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OTTAWA, ONT.

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COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c. C-34.

B E T W E E N :

THE COMMISSIONER OF COMPETITION

Applicant

- and -

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

Respondents

- and -

VIDÉOTRON LTD.

Intervener

**SUPPLEMENTAL COSTS SUBMISSIONS OF
THE COMMISSIONER OF COMPETITION**

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Shaw Communications Inc.

1. These supplementary costs submissions should be read together with the Commissioner's costs submissions dated December 29, 2022, and his Bill of Costs.
- I. A costs award should be materially reduced to reflect the important public interest in bringing this case**
2. In evaluating costs, it is relevant to consider (i) the importance of the merger and divestiture; and (ii) the public interest in having the proceeding litigated.¹ All parties agreed that the transactions were “a watershed moment for wireless competition in Canada”.² Rogers submitted that the Tribunal's decision would “determine the future of the Canadian telecommunications industry for the next decade or more”.³ Hundreds of people watched the hearing every day and news media covered the case in minute detail.
3. An award of elevated legal fees to the Respondents in the millions of dollars would be unprecedented; it runs counter to the importance and public interest in having this matter heard by the Tribunal. Underpinning the case were real and *bona fide* disputes warranting a hearing before this expert Tribunal. The hearing's complexity reflects the importance and novelty of the many factual and legal issues relating to competition in wireless services. Issues such as “litigating the fix”, the assessment of an emerging brand (Shaw Mobile), and the significance of wireline assets to wireless competition were novel. This was a consumer case: the ubiquity of mobile devices meant millions of individuals would experience the effects of an anticompetitive merger in this important part of the economy.
4. It is relevant in assessing costs that the Commissioner has no private commercial interest and is presumed to have acted in the public interest in seeking adjudication before the Tribunal.⁴ The Commissioner is a “public official with a statutory mandate to administer and enforce the Act.”⁵ Given the Commissioner's regulatory function in the public interest, the Tribunal should not require him to pay elevated legal costs without highly exceptional circumstances of which there are none here. As this Tribunal previously recognized,

¹ [Federal Courts Rules, SOR/98-106](#), rr 400(3)(c) and 400(3)(h).

² [Closing Submissions of the Respondents, Rogers, Shaw and the Intervenor, Videotron](#) at para 1.

³ [Opening Statement of the Respondent, Rogers Communications Inc.](#) at para 1.

⁴ [Rona Inc v Commissioner of Competition, 2005 Comp Trib 26](#) at para 17.

⁵ [Canada \(Commissioner of Competition\) v Parrish & Heimbecker, Limited, 2022 Comp Trib 18](#), at para 781.

“Competition law in Canada will not advance if a Commissioner is afraid to lose cases which ought to be brought.”⁶

5. It is essential to the proper functioning of justice in Canada that the Tribunal remains accessible to resolve *bona fide* disagreements between the Commissioner and merging parties about the likely competitive effects of a transaction.⁷

II. The Respondents’ costs should be reduced to reflect the Commissioner’s role in bringing about the Videotron divestiture

6. Dismissal of the application is not the only outcome relevant to assessing costs in this matter. The Respondents’ costs award should be reduced to recognize the Commissioner’s role in bringing about the Videotron divestiture in the public interest. The Commissioner incurred significant expenses reviewing and challenging the initial transaction proposed between Rogers and Shaw – resulting in a divestiture to Videotron to address competition concerns.
7. The Commissioner’s role is reflected in the timeline of the Videotron divestiture. The Respondents first notified the Commissioner of their proposed merger without any divestiture. The Respondents filed pleadings that put the Commissioner to his burden of proof with respect to that original transaction.⁸ Early divestitures contemplated by the Respondents were a moving target involving multiple buyers and remedy packages. They proposed making a divestiture to a financial buyer, which the Tribunal recognized “are not typically known for aggressive price or non-price behaviour”.⁹
8. The Videotron divestiture was only entered into on the eve of examinations for discovery. It was not until the Tribunal made its – expedited – scheduling order, that the Respondents disclosed to the Commissioner that they had concluded a term sheet with Videotron.
9. Any costs award should also reflect the substantial costs incurred by the Commissioner, (especially experts’ fees) as a consequence of the Respondents’ continued defence of their

⁶ [Commissioner of Competition v Visa Canada Corporation and Mastercard International Incorporated, 2013 Comp Trib 10](#) at para 406.

⁷ [Commissioner of Competition v Visa Canada Corporation and Mastercard International Incorporated, 2013 Comp Trib 10](#) at paras 406 and 407.

⁸ See [Response of Rogers Communications Inc.](#) and [Amended Response from Rogers Communications Inc.](#)

⁹ [Reasons for Order and Order](#) at para 1.

initial transaction. Even after disclosing the Videotron divestiture, the Respondents maintained their pleading that the initial Rogers/Shaw transaction did not substantially lessen or prevent competition until just a month before all parties filed witness statements and expert reports on September 23, 2022.¹⁰

III. Any costs award should be materially reduced on account of the Respondents' refusal to make admissions that would have simplified the case

10. Rule 400(3)(j) provides for the Tribunal to consider the Respondents' failure to admit anything that should have been admitted.¹¹ This encapsulates the principle that the fair and expeditious resolution of cases through admissions should be encouraged through costs.
11. The Respondents placed an unnecessary evidentiary burden on the Commissioner by refusing to admit many matters that should have been admitted. This was especially the case with their responses to the Commissioner's Requests to Admit, which were intended to narrow the issues before the Tribunal. For example, Rogers refused to admit that it experienced a service outage in 2022; or to a portion of its wireless terms of service.¹²

IV. The Respondents' claims for legal fees are excessive

12. There is no precedent in this Tribunal for assessing legal fees against the Commissioner in the magnitude sought by the respondents, or without regard to Tariff B of the *Federal Courts Rules*. For example, in the recent *P&H* decision, the successful respondent was awarded lump sum legal fees equal to 75% of Column IV of Tariff B, which amounted to \$157,000.¹³ The legal fees claimed by the Respondents in this case are unprecedented and unjustified.¹⁴
13. The Respondents' costs claims disregard the fact that the Commissioner proceeded with this application in the public interest. Additionally, they do not account for the substantial duplication of work as between the Rogers and Shaw legal teams. Counsel for both parties

¹⁰ [Fresh as Amended Response from Rogers Communications Inc.](#)

¹¹ *Federal Courts Rules*, SOR/98-106, r 400(3)(j).

¹² Copies of Response to Request to Admit of Rogers Communications Inc. can be filed with upon request.

¹³ *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, at para 785.

¹⁴ See e.g. *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 828 in which the Tribunal awarded the respondent \$70,000 in legal fees; and *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 02 in which the Tribunal awarded the Commissioner \$150,000 by agreement.

were heavily involved in every aspect of the defence to the Commissioner's application, leading to parallel and overlapping defences and evidence led by each party.

14. The legal fees claimed by the Commissioner (\$178,561.70) are an appropriate benchmark for reasonable non-duplicative legal fees in this litigation. Applying a similar approach of using the mid-range of Column III of Tariff B would result in claimed legal fees of \$174,038.08 by Rogers and \$182,535.68 by Shaw. These amounts should be discounted to reflect the duplication of work discussed above.

V. The Respondents' disbursement claims are excessive and duplicative

15. Expert-related costs and other disbursements are not automatically recovered in their entirety and will be adjusted by the Tribunal if they do not appear reasonable.¹⁵ Even with the adjustments in the Respondents' affidavits, the Respondents' disbursement claims are still excessive and unreasonable in the following ways.
16. First, the Respondents' economic experts undertook a much more limited task than the Commissioner's expert, Dr. Nathan Miller. Dr. Miller's work included a full modeling of the merger of Rogers and Shaw and assessing the Videotron divestiture, whereas Rogers' expert Dr. Mark Israel limited himself to a much more limited critique report. Yet, Dr. Israel's billings approach those of Dr. Miller. The work of Shaw's economic expert, Dr. Paul Johnson, was superfluous in view of Dr. Israel's work and was found not to be of much assistance to the Tribunal.¹⁶ Any reimbursement for Dr. Israel's billings should therefore be reduced and any reimbursement for Dr. Johnson's work should be foregone or very substantially reduced to reflect the limited value of Dr. Johnson's analysis to the Tribunal.
17. Second, it was duplicative for Rogers to lead industry evidence from Mr. Kenneth Martin and Shaw to also lead evidence from Dr. William Webb, in light of the evidence given by the other. Disbursement claims for these similar areas of evidence should be reduced to reflect the significant duplication.

¹⁵[Canada \(Commissioner of Competition\) v Parrish & Heimbecker, Limited, 2022 Comp Trib 18](#) at para 773.

¹⁶[Reasons for Order and Order](#) at para 81.

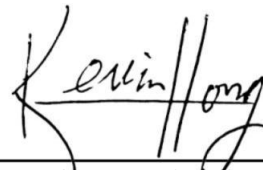
18. Third, the Respondents called excessive evidence from three separate experts on the subject of wealth transfer, with Rogers calling Dr. Roger Ware and Dr. Michael Smart and Shaw calling Dr. David Evans. In comparison, the Commissioner claimed \$89,302.50 in expert fees on wealth transfer issues whereas the Respondents claim more than seven times that amount (\$627,976.11).
19. Last, Rogers and Shaw claim other disbursements that are in the nature of overhead that the Commissioner did not claim in his Bill of Costs; these should be substantially reduced. Shaw claims almost \$2 million in e-discovery costs whereas the Commissioner also hosted all of the documents in this case using e-discovery software and claimed no such disbursements. Rogers also claims an additional \$93,265 in disbursements from a lawyer conducting document review. These latter billings are legal fees, not disbursements. In sum, the gold-plated e-discovery service claimed by the Respondents is excessive and unreasonable.

VI. Videotron is not entitled to costs

20. The Commissioner relies on his December submissions as to why the Tribunal should not award Videotron costs in respect of its intervention. However, if the Tribunal finds that Videotron is entitled to costs, Videotron's costs claims should be discounted for the same reasons above.¹⁷ Videotron's claims are also excessive and unreasonable in that they approach or exceed the claims of the parties in several respects and should be appropriately discounted. For example, Videotron's claimed legal fees meet or exceed those of the Commissioner despite it intervening on a much narrower class of issues.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 4, 2023.



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¹⁷ Videotron's claimed legal fees would be approximately \$134,289.00 using the mid-range of Column III of Tariff B .