Competition Tribunal | Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 03
File No.: CT-2022-002
Registry Document No.: 865

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)

REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] These reasons and the accompanying Order concern the costs claimed in relation to the application filed by the Commissioner of Competition for an Order under section 92 of the *Competition Act*, RSC 1985, c C-34 (the "**Act**"), prohibiting the completion of an Arrangement Agreement between the Respondents, dated March 13, 2021 (the "**Initially Proposed Transaction**").

[2] Pursuant to the Initially Proposed Transaction, Rogers Communications Inc. ("**Rogers**") agreed to purchase all of the issued and outstanding shares of Shaw Communications Inc. ("**Shaw**") for approximately $26 billion, inclusive of debt. That transaction included the indirect acquisition by Rogers of Shaw's subsidiary, Freedom Mobile Inc. ("**Freedom**"), which carried on the substantial majority of Shaw's mobile telephony business.

[3] On June 17, 2022, the Respondents, the Intervenor Videotron Ltd. ("**Videotron**"), and Quebecor Inc. (Videotron's ultimate parent company) entered into a letter of agreement and term sheet concerning the sale of Freedom to Videotron for $2 billion, plus $850 million representing the present value of forward lease obligations (the "**Divestiture**"). Pursuant to this three-way arrangement (the "**Merger and Divestiture**"), Shaw would first transfer Freedom to Videotron. Rogers would *only then* acquire the remainder of Shaw through an amalgamation arrangement.

[4] On December 31, 2022, the Tribunal issued an Order dismissing the Commissioner's application: *Commissioner of Competition v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 ("***Rogers-Shaw***"). In its accompanying Reasons for Order, the Tribunal stated that it would address the issue of costs in a subsequent decision.

[5] For the reasons that follow, the Commissioner will be ordered to pay counsel fees of $414,720.00 to Rogers and $416,187.00 to Shaw, plus applicable HST. The Commissioner will also be ordered to compensate Rogers and Shaw for reasonable disbursements in the amount of $9,298,152.58 for Rogers and $2,836,920.30 for Shaw, plus applicable HST.

[6] No costs shall be payable to Videotron.

II. BACKGROUND

[7] On December 21, 2022, the Tribunal directed the parties as follows:

> The parties are encouraged to reach an agreement regarding costs in a lump sum amount, plus disbursements, before they know the outcome in this proceeding. If they are unable to reach an agreement, they shall provide submissions, not exceeding five pages for the Commissioner and five pages for the Respondents and the Intervener combined, before the close of business on December 29, 2022, or such earlier date as the Tribunal may advise. If the parties are unable to reach an agreement on a lump sum amount of costs payable to the prevailing party, they shall file their respective bills of costs together with their submissions.

[8] As it transpired, the parties were unable to reach an agreement. Consequently, the Commissioner and the Respondents together with Videotron provided separate submissions. Given that those submissions were filed roughly contemporaneously, the parties did not have the benefit of seeing each other's submissions or their respective Bills of Costs.

[9] After noting that the Respondents and Videotron had not provided any support whatsoever for their requested disbursements, the Tribunal issued a Direction, dated June 22, 2023, requiring them to provide meaningful support for those disbursements by way of affidavit evidence. After also observing that one of the objectives underlying the Tribunal's initial Direction regarding costs was to avoid the significant time and expense that would be associated with preparing a granular analysis and a detailed Bill of Costs, the Tribunal clarified that such a granular analysis was not required.

[10] The Respondents provided their affidavit evidence in support of their requested disbursements shortly thereafter. Videotron did the same.

[11] The Commissioner then requested an opportunity to provide additional submissions. After that opportunity was granted, those submissions were filed on August 4, 2023. The Respondents replied to those submissions in writing on August 9, 2023.

[12] In dismissing the Commissioner's application on the merits, the Tribunal noted that the application raised the following three principal issues:

a) What relevance does the Initially Proposed Transaction have for this proceeding?

b) Is the Merger, as modified by the Divestiture, likely to prevent or lessen competition substantially?

c) If so, have the Respondents established the requirements of the efficiencies defence?

[13] Ultimately, the Tribunal found in favour of the Respondents on the first two of the abovementioned issues. Consequently, it was not necessary for the Tribunal to address the third issue, concerning the efficiencies defence.

III. OVERVIEW OF THE PARTIES' SUBMISSIONS

A. The Respondents and Videotron

[14] The Respondents provided submissions together with Videotron. They each requested a lump sum award representing 25% of actual legal fees, plus disbursements. In the alternative to such a lump sum award for legal fees, the Respondents and Videotron each requested legal fees guided by the top end of Column V of Tariff B of the *Federal Courts Rules*, SOR/98-106 (the "**Rules**").

[15] The abovementioned alternative requests, as amended, can be summarized as follows:

Table 1 – Summary of Claimed Counsel Fees
(as amended, excluding HST where applicable)

	Rogers	**Shaw**	**Videotron**
Actual fees incurred	*$7,967,640.00*	*$9,686,275.00*	*$1,949,180.48*
Claim based on 25% of actual fees	$1,991,910.00	$2,421,568.75	$487,295.12
Alternative claim guided by the high end of Column V of Tariff B	$414,720.00	$416,187.00	$303,880.00

Table 2 – Summary of Claimed Disbursements
(as amended, excluding HST where applicable)

	Rogers	**Shaw**	**Videotron**
Taxable disbursements	$163,302.27	$86,173.59	$85,639.16
Non-taxable disbursements	$9,232,168.84	$3,277,858.12	$6,350.25
Total	$9,395,471.11	$3,364,031.71[1]	$91,989.41

[16] In support of their requests, the Respondents and Videotron submitted that the Commissioner's intransigent pursuit of an order blocking the entire Initially Proposed Transaction, even after the Divestiture was publicly announced almost five months prior to the commencement of the hearing in this proceeding, should now have consequences. In any event, they maintained that the costs awarded should bear a meaningful relationship to the actual costs incurred. In this regard, they stated that a lump sum award representing 25% of actual legal fees, plus disbursements, is at the low end of the range that has been found to be acceptable in complex commercial cases. They asserted that this request was conservative, given the stakes involved, the complexity of the dispute, and the amount of work that was required from pleadings to trial, all within a matter of months.

[17] In addition to the foregoing, the Respondents and Videotron maintained that the Commissioner adopted an unnecessarily contentious approach throughout the litigation, which significantly increased the costs that they were required to incur. Moreover, they asserted that the Commissioner waited until his opening statement to resile from his claims with respect to the Ontario market – where approximately 72% of Freedom's customers were located.

[1] The Tribunal notes that there appears to have been a miscalculation in the assessment of adjusted disbursements at paragraph 5 of Ms. Debra Theresa Ann Bilou's affidavit on behalf of Shaw. While it is indicated therein that the total of taxable and non-taxable disbursements amounts to $3,363,758.71, the actual sum of taxable disbursements ($86,173.59) and non-taxable disbursements ($3,277,858.12) is $3,364,031.71.

B. The Commissioner

[18] The Commissioner requested a lump sum amount of $10.9 million, inclusive of counsel fees and disbursements, in the event that the application in this proceeding was successful.

[19] If the application was dismissed, the Commissioner's submissions can be summarized as follows:

a) Any cost award against the Commissioner should be materially reduced to reflect the important public interest in bringing the case;

b) The Tribunal should take into account any success the Commissioner had on particular issues;

c) The Tribunal should also take into account the Respondents' decision *not* to concede certain issues at the outset of the hearing, including concessions that would have simplified the proceeding;

d) The Tribunal should make a downward adjustment to reflect the excessive nature of the Respondents' claims and the unnecessary duplication of work among their respective counsel teams;

e) A further downward adjustment should be made to reflect the Commissioner's role in bringing about the Divestiture; and

f) Videotron should not be awarded any costs.

IV. ASSESSMENT

A. General Principles

[20] The general principles applicable to the assessment of costs were recently summarized by the Tribunal in *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 at paras 768-776 ("***P&H***"). They need not be repeated here.

[21] 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 point of departure is the provisions governing costs in the Rules and the associated jurisprudence: *Competition Tribunal Act*, RSC 1985, c 19, s 8.1(1).

[22] In the Federal Court, the "default" level of costs is the mid-point of Column III in Tariff B of the Rules: Rule 407: *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139 at para 4, aff'd 2012 FCA 265; *Bernard v Professional Institute of the Public Service of Canada*, 2020 FCA 211 at para 38; *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 25 ("***Allergan-Sandoz***"). Column III is intended to provide partial indemnification (as opposed to substantial or full indemnification) for "cases of average or usual complexity": *Air Canada v Thibodeau*, 2007 FCA 115 at para 21 ("***Thibodeau***"); *Novopharm Ltd v Eli Lilly and Co*, 2010 FC 1154 at para 5.

[23] In *P&H*, the Tribunal found that proceedings under section 92 of the Act involve complex legal and factual matters that support higher cost awards under Column IV of Tariff B: *P&H*, at para 781. Of course, this would be subject to the Tribunal's consideration of the other relevant factors at play in any given case.

[24] The most important overall factor in arriving at a costs award is which party succeeded. The Tribunal will also have regard to other relevant factors. These include the public interest in bringing the case and the extent to which there may have been divided success on the issues in dispute. In addition, the Tribunal will consider behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 25; *Thibodeau*, at para 24.

[25] Having regard to all of the foregoing, the fixing of costs typically involves a compromise between compensating a successful party and not unduly burdening an unsuccessful party, bearing in mind the parties' conduct during the litigation. The costs ordered should not be excessive or punitive, but rather reflect a fair and reasonable relationship to the actual costs of litigation, keeping in mind that the Rules are based on a partial indemnification model.

[26] In considering what is fair and reasonable, it cannot be ignored that there is broad recognition that Tariff B no longer provides an adequate level of partial indemnification and that the *Federal Courts Rules* Committee has approved amendments that would increase the amounts recoverable under Tariff B by approximately 25% : *Allergan-Sandoz*, at para 28.

[27] Insofar as disbursements are concerned, the parties' claims must be reasonable, necessary, and justified.

[28] The Tribunal favours lump sum cost awards over formal taxation of Bills of Costs.

B. The Prevailing Party

[29] In this proceeding, the Respondents prevailed on the two principal issues that provided the basis for the Tribunal's dismissal of the Commissioner's application. Those were (i) the relevance of the Initially Proposed Transaction, and (ii) whether the Merger, as modified by the Divestiture, was likely to prevent or lessen competition substantially.

[30] The Respondents also prevailed with respect to the principal contentious sub-issues, including the Commissioner's allegations 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 Initially Proposed Transaction; (ii) Rogers and Shaw were each other's closest competitor; (iii) Rogers' acquisition of Shaw Mobile would likely give rise to anti-competitive unilateral effects; and (iv) the Merger and Divestiture would likely facilitate the exercise of collective market power by Rogers, BCE Inc. ("**Bell**"), and TELUS Communications Inc. ("**Telus**").

[31] The Respondents' success with respect to the principal issues as well as the main sub-issues that were in dispute weighs strongly in their favour.

C. The Public Interest in Bringing the Application

[32] The Commissioner maintains that he should not be required to pay elevated legal costs in the absence of highly exceptional circumstances, which he asserts do not exist in this case.

[33] In support of this position, the Commissioner notes that the Tribunal has recognized that he is presumed to have acted in the public interest in seeking adjudication before the Tribunal, and that he is a public official with a statutory mandate to administer and enforce the Act: *Rona Inc v Commissioner of Competition*, 2005 Comp Trib 26 at para 17; *P&H*, at para 781. The Commissioner adds that there was a broad public interest in bringing this case.

[34] I agree that, *taken alone*, this factor weighs in favour of not imposing elevated legal costs against the Commissioner. This presumes that the Commissioner has in fact conducted himself in the public interest throughout the proceeding. As discussed below, that was not the case in the present proceeding.

D. Partial Success

[35] Before the issuance of the Tribunal's decision, the Commissioner submitted that the cost award issued by the Tribunal should reflect any success that he had on issues.

[36] Unfortunately for the Commissioner, the Tribunal did not find in his favour with respect to most of the key issues and sub-issues that were in dispute. The noteworthy exceptions were the relevant date for the commencement of the forward-looking "but for" analysis and Shaw's historical effectiveness as a vigorous and effective competitor. In addition, the Tribunal ultimately agreed with the Commissioner's positions with respect to market definition and barriers to entry, after the Respondents conceded to those positions during their final oral submissions. However, the parties did not spend a material amount of time on those issues during the hearing.

[37] In my view, when these exceptions are considered together with the large number of issues in respect of which the Respondents prevailed, and the small amount of time and effort they attracted relative to other issues, they do not warrant significant weight in the Commissioner's favour.

E. Unreasonable Behaviour

[38] The Commissioner maintains that any cost award in the Respondents' favour should be materially reduced to reflect conduct on the part of the Respondents that unnecessarily lengthened the hearing and the submissions he was required to make. In this regard, the Commissioner contrasted the abovementioned concessions that were made in final argument by the Respondents, with concessions that he made at the outset of the hearing. At that time, the Commissioner effectively withdrew his allegations with respect to (i) the impact of the Merger in Ontario, and (ii) the supply of services to *businesses* (as opposed to consumers).

[39] The Commissioner added that the Respondents' refusal to admit various matters that should have been admitted unnecessarily complicated the parties' dispute. As an example, the Commissioner noted that Rogers refused to admit that it experienced a service outage in 2022. As

a second example, the Commissioner asserted that Rogers refused to provide admissions with respect to certain of its wireless terms of service.

[40] The Respondents countered with the assertion that the Commissioner unreasonably pursued the Initially Proposed Transaction. The Respondents underscored that the Commissioner did so even after the public announcement of the Divestiture, almost five months before the commencement of the hearing, and even after the Minister of Innovation, Science and Industry officially announced, on October 25, 2022, that he would not approve the transfer of spectrum licenses from Shaw to Rogers.

[41] The Respondents added that the Commissioner also adopted an unnecessarily contentious approach throughout the litigation. They asserted that this resulted in excessive production of over 2.6 million documents, nine days of examinations for discovery, 16 contested pre-trial motions, the engagement of Bell and Telus in motions over documents and subpoenas, and the exchange of approximately 45 witness statements and expert reports in a very tight timeframe.

[42] On balance, I consider that the Commissioner's conduct, as described immediately above, was much more unreasonable than the conduct of the Respondents, as described at paragraphs 38 and 39 above.

[43] In the Tribunal's decision on the merits, it was observed that the Commissioner's pursuit of the Initially Proposed Transaction was "divorced from reality", because that transaction was no longer something that would ever happen: *Rogers-Shaw*, at para 110. On appeal, the Federal Court of Appeal observed that "[e]xamining the merger alone – a merger that, by itself, will not and cannot happen without the divestiture – would be a foray into fiction and fantasy": *Canada (Commissioner of Competition) v Rogers Communications Inc., Shaw Communications Inc. and Videotron Ltd*., 2023 FCA 16 at para 18 ("***Rogers-Shaw FCA***"). The Court added that "in competition terms, this was far from a close case": *Rogers-Shaw FCA*, at para 10.

[44] I agree with the Respondents that the Commissioner's pursuit of the Initially Proposed Transaction was intransigent and should now have consequences. Among other things, the Commissioner's refusal to focus on the Divesture, despite repeated suggestions from the Tribunal that he do so, resulted in substantial resources having to be devoted by the Respondents and the Tribunal to something that had become legally and practically foreclosed.

[45] I also agree with the Respondents that the Commissioner adopted an unnecessarily contentious approach at numerous points during the litigation. Once again, that approach resulted in significant additional time and effort being spent on various matters that were ultimately resolved in the Respondents' favour.

[46] I recognize that complex, high-stakes, and time-sensitive litigation can and does often require actions to be taken that may not objectively appear to be unreasonable at the time. I also acknowledge that the Respondents adopted at least some positions that were not entirely reasonable or ultimately accepted by the Tribunal.

[47] However, on balance, I find that the Commissioner engaged in much more serious unreasonable behaviour than did the Respondents, and that this behaviour had a very significant adverse impact on the time and costs that were associated with the proceeding. Consequently, I

conclude that this factor weighs in favour of awarding elevated legal costs in favour of the Respondents.

F. Excessive Claims

[48] The Commissioner submits that the legal fees claimed by the Respondents are unprecedented and excessive. By way of comparison, the Commissioner notes that the successful respondent in the recent *P&H* case was awarded a lump sum for legal fees of $157,000, which represented approximately 75% of its legal fees as claimed under Colum IV of Tariff B: *P&H*, at para 785.

[49] With respect to the allegedly excessive claims, the Commissioner asserts that they include a substantial duplication of work as between the legal teams of Rogers and Shaw. In this regard, the Commissioner states that counsel for both of those parties were heavily involved in every aspect of the defence of the Commissioner's application, leading to parallel and overlapping defences and evidence led by each party.

[50] I acknowledge that Rogers and Shaw each had significant legal teams and that multiple members of both of those teams appeared to be very involved in several of the issues in this proceeding, as well as in the large number of pre-hearing motions that took place. This contrasted with what occurred in a number of other merger cases adjudicated by the Tribunal, where counsel to the acquiring party assumed responsibility for the bulk of the litigation.

[51] Nevertheless, it is difficult "to second guess successful counsel on the amount of time spent on the case or the allocation of counsel to the tasks at hand, unless the time spent is so grossly excessive as to be obvious overkill": *Shibish v Honda of Canada Inc.*, 2011 ONSC 2989 at para 21. In the absence of particularized support for the Commissioner's allegations, it is difficult to do more than to find that this factor weighs in favour of moderately reducing the cost award that might otherwise be made.

G. The Commissioner's Role in Bringing about the Divestiture

[52] The Commissioner submits that any costs awarded to the Respondents should be reduced to recognize the Commissioner's role in bringing about the Videotron Divestiture. The Commissioner maintains that he incurred significant expenses reviewing and challenging the Initially Proposed Transaction, including prior to the announcement of the Divestiture. The Commissioner notes that the Divestiture was only announced on the eve of examinations for discovery, and after the Tribunal issued its expedited Scheduling Order.

[53] To the extent that the Commissioner maintained his challenge of the Initially Proposed Transaction after he became aware of the Divestiture, his efforts to persuade the Tribunal to reduce the amount of costs to be awarded to the Respondents are somewhat beside the point.

[54] In any event, the Bills of Costs filed by the Respondents reflect only very minor legal fees, totalling approximately $13,312, for work incurred prior to the announcement of the Divestiture, on June 17, 2022.

[55] I recognize that the Respondents incurred significant disbursements prior to the announcement of the Divestiture. I will deal with this in part IV.J. of these reasons below.

[56] In summary, with respect to the Respondents' claimed legal fees, the Commissioner's role in bringing about the Divestiture warrants only a minor reduction of the costs that would otherwise be awarded to the Respondents. For greater certainty, such reduction is significantly less than the increase in costs that is warranted by the Commissioner's continued challenge of the Initially Proposed Transaction, long after that transaction became a legal and practical impossibility.

H. Videotron's Costs

[57] The Commissioner submits that Videotron should not be awarded any costs because it failed to make any request in this regard in its motion for leave to intervene. In support of this position, the Commissioner notes that under Rule 46(2) of the *Competition Tribunal Rules*, SOR/2008-141, the Tribunal may allow a motion for leave to intervene, with or without conditions. The Commissioner adds that, in *Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 5 at paragraph 19 ("**HarperCollins**"), the Tribunal granted Rakuten Kobo Inc.'s request for leave to intervene on the basis that "Kobo shall be able to seek and be liable for costs in these proceedings."

[58] It is relevant to note that HarperCollins is not the only case in which a party requesting intervener status addressed the issue of costs in its application for leave to intervene. This was also done by the Canadian Real Estate Association in *Commissioner of Competition v Toronto Real Estate Board*, 2011 Comp Trib 22 at paragraph 43.

[59] Videotron was represented by sophisticated counsel from the outset of this proceeding. I am inclined to consider that Videotron's decision *not* to address the issue of costs in its motion for leave to intervene or at any time during the hearing was not an oversight.

[60] In any event, "[w]here costs are not requested in the pleadings or at the hearing" they cannot be awarded, unless leave is granted to seek costs: *Pelletier v Canada (Attorney General)*, 2006 FCA 418 at para 9; *Allergan-Sandoz*, at para 77.

[61] Consequently, and notwithstanding that I provided Videotron with an opportunity to make submissions on costs in my aforementioned Direction dated December 21, 2022, I consider it appropriate to exercise my discretion not to award Videotron any costs in this proceeding.

I. Conclusion regarding Counsel Fees

[62] Having regard to the parties' various submissions and to the general principles summarized in part IV.A above, I consider that the Respondents' alternative request for costs guided by the top end of Column V of Tariff B is fair and reasonable. In other words, I consider it appropriate to fix costs for the Respondents' legal fees at the amounts set forth in the bottom row of Table 1 above, namely, $414,720.00 for Rogers and $416,187.00 for Shaw, plus applicable HST.

[63] For the reasons given in the immediately preceding section, no costs will be awarded to Videotron.

[64] Although the amounts to be awarded to the Respondents represent only a small fraction of the legal fees actually incurred, it appears that they far exceed any amount that has previously been awarded by the Tribunal for legal fees.

[65] These amounts are very substantial for a public authority such as the Commissioner. I am mindful that the public interest may suffer if the level of costs awarded against the Commissioner were to begin to reach the point at which they have a chilling effect on his willingness to bring responsible cases that are in the public interest: *Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp Trib 10 at para 406 ("***Visa-MasterCard***").

[66] Despite the fact that the Commissioner continued to pursue this case after the announcement of the Divestiture, it was by no means vexatious or irresponsible of him to have done so. It raised some novel issues, and there was a broad public interest in bringing the case, even though it should have been recast to focus on the Divestiture after it was announced in June 2022: *Visa-MasterCard*, at para 407.

[67] Having regard to the foregoing, I will fix the costs for counsel fees awarded to the Respondents as reflected in Table 3 below, which reproduces Table 1 above, with changes to reflect my foregoing reasons.

Table 3 – Counsel Fees to be Awarded (excluding HST)

	Rogers	**Shaw**	**Videotron**
~~*Actual fees incurred*~~	~~*$7,967,640.00*~~	~~*$9,686,275.00*~~	~~*$1,949,180.48*~~
~~Claim based on 25% of actual fees~~	~~$1,991,910.00~~	~~$2,421,568.75~~	~~$487,295.12~~
Alternative claim guided by the high end of Column V of Tariff B	$414,720.00	$416,187.00	~~$303,880.00~~

J. Disbursements

[68] The Commissioner submits that the Respondents' claims for disbursements are excessive and duplicative with respect to (i) the amounts claimed for their experts, (ii) their claims for e-discovery costs, and (iii) their claims for certain costs associated with document review.

(1) The Respondents' experts

[69] Rogers claims a total of $8,105,079.70 for fees paid to its experts. The corresponding amount for Shaw is $1,357,827.20.

[70] By comparison with the aggregate of these two amounts ($9,462,906.90), the Commissioner sought a lump sum cost award of $10.9 million, inclusive of counsel fees and disbursements. He subsequently identified his legal fees as having totalled $178,561.70, which suggests that his expert fees amounted to approximately $10,721,438.30. In any event, it appears as though the total expert fees paid by the Commissioner were at least roughly equivalent to the total expert fees paid by the Respondents.

[71] At a broad level, this suggests that the expert fees paid the Respondents were not generally excessive in nature.

[72] With respect to the Respondents' specific experts, the Commissioner begins by taking issue with the fees charged by Dr. Israel, who testified on behalf of Rogers. The Commissioner notes that Dr. Israel had total billings approaching the level of Dr. Miller's aggregate billings, despite the fact that Dr. Israel limited himself to a narrow critique of the reports filed by Dr. Miller on behalf of the Commissioner. The Commissioner maintains that the Tribunal should not compensate Rogers for the full amount invoiced by Dr. Israel.

[73] After reviewing and comparing the two expert reports prepared by each of Dr. Israel and Miller, respectively, and after considering the testimony they provided, I am not persuaded that the aggregate amount invoiced by Dr. Israel and his team at Compass Lexecon is excessive or otherwise unreasonable. I am also mindful of the fact that Dr. Israel's testimony generally held up, and, where he and Dr. Miller disagreed, the panel found Dr. Israel's testimony to be more robust and persuasive than that of Dr. Miller: *Rogers-Shaw*, at para 77.

[74] The Commissioner also submits that the work performed by Dr. Johnson on behalf of Shaw was (i) superfluous in light of Dr. Israel's work, and (ii) found to have been weak in a number of respects. Consequently, the Commissioner submits that Shaw should not be reimbursed for Dr. Johnson's work, or should only receive a partial reimbursement for that work.

[75] I agree with the Commissioner that Shaw's claims in respect of Dr. Johnson's fees ought to be reduced. The total amount claimed by Shaw in respect of work performed by Dr. Johnson and his colleagues at Bates White amounted to $1,067,257.49. However, $151,753.48 of that amount was for work provided by certain partners, economists and other business professionals in support of Dr. David Evans, who is associated with Global Economics Group, and who testified with respect to efficiencies. Although the Tribunal ultimately found it unnecessary to address the Respondents' efficiencies defence, I consider that it would not be fair or reasonable to deny Shaw's claims in relation to the work performed by Dr. Evans and those at Bates White who supported him. Of the remaining $915,504.01 invoiced by Bates White for Dr. Johnson's work, I consider it appropriate to reduce the amount awarded by 50%, or $457,752.01. This will be deducted from the amount claimed in Table 2 above.

[76] The Commissioner further maintains that there was duplication as between the work of Mr. Kenneth Martin on behalf of Rogers and Dr. William Webb on behalf of Shaw. However, he does not explain how this was so. Upon reviewing the panel's perceptions of the testimony given by those experts, I am not persuaded that their work was sufficiently duplicative to warrant reducing the amount of fees paid to them by the Respondents: *Rogers-Shaw*, at paras 78 and 82.

[77] The Commissioner also states that the Respondents called excessive evidence from three separate experts on the subject of the relevance of wealth transferred from consumers to the Respondents, in the context of the trade-off assessment contemplated by the efficiencies defence in section 96 of the Act. In this regard, the Commissioner notes that Drs. Roger Ware and Michael Smart testified on behalf of Rogers, and that Dr. David Evans testified on behalf of Shaw. The Commissioner observes that the Respondents claim an excessive amount ($476,222.63[2]) for fees paid to these three experts, relative to what the Commissioner paid for expert opinion on issues related to the wealth transfer.

[78] Upon revisiting the reports filed on behalf of Drs. Ware, Smart and Evans, I agree that they reflect a significant degree of duplication, and that the aggregate amount claimed for fees paid to those experts is therefore excessive. I consider it appropriate to reduce the amount awarded in respect of those fees by 35%, that is to say, by $69,359.40 for Dr. Evans on behalf of Shaw; and by $11,713.18 for Dr. Smart and $85,605.35 for Dr. Ware, both on behalf of Rogers – for a total reduction of $ $166,677.93. Given that the Commissioner put the issue of the wealth transfer in play, the Respondents cannot be further penalized for having put a strong foot forward in response to the position taken by the Commissioner.

(2) E-discovery costs

[79] The Commissioner asserts that Shaw's claim for almost $2 million in electronic discovery costs is excessive, particularly given that the Commissioner hosted all of the documents in this case using e-discovery software and claimed no reimbursement for his associated disbursements.

[80] This is essentially a bald assertion. Shaw cannot be faulted or penalized for having retained a third party to assist with the e-discovery process, including managing document review and providing technical support services to Shaw. Electronic document discovery is increasingly becoming a necessity. With the Tribunal's shift to using electronic records during its hearings, the same is true for electronic document management and technical support services: *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 823.

[81] As noted at paragraph 41 above, the approach adopted by the Commissioner in this proceeding resulted in the production of over 2.6 million documents, nine days of examinations for discovery, 16 contested pre-trial motions, the engagement of Bell and Telus in motions over documents and subpoenas, and the exchange of approximately 45 witness statements and expert reports. In addition, the affidavit sworn by Ms. Ashley McKnight, a law clerk at Lax O'Sullivan Lisus Gottlieb LLP (Rogers' principal counsel) states that there were approximately 7 million documents in the document database that was managed by its third party provider.

[82] In the absence of any demonstrated shortcoming in the allegedly excessive nature of Shaw's claims in respect of its disbursements for e-discovery, I am reluctant to disallow what

[2] The Tribunal notes that the portion of costs invoiced by Dr. Evans which pertained to Dr. Johnson's work – *i.e.*, $151,753.48 – was dealt with in paragraph 75 of these reasons. The Tribunal understands Dr. Evans's claimed fees with respect to wealth transfer to be limited to $198,169.71.

appears to be a legitimate claim on its face. Stated differently, the Commissioner has not demonstrated that Shaw's claim is unreasonable, having regard to the volume of documents.

(3) Document review

[83] Finally, the Commissioner claims that Rogers' claim for reimbursement of $93,265 in disbursements paid to a lawyer conducting document review is excessive and unreasonable. He further claims that this amount is for legal fees, rather than disbursements.

[84] The documentation provided by Rogers in support of this claim reflects that the third party it retained (Mr. Bharath Kumar) docketed almost 550 hours for document review. The Commissioner does not suggest that such review was unnecessary or that the amount paid for the services rendered exceeds what Rogers' principal law firm would have charged to perform the same services. Having regard to the large number of documents produced in this proceeding, I am unable to conclude that either the approximately 550 hours spent reviewing documents, or the total amount disbursed in relation to such review, was unreasonable.

(4) Other disbursements

[85] The Commissioner has not raised any issues with respect to the other disbursements claimed by the Respondents. After having reviewed the Affidavits, including the exhibits thereto pertaining to those disbursements, I am satisfied that they are not unreasonable or unnecessary, and that they are sufficiently justified. Among other things, those disbursements relate to expert fees paid for services rendered by Mr. Harington (who testified in respect of efficiency gains), as well as for court transcripts, translation, court reporting services, online research, courier expenses, printing and photocopying, and travel expenses.

(5) Conclusion regarding disbursements

[86] Having regard to the foregoing, I consider that, with two exceptions, the disbursements claimed by the Respondents are not unreasonable or unnecessary, and that they are appropriately justified. Deductions in the amounts of $457,752.01 and $166,677.93 will be made for the reasons explained at paragraphs 75 and 78 above. These deductions are from the amounts claimed by Shaw and Rogers, as summarized in Table 2 above. These are reflected in Table 4 below:

Table 4 – Summary of Claimed Disbursements
(as amended, excluding HST where applicable)

	Rogers	Shaw	Videotron
Taxable disbursements	$163,302.27	$86,173.59	~~$85,639.16~~
Non-taxable disbursements	~~$9,232,168.84~~ $9,134,850.31[3]	~~$3,277,858.12~~ $2,750,746.71[4]	~~$6,350.22~~
Total	$9,298,152.58	$2,836,920.30	~~$91,989.41~~

For greater certainty, I acknowledge that some of the disbursements claimed by the Respondents concerned work performed or other costs incurred prior to the announcement of the Divestiture. However, it was entirely understandable for the Respondents to incur costs in relation to their modified transaction as soon as they received the specific proposal from Videotron that led to the Divestiture. The Tribunal's understanding is that this was no later than April 7, 2022: *Rogers-Shaw*, at para 115. Any expert fees or other disbursements that were incurred after that date were entirely reasonable. It is not immediately apparent that any of the claimed disbursements were incurred prior to that date.

V. ORDER

[87] The Commissioner shall pay Rogers and Shaw costs for legal fees fixed in the amounts of $414,720.00 and $416,187.00, respectively, plus any applicable HST.

[88] The Commissioner shall reimburse Rogers' reasonable disbursements of $9,298,152.58, plus any applicable HST.

[89] The Commissioner shall reimburse Shaw's reasonable disbursements of $2,836,920.30, plus any applicable HST.

[90] No costs are awarded in favour of Videotron.

[3] $9,232,168.84 (Rogers' total non-taxable disbursement claim) – $11,713.18 (Dr. Smart) – $85,605.35 (Dr. Ware) = $9,134,850.31

[4] $3,277,858.12 (Shaw's total non-taxable disbursement claim) – $457,752.01 (Dr. Johnson) – $69,359.40 (Dr. Evans) = $2,750,746.71

DATED this 28th day of August, 2023

SIGNED on behalf of the Tribunal by the Presiding Member.

(s) Paul Crampton C.J. (Presiding Member)

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