardly indicative of a sustained market impact, and bear no resemblance to the disruptive nature of Freedom's Big Gig offers of 2017. Instead, they represent the very sort of back-and-forth competitors in telecommunications engage in on a weekly – and sometimes daily – basis across Canada.

(iv) Shaw Mobile's Early But Limited Momentum

260. Shaw launched its new Fibre+ Gig residential Internet service and Shaw Mobile in May 2020 and July 2020, respectively, in the early stages of the COVID-19 pandemic. The timing of our launch aligned well with consumers' specific needs during the pandemic. Shaw Fibre+ Gig offered an advanced broadband Internet product at a time that Canadians' dependence on their home Internet had never been greater. With millions of Canadians working, learning and otherwise accessing the Internet almost exclusively from their homes, consumers were focused – like never before – on the speed and quality of their residential Internet service.

261. At the same time, Shaw Mobile's low cost (and low data) pricing packages appealed to many Canadians who were travelling outside of their homes only minimally and generally for short distances to take care of various necessities. Because of unprecedented and widespread restrictions on travel, and work-from-home orders, consumers were far less concerned than they otherwise may have been about the size of their wireless data packages and on roaming rates, for the obvious reason that they were not using either.

262. Given these extraordinary circumstances, Shaw Mobile had a successful initial launch period. [redacted]

within, you know, as we approached the autumn of 2020, we saw volume I would characterize as sort of go flat for about a year. But we did not accomplish our primary objective of bringing competitive subscribers over from Telus on internet or stemming the loss of subscribers in churning out to Telus anywhere near what we would have liked. We saw very, very limited impact as a result of that.

MR. THOMSON: What impact did Shaw Mobile have on overall pricing in the wireless industry?

MR. McALEESE: As I said earlier, when something is a threat to the Big Three, they tend to respond very quickly as they did in December of 2017. We saw no material response to Shaw Mobile pricing. I think the three of them understood that zero-dollar phones, 75 percent of our customers go on a zero-dollar MRCs, or monthly recorded charges, were in the main additional lines for younger children, older parents, things like that. We were not hitting at the heart of their core constituencies.

MR. THOMSON: You explained in your witness statement something called 12-box pricing that Shaw introduced in November of 2021?

MR. McALEESE: Yes.

MR. THOMSON: What is 12-box pricing?

MR. McALEESE: Twelve (12)-box pricing is

essentially just a way to package up and speak internally about the IT capability to recognize the price plans, the internet rate card, the internet rate plan that a residential subscriber for Shaw is on, which then determines their eligibility for pricing on Shaw Mobile.

So in a nutshell, the more -- the higher the speed band of internet, the more money you spend on internet pricing, the lower your pricing would be for Shaw Mobile. And the 12-box is just a visual representation of that.

MR. THOMSON: Why did Shaw implement 12-box pricing in November of 2021?

MR. McALEESE: Well, we realized fairly quickly into the development of Shaw Mobile that it was not going to have the desired impact on the market share losses that we were ceding to Telus as a result of their aggressive fibre build. So we needed to make a decision about balancing a greater degree of profitability with the growth of Shaw Mobile, and 12-box pricing was the mechanism by which we did that.

MR. THOMSON: When did Shaw first take steps towards the introduction of 12-box pricing?

MR. McALEESE: Well, our contemplation of something other than introductory pricing happened even prior to the launch. I think in June of 2020 we were

contemplating the need to have the infrastructure capability to be able to interrogate the wireline database, recognizing what speeds people might be on for their internet, and then bring it back to Show internet -- or Shaw Mobile pricing. But it's a complicated -- it's a complicated thing.

I mentioned earlier that we don't have much integration, if it any at all, between the two businesses on the IT front. So it created a project in the autumn of 2020 after the launch, and I believe that project for the first time made available at least on a trial basis, a 12-box construct in May of 2021.

MR. THOMSON: Did the implementation by Shaw of 12-box pricing in November of 2021 have anything whatsoever to do with the Competition Bureau's review of the proposed transaction between Rogers and Shaw?

MR. McALEESE: No, it did not.

MR. THOMSON: Has the introduction of 12-box pricing has any impact on the financial performance of this brand?

MR. McALEESE: It's had a significantly favourable impact. We have increased the monthly recurring charge or the amount the customer commits to on a monthly basis, nearly by an order, I think it's either 80 to 90 percent over the course of the year, so near doubled. So

it's led to a much more favourable contribution margin per subscriber.

MR. THOMSON: A number of Shaw's documents use the code word Ellipse. What does that refer to?

MR. McALEESE: Ellipse is the project name for the development of Shaw Mobile.

MR. THOMSON: Let me turn to Shaw Go Wi-Fi. Was that?

MR. McALEESE: Shaw Go Wi-Fi is a now 10 to 12-year-old portfolio of public hotspots, wi-fi hotspots across Western Canada, which was developed in the early days of our internet product development here in Western Canada, and before we had any wireless assets to speak of. It was really just a complement to our wireline portfolio.

MR. THOMSON: Has that network of hotspots become more or less important to consumers with the passage of time?

MR. McALEESE: Considerably less important. As I said, first and foremost, that's in the instance in most of the cases it's about 10-year-old technology, so imagine having a 10-year-old modem in your home. That's sort of the equivalent. It has very low throughput. A few things have happened that have obviated the need for that.

First and foremost, that was built at a time and we probably all remember the time, when you would get

not, we can move to a confidential session.

Did Bell have any competitive response to Shaw Mobile after this presentation? In other words, in the going-forward period from that presentation onwards, did Bell have any competitive response to Shaw Mobile?

MR. KIRBY: We did in the sense that we had to be much more aggressive with our pricing in the western Canada market, not only for existing customers and trying to keep them, but for customers that we were trying to get to switch from Rogers or Telus to join Bell.

MR. TYHURST: And can you give us an idea of timeframe? Did that endure for any period of time, to your recollection?

MR. KIRBY: It remains in place today.

MR. TYHURST: And what about the rest of Canada? Was there any impact outside the west?

MR. KIRBY: I mean, arguably both Rogers and ourselves did quite poorly in western Canada as a result of the Shaw Mobile launch, so both of us had to be more aggressive in the rest of the country to drive our growth.

MR. TYHURST: Thank you.

You were also asked some questions about Fizz and the November 2018 launch of Fizz and then -- do you recall you were taken to some documents in respect of Fizz?

I'm not going to get into the specifics, but do

Figure 2: Shaw Mobile's monthly market share growth, percentage points, July 2020 – March 2022

[redacted] "[redacted]
[redacted]
[redacted]
[redacted].

Expert Report of Dr. Israel - Figure 3

Figure 3: Shaw Mobile share of subscribers in AB and BC, July 2020 – April 2022

Sources: Same as Figure 2.

Witness Statement of Paul McAleese, Exhibit 73, Breakdown of Shaw's Wireless customers by region and brands as of May 31, 2022

Excerpt from: ***Canada (Director of Investigation and Research) v. Southam Inc.*, 1992 CarswellNat 637 (Comp. Trib.), *per* Teitelbaum J., Roseman and Clarke, *affirmed on the merits by the FCA and reversed on merits but affirmed on remedy by the SCC.***

.

Excerpt topic: In view of the market share and concentration at issue in this application, a finding of an SLPC would be unprecedented.

476 The major beneficiary of the attempt to organize Home and Realty appears to have been NRS, which requested and was granted an increased corporate discount after learning that it was not receiving as good a discount as it had been led to believe.[183] Mr. Jackman maintained that Royal LePage obtained no additional discounts.[184]

477 More recently, the Greater Vancouver Real Estate Board decided to dedicate "an area of the proposed premises for future production of a newspaper".[185] (The Board is currently looking at building new offices.) Mr. Jackman had approached the Management Board, as distinct from the full Board of Directors, in 1989 to propose that the Board buy the planned new publication for $1 once it was in operation. They turned him down mainly because the Board was "not in the publishing business".[186]

478 A decision by the Board of Directors to start a real estate publication would have to be ratified at a general meeting by the "active members" of the Greater Vancouver Real Estate Board, who number approximately 2,000. The Board of Directors consists of 19 elected directors plus the Past President. Twelve are elected at large by the "active" members; the others are elected in seven geographic divisions by all 7,000 members voting in their respective divisions. There is no evidence on who qualifies as an "active" member.

479 The valuation placed by Southam on the *Real Estate Weekly* indicates that in its view entry is not easy but that it is far easier than into community newspaper publishing. The valuation reflects a higher downside risk. Nevertheless, Southam paid an appreciable amount for the goodwill of the *Real Estate Weekly*. It must have had some confidence that the flow of profits would continue. Its assessment is probably a reasonable conclusion on the conditions of entry into the industry. Successful entry does not depend on appealing to a small number of actors with relatively common interests. To succeed, many agents must be convinced that advertising in a new publication will effectively reach their target audience. There is no convincing evidence that this can be done without significant risk and investment.

E. Prevent or Lessen Competition Substantially

480 On the North Shore the acquisitions have resulted in the elimination of all existing competition. The Tribunal is instructed to consider the factors listed in section 93 of the Act when evaluating the effect or likely effect of a merger or acquisition on competition. There are no other acceptable substitutes for print real estate advertising; whether one focuses on the *North Shore*

News or the *Real Estate Weekly*, an effective competitor has been eliminated; and there is no effective competition remaining. This brief statement captures paragraphs 93 (c), (e) and (f). Of the remaining factors mentioned in section 93, only barriers to entry are relevant. As the review of the evidence demonstrates, this is where the parties placed their emphasis. In the light of the fact that all the other relevant elements clearly point to a substantial lessening of competition, the question is whether entry barriers are sufficiently low that actual entry or the threat of entry can be relied on to conclude that the acquisitions have not lessened competition substantially and are not likely to do so.

481 The mixed picture of entry conditions already reviewed hardly supports such a conclusion. The most formidable threat of entry would be by the Real Estate Board. The evidence does not indicate that it is a poised entrant. Given the strong divisions in the industry it is difficult to know what it would take for effective joint action that was acceptable to a majority of Board members. Furthermore, the fact that the North Shore constitutes only a part of the territory covered by the Vancouver Board makes its direct involvement there highly unlikely unless there is a more widespread problem. For all these reasons, there is likely to be a substantial lessening of competition in the print real estate advertising market on the North Shore.

XII. ORDER

482 Both counsel for the Director and for the respondents have requested that, in the event that the Tribunal reaches a decision on the substantive issues that is adverse to the respondents, a special hearing be convened to consider possible remedies. Given that the Tribunal has found in favour of the Director only with respect to the print real estate market on the North Shore, this request is particularly appropriate. The Tribunal is aware that the North Shore edition of the *Real Estate Weekly* and the real estate section of the *North Shore News* each account for only 10-15% of their respective revenues. The challenge will be to devise an effective remedy that does not harm the interests of the respondents in a disproportionate way.

483 FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT counsel for both parties re-attend at a time convenient to counsel and members of the Tribunal to submit evidence and argument on the appropriate remedy given the findings of the Tribunal with respect to the print real estate advertising market on the North Shore.

APPENDIX

INFORMATION NOTE [187]

Director of Investigation and Research v. Southam Inc.

Excerpt from: ***Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, *per* Nadon J. (as he then was), Bolton, Lloyd and Schwartz, *remitted to the Tribunal by, and subsequently affirmed by, the FCA*.**

.

Excerpt topic: In view of the market share and concentration at issue in this application, a finding of an SLPC would be unprecedented.

107 With respect to the geographic market relevant for national accounts, the Commissioner submits that the relevant geographic market for the analysis of the national accounts is Canada. The respondents do not address the relevant geographic dimension for national accounts.

IV. SUBSTANTIAL PREVENTION OR LESSENING OF COMPETITION

108 The Commissioner submits that there will be a likely substantial lessening of competition in many local retail propane markets, a likely substantial lessening of competition regarding national accounts and a likely prevention of competition in Atlantic Canada. The Commissioner also argues that there will be a likely substantial lessening of competition by virtue of the creation or enhancement of market power by the merged entity which he attempted to demonstrate with expert and factual witnesses. He argues that market power can be inferred from various factors such as high market shares and concentration, the high barriers to entry, the removal of ICG as a vigorous competitor, the lack of foreign competition and the fact that there is no effective remaining competition.

109 The respondents submit that the merger is not likely to result in a substantial lessening of competition. They argue that the terms "likelihood of a substantial lessening of competition" are synonymous with "likely price increase" and that the Commissioner failed to demonstrate a likely post-merger price increase. They dispute the Commissioner's definitions of geographic and product markets, rely on the growth of independents' market share, advocate that ICG is not a vigorous and effective competitor and that barriers to entry in the retail propane business are low.

A. MARKET SHARES AND CONCENTRATION

110 The Commissioner's expert witness, Professor West, studied the combined market shares of Superior and ICG in 74 local markets for 1997 as stated above. He concludes at page 29 of his report (confidential exhibit CA-2051) that in 17 such markets, the combined market share is between 95 and 100 percent, that 32 markets have combined market shares in excess of 80 percent, that 46 markets have combined market shares of 70 percent, and that 66 markets have combined market shares in excess of 60 percent. In order to get these results, Professor West relies upon a set of completed surveys for the year 1997 that the Commissioner has received from responding propane dealers (the competitor survey) as well as, inter alia, internal business plans and data regarding sales volume and market shares of Superior and ICG. Professor West states that he has relied on Superior's data in the absence of sufficient data provided from competitors.

111 The respondents criticize Professor West's market share estimates on the grounds that he uses volume information for 1997 and Superior and ICG branch locations for 1998. The Commissioner points out, however, that Professor West does not mix 1998 locations with 1997

to calculate market share, he did not attempt to invent one in order to allocate some volumes to the market.

116 Professor West's results, set out at page 29 of his report (confidential exhibit CA-2051), are very similar to a frequency distribution of Superior/ICG market shares that Superior has estimated, apparently based on its branch trading areas. For example, Superior's own analysis indicates that 15 out of 116 branches have a market share of between 95 and 100 percent. Although the methodology of the two studies differ, this result is common to both and gives the Tribunal further confidence in Professor West's analysis.

117 In addition, the Tribunal has reviewed the criticisms made by the respondents on a market by market basis of Professor West's market share estimates. After careful review of his explanations and methodology (and having examined certain markets in detail), the Tribunal accepts that Professor West's approach is appropriate for a competition analysis in this case and that his inferences and conclusions about market shares are reasonable given the available data and the limitations therein identified by him. The Tribunal is of the opinion that it can rely on these results and conclusions for the purpose of determining whether the merger will result in a likely substantial prevention or lessening of competition.

118 The Commissioner's experts, Professors Schwindt and Globerman, classify markets on the basis of post-merger market share in their expert report (exhibit A-2056 at 27-41). Using Professor West's relevant geographic markets and market share estimates, they identified 16 local markets in which the merged entity would have combined market shares of 95 percent and higher, which they referred to as "merger to monopoly" markets. At page 28 of their report, they indicate that the merger will substantially increase the probability of a unilateral price increase in these markets.

119 They further identify eight markets ("category 1"), in which the Superior or ICG pre-merger market share is relatively small. In these markets, the merger may have minimal impacts on competition between Superior and fringe competitors and, therefore, the main concern is the removal of ICG as a potential future competitor (ibid. at 37). In addition, the merger in these markets would eliminate competition for propane buyers who prefer to deal with one of the major companies.

120 A third set of markets ("category 3") identifies 16 markets in which ICG has a substantial market share prior to the merger but where there are at least three competitors including Superior and ICG. In these markets, Professors Schwindt and Globerman expect that the elimination of ICG is likely to enhance interdependence and reduce competition (ibid. at 38, 40).

121 The final set of markets ("category 2") includes 33 local markets in which a relatively fragmented fringe of firms compete against Superior and ICG and where the merging parties are the two largest sellers (ibid. at 40). They state that there is a substantial likelihood that the merger

Excerpt from: ***Canada (Director of Investigation and Research) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, *per* McKeown J., Schwartz and Solursh, *affirmed by the FCA, leave to appeal refused by the SCC.***

.

Excerpt topic: In view of the market share and concentration at issue in this application, a finding of an SLPC would be unrecedented.

191 The evidence of a significant increase in capacity in Southern Ontario for ICI Waste from the GTA indicates to the Tribunal that Tipping Fees for such waste will likely fall in the absence of the transaction. Accordingly, the Tribunal is of the view that the market should be defined with reference to the likely future price rather than the prevailing price. Thus, as stated earlier, while a broader geographic market would be justified when premised on prevailing prices, the relevant market as identified using the hypothetical monopolist approach in the context of the lower future prices that are likely would be limited to Southern Ontario.

E. MARKET SHARES AND CONCENTRATION

192 The Commissioner alleges that CWS, if it were permitted to take control over the Ridge, will then control approximately 70 percent of the landfill capacity in Southern Ontario capable of taking ICI Waste from the GTA. If CWS were not allowed to take control of the Ridge, CWS's share of landfill capacity will be just under 50 percent.

193 After reviewing the various estimates of annual permitted capacity and demand, the Tribunal accepts the 1999 figures for total capacity and for capacity for ICI Waste from the GTA for all sites in Southern Ontario capable of accepting such waste, as provided by Professor Baye; it adds thereto the Petrolia capacity. For the 2002 year end, the Tribunal accepts the figures in the Commissioner's reconciliation as the best indication of total disposal capacity and Professor Baye's figures plus Petrolia for the capacities for ICI Waste from the GTA. On this basis, the Tribunal calculates the market shares of the various competitors based on their capacity as follows:

TABLE 1: Disposal Capacity at Sites in Southern Ontario Capable of Accepting ICI Waste from the GTA

Landfill Sites	Total Annual Capacity 19991	Tribunal's Estimates of Capacity Available for ICI Waste from GTA, 19991	Total Annual Capacity 20021	Tribunal's Estimates of Capacity Available for ICI Waste from GTA, 20021
LaSalle/ Blackwell	675	*	0	*

Walker	617	617	617	617
Ridge	220	220	680	680
Warwick	56	56	750	750
Richmond	125	125	750	750
Essex-Windsor	320	0	320	100
GreenLane	262.5	*	262.5	*
Petrolia	65	*	65	*
Keele Valley	1497.4	568.2**	0	0
Total	3837.9	2153	3444.5	3156.5

Share of Capacity			
Ridge 6 %	10 %	20 %	22 %
CWS 22 %	23 %	44 %	48 %
CWS + Ridge 28 %	33 %	64 %	70 %

1 all capacity figures in thousands of tonnes per annum at the year-end.

* confidential information

** equals actual ICI Waste accepted from GTA.

194 Having reviewed the various estimates of the parties and their experts, the Tribunal is of the view that the figures presented in table 1 display the changes in capacity for ICI Waste from the GTA and permit the Tribunal to infer the proper market share estimates. On these figures, the Tribunal finds that while total capacity will decline at the Ontario disposal sites that can take ICI Waste from the GTA, the capacity for such waste at those sites will increase by approximately 47 percent between 1999 and 2002.

195 These figures indicate that the combined share of capacity of CWS and the Ridge to accept ICI Waste from the GTA was approximately 33 percent in 1999. In 2002, this share will be 70 percent. If CWS is not permitted to acquire the Ridge, its share of capacity would be approximately 48 percent.

196 The Commissioner also alleges that if CWS takes control of the Ridge, it will control approximately 80 percent of the total excess capacity for ICI Waste from the GTA. In this regard, the Commissioner relies on Professor Baye's calculation of the distribution of total excess capacity and the Herfindhal indicies with and without the merger. Professor Baye's estimates show that at the end of the 2002 CWS will control 63.6 percent of the total excess capacity if it does not control the Ridge and 85.8 percent if it does (expert affidavit of M. Baye (12 October 2000); exhibit 348a at table 7). Having accepted above Professor Baye's capacity estimates and shares thereof, the Tribunal also accepts his calculation of the distribution of excess capacity.

197 In the Chatham-Kent area, the Ridge and CWS' Gore are the two local landfills that compete for solid waste generated in Chatham-Kent. Therefore, if it retains the Ridge, CWS will control 100 percent of the Chatham-Kent disposal market.

F. CONCLUSION OF THE TRIBUNAL

(1) Substantial Prevention of Competition

198 The Commissioner's reconciliation attempts to correct certain shortcomings in Professor Baye's capacity analysis, and to treat supply and demand symmetrically to resolve confusion. The Commissioner's reconciliation produces an excess capacity of 393,119 tonnes, much less than Professor Baye's estimate (1.2 million tonnes), yet much larger than Professor Hay's expected deficit of 1.68 million tonnes. If the Commissioner's reconciliation is correct, there would still be downward pressure on Tipping Fees at disposal sites in Southern Ontario that accept ICI Waste from the GTA.

199 The Tribunal agrees that Residential Waste is appropriately excluded from the analysis of demand given the contracts with Republic and Onyx negotiated by the City of Toronto. Moreover, the Tribunal accepts that the planned expansions of the Warwick and Richmond sites are likely to occur although the required evaluation process under environmental legislation and regulation has not been completed.

200 The Tribunal also accepts the Commissioner's argument concerning price discrimination. In light of the evidence of the practice of price discrimination, the fact that excess capacity may lead a disposal site in Ontario to reduce its Tipping Fee for ICI Waste from a GTA Transfer Station does not, in and of itself, indicate that this site would reduce its Tipping Fee to other Transfer Stations. Accordingly, on the evidence presented, the Tribunal cannot conclude, as suggested by the respondents, that non-GTA waste currently going to Michigan and New York would be permanently disposed of in Ontario at those sites where Annual Capacity will increase due to the anticipated expansions and reallocations of unused capacity.

201 Finally, the Tribunal finds a difficulty in Professor Hay's conclusion that lower Tipping Fees in Ontario would attract non-GTA waste and hence put upward pressure on Tipping Fees in Ontario. First, the Commissioner does not argue that Tipping Fees in Southern Ontario will fall, only that Tipping Fees for ICI Waste from the GTA would fall but for the transaction. Second, if Professor Hay's conclusion were correct, then, as the Commissioner points out, Tipping Fees could never fall. The Tribunal agrees with the Commissioner that Professor Hay's approach seems to confuse a change in demand with a change in quantity demanded.

202 As shown above in table 1, the Tribunal accepts that the supply of disposal capacity in Southern Ontario at sites capable of accepting ICI Waste from the GTA at the end of 2002 is 3,444,500 tonnes per annum as shown in the Commissioner's reconciliation. This represents a

Excerpt from: ***Commissioner of Competition v. CCS Corporation et al., 2012 Comp. Trib. 14, per Simpson J., Crampton C.J. and Askanas, affirmed by the FCA, reversed on other grounds by the SCC.***

.

Excerpt topic: **In view of the market share and concentration at issue in this application, a finding of an SLPC would be unprecedented.**

[2] The Tribunal has concluded that CCS is a monopolist in the geographic market and that it exercises significant market power which is being maintained as a result of the Merger.

[3] Although Dr. Baye, the Commissioner's expert, suggested a wide range of likely price decreases in the absence of the Merger, the Tribunal has found that a decrease in average tipping fees of at least 10% was prevented by the Merger.

[4] There is significant time and uncertainty associated with entry. The Tribunal has concluded that effective entry would likely take a minimum of 30 months from site selection to the completed construction and operation of a secure landfill in the relevant market.

[5] The Tribunal has also decided that, in the absence of the Merger, the Vendors would likely not have sold the Babkirk Facility in the summer of 2010 but would have operated it themselves and would have constructed a new secure landfill with a capacity of 125,000 tonnes by October of 2011. This landfill would likely have operated as a complement to the Vendors' bioremediation business until no later than October 2012.

[6] The Tribunal has also concluded that the Vendors' bioremediation business would likely have been unprofitable and that by October 2012, the Vendors would likely have changed their business plan to significantly focus on the secure landfill part of their business or would have sold the Babkirk Facility to a secure landfill operator. In either case, no later than the spring of 2013, the Babkirk Facility would have operated in meaningful competition with CCS' Silverberry secure landfill. It is the prevention of this competition by the Merger which constitutes a likely substantial prevention of competition.

[7] The efficiencies claimed by CCS do not meet the requirements of section 96 of the Act.

[8] Divestiture is an effective remedy and is the least intrusive option.

[9] The application has been allowed. The Tribunal has ordered CCS to divest the shares or assets of BLS.

[10] In dealing with the facts of this case, the Tribunal's conclusions were all based on an analysis of whether the events at issue were likely to occur.

> we invite you to take advantage of our Fibre+ Gig speeds available to more than 99 per cent of our market, and bundle it with a mobile service that will give you unprecedented savings exclusively available for Shaw customers." (emphasis added)

249. As set out in this News Release, we made Shaw Mobile available across our wireless footprint in Alberta and British Columbia in 19 fully dedicated Shaw retail stores (*i.e.*, stores that did not offer Freedom wireless products), including 12 new stores that opened later in 2020, and in over 120 locations of Shaw's largest national retail partners across these two Provinces. Shaw Mobile was never offered in Ontario.

250. Because Shaw Mobile was always designed and marketed as a value-add service for our existing and prospective residential Internet wireline customers in Western Canada, it was targeted to a limited audience. At the time of the launch of Shaw Mobile, we had approximately 1.9 million residential Internet customers. Only a subset of approximately [redacted] of those Shaw residential Internet subscribers lived within the footprint of our wireless network.

251. We launched Shaw Mobile with aggressive pricing that was offered on an introductory basis to Shaw Internet subscribers. In particular, Shaw Mobile's introductory price offerings were: the "By The Gig" plan, for $0/month, which included unlimited nationwide talk and text, and the option to add 90-day pre-paid data for $10/GB; and the "Unlimited Data" plan, which offered 25GB for $45/month with a $10/month US and Mexico roaming option. These were the only available price plans made available by Shaw Mobile at the time of launch in July 2020.

252. Our wireline customers were given the option of adding as many as six wireless lines to their plan. [redacted]

[redacted]

253. Our publicly stated strategy had always been to eventually raise the price of Shaw Mobile products following an introductory period of undetermined length after Shaw Mobile gained traction with our wireline customers, in an effort to realize increased revenues and ultimately achieve profitability. [redacted]

254. In connection with the launch of Shaw Mobile on July 30, 2020, Shaw scheduled calls with numerous analysts for the morning of the launch, including with TD Securities, Scotiabank, Canaccord Genuity, RBC Securities, CIBC, National Bank and Desjardins. I participated in these analyst calls, along with Trevor English. As reflected in Shaw's Key Themes document for these calls (a copy of which is attached to my Witness Statement as **Exhibit "95"** to this Witness Statement), and consistent with our long-term goal of eventually pricing the plans offered by Shaw Mobile to achieve profitability, we advised analysts that Shaw Mobile's prices at launch were introductory in nature and subject to change, as reflected by numerous analyst reports including the following:

(a) **RBC Research Analyst Report** (**Exhibit "96"**): "We continue to see Shaw striving for a balance of wireless growth and profitability with the current Shaw Mobile offerings dialed-in by: (i) bundling requirements versus outright price discounts/availability; (ii) leaning on non price-related value drivers such as WiFi; (iii) relatively limited retail distribution and a network quality of service that is still below that of the incumbents; and (iv) **an ability to adjust price points and/or data buckets beyond today's introductory pricing as market conditions warrant**" (emphasis added).

(b) **Bank of America Securities** (**Exhibit "97"** at page 1): "Shaw (SJR) launched the Shaw Mobile brand today in its Western Canadian wireless territory that overlaps with its cable footprint in British Columbia (BC) and

Alberta (AB). **The introductory launch price** for Shaw broadband subscribers is $50/month ($45 with pre-authorized payment) for 25GB of data and unlimited talk and text within Shaw's wireless coverage area and 2GB of data when outside" (emphasis added).

(c) **Scotiabank Equity Research Report** (**Exhibit "98"** at page 1): "We think **the introductory $45/25GB offer** is very attractive for Shaw Internet customers in AB and BC and that it will drive wireless subscriber share growth and improve Internet net additions" and "SJR noted that the pricing is introductory and is subject to change based on customer reaction. Changes could include the actual prices and/or Internet plan eligibility" (emphasis added).

(d) **BMO Capital Markets** (**Exhibit "99"** at page 1): "Shaw introduced the 'Shaw Mobile' brand in B.C. and Alberta with innovative offers tied to new or existing Internet subscribers. We view the offer as primarily a retention tool for wireline Internet subscribers, although the wireless packages will appeal to some segments. The introductory offers consist of a $0bundled Internet/WiFi mobile package with pay-as-go data options and a $45 'unlimited' mobile plan (25GB data). **We expect prices and bundles will change after an introductory period**" (emphasis added).

(e) **CIBC Equity Research Report** (**Exhibit "100"** at page 1): "The **introductory price** offer of Shaw Mobile is aggressive at launch" (emphasis added).

(f) **Desjardins** (**Exhibit "101"** at page 1): "The company announced the **initial pricing of its plans**" (emphasis added).

256. Contemporaneous reports from a number of market analysts predicted accurately the lack of any sustained competitive response to the launch of Shaw Mobile. For example, on July 30, 2020, Maher Yaghi and Jerome Dubreuil at Desjardins noted that

To: Paul Deverell (Freedom Mobile)[PDeverell@FreedomMobile.ca]
From: Mathew Flanigan (Freedom Mobile)[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=3448F8454458496A9C5E4E3882910B9F-MFLANIGAN_6]
Sent: Fri 10/9/2020 6:44:41 PM (UTC)
Subject: 12-Box Pricing Alignment

Responding Witness Statement of Paul McAleese, Exhibit 22, Email re 12-Box Pricing Alignment

Paul,

I've assembled the team, which will be supported by Shouvik (given timeframes), and we will walkthrough the plan on Tuesday (high level). Prior to that, I want to make sure we are aligned with the approach to 12-box covered below. There are two scenarios:

i) Introduce a true 12-box with a price increase on select customers (e.g., those paying less than $100/mo.); or,
   a. Current plan, but seeking re-confirmation of alignment
   b. I will connect with Alex if we want to include / exclude more or less plans from $0/$45/$55

ii) Introduce a 9-box with a discount for Gig, but similar pricing for all other customers
   a. An alt. for consideration

From a timing perspective, the plan is to line this launch up with the launch of TMS selling internet (approx.. October 23rd – October 26th).

Reminder:

i) With the below approach there will be a window where we rely on rep. manual selection of rate plans, therefore $25/mo. will be selected more often since it is not system enforced until mid November. We can bridge the gap with reporting, follow-ups in retail, etc..

ii) The $25/mo. price-point is permanent, but only offered for a limited time (e.g., high competitive periods or as a response)

iii) We will ***likely*** be able to exclude subsidy from this new plan, but plan migrations create an added layer of complexity for Finance to manually account for IFRS

Thanks,
Mat

Figure 1.0: *Rate Card Options*

July 30th, 2020	By The Gig	Unlimited	+U.S. & Mexico	
Fibre+ (& Eligible Plans)	$ -	$ 45.00	$ 55.00	
Rack-Rate	$ 15.00	$ 85.00	$ 95.00	
Option #1: ETA TBD	**By The Gig**	**Unlimited**	**+U.S. & Mexico**	
Fibre+ Gig	$ -	$ 25.00	$ 35.00	Price decrea
Fibre+ Max (Less Gig)	$ -	$ 45.00	$ 55.00	
Fibre+ Essentials & Basics (& Eligible Plans)	$ 5.00	$ 55.00	$ 65.00	Price increas
Rack-Rate	$ 15.00	$ 85.00	$ 95.00	
Option #2: ETA TBD	**By The Gig**	**Unlimited**	**+U.S. & Mexico**	
Fibre+ Gig	$ -	$ 25.00	$ 35.00	Price decrea
Fibre+ Max (Less Gig)	$ -	$ 45.00	$ 55.00	
Fibre+ Essentials & Basics (& Eligible Plans)	$ -	$ 45.00	$ 55.00	
Rack-Rate	$ 15.00	$ 85.00	$ 95.00	

essentially just a way to package up and speak internally about the IT capability to recognize the price plans, the internet rate card, the internet rate plan that a residential subscriber for Shaw is on, which then determines their eligibility for pricing on Shaw Mobile.

So in a nutshell, the more -- the higher the speed band of internet, the more money you spend on internet pricing, the lower your pricing would be for Shaw Mobile. And the 12-box is just a visual representation of that.

MR. THOMSON: Why did Shaw implement 12-box pricing in November of 2021?

MR. McALEESE: Well, we realized fairly quickly into the development of Shaw Mobile that it was not going to have the desired impact on the market share losses that we were ceding to Telus as a result of their aggressive fibre build. So we needed to make a decision about balancing a greater degree of profitability with the growth of Shaw Mobile, and 12-box pricing was the mechanism by which we did that.

MR. THOMSON: When did Shaw first take steps towards the introduction of 12-box pricing?

MR. McALEESE: Well, our contemplation of something other than introductory pricing happened even prior to the launch. I think in June of 2020 we were

296. Despite this positive association between Shaw Mobile and reduced churn in Shaw's wireline customer base, our wireline market share in Western Canada has continued to decrease. Between 2016 and 2021, for instance, Shaw's market share in the provision of wireline services decreased by 13%, as TELUS' increased by 14% in the same time period. The following table compares the total number of wireline customers of TELUS and of Shaw at the end of their respective fiscal years between 2016 and 2021, as reported in their respective Annual Reports for those years (for Shaw, see **Exhibits "11"-"125", "126", "127", "128"** and for TELUS, see **Exhibits "78").** Although the numbers are not completely comparable, including because Shaw and TELUS operate in different regions and have different fiscal year-ends, they nevertheless confirm that TELUS has been growing its wireline business directly at Shaw's expense.

Thousands Fiscal Year	2016	2017	2018	2019	2020	2021	Change 2016-2021
Telus subscribers (Internet, TV and Voice)	4,088	4,139	4,199	4,345	4,517	4,659	14%
Shaw Wireline Subscribers (Internet, TV, DTH and Voice)	5,779	5,812	5,679	5,492	5,257	5,008	-13%

297. [redacted]:

(a) [redacted]

(b) [redacted]

(c) [redacted]

(d) [redacted]

(e) [redacted]

(f) [redacted]

(g) [redacted]

[redacted]

(h) [redacted]

To: Paul McAleese[Paul.McAleese@sjrb.ca]; Paul Deverell[Paul.Deverell@sjrb.ca]
Cc: Linda Thomas[Linda.Thomas@sjrb.ca]
From: Sara Murray[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=945BFDB59B7D48989D98C34E3D64F7E4-SARA MURRAY]
Sent: Thur 7/29/2021 12:12:09 AM (UTC)
Subject: F22 options for discussion Thursday
F22B Options.xlsx

Responding Witness Statement of Paul McAleese, Exhibit 32, E,mail re F22 options for discussion Thursday

Hi Paul, Paul,

For our discussion tomorrow, I've put together a few options for us to review to improve the current F22 plan for Consumer.

These options would improve Contribution Margin by [redacted] and include a combination of:

- Wireline MRR improvements [redacted]
- [redacted]
- [redacted]
- Increased Shaw Mobile pricing and correlating reduced sales [redacted]
- Reduced Freedom subsidy and correlating reduced sales and increased disconnects [redacted]
- [redacted]
- [redacted]
- Other miscellaneous costs including [redacted]

The details of the options I've proposed are in the attached.
Looking forward to hearing your thoughts tomorrow morning.

Sara

For reference, below is the 'current' F22 roll up showing Contribution Margin of $2,952M, down $40M YoY

To: Mathew Flanigan[mflanigan@FreedomMobile.ca]; Tyler Spring[Tyler.Spring@sjrb.ca]
From: Parker Shaw[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A8165262D07643B5AFA2BD04D69ACFE1-PARKER SHAW]
Sent: Tue 10/12/2021 3:34:43 PM (UTC)
Subject: Re: Shaw Mobile GTM Planning
Nov Product MRS - Draft v.1.xlsx

Responding Witness Statement of Paul McAleese, Exhibit 28, Email re Shaw Mobile GTM Planning dated October 8, 2021

Hi Guys,

Attached is a first draft of the MRS. Key areas that need to be addressed in my opinion to complete.

1. **Tier Names** (if we keep TG/T0 we may be required to change plan names so that existing plans can be grandfathered and we don't duplicate name) I could be wrong on this, lets chat with IT.
2. **Tab Groupings,** (Discuss with Tony as we will need to reassess)
3. **Tablet rate plans** we should discuss

There are likely a lot more to touch on that I haven't called out at the moment.

Cheers,
Parker

From: Mathew Flanigan <mflanigan@FreedomMobile.ca>
Date: Friday, October 8, 2021 at 4:49 PM
To: Tyler Spring <Tyler.Spring@sjrb.ca>, Parker Shaw <Parker.Shaw@sjrb.ca>
Subject: RE: Shaw Mobile GTM Planning

Attached.

Mathew Ryan Flanigan | Vice President, Wireless Growth
Shaw Communications
207 Queens Quay West | Suite 710 | Toronto, ON | M5J 1A7
C: (416) 898-6345
E: mflanigan@freedommobile.ca

From: Mathew Flanigan
Sent: Friday, October 8, 2021 4:37 PM
To: Tyler Spring <Tyler.Spring@sjrb.ca>; Parker Shaw <Parker.Shaw@sjrb.ca>
Subject: Shaw Mobile GTM Planning

Gents,

Please see the attached **draft** update to the Shaw Mobile rate card planned for approx.. Tuesday, November 16th. It is not broadly circulated at this point, and potentially in need if a weak here and there, but broadly the structure will follow this logic:

i) 12-box pricing
ii) Additional mobile discount linked to higher household wireline MRR
iii) The 3GB back-pocket offer will continue to exist, but it will be a $15 premium on your eligible plan

Image 1.0: *Proposed Shaw Mobile Rate Card (Effective Tuesday, November 16th)*

Thanks, and let's connect on Tuesday. I chatted with Shouvik and Diane will be our project prime to help bring this to market. Note: November 16th is just the proposed date at this point, but it makes sense given the week prior we have an IT release for TradeUp, and the week after we are into Black Friday. Let's be open to feedback from teams about timing +/- a few days.

Please do not share prior to connecting on Tuesday.
Mat

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Shaw Communications
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8.4. The decline in Shaw Mobile gross adds does not well reflect how Shaw Mobile would compete absent the merger

342. [redacted][397][redacted].

343. [redacted]

344. [redacted][398][redacted][399][redacted][400][redacted]

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397 [redacted]

398 [redacted] SJRB-CCB00872845. [redacted]. See SJRB-CCB00824646 [redacted]

399 SJRB-CCB00829142 [redacted]

400 [redacted] Shaw's Reponses to Undertakings at Examination for Discovery of Paul McAleese (Day 1 and 2), No. 70, pp. 36–38. [redacted]. SJRB-CCB00827944 [redacted]. See Examination for Discovery of Paul McAleese, Day 2), pp. 356:19–357:5 [redacted]

[redacted].[401] [redacted]

[redacted].[402] [redacted]

[redacted].[403] [redacted]

[redacted].[404] [redacted]

[redacted].[405] [redacted]

345. Exhibit 28 below shows the actual and forecasted sales as of June – July 2021 for the period from April 2021 to August 2022. [redacted]

[redacted].[406] [redacted]

[redacted] Examination for Discovery of Paul McAleese, Day 2, p. 356:16–18.

[401] [redacted] SJRB-CCB00822858.

[402] See, e.g., SJRB-CCB00873298 [redacted] See also SJRB-CCB00824647, [redacted]

[403] SJRB-CCB00872845; See also SJRB-CCB00872846, Row 3: [redacted]

[404] SJRB-CCB00824646 [redacted] SJRB-CCB00368445. [redacted]. See SJRB-CCB00649408 at p. 5. [redacted] See SJRB-CCB00649408 at p. 4.

[405] SJRB-CCB00824721 ([redacted]

[406] SJRB-CCB00821611, [redacted]

350. [redacted][425] [redacted][426] (Emphasis added).

351. [redacted][427] [redacted][428] [redacted][429] [redacted][430] [redacted][431] [redacted]

[425] [redacted]

[426] SJRB-CCB00880307 [redacted]

[427] SJRB-CCB00876354 [redacted]

[428] See Workpaper 8.4.b.

[429] SJRB-CCB00826492 [redacted]

[430] [redacted]

[431] SJRB-CCB00826992 [redacted]

Extract from: ***Ciba Specialty Water Treatments Ltd. v. SNF Inc.*****, 2017 FCA 225,** ***per*** **Justice Pelletier,** ***leave to appeal refused by the SCC.***

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Extract Topic: Experts must be independent, impartial and objective.

[28] Ciba argues that the Federal Court's preference for SNF's experts because they had "greater field experience" is a palpable and overriding error. Ciba invites us to compare the experts' qualifications and to come to our own conclusion. That is not the role of an appellate court. Our role is to determine if there was a factual basis for the Federal Court's conclusion. In my view, there was such a basis.

[29] Beginning at paragraph 62 of its reasons, the Federal Court considered the academic qualifications and the practical experience of the experts tendered by the parties. It touched upon Dr. Klein's practical experience, without setting it out in detail. It found that "Klein brought an element of practicality to what was a practical patented process": Reasons at paragraph 71. The Court also summarized Mr. Hyatt's 30-year career as a vendor of process chemicals and consultant to the mining industry. There was a basis upon which the Federal Court could find as it did on the issue of SNF's experts' practical experience.

[30] Quite apart from the issue of practical experience, at paragraphs 83 to 87 of its Reasons, the Court explained why it preferred the evidence of SNF's experts to Dr. Farrow's. The Court found Dr. Farrow's evidence "less persuasive, consistent, objective and balanced than one would reasonably expect." It noted that on a major issue in the construction of the patent, Dr. Farrow "advanced different and shifting meanings" and supplied "a result oriented interpretation": Reasons at paragraphs 83-84.

[31] Overall, the Court found that Dr. Farrow was more of an advocate for the patent's validity than was appropriate, given his status as an expert. As a result, the Court approached his evidence with grave caution.

[32] The Federal Court's stance is consistent with the Supreme Court's teachings on expert witnesses:

> Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.
>
> *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paragraph 2, [2015] 2 S.C.R. 182.

[33] The Federal Court was entitled to treat Dr. Farrow's evidence with the caution it did on the basis of its conclusions as to the latter's partiality.

The content of the common general knowledge

[34] Ciba's primary concern in raising the issue of the expert evidence was the difference between the parties' experts on the question of whether the common general knowledge attributable to the Skilled Person at the material date included the concept of introducing polymer to a slurry "in-line" or "in-pipe", i.e. while it is being pumped or transferred to a tailings deposition area.

Excerpt from: *Native Council of Nova Scotia v. Canada*, 2011 FC 72, *per* Justice Zinn.

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Extract topic: Experts base opinions on facts, not cherry-picked evidence or speculation -- including speculation about an opposing party's supposedly "improper" motivations.

[26] The statement that the funding received is inadequate to meet the needs of the off-reserve aboriginal peoples is irrelevant to any issue before the Court in these applications and accordingly paragraph 16 of the Nash-McKinley affidavit is struck.

[27] Paragraphs 11, 12, 13, and 59 of the Hunka affidavit are statements of law and, while appropriate in a written submission by counsel, are inappropriate in an affidavit, especially when there is no evidence that the affiant has any legal training. Paragraphs 29, 33, and 35 of his affidavit are hearsay, being statements alleged to have been made by others, and they are struck. Paragraph 34 is struck as it purports to set out the reason for the resignation of the Chief Statistician. This is a matter that is not within the affiant's personal knowledge and, in any event, is irrelevant to these applications. Paragraphs 43 to 58 speculate as to the consequences of the changes objected to by the applicants; they constitute the affiant's opinion. No basis for these opinions is provided in the affidavit nor is there any indication that the affiant is qualified as an expert on the subjects on which he states his opinion. These paragraphs are struck.

[28] Paragraph 38 of the Siggner affidavit, commencing with the words "in the hopes that …" to the end of the paragraph, and paragraph 39, are struck. These passages speculate on the motives of

the Government of Canada and provide a characterization of its actions which is unwarranted, prejudicial, and beyond the expertise or knowledge of the affiant.

[29] Paragraph 17 of the Binder affidavit is struck as it provides a legal conclusion that is beyond the expertise of the affiant.

[30] Ultimately, given my disposition of this application and the reasons for my decision, the evidence filed by the applicants was of marginal value and little weight was given to it.

Issues

[31] The issues raised by the applicants and respondent are the following:

1. What is the appropriate standard of review?
2. Are the changes to the census contrary to the respondent's constitutional obligations to aboriginal peoples pursuant to s. 91(24) of the *Constitution Act, 1867* and s. 35 of the *Constitution Act, 1982*?
3. Do the changes to the census violate s. 15 of the *Canadian Charter of Rights and Freedoms*?
4. Do the changes to the census violate the *Canadian Human Rights Act*?
5. Do the changes to the census violate s. 9 of the *Statistics Act*?
6. Do the changes to the census result in the respondent being unable to fulfill its duties under the *Statistics Act*?
7. If there is a rights violation, what is the appropriate remedy?

Extract from: *Gould v. Western Coal Corporation*, 2012 ONSC 5184, *per* Justice Strathy (as he then was).

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Extract topic: Experts base opinions on facts, not cherry-picked evidence or speculation -- including speculation about an opposing party's supposedly "improper" motivations.

[83] Other examples abound. Rosen made comments about WCC's attempts to obtain financing, suggesting that management's efforts were "slow and half-hearted and fell short of expected measures for a business that was supposed to be in financial distress." This statement is not only impermissible fact-finding, but it also expresses an opinion on a subject matter – corporate financing practices – for which Rosen has no proven expertise, education or training.

[84] Rosen also purports to give evidence on matters having to do with corporate governance and oppression – frequently based on suspicion and innuendo – for example, "Far too many events and activities by the management of WCC raised very serious concerns about the governance of WCC in 2007. Minority shareholder oppression has to be thoroughly investigated as one possibility."

[85] The willingness of an expert to step outside his or her area of proven expertise raises real questions about his or her independence and impartiality. It suggests that the witness may not be fully aware of, or faithful to, his or her responsibilities and necessarily causes the court to question the reliability of the evidence that is within the expert's knowledge.

[86] *Second*, Rosen purports to weigh evidence, evaluate the credibility of witnesses and make findings of fact. Some of the previous examples are indicative of this propensity, but there are others. Simply by way of example, in one of his reports, Rosen stated: "Further investigation of the disclosures is necessary. Many indications exist that WCC was not insolvent and that its management chose not to explore viable options prior to, and during, the purported 'financial distress period'. Such behaviour would be consistent with an intention to create false panic about the financial health of the Company, so as to suppress its stock price." This statement is objectionable on a number of grounds: it is unvarnished fact-finding, it attributes motive and it contains pure speculation.

[87] I have already referred to Rosen's evidence to the effect that the efforts of management to obtain financing lacked a "sense of urgency". This is pure fact-finding in the form of generalized conclusory statements, without any attempt to provide a factual basis for his conclusions, couched in pejorative and argumentative language.

[88] By the time Rosen delivered this report, he had the affidavits of all members of senior management of WCC, including Redmond, and the affidavit of Boggio of PwC explaining the process leading up to the inclusion of the going concern note in the financial statements. He also had the evidence of the defendants concerning their efforts to explore financing options before, during and after the release of the financial statements. In making the foregoing statements he was purporting to weigh and evaluate this evidence and was drawing adverse and unsupported conclusions about what the evidence established.

[89] *Third*, Rosen engaged in blatant advocacy, making exaggerated, inflammatory and pejorative comments and innuendos, which were argument rather than evidence. For example, in commenting on the Q2 2008 disclosures, Rosen stated: "In our opinion, WCC's public announcement significantly overstated the financial risks facing the company in November 2007. A major concern for shareholders has to be that the Company's disclosures could very well have deliberately been made to create false panic with investors and depress the Company's share price." This is also another example of Rosen attributing motive, and engaging in speculation, rather than confining himself to opinions that are within his area of expertise.

[90] Again, there are numerous examples of this kind of language set out in the factum of counsel for Chase, Hogg and Brodie. Rosen seldom missed an opportunity to take a pejorative swipe at the defendants, often in a speculative way. The following will suffice simply as examples:

- "Minority shareholder oppression is highly suspected, based on publically available evidence."
- "[t]he entire transaction appeared to be unusual, carrying possible impacts on WCC's share price and therefore could be oppressive to some shareholders."

- "…the second quarter (ended September 30, 2007) financial statements represented the only opportunity to disseminate adverse news under the guise of "regular" financial reporting."

- "A major concern for shareholders has to be that the Company's disclosures could very well have deliberately been made to create false panic with investors, and depress the Company share price."

- "We would expect that specific, extensive effort would have been made by WCC management to follow the seemingly simple solution to avoid adverse financial disclosures." [emphasis added]

[91] There are multiple other instances in which Rosen exceeds the bounds of his expertise, purports to make findings of fact and engages in argument, advocacy and hyperbole. They offend the rules applicable to expert evidence as set out and discussed in: *R.* v. *Mohan,* [1994] 2 S.C.R. 9; *Williams v. Canon Canada Inc.,* [2011] O.J. No. 5049 (S.C.J.); *Carmen Alfano Family Trust (Trustee) v. Piersanti*, 2012 ONCA 297, [2012] O.J. No.2042 (C.A); *R. v. J (J.L.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 (S.C.C.), at para. 37.

[92] In the *Carmen Alfano Family Trust* case, the Court of Appeal observed, at paras. 107-108:

> That said, courts remain concerned that expert witnesses render opinions that are the product of their expertise and experience and, importantly, their independent analysis and assessment. Courts rely on expert witnesses to approach their tasks with objectivity and integrity. As Farley J. said in *Bank of Montreal v. Citak*, [2001] O.J. No. 1096, "experts must be neutral and objective [and], to the extent they are not, they are not properly qualified to give expert opinions."
>
> When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client. Courts require more. The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and

> conclusion. While the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client. An expert's report or evidence should not be a platform from which to argue the client's case. As the trial judge in this case pointed out, "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court."

[93] The Court of Appeal continued, at para. 110, by noting that where the court observes a lack of independence, it will generally discount the weight to be given to the expert's opinion:

> In most cases, the issue of whether an expert lacks independence or objectivity is addressed as a matter of weight to be attached to the expert's evidence rather than as a matter of the admissibility. Typically, when such an attack is mounted, the court will admit the evidence and weigh it in light of the independence concerns. Generally, admitting the evidence will not only be the path of least resistance, but also accord with common sense and efficiency.

[94] Rosen's willingness to engage in this type of advocacy, exaggeration and over-statement, and his failure to make a balanced assessment of the evidence, drawing only the most unfavourable conclusions, casts serious doubt on his independence and objectivity and causes me to discount the weight which might be given to his evidence.

[95] Rosen signed an acknowledgment of expert's duty in which he acknowledged a duty to provide fair, objective and non-partisan opinion that related only to matters that were within his area of expertise. He also acknowledged that this duty prevailed over any obligation he might owe to the party that retained him. Rosen did not confine himself to matters within his expertise. He engaged in impermissible fact-finding and speculation. The tone of his report was not fair, objective and non-partisan. These failings, together with shortcomings in his logic, discussed below, give me no confidence that his evidence can be relied upon, or could possibly be relied upon at trial.

IV. THE ISSUES AND ANALYSIS

[redacted]

D. The Decision to Deprioritize Shaw Mobile for Business

321. On January 28, 2021, I attended a meeting with Ms. McLeod, Ms. Thomas and Mr. Deverell to establish a framework to manage activity results associated with this proposed new offering. During this meeting, the decision was once again made to delay Shaw Mobile for Business in order to understand the timing, costs and commitment to resolving back-office limitations. The next steps flowing from this meeting were for me to speak with Ms. Emberly and align on a communication strategy and approach, as set out in a "Framework" presentation dated January 28, 2021. A copy of that presentation is attached to my Witness Statement as **Exhibit "149"**.

322. The SIM Program, which was targeted specifically at SOHO customers and was already set to launch, moved forward on February 5. However, all other phases of the project were put on hold.

323. The SIM Program was unsuccessful. We received a number of customer service complaints, including the fact that the product could service no more than four lines, with no path to additional lines, and offered Bring Your Own Device only, with no path to financing new devices. Moreover, the uptake among targeted customers in the SIM Program was extremely low. Between February 4 and March 10, 2021, Shaw sent approximately 14,094 SIM cards (which were received at approximately 12,000 addresses, the balance of which were returned to sender) and 13,000 emails to existing wireline customers. These efforts resulted in only approximately 363 new Shaw Mobile customers, for a take-up rate of approximately 1.5%. Copies of email exchanges in which the SIM Program was discussed are attached to my Witness Statement as **Exhibits "150"** and **"151"**.

324. On February 9, 2021, after discussing this matter with me in considerable detail, Candice McLeod informed the broader team that the Pilot, Phase 1 and Phase 2 of Shaw

Mobile for Business were officially delayed/paused, and asked that they relay the message to anyone who was still working on the initiative. To be crystal clear, I made the decision not to move forward with this initiative, and did so for the various reasons described above.

325. Shaw never developed an advanced "go to market" plan for Shaw Mobile for Business. Rather, Shaw continued to make feasibility assessments in respect of the possibility of such an offering. Ultimately, I and others at Shaw decided that a Mobile Business offering was not viable for a variety of operational and strategic reasons, and deprioritized the initiative before it ever reached the Pilot Phase.

326. The simple fact of the matter is that contrary to the Commissioner's allegations, the decision to deprioritize and pause Shaw Mobile for Business had nothing whatsoever to do with the proposed business combination between Rogers and Shaw, which was only concluded and announced publicly approximately one month after the Shaw Mobile for business proposal was shelved.

PART XI – THE TBT INITIATIVE

327. In the period from January 2018 to March 2020, Shaw pursued an extensive cost-cutting initiative known as "Total Business Transformation" ("**TBT**"). This initiative was intended to identify and capitalize on potential efficiencies within the Company's business operations. The initiative focussed on reducing expenses while taking measures to ensure that the wireline and wireless businesses of Shaw could be operated on an effective, efficient and profitable basis.

328. TBT was an organizational transformation initiative designed and implemented with the assistance of outside consultants at [redacted]. This initiative was presented to and approved by the Board of Directors of Shaw in October 2017. A copy of that presentation is attached to my Witness Statement as **Exhibit "152"**.

329. As described in the presentation, members of senior leadership of Shaw had identified a need to transform Shaw into a company with a "sustainable cost structure".

PART V – SHAW'S COMPETITIVE CHALLENGES AND COMPETITIVE INTENSITY

36. The assertions in Witness Statements filed by the Commissioner that Shaw has not competed with the same intensity in the period since the Merger Announcement was made in March 2021 are speculative and inaccurate, including because they conflate competitive *intensity* with competitive *success*. Shaw has not abandoned its efforts to be an aggressive and intense competitor in the period since the Merger Announcement. Although Shaw has continued to compete, it has not always been successful in those efforts. Those shortcomings are not the product of a lack of effort or intensity on the part

of Shaw, but instead are a function either of external events beyond the control of Shaw or the very sorts of challenges that have motivated Shaw to proceed with the Proposed Transaction.

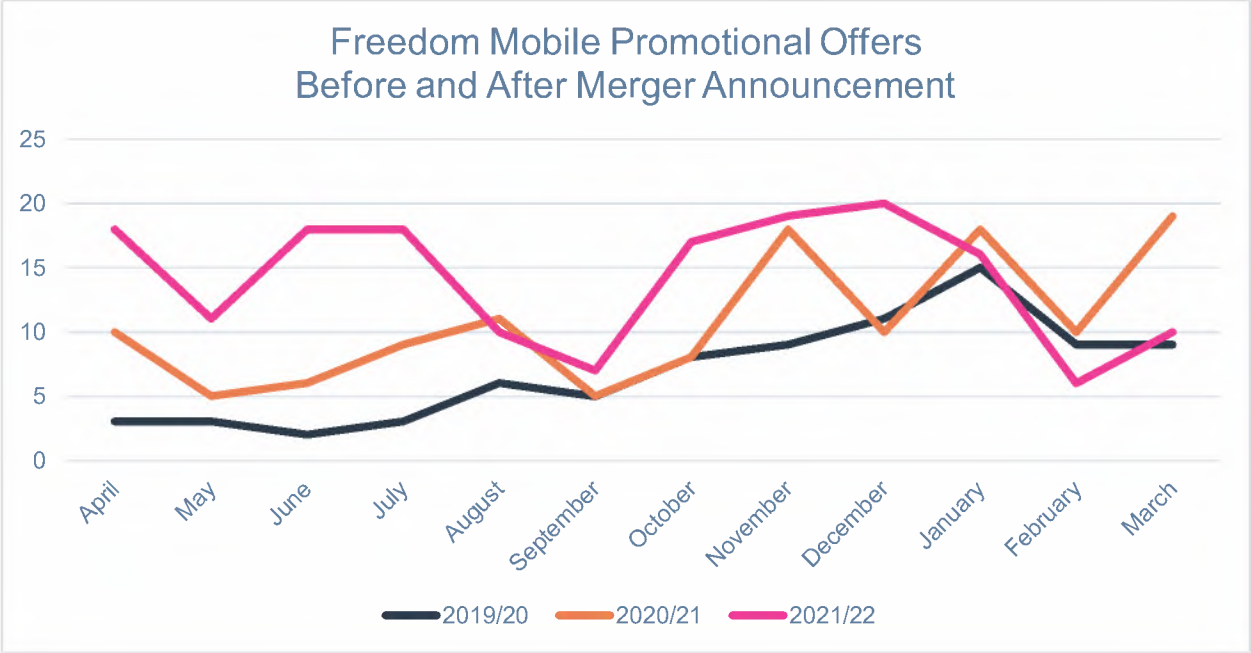
A. SHAW HAS NOT REDUCED ITS COMPETITIVE INTENSITY SINCE THE MERGER ANNOUNCEMENT

37. Several of the Witness Statements filed by the Commissioner claim that Freedom has reduced its competitive intensity. For example, at paragraphs 8 and 9 of the Witness Statement of Charlie Casey dated September 20, 2022, Mr. Casey (the Vice President Consumer, Controller at TELUS) claims that Shaw's competitive intensity has decreased materially in the period since the Merger Announcement was made. Blaik Kirby (the Group President, Consumer and Small & Medium Business at Bell) echoes this sentiment at paragraphs 17 and 36 to 41 of his Witness Statement dated September 23, 2022.

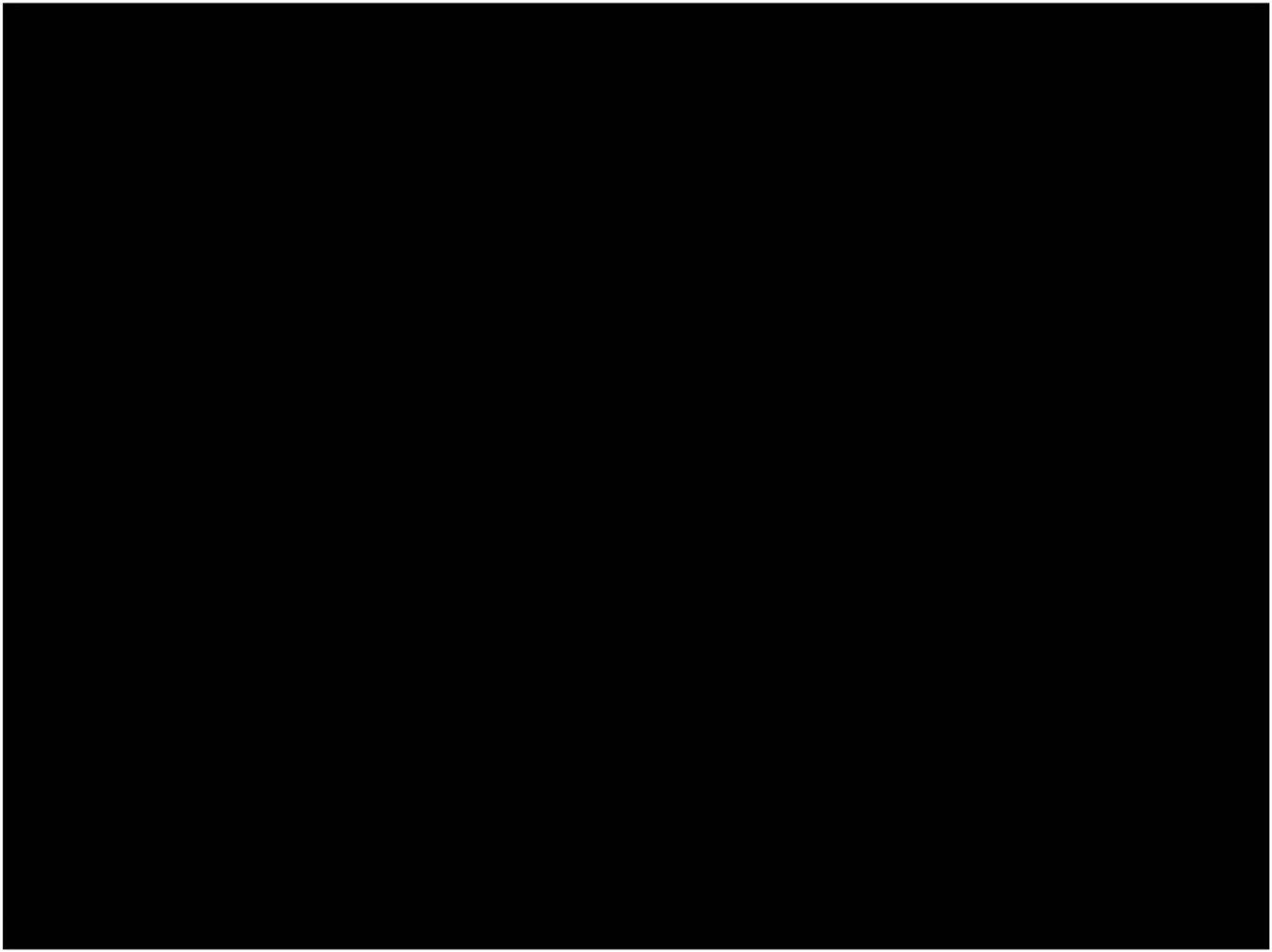
38. Similarly, two of Freedom's dealers, Messrs. Sameer Dhamani and Sudeep Verma, accuse Shaw in their Witness Statements dated September 22, 2022 of having become less aggressive in its marketing efforts. This evidence must also be placed in its proper context. Messrs. Dhamani and Verma have both been instrumental in spearheading litigation commenced earlier this year against Freedom on behalf of a group of Freedom dealers who are seeking enhancements to their contracted and agreed upon compensation arrangements. I am intimately familiar with that litigation in my capacity as the President of Shaw, including the decision by Messrs. Dhamani and Verma (and the other Plaintiffs) to publicize the commencement of their lawsuit. I attach to my Witness Statement as **Exhibit "11"** a copy of a Press Release entitled "Freedom Mobile Dealers Commence Litigation Against Freedom Mobile Distribution Inc." dated April 14, 2022, announcing the commencement of this litigation against Freedom, which I reviewed at the time it was issued.

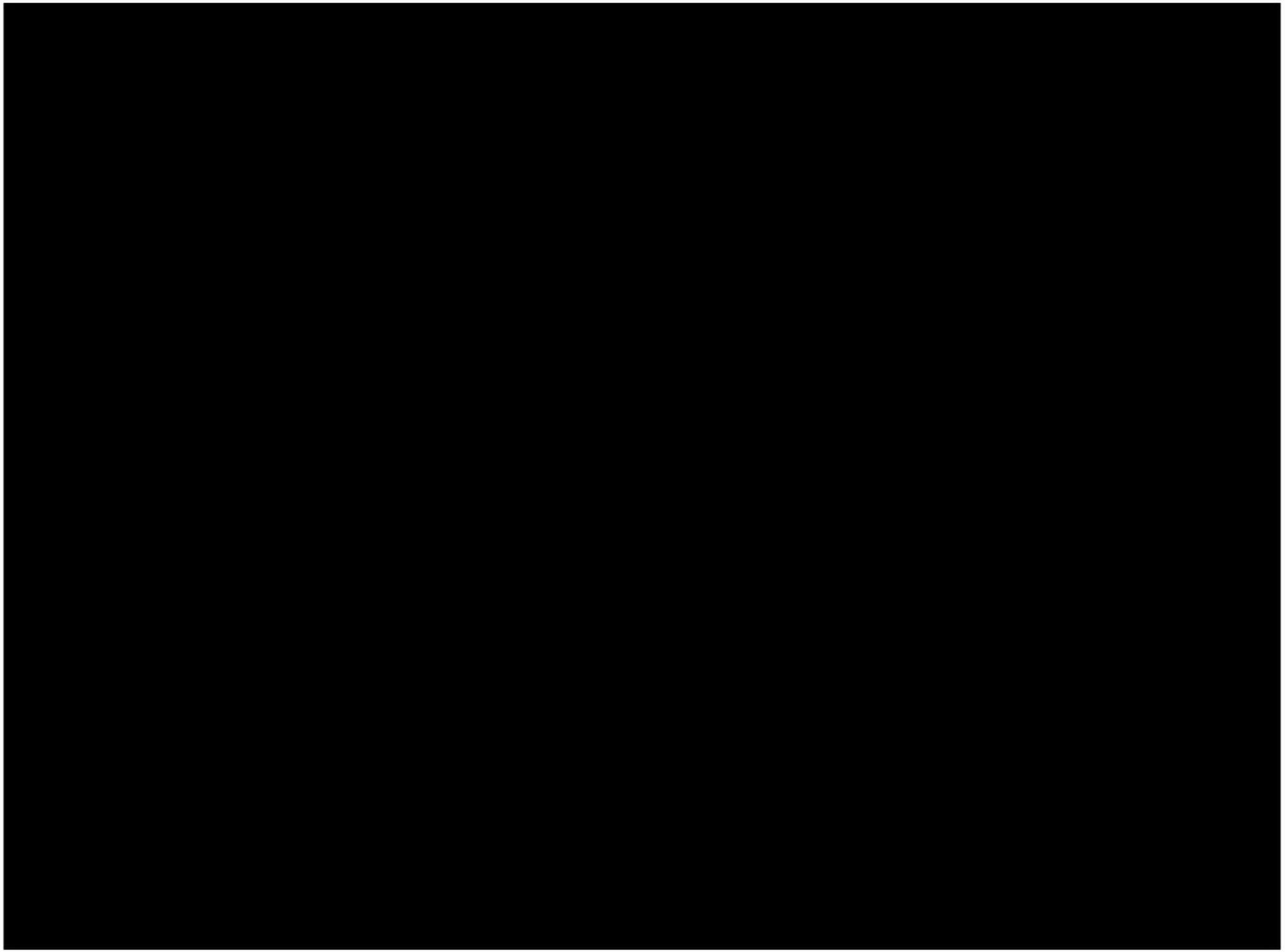
39. Prior to commencing this litigation, the group of dealers which included Messrs. Dhamani and Verma threatened on a collective basis to abandon all Freedom-branded retail stores operated by them (179 retail stores in total) and bring suit unless their various demands were resolved. Those demands included multi-million-dollar compensation

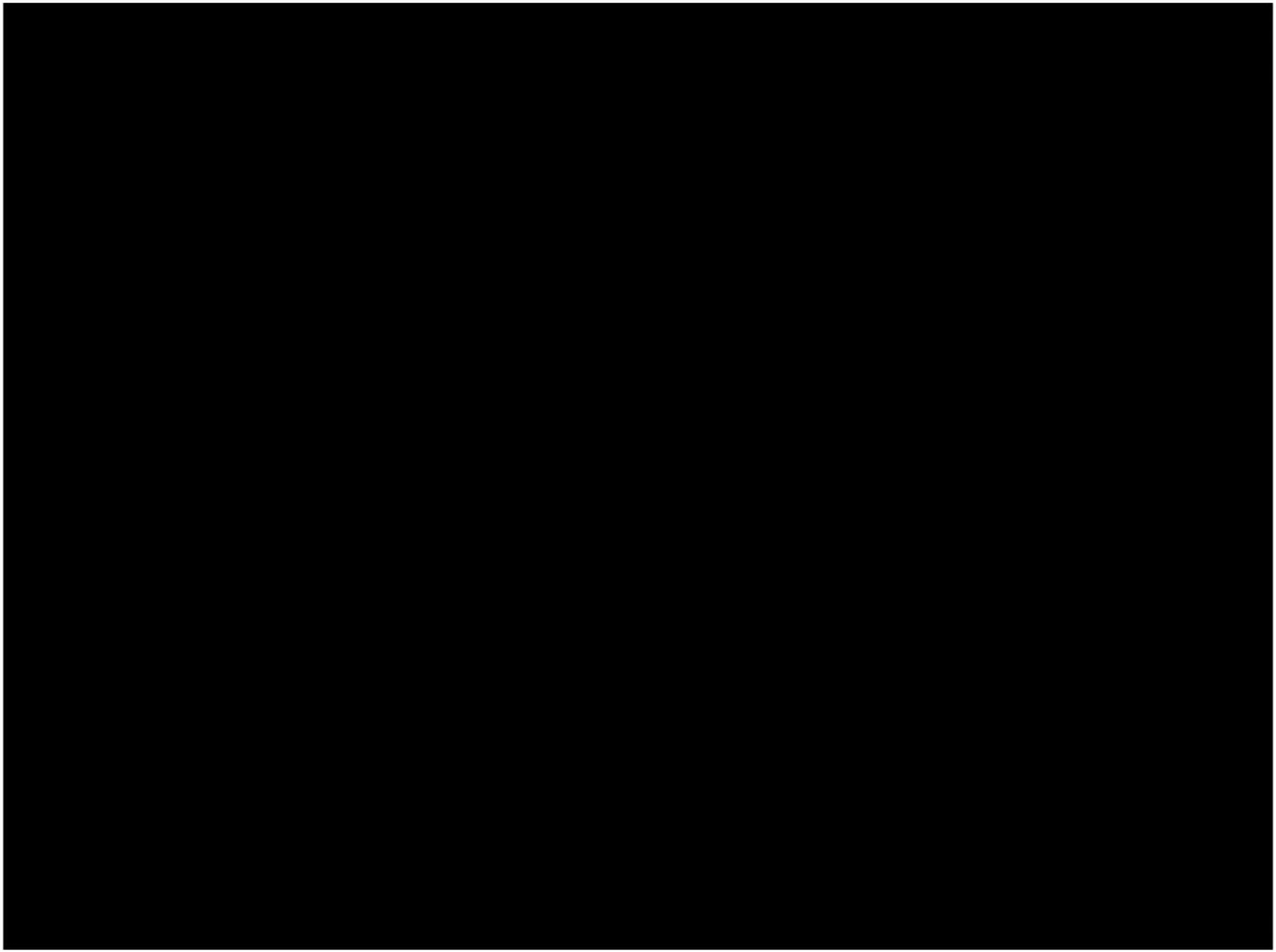
	Pre-Announcement (Mar. 15, 2019 – Mar. 14, 2021)	Post-Announcement (Mar. 15, 2021 – Sept. 15, 2022)[3]
Total Offers	145	198
Duration of Period	24 mos.	18 mos.
Average Number of Offers Per Month	6	11


Freedom Mobile Promotional Offers
Before and After Merger Announcement
25
20
15
10
5
0
April
May
June
July
August
September
October
November
December
January
February
March
2019/20
2020/21
2021/22

Interactive Technologies segments.







PART I – OVERVIEW OF THIS WITNESS STATEMENT

8. The Proposed Transaction involves a unique and transformative series of transactions among Shaw, Rogers and Videotron (and its parent company, Quebecor Inc.) [redacted] The Proposed Transaction involves two key elements:

(a) *First*, the purchase by Videotron from Shaw of Freedom, which will result in the expansion of Videotron's wireless operations to Alberta, British Columbia and large parts of Ontario that Videotron does not already serve; and

(b) *Second*, immediately following the divestiture of Freedom to Videotron, the purchase by Rogers of Shaw's wireline business (which includes Internet, cable and satellite television, and traditional phone services).[1]

[1] The sale of Shaw's wireline business to Rogers includes the customers of Shaw Mobile, but not the wireless facilities, which will have already been divested to Videotron.

the tariffed rates established by the CRTC that Freedom currently pays to Bell, Rogers and TELUS for the vast majority of its roaming requirements;

(b) Access to Shaw Go WiFi public hotspots for all Freedom subscribers and all subscribers of any other wireless brand owned by Videotron at no charge, for as long as this service is also provided to Rogers/Shaw customers [redacted];

(c) Rogers will continue to provide the same fibre backhaul services that Shaw currently provides to Freedom, except that such backhaul services will be free for four years instead of being charged at market rates. Videotron will have the right to purchase additional backhaul services from Rogers [redacted];

354. Rogers will also provide aggregated and disaggregated TPIA services using Rogers and Shaw wireline network infrastructure (wherever Rogers and Shaw provide home Internet services) to Videotron at rates that are further discounted from the CRTC tariffed wholesale rates.

C. Sequencing of the Proposed Transaction

355. The sequencing of steps in the Proposed Transaction is critical to understanding the **actual** transaction being proposed by Shaw and Rogers. The parties, and, as I understand it, the express terms of the Share Purchase Agreement entered into in connection with the divestiture of Freedom require that the sale of Freedom to Videotron be completed **before** the merger of Rogers and Shaw.

356. Thus, **the first step** of the Proposed Transaction is the purchase by Videotron from Shaw of Freedom for [redacted], which will result in the expansion of Videotron's wireless operations to Alberta, British Columbia and large parts of Ontario that Videotron does not already serve.

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

Exhibit P-R-008

Government of Canada / Gouvernement du Canada

Canada.ca

Statement from Minister Champagne on competitiveness in the telecommunications sector

From: Innovation, Science and Economic Development Canada

Statement

October 25, 2022 – Ottawa, Ontario

The Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry, made the following statement:

"Good afternoon, everyone.

"Later this week, the parties to the Rogers-Shaw transaction will begin mediation with the Competition Commissioner.

"As Minister of Industry, I wanted to take a moment to remind Canadians of where I stand with respect to spectrum licence transfers and to be crystal clear about my expectations moving forward.

"Earlier this year, I stated that I would—under no circumstances—permit the wholesale transfer of wireless spectrum licences from Shaw to Rogers.

"Today, I officially denied that request, which had been pending before me.

"My decision formally closes that chapter of the original proposed transaction.

Excerpt from: *Commissioner of Competition* v. *Canadian Waste Services Holdings Inc.* 2004 Comp. Trib. 10, *per* Simpson J., Gervason and Solursh, *affirmed by the FCA*.

Excerpt topic: Intervening events that affect the merger and that arise prior to or during an application are relevant to the section 92 process and *must* be brought to the attention of the Tribunal.

[1] This case began with an application by the Commissioner under section 92 of the *Competition Act*, R.S.C. 1985, c. C-34. Following a 13-day hearing, the Competition Tribunal (the "Tribunal") issued its Section 92 Decision, dated March 28, 2001, in which it allowed the Commissioner's application and ordered a remedy hearing. At the conclusion of that 3-day hearing, the Tribunal issued an order, dated October 3, 2001, in which it required CWS to divest the Ridge Landfill. In this Section 106 Application, CWS seeks to set aside the Divestiture Order and replace it with an order requiring the divestiture of a different landfill site on the basis that the circumstances which led to the making of the Divestiture Order have changed. Information about the transactions and proceedings that predate the present application is available in paragraphs 9 to 11 in the Section 92 Decision as well as in paragraphs 18 to 21 of the Statement of Facts which was marked as Exhibit A-4 during the hearing of this application.

Note: The section 92 application was commenced on April 26, 2000.

[3] At this time CWS owns the Ridge but is operating it independently of its other assets pursuant to the terms of the Hold Separate Order. As well, the Tribunal has ordered a stay of the Divestiture Order pending the outcome of this application.

[4] There have been Court proceedings since the Section 92 Decision. The Federal Court of Appeal dismissed CWS' appeal from the Divestiture Order (see *Canada (Commissioner of Competition)* v. *Canadian Waste Services Holdings Inc.* 2001 Comp. Trib. 34; *Canadian Waste Services Holdings, Inc.* v. *Canada (Commissioner of Competition)* 2003 FCA 131). Thereafter, CWS sought leave to appeal to the Supreme Court of Canada, but leave was denied on January 8, 2004.

II. THE INTERVENOR

[5] On July 29, 2003, the Tribunal granted the Corporation of the Municipality of Chatham-Kent leave to intervene in this Application. However, since the Corporation's concerns were met in a consent order made by the Tribunal on October 20, 2003, they are not addressed in these reasons.

III. THIS SECTION 106 APPLICATION

[6] Section 106 of the Act provides, in part, that:

106. (1) **The Tribunal may rescind or vary** a consent agreement or **an order made under** this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, **if the Tribunal finds that**

(a) **the circumstances that led to the making of the** agreement or **order have changed and, in the circumstances that exist at the time the application is**

106. (1) **Le Tribunal peut annuler ou modifier** un consentement ou **une ordonnance rendue en application** de la présente partie, à l'exception d'une ordonnance rendue en vertu des articles 103.3 ou 104.1 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, **il conclut que, selon le cas** :

a) **les circonstances ayant entraîné le** consentement ou **l'ordonnance ont changé et que, sur la base des**

[17] The six Alleged Changes can be divided into the following three categories:

(a) **The ToR**

Note: "ToR" means "terms of reference" under the *Environmental Assessment Act* (Ont.)

(i) the approval of the ToR for the Ontario EA of the Richmond Landfill expansion has been quashed by the Ontario Divisional Court;

(ii) the approval of the ToR for the Ontario EA of the Warwick Landfill expansion has been affected by the Divisional Court decision because the Ontario Minister of the Environment has said that an Ontario EA based on the current ToR will not be approved;

(b) **Host Municipality Support**

Note: "Host Municipality Support" is also described below as "HMS"

(i) the TGN has declared that it is not a willing host to the Richmond Landfill expansion application;

(ii) the Township of Warwick has declared itself to be opposed in principle to the Warwick Landfill expansion application;

Note: The "TGN" refers to the "Town of Greater Napanee"

(c) **CWS' Expectations**

(i) CWS no longer "expects" to receive approval for the Richmond Landfill expansion application by the autumn of 2001. Instead, it believes that approval cannot be obtained before 2007, if at all; and

(ii) CWS no longer "expects" to receive approval for the Warwick Landfill expansion application by the autumn of 2001, but that approval cannot be obtained before 2007, if at all.

A. TERMS OF REFERENCE

[18] The following paragraphs in the Tribunal's Section 92 Decision demonstrate that the existence of HMS and the fact that the ToR for the Expansions had received MOE approval led the Tribunal to conclude that the Expansions were likely to proceed.

> **[183]** There is a dispute among the parties as to whether CWS' applications to expand its landfills of Warwick and Richmond are likely to be approved. The Commissioner submits that approval is likely on the basis of evidence from CWS' internal documents, the fact that the process leading to the approval is well underway and that host municipalities are supporting the expansions. The respondents submit that there is no guarantee as to the approval at this stage and that to conclude otherwise would be speculation.
>
> **[184]** The Tribunal accepts that these applications are likely to be approved.

[19] The ToR for the Richmond Landfill were approved by the MOE on September 16, 1999 and the Warwick Landfill's ToR were approved on January 11, 2000.

[20] As noted above, the Tribunal relied, in part, on the fact that ToR for the Expansions had received the approval of the MOE for its prediction that Excess Capacity was likely to develop. However, at the Section 92 Hearing in November 2000, the Tribunal was not told by CWS that, in

the case of the Richmond Landfill, two applications for judicial review had been filed asking the court to quash the Minister's approval of the ToR.

[21] On September 20, 2000, two months before the Section 92 Hearing, the Canadian Environmental Law Association supported an application by Helen Kimmerly and Ben Sutcliffe for judicial review of the ToR for the Richmond Landfill. A copy of the Sutcliffe judicial review application was sent to CWS. Then, on October 5, 2000, the Mohawks of the Bay of Quinte also filed an application for judicial review.

[22] Dan Pio (then CWS' Comptroller and now its President) testified in this Section 106 Hearing that, at the time of the Section 92 Hearing, he was aware of the judicial review proceedings but also testified that, because CWS thought the applications had no merit, it did not disclose their existence to the Tribunal.

[23] In the Tribunal's view, CWS' assessment of the merits of the judicial review applications was not a proper basis for withholding the fact that they existed. The Tribunal was left to believe that the ToR approvals were unchallenged. This meant that the Ontario EAs were likely to proceed in an orderly and predictable manner leading to their approval by MOE in the autumn of 2001. With the ToR approvals in place and unquestioned, it was reasonable for the Tribunal to conclude that the Expansions would be in operation by the end of 2002.

[24] CWS is now asking the Tribunal to accept that (i) the fact that the Divisional Court quashed the MOE's approval of the Richmond ToR and (ii) the fact that the MOE is treating the Warwick ToR as if they had also been quashed, are changes in the circumstances that led to the making of the Divestiture Order. However, on the unusual facts of this case, the Tribunal has determined that CWS' silence about the existence of the applications for judicial review had the effect of misleading the Tribunal about the likelihood that the Ontario EAs would be approved in the autumn of 2001. At the time of the Section 92 Hearing, the ToR approvals were caught in the uncertainty of litigation. They remain in that state today as the case awaits disposition by the Ontario Court of Appeal. In reality, there has been no change and the Alleged Changes are not *bona fide* because they exist only because CWS failed to provide the Tribunal with all the relevant facts.

B. HOST MUNICIPALITY SUPPORT

(1) The Richmond Landfill

[25] There was some controversy in this Section 106 Application about how the Tribunal dealt with the issue of HMS in the Section 92 Hearing. The relevance of HMS is that, if it were available, the likelihood that the Expansions would be built, thereby creating Excess Capacity, would be greatly improved.

[26] CWS says that HMS was not addressed in the Commissioner's Section 92 Application or in his supporting Statement of Grounds and Material Facts. CWS also says that there was no evidence that the Expansions had HMS. CWS submits that the issue of HMS was not raised until the Commissioner's final written argument, thus precluding CWS from tendering evidence on the point.

[27] The Tribunal has reviewed the record and agrees that the Commissioner's initial pleadings did not mention HMS. However, the record also shows that HMS became an issue during the Section 92 Hearing and that, contrary to CWS' submission, there was evidence on the matter. The Section 92 Reasons refer to the evidence of Todd Pepper, who testified, in general terms, that, in the development and expansion of landfills, HMS was very important. By way of example he said that, in the case of the Essex-Windsor landfill, it had shortened the approval process by two years. As well, in the transcript at 3:287 (8 November 2000), Member Schwartz asked Mr. Pepper about the significance of HMS. This question signaled the Tribunal's interest in HMS.

[28] There was also specific evidence in a document marked as Exhibit 298 in the Section 92 Hearing and as Exhibit R-18 in this hearing. It is entitled "CWS Ontario Division Landfill Expansion - Project Requirement and Scheduling" (the "Report") and is dated September 22, 1997. It was prepared by Kevin Bechard, Area Senior Manager of Facilities Development for CWS. It indicated at page 5 that, three years before the Section 92 Hearing, CWS believed that HMS was a key attribute for a landfill expansion site and that both the Richmond and Warwick Landfills were strong candidates for expansion. The relevant passage in the Report reads as follows:

> **CANDIDATE SITES FOR LANDFILL EXPANSION**
>
> The candidate sites for landfill expansion have a number of key attributes (not ranked):
>
> - Proximity to central Ontario marketplace;
> - Land assembly for landfill expansion;
> - **Supportive host community**;
> - Appropriate hydrogeological conditions; and,
> - Good transportation access.
>
> Sites which possess these attributes must be deliverable within a three year time frame in order to meet CWS requirements from internal growth and to provide capacity to respond to the Metro Toronto waste disposal contract. **The strongest candidate sites for expansion**, within the current CWS portfolio of sites, are the **Richmond Twp. LF**, **Warwick Twp. LF** and Blenheim LF. [Tribunal Emphasis]

[29] The Tribunal accepted the Commissioner's submissions that the Expansions had HMS. This conclusion was reasonable because, at the Section 92 Hearing, CWS made no submissions and called no evidence which cast doubt on the existence of HMS for the Expansions. However, it now appears that such evidence was available. For example, with respect to the Richmond Landfill and the TGN, CWS knew but did not tell the Tribunal:

- That representatives of the TGN had met with the MOE on February 18 and August 24, 1999, to raise concerns about the proposed ToR for the Environmental Assessment for the Richmond Landfill expansion.
- That another meeting between the TGN and the MOE was held on August 15, 2000, at a time when the ToR had not yet been approved. The TGN again expressed concerns about the process.

- That the TGN asked the MOE not to approve the ToR because, *inter alia*, they addressed neither the size nor the necessity for the Expansion.
- That, when the ToR were approved for the Richmond Landfill on September 16, 1999, none of the TGN's concerns had been addressed.
- That the TGN held a town council meeting on October 23, 2000. Messrs. Bechard and Pinkerton of CWS were in attendance and they reported to CWS that the Chief of the Mohawks of the Bay of Quinte had also been there and had informed the council that the Band was seeking a Federal EA for the Richmond Expansion.
- That, in October 2000, CWS' consultants began to express concern. In a memo dated October 26, 2000, to Kevin Bechard of CWS from Peter Homenuck, of IER Planning, Research and Management Services ("IER") about changing circumstances related to both the Richmond and Warwick Expansions, Mr. Homenuck stated "We can anticipate an increasingly aggressive and focused opposition".

[30] While it is true that the TGN passed a formal resolution concerning its lack of support for the Richmond Expansion on March 26, 2001, the evidence shows that, long before the Section 92 Hearing began in November 2000, CWS knew that its Richmond Expansion project did not have HMS from the TGN. Yet, CWS asks the Tribunal to conclude that the fact that the TGN has "declared" its status as an unwilling host in a formal resolution is a change in circumstances which should engage section 106 of the Act.

(2) The Warwick Landfill

[31] Exhibit R-18 indicated that the Warwick Expansion enjoyed HMS in September 1997. In the Section 106 Hearing, Paul Murray, CWS' Project Manager for the Warwick Expansion testified that the Township formally stated that it was opposed, in principle, to Warwick Expansion as far back as 1998.

[32] As well, as mentioned above, Mr. Homenuck was a consultant on both Expansions and, in his memo of October 26, 2000, he spoke of his expectation that the Warwick Expansion would face ". . . an increasingly aggressive and focused opposition . . .". CWS received this memo directly from Mr. Homenuck.

[33] At a date before January 1999, at a meeting attended by Kevin Bechard on behalf of CWS, Warwick's Township council passed a motion regarding the Warwick Expansion at 750,000 tonnes per year. It said "Opposed in principle to a landfill of this size". The document which referred to the motion was marked as Exhibit R-65 in this hearing. It shows that, at the time of the Section 92 Hearing, CWS knew that the Warwick Expansion proposed by CWS had no HMS. Yet, because CWS called no reply evidence on the issue, the Tribunal was left with the impression that the project had the support of its host municipality.

[34] The Tribunal concludes that the Alleged Changes regarding HMS for the Expansions are not *bona fide*. They exist only because CWS did not inform the Tribunal about the true state of affairs. Such changes will not be accepted for the purpose of an application under section 106 of the Act.

C. CWS' EXPECTATIONS

[35] CWS' evidence in this Section 106 Hearing is that it still believes that the judicial review applications will fail and that the Ontario EAs will proceed based on the ToRs as originally approved. Dan Pio stated that the Expansions are a top priority for CWS and that CWS' consultants are still retained and are working on documents to be used during the Ontario EAs. The Alleged Change is limited to CWS' expectations about the timing. In the Section 92 Decision, the Tribunal found, largely based on internal CWS documents, that the Expansions would be in operation by the summer of 2002. Mr. Pio testified at the Section 106 Hearing that CWS now expects the Expansions to receive waste in 2007 at the earliest. There was also some confidential evidence on the matter. It is discussed in the next paragraph of this decision and is deleted in the public version of this document.

[36] [Confidential]

[37] The Tribunal concludes that, at the Section 92 Hearing, CWS did not present a realistic assessment about when the Expansions could be in operation. This appears to have occurred because it did not consider the possible impact of the judicial review applications and the lack of HMS. In the Tribunal's view, it is not open to CWS to raise revised expectations about timing as changes of circumstances when the facts which could reasonably have been expected to impact the timing were known to CWS and not presented at the Section 92 Hearing.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[38] This application is hereby dismissed with costs to the Commissioner. If the parties cannot agree on a lump sum for costs, they may apply to the Tribunal for an order fixing costs.

DATED at Ottawa this 28th day of June 2004.

SIGNED on behalf of the Tribunal by the members.

(s) Sandra J. Simpson

(s) Paul Gervason

(s) Gerry Solursh

[76] The legislative history of the Tribunal, and its enabling legislation, reflect an intention to judicialize to a substantial degree the processes of the Tribunal. This is notably reflected in: the Tribunal's establishment as a "court of record" by virtue of subsection 9(1) of the CTA; subsection 8(2) of the CTA which confirms that the Tribunal has, with respect to "the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record"; the requirement that a judicial member preside over the Tribunal's hearings; and the presence of appeal rights to the FCA as if a decision of the Tribunal was a judgment of the Federal Court (*The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 141; *B-Filer Inc et al v The Bank of Nova Scotia*, 2006 Comp Trib 42 at para 256). Furthermore, the Tribunal adheres to the duty of fairness, and subsection 9(2) of the CTA requires it to conduct its proceedings in accordance with the principles of natural justice, as it provides that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit". In addition, it has been repeatedly recognized that the judicial-like and court-like nature of the Tribunal, and the important impact that its decisions can have on a party's interests, mean that the Tribunal must act with the highest degree of concern for procedural fairness: "[t]he Tribunal resides very close to, if not at, the 'judicial end of the spectrum', where the functions and processes more closely resemble courts and attract the highest level of procedural fairness" (*Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 ("***VAA***") at para 29).

[77] In sum, the Tribunal performs a quasi-judicial function much like that of a court of law. The Tribunal is adjudicative in nature and is an impartial decision-maker. The Tribunal weighs evidence, hears the contradictory positions of the parties and witnesses, makes findings of fact and assesses credibility, and issues decisions that affect the rights and duties of the parties. Since proceedings before the Tribunal are highly "judicialized" and, subject to the informality and expeditiousness aspects of subsection 9(2) of the CTA, often virtually indistinguishable from civil trials in the courts, openness fosters the integrity of the Tribunal proceedings just as it does for judicial proceedings. In light of the foregoing, there are no grounds not to fully extend to the Tribunal and to the Commissioner's Motion the principles established in *Sierra Club* in a judicial context.

[78] I am therefore satisfied that, when considering whether to maintain the identity of a witness confidential and declare that a portion of a hearing shall not be open to the public, the Tribunal must apply the *Sierra Club* principles and has to balance the salutary effects of the contemplated order against its deleterious effects, as instructed by the SCC in *Sierra Club*. However, similarly to what Justice Dawson did in *Sears*, the first branch of the *Sierra Club* test must be reformulated to reflect the specific reference contained in the CT Rules to the notion of "details of the specific, direct harm", as opposed to a "serious risk to an important commercial interest".

[79] Applying the rights and interests engaged in this case and the CT Rules to the analytical framework of *Sierra Club*, I would therefore rephrase as follows the test to determine whether an order designating as confidential information relating to the identity of a witness and allowing such witness to testify *in camera* at a hearing before the Tribunal ought to be granted. Such an order should only be granted if the Tribunal is satisfied that:

5 Suppose, for example, a certificate which was tendered for registration showed on its face that an appeal was pending; or it indicated that the time within which an appeal might be taken had not expired. Suppose, too, that the judgment debtor did not appear. Can it fairly be said that because this defence under s. 3(6) (*e*) of the Act was shown to the Court not by the judgment debtor but from the record itself, the Court was powerless to give effect to it and instead had to close its eyes to what it knew in fact to be the case? The question answers itself. No Court is obliged to pretend such an ignorance of realities. If the Court becomes legitimately seised of facts which show that the judgment offered for registration is not properly registrable, its plain duty is to refuse registration. It is not bound to direct registration merely because the judgment debtor was not the source from which the relevant facts came to its notice.

6 I agree accordingly that Molloy, Co.Ct.J., was right in refusing registration. I would dismiss the appeal.

End of Document

> argument that the "sins" of defence counsel were improperly visited upon the client is not valid. Absent a finding of ineffective assistance of counsel, which is not suggested here, the client is fixed with the steps taken in furtherance of his defence.

[25] Clark, J. concluded that Mr. Gager had effectively changed his strategy based on his earlier ruling. He went on to say at paragraph 97:

> **97** Mr. Fishbayn was entitled to rely on the earlier ruling as a shield against potential prejudice to his client, but when Mr. Gager effectively sought to convert the ruling into a sword by creating for the jury an arguably counterfactual picture of his involvement with the gang, he ran the risk that the ruling would be revisited at the instance of the other parties in order to offset any potential to mislead the jury engendered by the substance of his evidence to that point. (emphasis mine)

[26] In this case, the Crown could not disclose the contents of the protected psychiatric reports nor could the Crown have any confidence as to what evidence Mr. Bush would provide if he chose to testify two years later. The full extent of Mr. Bush expected evidence was brought into sharper focus when defence counsel detailed the nature of the evidence that he was expected to give; namely that this was not a planned home invasion and that Mr. Bush was simply "testing a theory" and had no knowledge of the deadliness of suffocation by plastic bags. As noted in both *Sessions*[2] and *Hong*[3], a material change in circumstances, in the context of rulings based on probative value and prejudicial effect, is a change that has altered or impacted the balancing in a manner sufficient to warrant re-examination. This is what happened here.

[27] In *Niemi*[4], [2008] O.J. No. 4621, at paragraph 14, the court concluded that where an accused testifies as to matters in issue and there is a risk of that the jury will be misled, the Crown may use previously excluded evidence to challenge the accused's assertions.

[28] Immediately after my similar fact ruling, Defence was put on notice that the Crown would seek to revisit it should Mr. Bush testify. Rulings excluding evidence preserve the right to a fair trial. They temporarily set aside the truth that could damage the integrity of the trial rather than permanently distorting the truth. In contrast, the impact of prohibiting cross-examination by

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[2] *R. v. Sessions*, (1996), A.R. 121 (C.A.), at para. 14
[3] *R. v. Hong*, 2015 ONSC 5454, at para. 14
[4] *R. v. Niemi,* [2008] O.J. No. 4621, at para. 14

the Crown on provable falsehood would be to distort the truth and put "*blinders* over the eyes of the triers of fact."[5]

[29] I agree with Clark J.'s conclusion in *Gager* that the defence is entitled to rely and evidentiary rulings as a shield against potential prejudice, but the defence should not be permitted to use these rulings as swords in constructing their defence; to distort the truth and to mislead the jury. To do so would permit an accused to take advantage of the court. As I held in my ruling on the *Corbett* application, any potential prejudice to the accused can be mitigated by a proper mid-trial instruction.

[30] For these reasons, the Crown's motion to cross-examine the accused on the underlying facts of his prior convictions is granted.

Mr. Justice Robert N. Beaudoin

Released: December 12, 2017

[5] Language used by Smith J. in *R. v. Rouschop* (unreported)

[45] Mr. Sebastian further contends that the Tribunal, in determining whether to dismiss his complaint under s. 27(1)(d)(ii), failed to take the complaint as proven. The judge said in this regard:

> [79] The petitioner argues that the Tribunal erred in its assessment of whether the settlement offer was reasonable, under s. 27(1)(d)(ii), by not taking the complaint as proven; it must be evaluated as alleged. In doing so, the decision is patently unreasonable. He also suggests that the Tribunal failed to appreciate where the consent order and the offer did not properly accommodate him and provide him with an adequate remedy for the loss that he had sustained.
>
> [80] The Tribunal addressed that at para. 144. I cannot find that the Tribunal's approach to the complaints was patently unreasonable. It is similar to the argument that the Tribunal ought to have declared the consent award a nullity. The Tribunal cannot ignore objective facts, one of which is the existence of the consent award, particularly when it is addressing a settlement offer. I agree with VCHA: to accept only the facts provided in the complaint amounts to consideration of the subjective facts only. As *Renaud* makes clear at para. 51: "The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged."
>
> [81] In respect of the Tribunal's determination that $15,000 was a reasonable amount for injury to dignity, I cannot find that to be patently unreasonable. The petitioner's argument relies on his view that the Tribunal erred in not taking the complaint as alleged. I have rejected that argument.
>
> [Emphasis added.]

[46] One of the appellant's main submissions on this point is that since he did not agree to the Consent Award, the Tribunal should have accepted for the purposes of the application to dismiss that he had not been properly accommodated and that his loss of income was approximately $60,000, not the $17,500 he received. In my view, this is just another attempt by the appellant to remake the "nullity" argument.

[47] I note also that the Tribunal, in arriving at its conclusion, did consider how the Settlement Offer might compare with a successful human rights complaint:

> [167] It appears to me that, if this complaint went to a hearing and he was successful, Mr. Sebastian would be unlikely to recover any damages for injury to dignity in excess of what has been offered by VCH.
>
> [168] I am satisfied that the Consent Award was intended, on a plain reading of its terms and in all of the surrounding circumstances, to cover all claims relating to accommodation. I am alive to the need to ensure that complainants have access to remedies available under the *Code*. However, I

> am satisfied that Mr. Sebastian, through the Union, had that access and the matters underlying both the grievances and the complaint have now been resolved.
>
> [Emphasis added.]

[48] Finally, in this Court, the appellant did not argue that the Settlement Offer itself was unreasonable.

V. CONCLUSION

[49] For the reasons set out above, I am of the view that the chambers judge was correct in concluding that the Decision was not patently unreasonable. The Tribunal clearly has a broad discretion in an application such as this to consider whether permitting the complaint to proceed would further the purposes of the *Code*. In these circumstances, it was proper for the Tribunal to consider the Consent Award and to give effect to the principles relating to the relitigation of human rights issues.

[50] Since the appellant has not identified any aspect of the Decision which should have led the judge to conclude that it was patently unreasonable, I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Fisher"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Plaintiff,** **v.** **ARCH COAL, INC., et al.,** **Defendants.**	**Civil Action No. 04-0534 (JDB)**
STATE OF MISSOURI, et al., **Plaintiffs,** **v.** **ARCH COAL, INC., et al.,** **Defendants.**	**Civil Action No. 04-0535 (JDB)** **(Consolidated Cases)**

MEMORANDUM OPINION

On May 29, 2003, defendant Arch Coal, Inc. ("Arch") entered a Merger and Purchase Agreement to acquire defendant Triton Coal Co. ("Triton") -- including two mines, the Buckskin mine and the North Rochelle mine -- from Triton's parent, defendant New Vulcan Coal Holdings, LLC ("Vulcan"). Arch and Triton filed pre-merger notification forms on July 11, 2003, with the Department of Justice and the Federal Trade Commission ("FTC" or "Commission") under the Hart Scott Rodino ("HSR") Act, 15 U.S.C. § 18a. In August 2003, the FTC sent Arch and Triton Requests for Additional Information ("Second Requests") to aid in its investigation of the

proposed acquisition. Arch informed the FTC in early December 2003 that it was contemplating the sale of the Buckskin mine to Peter Kiewit Sons, Inc. ("Kiewit"). Arch notified the FTC in late January 2004 that an agreement to sell Buckskin to Kiewit had been signed ("Kiewit transaction"). The FTC considered the Arch-Triton merger in light of the additional information concerning the proposed Kiewit transaction, but nevertheless issued an administrative complaint challenging the merger.

On April 8, 2004, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the FTC filed a motion for preliminary injunction to enjoin Arch from acquiring, directly or indirectly, any stock, assets, or other interests in Triton. That same day, plaintiffs States of Arkansas, Illinois, Iowa, Kansas, Missouri, and Texas ("States") filed a similar motion for a preliminary injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26.[1] Presently before the Court is the motion in limine filed by the FTC to exclude, for the purposes of the preliminary injunction proceeding, all evidence and argument on the issue of Arch's proposed sale of the Buckskin mine to Kiewit. In effect, the FTC asks this Court to assess the proposed merger as if Arch would retain both the North Rochelle and Buckskin mines.

DISCUSSION

The FTC characterizes the proposed post-merger divestiture of Buckskin to Kiewit as a "self-help permanent remedy" that is not properly before this Court. FTC Mot. at 3. The FTC argues that the Court should exclude consideration of the Kiewit transaction because, as a question of "remedy," it cannot be considered by this Court in a Section 13(b) action for

[1] By minute entry order issued on April 21, 2004, this Court consolidated the FTC and States cases for purposes of the preliminary injunction hearing and all discovery and pre-hearing proceedings related thereto.

preliminary relief, and because the proposed Kiewit transaction is not a sufficiently binding commitment in any event. In their responses to plaintiffs' complaints and requests for a preliminary injunction, defendants have explained that the proposed acquisition challenged by the FTC is properly seen as a set of two transactions involving, first, the acquisition of Triton's North Rochelle and Buckskin mines by Arch, and then the "concurrent divestiture" of the Buckskin mine to Kiewit. Arch Answer at 1. Defendants argue that ignoring the second transaction would be tantamount to the Court assessing "a purely hypothetical transaction of the Commission's making -- that none of the parties are proposing." Defs.Opp. at 2.

The Court's analysis centers initially on the task of defining the transaction that is being challenged by the FTC. The FTC argues that the Kiewit transaction is merely a proposed remedy to the Arch-Triton merger, while defendants argue that it is a central component of what they are proposing to do and hence what the FTC is challenging. The case most directly on point is Federal Trade Comm'n v. Libbey, 211 F.Supp.2d 34 (D.D.C. 2002). In Libbey, the FTC brought a Section 13(b) preliminary injunction proceeding to enjoin the acquisition of one glassware manufacturer by another. About a month after the FTC had voted to seek a preliminary injunction, and a week after the FTC had filed its complaint in district court, the parties to the merger amended their agreement to allow one party to acquire only a part of the other's manufacturing plants and glassware business, while the rest of the assets would be transferred to another entity. Id. at 38. The court in Libbey, noting that the parties had made a good-faith effort to address the FTC's concerns regarding the original merger agreement in amending that agreement, concluded that

> . . . parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in

> an effort to address the government's concerns. And when they do so under circumstances as occurred in this case, it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued.

Id. at 46.

The FTC makes much of the fact that here defendants Arch and Triton, unlike the defendants in Libbey, have not amended their merger agreement to include the sale of Buckskin to Kiewit. The Commission notes that the Kiewit transaction is separate and distinct from the Arch-Triton merger agreement, that the Arch-Kiewit contract is contingent upon the successful acquisition of Triton by Arch and contains provisions that allow one or both parties to walk away from the deal, and that the deal might be renegotiated. The Commission therefore argues that the only transaction squarely in issue before this Court is the Arch-Triton merger.

While it cannot be denied that Arch, Triton, and Kiewit have chosen to structure the proposal as two separate transactions rather than one three-way agreement, the Court does not find this structural choice to be dispositive on the issue whether the Kiewit transaction should be considered in the preliminary injunction proceeding. In Libbey, the court noted that even after the parties had amended their merger agreement, the FTC remained capable of vetting the amended agreement and had in fact voted to enjoin the amended merger agreement. The court therefore concluded that it was the amended merger agreement that the FTC was challenging and that was properly before the court for review on the FTC's motion for preliminary injunction. Libbey, 211 F.Supp.2d at 46. Here as well, Arch informed the Commission in late January 2004 that it had signed an agreement with Kiewit and the FTC then issued its administrative complaint challenging the merger after "determin[ing] that the competitive concerns posed by Arch's acquisition of Triton were not remedied by Arch's offer to sell the Buckskin mine to Kiewit."

FTC Mot. at 4. Thus, the FTC has assessed and is in reality challenging the merger agreement imcluding the Buckskin divestiture.

The fact that the Kiewit transaction is contingent on the successful acquisition of Triton by Arch is not only a logical matter of course, but also reinforces, rather than casts doubt on, the representation the parties have made that the sale of the Buckskin mine will in fact take place after the Arch-Triton merger. The uncontroverted facts, as presented to the Court by both parties, reveal that the Kiewit transaction was proposed as a good faith response to the Commission's investigation and concerns regarding the competitive effects of the Arch-Triton merger. Arch and Kiewit, through senior officers, have testified unequivocally that each is fully committed to the transaction if the Arch-Triton merger is allowed, and that the Buckskin sale will definitely occur. The contract termination provisions referenced by the FTC do state that either Arch or Kiewit may terminate the agreement after a certain set "expiration date," if the closing on the Kiewit transaction, as determined by the closing of the Arch-Triton transaction, has not occurred by that date. But that is little more than a restatement of the obvious fact that the Arch-Kiewit contract is contingent upon the successful acquisition of Triton by Arch. Although theoretically the parties could renegotiate the Kiewit deal, senior officers have affirmed their intent to consummate all aspects of the transaction if not enjoined by this Court. The Court therefore concludes that the transaction that is the subject of the FTC's challenge is properly viewed as the set of two transactions involving the acquisition of Triton by Arch and the immediate divestiture of the Buckskin mine to Kiewit.

The FTC also argues that consideration of the Kiewit transaction is beyond the purview of this Court in a Section 13(b) preliminary injunction hearing and would impinge on the authority of

doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." Federal Trade Comm'n v. Heinz, 246 F.3d 708, 714-15 (D.C. Cir. 2000) (citations omitted). The FTC therefore argues that the DOJ antitrust cases cited by defendants are not applicable because in those cases the district court does sit as the finder of fact. This distinction, however, does not affect the applicability of the observation in United States v. Franklin Electric Co., Civ. A. No. 00-c-0334-c (W.D.Wisc. July 19, 2000) (order denying plaintiff's motion in limine), that a proposed transaction to resolve government antitrust concerns regarding a proposed merger or acquisition should be considered by the district court as "relevant to the determination whether, considered as a whole, defendants' transaction will lessen future competition substantially." Even under Section 13(b), this Court's task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the Court to review the entire transaction in question. Given this Court's conclusion, based on all circumstances including the evidence presented at the preliminary injunction hearing, that the Arch-Kiewit transaction will in fact occur as agreed if the Arch-Triton merger goes forward, the Court is unwilling simply to ignore the fact of the divestiture of Buckskin to Kiewit.

CONCLUSION

Because this Court regards the challenged transaction as consisting of both the acquisition of Triton by Arch and the divestiture of the Buckskin mine to Kiewit, and because its role under Section 13(b) requires it to give the challenged transaction a thorough, good-faith review, the Court concludes that excluding evidence and argument regarding the Kiewit transaction would be

tantamount to turning a blind eye to the elephant in the room. The FTC's motion in limine will therefore be denied. A separate order accompanies this memorandum opinion.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: July 7, 2004

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Extract from: ***In re Otto Bock Healthcare North America, Inc.*, 2019 FTC LEXIS 79, *per* Commissioner Chopra.**

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Excerpt topic: Intervening events that affect the merger and that arise prior to or during an application are properly considered by the Tribunal (or by the Courts in U.S. anti-trust proceedings).

Because Respondent failed to establish the three elements of the failing firm defense--*i.e.*, that Freedom would be unable to meet its financial obligations in the near future, that it would not be able to reorganize successfully under *Chapter 11 of the Bankruptcy Act*, and that it conducted a reasonable, good faith search for alternative offers that would keep its assets in the market and pose a less severe danger to competition--we find the defense inapplicable.

VIII. DIVESTITURE

Respondent has entered into[TEXT **[*126]** REDACTED BY THE COURT] Respondent argues that the proposed divestiture[TEXT REDACTED BY THE COURT] must be considered in determining whether Complaint Counsel have made a *prima facie* showing of anticompetitive effects. [51] RAB at 28-31. Respondent claims that a structural presumption of anticompetitive effects is inappropriate because, with the proposed divestiture, the HHI increase from the Acquisition is zero. RAB at 4, 28-29, 32; RRB at 1, 9-11. According to Respondent, Complaint Counsel ignored the divestiture and failed to establish a *prima facie* case. RAB 28-30, 32. Respondent cites to several cases to support its argument: *FTC v. Arch Coal*, No. 1:04-cv-00534, ECF No. 67 (D.D.C. July 7, 2004); *FTC v. Libbey, Inc., 211 F. Supp. 2d 34 (D.D.C. 2002)*; *United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969)*; and *White Consolidated Industries, Inc. v. Whirlpool Corp., 781 F.2d 1224 (6th Cir. 1986)*. In each of these cases, the court found that the divestiture agreement should be considered together with the merger in determining whether the merger would violate *Section 7*. *Arch Coal* and *Libbey* factored the divestiture into the *prima facie* analysis, as did the district court opinion in *White Consolidated Industries*, which was affirmed on appeal. [52] *See White Consol. Indus., Inc. v. Whirlpool Corp., 619 F. Supp. 1022, 1026 (N.D. Ohio 1985)*, *aff'd*, *781 F.2d 1224 (6th Cir. 1986)*; *Arch Coal* ***[*127]*** *, 329 F. Supp. 2d 109, 124 (D.D.C. 2004)*; *Libbey, 211 F. Supp. 2d at 46*.

All of those cases, however, are distinguishable in two important respects. First, in each case, the merger was unconsummated and would occur simultaneously or almost simultaneously with the divestiture. And second, in each case, the parties entered into the divestiture agreement before the plaintiff filed the complaint or soon after, such that the divestiture could be deemed

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Although in the proceeding below Respondent argued that[TEXT REDACTED BY THE COURT] should be assessed, on appeal it focuses on the[TEXT REDACTED BY THE COURT]. *Compare* RAB at 3-4 *with* RPTB 84, 89-90.

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In *Atlantic Richfield*, the court stated that the Government could not establish a reasonable probability of success at trial by citing market share statistics while completely ignoring the sale agreement accompanying the merger, and that merging firms should be able to "eliminate probable anti-competitive effects by . . . a disposition of assets[.]" *297 F. Supp. at 1068-69*.

part of the transaction being challenged. [53] Thus, in each of the cases Respondent cites, the challenged transaction consisted of both the merger and the divestiture, even if they were technically separate agreements. That is not the situation here.

Here, the Acquisition was consummated two years ago, while the divestiture is still in the future. The Commission filed its Complaint challenging the Acquisition long[TEXT REDACTED BY THE COURT] [54] Under these facts, the[TEXT REDACTED BY THE COURT] divestiture is not **[*129]** part of the challenged transaction but is one of several post-Acquisition proposals that would override the Commission's choice of remedy. The cases that incorporate the divestiture into the *prima facie* analysis of the merger are entirely inapposite. [55]

Further, in this case, the proposed future divestiture cannot preclude a finding of liability because the Acquisition has already harmed competition. Nearly two years have passed since the Acquisition, and nearly two years of competitive harm have accrued. A future divestiture cannot erase past competitive injury, and it cannot defeat liability based on the harm that already has occurred.

In any case, [TEXT REDACTED BY THE COURT] We cannot fail to find liability on the facts of this case and allow an anticompetitive merger to stand **[*131]** based on a[TEXT REDACTED BY THE COURT] agreement.

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n53 **[*128]** In *Arch Coal*, the court explained that the Commission brought its complaint after it was made aware of the divestiture agreement, such that the Commission had assessed and was in reality challenging the merger agreement with the divestiture. 1:04-cv-00534, ECF. No. 67, slip op. at *4. So, too, in *Atlantic Richfield*, the court noted that the sale was "fully known to the Government when the complaint was drawn." *297 F. Supp. at 1067*. In *White Consolidated Industries*, the complaint sought to enjoin both the initial sale and the related divestiture. *612 F. Supp. 1009, 1012 (N.D. Ohio 1985)*. In *Libbey*, the complaint was filed one week before the parties finalized their agreement that included a third-party asset sale, but in that case the finalized agreement amended the original merger agreement, which was deemed abandoned. The FTC then voted to enjoin the amended merger agreement, which the court construed as an indication that the Commission was now challenging the amended transaction. *Libbey, 211 F. Supp. at 46*.

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[TEXT REDACTED BY THE COURT]

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Even if this were an unconsummated transaction on all fours with *Arch Coal* and other cases cited by Respondent, a divestiture of assets would not automatically result in an HHI change of zero. The HHI calculation would depend on our assessment of whether the divestiture would succeed in creating an effective new competitor. *See infra* Section IX.A (finding the proposed divestiture to[TEXT REDACTED BY THE COURT] insufficient to restore competition). For instance, it would be inappropriate to assign the current market share of an existing successful competitor to a buyer of divested assets who is unlikely to be as effective a competitor. Acquiring a company and then divesting it to a buyer who is likely to fail would have a similar effect on competition as buying and then shelving the assets of a competing firm. *See White Consol. Indus., 612 F. Supp. at 1022* (regarding Whirlpool's planned purchase of KitchenAid and **[*130]** accompanying partial divestiture to Emerson: "[T]he importance of the [HHI] statistics hinges upon the viability and sincerity of Emerson as a new competitor in the dishwasher market. If Emerson will become a vibrant new force in the dishwasher market, the plaintiffs' assignment of KitchenAid's manufactured units market share to Whirlpool is inappropriate and the statistical warning system is never triggered. Still, if Emerson is overly optimistic about its prospects or disingenuous about its intentions, the assignment of the KitchenAid percentage points to Whirlpool is proper and the statistical warning system demands careful scrutiny of the transaction.").

Excerpt from: ***Commissioner of Competition v. CCS Corporation et al., 2012 Comp. Trib. 14, per Simpson J., Crampton C.J. and Askanas, affirmed by the FCA, reversed on other grounds by the SCC.***

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Excerpt topic: **"But-for" analysis entails a forward-looking comparison between the state of competition in: (i) a world where the merger (or proposed merger) has been implemented; and (ii) a world where the merger (or proposed merger) has not been implemented.**

A. The "But For" analysis

Introduction

[127] In *Commissioner of Competition v. Canada Pipe Company Ltd.*, 2006 FCA 233, the Federal Court of Appeal decided that a "but for" analysis was the appropriate approach to take when considering whether, under paragraph 79(1)(c) of the Act, "…the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially." The specific question to be asked is stated, as follows, at paragraph 38 of the decision "…would the relevant markets – in the past, present or future – be substantially more competitive but for the impugned practice of anti-competitive acts?"

[128] Language similar to that found in section 79 appears in section 92 of the Act. Section 92 says that an order may be made where "…the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially." For this reason, the parties and the Tribunal have determined that the "but for" approach is also appropriate for use in cases under section 92 of the Act. The parties recognize that the findings will be forward looking in nature and CCS has cautioned the Tribunal against unfounded speculation. With this background, we turn to the "but for" analysis.

[129] The discussion below will address the threshold issue of whether effective competition in the supply of Secure Landfill services in the Contestable Area identified by Dr. Kahwaty likely would have materialized in the absence of the Merger. Stated alternatively, would effective competition in the relevant market likely have emerged "but for" the Merger? After addressing this issue, the Tribunal will turn to the section 93 factors that are relevant in this case, as well as the issue of countervailing power.

[130] In undertaking the "but for" analysis, the Tribunal will consider the following questions:

(a) If the Merger had not occurred, what new competition, if any, would likely have emerged in the Contestable Area?
(b) If the Merger had not occurred, what would have been the likely scale of that new competition?
(c) If the Merger had not occurred, when would the new competition likely have entered the market?

[131] The Commissioner suggested that either June or July, 2010 be used as the timeframe for considering the "but for" world. CCS, on the other hand, was more precise and suggested that the relevant time for this purpose should be the end of July 2010, when CCS and Complete signed

[368] In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur.

[369] In making its assessment in the latter context, and with respect to a proposed merger, the Tribunal compares (i) the state of competition that would likely exist if the merger were to proceed, with (ii) the state of competition that would likely exist if the merger did not proceed. Scenario (ii) typically is referred to as the "but for", or "counterfactual", scenario. In the case of a completed merger, that "but for" scenario is the market situation that would have been most likely to emerge had the merger not occurred.

[370] When the Tribunal determines that a merger is not likely to enable the merged entity to exercise greater market power than in the absence of the merger, the Tribunal generally will conclude that the merger is not likely to prevent or lessen competition at all, let alone substantially. With respect to allegations that competition is likely to be *lessened*, this conclusion generally will flow from a finding that the merger is not likely to enable the merged entity to *enhance existing, or to create new,* market power. With respect to allegations that competition is likely to be *prevented*, this conclusion generally will flow from a finding that the merger in question is not likely to enable the merged entity to *maintain* greater existing market power than in the absence of the merger. Once again, the foregoing also applies with respect to other sections of the Act that contain the "prevent or lessen competition substantially" test.

[371] With respect to sellers, market power is the ability to profitably maintain prices above the competitive level, or to reduce levels of non-price competition (such as service, quality or innovation), for an economically meaningful period of time. With respect to purchasers, market power is the ability to profitably depress prices below the competitive level, or to reduce levels of non-price competition, for such a period of time.

[372] In assessing whether market power is likely to be created, enhanced or maintained by a merger or a reviewable trade practice, the Tribunal assesses the intensity of competition, as reflected in its price and non-price dimensions. Competition is a dynamic, *rivalrous process* through which the exercise of market power is prevented or constrained as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in rivalry with other firms. That rivalrous process generates the principal source of pressure on firms to innovate new or better products or business methods, and to deliver those products at competitive prices. In turn, those innovations and competitive prices serve to increase aggregate economic welfare in the economy, the economy's international competitiveness and the average standard of living of people in the economy.

[373] In assessing the intensity of price competition, the Tribunal focuses upon whether prices are likely to be higher than in the absence of the merger. In assessing the intensity of non-price

Excerpt from: *Tervita Corp. v.* Canada (Commissioner of Competition), 2015 SCC 3, *per* Rothstein J., *reversing on other grounds the FCA and Competition Tribunal*.

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Excerpt topic: "But-for" analysis entails a forward-looking comparison between the state of competition in: (i) a world where the merger (or proposed merger) has been implemented; and (ii) a world where the merger (or proposed merger) has not been implemented.

[51] A similar comparative analysis is conducted under s. 92(1). A merger review, by its nature, requires examining a counterfactual scenario: ". . . 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" (Facey and Brown, at p. 205). The "but for" test is the appropriate analytical framework under s. 92.

[51] Le paragraphe 92(1) appelle une analyse comparative similaire. De par sa nature, l'examen du fusionnement emporte l'examen d'un scénario conjectural : [TRADUCTION] « . . . le fusionnement permettra-t-il à l'entité fusionnée d'empêcher ou de diminuer sensiblement la concurrence par rapport à l'état de fait antérieur au fusionnement et qui sert de repère » (Facey et Brown, p. 205). Le critère de l'absence hypothétique est le cadre analytique qu'il convient d'appliquer sous le régime de l'art. 92.

(b) *The "But For" Analysis Under Section 92(1) Is Forward-Looking*

b) *L'analyse axée sur l'absence hypothétique qu'appelle le par. 92(1) est prospective*

[52] The words of the Act and the nature of the "but for" merger review analysis that must be conducted under s. 92 of the Act require that this analysis be forward-looking.

[52] Le libellé de la Loi et la nature de l'analyse axée sur l'absence hypothétique à laquelle il faut procéder dans le cadre de l'examen du fusionnement sous le régime de l'art. 92 commandent une démarche prospective.

[53] The Tribunal must determine whether "a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially". While the tense of the words "prevents or lessens" indicates existing circumstances, the ordinary meaning of "is likely to prevent or lessen" points to events in the future. To the same effect, the French text of s. 92(1) states "*qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet*". Both the English and French text allow for a forward-looking analysis. This proposition is not controversial. Both parties to this appeal agree that a forward-looking analysis is appropriate.

[53] Le Tribunal est appelé à déterminer si « un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet ». Si le temps présent des verbes « empêche ou diminue » renvoie aux circonstances actuelles, l'emploi du futur dans « aura vraisemblablement » annonce un acte qui se produira à l'avenir. Le libellé de la version anglaise de la disposition a le même effet. Elle est ainsi rédigée : « . . . *a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially* ». L'expression « *is likely to prevent or lessen* » dans son sens ordinaire indique quant à elle des actes futurs. Le texte anglais et le texte français permettent tous deux une analyse prospective. Cette proposition ne suscite aucune controverse. Les deux parties au présent pourvoi reconnaissent qu'une analyse prospective est de mise.

(c) *Similarities and Differences Between the "Lessening" and "Prevention" Branches of Section 92*

[54] In his concurring reasons at the Tribunal, Crampton C.J. found that the assessment of a merger review under either the "prevention" or "lessening" branch is "essentially the same" (para. 367). Both focus on "whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger" (*ibid.*). Under both branches, the lessening or prevention in question must be "substantial" (*Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 ("*Superior Propane I*"), at paras. 246 and 313). And the analysis under both the "lessening" and "prevention" branches is forward-looking.

[55] However, there are some differences between the two branches. In determining whether competition is substantially lessened, the focus is on whether the merged entity would increase its market power. Under the "prevention" branch, the focus is on whether the merged entity would retain its existing market power. As explained by Chief Justice Crampton in his concurring reasons:

> In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur. [Emphasis in original.]
>
> (Tribunal decision, at para. 368)

c) *Similarités et différences entre les volets relatifs à la « diminution » et à l'« empêchement » de l'art. 92*

[54] Dans les motifs concordants qu'il a rédigés pour le Tribunal, le juge en chef Crampton a conclu que les points sur lesquels porte l'examen d'un fusionnement sont « fondamentalement les mêmes », qu'il s'agisse du volet relatif à la « diminution » ou de celui relatif à l'« empêchement » (par. 367). Quel que soit le volet, il s'agit de déterminer « si l'entité fusionnée sera vraisemblablement en mesure d'exercer une puissance commerciale beaucoup plus importante qu'en l'absence de fusionnement » (*ibid.*). Dans un cas comme dans l'autre, il est question de diminuer ou d'empêcher « sensiblement » (*Canada (Commissaire de la concurrence) c. Supérieur Propane Inc.*, 2000 Trib. conc. 15, [2000] D.T.C.C. nº 15 (QL) (« *Supérieur Propane I* »), par. 48). En outre, l'analyse, peu importe qu'elle cherche à déterminer s'il y aura « diminution » ou « empêchement », est prospective.

[55] Les deux volets diffèrent cependant à certains égards. Pour déterminer s'il y a diminution sensible de la concurrence, il faut demander si l'entité fusionnée accroîtra sa puissance commerciale. Dans le cas de l'empêchement, la question est celle de savoir si l'entité fusionnée conservera sa puissance commerciale. Pour reprendre les propos du juge en chef Crampton dans ses motifs concordants :

> Pour déterminer si le fusionnement aura vraisemblablement pour effet de *diminuer* la concurrence, le Tribunal s'en tiendra à déterminer si le fusionnement aura vraisemblablement pour effet de rendre plus facile l'exercice d'une nouvelle ou d'une plus grande puissance commerciale par l'entité issue du fusionnement qu'elle ait agi seule ou en interdépendance avec d'autres entreprises rivales. Pour déterminer si le fusionnement aura vraisemblablement pour effet d'« *empêcher* » la concurrence, le Tribunal cherchera à savoir si le fusionnement aura vraisemblablement pour effet de préserver la puissance commerciale de l'une des parties fusionnantes ou des deux, en empêchant l'érosion de cette puissance commerciale qui se serait vraisemblablement produite en l'absence de fusionnement. [En italique dans l'original.]
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> (Décision du Tribunal, par. 368)

Excerpt from: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, per Gascon J., Little J. and Samrout.

Excerpt topic: "But-for" analysis entails a forward-looking comparison between the state of competition in: (i) a world where the merger (or proposed merger) has been implemented; and (ii) a world where the merger (or proposed merger) was not implemented.

- 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

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?;

[460] Section 93 of the Act provides a non-exhaustive list of factors that the Tribunal may consider when assessing whether a merger substantially lessens or prevents competition or is likely to do so. These factors include whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant market, the extent to which effective competition remains or would remain after a merger, whether the merger would result in the removal of a vigorous and effective competitor, and the nature and extent of change and innovation in a relevant market.

[461] The Tribunal points out that none of the section 93 factors specifically refers to exports or to the pro-competitive dimension or business rationale of a merger. The Tribunal further reaffirms that the intent of the parties is irrelevant in determining whether a merger will likely reduce competition (*Canadian Waste* at para 118).

(b) The "substantial lessening" analysis

[462] As the present case solely concerns an alleged substantial lessening of competition, the Tribunal's analysis will focus on that branch of the assessment of anti-competitive effects. In *Tervita SCC*, the SCC confirmed that the language in section 92 concerning anti-competitive effects is very close to the corresponding words in paragraph 79(1)(*c*) of the Act dealing with abuse of dominance (*Tervita SCC* at para 50). The legal framework applicable to analysis of effects under the two provisions has common features, so court and Tribunal decisions under both provisions provide guidance in relation to the assessment of a substantial lessening of competition.

[463] As the Tribunal discussed in *VAA CT* at paragraphs 632–644 and in *TREB CT* at paragraphs 456–483, there are two dimensions in the Tribunal's substantial lessening of competition analysis. The first considers a forward-looking, counterfactual comparison. The second considers whether the alleged anti-competitive effects are substantial.

[464] First, the Tribunal's review under section 92 examines whether the merger will give the merged entity the ability to lessen competition, compared with the pre-merger benchmark or "but for" world. The analysis involves a forward-looking counterfactual scenario where the Tribunal compares the state of competition that exists or would likely exist in the presence of the merger with the state of competition that would have likely existed in the absence of the merger (*Tervita SCC* at paras 51, 54; *Tervita FCA* at para 108). The focus is on whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger, through either materially higher prices or materially lower non-price aspects of competition in the market (*Tervita SCC* at paras 15, 50–51, 54, 80–81; *Tervita FCA* at para 108; *VAA CT* at paras 636, 642; *Tervita CT* at paras 123, 229(iv), 377)[8]. The Tribunal's approach thus contemplates an assessment that emphasizes the comparative and relative state of competition before and after the merger, as

[8] In a situation involving the purchase of a product and potential monopsony power, the determination to be made is whether prices are or likely would be materially lower than in the absence of the merger. In this discussion on the analytical framework, all references to "price increases" or "material price increases" are meant to relate to mergers involving the sale of a product and potential monopoly power. For mergers involving the purchase of a product and potential monopsony power, all references would be to "price decreases" or "material price decreases."

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).

MR. ROOK: Well, Exhibit I was prepared by you or under your supervision and direction.

MR. HICKEY: That's correct.

MR. ROOK: And did we not agree a few moments ago that the wireline cost to you, that is to Distributel, for 25 gigabytes[sic] per second was the difference between the number in column K, less the number in column J?

MR. HICKEY: That is correct. I would just like to clarify. I'm not a finance expert, but there are -- I just want to be clear that there are different costs that can be looked at and the costs that are in my Exhibit I are what we refer to as fully loaded costs, that include all one-time acquisition costs and everything else that has to be recouped over the life of the customer.

MR. ROOK: Without burdening the Tribunal at length with this discussion, can I suggest to you that the retail price that is shown on the screen, $39.95 per month, is less than the costs that you incur in Exhibit I for the same speed?

MR. HICKEY: Assuming that the $39.95 again represents a customer served via Shaw, then that would be correct.

MR. ROOK: And similarly, if I drop down to the -- I guess it's the fifth line for 75 megabytes[sic] per second service, we could go through the same question

discussions with Telus didn't advance. I don't see what the commercial interest of Distributel in preserving the confidentiality of that would be and how it meets the test in *Sierra Club*.

MR. ROOK: I accept that. But unfortunately, I'm only one party to this litigation.

Now, this document -- these are notes, Mr. Chairman, that the Competition Bureau prepared on or about December 6 of a call with Distributel, and these notes are marked Confidential Level A. In my submission, there is nothing at all in this document or in these notes that is confidential in the traditional sense, as the jurisprudence instructs. But it's my friend Mr. Gay who has marked this, and so I submit he be invited to vacate that request for confidentiality.

CHIEF JUSTICE CRAMPTON: Annie, can you send me that document, please, so I can scroll through it while Mr. Gay and Mr. Hickey are thinking about what Mr. Rook just said?

DEPUTY REGISTRAR: Yes, sure.

CHIEF JUSTICE CRAMPTON: Mr. Hickey, you're not a lawyer, are you?

MR. HICKEY: No, I'm not.

CHIEF JUSTICE CRAMPTON: Right. That's a part of the issue here, Mr. Rook.

Stein's meeting with the Bureau was to discuss the possibility that Distributel acquire Freedom?

MR. HICKEY: That is the high-level understanding that I would have had. But going into these level of details, this is not information that I would have been privy to.

MR. ROOK: Would you not have known at the time as the Chief Regulatory Officer at Distributel about the elements in general terms of what that divestiture would involve?

MR. HICKEY: That is not -- Director of Regulatory Affairs. But no, that is not part of the business angles and everything that make up those business plans, I am not part of those conversations.

If there's a regulatory issue related to those, absolutely, I can be brought in. But if it's generally putting together a business plan and what would need to be done to make some type of angle or acquisition possible -- I don't always get brought into those conversations, I'm sorry to say.

MR. ROOK: So in preparing to give evidence before this Tribunal, you didn't make any inquiries of the Chief Executive Officer of your company about the elements of the proposal that Distributel discussed with the Competition Bureau that are reflected in these notes;

MR. HICKEY: Yes. If we go too far into this, this is information marked as Confidential Level A in my affidavit, so --

MR. ROOK: I'm not going to get into the numbers, Mr. Hickey. I'm simply interested in the concept of how you proceeded.

So for the purposes of preparing Exhibit I, do I understand correctly that you obtained a price from a third-party service provider?

MR. HICKEY: For the purpose of Exhibit I, I reached out internally and asked for the costs and I received costs that, yes, we received from a or -- as per discussions with a third party provider. These were not discussions that I had myself.

MR. ROOK: And that third party provider, whomever it is, is a wireless carrier that would be providing you with wireless service.

MR. HICKEY: That is correct.

MR. ROOK: And are you in this context acquiring that service on a resale basis?

MR. HICKEY: I truly do not know the arrangements. Again, I was not subject to the details.

I reached out internally and asked for the price for the purpose of this comparison, and this is what I understood would be the price that we would incur to

offer these same wireless services that Shaw offers in its bundle today. But I can't speak to exactly how that would have been provided.

MR. ROOK: And you don't know how that price in that column was determined by whomever provided it; correct?

MR. HICKEY: That was per discussions that I was not involved in.

MR. ROOK: And do you know whether there was provision for overhead and profit included in the price that you obtained from that party?

MR. HICKEY: I understood that included costs only and a contribution for its SG&A, was my understanding.

MR. ROOK: Thank you.

Now, would you go back to paragraph 4 of your statement?

I'm asked to mark that screenshot as an exhibit, Mr. Chair.

DEPUTY REGISTRAR: You are muted, Chief Justice.

CHIEF JUSTICE CRAMPTON: I'm sorry. Yes, of course. Is there a document number?

MR. ROOK: Yes. I had it a moment ago.

DEPUTY REGISTRAR: It's 300004.

CHIEF JUSTICE CRAMPTON: There's four zeros and

170. In my experience in the telecommunications industry, ***neither*** Shaw Go WiFi hotspots nor Home Hotspots are required for a wireless operator to compete effectively in the provision of wireless services in Alberta, British Columbia or elsewhere.

PART VIII – FREEDOM'S DISTRIBUTION NETWORK

171. Claims made by Mr. Davies concerning Freedom's distribution network are also substantially mistaken. Mr. Davies' assertion that Videotron will be unable to compete effectively in providing wireless services in Western Canada are also contrary to my real world experience over the course of my lengthy career in this industry, including as a senior executive of both Freedom and Shaw. This contention rests on misguided observations of Mr. Davies concerning the distribution network utilized by Freedom and Shaw in marketing and selling their products and services to the public.

172. Mr. Davies asserts in paragraph 179 of his Report that Freedom will be less competitive than it now is under Videotron's management because it will lose access to Shaw Mobile's distribution network, and thus will lose the ability to cross-sell services, access to Shaw's brick-and-mortar stores, and the benefit of Shaw's advertising spend and digital traffic. This claim is misguided and contrary to my knowledge and experience for several reasons.

173. *First*, Mr. Davies asserts mistakenly that the distribution channels of Freedom and Shaw Mobile are integrated. He is simply wrong. They are not, and never have been. In making this mistaken assertion Mr. Davies fails to mention, and apparently to appreciate, four key aspects of the distinct distribution channels utilized by Freedom and Shaw Mobile:

(a) Freedom wireless plans are not sold—and have never been sold—at retail locations of Shaw utilized by Shaw Mobile. Nor have Freedom wireless plans ever been advertised or available on the websites of Shaw or Shaw Mobile;

(b) Freedom has its own retail locations, as well as its own retail partnerships with national retailers such as Best Buy, Loblaws (The Mobile Shop) and

Walmart, which it entered into through Freedom Mobile Distribution Inc. Each of the retail locations and retail partnership agreements will be transferred to Videotron in accordance with the Divestiture Agreement;

(c) There are only limited "digital" sales of Freedom and Shaw Mobile products online, all of which occur through an interactive chat function rather than through traditional e-commerce websites. Although Freedom chats are secure, in my experience, this feature dis-incentivizes many customers from purchasing Freedom products online. In this regard, as noted above approximately 99% of Freedom's gross adds are generated in its bricks-and-mortar retail locations, rather than remotely or online; and

(d) Approximately 70% of Freedom's customers are located in Ontario. Freedom operates successfully in Ontario without the benefit of Shaw's retail locations, brand recognition, advertising spend or cross-selling in that area, which constitutes the core of its business.

174. At all times after Shaw first acquired WIND in March 2016, Freedom has operated independently of Shaw. This is true of Freedom's standalone wireless network, including its radio access network, core networks and backhaul, its wireless engineering teams, its technology providers and manufacturers, and its retail distribution network.

175. Freedom's standalone retail distribution network consists of approximately 800 Freedom-branded retail locations across Alberta, British Columbia and Ontario, plus another 600 prepaid-focused distribution outlets. These include corporate-owned locations, as well as stores and kiosks that are owned and operated by independent dealers.

176. In 2018, consistent with significant investments being made in the wireless network, Freedom invested heavily in modernizing many of its stores and kiosks to increase the quality perception of the brand and to enhance the customer experience.

177. In 2018 Freedom began distributing products through major national retail chains, including through Best Buy, Loblaws (The Mobile Shop) and Walmart. Freedom entered

into these arrangements through its wholly-owned subsidiary "Freedom Mobile Distribution Inc.".

178. On August 12, 2022, Rogers, Shaw and Quebecor finalized the terms of the sale of Freedom to Videotron. Pursuant to the terms of the Proposed Transaction, Videotron will receive Freedom's real estate leases, ***including all of its retail operations***. These include all of its branded stores, contracts with Freedom dealers and contracts with National Retailers.

179. Mr. Davies' factual errors in this regard are as significant as they are surprising. Among other things, they result in serious overstatements concerning the alleged importance to Freedom of the entirely separate distribution network utilized by Shaw Mobile. Having been at the helm of both Shaw and Shaw Mobile, I am intimately familiar with the business operations of both. I can state categorically that Freedom's successes rest on its own distribution network, all of which it will bring to Videotron. None of those successes are attributable to the separate, and much smaller, distribution network utilized by Shaw Mobile.

180. *Second*, Mr. Davies understates (or ignores completely) the fact that Videotron's e-commerce platforms are substantially more robust than those of Freedom, including because Videotron already offers for sale a successful mobile product that is sold exclusively online known as Fizz. I am very familiar with Fizz, including the manner in which this online-brand is marketed and sold. I have compared the website of Fizz to the website of Freedom. The website of Fizz is sophisticated and user friendly. It enables purchases via an online form using Visa or MasterCard, or by using financing through PayBright.

PART IX – THE ROGERS OUTAGE

181. In paragraphs 212 to 222 of his Report Mr. Davies claims that the network outage recently experienced by Rogers in July 2022 is "highly relevant to competition". He also makes a series of related claims. I will defer to Rogers and Videotron's witnesses and experts to speak to this issue in greater depth, but I do wish to correct one of his assertions.

that, sir, that Vidéotron has a business plan; correct?

DR. MILLER: That's what I recall.

MR. SMITH: And that business plan tells us that they will be able to offer TPIA profitably. Do you recall that evidence?

DR. MILLER: At a high level, yes.

MR. SMITH: And do you recall, sir, that Mr. Lescadres testifies in his witness statement that Vidéotron, based on its experience and its business plan, believes it will be able to operate with a significant profit margin? Are you aware of that evidence?

DR. MILLER: I don't recall that specifically, but it sounds familiar.

MR. SMITH: Now, sir, the business plan is at Exhibit 66 to Mr. Lescadres' witness statement. Are you aware of that?

DR. MILLER: No.

MR. SMITH: Did you look at the business plan?

DR. MILLER: Yes, I read the whole thing. I don't recall the particular exhibit for sure.

MR. SMITH: Okay. You're aware it's 50 tabs in an Excel spreadsheet. Do you recall that?

DR. MILLER: No, I don't.

MR. SMITH: It covers 10 years of financial information. Are you aware of that?

DR. MILLER: No, I don't remember.

MR. SMITH: And are you aware, sir, that it has detailed cash flows? Aware of that?

DR. MILLER: No, I don't remember that.

MR. SMITH: And it has detailed operating expenses. Do you remember that?

DR. MILLER: No, I don't remember that.

MR. SMITH: And detailed capital expenditures. Do you remember that?

DR. MILLER: No.

MR. SMITH: And it also goes so far as to have detailed spectrum plans. Are you aware of that?

DR. MILLER: No, I don't recall the details of this.

MR. SMITH: And nowhere in your report, sir, first or second, do you engage or even mention the business plan; correct?

DR. MILLER: Yes, I believe my economic analysis proceeds on a different angle.

MR. SMITH: The answer is, you do not cite to or engage with the business plan at all.

DR. MILLER: That is my recollection.

MR. SMITH: Are you aware, sir, that -- are you aware, sir, that the Commissioner of Competition has had the business plan since July?

DR. MILLER: No.

MR. SMITH: And I take it nobody asked you to do a detailed review of it?

DR. MILLER: That would be correct.

MR. SMITH: And sir -- so when we look at your report -- I just want to make sure that we have this clear. You say, Mr. Hickey says that Vidéotron will not be able to do it profitably. That's what you say in your report; correct?

DR. MILLER: Yes, that's one of the reasons I am skeptical that it would be profitable.

MR. SMITH: But what you don't say and don't refer to is that the person who is actually going to provide the service, and who has an actual business plan, and that you actually have, believes that it will be profitable. You don't say that at all.

DR. MILLER: That is correct. That's not in the report.

MR. SMITH: What we do know, sir, is that Vidéotron, an experienced wireless and wireline provider, believes that the discount it has secured will be sufficient for it to launch aggressive bundled offerings in British Columbia, Alberta, and Ontario. You remember that evidence from Vidéotron?

DR. MILLER: Do you have particular language

with Telus. They've also made other commitments about a billion-dollar broadband fund to expand into rural, remote, and Indigenous communities in the West that likely would not occur without this transaction. They're excited about the possibility of having a more national wireline network coupled with their wireless business, what they're going to be able to do out West in terms of an effective competitor versus Telus.

MR. THOMSON: You've also been involved in the wireless business of Shaw in the period since Wind was acquired in March of 2016?

MR. ENGLISH: That's correct.

MR. THOMSON: You're familiar with the business by Vidéotron?

MR. ENGLISH: Yes, sir, I am.

MR. THOMSON: Are you also familiar with the terms of the agreements and arrangements pertaining to the acquisition of Freedom by Vidéotron?

MR. ENGLISH: Yes, sir.

MR. THOMSON: What is your view concerning the ability of Vidéotron to carry on the wireless business of Freedom if it's allowed to do so?

MR. ENGLISH: I think it's a dream scenario. I don't think you could have got a better solution here in terms of the fourth and fifth largest wireless operators

coming together with scale and size of 3.3 million customers across the four most populace provinces in this country of 30 million Canadians now. They've got complementary assets, most importantly spectrum. There's a clear path towards 5G with the 5G spectrum that they have in our footprint but also --

MR. GAY: Just -- you'll forgive me, Mr. Thomson. This is an opinion and isn't something that is necessarily -- and I think we even brought motions I think, to deal with what we thought was improper evidence and that is comments and observations in respect of a competitor's business, and we're there again. And so, you know, I'd prefer if we didn't go down this road.

MR. THOMSON: Sorry. Mr. Gay is partially correct. He did bring a motion on this and he lost, and Chief Justice, you ruled on this very point. This very evidence is given in the witness statement that remains in paragraphs 12, 13, 156, 157, 197 and 204. It's dealt with in six paragraphs of the witness statement that's before the Tribunal and it's perfectly admissible evidence. This issue has already been argued and my friend lost. He can't now raise the issue again.

MR. GAY: I think we're going well beyond, and my point is that what we have is an opinion and that is improper, and my objection stays.

CHIEF JUSTICE CRAMPTON: We did cut back some of those paragraphs. I'm just looking at 11, 12 --

MR. THOMSON: Okay. I'm happy to go through this and then my friend -- it can come out of his time. Read paragraph 12 and then read what remains in paragraph 13. Then go to paragraph 156. And then read paragraph 157. And then read paragraph 197. Paragraph 198. I'll give you one more paragraph, 159. You'll see the evidence that this witness is giving is completely consistent with the witness statement that is currently before the Tribunal, including the portions that remain following the motion that my friend brought. So I ask that he be --

CHIEF JUSTICE CRAMPTON: He just shouldn't be commenting on the types of things that we struck in some of those paragraphs that you took us to.

MR. THOMSON: And he's not. I asked him about the ability of Vidéotron to carry on the wireless business of Shaw, and that's exactly the evidence he's given in the parts of the witness statement that remain.

CHIEF JUSTICE CRAMPTON: That's right. All right.

MR. THOMSON: So go ahead. Start again and finish your answer.

MR. ENGLISH: Thank you, Mr. Thomson. Yes, I do think Vidéotron/Freedom will have the necessary

resources and scale to compete effectively in the wireless business going forward, including spectrum, including the fact that they have 3.3 million customers, including the fact that they're going to have a network, a robust network in Alberta, B.C., Ontario, and Quebec as well, considering they will have 5G spectrum in Alberta and B.C. and Ontario, and they already have a 5G offering in Quebec.

I think they're going to be a very viable, credible larger fourth wireless player in this country, and I think they're also getting -- you know, their cost base is attractive considering the purchase price that they paid. And they've also entered into -- I'm aware of the ancillary agreements that they've entered into as well that, you know, improves their operating cost base going forward versus Shaw's or Freedom's on a standalone basis. So I think for a whole host of factors, you know, they've created -- if the proposed transaction is approved, you've got this quasi-national fourth wireless player that's going to be a real -- a great operation.

MR. THOMSON: And to your knowledge, Mr. English, is there any other participant in the wireless industry in Canada capable of carrying on the business of Freedom in the way that Vidéotron is poised?

MR. ENGLISH: Absolutely not.

MR. GAY: Chief Justice, I'm actually going to

APPENDIX "D"
CONTRADICTORY STATEMENTS BY EXECUTIVES

Statements by Executives	Alleged Contradictory Evidence	Shaw's Response
Mr. English: [redacted][59]	Shaw's submission to the INDU Committee notes [redacted][60]	These statements are not contradictory. They are addressing different points in very different contexts. Mr. English testified that [redacted], which is unquestionably true. It is also true that 5G will depend on the wireline backbone—i.e., backhaul—[redacted] The evidence demonstrates that Canadian carriers routinely lease backhaul and still compete effectively in the provision of wireless services. Please see paragraphs 167 to 176 of the Closing Submissions of the Respondents and Videotron. Regrettably, the Commissioner seeks to impugn the testimony of Mr. English by relying on a document that the Commissioner elected not to put to the witness. By failing to do so, the Commissioner has deprived Mr. English of the opportunity to explain directly to the Tribunal why these statements are not contradictory. The Commissioner's failure to put the document to the witness is both manifestly unfair and contrary to the rule in *Browne v. Dunn*, which requires that evidence intended to contradict an opposing witness be put to that witness. Please see paragraph 85 of the Closing Submissions of the Respondents and Videotron.
Mr. English: You need backhaul to operate a business but you don't need to own it, we have leveraged our wireline assets but it's been fairly immaterial[61]	ARC Request submitted in relation to the Rogers/Shaw Transaction: "[redacted]"	These statements are not contradictory. They are addressing different points in very different contexts. Mr. English's testified that wireless success does not depend on ownership of wireline infrastructure. That is true. Mr. English also testified that the benefits Shaw has obtained from leveraging (or integrating) its wireline assets (such as its fibre network) with its wireless network have "been fairly immaterial". That is also true. The ARC Request does not say otherwise. Rather, the ARC submission discusses [redacted]

	[redacted][62] Damian Poltz, Shaw SVP, Wireline Technology & Strategy notes in September 2020: [redacted] "	[redacted] have nothing at all to do with the testimony of Mr. English in question. Similarly, Mr. Poltz's email of September 2020 is [redacted] with Mr. English's testimony that it is unnecessary for a carrier to own backhaul in order to complete effectively in wireless. Indeed, the evidence demonstrates that Canadian carriers routinely lease backhaul yet still compete effectively in the provision of wireless services. Please see paragraphs 167 to 176 of the Closing Submissions of the Respondents and Videotron. Regrettably, the Commissioner seeks to impugn the testimony of Mr. English by relying on two documents the Commissioner elected not to put to the witness. By failing to do so, the Commissioner has deprived Mr. English of the opportunity to explain directly to the Tribunal why these statements are not contradictory. The Commissioner's failure to put the document to the witness is both manifestly unfair and contrary to the rule in *Browne v. Dunn*, which requires that evidence intended to contradict an opposing witness be put to that witness. Please see paragraph 85 of the Closing Submissions of the Respondents and Videotron.
Mr. English: [redacted]	Mr. McAleese e-mail to Jeni McAleese in March 2022 [16 months post launch of Shaw Mobile][65] (Mr. McAleese agreed in discovery that this content is [redacted][66]: [redacted]	These statements are not contradictory. While they both address churn rates, they do so in different contexts with respect to different points in time and different customers of Shaw. Mr. McAleese's email confirms that [redacted]. In contrast, the testimony of Mr. English quoted by the Commissioner addressed the issue of [redacted]. Moreover, the Commissioner has cherry picked a small portion of Mr. English's evidence. The portion the Commissioner fixates on is

	[redacted]67	part of a broader answer in which Mr. English made clear that [redacted] Regrettably, the Commissioner seeks to impugn the testimony of Mr. English by relying on an email between Mr. McAleese and his wife that the Commissioner elected not to put to Mr. English. By failing to do so, the Commissioner has deprived Mr. English of the opportunity to explain directly to the Tribunal why these statements are not contradictory. The Commissioner's failure to put the document to the witness is both manifestly unfair and contrary to the rule in *Browne v. Dunn*, which requires that evidence intended to contradict an opposing witness be put to that witness. Please see paragraph 85 of the Closing Submissions of the Respondents and Videotron.
Mr. English: [redacted]68	Mr. McAleese, March 2022: [redacted]69	These statements are not contradictory. They are addressing different points in very different contexts and relate to different periods of time. Mr. English testified that Shaw [redacted]: **MR. THOMSON:** [redacted] **MR. ENGLISH:** [redacted].

		[redacted]  Regrettably, the Commissioner seeks to impugn the testimony of Mr. English by relying on an email between Mr. McAleese and his wife that the Commissioner elected not to put to the witness. By failing to do so, the Commissioner has deprived Mr. English of the opportunity to explain directly to the Tribunal why these statements are not contradictory. The Commissioner's failure to put the document to the witness is both manifestly unfair and contrary to the rule in Browne v. Dunn, which requires that evidence intended to contradict an opposing witness be put to that witness. Please see paragraph 85 of the Closing Submissions of the Respondents and Videotron.
Mr. English: [redacted]	Mr. McAleese, March 2022: [redacted]	These statements are not contradictory. They are addressing

[redacted]	[redacted]	different points in very different contexts. Mr. English testified about [redacted]. Regrettably, the Commissioner seeks to impugn the testimony of Mr. English by relying on an email between Mr. McAleese and his wife that the Commissioner elected not to put to Mr. English. By failing to do so, the Commissioner has deprived Mr. English of the opportunity to explain directly to the Tribunal why these statements are not contradictory. The Commissioner's failure to put the document to the witness is both manifestly unfair and contrary to the rule in *Browne v. Dunn*, which requires that evidence intended to contradict an opposing witness be put to that witness. Please see paragraph 85 of the Closing Submissions of the Respondents and Videotron.
Mr. McAleese: "We saw no material response to Shaw Mobile pricing."[72]	Mr. McAleese, March 2022: "[redacted][73]	There is no contradiction between these two statements, which pertain to different topics in very different contexts. Indeed, Mr. McAleese's testimony is [redacted] Mr. McAleese's testimony is about the absence of a material *pricing* response to Shaw Mobile from Shaw's competitors, [redacted] The broader context of Mr. McAleese's testimony makes clear that his evidence is *not* that Shaw observed no response to its Shaw Mobile offerings, but that Shaw Mobile did not have a sustained impact on pricing in the wireless industry in Canada: **MR. THOMSON:** What impact did Shaw Mobile have on overall pricing in the wireless industry? **MR. McALEESE:** **As I said earlier, when something is**

		a threat to the Big Three, they tend to respond very quickly as they did in December of 2017. We saw no material response to Shaw Mobile pricing. I think the three of them understood that zero dollar phones, 75 percent of our customers go on a zero dollar MRCs, or monthly recorded charges, were in the main additional lines for younger children, older parents, things like that. We were not hitting at the heart of their core constituencies. [McAleese Testimony, Vol 11 , p. 2883:9 – 19] Although Rogers, Bell and TELUS may have reacted to Shaw Mobile with promotional offerings, those offerings were normal course and time-limited. Please see McAleese Witness Statement at paras 256-259 and 295-298.
Mr. McAleese: [redacted]	There are several documents discussing Shaw Mobile [redacted]	There is no contradiction between Mr. McAleese's testimony and the documents referred to by the Commissioner. Rather, the Commissioner has mischaracterized Mr. McAleese's testimony. Mr. McAleese did not testify that [redacted] . Rather, he testified that MR. TYHURST: [redacted] MR. McALEESE: [redacted] MR. TYHURST: [redacted]

		[redacted] MR. McALEESE: [redacted] Although there was [redacted] Please see, for example: (i) Exhibit 22 to the Responding Witness Statement of Paul McAleese, which is an email from Mathew Flanigan to Paul Deverell, dated October 9, 2020, that discusses, among other things, the introduction of a "true 12-box with a price increase on select customers" [emphasis added]; and (ii) Exhibit 32 to the Responding Witness Statement of Paul McAleese, which is an email from Sara Murray to Paul McAleese and others, dated July 29, 2021 that discusses a price increase in respect of Shaw Mobile to drive profitability.
Mr. English: Shaw underinvested in wireline and has not been able to keep pace with Telus in Alberta and B.C.[76]	Brad Shaw during Q42020 Investor call: "During the pandemic, we launched new broadband services including fiber-plus gig internet service […] now available to over 1 million more customers than our main competitor, showcasing our leadership position with respect to the breadth and capability of our robot [robust] fiber plus network, the direct results of years of facilities-based investments. As a further validation, just last week Ookla named Shaw the fastest and most consistent internet provider in Western Canada."[77] Shaw Wireline Overview – Jun 23, 2021: "[redacted]	These statements are not contradictory. The statements pertain to different subject matters in different contexts, as well as different periods of time. Mr. English's testimony pertains to Shaw's capital investments in wireline relative to TELUS, whereas Mr. Shaw's comments pertained to the availability (to over 1 million more customers), speed and consistency of Shaw's broadband Internet service in comparison to the service of TELUS. While Mr. Shaw's statement noted that Shaw has made "years of facilities-based investments" (which is unquestionably true), he did not compare the quantum of those investments to the investments of TELUS. Nor did Mr. Shaw discuss whether Shaw underinvested in wireline relative to TELUS. The snippets of the Wireline Overview of June 2021 that the Commissioner now relies upon likewise said nothing about the

	[redacted] Shaw Fiscal 2022 Update – Oct 24, 2021: [redacted][80] [redacted][81]	capital investments of Shaw relative to those made by TELUS. Although the Fiscal 2022 Update of October 2021 noted that TELUS was [redacted] **Witness Statement of Paul McAleese, paras. 223-231; Responding Witness Statement of Paul McAleese, paras. 13-19; Shaw Testimony, vol. 12, 3131:22-3132:18**). As Mr. English testified, TELUS has roughly doubled Shaw's expenditure on wireline since 2016: see **English Testimony, vol. 10, 2616:7-17**. Regrettably, the Commissioner seeks to impugn Mr. English's testimony in the Appendix of his Written Closing by relying on documents that the Commissioner elected not to put to the witness. By failing to do so, the Commissioner has deprived Mr. English of the opportunity to explain directly to the Tribunal why these statements are not contradictory. The Commissioner's failure to put the document to the witness is both manifestly unfair and contrary to the rule in *Browne v. Dunn*, which requires that evidence intended to contradict an opposing witness be put to that witness. Please see paragraph 85 of the Closing Submissions of the Respondents and Videotron.
Mr. English: Wi-fi is of little benefit to Shaw, its importance has diminished over time[82]	Rogers expects revenue synergies from leveraging Wi-Fi to avoid network costs and reduce churn.[83] Rogers/Shaw ARC Request: "[redacted]	There is no inconsistency between these statements. They pertain to different subject matters in very different contexts. Mr. English's testimony pertained to the diminishing importance to *Shaw* of its Wi-Fi network from the perspective of the performance of Shaw's wireless network:

[redacted]

[redacted]

Testimony of Dean Prevost: "[redacted]

[redacted]

MR. THOMSON: How has the ownership and operation of Shaw of its wireline network impacted on the wireless business carried on by Freedom?

MR. ENGLISH: To be clear, since 2016, 70 percent of our wireless business has been based in Ontario and, to this day, it continues to be. So we've doubled our wireless subscriber base since 2016, but that growth has predominantly come from Ontario where we do not have any wireline assets.

We have used our wireline assets to our benefit in the west, but I'd say it's again, the benefits have been fairly small and they've been on twofold, first the Wi Fi.
So in 2011, we built a Wi Fi network that includes over 100,000 hotspots and that network was generally built from 2011 to 2016. As we reshaped our wireless business and really invested in a credible facilities based wireless business, the importance of Wi Fi has not been significant so we haven't really used Wi Fi. And the main reason for that is once we acquired low band spectrum, the importance of Wi Fi really diminished.

And I'll tell you, Mr. Thomson, since 2016 we spent a total in aggregate since 2016 to the end of this year, a total of $12.7 million, and it's because of those investments being a facilities based wireless provider, the importance of Wi Fi has diminished over time.

The secondary is backhaul. Again, in Ontario we do not have any backhaul assets. Do you need backhaul to run a wireless operation? Absolutely. However, access is more important than ownership. So in Ontario, we do not have any wireline assets and we've had no issues expanding our network or building out a business in Ontario because there's plenty of access to fibre. Not surprising in the west, we have used a fibre backbone to our advantage. However, even to this day, 50 percent of our backhaul requirements in Alberta and B.C. that's required for a wireless business

		is procured from third parties. Have we used some of our Wi Fi pardon me, our wireline network backhaul to the benefit of our wireless operations? Yes, but it's, again, been fairly immaterial. [**English Testimony, vol. 10, 2610:22-2612:13]** That testimony is unequivocally correct, and corroborated by the evidence of multiple witnesses, including Mr. McAleese and Dr. Webb. Please see, for example: McAleese Testimony, vol. 11, 2886:7-2888:2; McAleese Witness Statement dated September 23, 2022, para. 203 and Exhibit 62; Webb Testimony, vol. 15, 3889:6-3893:12. In contrast, the [redacted] and the [redacted] This is an entirely different subject-matter from the one addressed by Mr. English. Regrettably, the Commissioner seeks to impugn the testimony of Mr. English by relying on documents that the Commissioner elected not to put before the witness. By failing to do so, the Commissioner has deprived Mr. English of the opportunity to explain directly to the Tribunal why these statements are not contradictory. The Commissioner's failure to put the document to the witness is both manifestly unfair and contrary to the rule in *Browne v. Dunn*, which requires that evidence intended to contradict an opposing witness be put to that witness. Please see paragraph 85 of the Closing Submissions of the Respondents and Videotron.

59 Testimony of T English, Transcript, Vol. 11, November 22, 2022, pg 2765:13 - pg 2768:1.
60 CA-A-0556, Submission of Shaw to the House of Commons Standing Committee on Industry, Science and Technology – Study on the Proposed Acquisition of Shaw by Rogers, page 9; Testimony of P.McAleese, Transcript, Vol 12, Nov 23, 2022, p 3046:9 - p 3047:10.
61 Testimony of T English, Transcript, Vol. 10, Nov 21, 2022, pg 2611:23 - pg 2612:13.
62 CB-A-0700, ARC Request from Rogers and Shaw, April 13, 2021, p 2.
63 CA-A-0442, E-mail dated Sept 24, 2020 from Damian Poltz to Jillian Mullenix and Jeff Carr re Coax Blackhaul for Wireless
64 Testimony of T English, Transcript, Vol. 10, Nov 21, 2022, pg 2637:10-12.
65 CA-A-0670, Email dated March 7, 2022 from Paul McAleese to Jeni McAleese, re Research for Effies Case Study, p 2, confirmed during discovery examination and in witness statement.

66 CA-A-1882, Commissioner's Read ins from the Examination of Paul McAleese, August 22, 2022, p 112:25 – p 113:6.
67 CA-A-0670, Email from Paul McAleese re Research for Effies Case Study, p 2 confirmed during discovery examination and in witness statement.
68 Testimony of T English, Transcript, Vol. 10, Nov 21, 2022, pg 2637:12-14.
69 CA-A-0670, Email from Paul McAleese re Research for Effies Case Study, confirmed during discovery examination and in witness statement, p 2
70 Testimony of T English, Transcript, Vol. 10, Nov 21, 2022, pg 2637:7-10.
71 CA-A-0670, Email from Paul McAleese, confirmed during discovery examination and in witness statement, p 2
72 Testimony of P McAleese, Transcript, Vol. 11, Nov 22, 2022, pg 2883:11-14.
73 CA-A-0670, Email from Paul McAleese, , confirmed during discovery examination and in witness statement, p 2
74 Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3015:4-8.
75 CA-A-0522, Shaw Presentation Shaw Mobile 9/12 Box Introduction, Oct 13, 2020, p 3; CA-A-0520, Shaw Presentation titled 5G Pricing Approach Proposal, February 2021 (draft)pp 3-4; CA-A- 0614, Email dated Oct 26, 2021 from Tyler Spring to Mathew Flanigan. Subject: RE: BOD Prep Data Points - TM Feedback.
76 Testimony of English, Transcript, Vol 10, Nov 21, 2022, pg 2619:23 – p 2620:3.
77 CA-R-0192, McAleese Statement, Exhibit 47 p 2005 paras 2-3.
78 CA-A-1451, Shaw Presentation - Wireline Overview, June 23, 2021, slide 19.
79 CA-A-1451, Shaw Presentation - Wireline Overview, June 23, 2021, slide 29. Regarding the reliability of Ookla metrics, Mr. McAleese relies on Ookla in his WS at p 51 para 168.
80 CA-A-0648, Shaw Presentation titled Fiscal 2022, slide 56.
81 Testimony of R Davies, Transcript, Vol 11, Nov 22, 2022, p 2833:3 – p 2835:4.
82 Testimony of T English, Transcript, Vol 10, Nov 22, 2022, p 2611:10–22.
83 CA-R-0227, Fabiano Statement, Exhibit 5 slide 4.
84 CB-A-0700, ARC Request from Rogers and Shaw, April 13, 2021, p 10.
85 Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3307:9-11.
86 CA-I-0146, Reply Lescadres Statement, pp 8-9 paras 25-26; figures 1 and 2.
87 Testimony of J-F Lescadres, Transcript, Vol 9, Nov 20, 2022, p 2270:4–12.
88 Testimony of J-F Lescadres, Transcript, Vol 9, Nov 20, 2022, p 2272:5–23.