COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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CT- 2022-002

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PUBLIC

File No. CT- 2022-002

**THE COMPETITION TRIBUNAL**

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

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

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

**B E T W E E N :**

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**ROGERS COMMUNICATIONS INC.**
**SHAW COMMUNICATIONS INC.**

Respondents

- and -

**VIDÉOTRON LTD.**

Intervenors

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# COSTS SUBMISSIONS OF THE COMMISSIONER OF COMPETITION

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**Overview**

1. On December 21, 2022, the Tribunal directed the parties to attempt to come to an agreement on costs related to the section 92 application and if unable to come to an agreement, the Tribunal directed the parties to provide submissions. The parties were unable to reach an agreement. Therefore, the Commissioner is filing this written submission for consideration by the Tribunal in making its costs order.

2. If the Commissioner is successful, then a lump sum of $10.9 million, inclusive of counsel fees and disbursements, is a fair amount to award based on the Commissioner's bill of costs.[1]

3. The Commissioner has not seen the Respondents and the Intervenors' bill of costs, and therefore cannot make any statements about the accuracy or reasonableness of their costs. If the Tribunal decides to dismiss the Commissioner's application, the following should be considered when assessing costs:

    a. The Intervenor should not be awarded costs;

    b. The costs award should be materially reduced to reflect the important public interest in bringing this case;

    c. The costs award should be reduced to reflect any success the Commissioner had on issues, such as: (i) a Tribunal conclusion that Rogers' proposed acquisition of Shaw (the "**Proposed Transaction**") is likely to cause a substantial lessening of competition ("**SLC**") but was saved by the efficiencies defence; or, (ii) the Proposed Transaction was not saved by the

[1] The Tribunal has jurisdiction to award costs of proceedings before it pursuant to section 8.1 of the Competition Tribunal Act, in accordance with the provisions governing costs in the Federal Courts Rules, 1998. Subsection 400(1) of the Rules gives the Tribunal "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". Subsection 400(3) of the Rules sets out a list of factors the Tribunal may consider in the exercise of its discretion. Subsection 400(4) of the Rules provides that costs may be assessed according to the tariff and/or by awarding a lump sum. An award of costs is intended to balance between compensating a successful party without unduly burdening the unsuccessful party. The purpose of costs is a reasonable contribution to legal costs, fairness, and predictability. *Commissioner of Competition v. Vancouver Airport Authority*, 2019 Comp Trib 6, para. 817.

efficiencies defence but the proposed divestiture of Freedom to Videotron (the "**Proposed Divestiture**") is an effective remedy;

d. The Respondents' decision to not properly concede issues at the beginning of the hearing unnecessarily lengthened the time and expense of the hearing; and

e. There should be a single lump sum costs award to cover both Rogers and Shaw (if the Tribunal determines the Intervenor is entitled to costs then its costs should also be included in this amount), as the use of separate counsel for each party resulted in unnecessary duplication of work.

**The Tribunal should not award Videotron any costs for its intervention.**

4. If Videotron wanted the right to seek its own costs in this proceeding it should have sought this as part of its motion for leave to intervene. Under Rule 46(2) of the *Competition Tribunal Rules* the Tribunal may allow a motion for leave to intervene, with or without conditions, and Videotron made no request for costs in its motion for leave to intervene. In contrast, in *The Commissioner v. Harper Collins* the Tribunal granted Kobo the right to intervene and specifically ordered that "Kobo shall be able to seek and be liable for costs in these proceedings".[2]

5. The precedent set by other administrative tribunals also suggest that Videotron should only be awarded costs if it was granted the right to do so in the motion for leave to intervene. While the Tribunal has discretion to award costs under Rule 8(2), there is no specific guidance in the Tribunal's Rules on when cost awards may be granted to interveners. Similarly, the Canadian International Trade Tribunal also has broad discretion to award costs but its jurisprudence has a established a "judicial model" in which intervenors are not typically awarded costs. [3]

6. If the Tribunal does order the Commissioner to pay Videotron's costs, it should consider that Videotron's involvement was not anticipated when the proceeding

[2] *The Commissioner of Competition v. Harper Collins Publishers LLC et al.,* 2017 Comp Trib 5, para. 19.
[3] *Lions Gate Risk Management Group,* 2020 CanLII 101740 (CA CITT), at paras 62 - 66.

was initiated in May 2022. In addition, Videotron played more of a supporting role and carried less of a burden then the Respondents. As a result, if Videotron is to be awarded any costs, they should be nominal, as was the case in *UBCJA (Local 1325) v. J.V. Driver Installations Ltd.*[4]

**The Tribunal should reduce any costs award against the Commissioner because of the public interest of the proceedings**

7. There was a broad public interest in bringing this case.[5] The Tribunal in *The Commissioner of Competition v. Visa Canada Corporation et al.* declined to award costs in part because it recognized that the Commissioner advanced a case which should be brought even if the Commissioner was not successful. Competition law in Canada will not advance if a Commissioner is afraid to lose cases which ought to be brought.[6]

8. The public interest was also advanced because this case dealt with several novel legal issues in the context of merger review including:

   a. Whether the merger or proposed merger the Tribunal should consider under s. 92 is the Proposed Transaction, as pleaded by the Commissioner, or the Proposed Transaction coupled with the Proposed Divestiture;[7]

   b. Whether the Tribunal has jurisdiction to consider, in the absence of the consent of the Commissioner, behavioural and/or other contractual commitments proposed by the Respondents in its assessment under section 92 the Act;[8]

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[4] 2005 ABQB 310

[5] Rule 400(1) of the *Federal Courts Rules* provide the Tribunal with full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. One of the factors considered in awarding costs pursuant to rule 400(3)(h) is whether the public interest in having the proceeding litigated justifies a particular award of costs.

[6] 2013 Comp Trib 10 at paras 405-407.

[7] Final Written Argument of the Commissioner of Competition 2022 12 08 at para 4 and Written Opening Statement of the Commissioner of Competition 2022 10 31 at para 186.

[8] Final Written Argument of the Commissioner of Competition 2022 12 08 at para.6

c. Whether certain efficiencies claimed by the Respondents, referred to as the "Videotron Efficiencies", were legally cognizable under section 96 of the Act ;and[9]

d. Whether applying income tax methodology in calculating wealth transfer is appropriate.

9. The impact of this decision will be significant and will have a profound impact on the daily lives of Canadians for years to come. The Commissioner must not be hindered from advocating for competitive practices and the interests of consumers, because the legal challenges may be prohibitively expensive. Any costs award against the Commissioner should be reduced to reflect these considerations.

**The Tribunal should reduce any cost award to reflect split success on issues in dispute**

10. If the Tribunal concludes that the Proposed Merger is likely to cause a SLC but is saved by the efficiencies defence, or, the Proposed Merger was not saved by the efficiencies defence but the Proposed Divestiture is an effective remedy, then success on the issues in dispute has been divided. In such circumstances, it is appropriate to reduce the legal costs to reflect this divided success.

11. In VAA, the Tribunal recognized that when success is divided, the legal costs should be reduced. In that case, the Commissioner was successful in establishing the product and geographic markets, leading to a reduction in legal costs of approximately one-third.[10] Similarly, for example, in this case, if the Tribunal finds that the Commissioner was successful in establishing that the Proposed Merger is likely to cause a SLC and is saved by the efficiencies defense, then the legal fees and Respondents' expert disbursements should be reduced by at least 70% to reflect the Commissioner's success on these issues.

[9] Final Written Argument of the Commissioner of Competition 2022 12 08 at paras. 195 and 208.
[10] *VAA* at para 819.

**Respondents conduct unnecessarily lengthened the proceeding**

12. The conduct of the Respondents unnecessarily lengthened the proceeding, which is a factor to be considered by the Tribunal under Rule 400. Specifically, the Respondents waited until the last day of closing arguments to make simple admissions with respect to the product and geographic markets, and barriers to entry, which if made at the beginning of the hearing, would have saved both time at the hearing and for the Commissioner, who devoted many unnecessary pages to these topics in final written argument.[11] This can be contrasted with the approach taken by the Commissioner, who, in response to questions from the Tribunal in the opening, made several concessions.[12]

**Respondents unnecessary duplication of effort**

13. The Tribunal should award a single lump sum cost amount to the Respondents, taking into consideration Rule 400(l), which states that the Tribunal should consider whether more than one set of costs should be allowed where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defense unnecessarily.

14. In this case, Rogers and Shaw were unnecessarily represented by different counsel, despite the fact that their interests were aligned and they did not advance different positions or arguments. This duplication of effort was unnecessary and should be taken into consideration when determining an appropriate award of costs. Further, if the Tribunal determines the Intervenor should also be awarded costs, its interests were also aligned and it did not advance different positions or arguments.

[11] Letter to Competition Tribunal dated December 14, 2022, from M. Law.
[12] Hearing Transcript November 7, 2022 page 30 lines 1-16.

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# Competition Tribunal Act

R.S.C. 1985, c. 19 (2nd Supp.)

NOTE

[*1986, c. 26, assented to 17th June, 1986*]

Current to November 28, 2022

Last amended on November 1, 2014

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CODIFICATION

# Loi sur le Tribunal de la concurrence

S.R.C. 1985, ch. 19 (2e suppl.)

NOTE

[*1986, ch. 26, sanctionné le 17 juin 1986*]

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## Jurisdiction and Powers of the Tribunal

### Jurisdiction

**8 (1)** The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

### Powers

**(2)** The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, 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.

### Power to penalize

**(3)** No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

R.S., 1985, c. 19 (2nd Supp.), s. 8; 1999, c. 2, s. 41; 2002, c. 16, s. 16.1.

### Costs

**8.1 (1)** The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998*.

### Payment

**(2)** The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

### Award against the Crown

**(3)** The Tribunal may award costs against Her Majesty in right of Canada.

### Costs adjudged to Her Majesty in right of Canada

**(4)** Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from



## Compétence et pouvoirs du Tribunal

### Compétence

**8 (1)** Les demandes prévues aux parties VII.1 ou VIII de la *Loi sur la concurrence*, de même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.

### Pouvoirs

**(2)** Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

### Outrage au Tribunal

**(3)** Personne ne peut être puni pour outrage au Tribunal à moins qu'un juge ne soit d'avis que la conclusion qu'il y a eu outrage et la peine sont justifiées dans les circonstances.

L.R. (1985), ch. 19 (2e suppl.), art. 8; 1999, ch. 2, art. 41; 2002, ch. 16, art. 16.1.

### Frais

**8.1 (1)** Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la *Loi sur la concurrence*, peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais — même provisionnels — relatifs aux procédures dont il est saisi.

### Détermination

**(2)** Le Tribunal peut désigner les créanciers et les débiteurs des frais, ainsi que les responsables de leur taxation ou autorisation.

### Couronne

**(3)** Le Tribunal peut ordonner à Sa Majesté du chef du Canada de payer des frais.

### Frais adjugés à Sa Majesté du chef du Canada

**(4)** Les frais qui sont adjugés à Sa Majesté du chef du Canada ne peuvent être refusés ni réduits lors de la taxation au seul motif que l'avocat pour les services duquel les frais sont justifiés ou réclamés était un fonctionnaire salarié de Sa Majesté du chef du Canada et, à ce titre, rémunéré pour les services qu'il fournissait dans le cadre de ses fonctions, ou bien n'était pas, de par son statut ou

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# Federal Courts Rules

SOR/98-106

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# Règles des Cours fédérales

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if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.

#### Setting aside or variance

**(2)** On motion, the Court may set aside or vary an order

**(a)** by reason of a matter that arose or was discovered subsequent to the making of the order; or

**(b)** where the order was obtained by fraud.

#### Effect of order

**(3)** Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

## PART 11

# Costs

## Awarding of Costs Between Parties

#### Discretionary powers of Court

**400 (1)** The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

#### Crown

**(2)** Costs may be awarded to or against the Crown.

#### Factors in awarding costs

**(3)** In exercising its discretion under subsection (1), the Court may consider

**(a)** the result of the proceeding;

**(b)** the amounts claimed and the amounts recovered;

**(c)** the importance and complexity of the issues;

**(d)** the apportionment of liability;

**(e)** any written offer to settle;

**(f)** any offer to contribute made under rule 421;

**(g)** the amount of work;

ou d’une erreur ou à cause d’un avis insuffisant de l’instance.

#### Annulation

**(2)** La Cour peut, sur requête, annuler ou modifier une ordonnance dans l’un ou l’autre des cas suivants :

**a)** des faits nouveaux sont survenus ou ont été découverts après que l’ordonnance a été rendue;

**b)** l’ordonnance a été obtenue par fraude.

#### Effet de l’ordonnance

**(3)** Sauf ordonnance contraire de la Cour, l’annulation ou la modification d’une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

## PARTIE 11

# Dépens

## Adjudication des dépens entre parties

#### Pouvoir discrétionnaire de la Cour

**400 (1)** La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

#### La Couronne

**(2)** Les dépens peuvent être adjugés à la Couronne ou contre elle.

#### Facteurs à prendre en compte

**(3)** Dans l’exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l’un ou l’autre des facteurs suivants :

**a)** le résultat de l’instance;

**b)** les sommes réclamées et les sommes recouvrées;

**c)** l’importance et la complexité des questions en litige;

**d)** le partage de la responsabilité;

**e)** toute offre écrite de règlement;

**f)** toute offre de contribution faite en vertu de la règle 421;

**(h)** whether the public interest in having the proceeding litigated justifies a particular award of costs;

**(i)** any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

**(j)** the failure by a party to admit anything that should have been admitted or to serve a request to admit;

**(k)** whether any step in the proceeding was

**(i)** improper, vexatious or unnecessary, or

**(ii)** taken through negligence, mistake or excessive caution;

**(l)** whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

**(m)** whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

**(n)** whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

**(n.1)** whether the expense required to have an expert witness give evidence was justified given

**(i)** the nature of the litigation, its public significance and any need to clarify the law,

**(ii)** the number, complexity or technical nature of the issues in dispute, or

**(iii)** the amount in dispute in the proceeding; and

**(o)** any other matter that it considers relevant.

**g)** la charge de travail;

**h)** le fait que l’intérêt public dans la résolution judiciaire de l’instance justifie une adjudication particulière des dépens;

**i)** la conduite d’une partie qui a eu pour effet d’abréger ou de prolonger inutilement la durée de l’instance;

**j)** le défaut de la part d’une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

**k)** la question de savoir si une mesure prise au cours de l’instance, selon le cas :

**(i)** était inappropriée, vexatoire ou inutile,

**(ii)** a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

**l)** la question de savoir si plus d’un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

**m)** la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

**n)** la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l’application des règles 292 à 299;

**n.1)** la question de savoir si les dépenses engagées pour la déposition d’un témoin expert étaient justifiées compte tenu de l’un ou l’autre des facteurs suivants :

**(i)** la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

**(ii)** le nombre, la complexité ou la nature technique des questions en litige,

**(iii)** la somme en litige;

**o)** toute autre question qu’elle juge pertinente.

**Tariff B**

**(4)** The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

**Tarif B**

**(4)** La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

**Competition Tribunal** **Tribunal de la Concurrence**

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6
File No.: CT-2016-015
Registry Document No.: 429

**IN THE MATTER OF** an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

**The Commissioner of Competition**
(applicant)

and

**Vancouver Airport Authority**
(respondent)

Dates of hearing: October 2-5, 9-10, 15-17 and 30-31, November 1-2 and 13-15, 2018
Before: D. Gascon (Chairperson), P. Crampton C.J. and Dr. D. McFetridge
Date of Reasons for Order and Order: October 17, 2019

**REASONS FOR ORDER AND ORDER**

reasonable and expeditious resolution of the question of costs. The Tribunal further reiterates that it will typically favor lump sum awards of costs over formal taxation of bills of costs.

**[815]** By way of letter dated December 14, 2018, counsel for the Commissioner and for VAA notified the Tribunal that they had reached an agreement with respect to counsel fees as well as a partial agreement with respect to disbursements. According to that agreement, if the Tribunal awarded costs payable by VAA to the Commissioner, VAA would pay $101,000 to the Commissioner for counsel fees, whereas the Commissioner would pay $103,000 to VAA, if costs were payable to VAA. However, the parties were unable to reach an agreement on disbursements, except for travel costs and transcript costs, which they both agreed should be $73,314 and $35,258, respectively. The parties were unable to agree on the balance of the disbursements, and notably on their respective expert fees. They each submitted detailed bills of costs.

**[816]** As VAA is the successful party in this matter, it is entitled to recover at least some of its costs.

**[817]** Section 8.1 of the CT Act gives jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**"). Accordingly, pursuant to FC Rule 400(1), the Tribunal has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." A non-exhaustive list of factors that the Tribunal may consider when exercising its discretion is set out in FC Rule 400(3). It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233 (FCTD), 84 CPR (3d) 303, aff'd (2001), 199 FTR 320 (FCA)).

**[818]** In *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 ("***Maple Leaf Meats***"), the FCA described the approximation of costs as a matter of judgment rather than an accounting exercise. An award of costs is not an exercise in exact science. It is only "an estimate of the amount the Court considers appropriate" (*Maple Leaf Meats* at para 8). The costs ordered should not be excessive or punitive, but rather reflect a fair relationship to the actual costs of litigation. The question for the Tribunal is therefore to determine what, in the

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Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 5
File No.: CT-2017-002
Registry Document No.: 61

**IN THE MATTER OF** the *Competition Act*, RSC 1985, c C-34 as amended;

**AND IN THE MATTER OF** an arrangement between HarperCollins Publishers LLC, Hachette Book Group Inc, Verlagsgruppe Georg von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC d/b/a Macmillan, Simon & Schuster Inc and Apple Inc;

**AND IN THE MATTER OF** an application by the Commissioner of Competition pursuant to section 90.1 of the *Competition Act*.

BETWEEN:

**The Commissioner of Competition**
(applicant)

and

**HarperCollins Publishers LLC and HarperCollins Canada Limited**
(respondents)

and

**Rakuten Kobo Inc**
(applicant for leave to intervene)

Decided on the basis of the written record
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Reasons for Order and Order: April 18, 2017
Order signed by: Justice D. Gascon

**REASONS FOR ORDER AND ORDER GRANTING RAKUTEN KOBO INC LEAVE TO INTERVENE**

6. To attend and make representations at any pre-hearing motions, case management conferences or scheduling conferences; and

7. To make written and oral argument, including submissions on any proposed remedy.

**[18]** Kobo shall be required to:

1. Produce an affidavit of documents listing documents relevant to the three above-mentioned topics;

2. Produce those documents to the extent that they are not privileged; and

3. Make a representative available for examination for discovery (limited to the three above-mentioned topics).

**[19]** Kobo shall be able to seek and be liable for costs in these proceedings.

**[20]** If Kobo intends to make written representations in the context of HarperCollins' motion for summary dismissal, scheduled to be heard by the Tribunal on May 3, 2017, Kobo shall serve and file its memorandum of fact and law and any supporting affidavit or supplementary evidence, limited to the three above-mentioned topics (to the extent that they are affected by HarperCollins' motion for summary dismissal), by April 25, 2017.

**[21]** The style of cause of this matter shall be modified to add Rakuten Kobo Inc as intervenor.

**[22]** There is no order as to costs on this request for leave to intervene.

DATED at Ottawa, this 18th day of April 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Procurement

## DETERMINATION AND REASONS

File No. PR-2020-024

Lions Gate Risk Management Group

v.

Department of Public Works and Government Services

*Determination issued*
*Friday, December 18, 2020*

*Reasons issued*
*Tuesday, January 5, 2020*

Canada

2020 CanLII 101740 (CA CITT)

[55] Lions Gate also alleged that, according to an unnamed individual with direct knowledge of PWGSC's work on the solicitation, PWGSC gave C-BC advance knowledge of the procurement. C-BC denied this allegation. Without any evidence to substantiate this claim, the Tribunal finds that this allegation cannot give rise to an apprehension of bias.

[56] Lions Gate also emphasized requirement B1 of Annex J, which mandated the education, training and experience of proposed resources. The terms of B1 referred specifically to "Corps Commissionaires experience", rather than the more general term "commissionaire". While this may appear peculiar, in the Tribunal's view the terms of B1 alone cannot give rise to a reasonable apprehension of bias.

[57] Altogether, the Tribunal finds that Lions Gate has not provided sufficient evidence to support a finding of bias or the reasonable apprehension thereof. The totality of Lions Gate's evidence did not convince the Tribunal that "an informed person, viewing the matter realistically and practically—and having thought the matter through" would conclude that PWGSC failed to treat Lions Gate fairly. As such, the Tribunal finds that this ground is also not valid.

2020 CanLII 101740 (CA CITT)

### Ground 3: Allegation regarding the fairness monitor

[58] Lions Gate also submitted that the fairness monitor did not discharge its duty.

[59] In response, PWGSC argued that the trade agreements do not require a fairness monitor to be involved in a procurement process, nor are the findings of a fairness monitor relevant to the Tribunal's determination of whether the procurement was conducted in accordance with the trade agreements.

[60] Fairness monitors are third parties appointed to review the procurement process, and are intended to be at arm's length from the government institution. Lions Gate's arguments regarding the fairness monitor did not allege any wrongdoing on PWGSC's part. Lions Gate also did not provide any evidence in support of this ground of complaint. The Tribunal therefore concludes that this ground of complaint is not valid.

### Conclusion

[61] For the foregoing reasons, the Tribunal finds that the complaint is not valid.

## COSTS

[62] The Tribunal has broad discretion to award costs under section 30.16 of the *Act*. The Tribunal follows the "judicial model" under which, generally, the winning party is entitled to its costs. As such, the Tribunal will award costs to PWGSC.

[63] In determining the amount of cost award for this complaint, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

[64] In this case, the solicitation was not particularly complex, the issues raised in the complaint were limited and straightforward, and the complaint proceedings were not overly complicated. Accordingly, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, which has an associated flat-rate amount of $1,150.

[65] C-BC also requested its costs at Level 1.

[66] As a general rule, intervenors are not awarded their costs. The Tribunal has consistently decided against awarding costs to interveners.[32] In the present circumstances, the Tribunal finds no reason to deviate from this rule as C-BC chose to intervene and brought no new significant substantive issues to the proceedings. The Tribunal therefore declines to award costs to C-BC.

## DECISION

[67] Pursuant to subsection 30.14(2) of the *Act*, the Tribunal determines that the complaint is not valid.

[68] Pursuant to section 30.16 of the *Act*, the Tribunal awards PWGSC its costs in the amount of $1,150 for responding to the complaint, which costs are to be paid by Lions Gate. The Tribunal directs Lions Gate to take appropriate action to ensure prompt payment.

Cheryl Beckett

Cheryl Beckett
Presiding Member

32 *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) at para. 119; *TPG Technology Consulting Limited v. Department of Public Works and Government Services* (20 December 2007), PR-2007-060 (CITT) at 38; *Canadian North Inc. v. Department of Indian Affaires and Northern Development* (5 April 2007), PR-2006-026R (CITT) at paras. 16-28; *Bosik Vehicle Barriers Ltd. v. Department of Public Works and Government Services* (6 May 2004), PR-2003-082 (CITT) at paras. 37-39; *Bell Mobility v. Department of Public Works and Governments Services* (14 July 2004), PR-2004-004 (CITT) at paras. 46-47; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at paras. 96-99.

2020 CanLII 101740 (CA CITT)

# Court of Queen's Bench of Alberta

**Citation: UBCJA (Local 1325) v. J.V. Driver Installations Ltd., 2005 ABQB 310**

2005 ABQB 310 (CanLII)

**Date:** 20050422
**Docket:** 0303 15637, 0403 09643
**Registry:** Edmonton

In the Matter of the *Labour Relations Code*, R.S.A. 2000, Chapter L-1

and In the Matter of Decisions of the Labour Relations Board
dated July 31, 2003 and April 16, 2004, both chaired by Deborah Howes, Vice-Chair

Between:

**The United Brotherhood of Carpenters and Joiners of America, Local 1325**

Applicant

\- and -

**J.V. Driver Installations Ltd. and Christian Labour Association of Canada**

Respondents

\- and -

**Alberta Labour Relations Board**

Respondent

\- and -

**International Brotherhood of Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers, Local Lodge No. 146**

Respondent

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**Reasons for Judgment
of the
Honourable Madam Justice M.B. Bielby**

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2005 ABQB 310 (CanLII)

[1] The Interveners, Pyramid Corporation and Westbrook Electrical Services Ltd., applied for costs in this matter. Costs have been awarded to the successful Respondents. The Applicant took issue with an award of costs to the Interveners, relying on authority which suggests these parties should bear their own costs on a policy basis; see ***Stoney Tribal Council v. Pancanadian Petroleum Ltd.*** [2000] A.J. No. 674, para. 2.

[2] The Interveners argue that this is not always the result and that a distinction should be drawn between a "public interest intervener" which is not generally entitled to costs and an intervener who will be directly impacted by the resulting decision, such as those described by Burrows, J. in ***Ritter v. Hoag*** [2003] A.J. No. 579, para. 4 where he stated:

> [t]here are circumstances where deviation from the general rule is appropriate. Where for example a party intervenes in the public interest but is personally affected by the result more than other members of the public, costs may be awarded to or against that intervener.

[3] The Interveners in this case argue that they were in the identical situation as the Respondent J.V. Driver Installations Ltd. which was the reason the Labour Relations Board originally invited their participation. They had successfully litigated to support the current interpretation and application of s. 181 of the *Labour Relations Act* in the past and were therefore invited to intervene on that issue alone, to defend against the alternate interpretation being advocated by the Applicant.

[4] In relation to this issue the Interveners participated as if they were parties. They cross-examined witnesses, called witnesses and lead other evidence. They argued before the Board, successful at that level where no costs are awarded on a policy basis. The Applicant's application for judicial review of the Board decision drew them into that proceeding where they argued and were ultimately successful, as were the Respondents.

[5] Further, the possible appearance and participation of these Interveners should have been anticipated by the Applicant when they brought this application. The Applicant should have addressed the risk of bearing their costs if the application failed given the past relationships of the parties in dealing with s. 178 issues. This is not a situation where the court should hesitate to foist the cost of an unsuspected volunteer upon a party who could not have anticipated those costs when initially deciding to undertake the litigation.

[6] That said, the Interveners bore more of a supporting role and less of a burden than the Respondents who were the first to argue and carried the weight of argument throughout. Rather than awarding the same measure of costs as those granted to the other successful parties, I therefore order the Applicant to pay the Interveners' taxable costs and disbursements set on the same column with no multiplier as the column upon which the Respondents were awarded costs.

Heard on the 7th day of April 2005.
**Dated** at the City of Edmonton, Alberta this 22nd day of April 2005.

**M.B. Bielby**
**J.C.Q.B.A.**

**Appearances:**

Yvon Seveny
for the Applicant, The United Brotherhood of Carpenters and Joiners of America, Local 1325

Thomas W.R. Ross
for the Respondent, J.V. Driver Installations Ltd.

Daniel J. McDonald, Q.C.
for the Respondent, Christian Labour Association of Canada

P. Daryl Wilson, Q.C.
for the Interveners, Pyramid Corporation & Westbrook Electrical Services Ltd.

2005 ABQB 310 (CanLII)

PUBLIC

CANADA

CONSOLIDATION

CODIFICATION

# Federal Courts Rules

# Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to November 28, 2022

Last amended on January 13, 2022

À jour au 28 novembre 2022

Dernière modification le 13 janvier 2022

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if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.

**Setting aside or variance**

**(2)** On motion, the Court may set aside or vary an order

**(a)** by reason of a matter that arose or was discovered subsequent to the making of the order; or

**(b)** where the order was obtained by fraud.

**Effect of order**

**(3)** Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

ou d'une erreur ou à cause d'un avis insuffisant de l'instance.

**Annulation**

**(2)** La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :

**a)** des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

**b)** l'ordonnance a été obtenue par fraude.

**Effet de l'ordonnance**

**(3)** Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

**PART 11**

# Costs

## Awarding of Costs Between Parties

**Discretionary powers of Court**

**400 (1)** The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

**Crown**

**(2)** Costs may be awarded to or against the Crown.

**Factors in awarding costs**

**(3)** In exercising its discretion under subsection (1), the Court may consider

**(a)** the result of the proceeding;

**(b)** the amounts claimed and the amounts recovered;

**(c)** the importance and complexity of the issues;

**(d)** the apportionment of liability;

**(e)** any written offer to settle;

**(f)** any offer to contribute made under rule 421;

**(g)** the amount of work;

**PARTIE 11**

# Dépens

## Adjudication des dépens entre parties

**Pouvoir discrétionnaire de la Cour**

**400 (1)** La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

**La Couronne**

**(2)** Les dépens peuvent être adjugés à la Couronne ou contre elle.

**Facteurs à prendre en compte**

**(3)** Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

**a)** le résultat de l'instance;

**b)** les sommes réclamées et les sommes recouvrées;

**c)** l'importance et la complexité des questions en litige;

**d)** le partage de la responsabilité;

**e)** toute offre écrite de règlement;

**f)** toute offre de contribution faite en vertu de la règle 421;

**(h)** whether the public interest in having the proceeding litigated justifies a particular award of costs;

**(i)** any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

**(j)** the failure by a party to admit anything that should have been admitted or to serve a request to admit;

**(k)** whether any step in the proceeding was

**(i)** improper, vexatious or unnecessary, or

**(ii)** taken through negligence, mistake or excessive caution;

**(l)** whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

**(m)** whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

**(n)** whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

**(n.1)** whether the expense required to have an expert witness give evidence was justified given

**(i)** the nature of the litigation, its public significance and any need to clarify the law,

**(ii)** the number, complexity or technical nature of the issues in dispute, or

**(iii)** the amount in dispute in the proceeding; and

**(o)** any other matter that it considers relevant.

**g)** la charge de travail;

**h)** le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;

**i)** la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;

**j)** le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

**k)** la question de savoir si une mesure prise au cours de l'instance, selon le cas :

**(i)** était inappropriée, vexatoire ou inutile,

**(ii)** a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

**l)** la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

**m)** la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

**n)** la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

**n.1)** la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :

**(i)** la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

**(ii)** le nombre, la complexité ou la nature technique des questions en litige,

**(iii)** la somme en litige;

**o)** toute autre question qu'elle juge pertinente.

### Tariff B

**(4)** The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

### Tarif B

**(4)** La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

PUBLIC

**Competition Tribunal** **Tribunal de la Concurrence**

**PUBLIC VERSION**

Reference: *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated,* 2013 Comp. Trib. 10
File No.: CT-2010-10
Registry Document No.: 0337

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

AND IN THE MATTER of an application by the Commissioner of Competition pursuant to section 76 of the *Competition Act*;

AND IN THE MATTER OF certain agreements or arrangements implemented or enforced by Visa Canada Corporation and MasterCard International Incorporated.

B E T W E E N:

**The Commissioner of Competition**
(applicant)

and

**Visa Canada Corporation**
**MasterCard International Incorporated**
(respondents)

and

**The Toronto-Dominion Bank**
**The Canadian Bankers Association**
(intervenors)

Dates of hearing: 20120508 to 20120510, 20120514 to 20120517, 20120522 to 20120525, 20120528 to 20120601, 20120604 to 20120607, 20120618 to 20120621
Before: Phelan J. (presiding), Dr. W. Askanas and Mr. K. Montgomery
Date of Reasons and Order: July 23, 2013
Reasons and Order signed by: Mr. Justice M. Phelan, Dr. W. Askanas and Mr. K. Montgomery

**REASONS FOR ORDER AND ORDER DISMISSING THE COMMISSIONER'S APPLICATION**

be uniformly competitive. To the extent that markets within "the merchant sector" depart from this assumption, the order sought by the Commissioner risks replacing one set of distorted incentives by another.

**[397]** The powers of the Tribunal to effectively fashion a remedy are limited. Ongoing monitoring and enforcement are impossible. The "merchants" are not before the Tribunal, so the effectiveness of the remedy or the necessary safeguards cannot be assured.

**[398]** The Tribunal is mindful that a change in one part of the credit card system is likely to have consequences in other parts, such as cardholder fees and benefits while price reductions to consumers may be undetectable. The law of unintended consequences is likely to be a significant force. It is uncertain that the supposed "cure" will not be worse than the "disease".

**[399]** The credit card environment still is marked by significant competition and increasing supply – an unusual circumstance in anti-competitive scenarios.

**[400]** We further note that the exercise of our discretion is encumbered by our finding that the Commissioner has failed to establish that MasterCard has engaged in price maintenance through the implementation of the No-Discrimination Rule. This would mean that Merchants may have difficulties differentially surcharging MasterCard credit cards even in the absence of the No-Surcharge Rule.

**[401]** With all the uncertainties and infirmities of the Commissioner's case, the proposed remedy is not an attractive one absent some form of regulatory supervision, of which there is some but which, for policy choices, did not deal with the issues in this case.

## IX. COSTS

**[402]** The Tribunal may award costs in accordance with the provisions governing costs in the *Federal Courts Rules*, 1998 (see: s. 8.1 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.)). Costs are sought by the Respondents and the TD Bank.

**[403]** The Tribunal has full discretionary power over the amount and allocation of costs under Rule 400. Rule 407 provides that unless the Tribunal provides otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B. As stated in *B-Filer et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 26, the Tribunal has followed the jurisprudence to the effect that there must be sound reasons to depart from Rule 407.

**[404]** We are of the view that sound reasons exist to depart from Rule 407.

**[405]** In considering costs, the Tribunal observes that this is a case of mixed result (in the alternative findings). The case is novel and does not mirror the legal basis on which similar cases proceeded in other jurisdictions as Canadian law is different from that of the other jurisdictions. Novelty is not necessarily a bad thing.

**[406]** The Commissioner advanced a case which should be brought; even if she was not entirely successful. Competition law in Canada will not advance if a Commissioner is afraid to lose cases which ought to be brought. The courage to advance these cases is in the public interest. Gaps in our laws and policy will not be identified or remedied. Canadian competition law will develop more opaquely behind the scenes.

**[407]** There is a broad public interest in bringing this case. It is even so for the Respondents as it may add some certainty to their position. The public debate on the issues in this case and more broadly are enhanced by this proceeding.

**[408]** Therefore the Tribunal will make no award of costs.

**THEREFORE, THE TRIBUNAL ORDERS THAT:**

**[409]** The Commissioner's application for an order pursuant to section 76 is dismissed without costs.

DATED at Ottawa, this 23rd day of July, 2013.

SIGNED on behalf of the Tribunal by the panel members.

(s) Michael L. Phelan

(s) Wiktor Askanas

(s) Keith L. Montgomery

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[1] We note that where the words "Tribunal" or "we" are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

[2] Although they conduct their hypothetical monopolist tests at a different stage in the vertical chain, both Dr. Carlton and Dr. Frankel also suggest assuming that the SSNIP is due to an increase in the Acquirer Network Fee.

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

**FILED / PRODUIT**
Date: December 9, 2022
CT- 2022-002

Sara Pelletier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. | Doc. # 774



CT-2022-002

**THE COMPETITION TRIBUNAL**

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

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

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

B E T W E E N :

**COMMISSIONER OF COMPETITION**

Applicant

- and -

**ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.**

Respondents

- and -

**VIDÉOTRON LTD.**

Intervenors

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# FINAL WRITTEN ARGUMENT OF THE COMMISSIONER OF COMPETITION

---

## A. INTRODUCTION AND OVERVIEW

1. On March 13, 2021, the date Rogers Communications Inc. (“Rogers”) agreed to acquire Shaw Communications Inc. (“Shaw”) (“Proposed Merger”), Shaw was on the verge of rolling out 5G services. Window posters and marketing materials announcing Shaw’s new 5G offering were in the hands of its retailers. Shaw had ample cash and credit facilities to acquire 3500 MHz spectrum to make its 5G plans robust, competitive and successful. Its new brand, Shaw Mobile, was showing promising expansion, reducing churn in wireline accounts and enhancing profitability. Shaw Mobile’s entry in July 2020 in British Columbia and Alberta had driven competition, which was benefitting consumers across the markets that Shaw served, including Ontario. Geographic expansion of its wireless network was planned; new entry into business service was targeted. Shaw’s record as a maverick competitor and a competitive “catalyst” had particularly affected Rogers, which had shown disproportionate porting to Shaw Mobile. Rogers had Shaw in its sights.

2. The prospect of competitive growth, further innovation, of more pressure on the Big 3, was brought to a halt as a result of the Proposed Merger. The evidence from Shaw’s own witnesses at the hearing is clear: Shaw’s 5G roll-out and 3500 MHz purchase were shelved as a direct result of it. The impact of this development alone on Canadian wireless competition cannot be overstated.

3. Within months, Shaw, under the shadow of the Proposed Merger, had shifted direction to a “middle lane” strategy that brought price increases, reduced promotions, plummeting device subsidies and curtailed capital spending. The results, properly attributed as anti-competitive effects of the Proposed Merger, contribute to a clear substantial prevention and lessening of competition (“SPLC”).

4. 17 months after the announcement of Proposed Merger, after two deficient remedy proposals were rejected, the Respondents reached agreement for the proposed divestiture of Freedom Mobile (“Freedom”) to Videotron Ltd. (“Videotron”) (“Proposed Divestiture”) now before the Tribunal. They have the burden of showing that it alleviates the anti-competitive effects of the Proposed Merger. They have not done so.

5. The Proposed Divestiture would create an unprecedented relationship of dependence between a Big 3 competitor and a much smaller regional player, a regional player without a track record in, or detailed market knowledge of, Western Canada. The proposed stripping out of Freedom from its existing integration with Shaw (and its weakening as a consequence) would be

CT-2022-002

**THE COMPETITION TRIBUNAL**

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B E T W E E N :

**COMMISSIONER OF COMPETITION**

Applicant

- and -

**ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.**

Respondents

- and -

**ATTORNEY GENERAL OF ALBERTA**
**VIDÉOTRON LTD.**

Intervenors

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# WRITTEN OPENING STATEMENT OF THE COMMISSIONER OF COMPETITION

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a. an order directing the respondents not to proceed with the acquisition of all of the issued and outstanding shares of Shaw by Rogers (the "**Proposed Merger**"); and

b. in the alternative, an order requiring the respondents not to proceed with that part of the Proposed Merger necessary to ensure that it does not prevent or lessen and is not likely to prevent or lessen competition substantially.

186. The Commissioner's section 92 application is in respect of the proposed acquisition by Rogers of all the issued and outstanding shares of Shaw. There is no application properly before the Tribunal about any other transaction in any other form. The matter before the Tribunal is therefore whether to prohibit that Proposed Merger in whole or in part. Pursuant to section 92, absent consent of the Commissioner, the Tribunal cannot order anything except the partial or complete prohibition of the transaction. There is no consent in this case. The Commissioner is seeking an order prohibiting the parties from proceeding with the Proposed Merger. The parties cannot change the jurisdiction of the Tribunal by contract after the application is filed. The Tribunal does not have jurisdiction to accept a behavioural remedy with positive obligations under contractual arrangements absent the Commissioner's consent.

187. The burden of proof is on the Commissioner to demonstrate that it is more likely than not that the Proposed Merger will lead to a substantial prevention or lessening of competition.

188. The proposed divestiture of Freedom to Videotron is irrelevant at this stage of the analysis and beyond the jurisdiction of the Tribunal pursuant to section 92 when evaluating the evidence of whether the Proposed Merger is likely to substantially lessen or prevent competition.

189. It would be an error of law and beyond the jurisdiction of the Tribunal to include consideration of the Proposed Divestiture in its evaluation of the evidence of whether the Proposed Merger is likely to prevent or lessen competition substantially pursuant to section 92.

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: December 9, 2022
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Sara Pelletier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. Doc. # 774



CT-2022-002

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

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B E T W E E N :

**COMMISSIONER OF COMPETITION**

Applicant

- and -

**ROGERS COMMUNICATIONS INC. AND**
**SHAW COMMUNICATIONS INC.**

Respondents

- and -

**VIDÉOTRON LTD.**

Intervenors

---

# FINAL WRITTEN ARGUMENT OF THE COMMISSIONER OF COMPETITION

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accompanied by a complex web of 13 agreements, covering matters from transitional services to spectrum swaps. This is inimical to competition law, which eschews behavioural relief in favour of structural remedies to avoid imposing a monitoring burden and increase the likelihood of an enduring remedy. What Videotron may perceive as favorable terms in certain of these unfinished agreements is swamped by the company's severe vulnerability to the goodwill of a competitor – Rogers - it has already accused of "sabotaging" its Quebec network sharing agreement. These accusations, and the clear failure of that agreement, speak volumes about the dangers of the course the Respondents chart for the future of the Canadian wireless market on the back of the Proposed Divestiture. Added to these deficiencies is the proposed absorption of the disruptive Shaw Mobile product into Rogers, with price increases already planned by Rogers, as disclosed in ordinary course documents and admitted by their witnesses in evidence. The Proposed Divestiture would also cause a consolidation of distinct networks from three to two, with the consequential significant loss of investment incentive, network competition and consumer choice in respect of quality, resilience and reliability. This is particularly troubling given Rogers' poor track record in respect of network reliability.

6. The Tribunal lacks jurisdiction to include the proposed behavioural relief in any order. It must accept or reject the Proposed Divestiture without further terms. The deficiency of the behavioural package proposed must weigh against the Respondents' burden, which is not discharged. The Tribunal should reject the Proposed Divestiture, which is not salvaged by countervailing efficiencies.

7. The applicable legal framework was set out in Section J of the Commissioner's Written Opening and summarized at slides 4 and 5 of the Opening PowerPoint. Reference to that framework will be made from time to time in the discussion that follows.

## B. MARKET STRUCTURE AND INDUSTRY BACKGROUND

8. The record shows that the wireless services market in Canada is characterized by high concentration, significant barriers to entry and persistent coordinated behaviour. The result has been high historical pricing and lower data usage in comparison to most other Western economies.

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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B E T W E E N :

**COMMISSIONER OF COMPETITION**

Applicant

\- and -

**ROGERS COMMUNICATIONS INC. AND**
**SHAW COMMUNICATIONS INC.**

Respondents

\- and -

**VIDÉOTRON LTD.**

Intervenors

---

# FINAL WRITTEN ARGUMENT OF THE COMMISSIONER OF COMPETITION

---

191. The Notice of Application in this case is "in respect of" the Proposed Merger between Rogers and Shaw.[562] It has not been amended. Therefore, the "merger in respect of which the application is made" remains the Proposed Merger. There is no other application properly before the Tribunal about any other transaction in any other form.

192. A contextual reading of section 96 within the merger review scheme of the *Act* also supports excluding efficiencies from the Proposed Divestiture. The Act sets out a notification regime for transactions that meet certain thresholds, and waiting periods to allow the Commissioner to review and decide whether to challenge the transaction.[563] Both the Proposed Merger and Proposed Divestiture were separately notified under that regime.[564]

193. The Commissioner may, following review, challenge a transaction by way of an application to the Tribunal. The Tribunal's jurisdiction in section 92 of the *Act* is framed with respect to that application: "The Tribunal, on application by the Commissioner, may […]". It is the application that defines both which merger is being challenged and the scope of that challenge.

194. The parties are free to propose any remedy, but to allow parties to pretend the merger itself has changed after the application is filed would undermine this scheme. This could lead to the Commissioner – and the Tribunal being forced to contend with a merger other than the one that was notified, reviewed, and challenged. To put the Commissioner and the Tribunal on such shifting sands and erodes the certainty and predictability of the merger review regime.[565]

**a) Videotron's Claimed Efficiencies Are Offset by Negative Efficiencies**

195. In the alternative, Mr. Davies observes that the combination of Freedom and Shaw creates economies of scope and scale, such that their separation will result in negative efficiencies.[566] A divestiture of Freedom would lead to diminished scale for it and Shaw Mobile, increasing the cost of providing mobile services per customer. The resulting negative efficiencies were ignored by Mr. Harington and are of unknown magnitude.[567]

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[562] Notice of Application dated May 9, 2022, CT-2022-002, document #2, p 6 para 14.
[563] *Competition Act*, ss 114-119 (notification); ss 123-123.1 (waiting periods), BOA Tab 28.
[564] The Commissioner's review of the Proposed Divestiture is in progress as of the date of this submission.
[565] The Supreme Court has recognized in another context the importance of predictability to merger reviews: *Tervita SCC*, para 130, BOA Tab 24. The problem only becomes more acute in the context of an expedited proceeding.
[566] CA-A-0134, Davies Reply Report, p 48-50, paras 100-107.
[567] These gains may equal or exceed the claimed efficiencies in respect of the Proposed Divestiture: unlike Freedom and Videotron, Freedom and Shaw operate in the same markets, and therefore may have greater synergies.

### 6. Quantum of Substantiated Efficiencies

207. The substantiated efficiencies from the Proposed Merger are no greater than [593] The claimed labour cost efficiencies are not substantiated. In the alternative, they are no greater than [594]

208. The claimed efficiencies from the Proposed Divestiture are not cognizable. In the alternative, the substantiated 10-year NPV is n.[595] In the further alternative, Videotron's labour cost savings are no greater than [596]

### 7. Timing of Effects

209. The Respondents have questioned whether the anticompetitive effects will start in year one or whether they will take some time to materialize.[597] They are no doubt thinking of the section 96 trade-off analysis.

210. First of all, the merged entity will have the ability and incentive to raise prices and lower quality immediately following the closing of the Proposed Merger. Terms of service allow carriers to change any term of their contract, including fees, simply by giving 30 days' "notice" (e.g., by posting a statement on a wireless company's website).[598] [599] Prices can increase rapidly. This means consumers are likely to incur a welfare loss even before they return to the market to select a new wireless plan. Further, Shaw has already cut back on its promotional activity during the pendency of the arrangement agreement as part of its 'middle lane'

[593] CA-A-1869, Zmijewski Report, p 111, Exhibit VI-10, row [9], Net Efficiencies over 10 Years, Discounted.
[594] CA-A-1869, Zmijewski Report, p 112, Exhibit VI-11, row [5], Net Efficiencies over 10 Years, Discounted, adjusted for error in the Harington Report: Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4132:1-6; For example, the description for the project "Wireline Testing" simply reads "BMA Managed service testing SOW," CA-A-1833, Harington Report Electronic Schedule, tab "F23 Budget Submission," cell K27.
[595] CA-A-1869, Zmijewski Report, p 115, Exhibit VII-3, row [5], Net Efficiencies over 10 Years, Discounted, adjusted for missing "Costs related to Videotron Transaction" see: CB-R-1831, Presentation of Mr. Harington, p 4; Prof. Zmijewski corrects for the adding error with respect to costs to achieve non-labour related real estate savings; the error with respect to "savings relating to network separation initiative" does not relate to a substantiated efficiency; for NPV calculation, see Exhibit X – NPV Calculations (attached).
[596] CA-A-1869, Zmijewski Report, p 116, Exhibit VII-4, row [5], Net Efficiencies over 10 Years, Discounted.
[597] Testimony of N Miller, Transcript, Vol 7, Nov 16, 2022, p 1643:24 – p 1644:3.
[598] See, e.g., CA-A-1787, Answers to Undertaking Shaw Presentation Data Performance Benchmark & National Data Roaming Analysis, March 30, 2022 and CA-A-1759, Answers to Undertaking Shaw Appendix A: Terms of Service as of July 19, 2022.
[599] CA-A-1879, Read-Ins relating to Rogers' Examinations, pp 69-74, Q 390-410; pp77-79; Q. 423-430; pp 506-516. CB-A-0410, pp 6-7, 9. See also, CA-A-0122, Miller Report, p 175, para 372.

**Competition Tribunal** **Tribunal de la Concurrence**

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6
File No.: CT-2016-015
Registry Document No.: 429

**IN THE MATTER OF** an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

**The Commissioner of Competition**
(applicant)

and

**Vancouver Airport Authority**
(respondent)

Dates of hearing: October 2-5, 9-10, 15-17 and 30-31, November 1-2 and 13-15, 2018
Before: D. Gascon (Chairperson), P. Crampton C.J. and Dr. D. McFetridge
Date of Reasons for Order and Order: October 17, 2019

**REASONS FOR ORDER AND ORDER**

circumstances, are necessary and reasonable legal costs and disbursements (*Nadeau Ferme Avicole Ltée v Groupe Westco Inc*, 2010 Comp Trib 1 at para 49).

**[819]** With respect to legal costs, there is agreement between the parties on the amount to be paid to the successful party. However, in this case, the success on the issues in dispute has been divided; the Commissioner has prevailed on the product and geographic market definitions, on paragraph 79(1)(*a*) and on the PCI. A fair amount of time was spent by VAA disputing those issues. In the circumstances, the Tribunal is of the view that the legal costs to be paid to VAA should be reduced, by about a third. This is particularly so given that VAA persisted in spending time on market definition, paragraph 79(1)(*a*) and PCI, notwithstanding the Tribunal's encouragement to move along to the issues in respect of which VAA ultimately proved to be the successful party. The Tribunal thus fixes the Tariff B legal costs to be paid to VAA by the Commissioner at $70,000.

**[820]** Turning to disbursements, in addition to the travel and transcript costs agreed upon, VAA claims expert fees of $1,834,848 for Dr. Reitman and of $379,228 for Dr. Tretheway, as well as electronic discovery and document management fees of $291,290, for a total exceeding $2.6 million. The Commissioner submits that these disbursement amounts are excessive and should be substantially reduced.

**[821]** The Tribunal is satisfied that both parties have provided, in their respective bills of costs, detailed information and sufficient support to explain the disbursements incurred and the basis of their various claims. The bills of costs were prepared in accordance with Column III of Tariff B of the FC Rules, and evidence has been provided regarding the billing, payment and justifications of the services provided and expenses incurred. With respect to experts, details regarding the tasks performed by each expert (and their teams), as well as the amount of time spent per task, have been provided. The question is not whether the disbursements at issue were incurred but whether they are reasonable, necessary and justified.

**[822]** The Tribunal notes that the expert fees claimed by VAA are substantially higher than the fees of the Commissioner's sole expert witness, Dr. Niels, which totalled $1,333,209 for his two reports. Since Dr. Reitman did not have to construct his own data set to perform his analyses and was essentially responding to Dr. Niels' analysis, the Tribunal agrees with the Commissioner

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December 14, 2022

**BY EMAIL**

Chief Justice Crampton
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON
K1P 5B4

Dear Chief Justice Crampton:

**Commissioner of Competition Bureau v. Rogers Communications Inc. and Shaw Communications Inc. (CT-2002-002)**

At the outset of yesterday's hearing, you asked the Respondents for their position regarding geographic market definition, product market definition, and barriers to entry. This letter responds to that request.

Regarding geographic market definition, for purposes of this proceeding the Respondents do not contest the geographic markets defined by the Commissioner at paragraph 53 of his Notice of Application, namely, that the relevant markets are British Columbia, Alberta, and Ontario. There are important aspects of competition that are broader, such as the reduced dependency on roaming that Freedom and Videotron will enjoy as a result of being a near-national competitor post-merger. Similarly, while the Commissioner has conceded there is no SLPC in Ontario, the Respondents maintain that the pro-competitive effects in Ontario (such as marginal cost savings and introduction of new bundled competition) must be taken into account because they would be lost in the event of an order blocking the Proposed Transaction, as set out at paragraphs 144-146 of the Respondents' Closing Submissions. However, the Respondents do not contend that these competitive dynamics change the geographic market definition from that set out in the Commissioner's pleading.

Regarding product market definition, for purposes of this proceeding the Respondents do not contest the product market defined by the Commissioner at paragraph 50(a) of his Notice of Application, namely the provision of wireless services to non-business consumers. The Commissioner conceded at paragraph 9 of his Opening Statement and paragraph 10 of his Final Written Argument that he is no longer alleging an SLPC in the market for business wireless services, which was the second product market the Commissioner defined at paragraph 50(b) of his Notice of Application. There are

important aspects of differentiated competition that likely impact competition for wireless services to non-business consumers, such as particular bundled offerings and competition for wireline services. However, given the concession of the Commissioner that there is no SLPC associated with business wireless services, the Respondents do not contend that these competitive dynamics change the product market definition from that set out in paragraph 50(a) of the Commissioner's pleading.

Regarding barriers to entry, the Respondents do not agree that the factors identified by the Commissioner constitute high barriers to entry, particularly given the CRTC's MVNO regime. Nevertheless, for purposes of this proceeding and having regard to paragraphs 216 and 379 of the Tribunal's decision in *CCS Corp.*, 2012 Comp. Trib. 14, which make clear that the relevance of barriers to entry is to assess the likelihood of near-term entry, the Respondents accept that if the Commissioner's Application is dismissed and the Transaction proceeds, new and sufficient entry is unlikely within the following two years. That said, for all the reasons set out in the Respondents' Closing Submissions, the Transaction will not result in an SLPC and will in fact be pro-competitive, regardless of the likelihood of near-term entry.

The Respondents hope this is responsive to the Tribunal's questions and obviates the need for the Tribunal to conduct any material analysis on these points in its reasons. If further clarification is required the Respondents would be happy to provide it.

Respectfully yours,

Matthew Law

cc: John S. Tyhurst, Alexander Gay, Derek Leschinsky, *Competition Bureau Legal Services*
Kent Thomson, Derek Ricci, Steven Frankel, Chanakya Sethi, *Davies Ward Phillips & Vineberg LLP*
John Rook, Emrys Davis, Alysha Pannu, *Bennett Jones LLP*
Jonathan Lisus, Crawford Smith, Bradley Vermeersch, *Lax O'Sullivan Lisus Gottlieb LLP*

**File No. / Dossier no. CT-2022-002**

**COMPETITION TRIBUNAL**

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

**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 an order pursuant to section 92 of the *Competition Act*.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**- and -**

**ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.**

**Respondents**

**BEFORE:**

| | |
|---|---|
| The Honourable Chief Justice Paul Crampton | **Presiding** |
| Dr. Wiktor Askanas | **Member** |
| Ms. Ramaz Samrout | **Member** |

**HELD VIA VIDEOCONFERENCE**

7 November 2022

**Volume 1**
**Combined**

1 respect to geographic market, and the Commissioner does
2 allege a substantial lessening of competition from the
3 broader merger but does not allege substantial -- or is
4 accepting that the substantial aspect has been removed in
5 Ontario by the divestiture, but not in B.C. and Alberta.
6 So B.C. and Alberta with respect to the proposed
7 divestiture remain live in terms of the respondents' burden
8 of showing that they removed the substantial effect.
9 The application does allege a separate product
10 market in business services due to specialized demand and
11 supply side specialization. We no longer, however, allege
12 a substantial lessening. We submit that that lessening of
13 competition could be relevant in section 96 if the balance
14 becomes relevant, because Shaw was a poised competitor in
15 that market, as the facts and as the evidence will
16 indicate.
17 So turning to industry structure. An industry
18 that has featured high barriers to entry, and
19 concentration, and historically high prices, and reduced
20 data consumption. This slide presents the barriers to
21 entry that we have explained in more detail in our written
22 submissions.
23 The fact, we submit, is and I don't think
24 again, this is a contentious issue between the parties, is
25 that entry features a large number of barriers which make

**Respondents conduct unnecessarily lengthened the proceeding**

12. The conduct of the Respondents unnecessarily lengthened the proceeding, which is a factor to be considered by the Tribunal under Rule 400. Specifically, the Respondents waited until the last day of closing arguments to make simple admissions with respect to the product and geographic markets, and barriers to entry, which if made at the beginning of the hearing, would have saved both time at the hearing and for the Commissioner, who devoted many unnecessary pages to these topics in final written argument.[11] This can be contrasted with the approach taken by the Commissioner, who, in response to questions from the Tribunal in the opening, made several concessions.[12]

**Respondents unnecessary duplication of effort**

13. The Tribunal should award a single lump sum cost amount to the Respondents, taking into consideration Rule 400(l), which states that the Tribunal should consider whether more than one set of costs should be allowed where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defense unnecessarily.

14. In this case, Rogers and Shaw were unnecessarily represented by different counsel, despite the fact that their interests were aligned and they did not advance different positions or arguments. This duplication of effort was unnecessary and should be taken into consideration when determining an appropriate award of costs. Further, if the Tribunal determines the Intervenor should also be awarded costs, its interests were also aligned and it did not advance different positions or arguments.

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[11] Letter to Competition Tribunal dated December 14, 2022, from M. Law.
[12] Hearing Transcript November 7, 2022 page 30 lines 1-16.