PUBLIC

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

VIDEOTRON LTD.

Intervenor

COSTS SUBMISSIONS

of

ROGERS COMMUNICATIONS INC.,
SHAW COMMUNICATIONS INC. and VIDEOTRON LTD.

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PART I - OVERVIEW

1. This case epitomizes high-stakes commercial litigation. It concerns the fate of a $26 billion transaction and the future of Canada's telecommunications industry.

2. But the case should not have been pursued by the Commissioner through trial. In June, just over a month after he filed his application, the sale of Freedom to Videotron fundamentally changed the landscape. It presented a manifestly pro-competitive opportunity to launch a fourth national carrier on highly favourable terms.

3. In response, the Commissioner doggedly litigated a transaction no one proposed to consummate, and that had been legally foreclosed by the Minister of Industry on October 25, 2022, well before the hearing of this matter began. Two efforts at mediation were fruitless. The Commissioner has never moved from his all-or-nothing demand for a total block. That decision should now have consequences. The Commissioner is an experienced, professional litigant. He knew that all parties would deploy significant resources in this hard fought trial and understood the natural consequences of his litigation choices.

4. The Respondents and Videotron submit that the costs awarded should bear a *real relationship* to the actual costs incurred. This is consistent with prevailing guidance from the Federal Court of Appeal, holding that a lump-sum percentage award is routinely warranted in high-stakes commercial disputes.

5. Here, a lump-sum award representing 25% of actual legal fees, plus disbursements (as summarized in Appendix A and attached bills of costs) is at the low end of the range found acceptable in complex commercial cases and is a manifestly reasonable result. In the alternative, the Respondents and Videotron seek their legal fees guided by the top end of Column V of Tariff B, also set out below in Appendix A.

PART II - LAW AND ARGUMENT

A. Governing Legal Principles

6. Section 8.1 of the *Competition Tribunal Act* grants the Tribunal full discretion over the amount and allocation of costs in line with *Federal Court Rules*. Subsection 400(3) of the *Rules* provides a non-exhaustive list of relevant factors, including the result of the proceeding, the importance and complexity of the issues, the amount of work, and any other relevant matter.[1]

7. A costs award seeks to indemnify a successful party with "reasonable contribution" for its litigation costs. To achieve that objective, the Tribunal has discretion to depart from the tariff and issue a lump-sum award. Lump-sum awards are a matter of judgment and reflect the principle that costs "should have a fair relationship to the actual costs of litigation."[2]

8. In *Nova Chemicals*, the Federal Court of Appeal endorsed the "trend in recent case law favouring the award of a lump sum based on a percentage of the actual costs to the party when dealing with sophisticated commercial litigants that clearly have the means to pay for the legal choices they make." Similarly, Crampton C.J. observed in *Allergan* that parties to complex intellectual property disputes "generally are very sophisticated commercial litigants who can be assumed to calibrate the strategic decisions made over the course of the proceeding with a keen eye on the economic consequences of those decisions." He adopted the mid-point between 25% to 50% as the "starting point" for assessing lump sum costs.[3] Awards of 25-50% of actual legal fees are increasingly the practice in Federal Court commercial cases, as well as in the Tax Court.[4]

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[1] *Federal Court Rules* (SOR/98-106) at s. 400(3). *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, at para. 786 [*P&H*]; *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6, at para. 817.
[2] *P&H*, at paras. 771-772 [*P&H*]; *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 at paras. 13, 21 [*Nova Chemicals*].
[3] *Allergan Inc. v. Sandoz Canada Inc.*, 2021 FC 186, para. 35.
[4] *Nova Chemicals*, at paras. 16-17. See also, e.g., *CIT Group Securities (Canada) Inc. v. The Queen*, 2017 TCC 86; *Apotex Inc. v. Shire LLC*, 2018 FC 1106; *Cameco Corporation v. The Queen*, 2019 TCC 92.

9. Here, the request for 25% of actual fees plus disbursements is conservative given the stakes involved, the complexity of the dispute, and amount of work completed from pleadings to trial, all within a matter of months.

B. Commissioner's Hard Line Was Unreasonable and Gave Rise to Significant Costs

10. The Commissioner commenced this proceeding on May 8, 2022. At that time, he was well aware that efforts to divest Freedom were already underway. They came to fruition five weeks later on June 17, 2022, with the proposed sale of Freedom to Videotron on highly favourable terms.

11. Despite this important development, the Commissioner was intransigent. He refused to engage meaningfully with the Respondents or Videotron, and instead pursued his challenge to a fictional transaction that none of Rogers, Shaw or Videotron proposed to proceed with, all the way through to the end of trial. This all-or-nothing approach is encapsulated in his failure, despite repeated requests, to advise what terms were needed to gain his approval. On June 24, 2022, a week after the sale of Freedom to Videotron was announced, Videotron made detailed submissions explaining how its acquisition answered the Commissioner's concerns. Only three days later, this proposal was summarily rejected by Bureau staff before they had even met with Videotron to discuss it. Although that meeting proceeded on June 30, the Commissioner's mind was made up.

12. In the event the Respondents prevail, there will be no doubt the Commissioner should have shown restraint and reconsidered his opposition. Had he done so, this proceeding could have been avoided. He adopted an unnecessarily contentious approach throughout the litigation, which resulted in an intensive, compressed pre-trial process, including the production by the parties of over 2.6 million documents, nine days of examinations for discovery, 16 contested pre-trial motions, the engagement of Bell and Telus in motions over documents and subpoenas, and the exchange of 45 witness statements and expert reports in a very tight timeframe.

13. Even after the evidence showed the Commissioner's best economic case was an alleged 1.7% average price increase in Alberta and British Columbia (and none in Ontario)—well below the standard of substantiality—he pressed on with his proposed block of a transaction that will never occur. Rogers and Shaw had no choice but to defend every aspect of the case. It does not now lie in his mouth to suggest they should have been less forceful in their defence.

14. The Commissioner's hard line was maintained in spite of overwhelming lay and expert evidence that demonstrated the lack of merit to his allegations. His core assertion that wireline ownership is necessary to compete in wireless was contradicted by contemporaneous documents of his own witnesses, as well as by their statements and submissions to him during his investigation. Moreover, he elected not to call knowledgeable Bureau witnesses who conducted the investigation, testified at discovery and swore s. 104 affidavits. And it was only in his opening statement that he backed away from his claims of an SLPC in Ontario and the market for business services.

15. If the Respondents are successful, the Commissioner's strident opposition to the transaction following the sale of Freedom to Videotron will have been shown to be fundamentally misguided. The ordinary and expected costs consequences should follow.

C. <u>Stakes Could Not Have Been Higher; Costs Are Proportionate</u>

16. This is by far the largest contested merger this Tribunal's history. Its profound importance to the parties and the telecommunications industry cannot be overstated. It was prosecuted and defended by large, able teams supported by high calibre experts. Both sides expected high costs.

17. The trial was a major undertaking. Thirty fact witnesses and 14 experts testified over 18 extended days. The expert and fact opinion was at the very high end of the complexity scale and was necessary to give the Tribunal a full appreciation of the issues. The Agreed Book of Documents consisted of 9,050 documents. Over 1,900 exhibits were marked. The parties filed

detailed written submissions and thousands of pages of compendia. It was an enormous and urgent task to complete this "real time" commercial litigation from pleadings to closing arguments within six months. The Tribunal and staff of its Registry deserve enormous credit for this.

18. In the Federal Court and Tax Court, significant lump-sum costs awards are common in complex, high-stakes commercial proceedings. By way of example

(a) In *Cameco Corporation v. The Queen*, the Tax Court awarded a lump-sum of $10,250,000 of counsel fees against Canada, representing approximately 35% of counsel fees incurred by the successful party, plus disbursements. The Tax Court concluded that the award "appropriately reflects the success of the Appellant, the amounts in issue [$483 million] and the complexity of the issues and appropriately contributes to the costs incurred by the Appellant for counsel fees without being either extravagant or punitive to the Respondent."[5] In the process of getting case ready for trial, the parties produced over 200,000 documents, held weeks of oral discoveries, and called a total of 19 fact and eight expert witnesses to testify at trial.

(b) In *Seedlings Life Science Ventures, LLC v. Pfizer Canada ULC*, the Federal Court awarded lump-sum costs of $2,629,062.00, inclusive of disbursements, in a patent infringement suit. Legal fees were assessed based on 25% of the successful defendant's reasonably incurred legal fees. The Court held that "it is inherently difficult for a court to second-guess strategic litigation choices made by the parties. The court does not know each party's degree of tolerance of risk and may not have a full appreciation of the impact of its judgment on the parties. And, of course, hindsight is always perfect. Indeed, it should not be for the losing party 'to tell the winning party how they could have succeeded by doing or spending less'."[6]

19. This case represents a much larger, more complex endeavour on a substantially more compressed timetable with a $26 billion transaction and a $1.2 billion break fee hanging in the balance. Rogers has been put at risk of more than $250 million in additional financing costs alone from the Commissioner's insistence on litigating every aspect of the Proposed Transaction and insisting that it be fully blocked. The claimed fees and disbursements are modest in comparison to what was at stake. The costs claimed by the Respondents' and Videotron are manifestly proportionate in the circumstances.

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[5] 2019 TCC 92 at paras. 22-23, 46.
[6] 2020 FC 505 at paras. 1, 15.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of December, 2022

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APPENDIX A
SUMMARY OF CLAIMED COSTS BY ROGERS, SHAW & VIDEOTRON

	Rogers Communications Inc.	Shaw Communications Inc.	Videotron Ltd.
Counsel Fees			
Actual claimed legal fees (excluding HST)	$7,967,640.00	$9,686,275.00	$1,949,180.48
Of which 25%	$1,991,910.00	$2,421,568.75	$487,295.12
In the alternative, counsel fees under Tariff B	$468,633.60	$416,187.00	$343,384.40
Disbursements			
Expert Fees (excluding HST where applicable)	• Altman Solon: $3,768,524.43 • Brattle Group: $1,442,079.86 • Compass Lexecon: $4,367,482.45 • Roger Ware: $244,586.70 • Michael Smart: $33,466.22	Non-taxable disbursements (e-discovery, expert fees): $3,289,939.60	None.
Other Disbursements (excluding HST where applicable)	Taxable • Courier Costs: $486.05 • External Document Reviewer: $93,265.00 • Online Research – Canadian Databases: $4,104.41 • Printing & Photocopying: $5,000[1] • Transcript Costs: $34,411.70 • Travel Expenses: $5,478.70	Taxable disbursements (translations, transcript fees) = $86,173.59	• Printing/Copies: $22,849.60 • Courier: $66.55 • Online Legal Research: $34.00 • Court Reporter/Transcript Fees: $42,431.00 • Travel (HST inclusive): 6,350.25 • E-Discovery (database hosting): $43,107.61 Total (inclusive of HST): $103,122.50

[1] Rogers' actual printing costs are approximately $114,000. Rogers only claims $5,000, representing the approximate cost of printing one copy of all materials plus the printed documents delivered to the Tribunal and the mediators.

	Non-Taxable • E-Discovery Database: $1,053,544.39 • Online Research – US Databases: $78.11 • Travel Expenses: $22,614.56		

Total

Total Claimed Costs & Disbursements (based on 25% of Actual Legal Fees)	$13,344,537.84	$6,123,688.44	$654,298.01
Alternative Claimed Costs & Disbursements (based on the Tariff)	$11,562,313.14	$3,857,607.07	$446,506.90