CT-2022-002

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

BOOK OF AUTHORITIES

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Competition Bureau Legal Services

Place du Portage, Phase I,
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

Donald B. Houston
Derek Leschinsky
Kevin Hong

Counsel to the Commissioner of Competition

CT-2022-002

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INDEX

JURISPRUDENCE **TAB**

LEGISLATION

COURT RECORD

Competition Tribunal Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18
File No.: CT-2019-005
Registry Document No.: 296

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

BETWEEN:

Commissioner of Competition
(applicant)

and

Parrish & Heimbecker, Limited
(respondent)

Dates of hearing: January 6-7, 11-15, 19-21, and 25 and February 3-4, 2021
Before: D. Gascon J. (Chairperson), A.D. Little J. and Ms. R. Samrout
Date of Reasons for Order and Order: October 31, 2022

REASONS FOR ORDER AND ORDER

other terminals but will now be diverted to the FGT because P&H now owns all of the source Elevators. Further, P&H confirmed during argument that the additional volumes are for all types of grains, not just wheat and canola. Lastly, the Tribunal appreciates the logic of Mr. Heimbecker's evidence concerning congested rail lines. Even accounting for that evidence and the general claim that the FGT would be a more efficient terminal (it was scheduled to become fully operational shortly after the hearing), the Tribunal is not satisfied that the evidence demonstrates a significant increase in the real value of exports for the purposes of paragraph 96(2)(*a*).

[759] The Tribunal pauses to again note that P&H's intention or objectives in entering the Transaction are not relevant, or material, to the Tribunal's analysis.

[760] Given the analysis above with respect to subsection 96(1), the Tribunal finds that P&H has not shown a causal connection between any proven efficiencies under subsection 96(1) and an increase in the real value of any exports. The Tribunal therefore concludes that the requirements of subsection 96(2) have not been met.

(c) The trade-off analysis

[761] In light of the Tribunal' conclusions on efficiencies, there is no need to deal with the trade-off analysis in this case.

(3) Conclusion on efficiencies and section 96

[762] For the reasons detailed above, the Tribunal concludes that P&H has not demonstrated, with clear and convincing evidence, its claimed efficiencies and that it would not have met its burden of demonstrating, on a balance of probabilities, that its claimed gains in efficiency would be greater than, and would offset, the anti-competitive effects of any lessening of competition resulting from the Acquisition.

VIII. CONCLUSION

[763] For the above detailed reasons, the Commissioner's Application is dismissed. In light of this conclusion, no remedial action will be ordered.

IX. COSTS

[764] The parties were unable to come to an agreement as to costs.

[765] The Commissioner submits that he should be awarded a lump sum amount of CAD $2 million inclusive of counsel fees and disbursements if he is successful. If the Application is dismissed, then the Commissioner argues that P&H should be awarded CAD $2 million inclusive of counsel fees and disbursements. However, if the Application is dismissed and the Tribunal finds that P&H's section 96 efficiencies defence would not have been successful, then the Tribunal should, in the Commissioner's view, deduct CAD $500,000 from the lump sum cost award, in recognition of the costs the Commissioner incurred in order to respond to that defence. While the

Commissioner recognizes that P&H was entitled to rely on the efficiencies defence, he argues that if a respondent pleads the defence but does not adduce sufficient evidence to make it out, then the Tribunal should use a costs award to recognize the significant costs incurred by the Commissioner (and ultimately, Canadian taxpayers) to respond. If there is no financial deterrent associated with an unsuccessful efficiencies defence, the Commissioner submits that in the future, respondents will claim efficiencies as a matter of course, causing significant financial burden on the Commissioner regardless of whether raising the efficiencies defence was justified.

[766] P&H, in turn, seeks costs payable as a lump sum in the amount of CAD $2,206,958.18, inclusive of fees, disbursements and taxes, if the Commissioner's Application is dismissed. This sum represents approximately CAD $209,000 for legal fees and approximately CAD $1,998,000 for disbursements (both inclusive of taxes). Should the Application be allowed, P&H indicates that it takes no position with respect to the Bill of Costs submitted by the Commissioner, save for one item — *i.e.*, the preparation and filing of the Commissioner's motion materials dealing with confidentiality designations — which P&H maintains is an ineligible cost in view of the Tribunal's order dismissing the Commissioner's confidentiality motion without costs. As for the matter of costs relating to the efficiencies defence, P&H submits that the merits of the efficiencies defence becomes moot if a substantial lessening of competition is not found under section 92, and that the result of the case must drive costs, not *obiter dicta*. According to P&H, this is not a case of divided success (citing *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at paras 31, 43).

[767] Both parties submitted bills of costs and affidavits in support.

A. Legal principles applicable to costs

[768] In *VAA CT*, the Tribunal noted that section 8.1 of the CTA grants jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the FC Rules (*VAA CT* at para 817). Under subsection 400(1) of the FC Rules, 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 subsection 400(3).

[769] Costs ordinarily follow the outcome of the proceeding, in that the successful party is usually awarded costs (see, for example, *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 182; *MacFarlane v Day & Ross Inc*, 2014 FCA 199 at para 6; *VAA CT* at para 816; FC Rule 400(3)(a)).

[770] The costs regime does not indemnify the successful party for all of its legal fees and disbursements, absent very unusual circumstances. Costs are only partial compensation for the actual costs incurred in litigation. As noted in *VAA CT*, an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*VAA CT* at para 817, citing *Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233 (FCTD), 84 CPR (3d) 303, aff'd (2001), 199 FTR 320 (FCA)).

[771] The objectives of a costs award include having the unsuccessful party make a "reasonable contribution" to the successful party's costs of litigation, having regard to the Tariff in the FC Rules (*NOVA Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 ("***NOVA***

Chemicals") at paras 13, 21). Although the Tariff amounts may be inadequate in complex litigation, nevertheless, an increased costs award cannot be justified solely on the basis that a successful party's actual fees are significantly higher than the Tariff amounts. The burden is on the party seeking increased costs to demonstrate why their particular circumstances warrant an increased award (*NOVA Chemicals* at para 13, citing *Wihksne v Canada (Attorney General)*, 2002 FCA 356 at para 11).

[772] The approximation of lump sum costs is a matter of judgment rather than an accounting exercise (*Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 at para 8). While the costs awarded should have a fair relationship to the actual costs of litigation, the question for the Tribunal is what, in the circumstances, are necessary and reasonable legal costs and disbursements (*Nadeau Ferme Avicole Ltée v Groupe Westco Inc*, 2010 Comp Trib 1 at para 49).

[773] Disbursements must be reasonable, necessary, and justified (*NOVA Chemicals* at para 26; *VAA CT* at para 821). Expert-related costs are not automatically recovered in their entirety and can be adjusted by the Tribunal if they do not appear reasonable (*VAA CT* at para 822).

[774] In *VAA CT*, the Tribunal took into account that success on the issues in dispute, particularly the legal issues in dispute, was divided; although the respondent was successful overall, the Commissioner prevailed on certain issues (*VAA CT* at paras 819, 827). The Tribunal reduced the costs award to the respondent to reflect the time spent on issues on which the Commissioner prevailed but the respondent persisted in spending time, and based on the reasonableness and necessity of the disbursements.

[775] As paragraph 400(3)(a) of the FC Rules contemplates, success overall in the proceeding remains a principal factor, subject to additional considerations relevant to the circumstances and claims made. The Tribunal may consider the factors in paragraphs 400(3)(b) to (n.1) of the FC Rules and any other matter it considers relevant under subsection 400(3)(o).

[776] The Tribunal favours lump sum costs awards (*VAA CT* at para 825).

B. Tribunal's assessment

[777] As the successful party, P&H is entitled to an award of costs. The Tribunal will fix the costs payable by the Commissioner in this proceeding.

(1) Legal fees

[778] With respect to legal fees, P&H claimed approximately CAD $209,000 in respect of legal fees, calculated based on Tariff B, Column IV. Its claims included time spent for preparation of pleadings, affidavits of documents, preparing for and attending oral examinations for discovery, preparing for and attending case management conferences, preparation of witness statements, and the attendance of two counsel at the hearing. The Commissioner submitted that, if P&H is successful, its quantum of costs should be determined on the usual basis of the middle of column III, and should also be less than the amount fixed by the Tribunal in *VAA CT* (which was CAD $70,000) because the matter occupied fewer hearing days.

[779] As noted, both parties took positions to increase or decrease an award of costs by large amounts beyond the Tariff. P&H increased its requested award based on its actual legal fees and the complexity of this proceeding. P&H advised that it believed that an award for legal fees in the amount of CAD $900,000 would be appropriate (its actual legal fees were approximately CAD $3.6 million), but only claimed CAD $209,000 under Tariff B, Column IV. For his part, the Commissioner sought to decrease an award to P&H if it did not succeed on section 96 issues. The Commissioner submitted that P&H's costs award should be reduced by CAD $500,000, which the Commissioner argued represented the amount he paid to respond to P&H's position under section 96 by having to quantify the anti-competitive effects (through Dr. Miller) and file Mr. Harington's expert report on efficiencies under section 96.

[780] The parties also argued several novel points — i.e., issues that had not been argued to the Tribunal in previous litigated proceedings. The Commissioner's position on product market raised new issues for the Tribunal's consideration, while P&H raised issues under section 96 that had not been considered previously.

[781] The most important overall factor in arriving at a costs award is which party succeeded. Here, the Tribunal dismissed the Commissioner's Application. In addition to the overall result, the Tribunal recognizes that this proceeding involves a public official with a statutory mandate to administer and enforce the Act; both parties are highly sophisticated with very experienced counsel; and the legislative setting contemplates significant pre-litigation disclosure through the merger review process and pre-hearing disclosure, as well as well known elements and burdens of proof under sections 92 and 96 of the Act. The Tribunal also finds that proceedings under section 92 involve complex legal and factual matters that support higher costs awards under the Tariff B, Column IV in the FC Rules (as claimed by P&H).

[782] Although the Commissioner succeeded on several preliminary issues, the Tribunal does not find that those arguments diminish P&H's entitlement to an award of costs in this case.

[783] The Tribunal does not agree with the Commissioner's position that the costs award to P&H should be reduced by an overall lump sum amount of CAD $500,000 because P&H would not have succeeded on its section 96 defence. Although the cost of Mr. Harington's services are known (*i.e.*, CAD $259,000), the balance to arrive at the claimed amount of CAD $500,000 is merely an assumption or guess without a sufficient evidentiary basis.

[784] That said, however, the Tribunal finds it appropriate under FC Rule 400(3)(o) (and by analogy to other paragraphs in FC Rule 400(3)) to take into account the specific circumstances of this proceeding related to the section 96 evidence and arguments in its overall assessment of legal fees, as follows:

- The overall burden of proof under section 96 was on P&H;
- P&H raised efficiencies in its pleading. The Tribunal notes that P&H did not provide details of its position on efficiencies at examinations for discovery and did not file an expert report for the hearing — even though it advised it would do so during the discovery process. It only filed Mr. Heimbecker's fact evidence (which included some efficiencies arguments that P&H did not initially plead);

- The Commissioner did not waste time on section 96 issues during the fact portion of the hearing; he did not cross-examine Mr. Heimbecker on his evidence related to alleged efficiencies;

- The Commissioner prevailed on section 96 issues. Even if the Tribunal's conclusions on section 96 were, strictly speaking, unnecessary for the Tribunal to decide given the outcome of its analysis under section 92, the Commissioner had no practical alternative but to respond to the section 96 efficiencies defence raised by P&H and to do so with an expert report;

- The Commissioner had to prepare for and conduct discovery on section 96 issues, quantify the anti-competitive effects in accordance with the principles established in *Tervita SCC*, file an expert report, address section 96 issues at the hearing, and respond to issues related to the proper interpretation of subsection 96(2), all of which affected the time spent by legal counsel;

- The Tribunal considers that P&H's approach to the section 96 issues in this proceeding tended to unnecessarily increase the Commissioner's costs and increase the time spent on the proceeding. A considerable part of the Commissioner's legal costs in relation to section 96 and its disbursement for Mr. Harington's report could have been avoided.

[785] Exercising its discretion, the Tribunal concludes that the appropriate costs award to P&H for legal fees in this matter should be fixed at CAD $157,000, which represents approximately 75% of P&H's legal fees as claimed under Tariff B, Column IV.

(2) Disbursements

[786] The Tribunal has considered the positions of both parties with respect to each of the claims made by P&H for the disbursements it incurred in this litigation.

[787] P&H claims expert fees in the amount of approximately CAD $1.61 million. Having regard to the Tribunal's positive treatment of Ms. Sanderson's evidence, but also to the overall reasonableness of the quantum claimed by P&H to be reimbursed by the Commissioner, the Tribunal finds CAD $1.2 million to be a reasonable sum in respect of expert fees.

[788] The Tribunal recognizes that this hearing was conducted not only electronically (as is standard at the Tribunal) but entirely virtually, and in very unusual circumstances owing to the COVID-19 pandemic. P&H decided that its counsel would travel to Winnipeg, at or close to its witnesses (particularly Mr. Heimbecker), and presumably close to P&H's offices. For the hearing, P&H set up an operations centre at a hotel, necessitating the rental of a large room (to maintain physical distancing and set up the appropriate equipment for a virtual hearing with all the required computers and technical support).

[789] P&H claims a disbursement of approximately CAD $126,000 for hotel conference rooms and audio visual display equipment used during examinations for discovery and, later, during the facts portion of the hearing. The Commissioner submitted that these amounts were excessive,

noting his own claim for just CAD $2,200. The Tribunal does not accept the Commissioner's comparison of P&H's costs for four witnesses to testify in Manitoba, versus the 10 witnesses called by the Commissioner. Having decided that counsel would travel to Winnipeg (which the Tribunal does not find appropriate to question in this case), the Tribunal finds that the rental of space and equipment was reasonable given the COVID-19 restrictions in Manitoba at the time. Although some charges on the invoices related to food and package deliveries and the amounts charged for space and equipment appear quite high on a daily basis, the Tribunal finds it appropriate that the Commissioner make a reasonable contribution to this expense in the amount of CAD $50,000.

[790] P&H claimed payments made for case law searches in third party legal databases in the amount of approximately CAD $32,000. The evidence reveals more than 300 searches, done mostly in the two months leading up to the hearing. It is unclear whether those searches related to two motions argued and decided during the same period, or to the legal issues arising in the hearing itself. (On one motion, costs were awarded in the cause whereas no costs were awarded in the other.) The Tribunal recognizes that most legal research is done online and at the time, the law firm personnel were likely working from home and without a law library. It is also clear that some of the legal issues raised by the Commissioner's position and by P&H (for example, preliminary issues and the interpretation of subsection 92(2)) required legal research. Although the Commissioner did not object in his submissions, the Tribunal finds that the high number of searches and absence of details as to what the searches concerned (motions as opposed to hearing; issues raised by each party) support a reasonable claim for CAD $8,000.

[791] P&H sought reimbursement for air travel to and from Winnipeg in the amount of CAD $31,500. Its claim was based on 50% of the actual cost of a private jet for two counsel to travel to Winnipeg and back for discovery, and later for the fact portion of the hearing. Reviewing the invoices, it appears that at both the discovery and hearing stages, the aircraft flew from Winnipeg to Toronto (without passengers on board other than flight crew) to pick up P&H's counsel and returned the same day. The aircraft made a trip to return counsel to Toronto upon completion of both the discoveries or portion of the hearing, and then flew back to Winnipeg without passengers on board other than flight crew. The invoices reflect charges for round-trips even though counsel were on board one way only. The Tribunal will allow a claim for CAD $4,500, which (on the evidence) approximates a full fare economy air ticket for two counsel to fly between Toronto and Winnipeg for discovery and for the fact portion of the hearing.

[792] P&H claims approximately CAD $31,600 for transcripts of the examinations for discovery and the hearing and approximately CAD $10,600 for data hosting, which was necessary for the virtual hearing at the Tribunal. The Tribunal allows these claims in their entirety.

[793] The Tribunal allows claims for photocopies and printing in the amount of CAD $800 and for hotels and meals during examinations for discovery and at the hearing in the aggregate of the amount of CAD $8,000 (based on a contribution to the cost of hotel rooms for two counsel and a reasonable *per diem* for meals).

[794] P&H claimed approximately CAD $6,000 in courier costs attributable, for example, to counsel working from home during the pandemic and materials sent by counsel to the panel members and the Tribunal Registry during the hearing. The Tribunal notes that most (approximately CAD $4,200) of P&H's claim in that regard relates to a single package sent from

Winnipeg to Toronto to return materials and equipment after the fact portion of the hearing ended. The Tribunal considers CAD $2,000 as a reasonable contribution towards courier costs.

[795] P&H claimed meals in the amount of approximately CAD $1,350 in addition to those claimed by hearing counsel, which the Tribunal notes was not an appropriate claim for costs purposes.

[796] A claim for conference calls in the amount of CAD $127 is *de minimis* in this context. The Tribunal notes that certain calls occurred before the litigation began.

C. Conclusion on costs

[797] In light of the foregoing, the Tribunal awards costs for legal fees in the lump sum amount of CAD $157,000, inclusive of applicable taxes. The total of all disbursements allowed is CAD $1,315,500, inclusive of applicable taxes.

[798] The Tribunal therefore concludes that the Commissioner shall pay an all-inclusive aggregate lump sum amount of CAD $1,472,500 to P&H in respect of costs of this proceeding.

X. ORDER

[799] The Application brought by the Commissioner is dismissed.

[800] Within 30 days from the date of this Order, the Commissioner shall pay to P&H an amount of CAD $1,472,500.

[801] These Reasons are confidential. In order to enable the Tribunal to issue a public version of the Reasons, the Tribunal directs the parties to attempt to reach an agreement regarding the redactions to be made to these Reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal Registry by no later than the close of business on November 14, 2022, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the Reasons. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential Reasons. Such submissions are to be served and filed with the Tribunal Registry by the close of business on November 14, 2022.

DATED at Ottawa, this 31st day of October, 2022

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Presiding Member)
(s) Andrew D. Little J.
(s) Ramaz Samrout

Competition Tribunal Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1
File No.: CT-2022-002
Registry Document No.: 832

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

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
Shaw Communications Inc.
(respondents)

and

Videotron Ltd.
(intervenor)

Dates of hearing: November 7-10, 14-18, 21-25, 28-30, 2022; and December 1 and 13-14, 2022.
Before: P. Crampton C.J., W. Askanas and R. Samrout
Date of order: **December 31, 2022**

REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] A well-known adage in the competition law community holds that when competitors oppose a merger, it is often a good indication that the merger will be beneficial for competition. In this case, the opposition from the Respondents' two national competitors has been vigorous and far-reaching. Moreover, Rogers Communications Inc. ("**Rogers**") resisted discussing a potential transaction with Videotron Ltd. ("**Videotron**") until after the Commissioner of Competition (the "**Commissioner**") initiated this proceeding. Instead, Rogers attempted to address the Commissioner's concerns through a divestiture to a financial purchaser. Such purchasers are not typically known for aggressive price or non-price behaviour.

[2] The core issue in this proceeding is whether a proposed acquisition of Shaw Communications Inc. ("**Shaw**") by Rogers, as modified by a divestiture arrangement with Videotron, is likely to prevent or lessen competition substantially in the provision of wireless telecommunications services in Alberta and British Columbia. Pursuant to this three-way arrangement, Shaw would first transfer its subsidiary Freedom Mobile Inc. ("**Freedom**") to Videotron. Rogers would *only then* acquire the remainder of Shaw through an amalgamation arrangement.

[3] For the reasons that follow, the Tribunal finds that the proposed transactions and ancillary agreements comprising the arrangement (the "**Merger and Divestiture**") are not likely to prevent or lessen competition substantially. In other words, they are not likely to result in materially higher prices, relative to those that would likely prevail in the absence of the arrangement. The Merger and Divestiture are also unlikely to result in materially lower levels of non-price dimensions of competition, relative to those that would likely exist in the absence of the arrangement. Such non-price dimensions of competition include service, quality, variety, and innovation.

[4] In the course of making this finding, the Tribunal rejected various allegations made by the Commissioner in support of several propositions, including that: (i) Shaw's divestiture of Freedom to Videotron would result in Freedom being a less effective competitor than it was immediately prior to the announcement of the Merger; (ii) Rogers' acquisition of Shaw Mobile would likely give rise to anti-competitive unilateral effects; and (iii) the Merger and Divestiture would likely facilitate the exercise of collective market power by Rogers, BCE Inc. ("**Bell**"), and TELUS Communications Inc. ("**Telus**").

[5] Videotron is an experienced market disruptor that has achieved substantial success in Quebec. It has drawn upon that experience to develop very detailed and fully costed plans for its entry into and expansion within the relevant markets in Alberta and British Columbia, as well as in Ontario. Those plans were buttressed when Videotron acquired VMedia Inc. ("**VMedia**") earlier this year, with a view to accelerating its rollout of new bundled offerings. The Tribunal finds that the evidence establishes that the bundled offerings of Freedom and VMedia would likely be priced at a level that is at least as competitive as the level at which the bundled offerings of Shaw Mobile and Freedom likely would have been priced in the absence of the Merger. The Tribunal finds that the same is also likely to be true for the "wireless only" offerings of Freedom and Videotron's digital "Fizz" brand, relative to the corresponding offerings of Shaw Mobile and Freedom. In addition, the Tribunal finds that Videotron, which is in the process of rolling out 5G services in

in Dr. Miller's analysis, although he did not provide his own estimates in respect of some of those matters. Dr. Israel also made a number of appropriate concessions, including when he recognized that he should not have valued the 3500 MHz set-aside spectrum purchased by Videotron at a price paid by the three national carriers. However, there were a small number of occasions when he did not make an appropriate concession.[4] Nevertheless, his testimony generally held up. Where he and Dr. Miller disagreed, the panel found his testimony to be more robust and persuasive than that of Dr. Miller.

[78] Mr. Martin is a Director at Altman Solon, a strategic management consulting firm in the telecommunications industry. He testified with respect to the Commissioner's allegation that Freedom would be a less effective competitor under the ownership Videotron than it has been under the ownership of Shaw. The panel found his testimony to be forthright and candid. He readily conceded certain shortcomings in his report. On balance, his testimony was helpful, even though the panel was disappointed to learn that he was not only aware that he included certain charts in his presentation with information that was inconsistent with data provided in Mr. Lescadres' Reply Witness Statement, but that he also failed to alert the Tribunal of such inconsistencies.

[79] Mr. Harington, Dr. Ware, and Dr. Smart testified with respect to matters that are relevant to the efficiencies defence in section 96 of the *Competition Act*. Given the determination made in Part X below, it is unnecessary to address that defence or the testimony of these experts.

(3) Shaw's experts

[80] Three experts testified on behalf of Shaw. They were Dr. Paul Johnson, Dr. William Webb, and Dr. David Evans.

[81] Dr. Johnson is the owner of Rideau Economics, an Ottawa-based consulting firm, specializing in competition economics. From 2016-2019, he served as the T.D. MacDonald Chair in Industrial Economics at the Competition Bureau. He testified with respect to the alleged competitive impact of the July 2020 launch of Shaw Mobile. He had difficulty with the aggressive style of the Commissioner's cross-examination. He also avoided providing direct answers and acknowledging certain matters.[5] Ultimately, the panel found that his testimony was weak in a number of respects, including on the issue of the exclusion of Ontario from the control group, for the purposes of assessing the impact of Shaw Mobile's launch.

[82] Dr. Webb is an engineer who specializes in wireless communications. He testified about a number of technological matters, including (i) the primary components of wireless networks; (ii) the importance of spectrum and 5G; (iii) network reliability; (iv) and the potential impact of Freedom's lack of access to Shaw's WiFi hotspots under Videotron's ownership. Although Dr. Webb's experience in Canada is limited, he was knowledgeable on technical matters within his expertise and generally tried to be helpful. On a number of occasions, he did not hesitate to make

[4] For example, he did not readily agree that Shaw was a well-known brand with "significant value;" that evidence as to whether transferred subscribers were, in fact, likely to revert after the divestiture was relevant to the analysis; and that the high port-out numbers reflected the fact that Shaw and Rogers were close competitors.

[5] For example, he resisted acknowledging that market participants such as Telus and Freedom drew a link between Shaw Mobile's launch and Ontario.

Competition Tribunal Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 02
File No.: CT-2021-002
Registry Document No.: 349

IN THE MATTER OF the acquisition of Tervita Corporation by SECURE Energy Services 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:

Commissioner of Competition
(applicant)

and

SECURE Energy Services Inc.
(respondent)

Dates of hearing: May 9-12, 16-19, 24-27, and 30-31 and June 1-2 and 15-17, 2022
Before: P. Crampton C.J., D. Gascon J. and Dr. T. Horbulyk
Date of order: March 3, 2023

REASONS FOR ORDER AND ORDER

Table 15. The Tribunal will order the divestiture of the 29 facilities identified in that table, under the heading "Divestiture Required."

[719] For the reasons summarized in Part XV.B. (3) above, the Tribunal finds that Secure has failed to meet its burden of establishing that the gains in efficiency likely to be brought about by the Merger, and that would not likely be attained if the Tribunal's order were made, will be greater than, and will offset, the effects of any prevention or lessening of competition likely to result from the Merger, as required by subsection 96(1) of the Act.

XVII. COSTS

[720] By way of a direction issued on January 25, 2023, the Tribunal asked the Parties to attempt to come to an agreement on costs related to this application and, if unable, to provide submissions. On February 10, 2023, the Parties informed the Tribunal that they had agreed that the successful party shall receive $150,000 (inclusive of taxes) for legal fees. However, they were unable to come to an agreement for disbursement costs. They each provided submissions as well as detailed bills of costs with some supportive evidence to explain the disbursements and the basis for their respective claims.

[721] The Commissioner submits that he should be awarded a "lump sum cost award" of $2.5 million if he is successful. The Commissioner's bill of costs for disbursements adds up to $2,591,343.14. The vast majority of these disbursements relate to expert fees, mostly for the work of Dr. Miller. If the application is dismissed, the Commissioner argues that the Tribunal should not order him to pay disbursement costs to Secure because there was a broad public interest in bringing this case and because Secure allegedly provided overstated efficiencies estimates during the Section 104 Application that did not bear out in the evidence in the section 92 hearing. Furthermore, and in the alternative, the Commissioner maintains that, if the application is dismissed, the Tribunal should reduce any cost award to recognize any split success. The Commissioner added that, in the further alternative, a lump sum cost award of $2 million to Secure would be fair.

[722] For its part, Secure filed a bill of costs claiming $5,665,512.79 in total disbursements, inclusive of taxes, if the Commissioner's application is dismissed. These disbursements notably include a total sum of $3,680,108.25 for its expert witnesses (Dr. Duplantis, Mr. Harington, and Dr. Yatchew) and $1,814,710.10 in document processing, management and review provided by KLDiscovery. Secure submits that its disbursements are reasonable, necessary, and justified. In its submissions on costs, Secure takes no position with respect to the bill of costs submitted by the Commissioner or regarding the disbursements to be granted if the application is allowed.

[723] The legal principles applicable to costs have been recently summarized by the Tribunal in *P&H*, at paragraphs 768–776. They need not be repeated here. In essence, the Tribunal has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. The most important overall factor in arriving at a costs award is which party succeeded. The Tribunal will also have regard to the public interest in bringing the case.

[724] The fixing of costs typically involves a compromise between compensating a successful party and not unduly burdening an unsuccessful party. The costs ordered should not be excessive

or punitive, but rather reflect a fair relationship to the actual costs of litigation. Moreover, disbursements must be reasonable, necessary, and justified, and expert-related costs are not automatically recovered in their entirety and can be adjusted by the Tribunal if they do not appear reasonable. Finally, as was reiterated in all its recent proceedings and at the hearing of this application, the Tribunal favours lump sum cost awards over formal taxation of bills of costs.

[725] As the successful party, the Commissioner is entitled to an award of costs.

[726] With respect to legal fees, in light of the agreement between the Parties, the Tribunal is satisfied that a lump sum amount of $150,000 (inclusive of taxes) should be awarded to the Commissioner.

[727] Turning to disbursements, the Tribunal has considered the positions of both Parties with respect to the claims made by the Commissioner for the disbursements he incurred in this litigation. The Commissioner's claim essentially relates to expert fees: these fees amount to $2,525,897.84, including $10,000 for Mr. Johnston, $1,704,964.37 for Dr. Miller, and $810,933.47 for Dr. Eastman. Other disbursements incurred by the Commissioner include travel fees in an amount of $17,778.57, transcription fees of $46,359.98, and printing fees of $1,306.75.

[728] The Tribunal is satisfied that the Commissioner has provided, in his bill of costs, detailed information and sufficient support to explain the disbursements incurred and the basis of his various claims. The bills of costs were prepared in accordance with the applicable rules, and evidence has been provided regarding the billing, payment, and justifications of the services provided and expenses incurred. The question is not whether the disbursements at issue were incurred but whether they are reasonable, necessary, and justified in the circumstances. Having regard to the Tribunal's generally positive treatment of the Commissioner's expert evidence, as well as to the overall reasonableness of the quantum claimed by the Commissioner, the Tribunal generally finds the claimed amounts of disbursements to be a reasonable sum. The Tribunal pauses to note that the expert fees claimed by Secure are substantially higher than the fees of the Commissioner's expert witnesses. The Tribunal further notes that, in its costs submissions, Secure has not raised any specific objections to the disbursement amounts claimed by the Commissioner.

[729] As stated above, the Tribunal favors lump sum awards as it simplifies the costs assessment process. In fact, there is now "a judicial trend to grant costs on a lump sum basis whenever possible" (*Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9, at para 4). A lump sum award saves time and trouble for the parties by avoiding precise and unnecessarily complicated calculations. Lump sum awards also align with the objective of promoting the just, most expeditious and least expensive determination of proceedings. In this proceeding, the Commissioner submitted that a "lump sum cost award" of $2.5 million would be fair if he is successful.

[730] In light of the foregoing, the Tribunal awards costs for legal fees in the lump sum amount of $150,000, inclusive of applicable taxes. The total allowed for disbursements is fixed at $2,350,000, inclusive of applicable taxes. The Tribunal therefore concludes that Secure shall pay an all-inclusive aggregate lump sum amount of $2.5 million to the Commissioner in respect of costs of this proceeding.

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

OFFICIAL ENGLISH TRANSLATION

Citation: Rona Inc. v. Commissioner of Competition, 2005 Comp. Trib. 26
File No. : CT-2003/007
Registry document No. : 101

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

AND IN THE MATTER OF the *Competition Tribunal* Act, R. S. 1985, c. 19 (2nd Supp.), as amended.

AND IN THE MATTER OF the acquisition of Réno-Dépôt Inc. by RONA Inc.;

AND IN THE MATTER OF the application to vary a consent agreement pursuant to subsection 106(1) of the *Competition Act;*

BETWEEN:

RONA Inc.
(Applicant)

and

Commissioner of Competition
(Respondent)

Decided on the basis of the written arguments filed by the pall
Members: Blais J. (presiding), Lemieux J., and L. Riedle
Date of reasons and order: August 19, 2005
Reasons and order signed by: Mr. Justice P. Blais, Mr. Justice F. Lemieux, Ms. L. Riedle

REASONS FOR ORDER AND ORDER RESPECTING COSTS

> As I understand Rule 420(2)*(b)*, where a defendant makes an offer to a plaintiff which is rejected and the plaintiff then fails to obtain judgment (which is the case here), the defendant is automatically entitled to a doubling of the taxable fees thereafter "unless otherwise ordered by the Court". In this situation there is no need for the defendant to show that the offer was more generous to the plaintiff than the outcome. I am inclined to order otherwise than a doubling, however. The offer of November 26, 1999 was not, in my view, a real offer of a compromise. Apart from a few technical differences, for all practical purposes it was a demand for complete surrender with regard to the enforcement of the plaintiffs' alleged patent rights *vis à vis* these defendants (appellants). As I understand it the Court still has a discretion to exercise in the application or non-application of rule 420 and I so exercise it in favour of increasing the fees after November 26, 1999 by 50%.

[9] It should also be noted that the issue of the offer to settle is already referred to in paragraph 400(3)(e), which gives the Tribunal even more latitude in considering the offer.

ANALYSIS

[10] In the interest of clarity, the Tribunal would like to point out that this decision applies to the costs relating to the application made under section 106 and the costs of the two motions in which the Tribunal had indicated that costs would follow the cause. The fact that RONA consented to pay the costs of the Commissioner in the context of the motion under section 105 and the fact that the Tribunal awarded RONA increased costs for the motion to strike out the application of the Commissioner have no impact on this decision.

(1) Costs in light of the factors listed in Rule 400(3)

[11] The starting point for this analysis is that the Tribunal must, in the words of Décary J.A. in ***Wihksne,*** have "valid reasons to derogate from Rule 1407 which states the general principle that costs are to be awarded in accordance with column I11 of the table to Tariff B" (paragraph 11). RONA made various arguments in support of its request for increased costs, which we will now consider.

[12] The first point the Tribunal may consider under paragraph 400(3)*(a)* of the Rules is the result of the proceeding. RONA was successful. That in itself does not justify an increase but RONA argued that, at the very least, RONA should be awarded costs pursuant to the usual practice. The Commissioner does not contest this fact. The dispute concerning costs turns on the increased assessment.

[13] The second paragraph of subsection 400(3) of the Rules refers to the amounts claimed and the amounts recovered. Although in this case, the application did not involve a sum of money, RONA maintains that the issue in RONA's application must be considered: i.e. that it be released from the obligation to sell a store worth (according to the evidence) approximately 20 million dollars. The Commissioner, on the other hand, is of the view that the argument is absurd because no such sum of money was at stake in the case.

[14] The Tribunal recognizes the importance of the economic issue to RONA, namely whether to keep the store in order to operate it or to sell it at a price below its actual value. Nevertheless,

the Tribunal's decision did not in any way involve the value of the business but rather the interpretation of the law and its application in the circumstances. In other words, the dispute between the parties did not relate to a monetary obligation between the parties. Consequently, the Tribunal places little weight on this criterion in this decision.

[15] RONA also submits that it is necessary to consider the importance and the complexity of the issues. It is true that this is the first time that the Tribunal has had to decide an application to rescind a consent agreement under the new provisions (sections 105 and 106) of the Competition Act, R.S. 1985, c. C-34, as am. by S.C. 2002, c.16, s. 14. In the view of the Tribunal, that is not sufficient to make this a particularly complex issue. Any issue that arises before either a court of law or an administrative tribunal deserves to be considered seriously and for a while expends the energy of the tribunal required to decide the matter. In this case, the facts were clear, as were the issues. The interpretation of the Act in light of the facts was not especially complex or difficult.

[16] RONA argued that paragraph 400(3)*(e)* lists as a consideration "any written offer to settle". Rule 420 also gives more specific instructions concerning the calculation of costs in the event of a written offer, subject to certain conditions. We shall come back to paragraph (e) when we consider an increased assessment under Rule 420, in order to present a general finding on the effect of the offer on the costs. For now, it is sufficient to note that there was in fact a written offer prior to the hearing that would have given the Commissioner a more favourable result than the outcome of the proceeding.

[17] Another argument made by RONA was justifying the "public interest" in accordance with paragraph 400(3)*(h).* This case involves a disagreement between a public party, the Commissioner, and a private party, RONA. It may be presumed that the Commissioner is defending only the public interest, whereas RONA, as is its absolute right, is defending its own interests. Consequently, it is difficult to side with R-ONA on this point. This provision applies more in those cases where one party defends public interests and, without necessarily being successful, puts forward a meritorious case: Singh v. Canada (Attorney General), [I999] 4 F.C. 583, aff'd [2000] 3 F.C. 185 (F.C.A.); Shepherd v. Canada (Solicitor General) (1990), 36 F.T.R. 222 (T.D.).

[18] Without providing much justification, RONA claimed fees for three counsel for the duration of the hearing in accordance with paragraph l4(a) in Tariff B (RONA also claimed fees at the rate in column V). The Commissioner replied that the usual rate of one counsel and one-half of the fees of another counsel was more than adequate, especially since there were not always three counsel at the hearing.

(191 The Tribunal is of the view that RONA should be awarded the full fees of two counsels for the hearing time, in view of the additional work involved in an expedited process and counsel's hard work, of which the Tribunal was aware. However, the rate shall nevertheless remain the rate in column III in Tariff B.

(2) Increased costs under Rule 420

[20] Rule 420 provides that an applicant who makes a written offer that is not revoked and obtains a judgment as favourable or more favourable than the terms of the offer is entitled to double the party-and-party costs from the date of service of the offer.

[21] On March 16, 2005, three weeks before the hearing commenced, RONA served an offer on the Commissioner under which RONA offered to carry on an operation separate from the Sherbrooke business until the opening of Home Depot (scheduled for mid-November 2005), in exchange for the cancellation of the obligation to divest itself of the Sherbrooke business. The Commissioner never responded to this offer. If she had accepted it, this would have avoided the costs of the hearing and the costs occasioned by this order, and the Sherbrooke business would have continued to operate separately from the RON,4 stores, as the consent agreement provided. The decision is certainly as favourable if not more favourable, since RONA can immediately integrate the Sherbrooke business into its corporate structure.

[22] The Commissioner argued that the offer did not resolve the whole dispute since the motion filed by the Commissioner for the approval of the sale was still pending. In our opinion, the primary prevails over the peripheral: if the parties had agreed to eliminate the obligation to sell the store, the motion for approval of this sale would have been unnecessary. Nevertheless, the Tribunal is of the view that this is not a case in which Rule 420 should be fully applied, because the offer by RONA lacked an element of compromise. By offering to keep the business separate until the opening of Home Depot, while remaining the owner of the business, RONA was not giving up anything. It would continue to operate the store belonging to it and would be entitled, once Home Depot opened, to include it in its operations. Emphasis has often been placed on the element of compromise as the true mark of an offer (Canadian Olympic Association v. *Olymel, Société en commandite*, [2000] F.C.J. No. 1725). In all honesty, RONA was not offering the Commissioner much - it offered to accept the result that RONA wanted, which the Tribunal eventually imposed, i.e. the cancellation of the obligation to sell. The fact remains that the acceptance of the offer would have been a more favourable resolution of the dispute for the Commissioner, even just in terms of costs saved.

[23] The Tribunal takes into account the fact that a written offer was made, to which the Commissioner did not even respond. The principle expressed in the Rules, not merely Rule 420 but also paragraph 400(3)*(e)*, is that it is always preferable for the parties to agree rather than use the resources of a court (here the Tribunal) unnecessarily. To support the principle, the Rules provide that the party offering to end a proceeding in a more expeditious manner, with which the Tribunal sides in the final analysis, may be entitled to some compensation. Given all of the circumstances and the case law, the Tribunal is of the view that RONA should be awarded costs increased by 50%, again in accordance with column III in Tariff B, from March 16, 2005.

ORDER

[24] The Tribunal orders that:

(a) RONA is entitled to party-and-party costs to the date of the offer, namely March 16, 2005, and is subsequently entitled to costs increased by 50%, determined in accordance with column III in Tariff B, with the exception of its disbursements, which will be authorized in accordance with the usual practice.

(b) RONA is entitled to the fees of two counsels at the hearing, in accordance with paragraph 14(a) of the Table in Tariff B.

(c) The bill of costs and disbursements will be assessed by the assessment officer in accordance with this order.

(d) There will be no costs for this order.

Dated at Ottawa, this 19th day of August 2005.

Signed on behalf of the Tribunal by the members of the panel.

(s) Pierre Blais

(s) François Lemieux

(s) Lucille Riedle

Competition Tribunal Tribunal de la concurrence

PUBLIC VERSION

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

[811] In light of all of the foregoing, the Tribunal is not satisfied that the above-mentioned anti-competitive price or non-price effects which could be attributable to VAA's Exclusionary Conduct are, individually or in the aggregate, "substantial" as required by paragraph 79(1)(*c*) of the Act. The evidence does not allow the Tribunal to conclude that VAA's Exclusionary Conduct has adversely affected or is adversely affecting, price or non-price competition in the Relevant Market, to a degree that is material, or that it is likely to do so in the future.

(4) Conclusion

[812] For the reasons set forth above, the Tribunal concludes that the Commissioner has not demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*c*) are met. In brief, the Tribunal is not satisfied that there is clear and convincing evidence demonstrating, on a balance of probabilities, that "but for" VAA's Exclusionary Conduct, prices for Galley Handling services would likely be materially lower in the Relevant Market, that there would likely be a materially broader range of services in the Relevant Market, or that there would likely be materially more innovation in the Relevant Market.

VIII. CONCLUSION

[813] For all the above reasons, the Commissioner's Application is dismissed. In light of this conclusion, no remedial action will be ordered.

IX. COSTS

[814] At the end of the hearing, the Tribunal encouraged the parties to reach an agreement as to the quantum of costs without knowing the outcome of the case. The Tribunal explained that if no agreement could be reached, the parties could make submissions on costs in due course. The Tribunal reaffirms that it is increasingly favouring this approach. This is because asking the parties to agree on the issue of costs before they know the outcome is more likely to result in a 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 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 that his total fees should be reduced. Expert-related costs are not automatically recoverable in their entirety, and can be adjusted by the Tribunal when they do not appear reasonable. With respect to the expert fees of Dr. Tretheway, the Tribunal is also of the view that they should be reduced as they include expenses incurred prior to the Application and the Tribunal struck a portion of his report (i.e., question 4) on the ground that it was inadmissible expert evidence.

[823] Turning to the disbursements claimed by VAA for electronic discovery and document management, they essentially relate to the fees charged by a third-party provider. The Tribunal agrees with VAA that it would be unfair to expect a party to comply with the requirements of electronic discovery and document management for an electronic hearing, without allowing for a recovery of the fees incurred for that purpose. The use of an effective document management system is essential to the seamless functioning of electronic hearings before the Tribunal, and it has a fundamental impact at each step of the proceedings (whether it is oral discoveries, motions, preparation of witness statements and expert reports, document production, or the hearing itself). Fees incurred in that respect are disbursements which, in principle, should be recoverable by the successful party.

[824] However, there are nonetheless limits to such disbursements. Only the amounts incurred after the filing of the Application can be properly claimed. In this regard, the e-discovery charges incurred by a party to comply with compulsory production orders under section 11 of the Act as part of the Bureau's prior, underlying investigation should not form part of claimed disbursements, even though many documents produced in that context may end up being directly related to subsequent filings before the Tribunal. In *Commissioner of Competition v Canada Pipe*, 2005 Comp Trib 17 ("***Canada Pipe 2005***"), the Tribunal held that it would be against public policy to order costs against the Commissioner for "the expense of complying with an order mandated by the Act and ratified by a Court of competent jurisdiction" (*Canada Pipe 2005* at para 12). Accordingly, the amount of disbursements claimed by VAA for electronic discovery and document management will need to be reduced to exclude such amounts.

[825] As stated above, the Tribunal favors lump sum awards as it simplifies the assessment process. In fact, there is now "a judicial trend to grant costs on a lump sum basis whenever possible" (*Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 at para 4). A lump sum award saves time and trouble for the parties by avoiding precise and unnecessarily complicated calculations. Lump sum awards also align with the objective of promoting the "just, most expeditious and least expensive determination" of proceedings, as provided by FC Rule 3, which echoes the direction found in subsection 9(2) of the CT Act to deal with matters as informally and expeditiously as the circumstances and considerations of fairness permit.

[826] In his submissions on costs, the Commissioner argued that the Tribunal should consider FC Rule 400(3)(h) in making its assessment, and the broad public interest in having proceedings litigated before the Tribunal. Relying on *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 ("***Visa Canada***"), where the Tribunal made no award on costs as there was a broad public interest in bringing the case, the Commissioner submits that there was a similarly broad public interest in bringing the present case as it would clarify the interpretation of section 79 of the Act, its defenses, and its application to entities such as VAA.

The Tribunal disagrees. The Tribunal does not find the "public interest" argument in this case to be as "compelling" as it was in *Visa Canada*, where the matter before it was more novel (*Visa Canada* at paras 405, 407). All cases brought forward by the Commissioner have a public interest dimension and contribute to clarify contentious competition law matters, but that does not mean that the Commissioner can escape costs awards in all cases.

[827] In light of the foregoing, and taking into consideration the conditions of reasonableness and necessity, the Tribunal concludes that $1,850,000 would be an acceptable amount for VAA's disbursements, instead of the total exceeding $2.6 million claimed by VAA. However, as with the legal costs, success on the issues in dispute in this case should be taken into account. The Tribunal is of the view that the disbursements to be paid to VAA should also be reduced by about a third. The Tribunal thus fixes the disbursements to be paid to VAA by the Commissioner at $1,250,000.

[828] The Commissioner will therefore be required to pay to VAA a total lump sum amount of $70,000 in respect of Tariff B legal costs, and of $1,250,000 in respect of disbursements.

X. ORDER

[829] The Application brought by the Commissioner is dismissed.

[830] Within 30 days from the date of this Order, the Commissioner shall pay to VAA an amount of $70,000 in respect of legal costs, and of $1,250,000 in respect of disbursements.

[831] These reasons are confidential. In order to enable the Tribunal to issue a public version of this decision, the Tribunal directs the parties to attempt to reach an agreement regarding the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on October 31, 2019, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the decision. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential reasons. Such submissions are to be served and filed by the close of the Registry on October 31, 2019.

DATED at Ottawa, this 17th day of October, 2019.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Chairperson)
(s) Paul Crampton C.J.
(s) Dr. Donald McFetridge

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to June 21, 2023

Last amended on January 13, 2022

À jour au 21 juin 2023

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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.

Directions re assessment

(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.

Further discretion of Court

(6) Notwithstanding any other provision of these Rules, the Court may

(a) award or refuse costs in respect of a particular issue or step in a proceeding;

(b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;

(c) award all or part of costs on a solicitor-and-client basis; or

(d) award costs against a successful party.

Award and payment of costs

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.

SOR/2002-417, s. 25(F); SOR/2010-176, s. 11.

Costs of motion

401 (1) The Court may award costs of a motion in an amount fixed by the Court.

Costs payable forthwith

(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

Costs of discontinuance or abandonment

402 Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

Motion for directions

403 (1) A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400,

Directives de la Cour

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

Autres pouvoirs discrétionnaires de la Cour

(6) Malgré toute autre disposition des présentes règles, la Cour peut :

a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulières;

b) adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;

c) adjuger tout ou partie des dépens sur une base avocat-client;

d) condamner aux dépens la partie qui obtient gain de cause.

Adjudication et paiement des dépens

(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.

DORS/2002-417, art. 25(F); DORS/2010-176, art. 11.

Dépens de la requête

401 (1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.

Paiement sans délai

(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

Dépens lors d'un désistement ou abandon

402 Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

Requête pour directives

403 (1) Une partie peut demander que des directives soient données à l'officier taxateur au sujet des questions visées à la règle 400 :

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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND
SHAW COMMUNICATIONS INC.

Respondents

RESPONSE OF ROGERS COMMUNICATIONS INC.

I. OVERVIEW

1. Rogers opposes the Commissioner's Application under s. 92 of the *Competition Act* for an order blocking its acquisition of Shaw, in whole or in part. Rogers denies that the Commissioner is entitled to any of the relief sought.

2. Rogers' acquisition of Shaw will not lessen or prevent competition in any market. To the contrary, the transaction will increase competition and generate substantial efficiencies for the Canadian economy. It will allow Rogers to be a

stronger and more effective competitor and provide a national wireline network. It will also allow Rogers to make significant improvements to its national wireless network, benefitting the more than 13 million Canadians who currently subscribe to Rogers and Shaw.

3. The Commissioner accepts that the significant majority of this transaction – the combination of Shaw's wireline with Rogers' wireline and media businesses – will have no anti-competitive effect in those industries. Shaw and Rogers do not currently compete with one another in these areas and their wireline networks do not overlap.

4. Shaw generates more than three quarters of its revenue from its wireline business. Combining it with Rogers will generate substantial benefits for Canadians and the Canadian economy, including:

   a. allowing Rogers to extend its *Connected for Success* program to the areas served by Shaw, providing seniors and low-income Canadians with access to high speed, low cost internet;

   b. bringing increased competition to government and business wireline customers requiring national networks, who currently only have one option; and

   c. allowing Rogers to invest $1 billion to significantly enhance connectivity to rural, remote, and Indigenous communities across Western Canada.

5. Notwithstanding these significant benefits and the absence of any effect on competition in the wireline industry, the Commissioner seeks to block the entirety of the transaction solely on the basis of alleged effects on competition for wireless services in British Columbia, Alberta, and Ontario.

6. The Commissioner, who bears the burden of quantifying the competitive effects of the transaction, has failed to properly assess those effects, which are in fact minimal to none. The Commissioner has also failed to assess, properly or at all, the significant efficiencies the transaction will bring to the Canadian economy. The Commissioner cannot establish that the transaction will result in a substantial lessening of competition in wireless services, and any alleged impact on competition is far outweighed by the transaction's efficiencies.

7. Although Rogers and Shaw dispute there is any substantial lessening or prevention of competition in wireless services, or that any competitive effects are not outweighed by the efficiencies the transaction will generate, they have proposed the full divestiture of Freedom Mobile. Freedom accounts for the vast majority of Shaw's wireless subscribers and wireless revenues.

8. The Commissioner has rejected this proposal as well. The Commissioner insists that no aspect of the transaction can proceed, regardless of what divestiture Rogers and Shaw propose and regardless of the benefits to Canadians and the Canadian economy that will be lost as a result. The Commissioner's position is unreasonable, contrary to both the economic and fact evidence presented to the Bureau, and not supportable at law.

9. Contrary to the Commissioner's allegations, the transaction as a whole does not give rise to a substantial lessening or prevention of competition in wireless services, and any alleged competitive effects are far outweighed by the significant efficiencies the transaction will generate.

10. To the extent the transaction would generate any alleged competitive effects, those would be fully eliminated by the proposed divestiture of Freedom. The company would continue as a fourth competitor in the same markets and with the same assets as before the transaction.

11. The Commissioner's assertion that Freedom's ability to compete "vigorously" is dependent on leveraging Shaw's wireline assets is wrong. It is not grounded in technical or commercial reality and ignores that Shaw operates Freedom as a stand-alone business, there is little relationship between Freedom and Shaw's wireline business, and that relationship is conducted on an arms-length basis

12. The significant majority of Freedom's wireless business is located in Ontario, where Shaw has only a limited wireline presence and provides no backhaul services to Freedom. Where Freedom does use Shaw's backhaul services, in British Columbia and Alberta, Shaw charges Freedom market rates for that access.

13. A divested Freedom would have the same or greater economic incentive to compete as it had when owned by Shaw. The Commissioner cannot establish that the transaction, coupled with the proposed divestiture, would give rise to any effect on competition at all. And even if some competitive effect could be

demonstrated, it would be outweighed by the significant efficiencies the transaction will continue to generate even after the proposed divestiture.

14. There is no basis for any of the relief the Commissioner seeks and Rogers asks that this Application be dismissed in its entirety, with costs payable to Rogers.

II. THE PARTIES AND THE TRANSACTION

Rogers

15. Rogers Communications Inc. ("**Rogers**") is a publicly traded company in the business of providing wireline, wireless, and media products and services. Rogers provides wireline services in Ontario, New Brunswick, and Newfoundland, and wireless services across the country. Its media portfolio includes sports media, TV and radio broadcasting, and digital media.

16. Rogers is Canada's only truly national wireless network operator and has a long history of innovation, including being the first Canadian carrier to launch a 5G wireless network, in January 2020. Rogers provides services and content to tens of millions of Canadians from coast to coast.

Shaw

17. Shaw Communications Inc. ("**Shaw**") is a publicly traded company in the business of providing wireline and wireless services, as well as TV distribution. Shaw provides wireless services primarily through its wholly-owned subsidiary, Freedom Mobile ("**Freedom**"), which it purchased in 2016.

18. Shaw's wireline business represents the significant majority of its revenues and serves residential customers and businesses primarily in Western Canada and Northern Ontario. Its consumer offerings include broadband internet, video, and telephone services. Its business services include fibre internet, telephony, video and audio services, and network and trunking services. Shaw also provides third parties with wholesale access to its wireline networks.

19. In July 2020, Shaw also launched a discount wireless service, Shaw Mobile, marketed at its wireline customers, in an effort to protect its wireline business. Shaw Mobile's revenues and subscribers are a small portion of Shaw's overall revenues.

20. Shaw's primary wireless business is Freedom, which has over 1.7 million subscribers and accounts for a significant majority of Shaw's wireless revenues. Freedom provides service in southern Ontario, Alberta, and British Columbia. The significant majority of Freedom's subscribers are in Ontario, outside Shaw's wireline and wifi footprints. It offers its products and services through a distribution network that includes nearly 800 Freedom Mobile locations across Alberta, British Columbia and Ontario, including corporate and retail partners.

The Transaction

21. On March 13, 2021, Rogers and Shaw entered into an Arrangement Agreement pursuant to which Rogers agreed to purchase all of the issued and outstanding shares of Shaw for approximately $26 billion, inclusive of debt (the "**Transaction**"). Shaw made the decision to enter into the Transaction after a

careful evaluation of the strategic options available to it, including whether to continue to compete on a standalone basis.

22. The Transaction triggered the need for pre-merger notification and review under the *Competition Act* and is also subject to approval from the Canadian Radio-television and Telecommunications Commission (the "**CRTC**") under the *Broadcasting Act* and from the Minister of Innovation, Science and Industry (the "**Minister**") under the *Radiocommunication Act*.

23. The Respondents submitted filings to each of the CRTC, Commissioner and the Minister on April 13, 2021. Pursuant to an agreed process, the Respondents' submissions to the Commissioner included detailed evidence of the efficiencies that would be realized from the Transaction, which was provided in November of 2021 and subsequently. The review periods under the *Competition Act* have expired. The Transaction has received CRTC Approval but remains subject to approval from the Minister.

III. INDUSTRY BACKGROUND AND STRUCTURE

24. Competition for wireless services in Canada is intense. Carriers compete on price, as well as along other dimensions such as plan features, network quality, and customer service.

25. Wireless services have also been subject to significant regulatory scrutiny and intervention in recent years. In 2021, the CRTC issued Telecom Regulatory Policy CRTC 2021-130, *Review of mobile wireless services* (the "**MVNO Policy**")

which seeks to facilitate the expansion of facilities-based carriers. The MVNO Policy was developed based on input and submissions from a variety of stakeholders including the Competition Bureau.

26. Under the MVNO Policy, carriers such as Bell, Telus, Rogers and Sasktel are required to: (i) provide temporary access to their networks to other wireless carriers for resale in geographies in which those carriers hold spectrum and intend to build out their own network facilities within the next seven years; and (ii) offer low-cost and occasional use wireless plans that meet criteria set out by the CRTC.

27. The MVNO Policy did not impose any requirements related to access to backhaul, which the CRTC has decided in separate proceedings should be forborne from regulation because those markets were found to be competitive. Nor did the MVNO policy suggest that integration with wireline or commercial bundling with wireline is a requirement for success in wireless services.

28. The CRTC expects that the MVNO Policy will lead to near-term entry by firms that are best positioned to disrupt existing competitors in the sale of wireless services.

IV. GROUNDS ON WHICH THE APPLICATION IS OPPOSED

A. The Relevant Markets

29. The Commissioner has wrongly defined the relevant product markets in the provision of wireless services because:

a. the business consumers identified are mainly small and medium-sized enterprises which typically purchase services through the same channels as non-business consumers. As a result, there is no ability to define a separate market for this category; and

b. the Commissioner alleges that the competitive effects of the Transaction arise, in part, from the need to offer bundled wireless and wireline services, yet the relevant product market is not a bundled product.

B. Transaction Will not Substantially Lessen Competition for Wireless Services

30. The Commissioner's analysis of the competitive effects of the Transaction in the wireless market is flawed and incomplete. Contrary to the Commissioner's allegations, the Transaction has not substantially lessened or prevented competition in wireless services since it was announced in March 2021 and would not do so once completed.

31. The Commissioner's analysis is flawed because, among other things:

a. The Commissioner fails to consider the impact of entrants and reduced barriers to entry and expansion resulting from the CRTC's MVNO Policy. After an extensive consultation, written submissions, and a hearing, in which the Commissioner actively participated, the CRTC concluded that the MVNO Policy would allow for new wireless market entry in the near term, as well as support long-term sustainable competition in the industry;

b. The Commissioner's analysis of the Transaction's competitive effects is backwards looking and fails to take into account the near-term and disruptive impact that MVNOs will have, as well as the continued role that regulation, including price regulation, will play in the market;

c. The Commissioner wrongly asserts that Rogers has felt significant competitive pressure from Shaw, when Rogers in fact competes much more closely against Bell and Telus, and any competitive pressure Shaw has exerted in the past was attributable to specific market dynamics at that time;

d. The Commissioner has overstated the competitive significance and impact of the Shaw Mobile brand (as distinct from Freedom), in the wireless market. It was launched in British Columbia and Alberta only to protect Shaw's wireline business, with generous promotional discounts offered only to a subset of Shaw's highest-paying wireline households, and has no viable path for sustained future growth;

e. The Commissioner wrongly asserts that, but for the Transaction, Shaw would have made the necessary investments to allow it to be a significant competitive force in 5G. Among other things, and as noted above, when faced with the prospect of making those significant capital investments, Shaw chose instead to sell; and

f. The Commissioner's assertions that Freedom had planned to expand into business services in a manner that would impact competition are unsupported and incorrect.

C. Divestiture Fully Remedies Any Alleged Lessening or Prevention of Competition

32. The Commissioner's assertion that the Transaction would substantially lessen or prevent competition even with the divestiture of Freedom is wrong. It is premised, in large part, on the claim that Freedom's competitiveness is dependent on "leveraging" Shaw's wireline assets.

33. That claim is not grounded in technical or commercial reality and ignores that Freedom was a stand-alone business when Shaw acquired it and has been operated as such ever since. Among other things:

a. In southern Ontario, which accounts for the significant majority of Freedom's wireless revenues, Shaw has no wireline network and Freedom makes extensive use of microwave backhaul or pays market rates to access other companies' wireline networks. Similarly, Rogers has a successful wireless business in British Columbia and Alberta, where it has no wireline network and relies on microwave backhaul or pays for access to the wireline networks of others;

b. In British Columbia and Alberta, Freedom accesses wireline backhaul from Shaw at market rates. It also accesses additional backhaul from third

parties in British Columbia and Alberta, again at market rates, as it does in Ontario (where Shaw is not present); and

c. Contrary to the Commissioner's assertions, Shaw Go Wifi provides no material benefit to Freedom in offloading network traffic, nor could it, for both technical and practical reasons, provide any material advantage in the deployment of 5G services.

34. The Commissioner's assertions that Freedom would not be an effective standalone competitor are also misguided. What the Commissioner defines as "New Freedom" is in all material respects the same as old Freedom:

a. It will have the same spectrum, towers, and other operating assets as it currently does;

b. It will have the same if not greater economic incentives to compete in the market and build out a 5G network; and

c. It will be able to purchase additional spectrum in the upcoming 3800 MHz auction in 2023.

35. The Commissioner's assertions regarding the impact on Freedom of being divested from Shaw are without foundation:

a. Freedom does not currently provide bundled services to a material number of its customers and it purchases backhaul services at market rates, which it could continue to do;

b. Freedom does not currently sell its products and services through Shaw's retail network, but has its own network of nearly 800 locations, including corporate and retail partners; and

c. Freedom already has access to the services necessary to support its wireless services, both in terms of roaming and access to wireline networks for backhaul, through its contracts with various third parties.

36. Contrary to the Commissioner's assertions, Rogers and other carriers are likely to compete more intensely, not less, after the Transaction is completed, with or without the divestiture of Freedom. Rogers will be better placed to compete in wireless services against Bell and Telus, which have the distinct competitive advantage of sharing a single wireless network and pooling their spectrum, resulting in significantly lower network building and maintenance costs.

37. Rogers will also be better placed than Shaw was to compete against Telus in British Columbia and Alberta for bundled wireline / wireless services, given the relative attractiveness of Rogers' wireless network.

38. The additional competitive response that Rogers' presence would elicit from other carriers is already evident in the significant number of additional network investments announced by Bell and Telus immediately after the Transaction was announced and in the subsequent months.

V. EFFICIENCIES ARISING FROM THE TRANSACTION

39. The Commissioner has given no consideration at all to the significant productive and dynamic efficiencies the Transaction will generate for the Canadian economy. These efficiencies will significantly outweigh any alleged competitive effects and would be lost by the relief the Commissioner seeks.

40. These efficiencies will include:

a. The significant cost savings that would come from combining the Respondents' wireless networks (excluding set-aside spectrum) and wireline networks;

b. The significant quality improvements that would come from combining the Respondents' wireless networks (excluding set-aside spectrum) and wireline networks; and

c. The significant reduction of redundant real estate and network equipment.

41. Many of these efficiencies would remain cognizable even in the event of a divestiture of Freedom.

VI. RELIEF SOUGHT

42. Rogers respectfully requests that this Application be dismissed in its entirety. In the alternative, Rogers requests an order allowing the Transaction, subject to the divestiture of Freedom. In either scenario, Rogers seeks its costs of this Application.

VII. CONCISE STATEMENT OF ECONOMIC THEORY

43. Rogers' Statement of Economic Theory is attached as Schedule A.

June 3, 2022

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750
145 King Street West
Toronto, ON M5H 1J8

Jonathan Lisus (LSO# 32952H)
Tel: 416.59878736
Email: jlisus@lolg.ca

Crawford Smith (LSO# 42131S)
Tel: 416.598.8648
Email: csmith@lolg.ca

Matthew Law (LSO# 59856A)
Tel: 416.849.9050
Email: mlaw@lolg.ca

Bradley Vermeersch (LSO# 69004K)
Tel: 416.646.7997
Email: bvermeersch@lolg.ca

Counsel for the Respondent Rogers Communications Inc.

TO: **THE COMMISSIONER OF COMPETITION**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

John S. Tyhurst

Derek Leschinsky

Katherine Rydel

Ryan Caron

Suzanie Chua

Marie-Hélène Gay

Kevin Hong

Tel: (819) 956-2842 / (613) 897-7682
Fax: (819) 953-9267

Counsel for the Applicant,
The Commissioner of Competition

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
155 Wellington Street West
Toronto, ON M5V 3J7

Kent E. Thomson
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Derek D. Ricci
Tel: 416.367.7471
Email: dricci@dwpv.com

Steven Frankel
Tel: 416.367.7441
Email: sfrankel@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Counsel for the Respondent
Shaw Communications Inc.

SCHEDULE A - CONCISE STATEMENT OF ECONOMIC THEORY

1. Rogers and Shaw offer a range of telecommunications services. The Commissioner's application asserts that the proposed merger of Rogers and Shaw would substantially lessen competition in wireless services and has sought to block the Transaction in its entirety as well as other alternative relief.

2. The Respondents' economic theory addresses both: (i) the Commissioner's assessment of the competitive effects of the Transaction in wireless services; and (ii) the Commissioner's assessment of the competitive effects that would remain in wireless services after the divestiture of the Freedom wireless business (the "Proposed Divestiture").

Economic Analysis of Competitive Effects of Transaction

3. The Commissioner bears the burden of quantifying the alleged anti-competitive effects of the Transaction in wireless services. An economic analysis of the competitive effects of the Transaction upon wireless services must be forward-looking and reflect, among other things: (i) proper inputs such as, for example, the economic margins of various market participants and share of subscribers; (ii) the significant marginal cost savings that are likely to be realized by the merged entity; and (iii) the competitive discipline of poised entrants under the MVNO Policy. An economic analysis that takes such factors into account confirms that the Transaction would lead to significant gains in welfare and increased competition.

4. To the extent that the Transaction results in any anti-competitive effects in any market for wireless services (which is denied), any such effects would be significantly outweighed by the productive efficiencies that are cognizable under section 96 of the *Competition Act* and the quality improvements that are cognizable as dynamic efficiencies under section 96 of the *Competition Act* (or as enhancements to output under section 92 of the *Competition Act*), all of which would be lost in the event of an order blocking the Transaction as sought by the Commissioner.

Economic Analysis of Competitive Effects With Proposed Divestiture

5. The Proposed Divestiture would be effective in eliminating any alleged substantial prevention or lessening of competition in wireless services. The Proposed Divestiture represents a standalone business that will be a viable and effective competitor. An economic analysis of the competitive effects of the Transaction after the Proposed Divestiture must take into account the factors identified above as well as: (i) the limited competitive impact on wireless services of Shaw Mobile; (ii) the incentives and competitive impact of a divestiture purchaser; and (iii) the incentives and abilities that Rogers would have following completion of the Proposed Divestiture. Such economic analysis confirms that any alleged substantial prevention or lessening of competition in any market for wireless services in Canada would be eliminated if the Proposed Divestiture is effected.

6. Further, the Proposed Divestiture will continue to allow the merged entity to realize, among other things, significant cognizable productive efficiencies that will

outweigh any remaining alleged anti-competitive effects (which the Respondents deny) in any market for wireless services.

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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND
SHAW COMMUNICATIONS INC.

Respondents

AMENDED RESPONSE OF ROGERS COMMUNICATIONS INC.

I. OVERVIEW

1. Rogers opposes the Commissioner's Application under s. 92 of the *Competition Act* for an order blocking its acquisition of Shaw, in whole or in part. Rogers denies that the Commissioner is entitled to any of the relief sought and denies the allegations set out in the Commissioner's Notice of Application.

2. Rogers' acquisition of Shaw will not lessen or prevent competition in any market. To the contrary, the transaction will increase competition and generate

substantial efficiencies for the Canadian economy. It will allow Rogers to be a stronger and more effective competitor and provide a national wireline network. It will also allow Rogers to make significant improvements to its national wireless network, benefitting the more than 13 million Canadians who currently subscribe to Rogers and Shaw.

3. The Commissioner accepts that the significant majority of this transaction – the combination of Shaw's wireline with Rogers' wireline and media businesses – will have no anti-competitive effect in those industries. Shaw and Rogers do not currently compete with one another in these areas and their wireline networks do not overlap.

4. Shaw generates more than three quarters of its revenue from its wireline business. Combining it with Rogers will generate substantial benefits for Canadians and the Canadian economy, including:

   a. allowing Rogers to extend its *Connected for Success* program to the areas served by Shaw, providing seniors and low-income Canadians with access to high speed, low cost internet;

   b. bringing increased competition to government and business wireline customers requiring national networks, who currently only have one option; and

   c. allowing Rogers to invest $1 billion to significantly enhance connectivity to rural, remote, and Indigenous communities across Western Canada.

5. Notwithstanding these significant benefits and the absence of any effect on competition in the wireline industry, the Commissioner seeks to block the entirety of the transaction solely on the basis of alleged effects on competition for wireless services in British Columbia, Alberta, and Ontario.

6. The Commissioner, who bears the burden of quantifying the competitive effects of the transaction, has failed to properly assess those effects, which are in fact minimal to none. The Commissioner has also failed to assess, properly or at all, the significant efficiencies the transaction will bring to the Canadian economy. The Commissioner cannot establish that the transaction will result in a substantial lessening of competition in wireless services, and any alleged impact on competition is far outweighed by the transaction's efficiencies.

7. Although Rogers and Shaw dispute there is any substantial lessening or prevention of competition in wireless services, or that any competitive effects are not outweighed by the efficiencies the transaction will generate, they have proposed the full divestiture of Freedom Mobile. Freedom accounts for the vast majority of Shaw's wireless subscribers and wireless revenues.

8. Consistent with this proposal, Rogers, Shaw and Quebecor Inc.—the parent company of Videotron—have entered into an agreement for the divestiture of Freedom including, among other things, Freedom's entire wireless business and wireline subscribers. The proposed divestiture of Freedom to Quebecor, including the ancillary agreements, would occur immediately prior to Rogers' acquisition of Shaw.

9. The Commissioner has rejected this proposal as well. The Commissioner insists that no aspect of the transaction can proceed, regardless of what divestiture Rogers and Shaw propose and regardless of the benefits to Canadians and the Canadian economy that will be lost as a result. The Commissioner's position is unreasonable, contrary to both the economic and fact evidence presented to the Bureau, and not supportable at law.

10. Contrary to the Commissioner's allegations, the transaction as a whole does not give rise to a substantial lessening or prevention of competition in wireless services, and any alleged competitive effects are far outweighed by the significant efficiencies the transaction will generate.

11. To the extent the transaction would generate any alleged competitive effects, those would be fully eliminated by the proposed divestiture of Freedom. The company would continue as a fourth competitor in the same markets and with the same assets as before the transaction but with the benefit of lower marginal costs as well as efficiencies created from integrating with Videotron.

12. The Commissioner's assertion that Freedom's ability to compete "vigorously" is dependent on leveraging Shaw's wireline assets is wrong. It is not grounded in technical or commercial reality and ignores that Shaw operates Freedom as a stand-alone business, there is little relationship between Freedom and Shaw's wireline business, and that relationship is conducted on an arms-length basis

13. The significant majority of Freedom's wireless business is located in Ontario, where Shaw has only a limited wireline presence and provides no backhaul

services to Freedom. Where Freedom does use Shaw's backhaul services, in British Columbia and Alberta, Shaw charges Freedom market rates for that access.

14. A divested Freedom would have the same or greater economic incentive to compete as it had when owned by Shaw. The Commissioner cannot establish that the transaction, coupled with the proposed divestiture, would give rise to any effect on competition at all. And even if some competitive effect could be demonstrated, it would be outweighed by the significant efficiencies the transaction will continue to generate even after the proposed divestiture.

15. There is no basis for any of the relief the Commissioner seeks and Rogers asks that this Application be dismissed in its entirety, with costs payable to Rogers.

II. THE PARTIES AND THE TRANSACTION

Rogers

16. Rogers Communications Inc. ("**Rogers**") is a publicly traded company in the business of providing wireline, wireless, and media products and services. Rogers provides wireline services in Ontario, New Brunswick, and Newfoundland, and wireless services across the country. Its media portfolio includes sports media, TV and radio broadcasting, and digital media.

17. Rogers is Canada's only truly national wireless network operator and has a long history of innovation, including being the first Canadian carrier to launch a 5G

wireless network, in January 2020. Rogers provides services and content to tens of millions of Canadians from coast to coast.

Shaw

18. Shaw Communications Inc. ("**Shaw**") is a publicly traded company in the business of providing wireline and wireless services, as well as TV distribution. Shaw provides wireless services primarily through its wholly-owned subsidiary, Freedom Mobile ("**Freedom**"), which it purchased in 2016.

19. Shaw's wireline business represents the significant majority of its revenues and serves residential customers and businesses primarily in Western Canada and Northern Ontario. Its consumer offerings include broadband internet, video, and telephone services. Its business services include fibre internet, telephony, video and audio services, and network and trunking services. Shaw also provides third parties with wholesale access to its wireline networks.

20. In July 2020, Shaw also launched a discount wireless service, Shaw Mobile, marketed at its wireline customers, in an effort to protect its wireline business. Shaw Mobile's revenues and subscribers are a small portion of Shaw's overall revenues.

21. Shaw's primary wireless business is Freedom, which has over 1.7 million subscribers and accounts for a significant majority of Shaw's wireless revenues. Freedom provides service in southern Ontario, Alberta, and British Columbia. The significant majority of Freedom's subscribers are in Ontario, outside Shaw's

wireline and wifi footprints. It offers its products and services through a distribution network that includes nearly 800 Freedom Mobile locations across Alberta, British Columbia and Ontario, including corporate and retail partners.

The Transaction

22. On March 13, 2021, Rogers and Shaw entered into an Arrangement Agreement pursuant to which Rogers agreed to purchase all of the issued and outstanding shares of Shaw for approximately $26 billion, inclusive of debt (the "**Transaction**"). Shaw made the decision to enter into the Transaction after a careful evaluation of the strategic options available to it, including whether to continue to compete on a standalone basis.

23. The Transaction triggered the need for pre-merger notification and review under the *Competition Act* and is also subject to approval from the Canadian Radio-television and Telecommunications Commission (the "**CRTC**") under the *Broadcasting Act* and from the Minister of Innovation, Science and Industry (the "**Minister**") under the *Radiocommunication Act*.

24. The Respondents submitted filings to each of the CRTC, Commissioner and the Minister on April 13, 2021. Pursuant to an agreed process, the Respondents' submissions to the Commissioner included detailed evidence of the efficiencies that would be realized from the Transaction, which was provided in November of 2021 and subsequently. The review periods under the *Competition Act* have expired. The Transaction has received CRTC Approval but remains subject to approval from the Minister.

III. INDUSTRY BACKGROUND AND STRUCTURE

25. Competition for wireless services in Canada is intense. Carriers compete on price, as well as along other dimensions such as plan features, network quality, and customer service.

26. Wireless services have also been subject to significant regulatory scrutiny and intervention in recent years. In 2021, the CRTC issued Telecom Regulatory Policy CRTC 2021-130, *Review of mobile wireless services* (the "**MVNO Policy**") which seeks to facilitate the expansion of facilities-based carriers. The MVNO Policy was developed based on input and submissions from a variety of stakeholders including the Competition Bureau.

27. Under the MVNO Policy, carriers such as Bell, Telus, Rogers and Sasktel are required to: (i) provide temporary access to their networks to other wireless carriers for resale in geographies in which those carriers hold spectrum and intend to build out their own network facilities within the next seven years; and (ii) offer low-cost and occasional use wireless plans that meet criteria set out by the CRTC.

28. The MVNO Policy did not impose any requirements related to access to backhaul, which the CRTC has decided in separate proceedings should be forborne from regulation because those markets were found to be competitive. Nor did the MVNO policy suggest that integration with wireline or commercial bundling with wireline is a requirement for success in wireless services.

29. The CRTC expects that the MVNO Policy will lead to near-term entry by firms that are best positioned to disrupt existing competitors in the sale of wireless services.

IV. GROUNDS ON WHICH THE APPLICATION IS OPPOSED

A. The Relevant Markets

30. The Commissioner has wrongly defined the relevant product markets in the provision of wireless services because:

a. the business consumers identified are mainly small and medium-sized enterprises which typically purchase services through the same channels as non-business consumers. As a result, there is no ability to define a separate market for this category; and

b. the Commissioner alleges that the competitive effects of the Transaction arise, in part, from the need to offer bundled wireless and wireline services, yet the relevant product market is not a bundled product.

B. Transaction Will not Substantially Lessen Competition for Wireless Services

31. The Commissioner's analysis of the competitive effects of the Transaction in the wireless market is flawed and incomplete. Contrary to the Commissioner's allegations, the Transaction has not substantially lessened or prevented

competition in wireless services since it was announced in March 2021 and would not do so once completed.

32. The Commissioner's analysis is flawed because, among other things:

a. The Commissioner fails to consider the impact of entrants and reduced barriers to entry and expansion resulting from the CRTC's MVNO Policy. After an extensive consultation, written submissions, and a hearing, in which the Commissioner actively participated, the CRTC concluded that the MVNO Policy would allow for new wireless market entry in the near term, as well as support long-term sustainable competition in the industry;

b. The Commissioner's analysis of the Transaction's competitive effects is backwards looking and fails to take into account the near-term and disruptive impact that MVNOs will have, as well as the continued role that regulation, including price regulation, will play in the market;

c. The Commissioner wrongly asserts that Rogers has felt significant competitive pressure from Shaw, when Rogers in fact competes much more closely against Bell and Telus, and any competitive pressure Shaw has exerted in the past was attributable to specific market dynamics at that time;

d. The Commissioner has overstated the competitive significance and impact of the Shaw Mobile brand (as distinct from Freedom), in the wireless market. It was launched in British Columbia and Alberta only to protect

Shaw's wireline business, with generous promotional discounts offered only to a subset of Shaw's highest-paying wireline households, and has no viable path for sustained future growth;

e. The Commissioner wrongly asserts that, but for the Transaction, Shaw would have made the necessary investments to allow it to be a significant competitive force in 5G. Among other things, and as noted above, when faced with the prospect of making those significant capital investments, Shaw chose instead to sell; and

f. The Commissioner's assertions that Freedom had planned to expand into business services in a manner that would impact competition are unsupported and incorrect.

C. Divestiture to Videotron Fully Remedies Any Alleged Lessening or Prevention of Competition

33. On June 17, 2022, Rogers, Shaw and Quebecor—Videotron's parent company—entered into a letter agreement and term sheet ("**Divestiture Agreement**") for the divestiture of Freedom (the "Divestiture"). This agreement provides for (i) the transfer to Videotron of Freedom's entire wireless business and wireline subscribers; (ii) transitional services from Rogers and Shaw, which will ensure a seamless transfer of ownership to Videotron without operational or service disruption; and (iii) the provision by Rogers of ongoing ancillary network access services that will lower Freedom's cost base, making it a stronger and more effective competitor than it was before the merger.

34. Shaw and Videotron submitted filings to each of the Commissioner and the Minister on June 24, 2022 and June 27, 2022, respectively. The filings submitted to the Commissioner included detailed evidence about why Videotron is a qualified buyer for Freedom, why the Divestiture resolves the substantial lessening of competition in wireless alleged by the Commissioner, and why the combination of Freedom and Videotron will create significant efficiencies.

35. Key terms of the Divestiture Agreement are:

a. ***Asset Transfer***: The Divestiture Agreement provides for Videotron's purchase of all Freedom Mobile Inc. shares, as well as the transfer of all assets necessary for Videotron to continue operating Freedom's wireless and wireline businesses on a standalone basis. These assets include:

- **Subscribers:** All of Freedom's approximately [redacted] mobile subscribers, and its approximately [redacted] Freedom Gateway internet subscribers (as of March 2022);
- **Spectrum:** All of Freedom's spectrum licences;
- **Network Infrastructure:** Freedom's wireless core-network and related assets, cell sites and network equipment;
- **Backhaul Assets:** All of Freedom's backhaul microwave systems and contracts for backhaul with third parties at Freedom's cell sites;

- **Roaming Agreements:** All of Freedom's domestic and international third-party roaming agreements; and

- **Brand and Distribution:** All Freedom-related IP and goodwill, branded stores, and contracts with Freedom dealers/franchisees.

b. ***Transition Services***: The Divestiture Agreement requires Rogers and Shaw to provide Freedom with various transition services [redacted], so that it can continue under Videotron's ownership immediately upon completion without any service or operational disruption ("**Transition Services**"). [redacted]

c. ***Ancillary Network Access Services***: On top of these Transition Services, Rogers also agreed to provide Videotron with certain network access services ("**Access Services**") that will enable it to operate Freedom on a more cost-effective basis than Shaw could before the proposed divestiture. These Access Services include:

- [redacted]

[redacted]

36. Subject to regulatory approval, Freedom's divestiture to Videotron will occur immediately prior to the closing of Rogers' acquisition of Shaw.

37. The Commissioner's assertion that the Transaction would substantially lessen or prevent competition even with the divestiture of Freedom to Videotron is wrong. It is premised, in large part, on the claim that Freedom's competitiveness is dependent on "leveraging" Shaw's wireline assets. It takes no account of the wireless and wireline assets that Videotron would make available to Freedom.

38. That claim is not grounded in technical or commercial reality and ignores that Freedom was a stand-alone business when Shaw acquired it and has been operated as such ever since. Among other things:

a. In southern Ontario, which accounts for the significant majority of Freedom's wireless revenues, Shaw has no wireline network and Freedom makes extensive use of microwave backhaul or pays market rates to access other companies' wireline networks. Similarly, Rogers has a successful wireless business in British Columbia and Alberta, where it has no wireline network and relies on microwave backhaul or pays for access to the wireline networks of others;

b. In British Columbia and Alberta, Freedom accesses wireline backhaul from Shaw at market rates. It also accesses additional backhaul from third parties in British Columbia and Alberta, again at market rates, as it does in Ontario (where Shaw is not present). Under Videotron's ownership, Freedom will be in the same, if not better position as it is without the Transaction and Divestiture under Shaw's ownership in Alberta and British Columbia; and

c. Contrary to the Commissioner's assertions, Shaw Go Wifi provides no material benefit to Freedom in offloading network traffic, nor could it, for both technical and practical reasons, provide any material advantage in the deployment of 5G services. [redacted]

[redacted]

39. The Commissioner's assertions that Freedom would not be an effective standalone competitor are also misguided. What the Commissioner defines as "New Freedom" is in all material respects the same as old Freedom, except for certain advantages that New Freedom will enjoy as a result of its integration with Videotron:

a. New Freedom ~~It~~ will have the same spectrum, towers, and other operating assets as it currently does, as well as important 3.5 GHz spectrum that Videotron acquired in the recent auction (which Shaw does not possess);

b. New Freedom ~~It~~ will have the same if not greater economic incentives to compete in the market and build out a 5G network. The additional incentives arise from the fact that New Freedom will have access to 3.5 GHz spectrum that Videotron acquired in the recent auction, which is critical for the delivery of high-quality 5G services; and

c. New Freedom ~~It~~ will be able to purchase additional spectrum in the upcoming 3800 MHz auction in 2023.

40. The Commissioner's assertions regarding the impact on Freedom of being divested from Shaw are without foundation:

a. Freedom does not currently provide bundled services to a material number of its customers and it purchases backhaul services at market

rates, which it could continue to do. [redacted]

[redacted]

b. Freedom does not currently sell its products and services through Shaw's retail network, but has its own network of nearly 800 locations, including corporate and retail partners; and

c. Freedom already has access to the services necessary to support its wireless services, both in terms of roaming and access to wireline networks for backhaul, through its contracts with various third parties.

41. Contrary to the Commissioner's assertions, Rogers and other carriers are likely to compete more intensely, not less, after the Transaction is completed, with or without the divestiture of Freedom. Rogers will be better placed to compete in wireless services against Bell and Telus, which have the distinct competitive advantage of sharing a single wireless network and pooling their spectrum, resulting in significantly lower network building and maintenance costs. Videotron will be better placed to compete in wireless services than Freedom under Shaw's ownership against each of Rogers, Bell and Telus, in part due to its ownership of 3.5 GHz spectrum.

42. Rogers will also be better placed than Shaw was to compete against Telus in British Columbia and Alberta for bundled wireline / wireless services, given the relative attractiveness of Rogers' wireless network. [redacted]

[redacted]

43. The additional competitive response that Rogers' presence would elicit from other carriers is already evident in the significant number of additional network investments announced by Bell and Telus immediately after the Transaction was announced and in the subsequent months. The Divestiture is likely to elicit further competitive responses from other carriers.

44. Ultimately, the Divestiture provides Videotron with a unique opportunity for fast, efficient, and effective expansion outside of Quebec. It will ensure Freedom's position as an effective fourth wireless carrier in British Columbia, Alberta, and Ontario by increasing Videotron's incentive and ability to compete against Rogers, Bell, and Telus. It will further provide new opportunities for product differentiation, significantly boost Freedom's 5G capabilities by adding Videotron's valuable mid-band spectrum holdings, and fully address the Commissioner's concerns about any possible coordinated effects. This is particularly so given Videotron's history as a disruptive competitor and its incentive to grow market share.

V. EFFICIENCIES ARISING FROM THE TRANSACTION AND THE DIVESTITURE

45. The Commissioner has given no consideration at all to the significant productive and dynamic efficiencies the Transaction will generate for the Canadian

economy. These efficiencies will significantly outweigh any alleged competitive effects and would be lost by the relief the Commissioner seeks.

46. ~~These~~ With respect to the Transaction, these efficiencies will include:

a. The significant cost savings that would come from combining the Respondents' wireless networks (excluding set-aside spectrum) and wireline networks;

b. The significant quality improvements that would come from combining the Respondents' wireless networks (excluding set-aside spectrum) and wireline networks; and

c. The significant reduction of redundant real estate and network equipment.

47. Many of these efficiencies would remain cognizable even in the event of a divestiture of Freedom. The efficiencies that will be realized in the event of the divestiture of Freedom to Videotron are as follows:

a. The significant cost savings that would come from combining the Respondents' wireline networks and operations;

b. Quality improvements that would arise from combining the Respondents' wireline networks;

c. Quality improvements that would arise from combining Videotron's and Freedom's wireless networks; and

d. Productive efficiencies arising from the divestiture of Freedom to Videotron, as follows:

i. Avoided costs relating to network infrastructure and related assets in British Columbia, Alberta, and/or Ontario;

ii. Avoided costs related to retail operations in British Columbia, Alberta, and/or Ontario; and

iii. Labour-related savings.

VI. RELIEF SOUGHT

48. Rogers respectfully requests that this Application be dismissed in its entirety. In the alternative, Rogers requests an order allowing the Transaction, subject to the divestiture of Freedom. In either scenario, Rogers seeks its costs of this Application.

VII. CONCISE STATEMENT OF ECONOMIC THEORY

49. Rogers' Statement of Economic Theory is attached as Schedule A.

June 3, 2022

Amended August 8, 2022

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750
145 King Street West
Toronto, ON M5H 1J8

Jonathan Lisus (LSO# 32952H)
Tel: 416.598.7873
Email: jlisus@lolg.ca

Crawford Smith (LSO# 42131S)
Tel: 416.598.8648
Email: csmith@lolg.ca

Matthew Law (LSO# 59856A)
Tel: 416.849.9050
Email: mlaw@lolg.ca

Bradley Vermeersch (LSO# 69004K)
Tel: 416.646.7997
Email: bvermeersch@lolg.ca

Counsel for the Respondent Rogers Communications Inc.

TO: **THE COMMISSIONER OF COMPETITION**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

John S. Tyhurst

Derek Leschinsky

Katherine Rydel

Ryan Caron

Kevin Hong

Tel: (819) 956-2842 / (613) 897-7682
Fax: (819) 953-9267

Counsel for the Applicant,
The Commissioner of Competition

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
155 Wellington Street West
Toronto, ON M5V 3J7

Kent E. Thomson
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Derek D. Ricci
Tel: 416.367.7471
Email: dricci@dwpv.com

Steven Frankel
Tel: 416.367.7441
Email: sfrankel@dwpv.com

Chanakya Sethi
Tel: 416.863.5516
Email: csethi@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Counsel for the Respondent
Shaw Communications Inc.

SCHEDULE A - CONCISE STATEMENT OF ECONOMIC THEORY

1. Rogers and Shaw offer a range of telecommunications services. The Commissioner's application asserts that the proposed merger of Rogers and Shaw would substantially lessen competition in wireless services and has sought to block the Transaction in its entirety as well as other alternative relief.

2. The Respondents' economic theory addresses both: (i) the Commissioner's assessment of the competitive effects of the Transaction in wireless services; and (ii) the Commissioner's assessment of the competitive effects that would remain in wireless services after the divestiture of the Freedom wireless business (the "Proposed Divestiture").

Economic Analysis of Competitive Effects of Transaction

3. The Commissioner bears the burden of quantifying the alleged anti-competitive effects of the Transaction in wireless services. An economic analysis of the competitive effects of the Transaction upon wireless services must be forward-looking and reflect, among other things: (i) proper inputs such as, for example, the economic margins of various market participants and share of subscribers; (ii) the significant marginal cost savings that are likely to be realized by the merged entity; and (iii) the competitive discipline of poised entrants under the MVNO Policy. An economic analysis that takes such factors into account confirms that the Transaction would lead to significant gains in welfare and increased competition.

4. To the extent that the Transaction results in any anti-competitive effects in any market for wireless services (which is denied), any such effects would be significantly outweighed by the productive efficiencies that are cognizable under section 96 of the *Competition Act* and the quality improvements that are cognizable as dynamic efficiencies under section 96 of the *Competition Act* (or as enhancements to output under section 92 of the *Competition Act*), all of which would be lost in the event of an order blocking the Transaction as sought by the Commissioner.

Economic Analysis of Competitive Effects With Proposed Divestiture

5. The Proposed Divestiture would be effective in eliminating any alleged substantial prevention or lessening of competition in wireless services. The Proposed Divestiture represents a standalone business that will be a viable and effective competitor. An economic analysis of the competitive effects of the Transaction after the Proposed Divestiture must take into account the factors identified above as well as: (i) the limited competitive impact on wireless services of Shaw Mobile; (ii) the incentives, marginal cost savings, and competitive impact of a divestiture purchaser; and (iii) the incentives and abilities that Rogers would have following completion of the Proposed Divestiture. Such economic analysis confirms that any alleged substantial prevention or lessening of competition in any market for wireless services in Canada would be eliminated if the Proposed Divestiture is effected.

6. Further, the Proposed Divestiture will continue to allow the merged entity and Videotron/Freedom to realize, among other things, significant cognizable

productive efficiencies that will outweigh any remaining alleged anti-competitive effects (which the Respondents deny) in any market for wireless services.

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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

FRESH AS AMENDED RESPONSE OF ROGERS COMMUNICATIONS INC.

I. OVERVIEW

1. Rogers opposes the Commissioner's Application under s. 92 of the *Competition Act* for an order blocking its acquisition of Shaw in whole or in part. Rogers denies that the Commissioner is entitled to any of the relief sought and denies the allegations set out in the Commissioner's Notice of Application. Rogers asks the Tribunal to permit the Transaction, coupled with the Divestiture (as those terms are defined below), to proceed.

2. The Commissioner accepts that the significant majority of the Transaction—the combination of Shaw's wireline business with Rogers' wireline and media businesses—will have no anti-competitive effect in those industries. Shaw and Rogers do not currently compete with one another in these areas and their wireline networks do not overlap.

3. Shaw generates more than three quarters of its revenue from its wireline business. Combining it with Rogers will generate substantial benefits for Canadians and the Canadian economy, including:

   a. allowing Rogers to extend its *Connected for Success* program to the areas served by Shaw, providing seniors and low-income Canadians with access to high speed, low cost internet;

   b. bringing increased competition to government and business wireline customers requiring national networks, who currently only have one option; and

   c. allowing Rogers to invest $1 billion to significantly enhance connectivity to rural, remote, and Indigenous communities across Western Canada.

4. Notwithstanding these significant benefits and the absence of any effect on competition in the wireline industry, the Commissioner seeks to block the entirety of the transaction solely on the basis of alleged effects on competition for wireless services in British Columbia, Alberta, and Ontario.

5. While the Respondents do not agree with the Commissioner's position, Rogers, Shaw and Quebecor Inc.—the parent company of Videotron—have entered into an agreement for the divestiture of Freedom Mobile to Videotron. Freedom accounts for the vast majority of Shaw's wireless subscribers and wireless revenues. This Divestiture includes, among other things, Freedom's entire wireless business and wireline subscribers. The proposed Divestiture, including the ancillary agreements, would occur immediately prior to Rogers' acquisition of Shaw.

6. The Commissioner has rejected this proposal. The Commissioner insists that no aspect of the Transaction can proceed, regardless of what divestiture Rogers and Shaw propose and regardless of the benefits to Canadians and the Canadian economy that will be lost as a result. The Commissioner's position is unreasonable, contrary to both the economic and fact evidence presented to the Bureau, and not supportable at law.

7. The Commissioner cannot establish that the Transaction coupled with the Divestiture will result in a substantial lessening of competition in wireless services, and any alleged impact on competition is far outweighed by the efficiencies likely to be generated by the Transaction and the Divestiture.

8. Contrary to the Commissioner's allegations, the Transaction coupled with the Divestiture will not give rise to any, let alone a substantial, lessening of competition. Among other things, the Transaction:

- Will allow Rogers to be a stronger and more effective competitor and provide a national wireline network;

- Will allow Rogers to make significant improvements to its national wireless network, benefitting the more than 13 million Canadians who currently subscribe to Rogers and Shaw;

- Will allow Freedom to continue as a fourth competitor in the same markets and with the same infrastructure as before the transaction, but with the benefit of lower marginal costs as well as efficiencies and other advantages created from integrating with Videotron; and

- Will allow Videotron to create a strong fourth national wireless services provider.

9. With the divestiture of Freedom to Videotron, the Transaction is pro-competitive and will result in significant benefits to wireless customers in B.C., Alberta, and Ontario, as well as significant efficiencies to the Canadian economy on the whole. The Commissioner has failed to assess, properly or at all, the efficiencies the Transaction and Divestiture will bring to the Canadian economy, which substantially outweigh the competitive effects alleged by the Commissioner.

10. The Commissioner's assertion that Freedom's ability to compete "vigorously" is dependent on leveraging Shaw's wireline assets is wrong. It is not grounded in technical or commercial reality and ignores that Shaw operates Freedom as a stand-alone business, there is little relationship between Freedom and Shaw's

wireline business, and that relationship is conducted on arms-length commercial terms.

11. The significant majority of Freedom's wireless business is located in Ontario, where Shaw has only a limited wireline presence and provides no backhaul services to Freedom. Where Freedom does use Shaw's backhaul services, in British Columbia and Alberta, Shaw charges Freedom market rates for that access.

12. A divested Freedom owned by Videotron would have the same or greater economic incentive to compete as it had when owned by Shaw.

13. There is no basis for any of the relief the Commissioner seeks. Rogers asks that this Application be dismissed in its entirety, or in the alternative that the Tribunal issue an order allowing the Transaction, subject to the Divestiture of Freedom. In either scenario, Rogers seeks its costs of this Application.

II. THE PARTIES AND THE TRANSACTION

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15. Rogers is Canada's only truly national wireless network operator and has a long history of innovation, including being the first Canadian carrier to launch a 5G wireless network, in January 2020. Rogers provides services and content to tens of millions of Canadians from coast to coast.

Shaw

16. Shaw Communications Inc. ("**Shaw**") is a publicly traded company in the business of providing wireline and wireless services, as well as TV distribution. Shaw provides wireless services primarily through its wholly-owned subsidiary, Freedom Mobile ("**Freedom**"), which it purchased in 2016.

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Freedom provides service in southern Ontario, Alberta, and British Columbia. The significant majority of Freedom's subscribers are in Ontario, outside Shaw's wireline and wifi footprints. It offers its products and services through a distribution network that includes nearly 800 Freedom Mobile locations across Alberta, British Columbia and Ontario, including corporate and retail partners.

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21. The Transaction triggered the need for pre-merger notification and review under the *Competition Act* and is also subject to approval from the Canadian Radio-television and Telecommunications Commission (the "**CRTC**") under the *Broadcasting Act* and from the Minister of Innovation, Science and Industry (the "**Minister**") under the *Radiocommunication Act*.

22. The Respondents submitted filings to each of the CRTC, Commissioner and the Minister on April 13, 2021. Pursuant to an agreed process, the Respondents' submissions to the Commissioner included detailed evidence of the efficiencies that would be realized from the Transaction, which was provided in November of 2021 and subsequently. The review periods under the *Competition Act* have

expired. The Transaction has received CRTC Approval but remains subject to approval from the Minister.

The Divestiture

23. Having previously entered into a term sheet on June 17, 2022, Rogers, Shaw and Quebecor—Videotron's parent company—entered into a definitive Share Purchase Agreement on August 12, 2022 (the "**Divestiture Agreement**") for the divestiture of Freedom (the "**Divestiture**"). This agreement provides for:

    a. Transfer to Videotron of Freedom's entire wireless business and wireline subscribers;

    b. Provision by Rogers and Shaw of transitional services that will ensure a seamless transfer of ownership to Videotron without operational or service disruption; and

    c. Provision by Rogers of ongoing ancillary network access services that will lower Freedom's cost base, making it a stronger and more effective competitor than it was before the merger.

24. Shaw and Videotron submitted filings in respect of the Divestiture to each of the Commissioner and the Minister on June 24, 2022 and June 27, 2022, respectively. The filings submitted to the Commissioner included detailed evidence about why Videotron is a qualified buyer for Freedom, why the Divestiture resolves the substantial lessening of competition in wireless alleged

by the Commissioner, and why the combination of Freedom and Videotron will create significant efficiencies.

25. The key terms of the Divestiture Agreement are:

a. ***Asset Transfer***: The Divestiture Agreement provides for Videotron's purchase of all Freedom Mobile Inc. shares, as well as the transfer of all assets necessary for Videotron to continue operating Freedom's wireless and wireline businesses on a standalone basis. These assets include:

- **Subscribers:** All of Freedom's approximately [redacted] mobile subscribers, and its approximately [redacted] Freedom Gateway internet subscribers (as of March 2022);
- **Spectrum:** All of Freedom's spectrum licences;
- **Network Infrastructure:** Freedom's wireless core-network and related assets, cell sites and network equipment;
- **Backhaul Assets:** All of Freedom's backhaul microwave systems and contracts for backhaul with third parties at Freedom's cell sites;
- **Roaming Agreements:** All of Freedom's domestic and international third-party roaming agreements; and
- **Brand and Distribution:** All Freedom-related IP and goodwill, branded stores, and contracts with Freedom dealers/franchisees.

b. ***Transition Services***: The Divestiture Agreement requires Rogers and Shaw to provide Freedom with various transition services [redacted] years, so that it can continue under Videotron's ownership immediately upon completion without any service or operational disruption ("**Transition Services**"). [redacted]

c. ***Ancillary Network Access Services***: On top of these Transition Services, Rogers also agreed to provide Videotron with certain network access services ("**Access Services**") that will enable it to operate Freedom on a more cost-effective basis than Shaw could before the proposed divestiture. These Access Services include:

- [redacted]
- [redacted]
- [redacted]

- [redacted]

26. Subject to regulatory approval, Freedom's divestiture to Videotron will occur immediately prior to the closing of Rogers' acquisition of Shaw.

III. INDUSTRY BACKGROUND AND STRUCTURE

27. Competition for wireless services in Canada is intense. Carriers compete on price, as well as along other dimensions such as plan features, network quality, and customer service.

28. Wireless services have also been subject to significant regulatory scrutiny and intervention in recent years. In 2021, the CRTC issued Telecom Regulatory Policy CRTC 2021-130, *Review of mobile wireless services* (the "**MVNO Policy**") which seeks to facilitate the expansion of facilities-based carriers. The MVNO Policy was developed based on input and submissions from a variety of stakeholders including the Competition Bureau.

29. Under the MVNO Policy, carriers such as Bell, Telus, Rogers and Sasktel are required to: (i) provide temporary access to their networks to other wireless carriers for resale in geographies in which those carriers hold spectrum and intend to build out their own network facilities within the next seven years; and (ii)

offer low-cost and occasional use wireless plans that meet criteria set out by the CRTC.

30. The MVNO Policy did not impose any requirements related to access to backhaul, which the CRTC has decided in separate proceedings should be forborne from regulation because those markets were found to be competitive. Nor did the MVNO policy suggest that integration with wireline or commercial bundling with wireline is a requirement for success in wireless services.

IV. GROUNDS ON WHICH THE APPLICATION IS OPPOSED

A. The Relevant Markets

31. The Commissioner has wrongly defined the relevant product markets in the provision of wireless services because:

a. the business consumers identified are mainly small and medium-sized enterprises which typically purchase services through the same channels as non-business consumers. As a result, there is no ability to define a separate market for this category; and

b. the Commissioner alleges that the competitive effects of the Transaction arise, in part, from the need to offer bundled wireless and wireline services, yet the relevant product market is not a bundled product.

B. Transaction Will not Substantially Lessen Competition for Wireless Services

32. The Commissioner's analysis of the competitive effects of the Transaction coupled with the Divestiture in the wireless market is flawed and incomplete. Contrary to the Commissioner's allegations, the Transaction has not substantially lessened or prevented competition in wireless services since it was announced in March 2021 and, coupled with the Divestiture, would not do so once completed.

33. The Commissioner's analysis is flawed because, among other things:

a. The Commissioner's analysis of the competitive effects of the Transaction coupled with the Divestiture is backwards looking and fails to take into account the continued role that regulation, including price regulation, will play in the market;

b. The Commissioner wrongly asserts that Rogers has felt significant competitive pressure from Shaw, when Rogers in fact competes much more closely against Bell and Telus, and any competitive pressure Shaw has exerted in the past was attributable to specific market dynamics at that time;

c. The Commissioner has overstated the competitive significance and impact of the Shaw Mobile brand (as distinct from Freedom), in the wireless market. It was launched in British Columbia and Alberta only to protect Shaw's wireline business, with generous promotional discounts offered

only to a subset of Shaw's highest-paying wireline households, and has no viable path for sustained future growth;

d. The Commissioner wrongly asserts that, but for the Transaction, Shaw would have made the necessary investments to allow it to be a significant competitive force in 5G. Among other things, and as noted above, when faced with the prospect of making those significant capital investments, Shaw chose instead to sell; and

e. The Commissioner's assertions that Freedom had planned to expand into business services in a manner that would impact competition are unsupported and incorrect.

C. Divestiture to Videotron Fully Remedies Any Alleged Lessening or Prevention of Competition

34. The Commissioner's assertion that the Transaction would substantially lessen or prevent competition even with the Divestiture is wrong. It is premised, in large part, on the claim that Freedom's competitiveness is dependent on "leveraging" Shaw's wireline assets. It takes no account of the wireless and wireline assets that Videotron would make available to Freedom and that are available to Freedom under the Divestiture Agreement.

35. The Commissioner's assertion that Freedom's success is dependent on Shaw's wireline assets is not grounded in technical or commercial reality and ignores that

Freedom was a stand-alone business when Shaw acquired it and has been operated as such ever since. Among other things:

a. In southern Ontario, which accounts for the significant majority of Freedom's wireless revenues, Shaw has no wireline network and Freedom makes extensive use of microwave backhaul or pays market rates to access other companies' wireline networks. Similarly, Rogers has a successful wireless business in British Columbia and Alberta, where it has no wireline network and relies on microwave backhaul or pays for access to the wireline networks of others;

b. In British Columbia and Alberta, Freedom accesses wireline backhaul from Shaw at market rates. It also accesses additional backhaul from third parties in British Columbia and Alberta, again at market rates, as it does in Ontario (where Shaw is not present). Under Videotron's ownership, Freedom will be in the same, if not better position as it is without the Transaction and Divestiture under Shaw's ownership in Alberta and British Columbia; and

c. Contrary to the Commissioner's assertions, Shaw Go Wifi provides no material benefit to Freedom in offloading network traffic, nor could it, for both technical and practical reasons, provide any material advantage in the deployment of 5G services. [redacted]

[redacted]

36. The Commissioner's assertions that Freedom would not be an effective standalone competitor following the Divestiture are also misguided. What the Commissioner defines as "New Freedom" is in all material respects the same as old Freedom, except for certain advantages that New Freedom will enjoy as a result of its integration with Videotron:

a. New Freedom will have the same spectrum, towers, and other operating assets as it currently does, as well as important 3.5 GHz spectrum that Videotron acquired in the recent auction (which Shaw does not possess);

b. New Freedom will have the same if not greater economic incentives to compete in the market and build out a 5G network. The additional incentives arise from the fact that New Freedom will have access to 3.5 GHz spectrum that Videotron acquired in the recent auction, which is critical for the delivery of high-quality 5G services, and will realize marginal cost savings arising from the integration of Freedom and Videotron; and

c. New Freedom will be able to purchase additional spectrum in the upcoming 3800 MHz auction in 2023.

37. The Commissioner's assertions regarding the impact on Freedom of being divested from Shaw are without foundation:

    a. Freedom does not currently provide bundled services to a material number of its customers and it purchases backhaul services at market rates, which it could continue to do. [redacted]

    b. Freedom does not currently sell its products and services through Shaw's retail network, but has its own network of nearly 800 locations, including corporate and retail partners; and

    c. Freedom already has access to the services necessary to support its wireless services, both in terms of roaming and access to wireline networks for backhaul, through its contracts with various third parties.

38. Contrary to the Commissioner's assertions, Rogers and other carriers are likely to compete more intensely, not less, after the Transaction and Divestiture are completed. Rogers will be better placed to compete in wireless services against Bell and Telus, which have the distinct competitive advantage of sharing a single wireless network and pooling their spectrum, resulting in significantly lower network building and maintenance costs. Videotron will be better placed than Freedom is or was under Shaw's ownership to compete in wireless services against each of Rogers, Bell and Telus, in part due to its ownership of 3.5 GHz spectrum.

39. Rogers will also be better placed than Shaw was to compete against Telus in British Columbia and Alberta for bundled wireline / wireless services, given the relative attractiveness of Rogers' wireless network. [redacted]

40. The additional competitive response that Rogers' presence would elicit from other carriers is already evident in the significant number of additional network investments announced by Bell and Telus immediately after the Transaction was announced and in the subsequent months. The Divestiture is likely to elicit further competitive responses from other carriers.

41. Ultimately, the Divestiture provides Videotron with a unique opportunity for fast, efficient, and effective expansion outside of Quebec. It will ensure Freedom's position as an effective fourth wireless carrier in British Columbia, Alberta, and Ontario by increasing Videotron's incentive and ability to compete against Rogers, Bell, and Telus.

42. The Divestiture will also provide new opportunities for product differentiation, significantly boost Freedom's 5G capabilities by adding Videotron's valuable mid-band spectrum holdings, and fully address the Commissioner's concerns about any possible coordinated effects. This is particularly so given Videotron's history as a disruptive competitor and its incentive to grow market share.

V. EFFICIENCIES ARISING FROM THE TRANSACTION AND THE DIVESTITURE

43. The Commissioner has given no consideration at all to the significant productive and dynamic efficiencies the Transaction and Divestiture will generate for the Canadian economy. These efficiencies will significantly outweigh any alleged anti-competitive effects and would be lost if the Transaction were blocked, as the Commissioner asks.

44. The Transaction, coupled with the Divestiture, will result in the following efficiencies:

a. The significant cost savings that would come from combining the Respondents' wireline networks and operations;

b. Quality improvements that would arise from combining the Respondents' wireline networks;

c. Quality improvements that would arise from combining Videotron's and Freedom's wireless networks; and

d. Productive efficiencies arising from the divestiture of Freedom to Videotron, as follows:

   i. Avoided costs relating to network infrastructure and related assets in British Columbia, Alberta, and/or Ontario;

ii. Avoided costs related to retail operations in British Columbia, Alberta, and/or Ontario; and

iii. Labour-related savings.

VI. RELIEF SOUGHT

45. Rogers respectfully requests that this Application be dismissed in its entirety. In the alternative, Rogers requests an order allowing the Transaction, subject to the Divestiture of Freedom. In either scenario, Rogers seeks its costs of this Application.

VII. CONCISE STATEMENT OF ECONOMIC THEORY

46. Rogers' Statement of Economic Theory is attached as Schedule A.

June 3, 2022

Amended August 8, 2022

Fresh as Amended August 18, 2022

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750
145 King Street West
Toronto, ON M5H 1J8

Jonathan Lisus (LSO# 32952H)
Tel: 416.598.7873
Email: jlisus@lolg.ca

Crawford Smith (LSO# 42131S)
Tel: 416.598.8648
Email: csmith@lolg.ca

Matthew Law (LSO# 59856A)
Tel: 416.849.9050
Email: mlaw@lolg.ca

Bradley Vermeersch (LSO# 69004K)
Tel: 416.646.7997

Email: bvermeersch@lolg.ca

Counsel for the Respondent Rogers Communications Inc.

TO: **THE COMMISSIONER OF COMPETITION**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

John S. Tyhurst

Derek Leschinsky

Katherine Rydel

Ryan Caron

Kevin Hong

Tel: (819) 956-2842 / (613) 897-7682
Fax: (819) 953-9267

Counsel for the Applicant,
The Commissioner of Competition

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
155 Wellington Street West
Toronto, ON M5V 3J7

Kent E. Thomson
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Derek D. Ricci
Tel: 416.367.7471
Email: dricci@dwpv.com

Steven Frankel
Tel: 416.367.7441

Email: sfrankel@dwpv.com

Chanakya Sethi
Tel: 416.863.5516
Email: csethi@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Counsel for the Respondent
Shaw Communications Inc.

SCHEDULE A - CONCISE STATEMENT OF ECONOMIC THEORY

1. Rogers and Shaw offer a range of telecommunications services. The Commissioner's application asserts that the proposed merger of Rogers and Shaw would substantially lessen competition in wireless services and has sought to block the Transaction in its entirety as well as other alternative relief.

2. The Respondents' economic theory addresses both: (i) the Commissioner's assessment of the competitive effects of the Transaction in wireless services; and (ii) the Commissioner's assessment of the competitive effects that would remain in wireless services after the divestiture of the Freedom wireless business to Videotron (the "Divestiture").

Economic Analysis of Competitive Effects of Transaction Coupled with the Divestiture

3. The Commissioner bears the burden of quantifying the alleged anti-competitive effects of the Transaction coupled with the Divestiture in wireless services. An economic analysis of the competitive effects of the Transaction and the Divestiture upon wireless services must be forward-looking and reflect, among other things: (i) proper inputs such as, for example, the economic margins of various market participants and share of subscribers; (ii) the significant marginal cost savings that are likely to be realized by the relevant parties; (iii) the incentives and abilities that Rogers would have following completion of the Proposed Divestiture, and (iv) the continuing impact of government regulation of the market. An economic analysis that takes such factors into account confirms

that the Transaction coupled with the Divestiture would lead to significant gains in welfare and increased competition.

4. To the extent that the Transaction coupled with the Divestiture results in any anti-competitive effects in any market for wireless services (which is denied), any such effects would be significantly outweighed by the productive efficiencies that are cognizable under section 96 of the *Competition Act* and the quality improvements that are cognizable as dynamic efficiencies under section 96 of the *Competition Act* (or as enhancements to output under section 92 of the *Competition Act*), all of which would be lost in the event of an order blocking the Transaction as sought by the Commissioner.

Economic Analysis of Competitive Effects With Proposed Divestiture

5. The Proposed Divestiture would be effective in eliminating any alleged substantial prevention or lessening of competition in wireless services. The Proposed Divestiture represents a standalone business that will be a viable and effective competitor. An economic analysis of the competitive effects of the Transaction after the Proposed Divestiture must take into account the factors identified above as well as: (i) the limited competitive impact on wireless services of Shaw Mobile; (ii) the incentives, marginal cost savings, and competitive impact of Videotron; and (iii) the incentives and abilities that Rogers would have following completion of the Proposed Divestiture. Such economic analysis confirms that any alleged substantial prevention or lessening of competition in

any market for wireless services in Canada would be eliminated if the Proposed Divestiture is effected.

6. Further, the Proposed Divestiture will continue to allow the merged entity and Videotron/Freedom to realize, among other things, significant cognizable productive efficiencies that will outweigh any remaining alleged anti-competitive effects (which the Respondents deny) in any market for wireless services.

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

ATTORNEY GENERAL OF ALBERTA and VIDEOTRON LTD.

Intervenors

OPENING STATEMENT OF THE RESPONDENT, ROGERS COMMUNICATIONS INC.

October 31, 2022

LAX O'SULLIVAN LISUS GOTTLIEB LLP
145 King Street West Suite 2750
Toronto, ON M5H 1J8

Jonathan C. Lisus (LSO# 32952H)
Tel: 416.59878736
Email: jlisus@lolg.ca

Crawford G. Smith (LSO# 42131S)
Tel: 416.598.8648
Email: csmith@lolg.ca

Matthew R. Law (LSO# 59856A)
Tel: 416.849.9050
Email: mlaw@lolg.ca

Bradley Vermeersch (LSO# 69004K)
Tel: 416.646.7997
Email: bvermeersch@lolg.ca

Zain Naqi (LSO# 67870U**)**
Tel: 416 645 3789
Email: znaqi@lolg.ca

John Carlo Mastrangelo (LSO# 76002P)
Tel: 416.956.0101
Email: jmastrangelo@lolg.ca

Counsel for the Respondent,
Rogers Communications Inc.

TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
155 Wellington Street West
Toronto, ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Derek D. Ricci (LSO# 52366N)
Tel: 416.367.7471
Email: dricci@dwpv.com

Steven Frankel (LSO# 58892E)
Tel: 416.367.7441
Email: sfrankel@dwpv.com

Chanakya A. Sethi (LSO# 63492T)
Tel: 416.863.5516
Email: csethi@dwpv.com

Counsel for the Respondent,
Shaw Communications Inc.

THE COMMISSIONER OF COMPETITION
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

John S. Tyhurst

Derek Leschinsky

Alexander Gay

Paul Klippenstein

Katherine Rydel

Ryan Caron

Kevin Hong

Tel: (819) 956-2842 / (613) 897-7682
Fax: (819) 953-9267

Counsel for the Applicant,
The Commissioner of Competition

TABLE OF CONTENTS

PART I - OVERVIEW

1. The stakes in this proceeding could not be higher. The Tribunal's decision will determine the future of the Canadian telecommunications industry for the next decade or more. It will determine whether the federal government's longstanding objective establishing a fourth national wireless carrier—an objective previously supported by the Commissioner of Competition—will be fulfilled.

2. The Commissioner has given the Tribunal a stark choice.

3. It can allow the proposed transaction to proceed and entrust Freedom to the capable and experienced hands of Videotron, introducing to Western Canada a carrier with an enviable track record of disruptive competition. Doing so will give Videotron a national platform, and Freedom an immediate path to 5G service [redacted] This will allow it to compete more vigorously than it did under Shaw's ownership, and make generational investments that will deliver greater choice, better prices, and more powerful and reliable networks.

4. Or the Tribunal can acquiesce to the Commissioner's demand and block the proposed transaction. It can return Shaw and Videotron to their corners of the market. It can leave Freedom and its subscribers [redacted]. It can prevent Rogers from expanding its wireline network, a development the CRTC has found is in the public interest and which the Commissioner has not challenged. It can entrench the advantages that Bell and Telus enjoy from a national network-sharing agreement. And it can block Videotron from realizing its ambition to expand nationally, reducing prices by [redacted] or more, as it has done in Quebec.

5. The Commissioner bears the burden of proving that the transaction will cause a substantial lessening or prevention of competition in the wireless markets in British Columbia, Alberta, and Ontario. His evidence falls well short of meeting this burden.

6. It is important to identify the precise harm the Commissioner alleges. He alleges the proposed transaction will give rise to anti-competitive effects from the transfer of Shaw's *wireline* business and assets to Rogers. The principal focus of his objection is Rogers' retention of a minority of wireline customers who also subscribe to "Shaw Mobile" branded wireless service as part of a bundle.

7. The Commissioner claims Shaw Mobile has been a significant disruptor in the wireless market. It is nothing of the kind, and never has been. It is not even a true wireless product; it is a bundled product that serves as a wireline retention tool. It is not a "maverick competitor", and is priced comparably with the only other bundle in the market, offered by Telus, not Rogers. The Commissioner's theory of harm rests on a mischaracterization of Shaw Mobile.

8. But even taking the Commissioner's case at its highest, his expert economist concludes the anti-competitive effect of Rogers' retention of Shaw Mobile subscribers is a [redacted] Even if this were accurate, it is not on any reasonable metric a "substantial" lessening or prevention of competition. Thus, prior to accounting for the significant flaws in the Commissioner's economic approach and analysis, he will not be able to discharge his burden under s. 92.

9. Nor will the proposed transaction cause any harm to Freedom or Videotron customers. In fact, the Commissioner's expert concludes that Freedom's prices will go down between [redacted] And this price reduction is now ensured, as Videotron has accepted the conditions imposed just last week by the Minister of Innovation, Science and Industry on the transfer of Freedom's spectrum licences:

> First, I am giving notice that any new wireless licences acquired by Vidéotron would need to remain in its possession for at least 10 years. A new service provider needs to be in it for the long run.
>
> Second, I would expect to see prices for wireless services in Ontario and Western Canada comparable to what Vidéotron is

[1] Dr. Miller claims a price increase of 2.5% in British Columbia and 0.8% in Alberta.

> currently offering in Quebec, which are today on average 20 per cent lower than in the rest of Canada.[2]

10. The Commissioner has not quantified any anti-competitive effects from the sale of Freedom to Videotron. This is because there are none. The two operate in separate markets. The transaction will not lead to any greater concentration in market shares. It simply involves Videotron expanding outside of Quebec and stepping into the shoes of Freedom in Ontario, British Columbia, and Alberta.

11. Faced with no path to quantify any effects from this sale, the Commissioner advances an amorphous "qualitative" claim that Freedom will be a "less effective" competitor under Videotron. He will not prove this either. Videotron is the most disruptive regional competitor in Canada, an observation the Commissioner himself has made in the past but since forgotten. It has reduced prices in Quebec, such that they are now the lowest in the country. It has a business plan and strategy to aggressively compete, fully costed, conservative in its assumptions, and manifestly achievable. Videotron has secured all assets and arrangements it considers necessary to effectively compete. The Commissioner's dismissal of Videotron's considered business judgment—by way of the theories and speculations of an industry consultant who lacks depth of knowledge in the Canadian wireless space—is difficult to credit.

12. The Commissioner's case asks this Tribunal to ignore the simple reality that the market will have more and better options as a result of this transaction. [redacted]

13. The evidence will show that this transaction will not harm the competitive landscape for wireless services. It will improve it: choices will increase; networks will strengthen; prices will fall; and consumers will benefit. The Commissioner, respectfully, should be prepared to explain to this Tribunal how and why this is not the best possible outcome for Canadians.

---

[2] "Statement from Minister Champagne on competitiveness in the telecommunications sector", October 25, 2022.

PART II - A BRIEF NOTE ON THE EVIDENTIARY RECORD

14. Over the next six weeks, the Tribunal will hear from 33 fact witnesses and 13 experts on a range of topics, including the competitive dynamics and economics of the telecommunications market, the business rationale underlying this transaction, and Videotron's plan to become Canada's fourth national carrier. Tens of thousands of pages of evidence have been filed.

15. The Tribunal will be guided by the commercial realities in the Canadian telecommunications industry, not untethered theories or speculation. It will have the benefit of evidence from senior, seasoned leaders from Rogers, Shaw, and Videotron about the challenges and opportunities facing the companies participating in this transaction. Each of these witnesses has decades of experience running wireless businesses. They will explain their careful, reasoned judgment in relation to the core issues this Tribunal will decide. Their evidence about the viability and competitiveness of their businesses, both before and after the transaction closes, is rooted in fact and market reality and therefore reliable and probative.

16. The Commissioner's case is different. It rests in large part on a selective, decontextualized reading of documents from Rogers, Shaw, and Videotron regarding past competitive trends and dynamics. His approach is static, backward-looking and untethered from the commercial realities and industry outlook. The result is an incomplete and, respectfully, unreliable snapshot of the competitive landscape for wireless services.

17. The Commissioner also relies heavily on evidence from Bell and Telus—Rogers' closest competitors—who have vigorously opposed the transaction at every stage [redacted] (despite Bell having itself unsuccessfully bid to purchase Shaw). [redacted] The Commissioner has served four witness statements (two each) from senior representatives of Bell and Telus and a fifth from a representative of Distributel, which is now a subsidiary of Bell. This evidence is central to his case.

18. Bell and Telus are not disinterested observers, and their [redacted] must be weighed when this Tribunal evaluates the Commissioner's allegation that the transaction will reduce competition in

the wireless market. Videotron's disruptive effect is well known to all industry players, and its national expansion will place significant competitive pressure on Bell, Telus, and Rogers in particular. In this context, the Tribunal should carefully weigh the Commissioner's evidence that Videotron, with this transaction, will somehow have lost the competitive edge every industry participant, including the Commissioner, has recognized as "formidable".

19. The Tribunal's review of the evidence must be driven by common sense, market realities, and due regard for the experience and business judgment of Videotron, which has committed billions of dollars in the Canadian wireless industry and billions more to this transaction.

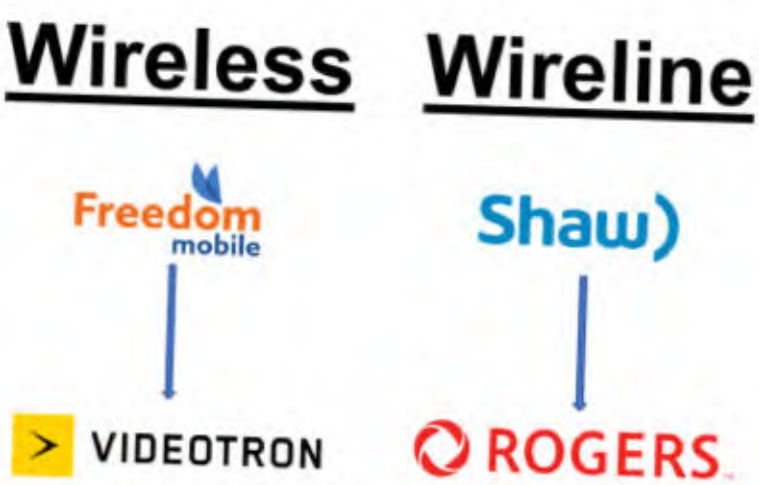
PART III - THE TRANSACTION AND THE COMMISSIONER'S BURDEN

20. On March 15, 2021, Rogers and Shaw entered into an arrangement agreement for Rogers to acquire all issued and outstanding shares of Shaw for a total purchase price of approximately $26 billion (inclusive of the assumption of debt). Under the terms of this agreement, Rogers was to purchase the entirety of Shaw's wireline and wireless businesses.

21. That is no longer the case. On June 17, 2022, the parties agreed to Shaw's sale of Freedom to Videotron. What the Commissioner is now opposing is a fundamentally different proposition than the original transaction—which in any event has now been foreclosed by the recent announcement of Minister Philippe Champagne that he will not approve the transfer of Shaw's spectrum licences to Rogers.

22. The transaction will proceed in two steps. First, Shaw will sell Freedom, including all of its spectrum and network assets, to Videotron. Rogers will never own Freedom or its assets. Second, immediately after Videotron acquires Shaw's wireless assets, Rogers will acquire Shaw's wireline assets.[3]

[3] Rogers will also acquire Shaw's broadcasting business, which is not at issue and has been approved by the CRTC.



23. The transaction the Commissioner asks the Tribunal to block through s. 92 of the *Competition Act* is depicted above: the sale of Shaw's wireline business to Rogers, and the sale of Freedom's wireless business to Videotron. The Commissioner must prove that this transaction gives rise to a substantial lessening or prevention of competition in the British Columbia, Alberta, and Ontario wireless markets. Only if he can discharge this burden—which he cannot—does the analysis shift to the efficiencies defence under s. 96.

24. This case is unlike any other case this Tribunal has seen; there is no "merger to monopoly" or significant increase in concentration levels in any market or industry. The Commissioner bears the heavy burden of demonstrating that the anti-competitive effects he alleges actually rise to the level of "substantiality".

25. A fair, careful review of the evidence will reveal that he has not come close to meeting this burden.[4] The Commissioner does not quantify any harm to competition in the wireless market arising from Freedom's sale to Videotron. Nor does he allege any harm to competition in the wireline market arising from Shaw's sale to Rogers. The only harm the Commissioner alleges is that the transfer of Shaw's *wireline* assets to Rogers will give rise to anti-competitive effects in the *wireless* market.

[4] This analysis is set out in Shaw's opening statement.

26. This is a novel proposition not grounded in the evidence. It treats Shaw Mobile, a bundled product and wireline retention tool, as if it were a wireless-only product, such that there is a reduction in the number of competitors. But there is not. [redacted]

27. [redacted]

28. The Commissioner's fundamental mischaracterization of Shaw Mobile as a purely wireless product permeates his entire case and allows him to find harm where there is none.

29. Even then, the harm the Commissioner alleges is marginal at best. Taking his evidence at its highest, his economic expert, [redacted] This manifestly does not meet the test for a substantial lessening or prevention of competition.

A. VIDEOTRON'S ACQUISITION OF FREEDOM'S WIRELESS BUSINESS

30. Videotron provides wireless services in Quebec and the Greater Ottawa Area. Freedom does so in Ontario, Alberta, and British Columbia. Except for a very small overlap in Ottawa, each operates in different geographic markets. There is virtually no competition between Videotron and Freedom across their respective wireless footprints.

31. The transaction will allow Videotron to expand *outside of its existing footprint* and step into Freedom's shoes in markets in which it does not currently compete. For this reason, the evidence of Dr. Miller does not identify any quantifiable anti-competitive effects arising out of the sale of Freedom's wireless business to Videotron. The anti-competitive effects he asserts in respect of Freedom are "qualitative" only. They go to Videotron's competitive abilities and incentives as compared to Freedom under Shaw's ownership.

32. The Commissioner cannot credibly dispute Videotron's financial, operational and managerial capacity to run Freedom. His primary objection is that Videotron will be competitively disadvantaged because it will not own the wireline assets that Shaw currently

owns, and will become "dependent" on Rogers for wireline network access if Rogers acquires those assets.

33. The evidence will not bear this out. It will demonstrate that Freedom has been run separately from Shaw's wireline business, and those assets have never been integral to Freedom's success. Freedom under Videotron's ownership will be even less dependent on this network if the transaction proceeds. [redacted] Videotron's demonstrated track record as the industry's the most disruptive wireless carrier, backed by a detailed plan for wireless competition and an investment of nearly $3 billion, will make Freedom significantly more competitive, not less, than it was under Shaw.

B. ROGERS' ACQUISITION OF SHAW'S WIRELINE BUSINESS

34. Rogers' wireline business serves consumers in Southern and Eastern Ontario, New Brunswick, and Newfoundland. Under the transaction, it will acquire Shaw's wireline business, which offers services to consumers in British Columbia, Alberta, and Northern Ontario. There is no overlap between these two businesses. And the Commissioner does not allege anti-competitive effects in the wireline services market. Rogers' acquisition of Shaw's wireline business in the west will be a powerful boost to competition in those markets.

35. There can be no doubt that this transaction positions Roges to be an even more vigorous competitor in the wireline market. The integration of Shaw's wireline network will give Rogers a robust and redundant network that reaches across Canada, with last mile services in three of Canada's largest four provincial markets.

36. Despite not alleging any anti-competitive effects in the wireline market, the Commissioner seeks to block the transaction in its entirety and deprive consumers of enhanced wireline competition and the benefit of the industry's most disruptive wireless competitor. He

[5] Affirmative Witness Statement of Jean-Francois Lescadres ("**Lescadres Affirmative**"), signed September 23, 2022, para. 7(a).

would prevent the emergence of Videotron as a further national carrier in new markets with the most favourable commercial terms in its operating arsenal.

PART IV - VIDEOTRON'S ACQUISITION OF FREEDOM IS PRO-COMPETITIVE

A. VIDEOTRON IS CANADA'S STRONGEST REGIONAL WIRELESS COMPETITOR

37. Over the last decade, Videotron has established its reputation as the most disruptive, competitive force in the Canadian wireless industry—more so than Freedom. The Commissioner has recognized this in his reports and statements. In submissions before the CRTC in 2019, the Competition Bureau concluded that "the growth of Freedom is having a price reducing impact on [Rogers, Bell and Telus], but not at the level of Videotron in their respective markets".[6]

38. Videotron's effectiveness as a maverick has been widely recognized by other market participants. [redacted] Telus has acknowledged it to be a "formidable competitor".[7]

39. The Tribunal will hear from Videotron. Pierre-Karl Péladeau and Jean-François Lescadres will testify about Videotron's entry into the wireless space, the tremendous growth it has experienced, the benefits it has delivered to consumers, and its plans for further disruption:

(a) Videotron began offering wireless services to Quebecers in 2006, initially as a "mobile virtual network operator" ("**MVNO**") using Rogers' physical network infrastructure;

(b) By 2010, Videotron acquired its own spectrum licences and built its own facilities-based wireless network. It has invested billions of dollars into that business, to the great benefit of consumers;

(c) Videotron is now a leader in bringing innovative wireless products to market. In 2018, it launched Canada's first digital-only discount wireless brand, Fizz Mobile,

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[6] Telecom Notice of Consultation CRTC 2019-57 – Review of Mobile Wireless Services, Further Comments of the Competition Tribunal dated November 22, 2019, para. 236 (emphasis added).
[7] Responding Witness Statement of Dean Prevost ("**Prevost Reply**"), affirmed October 20, 2022, Exhibit 14; Cross-examination of Eric Edora, October 13, 2021, p. 33, *Telus Communications Inc. v. Videotron Ltée., Fibrenoire Inc*.

that offers plans tailored to subscribers' individual data needs.[8] It was the first wireless carrier to launch a 5G network in Montreal, and continues to roll out this technology across its entire wireless footprint;[9]

(d) Notwithstanding relentless competition from Rogers, Bell, and Telus, Videotron and Fizz have established a market share of over 22% within their footprint (Quebec and the Greater Ottawa Area).[10] This compares to Shaw's 9% market share in Alberta and British Columbia across both the Freedom and Shaw Mobile brands.[11] This Tribunal should place strong weight on and take comfort in this record. It is the best evidence of Videotron's superior capabilities, particularly because Videotron and Freedom both began operations as facilities-based operators in or around 2010;

(e) Videotron's wireless business continues to have strong momentum. It expects to overtake each of Rogers, Bell, and Telus in total market share in its existing market (Quebec), as it routinely wins more wireless customers than its competitors.[12] [redacted][13] and

(f) In market research reports from independent sources, Videotron and Fizz perform better than Rogers, Bell, and Telus on customer care, network quality, purchase experience, and along various other metrics. This superior performance and customer satisfaction has been consistently reported over the past several years.[14]

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[8] Affirmative Witness Statement of Dean Prevost ("**Prevost Affirmative**"), affirmed September 23, 2022, para. 59(a) & Exhibit 21.
[9] Lescadres Affirmative, para. 4.
[10] Lescadres Affirmative, para. 5.
[11] TD Securities Inc., "Industry Note: Equity Research", 30 December 2021, p. 2.
[12] Lescadres Affirmative, para. 5.
[13] Prevost Reply, para. 63.
[14] Expert Report of Kenneth J. Martin ("**Martin Affirmative Report**"), dated September 23, 2022, paras. 28-31.

40. The Tribunal will also hear from Videotron's witnesses that its success in Quebec has not been dependent on its wireline assets. That success has generated real and significant benefits for consumers in Quebec, where wireless subscribers pay much lower prices than subscribers in other provinces. In some cases, prices in Quebec are 40% lower than in other provinces—a consequence of what is known as the "Videotron Effect".[15]

B. VIDEOTRON'S PLAN TO BECOME CANADA'S FOURTH NATIONAL CARRIER

41. To its credit, Videotron has had a longstanding ambition to expand its business to the rest of Canada and has actively pursued opportunities over the years to do so. Its acquisition of Freedom will allow it to quickly and efficiently realize this ambition, and fulfil the federal government's policy of achieving a fourth national wireless carrier, with over [redacted] million subscribers across Canada's four largest provincial markets. The Commissioner asks the Tribunal to block a major fast-forward in Videotron's ability to develop its presence in Ontario, Alberta, and British Columbia without the barriers it would otherwise face as a new market entrant.[16] The rationale for his position is difficult to appreciate, to say the least.

42. Videotron's decision to acquire Freedom was not made lightly. It was a carefully considered business judgment, backed by an initial investment of nearly $3 billion from Videotron's parent company, Quebecor Inc., with billions more in committed investments over the coming years.

43. The Tribunal will hear evidence from Videotron's senior leadership about the detailed financial planning that has gone into this decision. They have developed a competitive strategy by which to aggressively market wireless services under both the Freedom and Fizz banners, with prices [redacted] lower than what is currently offered in Ontario, Alberta, and British Columbia.[17] The transaction is fully backed by Videotron's President, Mr. Péladeau, who has affirmed his personal commitment to that growth strategy as Videotron's controlling shareholder.[18]

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[15] Lescadres Affirmative, para. 6.
[16] Affirmative Witness Statement of Pierre-Karl Péladeau ("**Péladeau Affirmative**"), signed September 23, 2022, paras. 7, 24-34.
[17] Lescadres Affirmative Witness Statement, paras. 162-164.
[18] Péladeau Affirmative, para. 48.

44. Mr. Péladeau recently underscored that commitment. On October 25, 2022, the Minister of Industry announced conditions that Videotron must satisfy to obtain the transfer of Shaw's spectrum licences: first, that Videotron maintain those licences for at least 10 years, because "a new service provider would need to be in it for the long run", and second, that Videotron's prices for wireless services in Ontario and Western Canada be reduced to the pricing levels that Videotron is currently offering in Quebec.[19]

45. Mr. Péladeau embraced these conditions unequivocally and without hesitation in a press release issued later that evening. He explained that they are "in line with our business philosophy" and that Videotron "will work to deliver better prices for Canadians in the other provinces and to end the reign of the 'Big 3'":

> We are pleased to see that Minister Champagne recognizes and supports the highly competitive environment created by Videotron in Québec's wireless market over the past several years, which has brought Quebecers the lowest prices and best wireless plans in Canada. We intend to accept the conditions stipulated by the Minister and incorporate them into the new version of the Rogers-Shaw/Quebecor-Freedom Mobile transaction, which has already been negotiated. They are in line with our business philosophy, which has proved highly successful in Quebec, where we have taken a significant market share in a very short span of time. We will work to deliver better prices for Canadians in the other provinces and to end the reign of the 'Big 3' by promoting competition, the public interest and the digital economy in Canada.[20]

C. THE TRANSACTION ENHANCES FREEDOM'S COMPETITIVENESS UNDER VIDEOTRON

46. Videotron drove a hard bargain to secure the assets, transition services, and network access rights it considered "necessary to operate the Freedom business successfully".[21] This includes Freedom's [redacted] million subscribers, cell sites, spectrum licences, microwave backhaul systems, fibre backhaul leases, roaming agreements, and Freedom's brand and distribution network.

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[19] "Statement from Minister Champagne on competitiveness in the telecommunications sector", October 25, 2022.
[20] "Pierre Karl Péladeau comments on announcement by the Minister of Innovation, Science and Industry of Canada concerning the proposed Rogers-Shaw merger", October 26, 2022
[21] Lescadres Affirmative, para. 118.

[redacted]

48. The Tribunal will hear from Videotron executives about the benefits of these assets [redacted] for effective competition. It will also hear from two seasoned industry experts called by Shaw and Rogers: Dr. William Webb, the Chief Technology Officer at a leading global public policy firm focused on the technology sector, and Kenneth Martin, a

[22] See Prevost Affirmative, para. 84; Lescadres Affirmative, paras. 136(a)-(c), 157(a)-(c).
[23] Affirmative Witness Statement of Paul McAleese ("**McAleese Affirmative**"), affirmed September 23, 2022, para. 370.
[24] McAleese Affirmative, para. 364.

leading telecommunications consultant and strategist. Each has over twenty years' experience advising wireless businesses in Canada, the United States, and internationally. They will testify to the significant technological and competitive advantages that Freedom will enjoy under Videotron, including:

(a) [redacted] The right to use radio wave frequencies for the transmission of data (known as "spectrum") is far and away the most important component of a wireless business. To deliver a "true" high-speed, data-intensive 5G experience, mid-band spectrum (generally available in frequency bands such as 3500 and 3800 MHz) is critical. In 2021, Videotron acquired valuable mid-band spectrum licences across Freedom's network footprint for nearly $830 million. [redacted]

(b) [redacted]

(c) Greater scale. These favourable transaction terms for Videotron will be coupled with the much greater scale of the combined entity. Doubling the number of subscribers (from [redacted] million to [redacted] million) will lead to superior economics, supporting future investments and increasing Videotron's negotiating power with

[25] Affirmative Expert Report of William Webb ("**Affirmative Webb Report**"), dated September 23, 2022, paras. 99-114; Affirmative Expert Report of Kenneth J. Martin ("**Affirmative Martin Report**"), September 23, 2022, paras. 50-55.
[26] Affirmative Martin Report, paras. 56-57; Affirmative Webb Report, paras. 76-98; Lescadres Statement, paras. 171-176.

suppliers. Conservative estimates suggest these savings at [redacted] dollars per year;[27] and

(d) [redacted]

D. FREEDOM WILL NOT BE RELIANT ON SHAW'S WIRELINE ASSETS

49. Central to the Commissioner's request of this Tribunal to block the transaction is his argument that Freedom will be unable to remain competitive if separated from Shaw's wireline network. This construct, at odds with market reality, rests on the false premise that owning wireline assets permits a carrier to compete more effectively in the wireless market by enabling it to:

(a) Offer bundled discounts on wireless and wireline services; and

(b) Self-supply fibre "backhaul", which refers to the wireline facilities that carry voice and data from the towers (cell sites) that communicate with wireless devices and transmit them to the core network—the "brain" of the wireless network which routes traffic to their ultimate destinations.

50. The evidence at trial will not support the Commissioner's argument. Freedom today does not engage in any meaningful bundling. It has been a successful competitor under Shaw despite never having owned *any* of the wireline assets used to deliver wireless services. There is no reason to believe Videotron cannot replicate Freedom's prospects, [redacted]

[27] Affirmative Martin Report, paras. 34-46; Lescadres Statement, paras. 209 & 215.

A. Videotron Will Not Be Disadvantaged on Bundling

51. The Commissioner claims that "bundling is essential to compete successfully in the Canadian market", and that wireline ownership allows for more competitive bundles compared to TPIA.[28] But the evidence will show that the expert on whom he relies for this point—Michael A. Davies—[redacted] and his opinion rests on a misunderstanding of Freedom's business, the role of bundling in the Canadian wireless market, and the opportunities that Videotron will have if the transaction proceeds. To the contrary:

(a) Freedom Mobile operates almost exclusively as a stand-alone wireless offering, and bundling has never been part of its competitive strategy. Less than [redacted] of its subscriber base purchases wireline internet through the Freedom Gateway brand. [redacted]

(b) Bundling is not "essential" to effective wireless competition generally. Rogers and Bell have gained sizeable market shares in Western Canada (together, approximately [redacted] in British Columbia and [redacted] in Alberta), and Telus has in Eastern Canada (approximately [redacted] in Ontario and between [redacted] in Atlantic Canada), without the ability to cross-sell wireline and wireless services.[30] This is because wireless-only carriers can drive growth by competing on other dimensions—*e.g.* price, plan options, branding, and product features;

(c) The Commissioner's position is contradicted by his own office's analyses on wireline/wireless bundling. In a 2019 study conducted jointly with the Ministry of Innovation, Science and Economic Development, the Competition Bureau found that only 17% of respondents bundled wireless and internet services, as opposed to the 56% that bundled internet and television, and 43% that bundled internet and home telephone. Likewise, in a study on competition in Canada's broadband industry, the Competition Bureau found that "[b]undling can make sense from a

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[28] Reply Expert Report of Michael A. Davies ("**Davies Reply Report**"), dated October 20, 2022, heading III.(B).
[29] McAleese Affirmative, paras. 12 & 350(a).
[30] McAleese Affirmative, para. 211.

consumer's perspective", but that "wireless phone services . . . are less frequently bundled with Internet service—nearly four out of five consumers who have a bundle reported that their wireless phone is not part of it".[31] Statistical evidence shows that Canadians place more value on selecting their service providers independently than they do on bundling;[32]

[redacted]

[31] Competition Bureau, "Delivering Choice: A Study of Competition in Canada's Broadband Industry", August 7, 2019, p. 27.
[32] Martin Affirmative Report, paras. 99-101.
[33] Lescadres Affirmative, para. 181.
[34] Lescadres Affirmative, paras. 36-44.
[35] Lescadres Affirmative, paras. 182-185.
[36] Lescadres Affirmative, paras. 178 & 180.

[redacted]

53. The Commissioner will also lead evidence from Distributel Communications, which was recently acquired by Bell, that "it would not be feasible" for Distributel to use TPIA for the wireline component of an internet/mobile phone bundle.[37] Mr. Davies goes one step further, suggesting that Videotron is "not likely" to replicate the TPIA success in Abitibi across other markets.[38]

54. This evidence does not square with market realities or Videotron's proven capabilities. More than a million Canadians purchase TPIA-based internet service. The Competition Bureau itself recognized that TPIA providers have increased wireline competition.[39] And Videotron is not Distributel. [redacted] In any event, evidence from Videotron will reveal that Distributel's financial analysis rests on several errors and incorrect assumptions which, when corrected, confirm that Videotron is able to provide bundled services at attractive prices with a healthy rate of return. It has a demonstrated history of making good on such commitments.[40]

B. Videotron Will Not Be Disadvantaged Without Self-Supply of Fibre Backhaul

55. The Commissioner further asserts that "[a]ccess to robust backhaul and fibre would be lost with an independent Freedom without its own wireline network".[41] Again, this assertion glosses over market realities. His evidence ignores the manner in which Freedom actually procures its backhaul and the robust, competitive market for backhaul that all major wireless carriers participate in. It also ignores the fact that neither Bell nor Telus entirely self-supply backhaul and—like Freedom—rely on backhaul leases from third parties.

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[37] Affirmative Witness Statement of Christopher Hickey ("**Hickey Affirmative**"), affirmed September 23, 2022, para. 15.
[38] Reply Davies Report, para. 34.
[39] McAleese Statement, at paras. 383-384.
[40] Reply Witness Statement of Jean-Francois Lescadres ("**Lescadres Reply**"), signed October 29, 2022, paras. 24-26.
[41] Reply Davies Report, para. 61.

56. The Tribunal will also have the benefit of evidence from Shaw and Videotron executives, who are best placed to speak to Freedom's backhaul needs, and the expert opinions of Dr. Webb and Mr. Martin. Their evidence is that Videotron's competitiveness will not be impaired without ownership of fibre backhaul, because:

(a) [redacted]

(b) Fibre is not the only option for backhaul. Data can also be transmitted between cell sites and the core network *via* wireless microwave facilities, which accounts for [redacted]

(c) Fibre leases are ubiquitous in the industry, which is served by a ready and competitive market. In densely-populated areas, carriers may have as many as six available options for fibre backhaul from sophisticated wireline operators, including Bell, Telus, Rogers, Videotron, and Shaw, as well as communications infrastructure companies like Beanfield and Zayo;[44]

(d) Backhaul lease costs represent a relatively small share of most wireless carriers' operating costs. [redacted]

(e) As noted above, Canadian wireless carriers can and have succeeded in growing significant market share without ownership of any fibre backhaul assets. Internationally, T-Mobile has grown to become one of the largest and most

[42] Affirmative Martin Report, para. 78.
[43] Affirmative Martin Report, para. 76.
[44] Prevost Affirmative, para. 32; Affirmative Martin Report, para. 80-81.
[45] Affirmative Martin Report, para. 77.

successful wireless providers in the United States—with over 72 million subscribers—despite having owned no wireline assets prior to 2020;[46] and

(f) Videotron has made the careful, reasoned business judgment that it does not need to own fibre backhaul in order to compete as the new owner of Freedom, especially in light of the favourable backhaul terms that it negotiated from Rogers. Mr. Lescadres will give evidence that this "long-term transport agreement with necessary protections and favourable pricing provided the data transport [Videotron] needed for the wireless network".[47]

E. VIDEOTRON WILL NOT BE "DEPENDENT" ON ROGERS

57. The Commissioner says a Videotron-owned Freedom [redacted] This bald claim is without merit. Once again, it ignores the reality of network sharing and access for all operators throughout the country.

(a) First, not a single wireless carrier in Canada has complete ownership over all the network infrastructure on which it relies. Infrastructure leases, indefeasible rights of use, and other contractual arrangements are standard and necessary in the telecommunications industry.[49] Regulators encourage these kinds of arrangements, as they reduce the barriers to entry for new participants and the cost base of existing participants;

(b) [redacted]

[46] Affirmative Martin Report, para. 72.
[47] Lescadres Affirmative, para. 120.
[48] Affirmative Davies Report, para. 256.
[49] Prevost Affirmative, paras. 27-40.

(c) [redacted]

(d) Fourth, Bell and Telus have an extensive nationwide network sharing agreement that essentially halves their cost of network investments. The Commissioner has never claimed that this agreement is anti-competitive or creates objectionable dependencies; and

(e) Finally, Videotron and Rogers have a history of vigorous competition notwithstanding extensive network relationships. Videotron grew a sizeable share of the Quebec market at Rogers' expense, despite being initially reliant on the Rogers' network as an MVNO between 2006 and 2010. In 2013, they entered into a long-term agreement for the joint construction and operation of a wireless network in Quebec and parts of Eastern Ontario. Videotron has not shied away from asserting its legal rights under that agreement. Throughout, Videotron remained a vigorous wireless competitor, with aggressive pricing and attractive offerings [redacted] There is no reason to believe that Videotron will not exert the same competitive push against Rogers within Freedom's footprint.[50]

F. "BUT FOR" WORLD: FREEDOM'S CHALLENGING FUTURE IF TRANSACTION IS BLOCKED

58. In the Commissioner's "but for" world, Shaw will remain a vigorous, maverick wireless and wireline competitor enabled by the most favourable terms in the industry. But his evidence mischaracterizes Shaw's place in these markets, [redacted]. It is a selective and backward-looking approach that bears no relation to the headwinds confronting Shaw in a highly capital-intensive and rapidly evolving marketplace.

[50] Prevost Reply, paras. 61-63; Lescadres Reply, 63-72.

59. The Tribunal will hear [redacted] from three of its executives—Chief Executive Officer Bradley Shaw, President Paul McAleese, and Executive Vice President Trevor English—as well as Rod Davies, the Managing Director at TD Securities Inc. who provided strategic advice to Shaw's leadership in connection with the transaction. Mr. Shaw will testify to the difficult decision he and his advisors made to sell the business—which had been in his family for over fifty years—[redacted]

[redacted] The arrangement agreement was endorsed by over 98% of Shaw's shareholders, and found to be fair and reasonable by the Alberta Court of King's Bench under the *Business Corporations Act*.

63. The Commissioner's case does not grapple with this evidence. His "but for" world is based on a curated sampling of stale-dated memos and slide decks about competitive pressures

[51] Reply Witness Statement of Paul McAleese ("**McAleese Reply**"), affirmed October 20, 2022, para. 12.

exerted by Shaw and Freedom in the past—in some cases, from many years ago. But the telecommunications industry is dynamic and changing. The competitive realities that existed when Freedom entered the wireless market, when it introduced the "Big Gig" plans, and even when Shaw Mobile was launched, are not the same as they are today. The past is not a crystal ball into the future. The "but for" world requires a *forward-looking* analysis, and not a glance at the rear-view mirror. None of the Commissioner's experts contend with Shaw's judgment about its own competitive *future*, including that of Freedom under its ownership.

64. The Tribunal should approach the Commissioner's predictions about Freedom's future with caution. Freedom faces formidable challenges in two key respects if the sale to Videotron is blocked:

(a) [redacted]

[redacted] Granting the Commissioner's request will set Shaw and

[52] McAleese Affirmative, paras. 157-163.
[53] Notice of Application, para. 98.

Freedom back years, stifle innovation and the rollout of 5G technologies, deprive Videotron of an unprecedented opportunity for national expansion, prevent Rogers from constructing a national wireline network, and [redacted]

66. This is the worst possible outcome for the wireless industry and the worst possible outcome for consumers. The primary effect of the block that the Commissioner seeks will be to further entrench Bell and Telus at the expense of consumers and their competitors. Indeed, the only beneficiaries would be Bell and Telus, who have vocally opposed this transaction at every turn and before every regulatory body.

67. The role of Bell and Telus bears mention. They [redacted] produced five witnesses to testify on his behalf (including a representative of Distributel). These are the Commissioner's main fact witnesses.

68. Bell and Telus are not disinterested observers. [redacted]

Bell and Telus' evidence in support of the Commissioner will have to be viewed through that lens, with a healthy dose of skepticism.

PART V - SHAW MOBILE IS NOT A "DISRUPTIVE" WIRELESS PLAYER

69. The Commissioner's core objection to the transaction is that Shaw Mobile subscribers will be transferred to Rogers, which the Commissioner says will eliminate the "significant and growing impact" Shaw Mobile was having on the wireless market. The Commissioner's position rests on a fundamental mischaracterization of Shaw Mobile as a wireless-only product when it is in fact a bundled product; [redacted] of Shaw Mobile customers are also Shaw wireline customers.[54]

[54] McAleese Affirmative, para. 292.

70. When properly viewed as a bundled product, Shaw Mobile was not actually offered at an aggressive discount, [redacted] and the transaction will increase, not decrease, competition between bundled products. Shaw Mobile was never a "highly discounted" or "maverick" competitor. It was a bundled product offered at market rates as a wireline retention tool.

A. SHAW MOBILE IS A BUNDLED WIRELINE PRODUCT, NOT A WIRELESS COMPETITOR

71. Shaw Mobile is not a true wireless product. It is a brand name through which Shaw offers discounted wireless plans to its internet customers in Alberta and British Columbia over the Freedom network. It does not own any physical network infrastructure or spectrum licences.

72. Shaw Mobile launched in July 2020 as a strategy to counteract aggressive competition from Telus and stem losses from Shaw's wireline base. Consistent with this strategy, [redacted] And it has no presence in Ontario, as Shaw does not offer residential internet in that market.

73. Although Shaw Mobile is offered on a stand-alone basis, [redacted] pricing is the same as Bell, Telus and Rogers—but on an inferior network without 5G. It offers no value to subscribers looking for a wireless-only product.[55]

	Bell	Rogers	TELUS	Shaw Mobile
Unlimited Canada talk and text, unlimited (25 GB) data	$85 /month	$85 /month	$85 /month	$85 /month

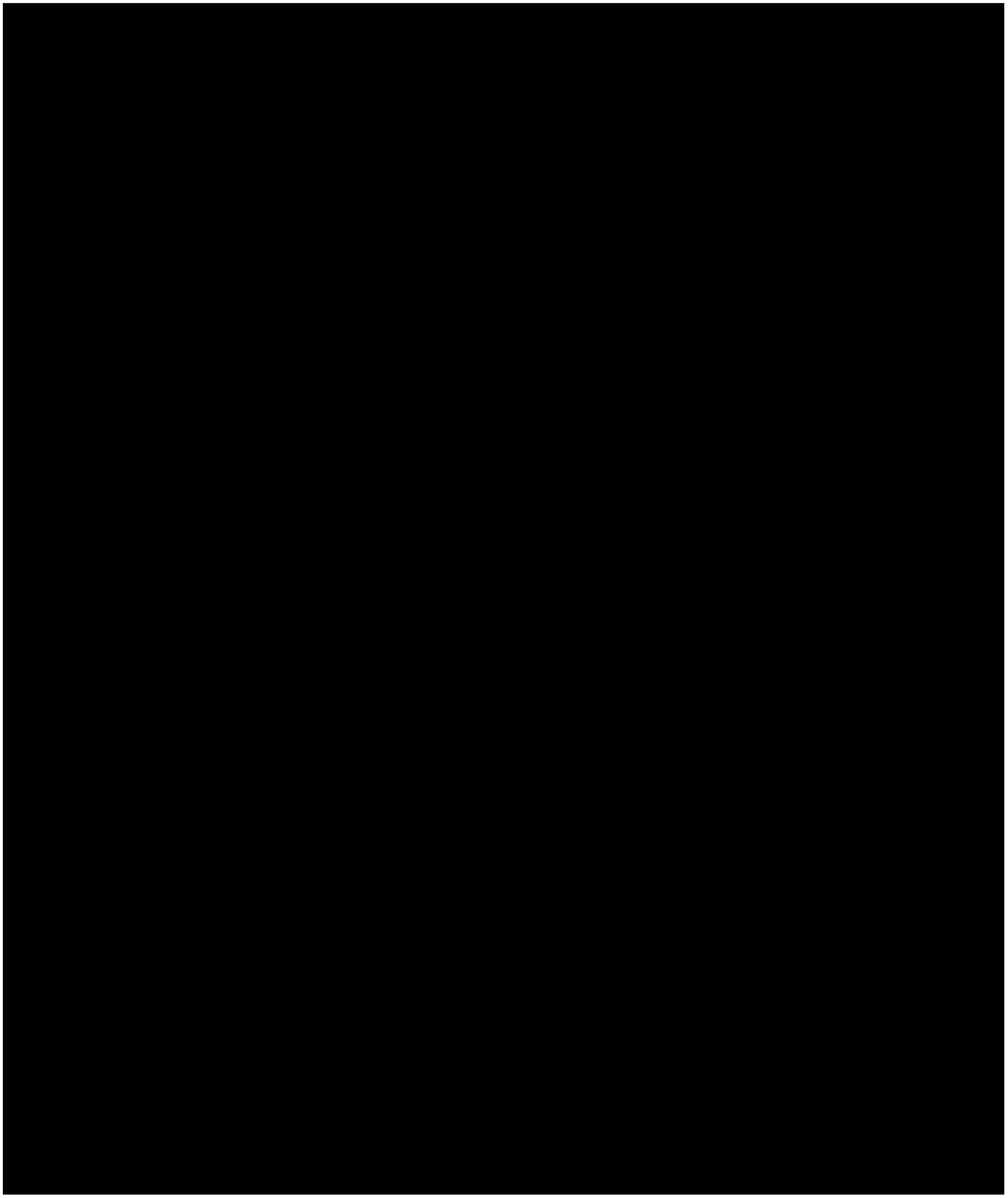
[redacted]

[55] McAleese Reply, paras. 131-132.

[redacted]

[redacted]

[56] Lescadres Affirmative, para. 110.
[57] McAleese Affirmative, paras. 292-293.
[58] Affirmative Expert Report of Nathan Miller ("**Affirmative Miller Report**"), dated September 21, 2022, para. 46; Reply Expert Report of Nathan Miller ("**Miller Reply Report**"), dated October 20, 2022, para. 34.



[59] McAleese Affirmative, paras. 292, 297.
[60] McAleese Affirmative, paras. 267-268.

[redacted]

81. Rogers will face the same competitive pressures in Alberta and British Columbia that led Shaw to introduce Shaw Mobile. [redacted] Rogers will have every incentive to compete at least as vigorously as Shaw if the transaction proceeds.

[61] Prevost Reply, para. 48.
[62] Affirmative Expert Report of Mark Israel ("**Affirmative Israel Report**"), dated September 23, 2022, para. 163.

PART VI - THE COMMISSIONER'S ECONOMIC EVIDENCE

A. NO SUBSTANTIAL LESSENING OF COMPETITION

82. Under s. 92 of the *Act*, the Commissioner must establish a "substantial" lessening of competition. He has not done so.

83. The Commissioner's economist, Dr. Miller, purports to model the alleged anti-competitive effects of this transaction. His model is fundamentally flawed and unreliable. But even if Dr. Miller's model were accepted without question, the Commissioner does not meet his burden of showing a "substantial" lessening of competition resulting from the transaction.

[redacted]

B. COMMISSIONER'S ECONOMIC MODEL IS FLAWED AND UNRELIABLE

86. As discussed above, even if the Commissioner's economic evidence were accepted without question, he cannot meet his burden to show a substantial lessening of competition. But that evidence is also fundamentally flawed and unreliable.

87. Dr. Miller's September 23 report sets out an economic model intended to analyze the transaction and predict its alleged anticompetitive effects. His analysis has the same fundamental flaw as the Commissioner's case; Dr. Miller proceeds on the basis that Shaw Mobile is a wireless

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[63] Affirmative Miller Report, Exhibit 22, p. 110. Dr. Miller claims a price increase of 2.5% in British Columbia and 0.8% in Alberta.
[64] *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, para. 46, citing *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd*, [1992] 41 C.P.R. (3d) 189 (Comp. Trib.), pp. 328-29.

product, rather than the bundled product that it is. He acknowledges that Shaw Mobile customers are tied to their Shaw wireline service, but fails to properly account for that fact in his analysis.

88. Dr. Miller's model is limited to the wireless market and he makes no attempt to model impacts in the wireline market. But this approach fails to account for what is actually happening in the transaction, namely that Shaw's *wireline* assets are transferring to Rogers while its *wireless* assets are transferring to Videotron. As a result, Dr. Miller has no model of the actual dynamics at play in the market.

89. Even setting aside this fundamental problem, Dr. Miller's analysis rests on several restrictive and unrealistic assumptions, none of which is supportable. As set out in the responding reports of Rogers' expert, Dr. Israel, partially adjusting some or all of these assumptions significantly reduces or eliminates the harm Dr. Miller predicts.

A. No Preference for Bundled Products

90. Dr. Miller does not account for the possibility that some customers have a preference for wireless-wireline bundles, versus standalone wireless products. Rather than model bundled customers as more likely to substitute to another bundled product, he assumes customers substitute between all products in proportion to their aggregate share in the market. In other words, Dr. Miller assumes that bundled customers and non-bundled customers are equally likely to switch to a given product, regardless of whether it is bundled or not.

91. As Dr. Israel explains in his October 20 reply report, if this assumption is partially adjusted, and the model is allowed to consider even a mild preference among bundled customers for bundled products, the predicted price effects are significantly reduced. Holding all other aspects of Dr. Miller's analysis constant, the predicted total consumer surplus loss drops by [redacted]

B. Assumed Transfer of Wireless Assets

92. Dr. Miller incorrectly assumes that all of Shaw's *wireless* assets are being transferred to Rogers, notwithstanding that the opposite is true—all of those assets are being transferred, along with Freedom, to Videotron. Specifically, Dr. Miller's model assumes that all of the assets used

to serve the Shaw Mobile customers are transferred to Rogers, which must include all Shaw's wireless assets.

93. Dr. Miller defends this aspect of his model by arguing that it is Shaw's *wireline* assets that are most important to Shaw Mobile customers, but this causes more problems for his analysis than it solves:

(a) First, it is inconsistent with Dr. Miller's assumption that bundled customers do not have a preference for bundled products. If Shaw Mobile's bundled customers are driven to choose the product primarily by their preference for the wireline service, then they must have different product preferences from wireless-only customers at other carriers.

(b) Second, unless Shaw Mobile customers care *only* about their wireline service and *not at all* about their wireless service, the problem remains. Dr. Miller's analysis assumes that the assets used to provide the wireless services Shaw Mobile's customers seek are being transferred to Rogers when they are not. Freedom keeping these assets means it will be a stronger competitor after the merger than Dr. Miller assumes in his model, and the effects of moving Shaw Mobile to Rogers are milder than his model predicts.

94. The underlying problem is Dr. Miller's attempt to make unrealistic simplifying assumptions that have a material impact on his analysis and bias the results towards greater predicted harm. By contrast, Dr. Israel provides the Tribunal with a range to consider between "all assets transferred" and "no assets transferred". Partially adjusting Dr. Miller's assumption again has a significant impact on the result, with the "no assets transferred" assumption generating a welfare-positive transaction.

C. Share of Gross Adds as Proxy for Market Share

95. Dr. Miller uses a measure called "share of gross adds" (SOGA) as a proxy for the market shares that his model requires. Gross adds refers to the sum of all subscribers each month who are either new to the wireless market or who switch providers. A company's SOGA refers to the percentage of all gross adds captured by that company in a given month.

96. Gross adds represent only a small fraction of the market, because it excludes all subscribers who do not switch providers. In the period Dr. Miller considers, January through April of 2021, gross adds were on average only [redacted] of total wireless subscribers in British Columbia and Alberta. That is a very small fraction of the market on which to base his analysis.

97. Dr. Miller acknowledges in his October 20 report that SOGA overstates the market shares that his model requires as an input, the necessary implication of which is that using SOGA biases his results upward to higher predicted welfare losses.[65] Nevertheless, Dr. Miller defends his use of SOGA on the basis that it is a reasonable proxy and better than the alternative of using each company's actual share of subscribers in the market. Dr. Miller's position does not withstand scrutiny:

(a) Dr. Miller argues that because Shaw Mobile was a new product during the period he considered (January to April 2021), its share of total subscribers did not represent its long-term potential—it was still in growth mode. That may be true, but it also underscores the problem with his use of SOGA.

As Dr. Israel explains, a new product is expected to have an initial burst of success, followed by a steady decline in its growth rate. By using Shaw Mobile's SOGA from shortly after its launch as a proxy for its long-term market share, Dr. Miller assumes an artificially inflated competitive significance for Shaw Mobile.

[redacted] Yet Dr. Miller simply takes an average of the last four of those months and assumes that average represents Shaw Mobile's long-run steady-state performance:

[65] Miller Reply Report, paras. 34, 41 & 46.

[redacted]

As can be seen from the period after Dr. Miller considered, [redacted]

(b) Dr. Miller argues that SOGA represents "actively shopping customers", giving a better indication of customer preferences than overall subscriber shares. But that is not what SOGA represents—it considers only those consumers who decided to switch providers (or entered the market for the first time). It does not account for consumers who considered switching and decided not to do so.

They, too, are "actively shopping customers", but ones that Dr. Miller's use of SOGA does not capture. This is a significant omission, especially when considering a new product like Shaw Mobile with a small base of existing

[66] Affirmative Israel Report, para. 64, Figure 2, p. 43.

customers. Excluding existing customers who decide to stay with their current provider significantly biases the results.

There is no way to know what percentage of existing subscribers are actively shopping each month, but given the maximum contract length is two years and many subscribers will not be on contract at all, a conservative assumption is that most subscribers consider whether to switch at least once every two years. Dr. Israel calculates what Shaw Mobile's share of "actively shopping customers" would be if that were the case, as well as under alternate scenarios of existing customers considering switching every year or every three years. In all cases, the results are significantly lower than Dr. Miller's use of SOGA:

Using any of these shares, rather than Dr. Miller's inflated market share based on SOGA, would, though still incorrect, significantly reduce the effects predicted by his model.

(c) Dr. Miller argues that whatever the flaws with SOGA may be, it would be much worse to use Shaw Mobile's market share from a period—January to April 2021—when it was still new and growing. But even this explanation (which is not correct on the facts) fails to explain why Dr. Miller does not use more recent data.

Dr. Israel used the most recent data available to calculate Shaw Mobile's market share as at the end of March 2022—a year after the period Dr. Miller considers

[67] Affirmative Israel Report, para. 62, Figure Table 2, p. 40.

and a year and a half after Shaw Mobile's launch. This shows an average market share of [redacted] across BC and Alberta, as compared to Dr. Miller's assumed average market share of approximately [redacted].

The data also show that Shaw Mobile market share had plateaued by this point and its [redacted] The following graph shows Shaw Mobile's share of subscribers in BC and Alberta (solid lines), as compared to the SOGA assumed by Dr. Miller (dashed lines):

[redacted]

Holding all other aspects of Dr. Miller's analysis constant, but replacing his SOGA numbers with Shaw Mobile's actual market share in March of 2022, results in the predicted total consumer surplus loss dropping by [redacted]

[68] Affirmative Israel Report, para. 64, Figure 3, p. 44.

D. Failure to Account for Marginal Cost Savings

98. Dr. Miller disregards the quantified marginal cost savings Freedom will realize as a result of the transaction, and the pro-competitive impact they will have on prices. These come from three sources: [redacted]

99. Dr. Israel calculates a range for these marginal cost savings, from [redacted] Dr. Israel also identifies several other categories of marginal cost savings that are certain to arise but that he does not have sufficient information to quantify.[70]

100. Dr. Miller dismisses all of these marginal cost savings, primarily on the basis that they are not "resources savings", but rather "rearrangements of existing contractual agreements."[71] This misses the point. The savings Dr. Israel quantifies are not productive efficiencies under s. 96 of the *Act*. They are marginal cost savings that will give Freedom the incentive to lower prices and compete more aggressively. Because these savings impact competitive incentives, they are to be considered under s. 92.[72]

101. Dr. Miller's refusal to include these savings when modeling the transaction means his analysis focuses exclusively on the alleged harm while ignoring the corresponding benefits. In Dr. Miller's October 20 report, he claims to run a version of his model incorporating marginal cost savings, but significantly discounts those savings to the point they have little impact and arbitrarily dismisses the welfare gains generated in Ontario. As a result, his harm predictions remain inflated and unreliable.

102. Holding all other aspects of Dr. Miller's analysis constant, but incorporating the marginal cost savings quantified by Dr. Israel, results in the predicted total consumer surplus loss

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[69] Affirmative Israel Report, para. 95, Table 6, p. 60.
[70] Affirmative Israel Report, paras. 96-105.
[71] Reply Expert Report of Nathan Miller ("**Miller Reply Report**"), dated October 20, 2022, para. 60.
[72] *Commissioner of Competition v. CCS Corporation*, 2012 Comp. Trib. 14, para. 388.

dropping by [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

F. Dr. Miller's Model Corrected for Faulty Assumptions

106. The preceding sections outlined the various faulty assumptions underpinning Dr. Miller's analysis of this transaction and the effect of partially adjusting each of them individually. These faulty assumptions were:

(a) No preference among bundled customers for bundled products;

(b) Assumed transfer of wireless assets;

(c) Using SOGA as a proxy for market share;

(d) Failure to consider marginal cost savings; and

(e) [redacted]

107. Leaving aside the second (correcting for which eliminates all harm predicted by Dr. Miller's model), partially relaxing each of Dr. Miller's assumptions at the same time reverses the harm his model predicts.

108. Dr. Israel's analysis shows that accounting for even a mild bundled preference,[73] [redacted] low-end marginal cost savings, and the most recent market share data available, the transaction is welfare-positive for both producers and consumers in each of British Columbia, Alberta, and Ontario. Assuming a moderate bundled preference and/or higher marginal cost savings only increases the transaction's benefits:

[redacted]

109. The Commissioner's analysis of the competitive effects of the transaction is flawed and unreliable. But even using Dr. Miller's flawed approach, partially relaxing his unrealistic assumptions completely reverses his predicted effects and shows the transaction is welfare-positive for consumers and producers in all provinces.

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[73] Accounted for by the "nest parameter" of 0.25.
[74] Affirmative Israel Report, para. 46, Table 5, p. 29.

PART VII - TRANSACTION GENERATES SIGNIFICANT EFFICIENCIES

110. The efficiencies defence should not have to be considered in this case. As set out above, the transaction is pro-competitive.

111. But if the Tribunal were to accept Dr. Miller's analysis in its entirety, and if the Tribunal were to conclude that the [redacted] increase he predicts amounts to a substantial lessening of competition, then the Tribunal would need to consider the efficiencies likely generated by the transaction. They are substantial—[redacted]—and they overwhelm Dr. Miller's predicted effects.

A. EVIDENCE IN SUPPORT OF EFFICIENCIES

112. Rogers' evidence of efficiencies comes from Dean Prevost, the president of Rogers' integration management office (the "**IMO**"), and Marisa Fabiano, a senior vice president of Finance and head of the Value Capture Office, a workstream tasked with quantifying the synergies that are likely to be achieved by combining Rogers' and Shaw's respective wireline networks, operations, facilities, personnel, and systems.[75]

113. Videotron's evidence of efficiencies comes from Jean-Francois Lescadres, Videotron's Vice-President of Finance and the lead of Videotron's integration planning, and Mohamed Drif, Videotron's Chief Technology Officer and lead of network integration planning.[76]

114. The fact evidence in support of the efficiencies is ordinary course documentation that provides the nature, magnitude, and likelihood of the expected efficiencies. The evidence consists of accounting statements, internal studies, strategic plans, integration plans, and management consultant studies that outline expected plans to create synergies.

B. EXPERT EVIDENCE IN SUPPORT OF EFFICIENCIES

115. The productive efficiencies are quantified by Rogers' expert, Andrew Harington of the Brattle Group. He has previously been retained as an expert by the Commissioner to quantify and evaluate the efficiencies claims of merging parties. Mr. Harington has quantified efficiencies in

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[75] Witness Statement of Marisa Fabiano ("**Fabiano Affirmative**"), affirmed September 23, 2022, paras. 23-43.
[76] Affirmative Witness Statement of Mohamad Drif ("**Drif Affirmative**"), affirmed September 23, 2022, paras. 154-162.

at least 35 high-profile Canadian mergers and acquisitions, including the Bell-MTS merger. He has been qualified as an expert in efficiencies before this Tribunal on three occasions.

116. Mr. Harington concludes that the discounted net present value of the productive efficiencies that will be realized as a result of the transaction over the next 10 years is between [redacted] Mr. Harington's opinion is summarized in the table below:

[redacted]

C. ROGERS' EFFICIENCIES

117. Mr. Harington's report identifies the efficiencies with particularity and outlines the nature, magnitude, likelihood, and expected timeframes. The detailed categories of efficiencies are as follows:

[redacted]

[77] Harington Affirmative Report, paras. 83-87.
[78] Harington Affirmative Report, paras. 118-127.
[79] Harington Affirmative Report, paras. 128-135. Mr. Harington's report previously contained an arithmetic error in the value of non-labour-related real estate savings, which has been corrected.

[redacted]

D. VIDEOTRON'S EFFICIENCIES

118. Mr. Harington also quantifies the efficiencies that result from Videotron's cost and resource savings under two scenarios:

[80] Harington Affirmative Report, para. 136
[81] Harington Affirmative Report, paras. 154-156.
[82] Harington Affirmative Report, para. 145.
[83] Harington Affirmative Report, para. 157-158.
[84] Harington Affirmative Report, para. 166.
[85] Harington Affirmative Report, para. 178-182.
[86] Harington Affirmative Report, paras. 183-184.
[87] Harington Affirmative Report, paras. 185-187.

[redacted]

E. SPECTRAL EFFICIENCIES

119. The combination of Videotron's 3500 MHz spectrum with Freedom's existing network has a multiplicative effect that significantly increases Freedom's network capacity. This additional capacity represents a more efficient use of existing resources and thus a resource saving to the economy, [redacted]

120. As a result of the transaction, Videotron's 3500 MHz spectrum will be deployed much sooner than it otherwise would, creating additional capacity and allowing additional spectrum that Freedom might otherwise need to be available for other uses. This results in efficiencies both to the Canadian economy (by producing greater output with the same resources) and to Freedom itself (which will avoid the cost of purchasing additional spectrum). [redacted]

[88] Harington Affirmative Report, paras. 192-194.
[89] Harington Affirmative Report, paras. 242-246.

[redacted]

F. COMMISSIONER'S RESPONSE TO EFFICIENCIES

121. The Commissioner's primary expert in response is Professor Zmijewski, a professor based in the United States. He has not previously been involved in any mandate relating to the evaluation of efficiencies claims under section 96, nor testified as an expert on productive efficiencies in Canada.

122. The Tribunal should approach Professor Zmijewski's opinion with caution. It should consider the methods employed by Professor Zmijewski to rule on the sufficiency of the evidence regarding efficiencies, against the ordinary normal course documentation before it evidencing the detailed integration plans of Rogers and Videotron.

PART VIII - EFFICIENCIES OVERWHELM ALLEGED EFFECTS

123. As discussed above, the efficiencies the transaction will generate are significant—[redacted] They overwhelm even Dr. Miller's alleged anti-competitive effects, regardless of whether the Tribunal adopts a Total Surplus or a Balancing Weights approach.

A. TOTAL SURPLUS STANDARD

124. The Total Surplus Standard is the default approach for conducting the trade off between efficiencies and effects. The Commissioner must demonstrate a good reason to depart from this approach and he cannot do so in this case.

125. In *Superior Propane*, the only case where a balancing weights approach was applied, it was because there were some low-income Canadians who consumed the good or service *as a necessity*. In that case, the concern was that these low-income Canadians used propane to heat their homes and would have no alternative but to pay a higher price post-transaction. There is no similar rationale in this case.

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[90] Reply Expert Report of Mark Israel ("**Israel Reply Report**"), dated October 20, 2022, paras. 63-84.

126. Even if some measure of wireless service were essential, as Dr. Osberg contends, the price for that level of service is fixed by the CRTC and will be unaffected by the transaction. In Telecom Regulatory Policy CRTC 2021-130, the CRTC required each of the large carriers to provide a low-cost plan with a minimum set of features at a fixed price of $35/month.[91] The features included in these plans are:

(a) Unlimited Canada-wide calling;

(b) Unlimited text messages; and

(c) At least 3GB of data.

127. In mandating this plan, the CRTC concluded that it would "enable Canadians to participate in the digital economy," would allow cell phones to be "used as substitutes for landline telephones," and would be "responsive to a consumer's most significant needs."[92]

128. The regulator with both the jurisdiction and the expertise to do so has already determined the level of wireless service that can be reasonably considered necessary. And it requires the large carriers, including Rogers, to offer that service at a fixed cost. The transaction will have no impact on the availability or cost of these low-cost plans, and therefore no impact on anyone who consumes wireless service as a necessity.

129. In addition, Dr. Miller predicts [redacted] across British Columbia and Alberta [redacted]. As a result, low-income consumers in British Columbia and Alberta will have a significantly cheaper option available to them after the transaction than they did before. These consumers will have the option to choose not only the current CRTC-mandated low-cost plan, but also [redacted] Far from being "socially adverse", the transaction will benefit low-income consumers.

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[91] Rogers' low-cost plan is offered by its Fido brand in each of British Columbia, Alberta, and Ontario: https://www.fido.ca/phones/bring-your-own-device?icid=ba-lpmbcnac-pgpfcwrls-1021206&flowType=byod.
[92] *Telecom Regulatory Policy CRTC 2021-130*, paras. 529-531 & 545. The same decision established fixed-price occasional use plans that will not be affected by the Transaction.

B. QUANTIFIABLE CONSUMER BENEFITS

130. If the Commissioner asks the Tribunal to give special consideration to an alleged socially adverse "wealth transfer" arising from the transaction, he must also credit the benefits to consumers arising from the transaction. These benefits arise in three ways:

(a) [redacted]

[redacted]

[redacted]

[redacted]

131. In total, then, this transaction will bring direct consumer benefits of approximately $43 million per year, almost all of which will go directly to the lowest income consumers. This is equivalent to [redacted] of the *total* consumer surplus losses Dr. Miller calculates, and therefore is likely to completely offset any alleged *socially adverse* consumer surplus loss that could be said to arise. On this basis alone, the balancing weights approach favours allowing the transaction to proceed.

C. APPLYING THE BALANCING WEIGHTS

132. If the Tribunal decides to depart from the Total Surplus Standard in this case, it will need to assess the total loss of consumer surplus to be weighted and measured against the producer surplus and productive efficiencies.

133. For the reasons set out above, Dr. Miller's analysis is flawed and unreliable and necessarily overstates the alleged harm. Nevertheless, this discussion assumes his highest quantification of consumer surplus [redacted]—to illustrate that taking the Commissioner's case at its highest, the efficiencies overwhelm the effects even on a Balancing Weights approach posited by the Commissioner.

134. In *Superior III*, the Tribunal set out the framework for a Balancing Weights approach. It is represented by the following formula, where CS is the consumer surplus loss, PS is the producer surplus gain, EF is the efficiencies generated by the transaction, and w is the weighting to be applied to the loss of consumer surplus:

$$w*CS + (PS + EF) = X$$

135. If X is greater than zero, then the efficiencies are greater than the weighted effects and, pursuant to s. 96 of the *Act*, the transaction will not be blocked.

136. This Tribunal has made clear that, if the Commissioner intends to advocate for a balancing weights approach, he must adduce expert evidence on how to calculate the appropriate weight.[93] The Commissioner has failed to do so in this case.

137. The Commissioner's expert, Dr. Lars Osberg, addresses the relative consumption of wireless services and predicted shareholdings in Rogers across the income distribution, but does not attempt to establish a basis for any weighting. His expert, Dr. Katherine Cuff, discusses the Canadian income tax system and its progressivity across different income groups, but does not do any analysis to derive a social weighting based on the tax system.

138. Only Rogers has adduced evidence of how the Tribunal can derive a weight from the Canadian income tax system that could be applied to the consumer surplus loss. Dr. Michael Smart, a tax economist at the University of Toronto, applies a standard "inverted optimum method" to the marginal tax rates set out in Dr. Cuff's report to derive distributional weights on different income groups based on observed tax rates. He then combines these distributional weights with the data on the gains and losses to different income groups set out in Dr. Osberg's report to derive the social weight applicable in this case based on the income tax system.

139. Dr. Smart concludes that if the Tribunal were to apply a balancing weight across the entire income distribution (that is, treat all consumer losses as socially adverse regardless of the incomes of the consumers in question), then the weighting derived from the tax system would be 1.06. If the Tribunal were instead to apply a weighting to only the bottom quintile of the income distribution as it did in *Superior Propane III*, then the weighting would be 1.0—that is, no weighting at all. This is because low-income Canadians consume only a small portion of total wireless services.

140. As a result, if the Tribunal were to apply a balancing weight to the entirety of the lost consumer surplus (an approach that has not previously been applied), the formula would, at most, be as follows:

$$1.06*CS + (PS + EF) = X$$

[93] *Commissioner of Competition v. Superior Propane Inc.*, 2002 CACT 16, para. 112.

141. Accepting Dr. Miller's analysis without adjustment, ignoring the offsetting consumer surplus gains discussed above, and even assuming all consumer surplus loss should be treated as socially adverse, the formula is:

[redacted]

142. Setting X equal to zero, such that the transaction is welfare neutral, and solving for EF, gives the minimum efficiencies the respondents need to establish to offset the Commissioner's highest quantification of harm:

[redacted]

143. If the respondents can establish just [redacted] of efficiencies, then even on the Commissioner's highest case the transaction should be allowed to proceed. The respondents' actual efficiencies, totaling over [redacted], dwarf this amount. The respondents need only succeed in establishing [redacted] of their total efficiencies.

144. If the consumer gains from the transaction are offset against the alleged loss of consumer surplus, then the respondents need only establish [redacted] of their total efficiencies:

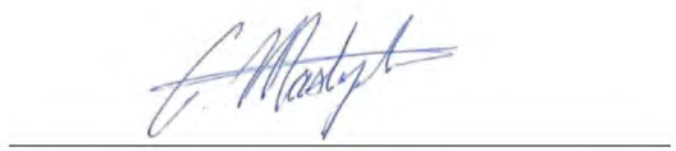
[redacted]

145. Whether the Tribunal applies the Total Surplus standard or the Balancing Weights approach, the transactions' efficiencies overwhelm the alleged anti-competitive effects, even taking the Commissioner's case at its highest. There is no reasonable basis on which to block the transaction.

PART IX - CONCLUSION

146. The evidence will demonstrate that the transaction does not give rise to a substantial lessening or prevention of competition in any market. And notwithstanding the flaws in his expert's analyses, and his inability to quantify *any* harm in relation to Freedom, the harm alleged by the Commissioner is greatly outweighed by the efficiencies that the transaction will generate. At the end of this trial, Rogers will ask that that the Commissioner's application be dismissed in its entirety, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2022



LAX O'SULLIVAN LISUS GOTTLIEB LLP
145 King Street West Suite 2750
Toronto, ON M5H 1J8

Counsel for the Respondent,
Rogers Communications Inc.

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

CLOSING SUBMISSIONS

of

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

LAX O'SULLIVAN LISUS GOTTLIEB LLP
145 King Street West Suite 2750
Toronto, ON M5H 1J8

Jonathan C. Lisus (LSO# 32952H)
Email: jlisus@lolg.ca

Crawford G. Smith (LSO# 42131S)
Email: csmith@lolg.ca

Matthew R. Law (LSO# 59856A)
Email: mlaw@lolg.ca

Bradley Vermeersch (LSO# 69004K)
Email: bvermeersch@lolg.ca

Zain Naqi (LSO# 67870U)
Email: znaqi@lolg.ca

John Carlo Mastrangelo (LSO# 76002P)
Email: jmastrangelo@lolg.ca

Ronke Akinyemi (LSO# 79227T)
Email: rakinyemi@lolg.ca

Patrick Wodhams (LSO# 82991W)
Email: pwodhams@lolg.ca

Counsel for the Respondent,
Rogers Communications Inc.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Email: kentthomson@dwpv.com

Derek D. Ricci (LSO# 52366N)
Email: dricci@dwpv.com

Steven G. Frankel (LSO# 58892E)
Email: sfrankel@dwpv.com

Chanakya A. Sethi (LSO# 63492T)
Email: csethi@dwpv.com

Counsel for the Respondent,
Shaw Communications Inc.

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, ON M5X 1A4

John F. Rook (LSO# 13786N)
Email: Rookj@bennettjones.com

Emrys Davis (LSO# 57391B)
Email: Davise@bennettjones.com

Kyle Donnelly (LSO# 61469K)
Email: Donnellyk@bennettjones.com

Alysha Pannu (LSO# 74369O)
Email: Pannua@bennettjones.com

Christina Skinner (LSO# 82947F)
Email: Skinnerc@bennettjones.com

Counsel for the Intervener, Videotron Ltd.

TO: **THE COMMISSIONER OF COMPETITION**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

John S. Tyhurst

Derek Leschinsky

Alexander Gay

Paul Klippenstein

Katherine Rydel

Ryan Caron

Kevin Hong

Tel: (819) 956-2842 / (613) 897-7682
Fax: (819) 953-9267

Counsel for the Applicant,
The Commissioner of Competition

TABLE OF CONTENTS

PART I - OVERVIEW

1. At the start of trial, the Commissioner said this case is "a watershed moment for wireless competition in Canada." He was right about that, but wrong in the result.

2. After four weeks of evidence from 45 witnesses, the stark choice created by the Commissioner's hard line demand of a full block can be resolved only one way: dismissal of his application. This Transaction should proceed with Freedom entrusted to the experienced hands of Videotron, a bold, proven competitor with a rigorous business plan never seriously challenged. It gives Freedom an immediate path to 5G and a substantially lower cost base, making it a stronger competitor than it was under Shaw. Videotron has committed billions of dollars in generational investments to create more choice and lower prices on a more powerful network.

3. The Commissioner has not come close to proving the Transaction is likely to prevent or lessen competition substantially in the British Columbia and Alberta wireless markets. Before calling a single witness, he abandoned his allegations in respect of Ontario—a necessary concession given that he had not even attempted to quantify harm in that province.

4. His remaining allegations do not withstand scrutiny. The centrepiece of his case, Shaw Mobile, has never been a true disruptor in the wireless market. Its limited growth peaked quickly and plateaued long ago. And it is not a true wireless product. It is a bundled wireline retention tool. It is priced comparably with the only other bundle in the West, offered by Telus, not Rogers.

5. Taking the Commissioner's case at its highest, the harm he attributes to Rogers' retention of Shaw Mobile subscribers is a market-wide price increase of 1.7% across British Columbia and Alberta. This is far from substantial, and *before* Dr. Israel's corrections for the serious flaws in the Commissioner's economic analysis and the marginal cost savings arising from the Transaction.

Further, it is admitted that Freedom's prices will go down—now ensured by the conditions imposed by the Minister of Innovation, Science and Industry in October.

6. The Commissioner's unquantified assertions that Freedom will be a "less effective" competitor under Videotron have been exposed. The myth that it is necessary to "own" a wireline network to compete effectively in wireless did not withstand scrutiny. Neither did the paternalistic claim of Videotron's dependency on Rogers. Every witness with knowledge of the Canadian market confirmed that the backhaul arrangements between the two companies are industry-standard—except these contain more favourable terms for Videotron. This evidence is consistent with the documents of Bell and Telus and their statements to the Commissioner in his investigation.

7. Videotron has made clear it has all the assets and arrangements necessary to vigorously compete. There is no basis to reject its reasoned business judgment. Videotron will inherit Freedom's network and subscribers, having spent half of what Shaw invested in it, and with enormous excess capacity—"exactly what you need to be an effective competitor."[1]

8. The Commissioner asks this Tribunal to ignore the reality that consumers will have more and better options with this Transaction. Today there are two providers of bundled services in British Columbia and Alberta: Telus and Shaw. After the Transaction, there will be three—Telus, Rogers, and Videotron enabled by a favourable TPIA agreement, all with 5G capability. The Transaction will boost competition between bundled products, not reduce it.

9. In short, the evidence is that the Transaction is highly pro-competitive. It positions Rogers to use its size, scale, and resources to compete aggressively against Telus in the wireline and bundled wireless markets, launches Videotron as a fourth near-national wireless provider, and delivers stronger networks and lower prices, to the benefit of consumers. The alternative—the full

block the Commissioner seeks—only entrenches Bell and Telus, denies Videotron its ambition, and pretends that Shaw will return to its corner and make the additional and ongoing substantial investments needed to keep up, [redacted]. And this is all before the Tribunal considers the overwhelming efficiencies that will arise from the Transaction.

PART II - SHAW'S PURSUIT OF A STRATEGIC SALE

10. The Commissioner's case rests on the false premise that Shaw has been competing in wireline and wireless from a position of strength, and will continue to do so indefinitely. Shaw's wireline business—which generates over 83% of its revenues—[redacted] and fierce competition from Telus. [redacted]

11. The reality is that Shaw's wireline and wireless businesses need substantial investments to remain competitive. Shaw's President Paul McAleese testified, [redacted].[3]

A. Shaw's Significant Competitive Challenges

12. Shaw's primary wireline competitor is Telus, an incumbent operator in Alberta and British Columbia, and successor to government-sanctioned telephone monopolies.[4] Telus has relentlessly built on this historic advantage. Since 2015, it has invested over $11.5 billion to expand its fibre to the home network in British Columbia, Alberta, and Quebec, making it the "[redacted]".[6]

13. Telus has steadily displaced Shaw as the market share leader in home Internet services in British Columbia and Alberta (**Appendix 1, Figure 1**). As a result, Shaw's wireline business has

faced "underperformance on pretty much every metric."[7] The "[redacted]."[8]

14. Shaw's substantial investments in Freedom's wireless network (most notably, spectrum) led to initial successes in 2017 and 2018. However, Freedom has more recently faced stiff operational headwinds. The Commissioner's witnesses acknowledged that Freedom has suffered in recent years (and before the Transaction was announced).[9] Shaw has not come close to recovering its multibillion dollar investments—let alone earning a reasonable return (**Appendix 1, Figures 2 & 3**). [redacted]

15. Investment is the "lifeblood" of a telecommunication provider's ability to compete.[11] Shaw does not have the resources to make the necessary investments to remain competitive. Every dollar spent on the wireless business is one that cannot be spent on the wireline business.[12]

16. Although Shaw has been able to maintain earnings and dividend payments, the company's EVP Trevor English explained this was possible until now largely due to cost-cutting initiatives, and cash generated through the sale of two major businesses. Mr. English and Mr. Shaw both testified that [redacted]. The Commissioner's emphasis on Shaw's positive earnings and dividend payments ignores that Shaw is accountable to its thousands of shareholders for investing sensibly and generating adequate returns. There is no dispute the company's share price "has underperformed for the better part of 10 years." It has not increased its dividend since 2016, when it acquired Freedom.[13] The Commissioner's response—that Shaw could cut its dividend and max-out debt to support its underperformance—asks the Tribunal to disregard reality and substitute its view for Shaw's considered business judgment.[14]

B. The Strategic Review and Decision To Sell

17. In these circumstances, Shaw made the difficult decision to put itself up for sale.

18. In November 2020, Shaw's CEO Brad Shaw asked TD Securities to prepare an overview of strategic options.[15] TD considered various options—including a strategic sale—and presented its analysis to members of the Shaw Family and representatives of the Shaw Family Living Trust in early February 2021.[16] This analysis documented Shaw's strategic challenges and advised that the combination of Shaw and a strategic buyer would have the [redacted]"[17]

19. With the benefit of TD's advice, the Shaw family initiated a competitive process for a sale to Rogers or Bell, the two companies with "the strongest strategic rationale and the requisite balance sheet strength."[18] [redacted] but Rogers' offer was eventually accepted.[19]

PART III - THE ROGERS/SHAW & VIDEOTRON/FREEDOM TRANSACTION

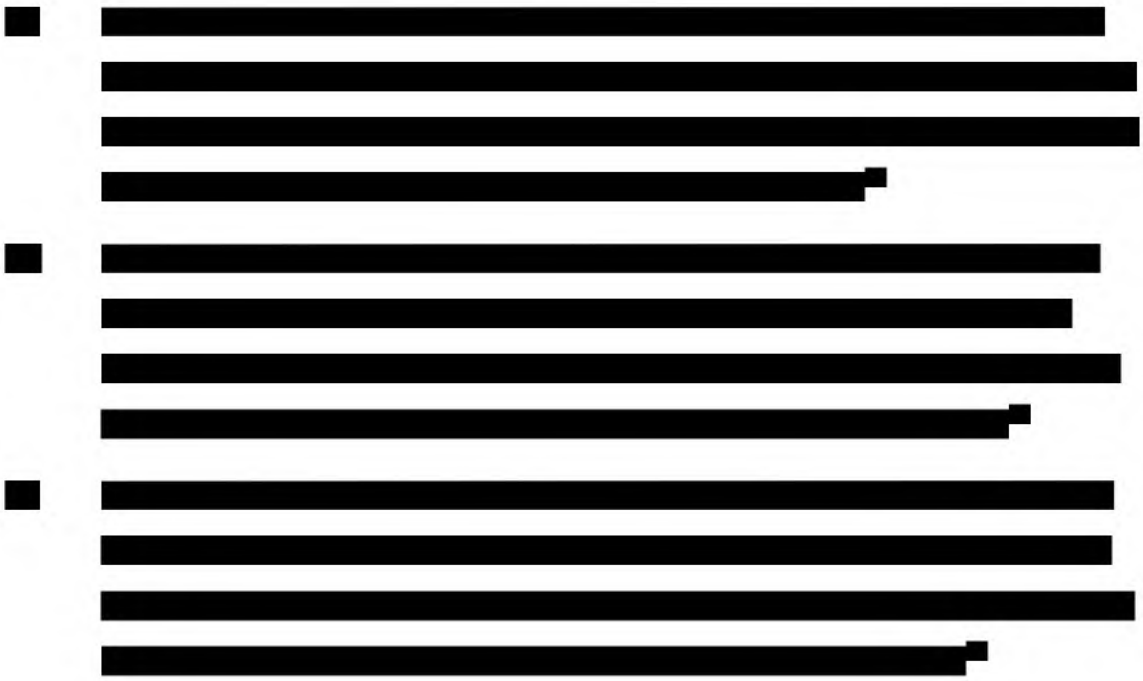
20. In March 2021, Rogers and Shaw entered into an arrangement agreement for Rogers to acquire all of Shaw's shares for approximately $26 billion (inclusive of debt). It was overwhelmingly accepted by Shaw's shareholders, considered "fair and reasonable" by the Alberta Court of Queen's Bench, and approved by the CRTC as serving the public interest.[20]

21. Rogers' acquisition of Shaw's wireless business faced regulatory challenges. In March 2022, the Minister of Innovation, Science and Industry announced that he "will simply not permit" the transfer of Freedom's spectrum to Rogers.[21]

22. In May 2022, Rogers entered into negotiations to sell Freedom to Videotron.[22]

23. On June 17, 2022, Rogers, Shaw, and Videotron executed a Letter Agreement and Term Sheet for Videotron's acquisition of Freedom.[23] They formalized these terms in a Share Purchase Agreement on August 12, 2022 (the "**Definitive Agreement**").[24]

24. Videotron will acquire Freedom's entire business, including its wireless network assets (towers, small cells, backhaul, spectrum) and approximately 1.7 million customers. It also secured favourable supply agreements from Rogers, set out in term sheets to the Definitive Agreement:



25. These term sheets "are complete, final and enforceable upon closing the Definitive Agreement."[28] Section 4.21(b) of the Definitive Agreement provides that long-form contracts are not a condition of closing.[29] Nor do they bind Videotron to Rogers or create any dependency. These network access services are entirely at Videotron's option.

26. Videotron's VP Finance Jean-François Lescadres testified that the Definitive Agreement provides Videotron with everything necessary to operate Freedom as a disruptive competitor, and "enable Videotron to meet its financial projections as set out in its Financial Plan."[30]

27. In response to the Tribunal's questions regarding key terms of the Transaction (as well as a roadmap of answers to other Tribunal questions as they appear in these submissions), Rogers has provided a summary at **Appendix 2**.

PART IV - VIDEOTRON'S POST-CLOSING PLAN TO DISRUPT WIRELESS

28. The Tribunal heard from three of Videotron's top executives: President Pierre-Karl Péladeau, Chief Technology Officer Mohamed Drif, and Mr. Lescadres. All testified about Videotron's plans to disrupt wireless competition in Freedom's footprint, as it has done in Quebec.

A. Videotron's Disruption in Quebec Produced Much Lower Wireless Prices

29. Videotron has a long history of successful competitive disruption in Quebec. It began offering wireless services in 2006 as an MVNO on the Rogers network, then bought spectrum and launched its own facilities-based wireless network in 2010.[31] Since then, it has rolled out a 5G network in Montreal and Quebec City, and is executing on a multi-billion dollar plan to roll out 5G across its wireless footprint in Quebec and parts of Eastern Ontario.[32]

30. In 2018, Videotron launched "Fizz Mobile", an innovative all-digital brand allowing customers to build their own plan without stepping into a physical store.[33] Videotron's competitors have noted Fizz's prodigious growth. [redacted]."[35]

31. As a result of this disruption, Videotron's in-footprint share of wireless subscribers has grown to [redacted] Videotron's disruptive competition has produced wireless prices in Quebec on average 20% lower than in the rest of Canada—a point emphasized by the Minister and not contested by the Commissioner or any witness.[37]

32. All subscriber witnesses testified that the lower wireless prices Videotron will bring would be a good thing. And the two Freedom dealers testified that their dealer association has "[redacted]." Mr. Verma stated that he was "cautiously optimistic" about Videotron and agreed that a 20% decrease in Freedom's prices would be a good thing for his business.[38]

B. Videotron-Freedom Will Disrupt Competition in the Rest of Canada

33. Videotron has a strategic imperative to grow outside Quebec given its maturity in its home market. Acquiring Freedom presents the best opportunity and allows Videotron to bring its aggressive competition to the West and Ontario. As Mr. Lescadres explained:

[redacted]

34. Videotron backed this competitive strategy with a detailed, fully costed business plan and financial model, with conservative projections, to ensure Freedom's long-term viability.[40] Mr. Lescadres expects to exceed the growth calculations in this plan, the key elements of which are:

(a) ***Lower prices***: Videotron plans to offer prices [redacted] lower than currently offered by competitors.[41] It has committed to the Minister that it will price wireless plans no higher than it does in Quebec.[42]

(b) ***Immediate 5G roll-out and 10-year investment in a full 5G network***: Videotron plans to roll-out 5G across the Freedom footprint [redacted].[43]

[redacted]

(f) ***Increased marketing spend and other supports***: Videotron will at least double Freedom's current marketing spend.[46] It will also better support Freedom dealers and assist them in re-positioning Freedom as a near-premium brand.[47]

35. Videotron's ability to profitably offer lower prices is supported by cost savings it will realize by combining its business with Freedom, as well as other benefits by virtue of being able to operate and compete as a near-national carrier, and the fact that it is paying a purchase price less than what Shaw invested in Freedom.[48]

36. [redacted]

37. Videotron's business plan, financial model, and projected cost savings went essentially unchallenged at trial. The Commissioner neither led evidence against nor cross-examined on any material aspect of these plans.[50]

PART V - WIRELINE OWNERSHIP UNNECESSARY TO COMPETE IN WIRELESS

38. A core feature of the Commissioner's case is the untenable theory that wireline assets are *necessary* to compete effectively in the wireless business. He claims Videotron will be unable to replicate the competitiveness that Freedom had under Shaw because it will be "separated" from Shaw's wireline network and "dependent" on Rogers.

39. Videotron's seasoned judgment, supported by its business and financial plans and its own experience, is that it will be successful without owning Shaw's wireline network.

40. This is consistent with Freedom's success: more than 70% of its subscriber base has developed in Ontario where Shaw has essentially no wireline infrastructure. After extensive due diligence, Videotron decided not to negotiate for wireline assets, and instead sought advantageous network access rights from Rogers for backhaul and TPIA.[51] The allegation that this is not enough is addressed at length below in Section VIII(D).

41. Videotron's business judgment aligns with the evidence of all market participants. Wireless competition outside a wireline footprint is "business as usual." All major wireless carriers in Canada operate successfully in geographies where they do not own residential wireline. Bell and Rogers have a combined wireless market share of [redacted] in British Columbia and [redacted] in Alberta despite having no residential wireline business in those provinces. Telus and Rogers have a combined [redacted] wireless market share in Quebec despite no meaningful residential wireline business in that province. Telus and Freedom have a combined [redacted] wireless market share in Ontario despite having no residential wireline business there.[52] That is not to say that ownership

cannot be advantageous. For example, done right, it can assist with bundling. But that is a far cry from necessity.[53]

42. The same is true across North America and elsewhere. For example, T-Mobile, one of the largest U.S. wireless operators, has over 110 million subscribers and no wireline network at all.[54]

43. These indisputable market realities raise an important question: where did the Commissioner's flawed theory come from? In large part, it rests on the problematic evidence of Bell and Telus, who embarked on an aggressive campaign to block the Rogers-Shaw deal immediately after it was announced. That opposition continued and intensified after the sale to Videotron was announced in June, and was maintained into the trial proper.

44. Bell and Telus' witness statements were thoroughly contradicted by their internal documents and prior statements to the Commissioner. The problematic nature of their evidence is reflected in the shifting, result-oriented story they told his staff.

45. Early in the Commissioner's review—when the transaction contemplated a full merger of Rogers and Shaw (including Freedom)—they said the opposite of what they said in their witness statements. At a two-hour meeting in June 2021, Telus emphasized to the Bureau that [redacted]

[redacted]

This is reflected in the Bureau's meeting notes.[55]

[redacted]

46. When the sale of Freedom became more likely, Bell and Telus changed their evidence. In December 2021 submissions, they told the Commissioner that [redacted]

[redacted].[56] They advanced the false narrative that [redacted] This narrative emerged as the core theme in the witness statements they prepared and submitted to the Commissioner, which he accepted.

47. The patent inconsistency of Bell and Telus' evidence with the reality of the market and their businesses prompted Rogers and Shaw to subpoena additional documents. Bell and Telus, supported by the Commissioner, said this effort was an abusive fishing expedition. On the eve of the motion, the Commissioner disclosed a redacted version of Telus' December 2021 submission. The problematic content of these documents will be more fully addressed in oral submissions.

A. Bell and Telus Are Concerned About More, Not Less, Competition

48. The Tribunal ordered production, and Telus responded with a dubious claim of privilege. Predictably, the documents contradict the evidence of Bell and Telus, confirming that [redacted] Their real concern is the immediate intensification of competition the Transaction will bring in Western Canada, with Rogers as a stronger wireline competitor than Shaw and Videotron super-charging Freedom.

49. Bell and Telus are Rogers' closest competitors. They collaborate extensively in the provision of wireless services across Canada. They have the most to lose if this Transaction is approved. The notion that their behaviour is motivated by a genuine desire to protect competition in wireless and to spare Videotron from failure is absurd. Their strident opposition and changing narrative is strong evidence of the pro-competitive effects of the Transaction.

50. This irony of their stance should not be lost on the Tribunal. Telus is unquestionably concerned that Rogers' acquisition of Shaw's wireline business will disrupt competition in the West. If Bell and Telus genuinely believe Videotron will fail, they would not be opposing its

acquisition of Freedom. They are not concerned *for* Videotron. They are concerned *about* Videotron and its disruptive track record. This is manifest in their documents:

(a) In an internal email to executives on May 27, 2021, Bell's CEO expressed [redacted];[57]

(b) An August 4, 2022 presentation to Bell's Board of Directors commented that Rogers' acquisition of Shaw's wireline network would give it [redacted];[58] and

(c) In an email to colleagues (including Mr. Kirby), an executive in Bell's wireless division described [redacted]".[59]

51. Telus' documents reveal that alarm bells were ringing at its highest levels, prompting a "top-of-house" GR and PR strategy to "kill, slow and shape" the deal:[60]

(a) In a brainstorming session on February 13, 2021, Telus executives expressed concern that [redacted]";[61] and

(b) In immediate response to the Transaction's announcement, Telus launched [redacted], focussed on "[redacted]." On August 4, 2022, Telus' Board received a presentation on Project Fox, which referred to the company's "advocacy" aimed at "highlight[ing] the danger of PKP [Mr. Péladeau] as remedy partner", and "leverag[ing] the 8 July outage" with ISED.[62] Telus asserted an untenable claim of privilege over this document, and the Commissioner objected to marking it as an exhibit.

52. The documentary record confirms that Bell and Telus do not view the Transaction as lessening competition. The opposite is true. They rightly see it as creating a more robust competitive environment. That is why they have made every effort to influence the outcome of the Commissioner's investigation, implored the Commissioner to commence these proceedings, and

participated actively as his witnesses. Their objective in doing so is obvious: to advance their commercial interests at the expense of competition both in wireline and wireless services in Western Canada.

B. Bell and Telus Witness Statements Do Not Withstand Scrutiny

53. Cross-examination also laid bare the omissions in the Bell and Telus witness statements. The theory that wireline ownership is necessary for effective competition did not hold up:

(a) ***Blaik Kirby (Bell President, Consumer Services)***: Mr. Kirby argued that success in wireless depends on wireline ownership. When presented with statements from Bell's CEO to investors that Bell is "able to compete in the west without wireline infrastructure", Mr. Kirby tried to explain that his CEO [redacted] His cross-examination confirmed that [redacted] His choice of exhibits was designed to [redacted]

(b) ***Stephen Howe (Bell Chief Technology Officer)***: Mr. Howe testified to the importance of wireline ownership for Bell's network resiliency. But he admitted that [redacted]

(c) ***Nazim Benhadid (Telus SVP, Network Build & Operate)***: Mr. Benhadid was called to speak to "the importance of Telus' wireline ownership." But he admitted that "[m]any carriers, including Telus, lease fibre for the purpose of transport, and backhaul", that leases are "very common in the industry", and wholesale backhaul "is an effective tool when available to provide [wireless network] footprint." He conceded that Telus buys fibre access from [redacted] wireline operators at an annual cost of [redacted] million, which he observed was "i[redacted]" for Telus [redacted]." Mr. Benhadid also testified that [redacted][66]

(d) ***Charlie Casey (Telus VP, Finance)***: Mr. Casey was evasive, untruthful, and thoroughly discredited. He denied involvement in [redacted] which he described as "business as usual" financial modelling—until confronted with his direct participation in [redacted].[67]

C. The Commissioner's Approach to the Evidence

54. The Commissioner is "not a normal adversary", but "a public officer with a statutory obligation to act fairly." He is a "guardian of the public interest" and "must be motivated by goals of fundamental fairness and not by achieving a strategic advantage."[68]

55. In certain respects, the Commissioner's approach to the evidence was lacking. His litigation strategy included efforts to exclude probative documents from Bell and Telus. He supported their efforts to quash these subpoenas as an abusive fishing expedition, then objected to the admissibility of internal documents contradicting their witness statements. The Commissioner's approach led the Tribunal to express some concern about his keeping documents from its view.

56. Likewise, the witnesses the Commissioner called from the Bureau were unhelpful. Strangely, none had any recollection of lengthy, important meetings with industry representatives—including with Telus' executives in June 2021. They were unable to provide a complete account of the Commissioner's review of Videotron's purchase of Freedom. His failure to call knowledgeable Bureau officials, such as the team leads who led his investigation, became a basis for objecting to the admissibility of his own case team's summaries from these meetings.

57. While the Commissioner may be entitled to call his case as he sees fit, there are consequences to his tactical decisions that court the risk of impairing its merits. Here, these decisions compromised the reliability and persuasiveness of his case.

PART VI - STATEMENT OF LAW

58. The *Competition Act* is practical, market-focused legislation. Its purpose is to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy … and provide consumers with competitive prices and product choices."[69]

59. The *Act* is concerned with the real-world consequences of market activity. The Tribunal's decisions must be grounded in common sense and market realities.

60. Section 92 mandates an inquiry into whether a "proposed merger … *is likely to* prevent or lessen competition substantially." Section 93 lists as factors to be considered "any *effect* of the … proposed merger on price or non-price competition" and "any other factor … relevant to competition in a market that is or *would be affected* by the … proposed merger." Section 96 requires an inquiry into whether a proposed merger "is likely to bring about" gains in efficiencies that outweigh any lessening of competition.

61. The Commissioner asks the Tribunal to take a completely different approach:

(a) ***First***, he asserts his only burden is to show that a non-existent transaction—in which Rogers acquires Shaw's wireline business *and* Freedom—will result in a substantial lessening of competition.[70]

(b) ***Second***, he asserts that the appropriate "but for world" involves turning back the clock two years to assess what *would have happened* had the Transaction never been announced, as opposed to *what will happen* if the Transaction is blocked.[71]

(c) ***Third***, he asserts the Tribunal does not have jurisdiction to consider the contractual commitments Videotron secured from Rogers.[72]

62. The Commissioner's position contravenes the plain language of the *Act* and the case law. He asks the Tribunal to ignore the actual competitive effects of the Transaction in the real-world and engage in a theoretical exercise. That is wrong as a matter of law.

A. The Commissioner's Onus under Section 92

63. The Commissioner "bears the onus to prove 'that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially' under s. 92."[73] He must do so on "clear and convincing evidence."[74]

i. The Commissioner Improperly Seeks to Reverse His Burden

64. This is the first time that an *uncompleted* "proposed merger" has been reviewed by the Tribunal. Every other case decided under s. 92 concerned a *completed* merger that the Commissioner impugned as anticompetitive.[75] In those cases, the Commissioner had the onus to prove that the completed merger substantially lessened or prevented competition compared to what had existed before, and that the relief he sought was appropriate.

65. In some of them, the responding parties proposed alternative remedial orders as a defence against the relief the Commissioner sought, including proposed "remedy" transactions.[76] Having done so, the responding parties bore the onus of demonstrating that their proposed order was more appropriate than the remedial order proposed by the Commissioner.[77]

66. That is not this case. The respondents are not proposing a remedial order or "remedy" transaction. Videotron's acquisition of Freedom is not an "alternative remedy" to the relief sought by the Commissioner; it is *the only transaction* the respondents propose. Rogers has no intention or ability to acquire Freedom and never will.[78]

67. The Commissioner's position is contradicted by leading authorities, which hold that subsequent and intervening events must be considered:

(a) In *Hillsdown*, a key facility belonging to the merged entity was closed after the merger was announced. Although the Tribunal found no SLPC, it considered this post-merger event in the alternative and found that it would have declined to issue a

divestiture order because of the closure. The intervening event arising after the merger had been completed was directly relevant to the Tribunal's assessment under s. 92.[79]

(b) In *Canadian Waste Services*, the Tribunal found an SLPC and ordered a divestiture based on the understanding that key waste disposal facilities had received environmental approvals for expansion. Shortly before the s. 92 hearing, environmental groups sought to judicially review these approvals. CWS did not bring this judicial review to the Tribunal's attention at the hearing, but subsequently sought to vary the decision on the basis of it. The Tribunal admonished CWS for not adverting to the review at the s. 92 hearing and refused to vary its order. Even though they occurred after the merger in question had been completed, the Tribunal clearly viewed these intervening events as important.[80]

(c) The Commissioner's approach has also been rejected by U.S. courts. In *Arch Coal*, the Court was "unwilling simply to ignore the fact of the divestiture" and held that "excluding evidence and argument regarding the [divesture] would be tantamount to *turning a blind eye to the elephant in the room*." It concluded that whether "the challenged transaction may substantially lessen competition … require[d] the Court to review the *entire* transaction in question".[81]

(d) In light of *Arch Coal*, the FTC jettisoned its previous (erroneous) position. It now accepts that where a "merger [is] unconsummated and would occur simultaneously or almost simultaneously with the divestiture" and "the parties entered into the divestiture agreement before the [antitrust authority] filed the complaint or soon after", "the divestiture could be deemed part of the transaction being challenged."[82]

68. The Commissioner cannot sidestep his onus by pretending the respondents are proposing a transaction abandoned months ago and which the Minister has made impossible.[83] The "proposed merger" this Tribunal must consider—and that the Commissioner must show lessens competition substantially—is the Transaction that includes Videotron's acquisition of Freedom.

69. Although the onus properly lies with the Commissioner, the result would be no different if it were shifted to the respondents to show that the proposed divestiture cures any SLC. The evidence on the pro-competitive impacts of the sale of Freedom to Videotron is overwhelming, even before taking into account the pro-competitive impacts of Rogers acquiring the wireline business of Shaw. The Tribunal should find that the result would be the same regardless of how the burden is allocated.

ii. Commissioner Cannot Meet his Burden on "Prevention" In Any Event

70. The "prevention" branch of s. 92 addresses mergers that would have the effect of preventing an independent competitor from entering the market.[84] The only prevention claim pleaded by the Commissioner concerns the alleged prevention of competition in the business services market.[85] The Commissioner has abandoned this claim.[86] He led no evidence that Shaw was a "poised competitor" in the business services market. [redacted].[87]

71. None of the remaining allegations properly relate to prevention. They are in substance claims that the Transaction will lead to a lessening of wireless competition.

B. <u>The "But For" World is Forward-Looking</u>

72. In *Tervita*, the Supreme Court held that the but-for analysis is "*forward-looking*".[88] Chief Justice Crampton explained, in his concurring opinion for the Tribunal, that the appropriate comparison in respect of a proposed merger is "(i) the state of competition that would likely exist if the merger were to proceed, with (ii) the state of competition that would likely exist *if the merger did not proceed*."[89] The Tribunal recently affirmed this approach in *Parrish v. Heimbecker*, holding that "[t]he issue is whether competition would likely be substantially greater, 'but for' the implementation of the merger or proposed merger."[90]

73. The Commissioner has also argued before the Supreme Court of Canada that the Tribunal should "apply a forward-looking approach in its assessment of the likely anti-competitive effects of mergers."[91] But here, he takes the opposite approach.

74. The Commissioner urges a backward-looking view of the "but for" world based on what would have happened *if the merger had never been announced*.[92] He asks the Tribunal to turn the clock back prior to March 2021 and ignore everything that has happened since. This makes no sense and is legally untenable. It precludes the Tribunal from "full[y] assess[ing] . . . all factors relevant in the particular fact situation at issue," [redacted].[93]

75. The Tribunal must evaluate the actual market and commercial realities and assess the likely impact on competition of the Transaction and of any order it may consider issuing.

C. Contractual Commitments Must be Considered

76. The Commissioner accepts the Tribunal's jurisdiction to prohibit Rogers' non-existent acquisition of Freedom. But he takes the position that in evaluating the effects of the Transaction, the Tribunal cannot consider the contractual arrangements between Rogers and Videotron.[94] In other words, the Commissioner is seeking to circumscribe the scope of facts the Tribunal may even "consider" in evaluating the Transaction.

77. There is no authority for that proposition. It is contrary to ss. 92 and 93 of the *Act* and makes no commercial or common sense. The Tribunal's role is to evaluate the likely real-world effects of the Transaction.

78. In his Opening Statement, the Commissioner cites to *Canadian Waste*,[95] but that case does not stand for the proposition that, in considering the competitive effect of a transaction, the Tribunal must ignore concluded contractual arrangements. As noted above, in *Canadian Waste*:

(a) The merger had already closed. The Tribunal had found an SLPC, and was being asked to consider what would be an effective remedy;

(b) The respondent did not propose selling any business or asset—it was only offering to enter into a hypothetical contract with one or more unidentified third parties; and

(c) In those circumstances, the Tribunal concluded that a purely contractual remedy was not available, likely would not be effective in any event, and an asset sale likely would be. That conclusion has no bearing on this case.

79. Nothing in *Canadian Waste* holds that, where the Tribunal is considering a proposed merger that involves the transfer of a business or assets to a third party, as here, it must blind itself to the commercial arrangements that will be enjoyed by that third party in operating the business going forward, or any other relevant facts.

80. The Commissioner's position is also contrary to the language of the *Act*, which requires the Tribunal to consider the likely state of competition post-transaction and all relevant factors:

(a) Under s. 92, the Tribunal must assess, factually, the likely state of the market and competition if the impugned merger were to close. The binding, voluntary agreements between Rogers and Videotron are highly relevant to the likely state of competition following implementation of the merger, as they will allow Freedom to compete more aggressively with a lower cost base.

(b) This is confirmed by the factors set out in s. 93 of the *Act*, including the express provision that the Tribunal may have regard to "any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger." Freedom's enhanced ability and incentive to compete as a result of the

> agreements between Rogers and Videotron are clearly "relevant to competition" in British Columbia, Alberta, and Ontario.

81. The Commissioner may make arguments about the quality or consequences of the agreements, but he cannot ask the Tribunal to pretend they do not exist.

D. Commissioner's Misplaced Reliance on Section 69 of the *Competition Act*

82. The Commissioner puts weight on s. 69(2) of the *Act*, which grants a limited right to have the respondents' records admitted into evidence. This provision provides only a rebuttable presumption that the respondent had knowledge of a record and its contents, and that anything recorded in it as having been done, said, or agreed to was in fact done, said, or agreed to.[96]

83. Section 69 does not allow the Commissioner to unilaterally admit documents for the truth of their contents. Nor does it require the Tribunal to give these documents any weight. In *Sears*, Dawson J. explained that it is for the Tribunal to consider the documentary evidence—including the Commissioner's s. 69 list—in light of the record as a whole:

> … [I]t is for the Tribunal to interpret [the respondent's] documents and to determine what "facts" documents are evidence of and to consider whether those facts, when viewed in the context of the entire body of evidence, establish reviewable conduct. The meaning, weight and the conclusions to be drawn from any document must be assessed by the Tribunal.[97]

84. The Commissioner's reliance on s. 69 is not consistent with its scope. He has submitted over 750 documents—asserting they "speak for themselves"— without putting the overwhelming majority of them to Rogers and Shaw witnesses, who could explain them.[98] The Tribunal has never endorsed this approach to s. 69.

85. The Commissioner's approach is also contrary to the rule in *Browne v. Dunn*, which requires that evidence intended to contradict an opposing witness be put to that witness.[99] This is a

rule of trial fairness that, respectfully, was not followed by the Commissioner in the presentation of his case. Only 32 of the Commissioner's s. 69 documents—less than 4%—were put to fact witnesses, as illustrated by the table and set of examples found at **Appendix 3**.

PART VII - TRANSACTION IS PRO-COMPETITIVE; NO SLPC IN ANY MARKET

86. This application could not be more different from previous cases decided by the Tribunal. Every prior merger decision from the Tribunal has involved a reduction in the number of competitors in some or all of the affected markets, alleged post-merger market shares at least in the range of 60% and often nearly 100%, and alleged price increases of at least 7% and as high as 347%, with typical cases falling in the range of 10-20%.[100]

87. Here, the total number of wireless competitors post-closing remains the same at four, and the number of competitors in bundled services increases, from two to three; Rogers' post-merger share will be [redacted] in Alberta and British Columbia respectively, [redacted];[101] and even the Commissioner's best evidence establishes an average price increase across BC and Alberta of just 1.7%.

88. The Commissioner's economic expert, Dr. Miller, takes an improperly narrow approach to assessing competitive effects with a flawed economic model. He fails to consider its positive effects on the market as a whole and the significant improvement it will bring to Freedom's competitive position.

89. First, the Transaction does not reduce the number of competitors on any dimension. It *increases* them. There are currently four wireless competitors in British Columbia and Alberta and that will be the same post-closing. There are currently three national (or near-national) competitors in British Columbia, Alberta, and Ontario, which will increase to four. And there are currently two

bundled competitors in British Columbia and Alberta, which will increase to at least three. The competitive landscape following the Transaction will be *better* than it is today.

90. Second, the Transaction greatly improves Freedom's competitive position and its incentives to compete vigorously. Mr. Lescadres described the benefits of combining with Freedom and becoming a near-national carrier. His evidence was not challenged. Even, the Commissioner's industry expert, Mr. Davies, acknowledged that the combination of Freedom's network with Videotron's spectrum, and the removal of Shaw Mobile subscribers, will give Freedom's network enormous excess capacity.[102] This means Freedom under Videotron will have near-zero network marginal costs and can grow significantly before incurring material build costs. Dr. Israel explained that excess capacity is the most important driver of aggressive wireless competition.[103]

91. Because of this excess capacity, Freedom will be in a similar position post-closing as it was in 2017, when it launched its Big Gig plans.[104] Dr. Miller points to the Big Gig plans as epitomizing aggressive competition, but fails to acknowledge that this Transaction enables Freedom to replicate that earlier success.

92. Third, the Transaction will enhance wireline competition. Shaw's competitive position relative to Telus has steadily declined over the past several years, as it diverted resources to its wireless business and under-invested in its wireline business.[105] Rogers will be a financially stronger competitor, bringing national scale and an already well-established wireless network.

93. These factors all point to the same conclusion: the Transaction will be pro-competitive in both the wireless and wireline markets. That is supported by competitive responses in the period since the Transaction was announced. To combat the threat they perceive from Videotron in wireless and Rogers in wireline, Bell and Telus have taken aggressive competitive steps:

(a) Shortly after Rogers announced its acquisition of Shaw, Telus announced the closing of a $1.3 billion equity offering, and Bell announced its $1.7 billion "biggest ever" network acceleration plan;[106]

(b) Telus used its sizeable war chest to [redacted];[107] and

(c) Bell developed a detailed post-Transaction competitive plan—elevated to its Board of Directors—that included [redacted].[108]

94. Against that backdrop, the Commissioner seeks to block the entire $26 billion transaction on the basis of: (i) a flawed and overstated, yet still unprecedentedly small, quantification of harm allegedly arising from the transfer of Shaw Mobile's subscribers to Rogers; and (ii) unquantified and theoretical allegations regarding Freedom's competitiveness that do not reflect commercial reality and defy common sense.

95. Even taking the Commissioner's case at its highest, the merger does not result in the elimination or prevention of any competitor, a significant increase in market power, or a material price increase. The alleged effects of this Transaction are minimal and do not rise to the level of "substantiality".

A. The Commissioner Cannot Meet the High "Substantiality" Threshold

96. As explained in *Tervita*, and recently confirmed in *Parrish & Heimbecker*, "it is not enough to demonstrate that an actual or likely lessening of competition will result, or the mere creation of or enhancement of market power." Rather, the "substantial" lessening of competition required under section 92 concerns whether the merged company is likely to be able to "exercise materially

greater market power than in the absence of the merger."[109] In evaluating this, the Tribunal considers the following factors: the degree (or magnitude), the scope, and the duration of any change to competition.[110]

97. Taking his economic case at its highest, the Commissioner has failed to establish that any alleged lessening of competition in this case is "substantial":

(a) ***Degree (or Magnitude)***: Dr. Miller estimates a weighted average price increase across British Columbia and Alberta of just 1.7%. As held in *Parrish*:

> . . .[t]he Tribunal is not aware of any merger cases, in Canada or in any other jurisdiction, where a court or tribunal has recognized that a predicted price effect revolving around 1% could be enough to meet the test of substantiality.

And earlier,

> On the contrary, the Tribunal finds that predicted price variations representing such a small fraction… are immaterial, <u>especially in light of the fact that a merger simulation will always predict a price increase</u>.[111]

The Commissioner has not presented any evidence that a price increase of 1.7% should be considered material on the specific facts of this case.[112] And even that minimal price effect is clearly overstated given the flaws in Dr. Miller's analysis.

The same is true in respect of any non-price dimensions to competition. There will be no decrease in the number of wireless providers or bundled offerings; no reduction in the quality of Freedom's wireless network; Shaw Mobile customers will realize the benefit of Rogers' superior network; and no reduction in service as Videotron [redacted] on roaming and has been rated as the best company for customer service in its territory for 17 years in a row. Instead, there will be increased innovation as Videotron [redacted] use the TPIA framework to offer wireless/wireline bundles, and deploy the technologies it acquired through its acquisition of VMedia.[113]

(b) ***Scope***: The price effects estimated by Dr. Miller are province-wide in British Columbia and Alberta, but many consumers, especially low-income ones, will experience a price decrease through Freedom, while Shaw Mobile customers are protected against any increase by Rogers' pricing commitment. Dr. Miller's analysis also takes no account of the CRTC-mandated low-cost plans available to all consumers. These plans mean that a segment of the market will not be affected at all by the Transaction, as they already subscribe to, or will switch to, these low-cost plans, the prices of which remain fixed.

(c) ***Duration***: Dr. Miller conceded in cross-examination that his forecast price increase would not occur immediately, but rather would play out over time.[114] [redacted] It is equally clear from [redacted] The Commissioner has failed to establish when, or for how long, his alleged price effects will arise, or to consider the competitive responses of Bell and Telus that will curtail any such effects.

98. The Commissioner cannot meet his burden, even accepting Dr. Miller's analysis without question. For the reasons set out below, that analysis must be rejected and the only reasonable assessment of the Transaction is that it will be pro-competitive.

B. Unilateral Effects Are Positive and Pro-Competitive

99. The Commissioner alleges unilateral anti-competitive effects arising from the transfer of Shaw Mobile to Rogers and the transfer of Freedom to Videotron. Those allegations do not withstand scrutiny. Dr. Miller attempted to quantify the harm arising from the transfer of Shaw Mobile to Rogers, but did not quantify any harm associated with Videotron's acquisition of Freedom. Indeed, he acknowledged that his model is agnostic as to whether Freedom remains with Shaw or transfers to Videotron.[116]

100. By contrast, Dr. Israel *did* quantify the effect of Videotron acquiring Freedom and the result is unequivocally positive. [redacted] Dr. Israel quantifies these benefits, concluding they will make Freedom a more effective competitor under Videotron.[117]

101. The Commissioner has also conceded there is no SLC in Ontario. As set out below, that concession affects equally his argument that Videotron's acquisition of Freedom is anti-competitive in British Columbia and Alberta. If the acquisition does not result in an SLC in Ontario, it cannot do so in the West, where Freedom's market share is [redacted] *lower*.[118] The Commissioner's case therefore rests on Shaw Mobile.

C. No Anti-Competitive Effects from Shaw Mobile

i. Shaw Mobile Not Competitively Significant

102. Before focusing on the fundamental errors in Dr. Miller's econometric model regarding Shaw Mobile, some context is necessary. Although Shaw Mobile was popular in the first several months following its launch, its initial success faded and never translated into a sustainable, profitable path forward.

103. [redacted] It offered attractive pricing for wireless customers who were also Shaw Internet subscribers (**Appendix 1, Table 1**), but not for the market more broadly. Shaw Mobile's "rack rate" for non-bundled customers has always been in line with that of Bell, Rogers, and Telus, even though those carriers provide faster and lower-latency wireless services with much better coverage.[120] [redacted]

104. [redacted] In order to "drive more of Shaw's wireline customers to [its] fastest, most expensive and highest value wireline Internet plan", Shaw Mobile offered discounted wireless services as a value-add. But looking only at that discount is misleading: those same customers are paying a premium for their wireline services, such that the bundled price of Shaw Mobile has never been materially discounted relative to Telus.[123]

105. That bears directly on why Shaw Mobile is not part of Videotron's acquisition of Freedom. [redacted]

106. [redacted] (**Appendix 1, Figure 4**).[125]

107. Although the Tribunal heard evidence from multiple senior executives of Bell, Telus, Rogers, Shaw, and Videotron, none testified that Shaw Mobile had a sustained, meaningful impact on wireless prices. None said that they offered lower prices in Western Canada in response to Shaw Mobile.

108. Dr. Miller asserts that Shaw Mobile had a wider market impact, but conceded that this was unsupported by any empirical analysis. Although Dr. Miller acknowledged that Shaw Mobile

"drives a good part of the action" in his merger simulation, he contended that it was "too much to ask" of the data for it to show any impact as a result of Shaw Mobile's entry.[126]

109. His analysis also fails on its own terms. As demonstrated by Dr. Israel in Figures 9 to 12 of his initial report, the trends in price and data consumption Dr. Miller pointed to as evidence of Shaw Mobile's market-wide impact clearly preceded its introduction.[127] Dr. Paul Johnson's analysis also demonstrated the obvious empirical flaws in Dr. Miller's assessment of Shaw Mobile's impact.[128]

ii. Dr. Miller's Analysis is Fundamentally Flawed

110. Shaw Mobile is a bundled [redacted]—and Dr. Miller acknowledged that its customers are tied to their Shaw wireline service, which is the "stickier" part of the bundle.[129] Yet his model treats Shaw Mobile as if it were a wireless-only product, ignoring the more important wireline dimension. As a result, Dr. Miller's model cannot capture the *actual* market dynamics at play.

111. This leads to a related problem: his model is incoherent. In treating Shaw Mobile as a wireless-only product, Dr. Miller assumes that Rogers is acquiring the *wireless* assets of Shaw Mobile. It is not. Videotron is acquiring Freedom's network assets (through which Shaw Mobile provides service). Dr. Miller attempts to escape this problem by arguing that it is the *wireline* assets that matter most to Shaw Mobile subscribers.[130] But this leads back to the first problem: treating Shaw Mobile as a wireless-only product when it is in fact a bundled product driven by wireline service.

112. Dr. Miller developed his model for the s. 104 application on the understanding that Rogers was acquiring Shaw and Freedom. But he failed to properly update his analysis to account for

Videotron's acquisition of Freedom. Dr. Miller's model is therefore irrelevant and the Commissioner has failed to meet his burden.

113. But even if Dr. Miller's model were accepted, his erroneous inputs and assumptions significantly overstate the alleged harm. These include: (i) using Share of Gross Adds ("**SOGA**") instead of share of subscribers; (ii) ignoring marginal cost savings; (iii) ignoring the introduction of a new bundled product; and (iv) ignoring preferences for bundled products.

114. Correcting these problems, as Dr. Israel did, shows the Transaction is welfare-positive.[131]

iii. SOGA vs. Share of Subscribers

Conceptual Flaws with Dr. Miller's Use of SOGA

115. Dr. Miller acknowledges that the appropriate input for his model is the long-run steady-state share of subscribers for each product in the market. Nevertheless, he uses Shaw Mobile's share of gross adds (SOGA) from January to April 2021, when Shaw Mobile was still a new and growing product, instead of Shaw Mobile's share of subscribers from March 2022, when its growth had leveled out (as Dr. Israel did).[132]

116. SOGA measures a firm's share of consumers who switch providers each month or are new to the market. It does not measure a firm's share of all *actively shopping* customers, including customers who consider leaving their provider but decide not to. Dr. Miller acknowledges the correct measure, even on his approach, is share of active shoppers—*not* share of gross adds—but he assumes these things are equivalent.[133] They are not.

117. Dr. Miller concedes that using SOGA will overstate the share of a new firm, like Shaw Mobile, if established firms have large customer bases who are more likely to stay with their current provider than are switchers.[134] That is common sense—firms with large customer bases are

successful at retaining many of those customers—and Dr. Miller provides no support for his assumption to the contrary. The *only* evidence on this point comes from the Commissioner's witness, Mr. Kirby, who testified that roughly [redacted] of Bell customers who consider leaving ultimately decide to stay.[135] This undermines Dr. Miller's assumption and leads to the very problem he concedes can arise: that his use of SOGA overstates the share of a small firm like Shaw Mobile, relative to large firms like Bell, Telus, and Rogers.

118. This alone is enough to reject Dr. Miller's use of SOGA as biased and unreliable, and to prefer an approach based on share of subscribers. But there is a more fundamental problem with Dr. Miller's use of SOGA as an input for his model. As Dr. Israel explained, the model assumes that pricing incentives are determined not just by the effect of price changes on switching customers, but also on their existing subscriber base.[136]

119. This is important in the wireless market, where every subscriber pays for service every month. As Dr. Miller acknowledges, his model is premised on firms making profit-maximizing decisions across their entire subscriber base. Specifically, when considering price increases, the model assumes firms will balance increased revenue from subscribers who stay against decreased revenue from those who leave.[137]

120. Because Dr. Miller uses SOGA as an input, rather than share of subscribers, his model cannot reflect firms' actual pricing incentives. Firms are no longer making pricing decisions across their entire subscriber base (because Dr. Miller's model has not been given that information); instead, they are making them solely on the basis of switchers. As a result, the model assumes firms are solving the wrong profit-maximization problem and therefore cannot accurately predict post-merger pricing decisions.[138]

121. It also forced Dr. Miller to concede that even the minimal annual harm his model predicts will only arise gradually over time as customers switch.[139] On re-examination, he tried to reverse himself, claiming the harm would instead arise "quite fast" because firms would reprice their existing subscribers.[140] But this brings back the problem of not having accounted for those existing subscribers in his model of the firms' pricing incentives. It also contradicts his assertion that customers shop very rarely—once every eight years on average—as that would suggest the alleged harm will not reach the annual level he calculates until eight years post-closing.[141]

122. These contradictions highlight the problem Dr. Israel identifies at the outset of his report: the model Dr. Miller uses *requires* share of subscribers as an input. Using anything else violates the premise of the model and leads to irreconcilable problems.

Data Problems with Dr. Miller's Use of SOGA

123. Even if these conceptual problems are set aside, the SOGA data Dr. Miller uses significantly overstate Shaw Mobile's share and cannot be justified.

124. Dr. Miller acknowledges that Shaw Mobile was a new product with [redacted]"[142] But he assumes that: (i) this period of unusually high growth had run its course by January 2021 (just five months after launch); and (ii) Shaw Mobile's performance over the next four months (January to April 2021) was representative of its long-term competitive significance. Both assumptions are contradicted by the evidence.

Shaw Mobile Price Change was Bona Fide and Profit-Maximizing

125. Shaw Mobile's initial prices were introductory, as is common practice. Dr. Miller acknowledged that carriers often engage in early-stage promotions to attract customers.[143]

126. These introductory prices were revised twice, which Mr. McAleese explained in detail:[144]

(a) First, in October 2020, to introduce "9 Box Pricing" (**Appendix 1, Table 2**); and

(b) In November 2021, Shaw Mobile moved from 9-Box to 12-Box pricing (**Appendix 1, Table 3**) to drive customers to higher wireline tiers. By Dr. Miller's admission, this is precisely the sort of decision his model assumes will be made by profit-maximizing firms.[145]

127. Dr. Miller asserts, without foundation, that Shaw adopted 12-Box pricing in November 2021 to drive down Shaw Mobile's gross adds in a deliberate attempt to circumvent the Bureau's analysis on competitive impacts.[146] Dr. Miller's only support for this assertion is a reference to an alleged meeting on October 18, 2021 that he did not attend, that no witness has testified to or been cross-examined on, and that appears nowhere in the evidentiary record.[147] Mr. McAleese emphatically rejected Dr. Miller's unsubstantiated allegations, and contemporaneous documents confirm Mr. McAleese's evidence:[148]

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128. Confronted with these documents, Dr. Miller admitted he "doesn't know what to make of this price increase" and was unable to identify any documents consistent with his claims on 12-Box pricing. He conceded that every document he reviewed indicated that Shaw believed the price change was profitable, and that he undertook no analysis concerning the manner in which the adoption of 12-Box Pricing in November 2021 affected the profitability of Shaw Mobile.[152]

Evidence on Shaw Mobile's Competitiveness

129. The evidence on Shaw Mobile's competitiveness is reflected in the data. Figure 2 in Dr. Israel's first report uses Dr. Miller's backup data to calculate the month over month change in Shaw Mobile's market share growth over time. [redacted].

130. By March 2022, Shaw Mobile was gaining only [redacted] market share per month. Its growth had plateaued.

[redacted]

131. There is no plausible scenario in which Shaw Mobile ever would have reached the 26% market share Dr. Miller asserts. The only way he can arrive at that conclusion is by assuming SOGA is equivalent to market share, taking an average over a period of steady decline, and assuming that average would continue in perpetuity while Bell, Telus, and Rogers sat on their hands. None of this makes sense.

132. Figure 3 from Dr. Israel's initial report demonstrates this. The solid lines at the bottom show Shaw Mobile's actual market share over time. [redacted]

133. The reason Dr. Miller gave in his reports for cutting off his analysis in April 2021 was that he did not have access to data after that time.[153] Cross-examination revealed that:

(a) Dr. Miller needed and specifically asked the Commissioner for the updated gross adds data from Bell and Telus for his analysis. The Commissioner did not provide this data or give Dr. Miller any reason for not doing so;[154]

(b) As set out above, Dr. Miller could not point to a single document suggesting the price change was anything other than profit-maximizing;[155] and

(c) If the November 2021 price change was profit-maximizing, that would mean it was an ordinary course decision that Dr. Miller could have and should have taken into account in assessing Shaw Mobile's subsequent performance.[156]

134. The Tribunal should draw an inference that the data Dr. Miller requested, and that the Commissioner failed to obtain for him, would have undermined the Commissioner's claims about Shaw Mobile's growth trajectory.

135. [redacted]

	Consumer Surplus	Total Surplus
Miller Original	- $78	- $42
With SoS	- $55	- $22

136. Lastly, on this point, SOGA cannot be justified by reference to porting data which, as Dr. Israel explained, is not the same as diversion and efforts to undermine this reality were rejected by him in cross-examination.[158] It also bears mention that Dr. Miller's porting analysis in his initial report relies on Comlink data which was ultimately struck by the Tribunal.

iv. Freedom's Marginal Cost Savings

137. Videotron led evidence of marginal cost savings Freedom will realise in two categories: [redacted]. Dr. Israel quantified Freedom's marginal cost savings and their impact

on Dr. Miller's analysis. Incorporating these savings further reduces the predicted harm by more than half for both consumer and total surplus.[159]

Videotron's Uncontested Evidence

138. In his reply report, Dr. Miller describes Dr. Israel's reliance on Videotron's marginal cost savings as "speculative"[160] because they are "information obtained from Videotron without clear support."[161] This is wrong.

139. Mr. Lescadres gave detailed evidence regarding the nature and quantum of Freedom's marginal cost savings. The Commissioner did not lead any contrary evidence and did not cross-examine Mr. Lescadres on this point. These savings will help Freedom compete more effectively than it can today by reducing its post-merger marginal costs.

140. Videotron's projected savings are conservative:

(a) ***Handsets***: The handset savings are based solely on Freedom taking advantage of Videotron's current prices with manufacturers, without accounting for any further discounts based on the increased volume.[162] [redacted] which will further lower Freedom's handset costs.[163] Dr. Miller admitted he had not actually reviewed any of Freedom's handset contracts.[164]

(b) ***Roaming***: Videotron estimated that user data usage would grow by only [redacted],[165] when the compound annual growth rate from 2015-2019 was [redacted].[166] The Commissioner did not lead any contrary evidence (despite having ready access to Bell and Telus), nor cross-examine Mr. Lescadres on this point. Not only is Mr. Lescadres' evidence unchallenged, but when the Commissioner put Videotron's projections to Dr. Israel, he explained that they are consistent with the company's plans [redacted][167]

Dr. Israel Incorporates Freedom's Marginal Cost Savings

141. Dr. Israel quantified Videotron's average marginal cost savings per subscriber as between [redacted].[168] This range does not account for marginal cost savings that clearly exist but that Dr. Israel was unable to quantify based on the information available—*e.g.* [redacted]. Not including these additional savings makes even his upper bound conservative.[169]

142. Incorporating Freedom's uncontested marginal cost savings into Dr. Miller's model, together with using Share of Subscribers instead of SOGA, reduces the predicted harm to near-zero: consumer surplus loss of only $4 million and total surplus loss of only $13 million:

	Consumer Surplus	Total Surplus
Miller Original	- $78	- $42
With MC Savings Alone	- $6	- $21
With MC and SoS	- $4	- $13

143. Dr. Miller took issue with the quantum of Freedom's marginal cost savings because he did not accept Videotron's uncontested evidence on this point, but Dr. Miller did not dispute the manner in which Dr. Israel incorporated these savings into the model. Nor was Dr. Israel cross-examined on that point. His analysis is unchallenged.

Ontario Must Be Taken Into Account

144. In his rebuttal report, Dr. Miller says he does not consider the marginal cost savings in Ontario because benefits to consumers in Ontario "do not help a consumer in Alberta or British Columbia."[170] There is no basis to disregard Ontario consumers and focus only on those in British Columbia and Alberta.

145. The Commissioner is seeking a full block, including Videotron's acquisition of Freedom in Ontario, which will prevent Freedom from realizing the marginal cost savings that would otherwise arise in Ontario and benefit Ontario consumers. These benefits must be taken into account in assessing the competitive impact of the Transaction. If Dr. Miller's approach were accepted, the Tribunal would be disregarding the interests of Ontario consumers in favour of consumers in British Columbia and Alberta, when it should be treating all consumers equally.

146. Dr. Miller's position is also contrary to section 93 of the *Act*, which allows the Tribunal to consider "any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger." As a result of Freedom's marginal cost savings, and the introduction of a new bundled product (discussed below), Ontario is a market that will be positively affected by the proposed merger.

v. New Bundled Product

147. As set out above, Videotron led extensive evidence of its plan to offer a new bundled product using TPIA in British Columbia, Alberta, and Ontario. The Commissioner did not challenge this evidence and there can be no dispute that Videotron will pursue this strategy post-closing. Nor did the Commissioner challenge Videotron's projections for the growth and success of that bundled product.

148. Despite this unchallenged evidence, Dr. Miller's model fails to account for the new bundled product. This omission ignores gains in consumer surplus that make the Transaction significantly pro-competitive.

Dr. Miller's Unfounded Criticisms

149. Dr. Miller does not account for this new bundled product because he does not believe it can fully replicate the competitiveness of Shaw Mobile.[171] But that misses the point. The Shaw Mobile

bundled product will remain in the market post-closing, and Videotron's TPIA bundle will be an additional bundled product. So long as it achieves some measure of success—and the uncontested evidence is that it will—competition will *improve* and consumers will benefit.

150. Dr. Miller also claimed that Videotron could not bundle profitably, but admitted in cross-examination that he had not analyzed this part of Videotron's business plan and was relying solely on the evidence of Mr. Hickey, Distributel's Director of Regulatory Affairs.[172] Mr. Hickey conceded he had no knowledge of Videotron's plans or the [redacted] it will receive from Rogers, and was unable to comment on whether Videotron would be able to offer TPIA profitably.[173] As a result, there was no foundation for Dr. Miller's assertion that Videotron's TPIA bundle would not be profitable. The uncontested evidence is that it will be.

Dr. Israel Incorporates New Bundled Product

151. Dr. Israel incorporated Videotron's new bundled product into Dr. Miller's model to assess its impact on consumer and total surplus. He did so using Videotron's conservative and unchallenged projections, and ran sensitivities assuming more or less success than Videotron projected.[174]

152. The results are dramatic. Incorporating the new bundled product shows the Transaction will bring substantial benefits to consumers. Consumer surplus increases to $214 million and total surplus increases to $220 million:

	Consumer Surplus	Total Surplus
Miller Original	- $78	- $42
With New Bundle Alone	+ $52	+ $165
With Bundle, MC, SoS	+ $214	+ $220

153. Dr. Miller took issue with the premise that Videotron would launch even a moderately successful new bundled product, but he did not dispute the manner in which Dr. Israel incorporated this new product into his model. Nor was Dr. Israel cross-examined on the point.

vi. Bundled Preferences and Nested Model

154. The Commissioner's case was replete with documents that noted some customers prefer bundled products and that carriers compete with their bundled offerings. Yet Dr. Miller's model disregards this. He assumes that bundled products compete equally with non-bundled products, implying that bundled customers have no particular preference for bundled products.

155. That is not only contrary to the Commissioner's case, but also common sense.

156. All else being equal, a consumer with a bundled product is more likely to choose another bundled product than a non-bundled one. That basic intuition renders Dr. Miller's model unreliable because it fails to account for the fact that bundled providers compete more closely with each other than they do with non-bundled providers.

157. Dr. Israel incorporated "nests" into Dr. Miller's model to allow for differentiated competition between bundled and non-bundled competition. That does not mean there is no, or even minimal, competition between bundled and non-bundled competition. It just allows for somewhat greater competition between products of the same type.[175]

158. Incorporating even a mild preference for bundled products has a significant effect on the results of Dr. Miller's model, generating positive consumer surplus of [redacted] and positive total surplus of [redacted]:

	Consumer Surplus	Total Surplus
Miller Original	- $78	- $42
With Nest Alone	- $61	- $36
Nest, Bundle, MC, SoS	+ $311	+ $317

159. Again, Dr. Miller took issue with the premise that there is more competition between bundled products, but did not dispute the manner in which Dr. Israel incorporated this into his model. Nor was Dr. Israel cross-examined on the point.

vii. Conclusion on Quantified Effects

160. Taken at face value, Dr. Miller's model predicts only *de minimis* anticompetitive effects. If his model is corrected for just one of the significant flaws identified above, the predicted effects fall substantially. If all four flaws are corrected, the model predicts large welfare *gains*.

D. No "Qualitative" Harm from Videotron's Purchase of Freedom

161. Dr. Miller did not quantify any anti-competitive effects from the sale of Freedom to Videotron. No attempt was made to model the allegation that Freedom will be a "less effective" competitor if its wireless network is "separated" from Shaw's wireline network, due to:

(a) The alleged advantageous "cost structure of owned wireline" versus TPIA for bundled services, and the "cost disadvantage" of leased backhaul;

(b) The "loss of owned wi-fi and access to private wi-fi sites"; and

(c) An alleged "dependency" created by term sheets in the Definitive Agreement.[176]

162. The only quantitative evidence on the effects of Videotron's acquisition of Freedom is in Dr. Israel's interactive model, which proves that this acquisition is highly pro-competitive. Even if all inputs in Dr. Miller's model are accepted, and it is adjusted only for Dr. Israel's calculated marginal cost savings, the model shows that Videotron's acquisition of Freedom will increase consumer and total surplus.[177]

163. The Commissioner instead resorts to an amorphous claim that the wireline/wireless "separation" creates *qualitative* harms for which no dollar value need be ascribed. But qualitative effects are those that *cannot* be measured, not those he *chose not* to measure.[178]

164. Nor can the Commissioner prove that his subjective theories of harm *substantially* outweigh the manifestly pro-competitive benefits quantified by Dr. Israel. Even assessed qualitatively, the harm asserted by the Commissioner rests on a theory—that ownership of wireline assets is "essential" to compete in the wireless market—that was thoroughly debunked.

i. Commissioner's Concession Regarding Ontario

165. The Commissioner's concession in his opening statement—that the sale of Freedom to Videotron will not result in an SLC in Ontario—is fatal to his claim of qualitative effects.[179] Because there is no overlap in Ontario between Shaw's wireline network and Freedom's wireless network, Freedom will be in precisely the same position post-Transaction as it is now: a successful wireless competitor without self-supply of backhaul, bundled wireline services, or a network of wi-fi hotspots in that province. Videotron's acquisition changes nothing in Ontario and the Commissioner's concession acknowledges this.

166. But the concession goes further. Freedom's experience in Ontario shows that its wireless business model succeeded independently of wireline ownership. It is impossible to reconcile the concession that no SLC arises in Ontario (where Shaw has no wireline network in Freedom's wireless footprint) with the allegation of an SLC in British Columbia and Alberta where Freedom has a smaller market share.

ii. No Harm From Leasing Fibre Backhaul

167. The Commissioner's argument that Videotron-Freedom would be at a significant (but unquantified) competitive disadvantage without Shaw's "self-supply" of fibre backhaul is unsupported, inconsistent with the evidence, and contrary to commercial realities.

168. The Commissioner overstates the importance of Shaw's fibre to Freedom. Freedom's backhaul consists of a combination of owned microwave facilities ([redacted]) and fibre leases [redacted]) from nine wireline operators, including Shaw, at market rates.[180] Of that [redacted] leased fibre backhaul, only [redacted] of its spend is with Shaw.

169. In fiscal 2021, Freedom's backhaul lease costs represented only [redacted] of its annual operating expenses. [redacted] of this is payable to Shaw.[181] The Commissioner's arguments on backhaul concern a relatively modest line item.

170. Freedom will benefit from a lower backhaul cost base. Videotron will acquire all of Freedom's microwave facilities and backhaul leases, such that Freedom will continue to operate under Videotron's ownership in exactly the same manner as it does currently. [redacted]

171. Videotron carefully considered Freedom's backhaul needs in choosing long-term leases over fibre acquisition. In the judgment of its executive leadership, [redacted] rates was clearly preferable to buying. Mr. Lescadres testified that "a long-term transport agreement with necessary protections and favourable pricing provided the data transport we needed for the wireless network but [redacted]

[redacted]." Mr. Drif testified to the [redacted]

[redacted].[183] Neither was challenged in their evidence.

172. Leased backhaul is industry standard. Videotron's decision to seek attractive long-term backhaul leases *in lieu* of acquiring or building out a fibre backhaul network aligns with a ubiquitous industry practice, confirmed by witnesses from Bell, Telus, Rogers, Shaw and Videotron:

(a) Rogers' Chief Technology Officer, Ron McKenzie, testified that "no one operator owns all their assets" and "there's a very healthy wholesale market and availability of last mile", which is used to supply backhaul to wireless cell sites. Rogers leases and supplies fibre access, including over [redacted] circuits to Telus at approximately [redacted]. This was not challenged or contradicted;[184]

(b) Videotron's Mr. Drif explained [redacted];[185]

(c) Distributel's Director of Regulatory Affairs, Christopher Hickey, confirmed that fibre transmission facilities are "readily available" in urban centres from many suppliers, including the telephone and cable companies, as well as Zayo and Beanfield. Distributel chose to lease network access rather than build its own;[186]

(d) Telus' Mr. Benhadid told the Tribunal in his witness statement that "network ownership is critical to wireless network performance and reliability." But on cross-examination, he acknowledged that:

- "Many carriers, including Telus, lease fibre for the purpose of transport and backhaul." Telus spends approximately [redacted] million annually on fibre access from 29 operators. Mr. Benhadid described this as [redacted]";
- This practice of leasing fibre backhaul is "common in the industry", with "many wireline carriers hav[ing] reliable, well-performing networks outside of their wireline footprint"; and
- "Wholesale [backhaul] is an effective tool when available to provide [wireless] footprint" and is "very common in the industry";[187]

(e) Bell's Stephen Howe spoke of "significant advantages [of] deploying a wireless network within your wireline network footprint" in his witness statement—but like Mr. Benhadid, he acknowledged on cross-examination that Bell has high market shares in British Columbia and Alberta, where it has no wireline assets, and Freedom has succeeded as a wireless competitor in urban Ontario, where Shaw has no wireline infrastructure;[188]

(f) Mr. English and Mr. McAleese both testified that backhaul arrangements are readily available in Canada and are commonplace.[189]

173. The Commissioner knows this. Telus executives told him at the June 2021 meeting that [redacted]." As excerpted above, notes from Bureau staff make this clear.[190]

174. <u>CRTC decided to forbear from regulating backhaul given the healthy, competitive market.</u> As the expert regulator in the field of telecommunications, the CRTC made the reasoned policy decision *not* to regulate wireline transport market due to the "high incidence of competitor self-supply or alternative supply of fibre-based access and transport facilities", "demonstrat[ing] the existence of competition in the upstream market for such facilities."[191] The CRTC's decision to forbear from backhaul/transport regulation is a "polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake."[192] It is owed deference.

175. Yet the Commissioner asks the Tribunal to second-guess this policy choice and to find that backhaul leases will weaken Freedom and damage competition in the wireless market. Respectfully, this is not consistent with the deference owed to the CRTC on matters within the core of its jurisdiction and expertise. Accepting his position would undermine over a decade of industrial policy aimed at encouraging shared fibre resources.

176. The suggestion that leased backhaul is disadvantageous to ownership is wrong and flies in the face of market realities. In an efficient market, a wireless operator can make a rational decision to lease rather than build or acquire fibre when existing fibre providers have capacity that they rent at attractive rates. That is consistent with Videotron's business plan and its experience in Abitibi where it leases [redacted].[193]

iii. No Harm from Videotron's Reliance on TPIA for Bundled Services

177. The Commissioner suggests that Videotron will "not have the incentive nor the ability" to profitably offer competitive bundled plans and that "the cost structure of owned wireline cannot be replicated through TPIA."[194] This claim cannot succeed in the face of the Videotron's detailed and fully costed plans, which are uncontradicted. As with the Commissioner's arguments on backhaul, it also amounts to an improper collateral attack on the CRTC's regulatory framework.

178. There is no basis to second-guess the CRTC's framework on TPIA. It was instituted decades ago to promote competition, efficiency, and affordability. The most recent rates were set following a rigorous costing process aimed at "provid[ing] Canadians with more choice for high-speed connectivity" and "driv[ing] competition" to bring "high-quality telecommunications networks, innovative service offerings, and reasonable prices for consumers." These rates were found to be "just and reasonable" under s. 27 of the *Telecommunications Act*.[195] As with the CRTC's determination on backhaul, its regulation of TPIA commands strong deference.

179. The TPIA framework is successful in meeting the CRTC's objectives. Collectively, TPIA resellers—like Distributel, VMedia and TekSavvy—provide internet to over 1.3 million households nationwide. The Bureau has described them as "fulfill[ing] a meaningful competitive presence in the marketplace" and acting "as an alternative for countless others, who use the presence of wholesale-based competitors to negotiate better terms from other competitors in the

marketplace."[196] This has not gone unnoticed by incumbent wireline operators. Bell, Telus and Videotron have each taken steps to enter the TPIA markets outside their wireline footprints, through the acquisition of Distributel (Bell), VMedia (Videotron) and, in [redacted].[197]

180. Videotron will use TPIA to offer wireline services at competitive prices in the West and Ontario, "at least [redacted]% below comparable wireline services offered by Telus, Bell and Rogers."[198]

181. Mr. Davies has no basis to question the TPIA framework. He admitted on cross-examination that he was not aware of "the specifics of [the CRTC's] remit" and could not recall what TPIA stands for. The Commissioner engaged Videotron to brief him because "he does not have detailed knowledge of the Canadian network infrastructure or practical knowledge of wholesale access in Canada." Still, Mr. Davies felt entitled to call into question the CRTC's policy determination regarding TPIA.[199]

182. Videotron gets a [redacted] if it exceeds 200,000 subscribers. Mr. Lescadres explained that this [redacted] gives Videotron a "big advantage on that side of the business." Bell's CEO noted his "[redacted]" about precisely this outcome in an email to other Bell executives:

[redacted]

183. Videotron has succeeded as a TPIA reseller in Abitibi. Videotron began operating TPIA services in Abitibi on the Bell network, without a volume discount. Within two years, Videotron has taken a [redacted]% share of this market, with prices up to [redacted]% cheaper than Bell. Mr. Lescadres testified that this "exceeded [Videotron's] expectations" and "confirmed management's belief in Videotron's ability to provide wireline services under the TPIA framework."[201]

184. The Commissioner's only response was to downplay this success as applicable only to a [redacted]", but Mr. Lescadres was unequivocal that Videotron's TPIA foray in Abitibi was "[redacted]" and earned "a [redacted]."[202]

185. Distributel's evidence on TPIA margins is not relevant to Videotron. Mr. Hickey testified that "it would not be feasible to use Shaw's regulated wholesale services" to bundle "as doing so would result in insufficient or negative margins." But his evidence was flawed in two key ways:

(a) First, he only spoke to the ability of Distributel (not Videotron) to offer attractive and financially viable bundles. In answer to a question from the Chief Justice, he acknowledged that he "d[id] not know any of the terms" of the Definitive Agreement" and "wouldn't be able to speak to or address [those] issues";

(b) Second, Mr. Hickey's evidence was contradicted by [redacted]."[203]

186. Videotron will increase the number of competitive bundles in British Columbia, Alberta, and Ontario. Today, there are only two bundled options in the West: Telus and Shaw Mobile, the latter of which does not offer 5G. Again, if the Transaction is approved, consumers can choose between three bundled offerings—Telus, Rogers, and Videotron—all of which will have 5G.

187. The Commissioner fails to appreciate this manifestly pro-competitive outcome. After four weeks of trial, he cannot answer why Videotron should be precluded from building upon Freedom's success and capitalizing upon the TPIA framework implemented by the CRTC for the very purpose of increasing competition, using hard-bargained rates it secured from Rogers.

188. At best, he can say that the operating costs of the wireline aspect of Videotron's bundle will be higher than Shaw's. But, this completely misses the point: Videotron is not proposing to replicate Shaw Mobile's bundle. It will offer a cheaper bundle—priced [redacted]—to disrupt the market and aggressively expand its market share. Mr. Lescadres testified that Videotron is [redacted].[204] And, Videotron does not have the high cost of wireline ownership to maintain. Dr. Israel explained that this is exactly what he would expect from Videotron: offering at-cost TPIA service as a low-risk way to attract wireless customers on a network with excess capacity.[205] This is a win for consumers.

iv. No Material Benefits from Access to Shaw's Go Wi-Fi Network

189. The Commissioner claims that post-Transaction Freedom will lose the benefit of Shaw's "Home Hotspot" network and will become "dependent" on Rogers for access to Shaw's public network of Go Wi-Fi hotspots. His claim grossly overstates the benefits of this service.

190. Go Wi-Fi allows Shaw and Freedom subscribers to authenticate automatically to a network of public hotspots (*i.e.* in shopping centres, areas, malls and restaurants) and residential hotspots (*i.e.* subscribers' home internet modems). Automatic access to Shaw's public hotspot network is available to any user who signs into the wi-fi connection from their mobile device. Non-Shaw subscribers can also connect to Shaw's network of wi-fi hotspots, but only if they manually authenticate. Rogers' President of Integration, Dean Prevost, described this as a "[redacted]

[redacted]

191. Mr. McAleese and Mr. English both testified that Shaw's network of hotspots uses legacy technology developed more than a decade ago, performs poorly, and is now used much less by consumers who can instead take advantage of ubiquitous unlimited data plans. They also testified that the network of hotspots is not used for "offload" purposes, or to operate Freedom's wireless network.[207]

192. Videotron [redacted]

194. Rogers has decided to keep the Go Wi-Fi service and hotspot network post-close, and maintain it for Freedom and Videotron subscribers [redacted]. Mr. Lescadres' unchallenged evidence is that Videotron "[redacted]."[210] Under the Definitive Agreement, [redacted].

195. As for the "Home Hotspot" network, the Commissioner's concerns regarding "offloading" are contrary to the evidence. The Home Hotspot network provides no meaningful offloading benefits:

(a) [redacted]

(b) Because of the minimal Go Wi-Fi usage of Freedom subscribers, Rogers' industry expert Kenneth Martin, determined that, on Mr. Davies' own evidence, the value of offload is minimal;[214]

(c) Home Hotspot traffic can easily be offloaded in other ways. [redacted];[215] and

(d) Videotron determined that the Home Hotspots were not important to Videotron post-closing. Mr. Drif testified: « [redacted][216]

[redacted]

v. No "Dependency" from Definitive Agreements & Network Access Rights

198. A persistent theme in the Commissioner's case is the alleged "dependency" he says Videotron will have on Rogers, due to the network access rights it secured at its option. He asks the Tribunal to accept his own views about the way wireless businesses work. He asks the Tribunal to reject the reasoned judgment of Videotron's executives, who committed a $2.85 billion after extensive due diligence, with billions more to come. He asks the Tribunal to embrace the witness statements of Bell and Telus, revealed to be at odds with the market, their businesses and internal documents they fought to keep from the Tribunal.

199. Full faith and credit should be given to Videotron's business judgment as to the assets and rights necessary to ensure its long-term viability. It represents the culmination of over a decade-long ambition for national expansion. It is to be accorded much deference—particularly given its consistency with standard industry an regulatory practice and the business realities in which new Freedom will operate.

200. Network access agreements are industry-standard. No Canadian carrier owns all of the infrastructure necessary to provide wireless services. Network access agreements are integral to the business model of every carrier for roaming (which is mandatory under ISED regulations) and for backhaul (for which no carrier can self-supply). There is nothing unusual about Videotron's decision to procure these network access services by contract and not to incur the significant upfront investment of purchasing or building an entire wireline network.

201. Freedom's larger post-Transaction footprint means less reliance on roaming contracts. At present, Videotron uses roaming agreements outside its wireless footprint in Quebec and Eastern Ontario, and Freedom uses roaming agreements outside its footprint in British Columbia, Alberta, and Ontario. The combined Videotron-Freedom will have a network across Canada's four most

populous provinces, meaning that subscribers will not need to roam in those provinces. Coupled with [redacted] on the Rogers network, the Definitive Agreement places Videotron-Freedom in a much better competitive position.[219]

202. Network access services are "no obligation", and entirely at Videotron's option. Nothing in the parties' agreement requires Videotron to purchase backhaul, roaming, or TPIA from Rogers. While these services are available to Videotron at [redacted] Videotron has the option to procure them from other parties or build out its own network for self-supply. [redacted].

203. The Definitive Agreement was extensively negotiated by sophisticated parties. Mr. Lescadres detailed the negotiations leading up to the Definitive Agreement, including Videotron's insistence on securing terms it judged necessary to operate Freedom competitively. The Commissioner did not challenge this evidence on cross-examination.

204. Videotron is perfectly capable of competing vigorously with network access agreements. [redacted] In 2021, it commenced proceedings against Rogers to assert its claimed rights under that agreement. While Mr. Lescadres [redacted],[221] it shows that Videotron has asserted itself when it perceives unfair treatment.

205. The Definitive Agreement contains [redacted]

206. Outside contractual dispute resolution, market participants already have recourse to the CRTC, to which Parliament granted broad powers to sanction problematic market behaviour:

(a) The Commissioner put to Mr. Martin (but not to any Rogers fact witness) a CRTC decision from 2014 in which Rogers was fined, in an effort to prove the potential for dominance over Videotron. But that decision and others like it prove the opposite: the existence of a strong regulatory framework.[223]

(b) The Commissioner did not point to a more recent decision in June 2022 in which the CRTC imposed a $7.5 million penalty on Bell for denying Videotron access to support structures. Nor did he refer to an August 2020 decision in which the CRTC found that Telus engaged in unjust discrimination by deliberately reducing the ability to complete calls to the Canadian Territories.[224] These decisions demonstrate that the CRTC regularly and effectively exercises enforcement powers to ensure market participants act in accordance with their obligations.

207. Bell & Telus Network Sharing Agreement: The Commissioner has never challenged the Bell/Telus wireless network sharing agreement as giving rise to inappropriate "dependency." Since as early as 2001, Bell and Telus have been partners in a long-term contractual relationship that creates a single nationwide wireless radio access network. This is the only national network sharing partnership in Canada of its kind and provides obvious competitive advantages to Bell and Telus:

(a) [redacted]

(b) [redacted]

(c) [redacted]

208. The reality is that Bell and Telus are and will remain far more reliant on one another than Videotron will ever be on Rogers. This acknowledged dependency appears to have been lost on the Commissioner, who has never scrutinized Bell and Telus' arrangement.

vi. Rogers Will Have the Same Incentive as Shaw to Offer Attractive Bundles

209. The Commissioner argues that Rogers will have reduced incentives to offer the attractive bundled services that Shaw Mobile does. This too is contrary to the evidence and market realities.

210. Post-closing, Rogers will face even greater competitive pressures in British Columbia and Alberta than those that led Shaw to introduce Shaw Mobile. The entry of Videotron's bundled products, at lower prices, will challenge Rogers more than Shaw is currently challenged. If Rogers fails to replicate any "disruptive" force that Shaw Mobile played, it risks losing its most valuable wireline subscribers. Dr. Israel's evidence was unchallenged that "[a]s a matter of economics, it would not make sense for Rogers to pay many billions of dollars to acquire Shaw's wireline business just to see its newly acquired subscribers migrate to Telus."[228]

211. [redacted]

212. The Transaction will be better for Shaw Mobile subscribers who will move to Rogers' superior network—a source of consumer surplus that Dr. Miller failed to account for. On cross-

examination, he acknowledged that (a) the "non-price" parameter in his model captures the quality of the wireless product; (b) Rogers' product is higher quality than Freedom's; and (c) his model did not adjust the quality parameter as it relates to the transfer of Shaw Mobile's 450,000 subscribers on to Rogers' superior network. Dr. Miller wrongly assumes that, post-Transaction, these subscribers will remain on Shaw's inferior network when the evidence is that they will enjoy a better product under Rogers.[230]

vii. Rogers' Network Outage Has No Bearing on the Tribunal's Task

213. The time spent by the Commissioner on Rogers' July 2022 outage—which Member Askanas rightly described as a "black swan" event—was an unfortunate distraction. It has no bearing on the Transaction or the landscape for wireless competition. It is in the exclusive jurisdiction of the CRTC, which has been fully responsive. If anything, Rogers' commitments to the CRTC and Parliament (which it is now implementing) will ensure a stronger, more resilient network than any other network in Canada. This is a tangible benefit to consumers.

214. The commercial reality is that outages can and do occur on even the best designed and most resilient networks. Like Rogers, Bell suffered a significant outage in 2020 that brought down its wireless and wireline services in Quebec and Ontario for several hours. [redacted].

215. But outages typically have "little impact on [wireless] competitive dynamics." Mr. Martin—who has advised ten of the top thirteen telecommunications companies in the U.S.—

testified that most outages occur unexpectedly and resolve quickly. This was confirmed by Rogers' Q3 2022 results, which showed substantial net adds in its wireless business—indicating that the outage is now behind Rogers.[232]

216. Mr. Martin also testified that "it is not typical for consumers to make purchasing decisions based on (much less be aware of) the relationship between wireless providers and their wireline backhaul providers."[233] It is simply not a factor that is relevant to Freedom's competitiveness post-Transaction. The outage was certainly not a concern for Videotron. [redacted]

217. The July outage will not mean less, but *more* reliable, networks. Rogers has committed to physically separate its "common core" currently shared by its wireless and wireline networks. As a result, if either of those networks experiences a system-wide outage, it would not cause material service interruption to the other. Rogers estimates that this is a $250 million investment over at least three years, and would be significantly facilitated by the acquisition of Shaw's wireline network.[235]

218. This is an unprecedented commitment that no other wireless carrier has given. Once complete, Rogers' fully separated IP core will be the industry benchmark, ensuring that its subscribers, customers, and third parties—including Freedom for roaming and backhaul—will access the most robust, redundant, and resilient network in the country.[236] The outcome is manifestly pro-competitive. The Commissioner's cynical attempt to capitalize on the outage was not a high point of this trial. It should be soundly rejected.

E. Commissioner Has Not Established Any Coordinated Effects

219. To meet his burden on coordinated effects, the Commissioner must establish both that the relevant market is susceptible to coordination and that the Transaction substantially increases the likelihood or effectiveness of coordination. He has not done either. Nor has he made any attempt at quantification.

i. Wireless Market Not Susceptible to Coordination

220. As a matter of standard economic theory, and as summarized in the MEGs, a market is only susceptible to coordination if firms (i) individually recognize mutually beneficial terms of coordination; (ii) are able to monitor each other's conduct and detect deviations; and (iii) have credible means of punishing such deviations.[237]

221. As Dr. Israel explained, the market for wireless services does not satisfy these conditions. Coordination is more readily met for commodity products, rather than multidimensional ones like wireless services, where providers compete on network quality, customer service bundling, handset discounts, and roaming rates, and many other factors. Indeed, the Commissioner has been at pains to point out the differences in network quality, customer service, and bundling offers between different carriers. These dimensions of competition make coordination unlikely in this industry.[238] The advent of 5G makes further product differentiation and innovation possible and co-ordination even less likely.

222. In addition, the Commissioner did not call any fact witnesses to provide evidence that the wireless market is coordinated, or elicit evidence from his Bell or Telus witnesses about the characteristics of the wireless market or coordination.

ii. Freedom's Competitiveness Will be Strengthened

223. For the reasons set out above, Freedom will be *stronger* under Videotron. To the extent the wireless market is susceptible to coordination and Freedom has disrupted that coordination, it will be better positioned to be disruptive post-Transaction. Freedom will now be in the hands of Videotron, an experienced and known disruptor. Its network will have significant excess capacity and near-zero network marginal costs. This will incent aggressive competition, similar to what Freedom achieved in 2017 with its Big Gig plans.

224. The Commissioner asserts that Freedom under Videotron will be more susceptible to coordination because Videotron would fear retaliation in its "home market" of Quebec. But this ignores two crucial facts.

(a) Videotron's prices in Quebec are already lower than Bell, Telus, and Rogers, so any attempt to undercut it would cause more harm to those carriers than to Videotron.

(b) Videotron's market share is lower than Bell's and Telus's, and equivalent to Rogers', meaning it has the *least* to lose from any retaliatory price war.

F. Shaw Not A Viable or Effective Competitor in But-For World

225. The Commissioner alleges that [redacted] The evidence proves otherwise. The Tribunal should have a clear-eyed view of the challenges Shaw would face were the Transaction blocked. Mr. Shaw testified that the company cannot survive on its own:

[redacted]

226. The Commissioner sidesteps this evidence by relying on speculation from Mr. Davies, who contended that Shaw is "well positioned to do 5G" (albeit "with some delay") because Shaw will supposedly receive a $1.2 billion break fee from Rogers if the Transaction is blocked, which could be used to purchase the necessary spectrum.[240]

227. [redacted].

228. This cascade of assumptions is untethered from reality. Shaw has no ready path to acquiring 3500 MHz spectrum licences. [redacted]

229. Even if Shaw could find a willing seller of spectrum, its deployment would involve considerable capital costs and take years. [redacted]

230. In the circumstances, Shaw's and Freedom's wireless offerings will become less competitive if the Transaction is blocked. 5G services are now available from the Big 3 to

approximately 70% of the Canadian population, including in all of Ontario, Alberta and British Columbia.[248] Freedom is thus "an outlier in not having 5G capability."[249] As Mr. Verma confirmed in his evidence, the inability of Freedom to offer 5G has "served as a significant competitive deterrent."[250] Mr. Kirby agreed.[251]

231. To make matters worse, without being able to provide 5G, Shaw risks losing the ability to sell the iPhone. Each new iPhone model since 2020 has been 5G capable—so long as the device is operating on a 5G network. [redacted] The consequences to Freedom associated with losing the right to sell iPhones would be "an existential event" and a "major setback."[253]

232. The challenges Shaw faces in the "but for" world contrast dramatically with Videotron's position in the post-merger world. Whereas Shaw's wireless business has not been cash flow positive, Videotron can immediately generate free cash flow to lower prices and invest in 5G because of the low purchase price. Whereas Shaw has an uncertain path to 5G, Videotron has 3500 MHz spectrum. Whereas Shaw needs to invest significantly in its wireline network, Videotron can compete under the TPIA framework without further up-front investments.

PART VIII - TRANSACTION WILL GENERATE SIGNIFICANT EFFICIENCIES

233. The efficiencies defence need not be considered because the transaction is clearly pro-competitive. But if the Tribunal accepts Dr. Miller's analysis, the respondents have proven cognizable productive efficiencies of at least [redacted] million per year, overwhelming any alleged anti-competitive effects. The efficiencies are transaction-specific and would be lost in the event of an order blocking the Transaction.

A. Efficiencies Evidence Amply Meets Canadian Requirements

234. The evidence of Rogers and Videotron demonstrates the nature, magnitude and likelihood of their forecasted efficiencies. The cognizable efficiencies are supported by ordinary course documents (integration plans, management consultant studies and accounting statements) and evidence from key Rogers and Videotron personnel, consistent with the MEGs[254], the Commissioner's guidance[255] and the jurisprudence.[256] Rogers' efficiencies expert, Andrew Harington, quantified the likely productive efficiencies, as he has done in multiple proceedings before this Tribunal acting for both the Commissioner and merging parties.[257]

235. The quantified cognizable efficiencies are conservative and likely to be achieved. Ms. Fabiano testified that Rogers' senior leadership will be measured against their synergy plans and therefore they "want to under promise and overdeliver."[258]

236. The U.S.-based approach to efficiencies advocated by the Commissioner and his expert, Professor Mark Zmijewsky, should be rejected. He has never testified before this Tribunal[259] , was unfamiliar with aspects of the defence[260], and admitted he had never been qualified as an expert in efficiencies "anywhere".[261] Prof. Zmijewsky did not disclose in his report that he developed his methodology over 20 years ago to be consistent with the U.S. Horizontal Merger Guidelines ("**HMG**").[262] Instead, he implied in his report that his methodology was based on the MEGs and claimed that he used them as his "framework".[263] On cross-examination, he admitted that his methodology is not based on the MEGs, but the HMG instead, relying heavily on U.S. principles.[264] He also admitted that the Commissioner had not brought to his attention to *Superior III*, which addressed the differences between the U.S. and Canadian approaches:[265]

> The Tribunal does not criticize the American antitrust regime, but it notes that it is the result of circumstances, policies, and judicial interpretation of the pertinent statutes that are unique to the United

> States. The opinions of American commentators on Canada's Act, whether cited by the Court or by the Commissioner, should be seen in the context of historical and continuing hostility toward efficiencies in merger review in the United States.
>
> . . . The adoption of the American approach to efficiencies under the Act would, without question, introduce the hostility that characterizes that approach.[266]

237. Prof. Zmijewsky's methodology does not reflect this Tribunal's approach to efficiencies, and it yields impractical and unlikely outcomes. This Tribunal should favour Mr. Harington's evidence and Prof. Zmijewsky's evidence should be given no weight.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

PART IX - EFFICIENCIES OVERWHELM ALLEGED HARM

249. The efficiencies the Transaction will generate—at least [redacted] million per year in productive efficiencies alone—overwhelm even Dr. Miller's alleged anti-competitive effects, regardless of whether the Tribunal adopts a Total Surplus or a Balancing Weights approach.

250. Taking into account the specific benefits to low-income consumers (discussed below), and applying even the highest weight available on the evidence, yields a quantum of harm that is less

than the efficiencies *conceded* by the Commissioner's expert, Prof. Zmijewski. And that is without accounting for any of the flaws in Dr. Miller's analysis.

A. No Reason to Depart from Total Surplus Standard

251. The Total Surplus Standard is the default approach for conducting the trade-off between efficiencies and effects. The Commissioner must demonstrate a good reason to depart from that approach and he cannot do so here.

252. In *Superior Propane*, the Tribunal applied a balancing weights approach because some low-income Canadians purchased propane as a necessity to heat their homes and would have no alternative but to pay higher prices post-transaction to a monopolist supplier.[295] There is no similar rationale in this case.

253. First, the "necessary" component of wireless service was defined by the CRTC in Telecom Regulatory Policy 2021-130, which mandated large carriers, including Rogers, to offer plans with certain features for a maximum of $35 per month.[296] The CRTC concluded these plans would "enable Canadians to participate in the digital economy," allow cell phones to be "used as substitutes for landline telephones," and be "*responsive to a consumer's most significant needs*."[297]

254. The Transaction will have no impact on the availability or price of necessary wireless services, which will remain available to all Canadians at a fixed price of $35 per month.

255. Second, the Commissioner's own expert predicts that Freedom's prices will go *down* by 15-17% in British Columbia and Alberta as a result of the transaction.[298] The uncontested evidence from the Commissioner's own witnesses is that Freedom caters primarily to a lower-income market segment, and lower-income consumers are likely to choose the lowest-price option, which

is Freedom.[299] The evidence is clear that low-income consumers will be *better off* as a result of the transaction, and markedly so.

256. [redacted]

258. The Commissioner did not lead any contrary fact or expert evidence and did not cross-examine Mr. Prevost or Dr. Israel on these points. The unchallenged evidence is that this Transaction will bring significant benefits to low-income consumers.

B. Weight on Consumer Surplus is Small

259. In *Superior III*, the Tribunal set out the following balancing weights formula, where CS is the loss in consumer surplus, PS is the gain in producer surplus, EF is the efficiencies generated by the transaction, and *w* is the weighting to be applied to consumer surplus loss:

$$w*CS + (PS + EF) = X$$

260. If X is greater than zero, then the efficiencies are greater than and will offset even the weighted effects and, pursuant to s. 96 of the *Act*, the transaction will not be blocked.[303]

i. Expert Evidence

261. The Tribunal made clear in *Superior III* that if the Commissioner intends to advocate for a balancing weights approach, he must adduce expert evidence on how to calculate the appropriate weight.[304] The Commissioner has failed to do so.

262. The Commissioner's expert, Dr. Lars Osberg, addressed the relative consumption of wireless services and predicted shareholdings in the combined Rogers/Shaw across income distributions, but did not attempt to establish a basis for any weighting. Similarly, Dr. Katherine Cuff discussed the Canadian income tax system and its progressivity across different income groups, but acknowledged that she had not been asked to calculate, and did not calculate, the weighting that can be inferred from the tax system.[305]

263. Dr. Cuff also acknowledged that there are two standard approaches for inferring distributional weights from the income tax system, that Rogers' expert, Dr. Michael Smart, had used one of those two approaches (the inverted optimum method), and that no other expert in this case had used the others.[306] Thus, the only evidence, expert or otherwise, on the appropriate balancing weight comes from Dr. Smart.

264. There is no foundation, expert or otherwise, for the Commissioner's approach to balancing weights or "socially adverse transfer", as reflected in the spreadsheet he submitted to the Tribunal on November 16, 2022. In particular, his approach is not supported, or even commented on, by any of his experts, and Drs. Smart, Israel, Ware, and Shaw's expert, Dr. David Evans, explained that it is economically incoherent and contrary to well-established economic principles.

ii. The Appropriate Weight

265. The Commissioner appears to take the position that the weighting on consumer surplus should apply across the entire income distribution, as opposed to only low-income consumers. There is no precedent or support for the Commissioner's approach and it invites the Tribunal to engage in a micro-redistribution exercise that ignores income mobility over time.

266. There is no basis to depart from the approach in *Superior III*, which applied the weighting only to the bottom 20% of the income distribution. This yields an overall weight on consumer surplus of 1.23. If the entire income distribution is considered, the weight rises slightly to 1.32.

iii. Applying the Weight

267. Dr. Osberg acknowledged that the balancing weights exercise should take into account the benefits to consumers the Transaction will generate.[307] [redacted]

268. Taking the Commissioner's case at its highest and applying it to the formula yields:

[redacted]

269. As a result, the respondents need only establish [redacted] million in efficiencies for the Transaction to be allowed, or [redacted] million if the higher weight of 1.32 is used. Both are well below the amount of efficiencies *conceded* by Dr. Zmijewski of [redacted] million per year.[308] If the Total Surplus Standard is used, no efficiencies are needed at all. Calculations using different inputs are set out in **Appendix 5**.

PART X - ORDER REQUESTED

270. The respondents respectfully ask that the Tribunal dismiss the Application with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of December, 2022

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel to Rogers Communications Inc.

DAVIES WARD PHILLIPS & VINEBERG LLP
Counsel to Shaw Communications Inc.

BENNETT JONES LLP
Counsel to Videotron Ltd.

[1] Transcript, Day 18 (Dec. 1), pp. 4644:23-4645:5 (Israel Cross).

[2] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 59(a); Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 14 & 19.

[3] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 12. See also: Transcript, Day 10 (Nov. 21), pp. 2616:18-2617:15, 2621:7-2622:20 (English Chief); Transcript, Day 11 (Nov. 22) pp. 2685:15-2687:4 (English Cross); Transcript, Day 11 (Nov. 23), p. 2893:8-25 (McAleese Chief).

[4] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 223-224.

[5] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 227, Exhibit 78, pp. 2785, 2965.

[6] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 223-224, 227; Transcript, Day 12 (Nov. 23), pp. 3120:17-3121:21 (McAleese Panel Questions).

[7] Ex. C-R-190, Amended Witness Statement of Rod Davies (September 23, 2022), Exhibit 1, p. 52; Transcript, Day 10 (Nov. 22), pp. 2617:16-2619:15 (English Chief).

[8] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 65; Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 11 & 13.

[9] Transcript, Day 4, pp. 922:3-923:5 (Kirby Cross).

[10] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 105-106, 115, 120. Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), paras. 96-97.

[11] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 65; Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 11.

[12] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 65; Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 11 & 13.

[13] Transcript, Day 10 (Nov. 21), pp. 2613:6-2614:4; pp. 2617:16-2619:15 (English Chief); Transcript Day 11 (Nov. 22), pp. 2682:6-2683:2, 2688:6-2689:20 (English Cross).

[14] Transcript, Day 10 (Nov. 21), pp. 2613:6-2614:4; pp. 2617:16-2619:15 (English Chief); Day 11 (Nov. 22), pp. 2682:6-2683:2, 2688:6-2689:20 (English Cross).

[15] Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), para. 115; Ex. CA-R-198, Amended Witness Statement of Brad Shaw (September 23, 2022), para. 27; Ex. CA-R-190, Witness Statement of Rod Davies (September 23, 2022), para. 17.

[16] Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), paras. 115-116; Ex. CA-R-198, Amended Witness Statement of Brad Shaw (September 23, 2022), paras. 27 & 34; Ex. CA-R-190, Witness Statement of Rod Davies (September 23, 2022), paras. 17 & 44.

[17] Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), para. 126.

[18] Ex. CA-R-198, Amended Witness Statement of Brad Shaw (September 23, 2022), paras. 35-40. Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), Exhibit 35, p. 49.

[19] Transcript, Day 3 (Nov. 9), p.775:2-777:2 (Kirby Cross).

[20] Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), paras. 72-73.

[21] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), Exhibit 160.

[22] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), paras. 105-106.

[23] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 55.

[24] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 64.

[25] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 136(b).

[26] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 136(a).

[27] Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), para. 84; Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 136(c).

[28] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 156.

[29] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 64.

[30] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 138.

[31] Ex. P-I-0145, Witness Statement of Jean-François Lescadres – Public (September 23, 2022), para. 3.

[32] Ex. P-I-0145, Witness Statement of Jean-François Lescadres – Public (September 23, 2022), para. 4.

[33] Ex. P-I-0160, Witness Statement of Pierre Karl Péladeau–Public (September 23, 2022) para. 23.

[34] Transcript, Day 4 (Nov. 10), p. 860:5-12 (Kirby Cross).

[35] Ex. CA-R-212, Responding Witness Statement of Dean Prevost (October 20, 2022), Exhibit 15, slide 2.

[36] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 5; CA-R-212, Responding Witness Statement of Dean Prevost (October 20, 2022), para. 63.

[37] Transcript, Day 9 (Nov. 18), p. 2335:8-18 (Lescadres Panel Question); Ex. CA-I-159, Witness Statement of Pierre-Karl Péladeau (September 23, 2022), paras. 15; Ex. P-R-008, Statement from Minister Champagne on competitiveness in the telecom sector dated October 25, 2022.

[38] Transcript, Day 2 (Nov. 8), pp. 486:14-10; p. 496 :18-22 (Verma Cross); Day 3 (Nov. 9), p. 536:10-25; p. 538:12-25 (Dhamani Cross).

[39] Transcript, Day 9 (Nov. 18), p. 2336:6-15 (Lescadres Panel Question).

[40] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 66.

[41] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 7.

[42] Ex. P-R-0009, Statement from Pierre-Karl Péladeau in response to the Minister's statement October 25, 2022.

[43] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 193.

[44] Transcript, Day 9 (Nov. 18), pp. 2172:3-2173:21 (Lescadres Chief).

[45] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), paras. 108-112.

[46] Ex. CA-I-0146, Responding Witness Statement of Jean-Francois Lescadres (October 20, 2022), para. 39.

[47] Ex. C-A-146, Responding Witness Statement of Jean-Francois Lescadres (October 20, 2022), paras. 56-58.

[48] Ex. P-I-0145, Witness Statement of Jean-François Lescadres – Public (September 23, 2022), para. 133.

[49] Transcript, Day 9 (Nov. 18), pp. 2163:1-2164:7 (Lescadres Chief).

[50] These include (i) Videotron's projected wireless subscriber growth and market share estimates; (ii) Videotron's projected ARPU figures; (iii) [redacted] (iv) Videotron's plan to roll out 5G, the timing of that roll out or Videotron's 10-year capital expenditure plan to support the roll out; (v) Videotron's projected wireline subscriber growth under the TPIA regime or the detailed cost breakdown for providing those services contained in its financial model; (vi) Videotron's projected cost savings with respect to roaming, including its estimates of future data usage; (vii) Videotron's projected cost savings related to handset manufacturers, or the increased rebates and marketing supports that it will receive as a national carrier; and (viii) Videotron's projected cost savings and the improved quality of service for customers in Eastern Ontario owing to the combination of the Freedom and Videotron networks and spectrum assets in that region.

[51] Transcript, Day 10 (Nov. 21), pp. 2368:22-2372:20 (Drif Chief).

[52] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres – (September 23, 2022), Exhibit 27, p. 895.

[53] Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), para. 49.

[54] Ex. CA-R-0232, Witness Statement of Kenneth Martin (September 23, 2022), para. 72.

[55] Ex. ID-034 (ABD #202456), Telus market contact meeting, 6 June 9, 2021, slide 4 (emphasis added); Ex. CA-R-0022, Summary of Bureau-TELUS call June 9, 2021 - Conf. A, pp.1-3.

[56] Ex. ID-027 (ABD # 201108), BCE Submission to Competition Bureau dated December 29, 2021, paras.9-10; Ex. ID-014 (ABD # 205028), Telus Submission to Bureau dated 6 December 3, 2021, pp. 4-5.

[57] Ex. CA-R-085, Email dated May 27, 2021 from M. Bibic to B. Kirby and others.

[58] Ex. CA-R-080, Post Sea Response Plan Update to BCE Board of Directors August 4, 2022, p.19.

[59] Ex. CA-I-083, Email re Vidéotron could take Fizz national as an MVNO dated September 17, 2020.

[60] Ex. ID-030 (ABD #100922), Redacted Telus Board presentation dated 11 August 4, 2022, slide 5.

[61] Ex. CA-R-059, Notes from February 13, 2021, internal Telus war games session, p.7.

[62] Ex. CA-R-067, E–mail from J. Bajic to internal recipients dated March 22, 2021, p.1; Ex. ID-030 (ABD #100922), Redacted Telus Board presentation dated 11 August 4, 2022, slide 3.

[63] Transcript, Day 4 (Nov. 10), p. 812:9-16, p.883:1-885:2 (Kirby Cross).

[64] Transcript, Day 4 (Nov. 10), pp.922:3-923:5 (Kirby Cross).

[65] Ex. CA-A-0111, Witness Statement of Stephen Howe (Bell) (September 23, 2022), para. 17; Transcript Day 6 (Nov. 15), pp.1331:17-1332:6, pp.1358:23-1359:8, p. 1363:10-17, pp.1389:22-1393:21 (Howe Cross).

[66] Ex. CA-R-102, E-mail exchange between Mr. Benhadid and Mr. Amery re Competition Bureau prep dated June 2-4, 202; Transcript Day 5 (Nov. 14), p.1150:2-20, pp.1173:22-1174:15 (Benhadid Cross).

[67] Transcript, Day 3 (Nov.9), pp. 572:14-574:25, pp.580:1-583:14, p.640:3-17, p.685:2-11, pp .696:1 - 700:13 (Casey Cross).

[68] *Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6, para. 68, rev'd on other grounds in 2018 FCA 24; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2004 Comp. Trib. 2, paras. 62-64.

[69]*Competition Act*, R.S.C., 1985, c. C-34, s. 1.1.

[70] Commissioner's Written Opening, paras. 185-188.

[71] Commissioner's Written Opening, paras. 69, 83-84.

[72] Commissioner's Written Opening, para. 189.

[73] *Tervita Corporation v. Canada (Commissioner of Competition*), 2013 FCA 28 paras. 107-109, *reversed on other grounds*, 2015 SCC 3, para. 193 (Karakatsanis J, dissenting, but not on this point). See also *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18, paras. 18, 179 & 180.

[74] *Tervita Corporation v. Canada (Commissioner of Competition*), 2013 FCA 28 paras. 107-109, *reversed on other grounds*, 2015 SCC 3, para. 193 (Karakatsanis J, dissenting, but not on this point). See also *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18, paras. 18, 179 & 180.

[75] *Canada (Director of Investigation and Research) v. Southam Inc.*, (1992) 43 C.P.R. (3d) 161 (Comp. Trib.), affirmed [1995] 3 F.C. 557 (C.A.), affirmed as to remedy, [1997] 1 S.C.R. 748 (SCC); *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd*, (1992), 41 C.P.R. (3d) 289 (Comp. Trib.); *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15 (Superior Propane #1)

and , *Commissioner of Competition v. Superior Propane Inc.*, 2001 FCA 104 (Superior Propane #2); *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib.3; *Tervita Corporation v. Canada (Commissioner of Competition*), 2015 SCC 3.

[76] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, paras. 14, 89; *The Commissioner of Competition v. Canadian Waste Services Holdings Inc*. (Remedy), 2001 Comp. Trib. 34 , para. 4.

[77] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, paras. 83-89.

[78] Rogers' Written Opening, para. 22, see also: Shaw's Written Opening, para. 4.

[79] *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd*, (1992), 41 C.P.R. (3d) 289 (Comp. Trib.), paras. 4, 5, 14-22, 44, 94, 137, 141 & 157-165.

[80] *Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2004 Comp. Trib. 10, paras. 1-4 & 18-38.

[81] *FTC v. Arch Coal, Inc.*, No. 1:04-cv-00534, ECF No. 67 (D.D.C. July 7, 2004) at pp. 2-5 & 7-8 (emphasis added).

[82] *In re Otto Bock HealthCare North America, Inc.*, 2019 FTC LEXIS 79 at p. [*126].

[83] Ex. P-R-0008, Statement from Minister Champagne on competitiveness in the telecom sector dated October 25, 2022, p. 1.

[84] *Tervita Corporation. v. Canada (Commissioner of Competition)*, 2015 SCC 3, para. 61.

[85] Commissioner's Notice of Application, paras. 90-93.

[86] Commissioner's Written Opening, para. 9.

[87] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 311-326.

[88] *Tervita Corporation v. Canada (Commissioner of Competition*), 2015 SCC 3, paras. 52 & 53.

[89] *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, para. 369 (Concurring reasons by Crampton C.J.), *rev'd on other grounds* 2015 SCC 3.

[90] *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18, para. 465 (emphasis added).

[91] *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 SCR 161, Factum of the Commissioner of Competition, paras. 44-47.

[92] Commissioner's Written Opening, para. 83.

[93] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, paras. 46-48.

[94] Commissioner's Written Opening, paras. 186-189.

[95] *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 34.

[96] *Canada (Commissioner of Competition) v. Sears Canada Inc.*, 2005 Comp. Trib. 2 para. 248.

[97] *Canada (Commissioner of Competition) v. Sears Canada Inc.*, 2005 Comp. Trib. 2, para. 249.

[98] See for example, Transcript, Day 18 (Dec. 1), pp. 4633:9-4634:15 (Israel Cross), Mr. Tyhurst: "…we're just going to let [the document] speak for itself". See also Transcript, Day 16 (Nov. 29), pp. 4240:21-4244:6 (Johnson Cross), Mr. Bitran presented a Rogers document to Shaw's expert, Mr. Johnson, without having shown the same document to any of Rogers' fact witnesses.

[99] *Green v Canada (Treasury Board)* (2000), 254 NR 48 (FCA), para 25.

[100] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1992] C.C.T.D. No. 7, rev'd [1995] 3 FC 557 (CA), rev'd [1997] 1 S.C.R. 748. *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd*., 1992 CanLII 2092 (CT). *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, remitted for redetermination by the FCA, 2001 FCA 104, confirmed 2002 Comp. Trib. 16, aff'd 2003 FCA 53. *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, aff'd 2003 FCA 131, leave to appeal to the SCC ref'd [2004] 1 S.C.R. vii. *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, aff'd (*sub nominee Tervita Corporation v. Commissioner of Competition*), 2013 FCA 28, rev'd 2015 SCC 3. *Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18.

[101] Ex. CA-A-0122, Expert Report of Nathan H. Miller (September 23, 2022), para. 229.

[102] Ex. CA-A-0137, Presentation of Michael AM Davies, p. 39.

[103] Transcript, Day 17 (Nov. 30), p. 4425 (Israel Chief).

[104] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 136.

[105] Ex. PR-R-0194, Amended Witness Statement of Trevor English (September 23, 2022), paras. 102-110.

[106] Exhibit P-R-0071, Telus Press Release Issued March 31, 2021. Exhibit CA-R-0080, Bell presentation, "Post Sea Response Update to BCE's Board of Directors" dated August 4, 2022, p. 21; Kirby Testimony, Transcript, vol. 4, pp. 808:14-818:9; Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), para 87(c).

[107] Exhibit CA-R-072, TELUS presentation, Rogers' Planned Acquisition of Shaw May Board Strategy Discussion May 5, 2021, p. 3**;** Transcript, Day 3, p. 640:18-641:17 (Casey Cross).

[108] Exhibit CA-R-0080, Bell presentation, Post Sea Response Update to BCE's Board of Directors dated August 4, 2022, Slides 18, 21.

[109] *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, para. 367. *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, para 54.

[110] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, paras. 470 – 475.

[111] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, para. 519

[112] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, para. 518.

[113] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres – (September 23, 2022), paras. 7(d) & 184-185.

[114] Transcript, Day 7 (Nov. 16), pp. 1640:15-1642:14 (Miller Cross). .

[115] Exhibit CA-R-0080, Bell presentation, "Post Sea Response Update to BCE's Board of Directors" dated August 4, 2022. Transcript, Day 4 (Nov. 10), p. 801:19-804:16 (Kirby Cross).

[116] Transcript, Day 6 (Nov. 15), pp. 1522-1524 (Miller Cross).

[117] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 10.

[118] [redacted]. See Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Table 3.

[119] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 236, 243, 245, Exhibits 88, 94; Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 88; Miller Testimony, Transcript, vol. 7, pp. 1670:14-1672:4.

[120] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 132 (table).

[121] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 292.

[122] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 234, 245, 292, Exhibit 123.

[123] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 117; Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 252.

[124] Ex. CA-I-0144, Lescadres Witness Statement, paras. 61(d), 66, 107-115; see also, Transcript, Day 9 (Nov. 18), pp. 2156:24-2157:21, 2220:24-2221:5 (Lescadres Cross).

[125] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 267.

[126] Transcript, Day 7 (Nov. 16), p. 1750:1-15 (Miller Panel Questions); Day 6 (Nov. 15), pp. 1452:13-1453:10 (Miller Chief); CA-A-127, Expert Presentation of Dr. Miller, slide 22.

[127] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Figures 9-12. See also Ex. CA-R-1835, Amended Expert Report of Paul Alan Johnson (September 23, 2022), pp. 18-28.

[128] Ex. CA-R-1840, Expert Presentation of Paul Johnson (November 29, 2022), slide 26.

[129] Ex. CA-R-0192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 292-293; Transcript, Day 6 (Nov. 15), p. 1455:15-20 (Miller Chief), 1635:1-13 (Miller Cross).

[130] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), paras. 31-32.

[131] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Table 7.

[132] Ex. CA-A-0122, Expert Report of Nathan H. Miller, paras. 58-61.

[133] Ex. CA-A-0122, Expert Report of Nathan H. Miller, para. 61 and fn. 114.

[134] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), para. 39.

[135] Transcript, Day 4 (Nov. 10), p. 954 (Kirby Panel Questions).

[136] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), at paras. 52-54.

[137] Transcript, Day 6 (Nov. 15), pp. 1524-1525 (Miller Cross).

[138] Ex. CA-R-1857, Expert Presentation of Mark Israel, p. 35; Transcript, Day 17 (Nov. 30), pp. 4450:23-4453:6 (Israel Chief).

[139] Transcript, Day 7 (Nov. 16), pp. 1643:2-1644:10 (Miller Cross).

[140] Transcript, Day 7 (Nov. 16), p. 1700:2-15 (Miller Re-Examination).

[141] Transcript, Day 7 (Nov. 16), p. 1597:5-15 (Miller Cross).

[142] Ex. C-A-122, Expert Report of Nathan H. Miller (September 23, 2022), para. 299.

[143] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 251; Transcript, Day 5 (Nov. 14), pp. 1216:20-1217:11 (Hickey Re-Examination); Transcript, Day 7 (Nov. 17), p. 1757:12-24 (Miller Panel Questions).

[144] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 92-127.

[145] Ex. C-A-122, Expert Report of Nathan H. Miller (September 23, 2022), para. 140.

[146] Ex. C-A-122, Expert Report of Nathan H. Miller (September 23, 2022), Section 8.4.

[147] Transcript, Day 7 (Nov. 16), p. 1663:3-25 (Miller Cross).

[148] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 92-93.

[149] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 101 (and accompanying table) & Exhibit 22.

[150] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), Exhibit 32; Transcript, Day 7 (Nov. 16), pp. 1680:18-1682:15 (Miller Cross).

[151] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 107, Exhibit 28; Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 289.

[152] Transcript, Day 7 (Nov. 16), p. 1651:15-25; p. 1687:12-1688:8, p. 1690:5-13, 1692:24-1693:10 (Miller Cross).

[153] Ex. CA-A-0122, Expert Report of Nathan H. Miller (September 21, 2022), para. 299.

[154] Transcript, Day 6 (Nov. 15), pp. 1547:12-1548:20 (Miller Cross).

[155] Transcript, Day 7 (Nov. 16), pp. 1692:24-1693:10 (Miller Cross).

[156] Transcript, Day 7 (Nov. 16), pp. 1657-1658 (Miller Cross).

[157] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Table 4.

[158] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 58; Transcript, Day 17 (November 30), pp. 4462-4466 (Israel Chief). Transcript, Day 17 (November 30), pp. 4540-4548.

[159] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Table 7.

[160] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), para. 61.

[161] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), para. 69.

[162] Transcript, Day 9 (Nov. 18), pp. 2162:16-2163:4 (Lescadres Chief); Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), paras. 93-95.

[163] Transcript, Day 9 (Nov. 18), pp. 2162:11-2164:7 (Lescadres Chief).

[164] Transcript, Day 7 (Nov. 16), pp. 1645-1646 (Miller Cross).

[165] Transcript, Day 9 (Nov. 18), pp. 2177:20-2178:24 (Lescadres Chief).

[166] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 52, Slide 5. See also Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 66, "Roaming" Tab.

[167] Transcript, Day 17 (Nov. 30), p. 4581 (Israel Cross).

[168] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 95, Table 6.

[169] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), paras. 102-103.

[170] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), para. 68.

[171] Ex. CA-A-0122, Expert Report of Nathan H. Miller, paras. 241-244.

[172] Transcript, Day 7 (Nov. 16), pp. 1615-1616 (Miller Cross).

[173] Transcript, Day 5 (Nov. 14), pp. 1218 (Hickey Panel Questions).

[174] Transcript, Day 17 (Nov. 30), pp. 4520:3-4521:17 (Israel Cross).

[175] Ex. CA-R-1854, Amended Reply Expert Report of Mark Israel (October 20, 2022), paras. 36-37.

[176] Commissioner's Written Opening, paras. 99, 101, 113, 118, 124, 135, 142, 165; Notice of Application, para. 96.

[177] Using Dr. Israel's interactive merger simulation spreadsheet, the "No Assets Transferred" section isolates the effect of the Videotron-Freedom transaction, independent of Rogers' acquisition of Shaw Mobile. Accepting all Dr. Miller's inputs, but adding in marginal costs savings, shows the Videotron-Freedom transaction generates positive consumer surplus of $40-$64 million and positive total surplus of $13-$21 million.

[178] *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, paras. 100, 124-125.

[179] Commissioner's Written Opening, para. 5; Transcript, Day 1 (Nov. 7), pp. 29:24-30:8 (Commissioner's Opening).

[180] Ex. CA-R-232, Witness Statement of Kenneth Martin (September 23, 2022), para. 76.

[181] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 186.

[182] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 364.

[183] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 120; Transcript, Day 10 (Nov. 21), p. 2372:3-20 (Drif Chief).

[184] Transcript, Day 13 (Nov. 24), p. 3447:2-21 (McKenzie Chief); Ex. CB-R-225, Witness Statement of Ron McKenzie (October 20, 2022), para. 14.

[185] Transcript, Day 9 (Nov. 21), pp. 2373:19-2374:23 (Drif Chief).

[186] Transcript, Day 4 (Dec. 10), pp. 993:15-997:21 (Hickey Cross).

[187] Ex. CA-A-100, Witness Statement of Nazim Benhadid (September 23, 2022), para. 4 (heading); Transcript, Day 5 (Nov. 14), pp. 1116:9-1117:16; 1119:17-1122:24; pp. 1144:1-1145:14; pp. 1148:10-1153:11 (Benhadid Cross).

[188] Ex. C-A-111, Witness Statement of Stephen Howe (September 23, 2022), para. 10; Transcript, Day 6 (Nov. 15), pp. 1331:17-1332:6; pp. 1358:23-1359:8 (Howe Cross).

[189] Transcript, Day 10 (Nov. 21), pp. 2610:22-24, 2611:23-2612:13 (English Chief); Transcript, Day 11 (Nov. 22), pp. 2867:16-2868:14 (McAleese Chief).

[190] Ex. ID-034, Telus market contact meeting, June 9, 2021; Transcript, Day 19 (Dec. 2), p. 4955:2-9 (Ruling). Ex. CA-R-022, Summary of Bureau-TELUS call, June 9, 2021.

[191] Telecom Decision CRTC 2008-17, paras. 117-119.

[192] *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, para. 38.

[193] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), paras. 117, 187-188.

[194] Commissioner's Written Opening, para. 101.

[195] Telecom Regulatory Policy CRTC 2015-326 (pre-amble); Telecom Decision CRTC 2021-181, para. 4.

[196] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 8, p. 57.

[197] Ex. P-R-061, "Notes from February 13, 2021, internal Telus war games session".

[198] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 144(e).

[199] Transcript, Day 8 (Nov. 17), p. 1970:15-21; p. 1977:1-8; p. 1981:12-20 (Davies Cross); Ex. ID-044, Email exchange between J. Rook and J. Tyhurst, January 28, 2022; Transcript, Day 19 (Dec. 2), p. 4962:5-22 (Ruling).

[200] Ex. CA-R-085, Email dated May 27, 2021 from M. Bibic to B. Kirby and others.

[201] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), paras. 41 & 43.

[202] Transcript, Day 9 (Nov. 18), p. 2229:5-11 (Lescadres Cross), pp. 2331:22-2332:20 (Lescadres Panel Questions).

[203] Transcript, Day 5 (Nov. 10), p. 1207:2-9 (Hickey Cross); p. 1219:6-15 (Hickey Panel Questions).

[204] Transcript, Day 9 (Nov. 18), pp. 2153:17-2154:21; (Lescadres Chief); p. 2323 :7-25 (Lescadres Panel Questions).

[205] Transcript, Day 17 (Nov. 30), pp. 4614:9-4615:10; 4437:16-4438:19 (Israel Cross).

[206] Transcript, Day 13 (Nov. 24), p. 3402:3-22 (Prevost Cross).

[207] Transcript, Day 11 (Nov. 22), pp. 2886:7-2888:1 (McAleese Chief); Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 189-203; Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 155-170; Transcript, Day 10 (Nov. 21), pp. 2610:22-2611:22 (English Chief).

[208] Ex. CA-I-0152, Witness Statement of Mohamed Drif (September 23, 2022), paras. 140-141.

[209] Ex. CA-R-037, Summary of Facts, Bell Presentation July 7, 2022. (This exhibit also contains notes from the Bureau's meeting with Comcast. Mr. Nagel was examined thoroughly on this document.)

[210] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 136(d).

[211] Ex. CA-R-1818, Amended Expert Report of Dr. William Webb (September 24, 2022), para 132; Transcript, Day 15 (Nov. 28), p. 3891:2-3893:12; (Webb Cross).

[212] Ex. CA-R-1821, Amended Responding Expert Report of Dr. William Webb (October 20, 2022), para 69 (table); Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 160 (table).

[213] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 21, 2022), para 166 (table).

[214] CA-R-232, Witness Statement of Kenneth Martin (September 23, 2022), paras. 90 & 94(b).

[215] Transcript, Day 15 (Nov. 28), p. 3962:3-3963:6 (Webb Cross).

[216] Transcript, Day 10 (Nov. 21), p. 2456:1-12 (Drif Cross).

[217] Commissioner's Written Opening, para. 128; Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), para. 117.

[218] Ex. CA-I-152, Witness Statement of Mohamed Drif (September 23, 2022), para. 138; Transcript, Day 10 (Nov. 21), pp. 2489:2-2590:9 (Drif Panel Questions).

[219] Transcript, Day 17 (Nov. 30), p. 4418:2-8 (Israel Chief).

[220] Ex. CA-R-212, Responding Witness Statement of Dean Prevost (October 20, 2022), para. 62.

[221] Transcript, Day 9 (Nov. 18), pp. 2201:19-2202:4; pp. 2204:16-2205:6 (Lescadres Cross).

[222] Transcript, Day 9 (Nov. 18), p. 2278:24-2279:20; pp. 2293:22-2294:6 (Lescadres Cross).

[223] Transcript, Day 13 (Nov. 25), pp. 3829:12-3830:12 (Martin Follow-Up from Mr. Leschinsky).

[224] Telecom Decision CRTC 2022-160 (Bell); Telecom Decision CRTC 2020-268 (Telus).

[225] Transcript, Day 4 (Nov. 10), p. 895:8-21 (Kirby Cross).

[226] Transcript, Day 5 (Nov. 11), pp. 1081:4-1085:25 (Benhadid Cross).

[227] Transcript, Day 5 (Nov. 11), p. 1086:1-16 (Benhadid Cross).

[228] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 163.

[229] Ex. CA-R-212, Responding Witness Statement of Dean Prevost (October 20, 2022), paras. 48-49.

[230] Transcript, Day 8 (Nov. 17), p. 1600:19-23; p. 1603:14-21; p. 1607:21-1608:8 (Miller Cross).

[231] Transcript, Day 7 (Nov. 16), pp. 1389:22-1394:11 (Howe Cross).

[232] Transcript, Day 8 (Nov. 17), pp.1963:16-1967:24 (M. Davies Cross).

[233] Ex. CA-R-235, Reply Witness Statement of Kenneth J. Martin (October 20, 2022), para. 24.

[234] Transcript, Day 10 (Nov. 21), pp. 2373:19-2374:8

[235] Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), paras. 129-130.

[236] Transcript, Day 13 (Nov. 24), pp. 3300:22-3301:19 (Prevost Cross).

[237] Competition Bureau, Merger Enforcement Guidelines, para. 6.26; Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 122.

[238] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), paras. 122-129.

[239] Commissioner's Opening Slides, pp. 39-40; Commissioner's Opening Statement, Transcript, Day 1 pp. 49:20-50:10.

[240] Transcript, Day 8 (Nov. 17), pp. 1838:12-1839:14 (M. Davies Direct); Ex. CA-A-131, M. Davies Expert Report, para. 200.

[241] Transcript, Day 8 (Nov. 17), pp. 1915:13-1916:13 (M. Davies Chief).

[242] Ex. CA-I-144, Lescadres Witness Statement, paras. 224-228; Ex. CA-I-152, Drif Witness Statement, paras. 64-65; Transcript, Day 9 (Nov. 18), pp. 2194:1-12, 2310:12-2311:13 (Lescadres Direct); Transcript, Day 11 (Nov. 22), pp. 2763:12-2764:12 (English Direct) (noting that Videotron executive shave discussed pursuing MVNO and that "the ownership of 3,500 spectrum is very important to expand by MVNO"); Transcript, Day 15 (Nov. 28), pp. 3941:4-3944:7 (Webb Direct) (noting that operators in the U.K. and Australia have used 3500 MHz spectrum for stand-alone services and "[s]o I think there are alternatives open to [Videotron]").

[243] Transcript, Day 8 (Nov. 17), pp. 1916:22-1917:17 (M. Davies Chief).

[244] Ex. CA-I-144, Lescadres Witness Statement, paras. 76-82; 221-228; Transcript, Day 11 (Nov. 22), pp. 2763:12-2764:12 (English Chief).

[245]Transcript, Day 10 (Nov. 21), p. 2636:9-13 (English Direct); Ex. CA-R-192, McAleese Witness Statement, paras. 162, 379.

[246] Transcript, Day 11 (Nov. 22), pp. 2786:18-2787:14 (English Chief).

[247] Transcript, Day 11 (Nov. 22), pp. 2786:18-2787:18 (English Chief).

[248] Transcript, Day 4 (Nov. 10), p. 836:6-14 (Kirby Chief).

[249] Transcript, Day 11 (Nov. 22), p. 2877:6-16 (McAleese Chief).

[250] Ex. CA-A-43, Witness Statement of Sudeep Verma (September 23, 2022), para. 17.

[251] Transcript, Day 4 (Nov. 10), p. 837:10-16 (Kirby Chief).

[252] Ex. CA-R-192, McAleese Witness Statement, para. 381; Ex. CA-R-195, McAleese Responding Witness Statement, para. 73; Transcript, Day 11 (Nov. 22), pp. 2894:1-2897:1 (McAleese Chief).

[253] Transcript, Day 11 (Nov. 22), pp. 2896:24-2897:1 (McAleese Chief); Transcript, Day 2 (Nov. 8), p. 483:5-9 (Verma Cross); Ex. CA-A-262, McAleese Examinations for Discovery, QQ783-784.

[254] Competition Bureau, Merger Enforcement Guidelines, para. 12.11.

[255] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), fn.79, Lourdes DaCosta, Sr. Competition Law Officer, Competition Bureau, "Efficiencies Analysis in Canada," 2019, https://www.apeccp.org.tw/htdocs/doc/APECOECD/Seminar/03-Efficiencies%20Analysis%20in%20Canada.pdf.

[256] *Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18; *Tervita Corporation v. Canada (Commissioner of Competition)*, 2015 SCC 3.

[257] Transcript, Day 15 (Nov. 28), pp. 4001:5-21 (Harington Chief).

[258] Transcript, Day 14 (Nov. 25), pp. 3654:11-3655:15 (Fabiano Panel Questions).

[259] Transcript, Day 18 (Dec. 1), pp. 4813:7-10. (Zmijewski Cross).

[260] Transcript, Day 18 (Dec. 1), pp. 4864:17-4865:12 (Zmijewski Cross).

[261] Transcript, Day 18 (Dec. 1), pp. 4813:13-16 (Zmijewski Cross).

[262] US Horizontal Merger Guidelines.

[263] Transcript, Day 18 (Dec. 1), pp. 4823:15-4827:22 (Zmijewski Cross).

[264] Transcript, Day 18 (Dec. 1), pp. 4823:15-4837:7 (Zmijewski Cross).

[265] Transcript, Day 18 (Dec. 1), pp. 4837:11-25 (Zmijewski Cross).

[266] *Commissioner of Competition v. Superior Propane Inc.*, 2002 CACT 16, paras 158 -159. See also para. 116: "The Price Standard guided courts in the United States for much of the past century and created judicial hostility toward efficiency evidence and arguments."

[267] All values in this section are based on a 10-year discounted net present value unless indicated otherwise.

[268] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 178-182.

[269] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), para. 136.

[270] Ex. CA-A-1869, Expert Report of Mark E. Zmijewski (October 20, 2022), paras. 132, 173.

[271] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 154-156.

[272] Ex. CB-R-0223, Witness Statement of Alexandre Mercier-Dalphond (October 20, 2022), para. 4 & Exhibit A.

[273] Ex. CA-A-0134, Amended Reply Expert Michael AM Davies (October 20, 2022), para. 124.

[274] Transcript, Day 13 (Nov. 24), pp. 3307:12-3308:8 (Prevost Cross); 3440:1-20; 3441:17-3442:4 (Mercier-Dalphond Cross).

[275]Transcript, Day 13 (Nov. 24), pp. 3299:22-3301:19 (Prevost Cross); pp. 3475:12-3476:9 (McKenzie Cross).

[276] Transcript, Day 13 (Nov. 24), pp. 3307:12-3308:8 (Prevost Cross); 3441:17-3442:4 (Mercier-Dalphond Re-Examination).

[277] Ex. CA-A-0134, Amended Reply Expert Michael AM Davies (October 20, 2022), paras. 132-133.

[278] Transcript, Day 10 (Nov. 21), pp. 2000:14-2001:17; 2003: 4-24 (Davies Cross).

[279] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 157-158.

[280] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 185-187.

[281] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 128-135. Note that Mr. Harington conservatively reduced his quantification of the savings associated with redundant real estate holdings in direct examination after seeing a draft document in Prevost's cross-examination that suggested Rogers may have already given notice to abandon some facilities prior to the completion of the transaction. Transcript, Day 15 (Nov. 28), pp. 4006:7-20 (Harington Chief).

[282] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), para. 166.

[283] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 183-184.

[284] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 83-87

[285] Ex. CA-R-0227, Amended Witness Statement of M. Fabiano (September 23, 2022), Exhibit 8.

[286] Notably, while the Commissioner's counsel put it to Ms. Fabiano that Shaw did not have a communications department, he failed to show Ms. Fabiano the multiple places where it was clear in the document that Shaw *did* have communications staff. See Ex. CA-R-0227, Amended Witness Statement of M. Fabiano (September 23, 2022), cells x-y.

[287] Transcript, Day 15 (Nov. 28), pp. 4038:3-21 (Harington Cross).

[288] Transcript, Day 15 (Nov. 28), pp. 4084:7-25 (Harington Cross).

[289] Ex. CA-A-1869, Expert Report of Mark E. Zmijewski (October 20, 2022), para. 105.

[290] Transcript, Day 18 (Dec. 1), pp. 4862:13-4864:24 (Zmijewski Cross).

[291] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 118-127.

[292] Ex. CA-R-1854, Amended Reply Expert Report of Mark Israel (October 20, 2022), paras. 63-84.

[293] Transcript, Day 17 (Nov. 30), pp. 4638:22-4640:4, pp. 4644:12-4645:13 (Israel Cross).

[294] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 242-246.

[295] *Commissioner of Competition v. Superior Propane Inc.*, 2002 CACT 16, para. 367.

[296] Rogers' low-cost CRTC mandated plan is offered by its Fido brand in each of British Columbia, Alberta, and Ontario: https://www.fido.ca/phones/bring-your-own-device?icid=ba-lpmbcnac-pgpfcwrls-1021206&flowType=byod.

[297] *Telecom Regulatory Policy CRTC 2021-130*, paras. 529-531 & 545. The same decision established fixed-price occasional use plans that will not be affected by the Transaction.

[298] Ex.CA-A-0122, Expert Report of Nathan H. Miller (September 21, 2022), Exhibit 22 & para.227, pp.110-111.

[299] Transcript, Day 2 (Nov. 8), p.423:7-25 (Verma Chief), pp. 496:18-497:17 (Verma Cross); Transcript, Day 9 (Nov. 18), p. 2088:6-22, pp.2090:24-2093:19 (Osberg Cross).

[300] Ex. CA-R-0212, Responding Witness Statement of Dean Prevost (October 20, 2022), paras.70-72, 77-79.

[301] Ex. CA-R-0212, Responding Witness Statement of Dean Prevost (October 20, 2022), paras. 64-69, 75-76.

[302] Ex. CA-R-1854, Amended Reply Expert Report of Mark Israel (October 20, 2022) paras. 15, 106-119, table 5, p.29.

[303] *Commissioner of Competition v. Superior Propane Inc.*, 2002 CACT 16, paras. 92, 102-103.

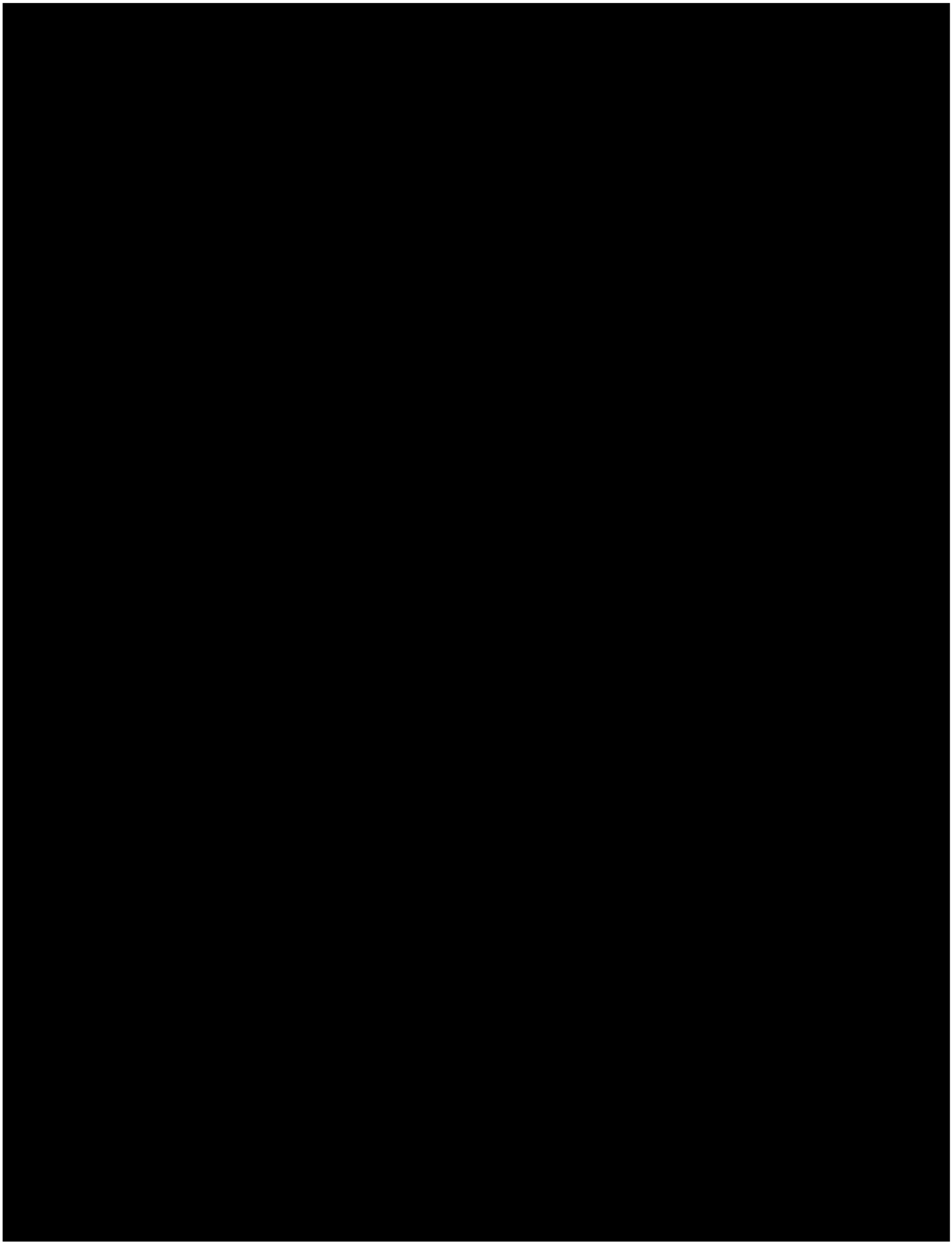
[304] *Commissioner of Competition v. Superior Propane Inc.*, 2002 CACT 16, para. 112.

[305] Transcript Day 9 (Nov. 18), pp. 2139:18-2140:23 (Cuff Cross).

[306] Transcript, Day 9 (Nov. 18), pp. 2141:12-2143:1 (Cuff Cross); Ex. P-R-1868, Presentation of Michael Smart Public, slide 4. Note that the numbers in this slide are the updated numbers after Dr. Smart corrected for the calculation error identified by Dr. Cuff.

[307] Transcript, Day 9 (Nov. 18), p.2104:5-23 (Osberg Cross).

[308] Ex. CA-R-1854, Amended Reply Expert Report of Mark Israel (October 20, 2022), para. 119 & table 5, p.29.



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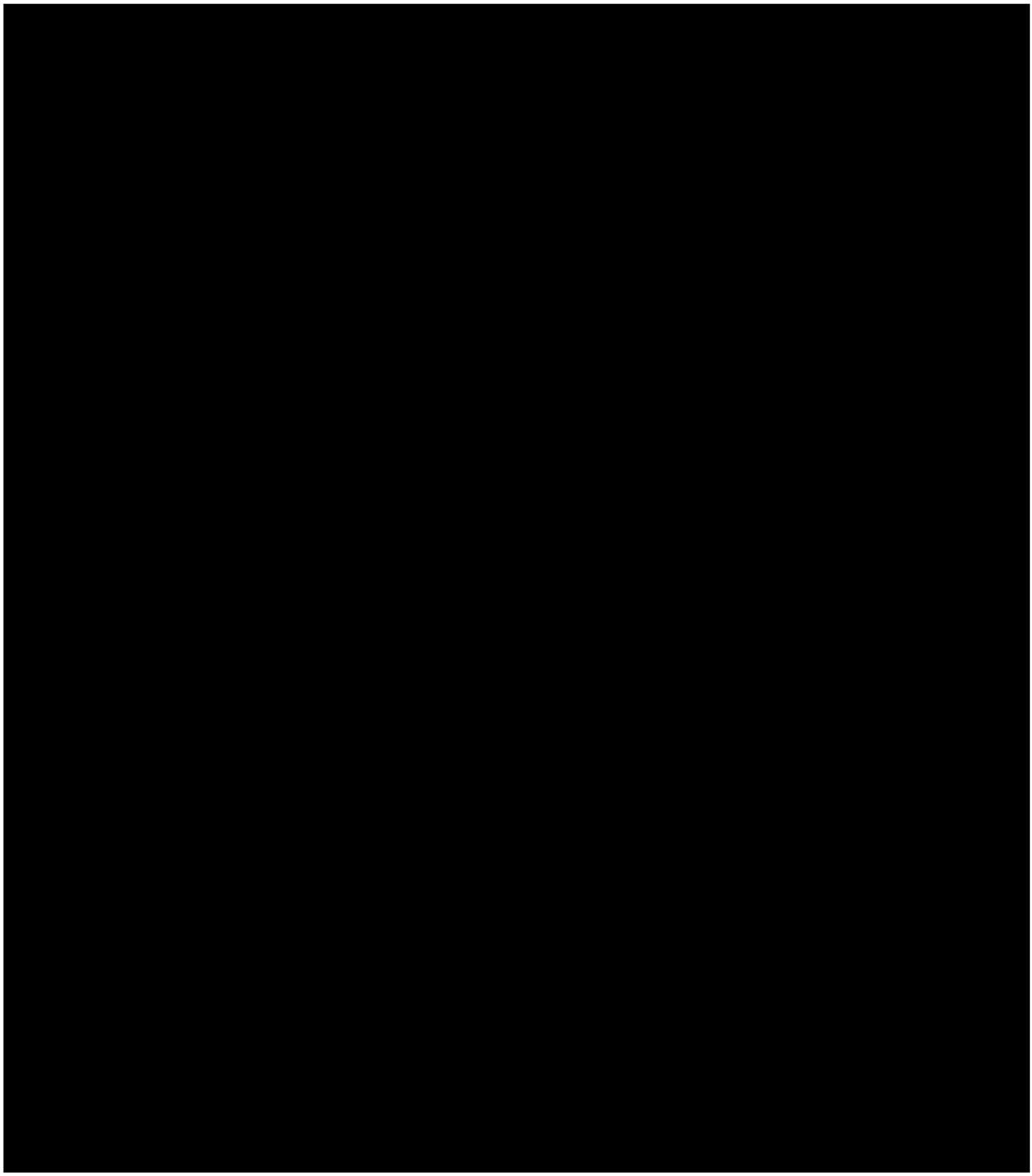
[3] McAleese Responding Witness Statement, paras. 15-17.



[4] McAleese Responding Witness Statement, para. 89 (table). Please note this figure was erroneously labeled “Freedom Postpaid Gross Adds” in Mr. McAleese’s Responding Witness Statement, although it was described as concerning Shaw Mobile repeatedly. That typographical error has been corrected here.

[5] McAleese Responding Witness Statement, para. 97 (table).

[6] McAleese Responding Witness Statement, para. 97 (table).

[redacted]

7 McAleese Responding Witness Statement, para. 109 (table).

Appendix 2

Rogers' Response to Tribunal Questions During Openings

References below are to paragraphs or Parts from the Respondents' Closing Submission.

Question 1: To provide an overview of the key provisions of the Arrangement Agreement.

See paragraphs 20, 21 and 68. See also:

- *Transaction Structure – Section 2.3.* Under the Arrangement Agreement, Rogers has agreed to acquire 100% of the issued and outstanding shares of Shaw by way of a statutory plan of under section 193 of the *Business Corporations Act* (Alberta).

- *Consideration – Section 2.10.* Rogers will pay $40.50 per share in cash to all shareholders, except that the Shaw Family Living Trust (the controlling shareholder of Shaw) and related persons will a portion of the consideration for their shares in the form of Class B Non-Voting Shares Rogers and the balance in cash.

- *Conditions to Closing – Section 6.* Closing is conditional upon the receipt of all regulatory approvals required by the Arrangement Agreement including:

    - Approval from the Minister of Innovation, Science and Industry for the deemed transfer of spectrum under the *Radiocommunication Act*. The Minister has stated publicly that he will not approve this transfer if Shaw owns Freedom Mobile Inc. at the time Shaw is acquired by Rogers.

- *Financing – Section 4.15.* The Arrangement Agreement is not conditional upon Rogers' financing arrangements.

The Outside Date and the Consequences of Termination are discussed in response to the Tribunal's specific question (Question 3, below).

[redacted]

[redacted]

- [redacted]

[redacted]

Question 3: To address other aspects of the agreements that are relevant to the proceedings as they relate to outside date, assets and access rights that would be acquired by Rogers and Videotron respectively, as well as any spectrum that might be transferred to Shaw in the event the transaction does not proceed.

- *Outside Date(s).* Rogers and Shaw have extended the outside date under their Arrangement Agreement until December 31, 2022. That date can be further extended to January 31, 2023 at the option of either Rogers or Shaw, provided that Rogers continues to have in place committed financing available to complete the merger. Neither Rogers nor Shaw is obligated to extend the outside date beyond January 31, 2023.
    - On August 31, 2022, Rogers announced that it had obtained the consents required to extend its financing for closing of the transaction to December 31, 2023. Extending that financing past December 31, 2022 requires that Rogers pay its lenders a further fee of approximately CAD $264 million.

  Under the Freedom Share Purchase Agreement, the outside date is the same outside date as set out in the Arrangement Agreement, provided that the outside date of the Freedom Mobile sale cannot be extended beyond January 31, 2023 without Videotron's consent (which it is under no obligation to provide).

- [redacted]

Question 4: Could you address the Commissioner's position set out at para. 217 of his Opening that "Anything beyond prohibition (in whole or in part), including any contractual arrangements or other behavioural commitments proposed by the parties is beyond the scope of consideration of the Tribunal."

See paragraphs 76 to 81.

Question 5: Could you walk the Tribunal through your treatment of the alleged pro-competitive effects of the proposed transaction and their impact on the Commissioner's position under sections 92 and 96, including specifics of deadweight loss.

See Part VII to Part IX which discuss the effects of the transaction, s. 92, efficiencies and the approach to s. 96.

Question 6: Could you address the Commissioner's position regarding foreign shareholders.

The Commissioner's position regarding foreign shareholders is not clear. Paragraphs 175-176 of the Commissioner's Opening Statement read:

> *The Tribunal should not recognize gains by foreign shareholders or the gains to the families given their high incomes and extreme wealth*. …

It is not clear whether the Commissioner intends to assert that savings from operations in Canada that would flow through to foreign shareholders are not cognizable in addition to arguing (as he does in his letter dated November 16, 2022) that there is a need to apply a balancing weights standard on the basis of the redistribution of wealth that includes a "wealth transfer" to foreign shareholders. (see also, paras. 178 and 181 of the Commissioner's Opening Statement).

There is no support for either position in law or economics and there are good reasons to reject them.

First, no decision by the Tribunal or a Court has ever discounted the merging parties' efficiencies based on the proportion of their shareholders who are foreign. The focus when considering efficiencies from a merger is the real resource savings to the Canadian *economy* – not the transfer of wealth to shareholders.[1] As the MEGs state, the issue is whether the efficiency gains will benefit the Canadian economy,[2] not the

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[1] *Superior Propane I*, para 430.

[2] Competition Bureau Merger Enforcement Guidelines at footnote 66 ("The issue is whether the efficiency gains will benefit the Canadian economy rather than the nationality of ownership of the company").

nationality of ownership of the company. Further, this approach would ignore the tax benefits accruing to Canada as Dr. Ware explained.

Second, as has been raised in prior Tribunal proceedings,[3] excluding efficiencies based on the nationality of shareholders constitutes discrimination under Canada's international obligations/trade and investment treaties and would be inconsistent with Canada's treaty obligations (including the obligation under USCMA to provide "national treatment" to investors from the United States and certain other countries).

Third, as it concerns balancing weights, there is no case in which the Tribunal has treated a "transfer" to foreign shareholders differently from a transfer to domestic shareholder and no support in the Act.

Question 7: To explain the reasons Rogers says at paragraph 4 of its Opening Submissions that Shaw would be a weakened competitor if the transaction does not proceed.

See paragraphs 12 to 16 and 225 to 231.

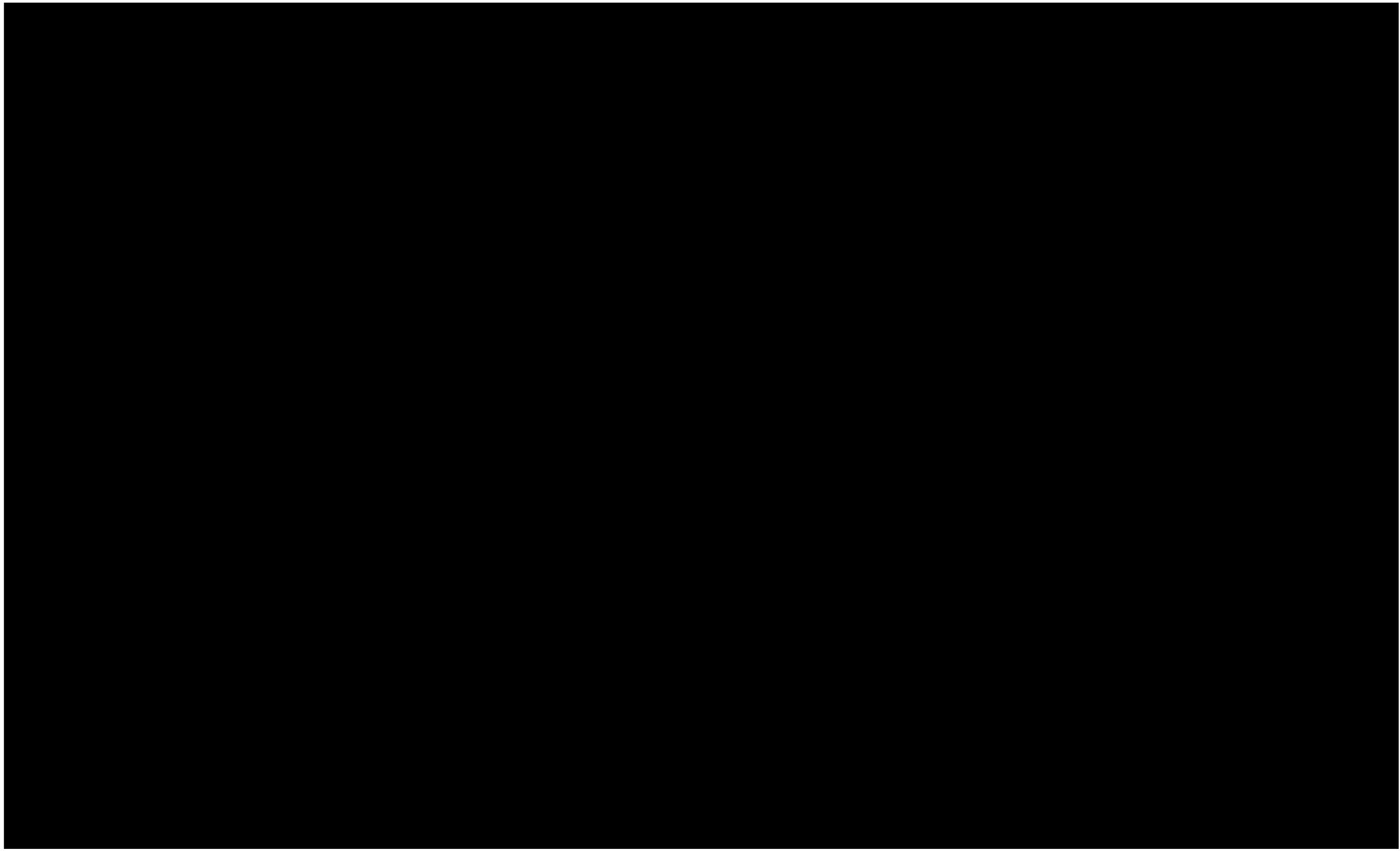
[3] *Canada (Commissioner of Competition) v. Superior Propane Inc*, 2002 Comp. Trib. 16, paras. 194-195.

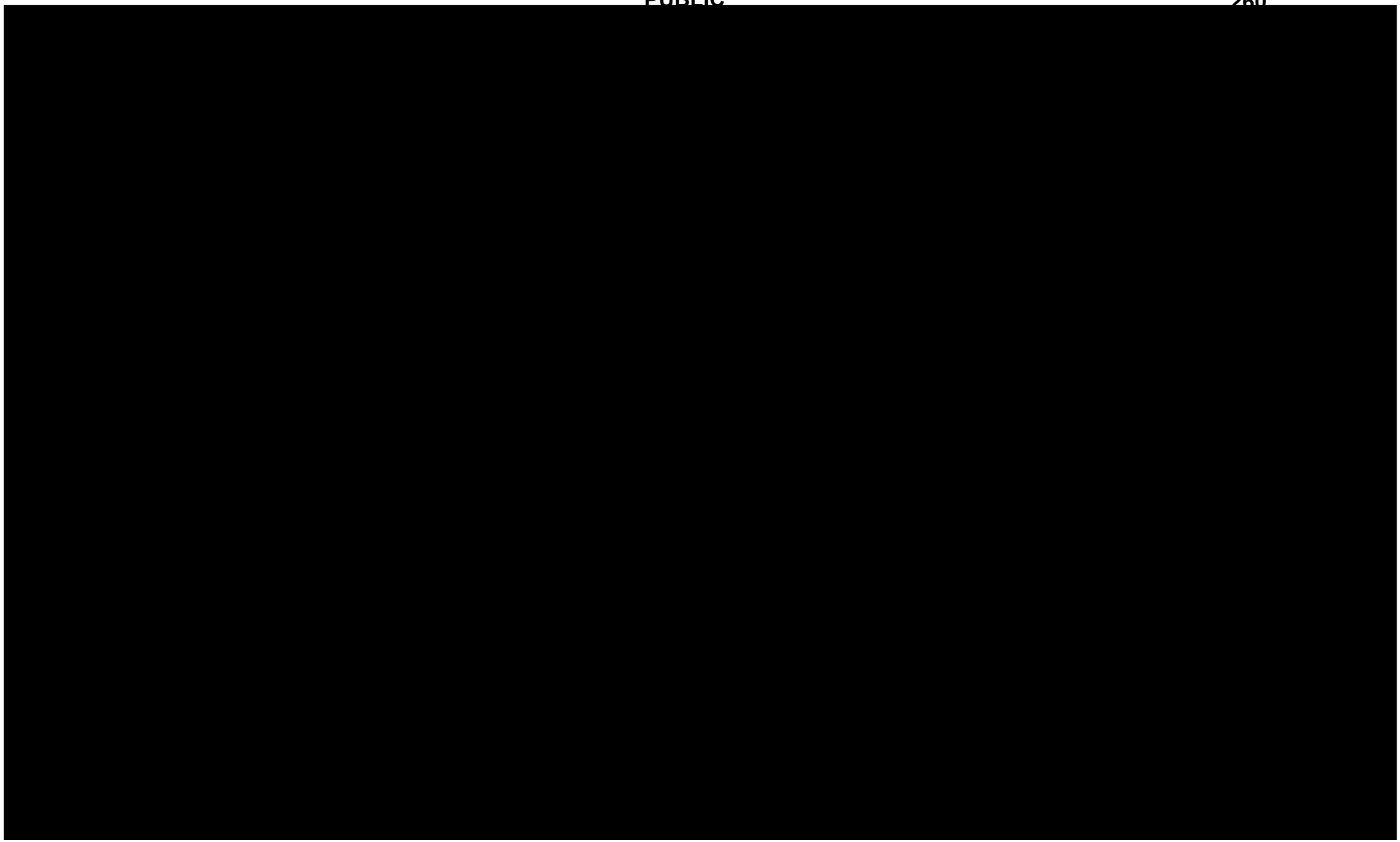
APPENDIX 3: COMMISSIONER'S USE OF SECTION 69 DOCUMENTS

	Total on s. 69 List		Fact Witnesses		Expert Witnesses		All Witnesses	
	No. of Documents	Percentage	Put to Witness	Percentage	Put to Witness	Percentage	Put to Witness	Percentage
Shaw	383	50%	15	2%	34	4%	47	12%
Rogers	324	42%	17	2%	13	2%	25	8%
Other documents	60	8%	0	0%	0	0%	0	0%
Total	**767**	**100%**	**32**	**4%**	**47**	**6%**	**72**	**9%**

NOTES:

The total number of documents shown to all witnesses (72) is less than the sum of (i) the total number of documents shown to fact witnesses (32) and (ii) the total number documents show to expert witnesses (47) because seven documents were put to more than one witness. These documents are not double counted for purposes of the total put to all witnesses, but are counted separately in each of the fact and expert witness categories.





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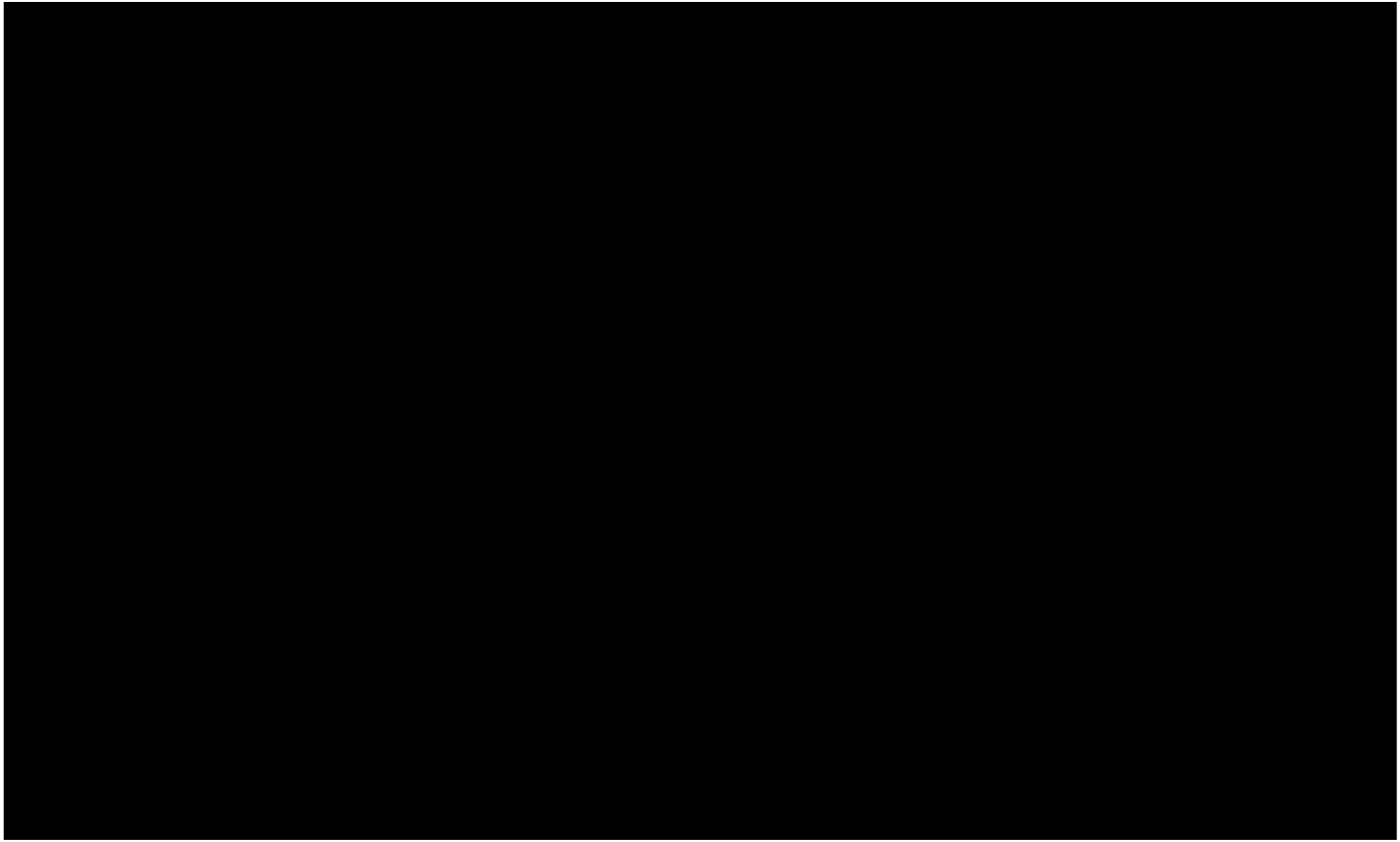

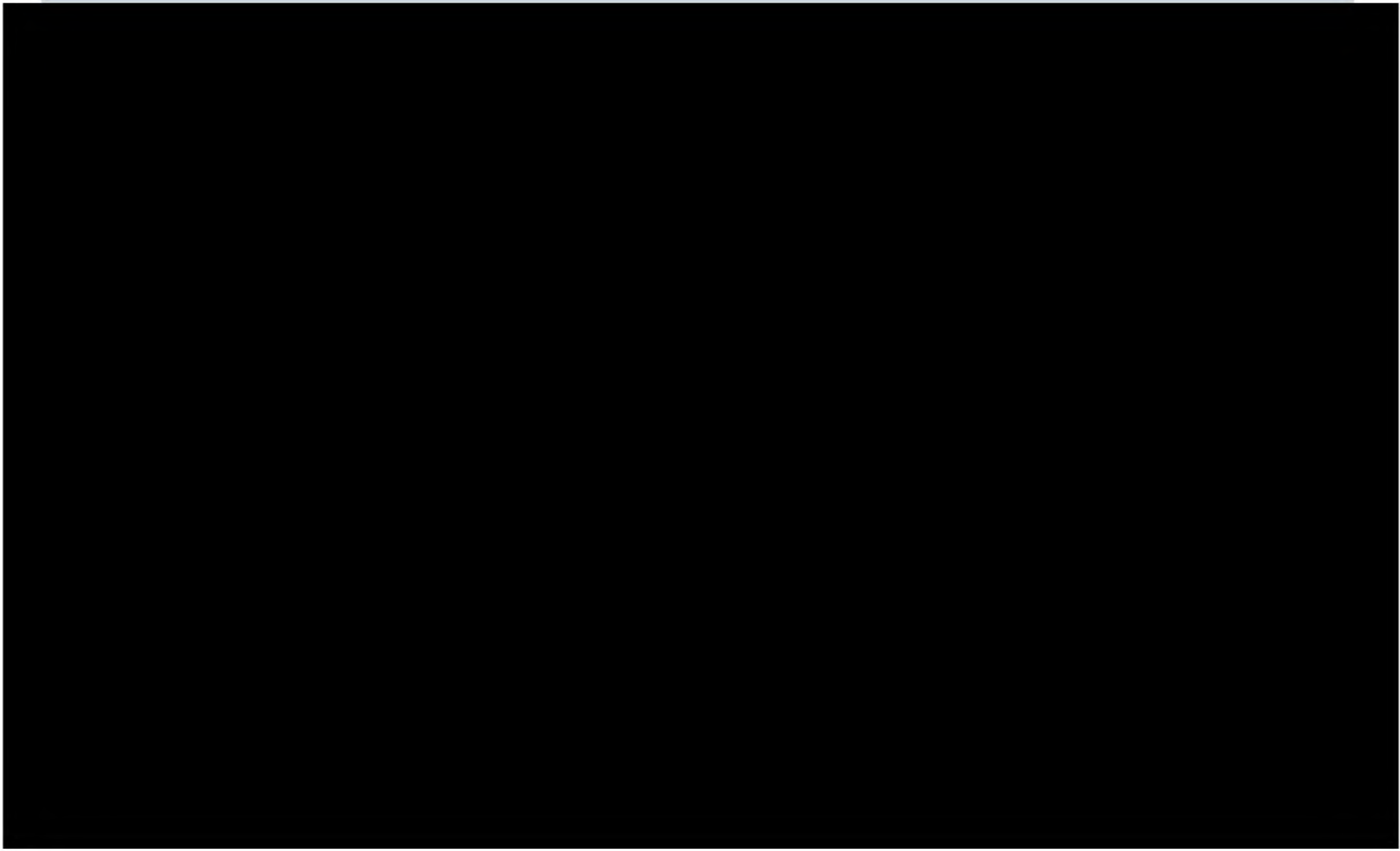

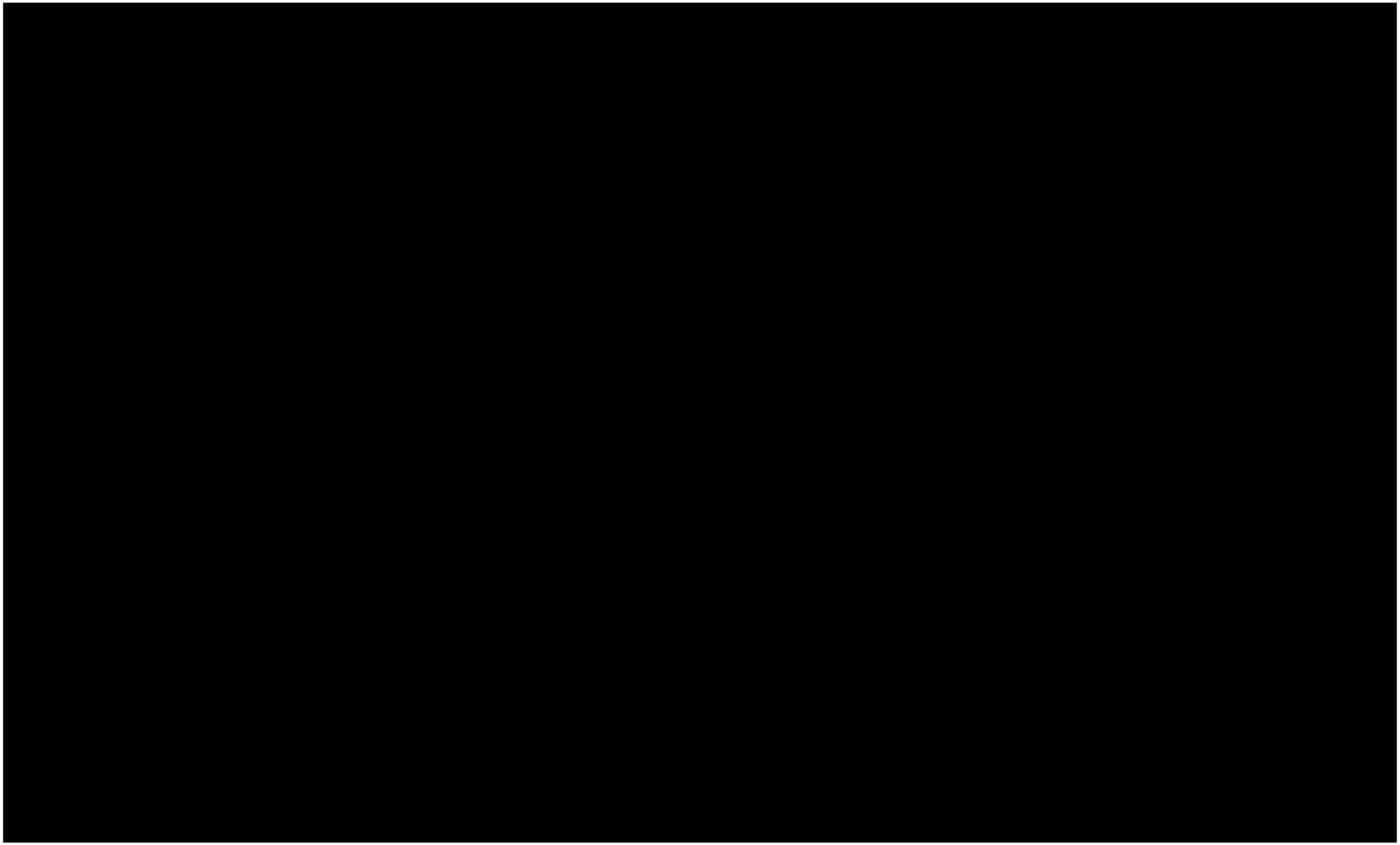

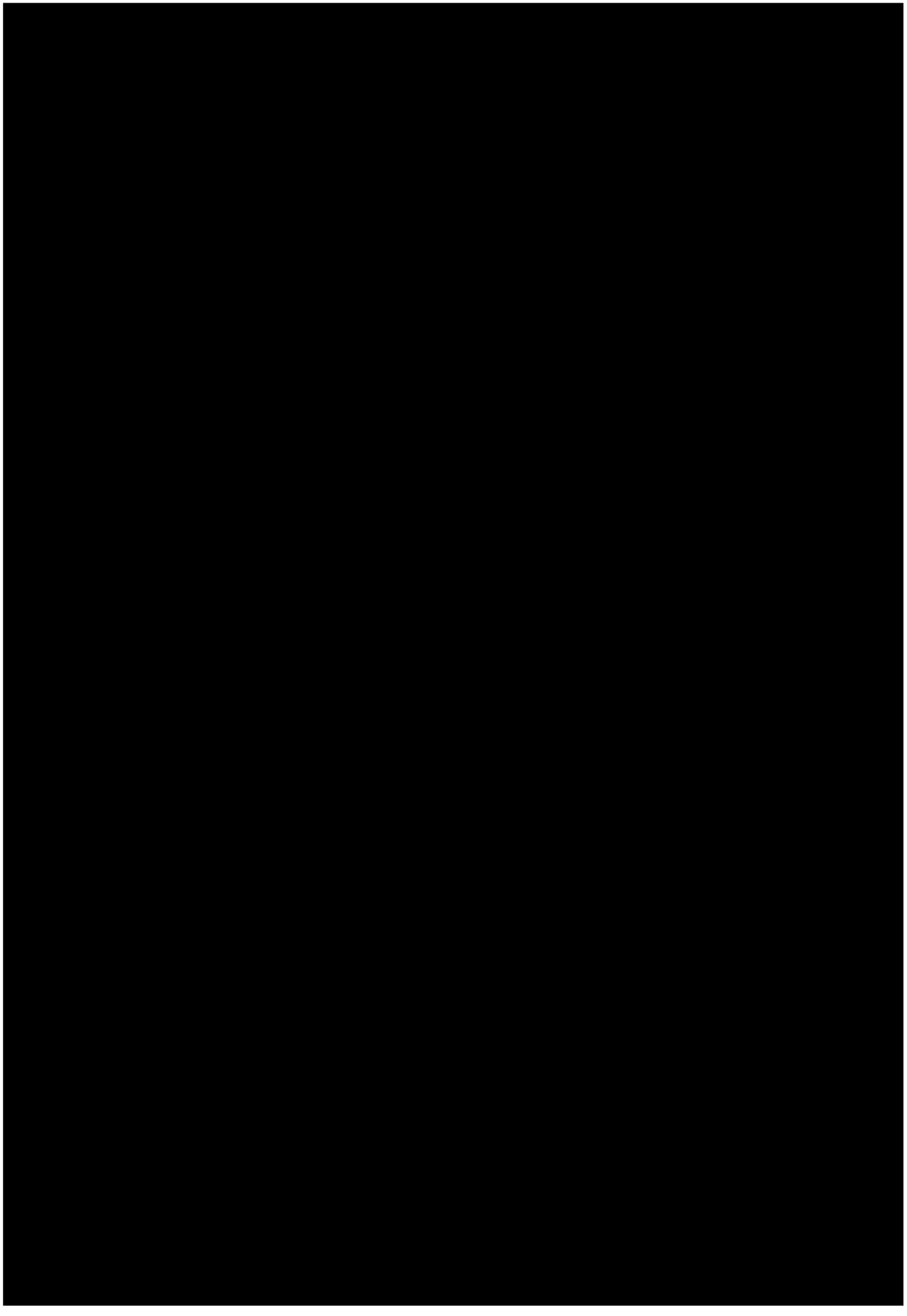

CT-2022-002

THE 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:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

VIDÉOTRON LTD.

Intervener

BOOK OF AUTHORITIES

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Competition Bureau Legal Services

Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

Donald B. Houston
Donald.Houston@cb-bc.gc.ca

Derek Leschinsky
Derek.Leshinsky@cb-bc.gc.ca

Kevin Hong
Kevin.Hong@cb-bc.gc.ca

Counsel to the Commissioner of Competition