

**FILED / PRODUIT**

Date: December 9, 2022

CT- 2022-002

Sara Pelletier for / pour  
REGISTRAR / REGISTRAIRE

CT-2022-002

OTTAWA, ONT.

Doc. # 774

**THE COMPETITION TRIBUNAL**

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

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

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

B E T W E E N :

**COMMISSIONER OF COMPETITION**

Applicant

- and -

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

Respondents

- and -

**VIDÉOTRON LTD.**

Intervenors

---

**FINAL WRITTEN ARGUMENT OF THE COMMISSIONER OF COMPETITION**

---

<b>A.</b>	<b>Introduction and Overview</b> .....	<b>1</b>
<b>B.</b>	<b>Market Structure and Industry Background</b> .....	<b>2</b>
1.	The Relevant Markets are Wireless Services in ON, BC, and AB.....	3
2.	Barriers to Entry are High .....	3
3.	Concentration is High.....	4
4.	Coordination by the Big 3 is a Feature of Canadian Markets .....	4
5.	Failed Entry, High Prices, Low Data Consumption.....	5
<b>C.</b>	<b>Substantial Lessening and Prevention of Competition From the Proposed Merger</b> <b>5</b>	
1.	The Forward-Looking “But For” Test Looks to Shaw as of March 13, 2021.....	5
2.	Both a Substantial Prevention and Lessening of Competition .....	6
3.	The Merger Lessens Network Competition and Network Choice .....	21
4.	Remaining Competition Will Not Constrain Roger’s Post-Merger Market Power....	22
5.	Conclusion on SPLC .....	23
<b>D.</b>	<b>Remedy</b> .....	<b>23</b>
1.	Legal Framework: Removing the “S” from the SPLC .....	23
2.	The Proposed Merger has Already Harmed Shaw’s Competitiveness.....	24
3.	Maverick Competitor Shaw Mobile Will be Lost .....	25
4.	Shaw Mobile was on a Growth Trajectory; Videotron is an Unproven Competitor in Western Canada .....	26
5.	Videotron will not Recapture Shaw’s Disruptive Success .....	26
6.	Existing Regulatory Frameworks Do Not Resolve Competition Concerns .....	37
7.	Merger Simulation Shows Proposed Divestiture will not remove the “S”.....	39
<b>E.</b>	<b>Economic modelling and other evidence of anti-competitive effects</b> .....	<b>40</b>
1.	Dr. Miller’s Merger Simulation Yields Reliable Results .....	41
2.	Dr. Israel Responding Evidence Demonstrated no “Flaws” in the Model .....	43
3.	Qualitative evidence is consistent with significant merger effects.....	46
4.	Conclusion – Anti-Competitive Effects Remain in spite of the Proposed Divestiture	49
<b>F.</b>	<b>The Trade-Off Framework under s. 96</b> .....	<b>49</b>
1.	Wealth Transfer .....	50
2.	Efficiencies .....	55
3.	Rogers Has Not Met Its Burden of Substantiating Its Efficiency Claims .....	55
4.	Claimed Efficiencies from Proposed Divestiture are Not Cognizable .....	61
5.	The Alleged Efficiencies are Contrary to Parliament’s Intent .....	65
6.	Quantum of Substantiated Efficiencies .....	66

- 7. Timing of Effects ..... 66
- 8. Efficiencies are not “Greater Than” and do not “Offset” the Effects..... 67
- G. Response to Respondents’ Arguments..... 68**
  - 1. The “Proposed Merger” Before the Tribunal is Rogers’ Proposed Acquisition of Shaw 68
  - 2. Respondents’ Claims About the Commissioner’s Investigation are Unfounded and Irrelevant ..... 72
  - 3. Ordinary Course Internal Documents Should Trump Self-Serving Testimony ..... 73
- H. Conclusion ..... 75**

## A. INTRODUCTION AND OVERVIEW

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

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

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

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

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

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

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

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

## **B. MARKET STRUCTURE AND INDUSTRY BACKGROUND**




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

## 1. The Relevant Markets are Wireless Services in ON, BC, and AB

9. The Proposed Merger would cause a SPLC in wireless services in Ontario, BC, and Alberta; the Proposed Divestiture does not remove those effects in the latter two provinces. The dimensions of this relevant market are not in dispute. The product market of wireless services is “no broader than postpaid and prepaid mobile wireless services offered to consumers”; and the geographic market is “no broader than a province”.<sup>1</sup>

10. The market for business services is distinct.<sup>2</sup> While the Commissioner does not allege a substantial prevention or lessening of competition in that market, Shaw is a poised entrant in that market; that is a qualitative effect if an assessment of the efficiencies trade-off is required.

## 2. Barriers to Entry are High

11. Barriers to entry into wireless services in Canada are high. This is widely accepted.<sup>3</sup> A new entrant in the wireless services market in Canada faces numerous hurdles, including: scale;<sup>4</sup> retail distribution;<sup>5</sup> branding and customer perception;<sup>6</sup> access to devices/phones;<sup>7</sup> securing spectrum; and building or acquiring a network.<sup>8</sup> The Respondents have admitted that “  
  


9

12. Barriers to expansion are lower for carriers with a pre-existing network in a given geographic area, due to brand recognition; cross-selling;<sup>10</sup> bundling;<sup>11</sup> lower fixed and operating

<sup>1</sup> CA-A-0122, Expert Report of Nathan H. Miller, Sept 21, 2022 (“Miller Report”), paras 41, 46, 49-50. At para 46, Dr. Miller notes: “a degree of differentiation appears to exist between postpaid and prepaid service, but note that the difference is not likely to change the substance of my conclusions”; see also paras 49-50, where he notes sub-provincial differences are “unlikely to meaningfully alter the results of my analysis”.

<sup>2</sup> CA-A-0748, Testimony of D Prevost, Discovery Transcript, Aug 26, 2022, p 356:20 – p 357:17; p 361:17 – p 363:6; p 356:11-14; p 363:7-12; and CA-A-0570, Shaw Presentation Shaw Mobile for Business, Jan 8, 2021, p 5. However, a small businesses, such as self-employed individuals, are indistinguishable from consumers, and are generally included in the market for consumer service: CA-A-0122, Miller Report, p 28, para 45. See also, CA-A-0748, Testimony of D Prevost, Discovery Transcript, Aug 26, 2022, p 359:2-5.

<sup>3</sup> CA-A-0028, Witness Statement of Mathew McCarthy, Sept 23, 2022 (“McCarthy Statement”), Exhibit U, p 1154 paras 100-101, Telecom Regulatory Policy CRTC 2021-130, Review of mobile wireless services, April 15, 2021.

<sup>4</sup> P-A-1412, Shaw Submission to Telecom Notice of Consultation CRTC 2019-57, May 15, 2019, p 6 para 10.

<sup>5</sup> P-A-1412, Shaw Submission to Telecom Notice of Consultation CRTC 2019-57, May 15, 2019, p 15 para 36(a).

<sup>6</sup> CA-A-0496, WIND Mobile Presentation Strategic Plan Draft dated Oct 4, 2016, p 19.

<sup>7</sup> CA-R-0192, Witness Statement of Paul McAleese, Sept 23, 2022 (“McAleese Statement”), Exhibit 26 p 1445.

<sup>8</sup> CA-A-0122, Miller Report, p 32 para 54.

<sup>9</sup> CA-A-0262, Shaw’s Responses to Undertakings at Examination of P McAleese, Sept 2, 2022, No. 49, p 26.

<sup>10</sup> CB-A-0132, Expert Report of M Davies, Sept 23, 2022 (“M Davies Report”), p 35, paras 80-81; Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2208:7-13; Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p 745:12-25.

<sup>11</sup> CA-A-0074, Witness Statement of Blaik Kirby (Bell), Sept 23, 2022 (“Kirby Statement”), p 11 paras 23-24; CA-A-0131, Davies Report, p 22 para 40, p 24 p 48, p 26 para 53; Testimony of Kenneth Martin, Transcript, Vol 14, Nov 25, 2022, p 3797:25 – p 3800:9; Testimony of T Nagel, Transcript, Vol 5, Nov 14, 2022, p 1234:19 – p 1236:6.

costs;<sup>12</sup> Wi-Fi hotspots (where available);<sup>13</sup> faster and cheaper small cell deployment and 5G-critical fibre backhaul.<sup>14</sup> Strong regional players Shaw and Videotron demonstrate that carriers offering wireless services are more competitive, and operate at lower costs, in markets where they own wireline infrastructure.<sup>15</sup>

### 3. Concentration is High

13. Pre-merger concentration levels were already very high in wireless markets, with CR3 and CR4 shares of subscribers exceeding 85% and 95% respectively in both BC and Alberta.<sup>16</sup> Where, as here, incumbents are facing enhanced and growing competition from a disruptive rival like Shaw, the *Merger Enforcement Guidelines* (“MEGs”) signal that the best indicator of market share are new customer acquisitions.<sup>17</sup> Dr. Miller concurred, referencing “gross adds”, or “the new customers that a wireless carrier gains during a particular period of time.”<sup>18</sup> The choice of market share measure will be canvassed at greater length below.<sup>19</sup>

### 4. Coordination by the Big 3 is a Feature of Canadian Markets

14. Canadian wireless markets feature a tight oligopoly, with pricing often subject to coordinated behaviour. Market characteristics make them susceptible to coordination among the Big 3, particularly in markets that lack a strong, regional competitor. Tactics used by the Big 3 include: (a) plans with common features, allowing them to easily compare their respective offerings, and match each other’s promotions; (b) active monitoring, quickly identifying and responding to pricing changes; (c) communication through signalling by disclosing start and end dates for promotional activities; and (d) disciplinary retaliation targeted to their respective “home markets”, thus stifling and deterring competitive behaviour. The record discloses internal ordinary course documents demonstrating coordination in the form of these and other tactics.<sup>20</sup>

---

<sup>12</sup> CA-A-0111, Witness Statement of Stephen Howe (Bell), Sept 23, 2022 (“Howe Statement”), pp 4-6, paras 10-12.

<sup>13</sup> CA-A-0109, Witness Statement of Tom Nagel, Sept 22, 2022 (“Nagel Statement”), p 2, para 6; Testimony of T Nagel, Transcript, Vol 5, Nov 14, 2022, p 1238:18 – p 1239:13.

<sup>14</sup> CA-A-0109, Nagel Statement, p 3, para 10; Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p 744:21 – p 745:3.

<sup>15</sup> CA-A-0074, Kirby Statement, p 11, para 25; Testimony of P Peladeau, Transcript, Vol 10, Nov 21, 2022, p 2575:24 – p 2578:13; and Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3735:3 – p 3740:17, and p 3761:13 – p 3763:20.

<sup>16</sup> CA-A-0122, Miller Report, p 38, Exhibit 3.

<sup>17</sup> Federal Government of Canada, Competition Bureau of Canada, *Merger Enforcement Guidelines* (Ottawa: 2011) [MEGS], at 21 para 5.4.

<sup>18</sup> CA-A-0122, Miller Report, pp 35-36, paras 61 and 63, Exhibit 2.

<sup>19</sup> See Section E and Appendix VV.

<sup>20</sup> CA-A-0122, Miller Report, paras 27, 28, 204. See also, CA-A-0308; CA-A-0312; CA-A-0354; CA-A-0362; and CA-A-0508.

## 5. Failed Entry, High Prices, Low Data Consumption

15. The important role played by Shaw since 2017 as a disruptive and growing competitor is elevated in the context of decades of failed entry attempts and consolidation, frustrating regulatory efforts to stimulate competition. In the 2008 spectrum auction, several firms purchased “set-aside” spectrum (reserved for those with less than 10% national wireless subscriber share).<sup>21</sup> Three of the four new entrants were acquired by larger companies.<sup>22</sup>

16. The combination of high concentration, significant barriers and failed entry have produced higher retail prices and lower consumer data usage than in other countries. The ordinary course records of Shaw<sup>23</sup> and Rogers<sup>24</sup> recognize this. The CRTC clearly flagged Canada as a high-priced market in an April 2021 study, citing international sources, “almost all” of which “pointed to similar conclusions and consistently reported higher retail prices in Canada.”<sup>25</sup>

## C. SUBSTANTIAL LESSENING AND PREVENTION OF COMPETITION FROM THE PROPOSED MERGER

### 1. The Forward-Looking “But For” Test Looks to Shaw as of March 13, 2021

17. Under the “but for” test set out by the Supreme Court, “[a] merger review, by its nature, requires examining a counterfactual scenario: ‘... whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark or 'but for' world.’”<sup>26</sup> Here, as in *Tervita*, the test asks what would have happened but for the proposed merger, which in this case is framed by the Arrangement Agreement of March 13, 2021 (“AA”). The test is forward-looking. The Tribunal should consider the competitive trajectory that Freedom and Shaw Mobile were on *at that time*, “but for” the AA.

18. In addition, the Tribunal must consider the impact of the AA on reducing or preventing competition by, for example, making Shaw’s participation in the 3500 MHz auction impossible, thereby hampering its 5G rollout. The Tribunal should give due weight to such facts to ensure that

---

<sup>21</sup> CA-A-0028, McCarthy Statement, Exhibit H, p 256, Exhibit I, p 261, Exhibit J, p 264, & Exhibit K, p 268.

<sup>22</sup> CA-A-0028, McCarthy Statement, Exhibit L, p 320, Exhibit M, p 497, Exhibit N, p 607. In 2013, Public Mobile was acquired by Telus. In 2015, Mobilicity was acquired by Rogers. In 2016, WIND Mobile was acquired by Shaw.

<sup>23</sup> CA-A-0526, Shaw Presentation Wireless 101 slide deck dated March 28, 2017, p 15; CA-A-0452, Shaw Presentation Shaw Communications Wireless Data Discussion, Sept 30, 2018, p 3.

<sup>24</sup> CA-A-0306, Rogers Presentation ELT Strategy Offsite Brent Johnston, President Wireless, Jan 29, 2019, p 6; CA-A-0352, Rogers Presentation Freedom Analysis and Strategic Options for Consideration, p 3.

<sup>25</sup> CA-I-0144, Witness Statement of Jean-Francois Lescadres, September 23, 2022 (“Lescadres Statement”), Ex 14, p 359, para 120, CRTC 2021-130 Review of mobile wireless services, April 15, 2021.

<sup>26</sup> *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCR 161, at para 44 (“*Tervita SCC*”), BOA Tab 24; see also *Commissioner v Canada Pipe 2006 FCA 233* at para 37, BOA Tab 2; *Commissioner v TREB 2017 FCA 236* at paras 86 and 90, BOA Tab 9.



Canada's competition law does not permit merging parties to "profit" by diminishing a target firm. To do otherwise would incentivize acquisitions orchestrated to diminish competitors before adjudication is possible. The regulatory process should not become a facilitator of anti-competitive conduct.

## **2. Both a Substantial Prevention and Lessening of Competition**

19. The evidence has disclosed a likely substantial *prevention* of competition: but for the Proposed Merger, Shaw was likely to have continued to expand and to innovate, as evidenced by facts including its: (a) track record as a maverick disrupter and innovator; (b) growth trajectory until the merger announcement; (c) plans to purchase 3500 MHz spectrum and entry into 5G; (d) network expansion plans; and (e) poised entry into other markets, such as business services.

20. The merger is also likely to *lessen* competition substantially by eliminating the close competition between Shaw and Rogers and removing Shaw as a disrupter of price coordination. The evidence shows that Rogers' acquisition of Shaw was designed to staunch its competitive bleeding; Shaw was acquired on the eve of its planned 5G entry and was shifted away from disruption to a "middle lane" strategy. Shaw's competitive decline since then is properly attributed to the Proposed Merger, given that it halted Shaw's competitive trajectory.

### **a) Shaw Has Been a Maverick Competitor in Wireless Markets, Bringing Innovation, Low Prices and Greater Data Usage to Consumers**

21. In 2016, Shaw began rolling out its Freedom LTE network in major Canadian cities within Alberta, BC and Ontario.<sup>27</sup> Its Big Gig plans in 2017 set off "[REDACTED]".<sup>28</sup> In 2018, Shaw continued to improve its network;<sup>29</sup> in November, it launched Freedom's 100GB Big Binge plans.<sup>30</sup> In 2019, it expanded its retail footprint and undertook aggressive comparative advertising. It launched its Absolute Zero promotion and a series of commercials depicting the Big 3 as "Monolithic Wireless", featuring Canadian actor Will Arnett.<sup>31</sup>

22. Freedom's impact can be clearly seen in Rogers' documents showing concern about the need for "[REDACTED]", in part due to their own [REDACTED]

<sup>27</sup> CA-A-0470, Shaw Presentation titled Shaw Wireless Update, Family Day, Jan 2020, p 2.

<sup>28</sup> CA-A-0480, Email dated Dec 19, 2017 from Jay Mehr to Brad Shaw re: Having Confidence in Ourselves, p 1.

<sup>29</sup> CA-A-0492, Shaw Presentation Wireless Board Materials (draft), Oct 5, 2018, pp 2, 6, 7-12.

<sup>30</sup> CA-A-0690, Shaw Presentation Wireless Board Materials, Oct 2018, p 29.

<sup>31</sup> P-A-1417, Shaw Press Release, Freedom Mobile Lowers Monthly Bills with Absolute Zero Phone-Included Offers and More Affordable Unlimited Plans, July 25, 2019.

[REDACTED].<sup>32</sup> In the summer of 2019, Rogers responded with “unlimited” (“Rogers Infinite”) plans.<sup>33</sup> [REDACTED] [REDACTED]” for competition.<sup>34</sup>

23. In 2020, Shaw’s continued with “disruptive efforts” to win customers.<sup>35</sup> In summary, “Rogers, Bell, and Telus ... responded to Shaw’s competitive initiatives, including by offering price promotions, introducing plans with more data at a less expensive base price (per gigabyte), and reducing data overage charges.”<sup>36</sup>

### **b) Shaw Mobile: Deep Discounts Driven by Wireline Incentives**

24. Shaw Mobile launched in July 2020.<sup>37</sup> Shaw’s strategy was to use a disruptive wireless pricing model to strengthen internet customer relationships and capture more of the market.<sup>38</sup> Modeled after the strategy of US cable companies like Comcast,<sup>39</sup> Shaw Mobile was intended “[REDACTED]”<sup>40</sup> Shaw Mobile plans were up to \$60 cheaper than equivalent plans of incumbents.<sup>41</sup> Shaw Wi-Fi hotspots enabled subscribers to consume less data, and in some cases to “virtually eliminate their monthly wireless data bill.”<sup>42</sup> Its launch was met with overwhelming customer demand,<sup>43</sup> outperforming Freedom. Between Q4 2020 and Q4 2021, Shaw Mobile gained [REDACTED] postpaid wireless subscribers, compared to Freedom which lost [REDACTED]<sup>44</sup>

<sup>32</sup> CA-A-0306, Rogers Presentation ELT Strategy Offsite Brent Johnston, President Wireless, Jan 29, 2019, pp 2-6.

<sup>33</sup> CA-A-0528, Shaw Presentation Market Move to "Unlimited" Discussion, June 21, 2019), pp 2 and 7.

<sup>34</sup> CA-A-0252, Rogers Presentation Consumer Wireless Health Check, July 30, 2019, p 4.

<sup>35</sup> CA-A-0460, Wireless F20 and 5Y Plan Overview, Preliminary Discussion Materials, Sept 27, 2019, p 4.

<sup>36</sup> CA-A-0122, Miller Report, pp 42-43, paras 76 and 78, Exhibit 7, pp 53-54, and Exhibit 9, pp 56-57; CA-A-1158, Email dated Dec 16, 2017 from JR Shaw to Brad Shaw Re: We have an idea - and a competitive update, pp 2-5.

<sup>37</sup> P-A-1416, Global Newswire article: Shaw Mobile Has Arrived - Fast LTE and Shaw's Fibre+ Network Combine to Give Customers an Innovative Wireless Experience with Unprecedented Savings, July 30, 2020.

<sup>38</sup> CA-A-0680, Shaw Presentation Wireless F20 & 5Y Plan Overview Preliminary Discussion Material, Oct 16, 2019, pp 10-11 and Testimony of P McAleese, Transcript, Vol 11, Nov 22, 2022, p 2911:3 – p 2912:13.

<sup>39</sup> CA-A-0472, Shaw Presentation, Strategic Overview, May 15, 2020, pp 7-9 and Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2979:13 - p 2980:8.

<sup>40</sup> CA-A-0680, Shaw Presentation titled Wireless F20 & 5Y Plan Overview Preliminary Discussion Material dated October 16, 2019, p 3 and CA-A-1882, Commissioner’s Read-Ins (Shaw), August 22, 2022, p 44:7-17.

<sup>41</sup> Its “[REDACTED]” CA-A-0122, Miller Report, p 61, para 111 (emphasis added).

<sup>42</sup> CA-A-0122, Miller Report, p 61, para 111; P-A-1416, Article July 30, 2020 Shaw Mobile Has Arrived - Fast LTE and Shaw's Fibre+ Network Combine to Give Customers an Innovative Wireless Experience with Unprecedented Savings, pp 2-3.

<sup>43</sup> CA-A-0554, Shaw Presentation, Executive Chair and CEO Report, Oct, 2020 attaching Q4 and F20 Review and Discussion Materials, p 12, Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2950:13 – 22 and CA-A-0670, Email, Mar 7, 2022 from P McAleese to Jeni McAleese, Re: Research for Effies Case Study.

<sup>44</sup> CA-A-0654, Audit Committee Q4 and Fiscal 2021 Financial & Operational Performance Review, Oct 27, 2021, p 14.

25. Dr. Miller analysed the competitive impact of Shaw Mobile and concluded that “the available evidence from Rogers documents indicates that Rogers’ responses to Shaw Mobile during this period resulted in lower prices for Rogers subscribers”; “[t]hese benefits accrued not only in Alberta and BC ... but spilled over to Ontario as well, as the result of retaliatory promotions targeted at Freedom.”<sup>45</sup> For example, [REDACTED]

[REDACTED]<sup>47</sup> CEO Joe Natale summarized this in a briefing to Rogers’ Board:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>8</sup>

26. Shaw Mobile’s success shows that the foundation for growth and competitive strength in Canadian wireless markets is facilities-based competition.<sup>49</sup>

27. Bell’s Blaik Kirby said that Shaw Mobile “made the market very, very competitive in western Canada,”<sup>50</sup> with carriers launching [REDACTED].<sup>51</sup> Bell then saw its [REDACTED] port-outs to Shaw.<sup>52</sup> This contradicts Mr. McAleese’s claims that Shaw saw “no material response to Shaw Mobile pricing.”<sup>53</sup> The response was also sustained.<sup>54</sup> Mr. McAleese suggested that Shaw Mobile was a retention strategy with limited scope for growth and contributed little to the company’s bottom line. To the contrary, it was growing, “[REDACTED]  
[REDACTED]

<sup>45</sup> CA-A-0122, Miller Report, p 75, para 133; CA-A-0464, Freedom Mobile Holiday Campaign Brief, Sep 25, 2020, p 1.

<sup>46</sup> [REDACTED]  
[REDACTED]: P Johnson, Transcript, Vol 16, Nov 29, 2022, p 4244:7 – p 4245:21.

<sup>47</sup> CA-A-0342, Email dated Sept 25, 2020 Subject: FW: Following the story on \$10/\$11x24; CA-A-1879, Commissioner’s Read-ins (Rogers), Q 197-205, p 47:7 – p 49:22 and pp 800-801; CA-A-0304, Shaw Mobile Response Strategy, Aug 14, 2020, pp 16, 18 and 20; and CA-A-0344, Rogers-Shaw Winback Response.

<sup>48</sup> CA-A-0330, Rogers letter from Joe Natale to RCI Board of Directors re Q3 2020, Oct 15, 2020, p 3.

<sup>49</sup> CA-A-0672, Email, Jan 12, 2022 Shaw Announces First Quarter Fiscal 2022 Results, p 11.

<sup>50</sup> Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p 725:2-13.

<sup>51</sup> Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p 737:19 – p 738:7.

<sup>52</sup> CA-A-0074, Kirby Statement, p 6, at Figure 1.

<sup>53</sup> Testimony of P McAleese, Transcript, Vol 11, Nov 22, 2022, p 2883:9-19.

<sup>54</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3369:21 – p 3372:3; CA-A-0358, Email Jan 21, 2022 HEADS UP - COLOR OF THE FLAG... and ACTION PLAN, p 2; Testimony of B Kirby, Transcript, Vol 4, Nov 10, 2022, p 936:23 – p 937:20.

<sup>55</sup> CA-A-0688, Shaw 2021 Divisional Review-Consumer & Wireless Board Discussion Materials; pp 5, 9, 10, Jan 13, 2021; CA-A-0686, Shaw 2022 Fiscal Planning - Responses to Undertakings from Discovery, p 18.

██████████<sup>56</sup> His claim that Shaw Mobile’s success quickly moderated is also unsupported;<sup>57</sup> in fact, it became a sustained source of Shaw’s subscriber growth.<sup>58</sup>

**c) Rogers-Shaw Rivalry: Shaw Mobile Disproportionately Affected Rogers**

28. Shaw Mobile’s gains were largely ██████████<sup>59</sup> Shaw Mobile accounted for ██████████ customers leaving Rogers in Alberta and BC.<sup>60</sup> Competitors noticed Rogers was getting “██████████” by Shaw Mobile and ██████████<sup>61</sup> Approximately ██████████ of Rogers wireless customers in the West are Shaw wireline households.<sup>62</sup> R ██████████

██████████<sup>65</sup> In January 2021, six months after launch, ██████████  
 ██████████<sup>66</sup> Rogers’ VP of Fido wrote: “██████████  
 ██████████”.<sup>67</sup> By July 2021, ██████████  
 of Shaw Mobile’s total port-ins continued to be from Rogers.<sup>68</sup>

29. Porting data “confirms that Rogers and Shaw do indeed compete closely with one another”.<sup>69</sup> Consumers switched between Rogers and Shaw at higher rates than between other firms.<sup>70</sup> Mr. Kirby explained that Bell views porting as “the most reliable indicator of market share performance”<sup>71</sup> and that “Rogers and Shaw are often each other’s closest wireless competitor”.<sup>72</sup>

<sup>56</sup> CA-A-0594, Shaw Presentation Consumer F22 Results Presentation, April 2022, pp 53-54.

<sup>57</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 22, 2022, p 2880:13-25.

<sup>58</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2943:13-16; CA-A-0654, Shaw Presentation Audit Committee Q4 and Fiscal 2021 Financial & Operational Performance Review, Oct 27, 2021, p 14; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2960:14 - p 2961:15.

<sup>59</sup> CA-A-0304, Shaw Mobile Response Strategy, Aug 14, 2020, p 7.

<sup>60</sup> CA-A-0346, Consumer Insights: Q3’2020 Rogers Postpaid Wireless Churn Report, Dec 18, 2020, p 8.

<sup>61</sup> CA-A-0074, Kirby Statement, Exhibit CC, p 600.

<sup>62</sup> Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p 738:8 – p 739:3.

<sup>63</sup> CA-A-0474, Email, Sep 11, 2020 Subject: Shaw Mobile porting summary, p 1.

<sup>64</sup> CA-A-0476, Email, Sept12, 2020 from P McAleese to Brad Shaw, re Shaw Mobile porting insights, p 1; CA-A-0324, Email, Jan 14, 2022 re: Fido internet upsell to Fido wireless base in footprint, p 2.

<sup>65</sup> CB-A-0376, Converged Research: Attitudes & Market Sizing For Discussion of Rogers-Shaw Value Prop, Jan 25, 2021, p 6 and CA-A-0308, Email, Jan 26, 2021, re: Weekly Wireless Update Jan 26

<sup>66</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3369:21 – p 3372:3.

<sup>67</sup> CA-A-0358, Email Jan 21, 2022, re Heads-up - COLOR OF THE FLAG...and ACTION PLAN, p 2.

<sup>68</sup> CA-A-0604, Email July 29, 2021, Subject: Fwd: Shaw Mobile: Port In Data, p 1.

<sup>69</sup> CA-A-0122, Miller Report, p 38, para 68.

<sup>70</sup> CA-A-0122, Miller Report, Exhibit 4 and para 70, p 39.

<sup>71</sup> Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p742:15-24.

<sup>72</sup> CA-A-0074, Kirby Statement, p 12, para 28; Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p 733:19 – p 734:3.

Rogers' data shows the same;<sup>73</sup> as does Shaw's data.<sup>74</sup> Mr. Verma, a Freedom dealer, testified that "60 percent of our customers ... come from Rogers and Fido".<sup>75</sup>

30. Rogers described Shaw as a "[REDACTED]" which was "[REDACTED]" and whose "[REDACTED]" was "[REDACTED]".<sup>76</sup> Rogers' 2021 wireless operating plan refers to the launch of Shaw Mobile as a "[REDACTED]".<sup>77</sup>

**d) Rogers' Acquisition of Shaw Was Driven, at Least in Part, by a Desire to Eliminate the Threat Presented by Shaw Mobile**

31. As early as 2018, Rogers recognized that it was highly exposed to a Shaw Mobile bundle offer in the West.<sup>78</sup> By April 2020, one of Rogers' strategic rationales for the Proposed Merger was to "[REDACTED]", which could "[REDACTED]".<sup>79</sup>

32. Shaw Mobile's impact increased Rogers' appetite to proceed quickly with a Shaw merger.<sup>80</sup> Mr. Prevost's evidence confirmed Rogers' post-merger plans "[REDACTED]". As then-CEO Joe Natale stated in 2021, "[REDACTED]".

[REDACTED]<sup>81</sup> In cross examination, Mr. Prevost admitted Mr. Natale's post-merger intention "[REDACTED]".

[REDACTED]<sup>82</sup> Mr. Prevost explained "[REDACTED]".

<sup>73</sup> CA-A-0282, Email, Jan 16, 2019, to Anthony Staffieri and others, re freedom analysis, p 1.

<sup>74</sup> CA-A-0604, Email, July 29, 2021, Fwd: Shaw Mobile: Port In Data, p 1.

<sup>75</sup> Testimony of S Verma, Transcript, Vol 2, Nov 8, 2022, p 442:9-15.

<sup>76</sup> CA-A-0918, Consumer Planning Q4 Dual Brand Freedom Plan -Draft dated Sept 17, 2018, p 3.

<sup>77</sup> CA-A-0300, Rogers Wireless 2021 Operating Plan, Bart Nickerson, Oct 5, 2020, p 4.

<sup>78</sup> CA-A-0348, Freedom Mobile, Project Liberty - Fact Base & Situational Assessment, Dec 5, 2018, p 10.

<sup>79</sup> CA-A-0864, Shaw Presentation, Corporate Development, April 22, 2020, p 8.

<sup>80</sup> "If we can find a way to get Shaws comfortable with a merger with Rogers clan, I'm sure we can figure out price. That's the game changer. And the sooner the better (so that the WLS [wireless] remedy piece is kept as small as possible)" CA-A-0310, Email dated Sept 10, 2020 from Dan Golberg to Brent Johnson and "The Scotch (Shaw) work is really exposing this is a priority / opportunity. TELUS is killing Shaw on this and that battle (and Shaw's weakness) is forcing them into the crazy WLS pricing that is leaking national. As we think about the potential to merge / acquire Scotch, driving value from Rogers WLS and Shaw WLN customers (without excessive bundle discounts) will also be a key value driver. Getting good here is a big opp, far from fully tapped": CA-A-0314, Email Jan 28, 2021 from D.Golberg to D. Prevost and D. Stevenson; CA-A-1879, Read-ins, (Rogers), p 489.

<sup>81</sup> CA-R-0209, Witness Statement of Dean Prevost, Sept 23, 2022 ("Prevost Statement"), Exhibit 19, p 580.

<sup>82</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3381:17 – p 3383:14; and CA-R-0209, Prevost Statement, Exhibit 19, p 580.

[REDACTED]<sup>83</sup> This “repricing” risk, Dr. Miller explained, is a deterrent to competition in coordinated markets.<sup>84</sup>

**e) Rogers Found a Compliant Vendor**

33. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] by March 13, 2021, Shaw reached agreement to sell to Rogers.<sup>88</sup> This quick evolution following the passing of the family patriarch suggests that Shaw’s decision to sell the company was motivated largely by personal and Shaw family interests.<sup>89</sup>

**f) Meanwhile, Shaw Mobile Drove Profitability and was on a Growth Trajectory**

34. Shaw’s planning documents reveal a consistent story: Shaw Mobile was expected to be the primary driver of wireless growth in coming years. Records from 2019 projected that [REDACTED]  
[REDACTED]  
[REDACTED]<sup>90</sup> Records from 2020 stated Shaw’s Mobile’s “[REDACTED]  
[REDACTED]”.<sup>91</sup> Records from 2021 found it “[REDACTED]  
[REDACTED]”<sup>92</sup> and projected it to “[REDACTED]  
[REDACTED]”<sup>93</sup> forecasting over [REDACTED] subscribers by the end of F23.<sup>94</sup>

---

<sup>83</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3380:7–15.  
<sup>84</sup> CA-A-0122, Miller Report, pp 43-45, paras 80-83; CA-A-0452, Shaw Wireless Data Discussion Sept.30, 2018, slide 3.  
<sup>85</sup> Transcript, Vol 12, Nov 23, 2022, B Shaw, p 3164:2-18.  
<sup>86</sup> Transcript, Vol 12, Nov 23, 2022, B Shaw, p 3165:1-11 and pg 3167:4-22.  
<sup>87</sup> Transcript, Vol 12, Nov 23, 2022, B Shaw, p 3170:12 - 3171:9, Testimony of R Davies, Transcript, Vol 11, Nov 22, 2022, p 2830:10–19; CA-R-0190, p 16, para 44 and pp 35-36.  
<sup>88</sup> Transcript, Vol 12, Nov 23, 2022, B Shaw, p 3171:1-9.  
<sup>89</sup> Transcript, Vol 12, Nov 23, 2022, B Shaw, p 3189:7-12.  
<sup>90</sup> CA-A-0680, Wireless F20 & 5Y Plan Overview Preliminary Discussion Material, Oct 16, 2019, p 14.  
<sup>91</sup> CA-A-0518, Virtual SLT Retreat Pre-Read Materials, Nov 4, 2020, p 19.  
<sup>92</sup> [REDACTED] CA-A-0590, Shaw Presentation, Fiscal 2022 - Get through the finish line, Nov 1, 2021, p 22 and Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2982:19 - p 2983:5 and CA-R-0190, Witness Statement of Rod Davies (“R Davies Statement”), Exhibit 1, p 48.  
<sup>93</sup> CA-A-0504, Shaw Presentation titled SFG F20 and Q1F21 update, Jan 15, 2021, p 9; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2948:23 - p 2949:19.  
<sup>94</sup> CA-A-0538, Spreadsheet Wireless Stats F2019-F2023 (cell V18); and Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2986:19 - p 2987:23.

35. Despite Shaw's suggestions to the contrary, Shaw Mobile made Shaw more profitable.<sup>95</sup> Shaw Mobile was "[REDACTED]

[REDACTED]<sup>97</sup> As of March 2022, the CLV for Shaw's broadband customers with wireless was approximately \$ [REDACTED] compared to \$ [REDACTED] for broadband-only customers.<sup>98</sup>

36. Mr. McAleese acknowledged on discovery that Shaw Mobile's [REDACTED]

[REDACTED]<sup>100</sup> As both Mr. McAleese<sup>101</sup> and Dr. Israel acknowledged, firms report and focus on the impact of a product on overall profitability.<sup>102</sup> In Shaw's second quarter (Jan-Mar 2021) results, Shaw Mobile was increasing household profitability and reducing customer churn.<sup>103</sup> This was not an introductory phenomenon: in March 2022, Mr. McAleese noted "[REDACTED]

[REDACTED]<sup>104</sup> All of this evidence contradicts Mr. McAleese's claims that Shaw did not accomplish its primary objective of stemming the loss of wireline subscribers.<sup>105</sup> Fifteen months after its launch, Shaw Mobile was still "[REDACTED]"<sup>106</sup> Furthermore, Shaw's internet subscriber base, which had previously been declining, returned to growth.<sup>107</sup>

### **g) Shaw Was Well-Positioned to Compete and Fund Capital Expansion**

37. Shaw will argue "[REDACTED]"<sup>108</sup> This is incorrect.

<sup>95</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2946:6 - p 2947:14.

<sup>96</sup> CA-A-0686, Shaw 2022 Fiscal Planning - Responses to Undertakings from Examination for Discovery, p 18; CA-A-0688, Shaw 2021 Divisional Review-Consumer & Wireless Board Discussion Materials; pp 5, 9 and 10.

<sup>97</sup> CA-A-0594, Consumer F22 Results, April 2022, pp 53-54.

<sup>98</sup> CA-A-0594, Consumer F22 Results, April 2022, p 53; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2973:4 - p 2974:9.

<sup>99</sup> CA-A-1882, Read-Ins relating to Shaw's Examination Aug 22, 2022, Qs 300-301, p 50:5-20.

<sup>100</sup> CA-A-1882, Read-Ins relating to Shaw's Examination Aug 22, 2022, Q 302, p 50:22 - p 51:13.

<sup>101</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2970:11 - p 2971:5.

<sup>102</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022 p 4557:5-17.

<sup>103</sup> P-A-1408, Shaw News Release, April 14, 2021, Shaw Announces Second Quarter and Year-to-Date Fiscal 2021 Results, p 3.

<sup>104</sup> CA-A-0670, Email dated March 7, 2022 from P McAleese to Jeni McAleese; Subject: Research for Effies Case Study, p 2 and Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2963:24 - p 2964:25.

<sup>105</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 22, 2022, p 2883:3-8.

<sup>106</sup> CA-A-0686, Shaw 2022 Fiscal Planning - Responses to Undertakings from Examination for Discovery, p 18.

<sup>107</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2991:14 - p 2992:25, p 3125:13 - p 3127:25, CA-A-0686, Shaw Presentation titled Shaw 2022 Fiscal Planning - Responses to Undertakings from Examination for Discovery, p 15-18 and CA-A-0670, Email dated March 7, 2022 from P McAleese to Jeni McAleese; Subject: Research for Effies Case Study, p 2.

<sup>108</sup> TR 615, Shaw's Opening Statement, pp 46-47, para 124.

38. Shaw had a strong financial position and was well-positioned to continue to grow. Under cross-examination, Mr. English conceded Shaw is in no way in financial distress.<sup>109</sup> Prior to the Proposed Merger, Shaw had strong free cash flow,<sup>110</sup> an excellent balance sheet,<sup>111</sup> lower debt ratios and leverage than its peers,<sup>112</sup> and significant undrawn credit facilities (\$1.5 billion),<sup>113</sup> which translates into an ability to fund necessary investments.<sup>114</sup> TD's assessment was clear: Shaw was "[redacted]".<sup>115</sup> Contrary to claims by Shaw executives, its wireless business was "[redacted]"<sup>116</sup> A Q1 2021 update reported, and Mr. McAleese confirmed: "[redacted]".<sup>117</sup>

39. As noted above, prior to the Proposed Merger, Shaw's wireless business was growing and outperforming its peers,<sup>118</sup> and expected to continue to grow.<sup>119</sup> This included Shaw Mobile, which, with over [redacted] subscribers,<sup>120</sup> was increasing overall profitability.<sup>121</sup> Capital intensive industries such as telecommunications often require years to recover investments and start generating positive cash flows.<sup>122</sup> Rogers' wireless business had negative free cash flow from 1986 to 2004.<sup>123</sup>

<sup>109</sup> Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p 2682:25 - p 2683:2.

<sup>110</sup> Ibid., p 2683:3-11; p 2692:16- p 2698:4; CA-A-0183, Shaw F20 Outlook & Scenario Analysis dated April 9, 2020, p 41.

<sup>111</sup> Strong net income (over \$600 million), strong adjusted EBITDA (\$2.4 billion), lots of cash (\$571 million), see P-A-0185, Shaw Communications Interim Financial Statements dated Jan 13, 2021, pp 1-2; P-A-1797, Shaw 2020 Annual Report, p12. Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p 2706. : 1-17.

<sup>112</sup> CA-A-0183, Shaw Communications Inc. F20 Outlook and Scenario Analysis, April 9, 2020, slide 20; Transcript, Vol 11, Nov 22, 2022, T English, p 2703:11 - p 2704:9.

<sup>113</sup> CA-A-0183, Answers to Undertakings, Shaw F20 Outlook & Scenario Analysis dated April 9, 2020 p 7.

<sup>114</sup> P-A-0182, Shaw Communications Inc. CEO Bradley Shaw on Q4 2020 Results - Earnings Call Transcript, p 13; Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p 2685:15 - p 2687:4.

<sup>115</sup> CA-R-0165, English Statement, Exhibit 36, p 2877.

<sup>116</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2948:23 - p 2949:19; Testimony of S Dhamani, Transcript, Vol 3, Nov 9, 2022, p 512 10:13.

<sup>117</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2949:20 - p 2950:12.

<sup>118</sup> In F2021, Shaw's wireless business had robust financial metrics, including \$1.3 billion in revenue and \$400 million in EBITDA. Wireless revenues, EBITDA and free cash flow were all increasing: See A-R-0165, Amended Witness Statement of Trevor English, pp 30-32, para 97 and table; and Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p 2709:5-16.

<sup>119</sup> CA-R-0190, R Davies Statement, p 48.

<sup>120</sup> CA-A-0664, Spreadsheet, Shaw Wireless F22 LE 7+5.xlsx, Apr 28, 2022, at "WirelessKPI" tab (cell BW14).

<sup>121</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2946:6 - p 2947:14, p 2954:1-21, p 2966:23 - p 2970:7, p 2991:14 - p 2992:25; CA-A-0688, Shaw Presentation, Shaw 2021 Divisional Review - Consumer & Wireless Board Discussion Materials p 10; P-A-1408, Shaw News Release, April 14, 2021, Shaw Announces Second Quarter and Year-to-Date Fiscal 2021 Results p 2.

<sup>122</sup> Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p 2742:3 - 2743:3; 2747: 5 - p 2749:1

<sup>123</sup> PA-A-0031, Reply Witness Statement of Mathew McCarthy, Oct 20, 2022 ("Reply McCarthy Statement"), p 79.



### h) But for the Merger, 5G Was Ready to Go; Shaw was Poised for the 3500 Auction

40. But for the Proposed Merger, Shaw would have launched 5G;<sup>124</sup> [REDACTED]  
 [REDACTED].<sup>125</sup> TD said it was  
 [REDACTED]  
 [REDACTED].<sup>126</sup> Shaw acknowledges that [REDACTED]  
 [REDACTED]<sup>127</sup> Shaw's suggestion that it [REDACTED]  
 [REDACTED]  
 [REDACTED]<sup>128</sup>

### i) The Rollout of 5G was Stopped in its Tracks by the Proposed Merger

41. In [REDACTED]  
 [REDACTED]<sup>129</sup> [REDACTED]<sup>130</sup>  
 On October 30, 2020, Shaw told analysts that it expected its 5G services to be live in the market in early 2021.<sup>131</sup> Similar messaging was provided to Freedom dealers at a 2020 quarterly dealer forum,<sup>132</sup> and to Shaw's investment bankers, TD.<sup>133</sup> Shaw had made investments to enable 5G, including upgrading its wireless core.<sup>134</sup> Industry expert Michael Davies stated [REDACTED]  
 [REDACTED]<sup>135</sup> Videotron confirmed Shaw was positioned to launch 5G within months, if not weeks.<sup>136</sup> [REDACTED]  
 [REDACTED]<sup>137</sup> [REDACTED]  
 [REDACTED]<sup>138</sup> Mr. Verma, owner of

<sup>124</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3058:21 - p 3062:21.

<sup>125</sup> Transcript, Vol 11, Nov 22, 2022, T English, p 2758:21 - p 2759:22.

<sup>126</sup> Testimony of R Davies, Transcript, Vol 11, Nov 22, 2022, p 2845:3 – p 2846:11; CA-R-0190, R Davies Statement, Ex 1, p 28.

<sup>127</sup> CA-R-192, McAleese Statement, pp 46-48 paras 151-153 and 156-159; Transcript, Vol 11, Nov 22, 2022, T English, p 2758:21 - p 2759:22.

<sup>128</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3065:18 – 3066:20; p 3067:17 - p 3068:11. CA-A-0530, Shaw Presentation, 3500MHZ Risk Associated with an aggressive auction, p 1; CA-A-1194, Email from L Leblanc to P McAleese, Feb 26, 2021 RE: Spectrum analysis.

<sup>129</sup> CA-A-0536, Shaw Presentation 5G Status March 2, 2021, pp 5 and 9.

<sup>130</sup> CA-A-0536, Shaw Presentation 5G Status March 2, 2021, p 5.

<sup>131</sup> CA-A-1882, Read-Ins relating to Shaw's Examination Aug 22, 2022, Q 203, p 31:18-22.

<sup>132</sup> Testimony of S Verma, Transcript, Vol 2, Nov 8, 2022, p 439:1- p 440:6.

<sup>133</sup> Testimony of R Davies, Transcript, Vol 11, Nov 22, 2022, p 2840:19 – 25; CA-R-0190, R Davies Statement, Exhibit 1, p 31.

<sup>134</sup> Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p2758:21 - p 2759:11.

<sup>135</sup> [REDACTED] see CA-A-0131, M Davies Report, pp 30-31, paras 68-70; CA-A-0438, Shaw Presentation Shaw Wireless Network Strategy: 36mth Plan with view to 60 mths Presentation July 15, 2019, pp 7.; P-A-1797, Shaw 2020 Annual Report, p 23; CA-A-0428, Shaw Presentation 5G Status, Mar 2, 2021, pp 1, 5, 9.

<sup>136</sup> Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2194:13 – p 2195:16. CA-A-1891, Read-ins (Videotron), p 66:3 – p 67:2.

<sup>137</sup> CA-A-0510, Email March 4, 2021 re: 5G; CA-A-0512, Shaw Mobile 5G Launch Strategy, pp 3,8.

<sup>138</sup> CA-A-0131, M Davies Report, p 70, para 194; CA-A-0510, Email March 4, 2021 re: 5G.

19 Freedom stores,<sup>139</sup> received posters and marketing materials for use on April 8, 2021.<sup>140</sup>

[REDACTED]

[REDACTED]<sup>141</sup>

**j) Shaw Had Firm Plans Prior to the Merger Announcement for 3500 MHz**

42. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>148</sup>

**k) Shaw Planned Geographic and Product Expansion**

43. “But for” the Proposed Merger, Shaw would have likely expanded its wireless network.<sup>149</sup>

[REDACTED]

[REDACTED]

[REDACTED]

<sup>139</sup> Testimony of S Verma, Transcript, Vol 2, Nov 8, 2022, p 420:6 – 17.

<sup>140</sup> Testimony of S Verma, Transcript, Vol 2, Nov 8, 2022, p 439:1 - p 440:23.

<sup>141</sup> CA-A-0043, Verma Statement, Exhibit A, p 14, para 31.

<sup>142</sup> CA-A-0131, M Davies Report, p 71, para 197; CA-A-1138, Shaw's Road to 5G, Sept 30, 2020, p 13. CA-A-1122, Microsoft Teams chat, Freedom Mobile, p 7-8, message from Paul Deverell.

<sup>143</sup> Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p 2758:21 – p 2759:22.

<sup>144</sup> CA-A-0131, M Davies Report, pp 30-31, para 69.

<sup>145</sup> CA-A-0131, M Davies Report, pp 30-31, para 69; CA-A-0558, 3500MHZ Auction Jan 13, 2021, pp 170-174.

<sup>146</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3062:22 – p 3063:11.)

<sup>147</sup> CA-I-0146, Lescadres Reply Statement, p 11, para 36.

<sup>148</sup> Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p 2761 : 10-19.

<sup>149</sup> CA-A-0552, Shaw Presentation TOPS 3-Year Plan dated Sept 2019, p 65; CA-A-0436, Spreadsheet New Market Expansion; CA-A-0432, Shaw Presentation AW3 licenses expansion summary, Mar 3, 2021, p 1; CA-A-0548, Shaw Presentation, 600 MHz Deployment ELT Review, April 24, 2019, p 47.

<sup>150</sup> CA-A-0552, TOPS 3-Year Plan, Technology, Operations, Product and Supply Chain, Sept 2019 , p 66.

<sup>151</sup> CA-A-0552, TOPS 3-Year Plan, Technology, Operations, Product and Supply Chain, Sept 2019 , p 65; CA-A-0548, Shaw Presentation, 600 MHz Deployment ELT Review April 24, 2019, p 47; CA-A-0436, Spreadsheet New Market Expansion.

<sup>152</sup> CA-A-0432, Shaw Presentation AW3 licenses expansion summary dated March 3, 2021, p 1.

[REDACTED]<sup>153</sup> While this roll out was shelved after the Proposed Merger was announced, [REDACTED]  
 [REDACTED]<sup>154</sup> Steps were planned<sup>155</sup> to benefit from [REDACTED]  
 [REDACTED] which make it clear that Shaw remains a poised competitor in this market.

44. S [REDACTED]  
 [REDACTED]  
 [REDACTED]<sup>156</sup>

**l) Shaw Was not Handicapped by Network Quality or Competition with Telus**

45. The suggestion that Shaw was materially behind the Big 3 in network quality at the time of the Proposed Merger is contradicted by Mr. McAleese’s public statements. In a January 2021 earnings call, he stated that Shaw’s customers did not perceive a deficit in Shaw’s network, noting that Shaw has been able to gain significant share with its existing service levels.<sup>157</sup>

46. Pressure from Telus’ investment in fibre was not a barrier to further growth by Shaw. Telus was playing catch-up, replacing copper wires not capable of higher internet speeds, unlike cable companies’ coaxial cable.<sup>158</sup> In contrast, Shaw was able to deliver high speeds with lower capital costs, needing only fibre-to-the-node (with its installed coaxial being sufficient for the last mile).<sup>159</sup> Moreover, Telus was about [REDACTED] through its fibre-to-the-home build at the time of the merger announcement, leading TD to predict that its [REDACTED]<sup>160</sup> Shaw’s wireline results were not a barrier to further investment.<sup>161</sup>

**m) Shaw’s Deliberate Strategy to Decelerate its Wireless Brands has Already Resulted in a**

<sup>153</sup> CA-A-0570, Shaw Presentation titled Shaw Mobile for Business, Jan 8, 2021, p 4.

<sup>154</sup> CA-A-0582, p 285; CA-A-0564, p 10-11

<sup>155</sup> CA-A-0564, Chat, TOPS SLT Initiatives Updates from Candice McLeod Sept 23, 2020, pp 10-11.

<sup>156</sup> CA-A-0131, M Davies Report, p 44, para 107; CA-A-0678, Shaw F22 Planning - Focus Areas, p 11.

<sup>157</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3027:14 - p 3029:16.

<sup>158</sup> CA-R-0168, English Statement, p 34, para 102.

<sup>159</sup> CA-R-0192, McAleese Statement, Exhibit 47 p 2005 paras 2-3; CA-A-1451, Shaw Presentation - Wireline Overview, June 23, 2021, slide 19; CA-A-0648, Presentation, Shaw Fiscal 2022, p 56; Regarding the reliability of Ookla metrics, see CA-R-0192, McAleese Statement, p 51 para 168; CA-A-1108, Shaw Presentation, Overview of Shaw Business, Presentation prepared for the Assistant Deputy Minister, Information Communication Technologies, Nov 8, 2018, p 5; CA-A-1142, Shaw Presentation, "Strategic Drivers for HFC Backhaul," Nov 12, 2020, p 3; CA-R-190, R Davies Statement, Exhibit 1, p32.

<sup>160</sup> Testimony of R Davies, Transcript, Vol 11, Nov 22, 2022, p 2833:3 - p 2834:15 and CA-R-0190, R Davies Statement, Exhibit 1, p 31.

<sup>161</sup> Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p 2727 : 16 - p 2728:23; CA-A-0188, North American Telecommunications Industry Review Discussion Materials, Aug 2021, slide 3.

### Prevention and Lessening of Competition

47. From 2016 to early 2021, Shaw pursued a wireless strategy aimed at innovation and market disruption.<sup>162</sup> A marked shift occurred following merger announcement, as Shaw retreated to a “ [REDACTED] ” strategy.<sup>163</sup> Shaw elected to prioritize completion of the merger ahead of growth and competition.<sup>164</sup> Shaw knew this came at a cost to its wireless business, already seen as “ [REDACTED] [REDACTED] ”.<sup>165</sup> Mr. English, for example, warned Shaw’s Executive Leadership Team: “ [REDACTED] [REDACTED] ”.<sup>166</sup>

48. The industry noticed the shift. Videotron’s Mr. Lescadres said on discovery, “the Shaw organization has been in a standstill for 18 months”,<sup>167</sup> and Shaw is “not as aggressive, not as focused than it has been in the past.”<sup>168</sup> This passive posture benefitted the Big 3, particularly Rogers.<sup>169</sup> A spring 2022 report for Rogers CEO Mr. Staffieri notes, “ [REDACTED] [REDACTED] [REDACTED] ”.<sup>170</sup> Rogers attributed improvements in win share to Shaw “ [REDACTED] ”.<sup>171</sup> Shaw’s SVP of Sales even observed “ [REDACTED] ”.<sup>172</sup>

#### n) Shaw Mobile: Shelving Discounting for a Price Increase

49. Prior to the merger announcement and as late as February 2021, Shaw was considering building on existing Shaw Mobile offers to “ [REDACTED] ”.<sup>173</sup>

<sup>162</sup> CA-A-0480, Email Dec 19, 2017 re: Having Confidence in Ourselves, p 2.

<sup>163</sup> CA-A-0616, Shaw Presentation, Divisional Review – Consumer & Wireless Board Discussion Materials, Oct 27, 2021, p 2; and Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2994:4-21.

<sup>164</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 2993:2 - p 2994:3; CA-A-0598, Shaw Presentation titled Q2 F22 Performance Overview, Executive Summary Highlights (with notes), p 2; CA-A-0584, Shaw Presentation titled Divisional Review - Consumer & Wireless Board Discussion Materials Presentation dated June 24, 2021, p 3; and CA-A-0632, Shaw Chat between Candice McLeod to Dawit Asfaha, Chad Rumpel and Tanya Foster (Shaw), Sept 15, 2021, p 1.

<sup>165</sup> CA-A-1320, Shaw Presentation Calendar 2022 Plan with Normalized Growth Rate, Nov 2021, p 5; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3076:2-14.

<sup>166</sup> CA-A-1306, Email Feb 2, 2022 re: Input Request-ELT Update-6+6 Forecast, p 1-2; CA-A-0668, Email Feb 8, 2022 Subject: ELT Update - 6+6 Forecast p 1.

<sup>167</sup> CA-A-1891, Read-Ins Relating to Videotron’s Examinations, Q 907, p 78:12-79:6.

<sup>168</sup> CA-A-1891, Read-Ins Relating to Videotron’s Examinations, Q 910, p 80:12-81:9.

<sup>169</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3373:25 - p 3377:14.

<sup>170</sup> CA-A-0406, Rogers Presentation RCI April KBI Report dated May 2, 2022, p 24.

<sup>171</sup> CA-A-0364, Rogers Presentation RCI Feb KBI’s dated Feb 22, 2022, p 14.

<sup>172</sup> CA-A-0644, Email dated April 5, 2022 from Pat Button to Mark Elson et al re: Research Reports, p 1.

<sup>173</sup> CA-A-0522, Shaw Presentation, Shaw Mobile 9/12 Box Introduction dated Oct 13, 2020, p 3; and CA-A-0520, Shaw Presentation 5G Pricing Approach Proposal, dated Feb 2021 (draft), p 3-4.

██████████<sup>174</sup> Instead, in line with its “██████████” strategy,<sup>175</sup> Shaw implemented a price increase in November 2021 that significantly reduced the eligibility of discounts to new customers for its most popular plans.<sup>176</sup> Shaw Mobile took an immediate hit, both in gross subscriber additions and overall profitability. It also had an immediate positive impact on Rogers’ year-over-year results.<sup>177</sup>

50. Contrary to any suggestion otherwise,<sup>178</sup> the decision to increase Shaw Mobile’s prices only took place post-announcement, when completing the Proposed Merger took precedence over growth. In cross-examination, Mr. McAleese admitted that there was no evidence of consideration of that price increase in October 2020.<sup>179</sup> A comparison of pricing considered pre-announcement versus immediately prior to the November 2021 price increase makes it clear that only in the latter period was this price increase considered.<sup>180</sup> The email and a contemporaneous slide deck also did not contemplate the price increase for Fibre+ Gig customers, nor did any pricing considered prior to March 2021.<sup>181</sup>

51. Shaw knew that the November 2021 price increase would adversely affect Shaw Mobile; Mr. McAleese’s suggestion otherwise<sup>182</sup> is contradicted by the evidence. Prior to November 2021, Shaw Mobile was consistently exceeding its gross subscriber addition targets,<sup>183</sup> but after the price increase, gross adds were projected to slow by ██████████<sup>184</sup> This abrupt decline in projected gross adds

---

<sup>174</sup> Shaw’s Fibre+ Gig 1.5 internet was launched in Nov 2020. It was not contemplated as its own pricing tier (separate from other Fibre+ Gig plans) in proposed 12-box pricing prior to the Proposed Merger, including up to Feb 2021 (see CA-A-0520, 5G Pricing Approach Proposal (draft), February 2021, p 4).

<sup>175</sup> CA-A-0622, Chat between Sami Syed and Mathew Flanigan dated Dec 9, 2021, pp 1-3.

<sup>176</sup> CA-A-0614, Email Oct 26, 2021 Subject: RE: BOD Prep Data Points - TM Feedback, p 2.

<sup>177</sup> CB-A-0378, Chat between David Fuller, Vedran Petrusic, Bart Nickerson and Shailendra Gujarati, p 1-2.

<sup>178</sup> CA-R-0195, Responding Witness Statement of Paul McAleese (“Responding McAleese Statement”), p 42, para 101.

<sup>179</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3014:3-8.

<sup>180</sup> ID-056, Compendium Brief for Paul McAleese of Commissioner of Competition Level A, p 1114 and Testimony of P McAleese, Hearing Transcript, Vol 12, Nov 23, 2022, p 3004 line 19 - p 3007 line 24, CA-R-0195, McAleese Responding Statement, pp 41-42 and 44-45, paras 100-101 and 109: Unlike the charts in paras 100 and 109, which refer to the prices for Shaw’s Fibre+ Gig and Fibre + Gig 1.5 plans, the chart in para 101 does not include those plans and instead uses generic names for the internet plan levels.

<sup>181</sup> CA-R-0192, McAleese Statement, p 5394, exhibit 122; CA-R-0195, Responding McAleese Statement, p 395, exhibit 22; CA-A-0520, Shaw Presentation, 5G Pricing Approach Proposal, Feb 2021 (draft), pp 3 and 4.

<sup>182</sup> CA-R-0195, McAleese Responding Statement, p 38, para 90.

<sup>183</sup> CA-A-1314, Email dated August 3, 2021 from Mathew Flanigan to Mathew Flanigan and Paul Deverell, Subject: SLT Update, p 1; CA-A-0588, Email dated October 12, 2021 from Mathew Flanigan to Paul Deverell and Pat Button, Subject: SLT Update: Consolidated Wireless, p 2; CA-A-1882, Commissioner’s Read-Ins (Shaw), pp 87:6 - 88:5 (Q 455-458); and Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3016:10-22.

<sup>184</sup> CA-A-1266, Email dated Nov 10, 2021 re: FW: SLT Update: Consolidated Wireless, p 2; CA-A-0618, Shaw Chat between Paul Deverell and Mathew Flanigan et al dated Nov 17, 2022, p 2 and Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3019:17 - p 3021:13. Shaw’s F22 Shaw Mobile GA forecast dropped from 250,000 (CA-A-0602, Email dated June 23,

is illustrated in Dr. Miller's report, which plots the changing projections as they developed.<sup>185</sup> This decline is also not reflected in Shaw's longer term subscriber projections.<sup>186</sup>

52. Mr. McAleese's claim that Shaw Mobile's pricing was "introductory" is also at odds with the simple fact that it was in-market for 16 months before any price increase. His suggestion that IT delays impaired Shaw's ability to implement the change sooner is not borne out in the documents and discussions of IT changes make no reference to a price increase.<sup>187</sup>

53. The suggestion that the November 2021 price increase was introduced to improve profitability<sup>188</sup> is contradicted by Shaw's own documents showing that Shaw Mobile was already driving profitability.<sup>189</sup> Furthermore, Mr. McAleese's claim that the price increase had a favorable impact is contradicted by Shaw's internal analysis, which assessed it as "[REDACTED]

#### **o) Shaw's Other Conduct Led to a Plunge in Market Share and Employee Morale**

54. In addition to the Shaw Mobile price increase, the evidence discloses other sources of decline linked to the "middle lane" post-announcement strategy: (a) **Reduced promotional spending and device subsidies:** Since the announcement of the Proposed Merger, Shaw's wireless advertising expenditure has [REDACTED]<sup>191</sup> Freedom dealers also gave evidence that the gap between them and the incumbents has narrowed, and Freedom's offerings have ceased to be competitive.<sup>192</sup> Mr. Verma indicated that device subsidies had "dried up" or "diminished";<sup>193</sup> the 2022 "back-to-school" season was not competitive; it was "unlike" any of the other 11 back to

---

2021 from Chris Gowan to Shelly Shang, Mathew Flanigan and Tyler Spring re F22 Discussion) to 140,000 (CA-A-0608, Spreadsheet F19-F2022 Consolidated Subscribers Gross Adds, row 5).

<sup>185</sup> CA-A-0122, Miller Report, p 163, exhibit 31.

<sup>186</sup> CA-A-0538, Spreadsheet Wireless Stats F2019-F2023, Testimony of P McAleese, Hearing Transcript, Vol 12, Nov 23, 2022, p 2986 line 19 - p 2984 line 5 and CA-A-1212, Spreadsheet Wireless BP 2021-2025 v1 Budget FY21, tab "Subs by Market", cells JO94-JW94.

<sup>187</sup> CA-R-0195, Responding McAleese Statement, Exhibits 23-27, pp 397-428.

<sup>188</sup> CA-R-0192, McAleese Statement, p 121, para 401.

<sup>189</sup> CA-A-0594, Shaw Presentation, Consumer F22 Results Presentation, April 2022, pp 53-54; P-A-1408, Shaw News Release dated April 14, 2021, p 3; CA-A-0670, Email dated March 7, 2022, Subject: Research for Effies Case Study, p 2; and CA-A-0686, Shaw 2022 Fiscal Planning - Responses to Undertakings from Examination for Discovery, p 18.

<sup>190</sup> Testimony of P McAleese, Transcript, Vol 11, Nov 22, 2022, p 2885:18 - p 2886:2; CA-A-0652, Email dated Jan 12, 2022 re: Q1F22 - Board of Directors - Consumer Division; CA-A-1322, Shaw Q1 F22 Board Prep-Supplementary Wire: Stats as of Nov 30, 2021, p 5.

<sup>191</sup> [REDACTED]

[REDACTED] CA-A-0692, Spreadsheet of Shaw's Responses to Undertakings at Examination of Discovery, August 23, 2022, tab "Wireless Support", cells "AN:42-AP 42 & AR:42-AT42".

<sup>192</sup> Testimony of S Verma, Transcript, Vol 2, Nov 8, 2022, p 434:14-19.

<sup>193</sup> Testimony of S Verma, Transcript, Vol 2, Nov 8, 2022, p 435:1.

school periods he had seen.<sup>194</sup> Shaw’s records reveal that the reduction in advertising expenditure is tied to the Proposed Merger. A 2022 update to the Board explained that Shaw’s [REDACTED]

[REDACTED] and that Shaw has [REDACTED]

[REDACTED].<sup>195</sup> Device subsidies

[REDACTED]<sup>196</sup> Bell’s Blaik Kirby<sup>197</sup> and Mr. Casey of Telus

also observed the change.<sup>198</sup> (b) **Reduced wireless capital expenditures:** Shaw cut its wireless

capital expenditure significantly post announcement,<sup>199</sup> In contrast, Rogers increased its capital

expenditures in the comparable periods.<sup>200</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>202</sup> Trevor English similarly [REDACTED]

[REDACTED]<sup>203</sup> (c) **Employee attrition:** Jumping the gun on the merger closing, in September

2021, Rogers informed four Shaw wireless vice presidents of Rogers’ post-merger intention to

“s [REDACTED]

[REDACTED]

[REDACTED]<sup>205</sup> Given the demotivating

impact of such conduct on Shaw’s most senior managers, it is not surprising that [REDACTED]

[REDACTED]<sup>206</sup> Despite retention bonuses, [REDACTED] “critical employees/leaders”

<sup>194</sup> Testimony of S Verma, Transcript, Vol 2, Nov 8, 2022, p 437:20 – p 438:10.

<sup>195</sup> CA-A-0658, Shaw Presentation Q1/F22 Business Updated dated Jan 12, 2022, p 4.

<sup>196</sup> CA-A-1254, Email dated May 9, 2022, RE: Weekly Consumer (Wireless) Subsidy Update - May 8.

<sup>197</sup> CA-A-0074, Kirby Statement, pp 15-16 paras 36-37.

<sup>198</sup> CB-A-0051, Amended Witness Statement of Charlie Casey (Telus) Sept 23, 2022 (“Casey Statement”), p 5 – 6, paras 8-9.

Testimony of C Casey, Transcript, Vol 3, Nov 09, 2022, p 560:2-5 and p 561:4-8.

<sup>199</sup> [REDACTED] CA-A-0692, Spreadsheet of Shaw’s Responses to Undertakings at Examination of Discovery, August 23, 2022, tab “Wireless Support”, cells “AM116-AT116”.

<sup>200</sup> [REDACTED] CB-A-0402, Rogers Presentation - Q4 2021 Benchmark Summaries (Q3-2021-Q4-2021), Feb 12, 2022, p.6; CB-A-0998, Shaw Slide Shaw Q1’22 results (Dec to Feb), p.1; CB-A-0384, Email re Q1’22 SJR, April 13, 2022, p.1.

<sup>201</sup> CA-A-1402, Board of Directors Q4/F21 Performance Summary and F22 Budget, October 28, 2021, p. 13.

<sup>202</sup> CA-A-1882, Read-Ins relating to Shaw’s Examination, Aug 22, 2022, p 113:16-25 and p 114:1-14 (Q 581–583).

<sup>203</sup> CA-R-0165, English Statement, p 58, para 180.

<sup>204</sup> CA-A-0612, Email dated Sept 22, 2021 from Julie Gass to Aimee Debow et al re Freedom/Shaw Mobile - Post Close Integration Planning.

<sup>205</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3421:17 – p 3430:4; CA-A-0612, Email dated Sept 22, 2021 from Julie Gass to Aimee Debow et al re Freedom/Shaw Mobile - Post Close Integration Planning.

<sup>206</sup> CA-A-0684, Turnover & Hiring: Transaction Impact, p 1: [REDACTED] Shaw reported that “Transaction uncertainty has increased voluntary turnover by [REDACTED] in F22 and that approximately [REDACTED] of employees that resigned indicated ‘uncertainty about my future within the organization’ was a key driver for leaving”.

resigned,<sup>207</sup> [REDACTED]<sup>208</sup> linked to “uncertainty as we approach the transaction”,<sup>209</sup> and acknowledged by Mr. McAleese;<sup>210</sup> and (d) **Declining market shares:** Freedom has lost market share since the merger announcement. Shaw’s national, quarterly gross adds have fallen significantly on a year-over-year basis.<sup>211</sup> An even sharper trend is observed with new activations.<sup>212</sup> [REDACTED]

[REDACTED]<sup>215</sup>

### 3. The Merger Lessens Network Competition and Network Choice

55. Quality is a key competitive variable for consumers of wireless services,<sup>216</sup> with reliability and speed being the main considerations. Correspondingly, wireless carriers compete with investment dollars to have the best quality network,<sup>217</sup> and refer in promotional materials to reliability and speed.<sup>218</sup>

56. On July 8, 2022, Rogers experienced a network outage that affected [REDACTED] wireless customers [REDACTED] of all wireless consumers in Canada) and [REDACTED] wireline customers.<sup>219</sup> The outage had other serious consequences for businesses, public services and public safety.<sup>220</sup> Mr. Davies noted that the outage “will have made the reliability of wireless networks a more salient

<sup>207</sup> CA-A-0684, Turnover & Hiring Impact, p1.

<sup>208</sup> CA-A-0630, Shaw Presentation TOPS F22 Budget Status Update dated August 3, 2021, p 6.;

<sup>209</sup> CA-A-0630, Shaw Presentation TOPS F22 Budget Status Update dated August 3, 2021, p 6.; Testimony of P McAleese, Transcript, Vol 11, Nov 22, 2022, p 2932:19-24.

<sup>210</sup> Testimony of P McAleese, Transcript, Vol 11, Nov 22, 2022, p 2933:1-13.

<sup>211</sup> [REDACTED] CA-A-1308, Email dated May 5, 2022 to P McAleese et al from Roland Schlichting re: Bell Q1 2022 Wireline and Wireless Results, p 7; [REDACTED]

<sup>212</sup> Ibid.

<sup>213</sup> Capture rate is defined as the customer ports won by a carrier divided by the number of customer ports lost by all competitors; CA-A-1457, Answers to Undertaking - 2022 08 25-26 - Updated Answers to Undertakings of D. Prevost, dated Sept 15, 2022. p 16 para 6 no.70.

<sup>214</sup> CB-A-1024, Rogers Wireless Weekly Results dated Oct 4, 2021, p 24.

<sup>215</sup> CB-A-1016, Weekly Switching Performance Update, Dec 26, 2021-Jan 1, 2022, p 10; CA-A-0388, Rogers Wireless Weekly Results dated March 21, 2022, p 23.

<sup>216</sup> CA-A-0722, Follow-up Examination for Discovery Transcript - D Prevost dated Sept 16, 2022, p 10; CA-A-0726, Follow-up Examination for Discovery Transcript - P McAleese dated Sept 15, 2022, p 40; CA-A-0292, Rogers Presentation titled OM5G Q3 Network Brief dated April 8, 2021, p 3.

<sup>217</sup> CA-A-1098, Email dated Oct 28, 2020 to Edward Rogers from Tony Staffieri, ps. 12-13. CA-A-0290, Rogers Presentation titled Mobile Network Strategy and Insights - a regional view dated Spring, 2021, pp 5-6; CA-A-0111, Howe Statement, p 7 paras 15 - p 8 para 17; CA-A-0686, Shaw Presentation titled Shaw 2022 Fiscal Planning – Responses to Undertakings from Examination for Discovery, pp 7-8; Testimony of Nazim Benhadid, Hearing Transcript, Vol 5, November 14, 2022, p 1069 lines 10 - p 1071 line 17.

<sup>218</sup> CA-A-0131, M Davies Report, p 73-74, paras 205-209; CA-A-0270, 3-brand strategy, pp 6, 8, 12-15 and 26-28.

<sup>219</sup> CA-A-0131, M Davies Report, p 76, para 214.

<sup>220</sup> CA-A-0131, M Davies Report, p 77, para 219



factor in the choices that customers make about their wireless service providers”.<sup>221</sup> This was the third recent major outage experienced by Rogers’ network since 2019.<sup>222</sup>

57. Shaw offers consumers a competing facilities-based wireless network which has provided choice in the area of reliability, quality and resiliency. If the Proposed Merger and Proposed Divestiture were consummated, Videotron would rely upon the combined Shaw-Rogers wireline network for backhaul and transport. In that hypothetical world, Mr. Davies notes that for an outage like that on July 8<sup>th</sup>, “Vidéotron would have lost connectivity [REDACTED]

[REDACTED]”<sup>223</sup>

58. The Proposed Merger will result in a loss of choice – from “three distinct wireless networks (Rogers, Bell/Telus and a regional provider such as Shaw)” to two distinct networks – those of Rogers/Shaw and of Bell/Telus.<sup>224</sup> The reduction in competition and choice would have significant effects on consumers and the economy. This will substantially lessen the incentive of wireless competitors in BC and Alberta to compete by investing in and offering the most resilient and reliable network possible.

#### **4. Remaining Competition Will Not Constrain Roger’s Post-Merger Market Power**

59. As noted above, wireless markets in Canada display the hallmarks of coordination.<sup>225</sup> Shaw itself has acknowledged “substantial evidence of coordinated behaviour” before the entry of regional competitors (such as Shaw), including high prices in areas in which there is no such fourth facilities-based regional player.<sup>226</sup> Dr. Miller concludes from such evidence “it is reasonably likely that Shaw’s presence as a strong fourth carrier in Alberta, British Columbia, and Ontario has inhibited coordination among the Big 3 in those provinces.”<sup>227</sup> The removal of Shaw as an independent regional competitor – a “strong fourth carrier” as Dr. Miller puts it – would increase the likelihood of coordination by the remaining competitors. The remaining players – Bell and Telus – would not provide a sufficient competitive constraint on a combined Rogers-Shaw to

---

<sup>221</sup> CA-A-0131, M Davies Report, p 76, para 216.

<sup>222</sup> CA-A-0250, Response to RFI from CRTC to Claude Doucet from Ted Woodhead, July 22, 2022, p 36-37; CA-A-0726, Follow-Up Examination for Discovery Transcript – P McAleese dated Sept 15, 2022, pp 40 : 25 – p 41 : 21. CA-A-1755, Answers to Undertaking – Shaw Major Incident Review dated August 26, 2022, pp 2-6.

<sup>223</sup> CA-A-0131, M Davies Report, p 77, para 218.

<sup>224</sup> CA-A-0131, M Davies Report, pp 77-78, para 221.

<sup>225</sup> CA-A-0122, Miller Report, p 20, para 28.

<sup>226</sup> P-A-1420, Shaw Answers to Questions from the CRTC dated July 5, 2019, p 34.

<sup>227</sup> CA-A-0122, Miller Report, p 103, para 206.

address the SPLC that the Proposed Merger would likely bring about given the proclivity for coordinated behaviour.

## **5. Conclusion on SPLC**

60. The combination of high market share, significant barriers to entry and the elimination of Shaw as a maverick and growing competitor easily demonstrates a likely SPLC as a result of the Proposed Merger.<sup>228</sup> Rogers has significant market share in BC and Alberta. Shaw was a growing competitor with market shares of more than [REDACTED] in terms of gross adds in BC and more than [REDACTED] in Alberta respectively. The combined market shares of Rogers and Shaw based on gross ads would exceed [REDACTED] in both provinces. Their subscriber-based combined shares would exceed [REDACTED] in both provinces. In an already concentrated market characterized by high barriers to entry, and given the evidence reviewed above, this would enhance Rogers’ market power and cause a likely substantial prevention or lessening of competition.

61. Dr. Miller examined the effects of the merger in Alberta, British Columbia and Ontario using a merger simulation model discussed in more detail below. He noted that the model may underestimate a merger’s effects in respect of the impact of future planned expansion by a firm and the impact of a merger which may increase the potential for coordination.<sup>229</sup> The significant price increases projected by his model,<sup>230</sup> bolstered by these additional factors, satisfy the Commissioner’s burden to show a substantial anti-competitive effect from the Proposed Merger, in the form of substantial price increases in Ontario, BC and Alberta, and substantial negative effects on service, quality and choice for consumers.

62. The details of the quantitative modelling as well as further qualitative effects disclosed by the evidence are discussed in Section E, below.

## **D. REMEDY**

### **1. Legal Framework: Removing the “S” from the SPLC**

63. Where the Tribunal finds that a merger is likely to cause a SPLC, the appropriate remedy is to restore competition to the point at which it can no longer be said to be substantially less than

---

<sup>228</sup> See Legal Framework, Commissioner’s Written Opening, paras 202-204.

<sup>229</sup> CA-A-0122, Miller Report, paras 147-8.

<sup>230</sup> Ibid., Exhibit 20: prices for Rogers and Fido brands increase by [REDACTED]

it was before the merger.<sup>231</sup> At the very least, the remedy must be effective. If the choice is between a remedy that goes farther than is strictly necessary and a remedy that does not go far enough, then the former is to be preferred.<sup>232</sup>

64. The party putting forward a remedy proposal has the burden of demonstrating its availability and effectiveness.<sup>233</sup> And, the Tribunal only has the jurisdiction to order structural remedies under section 92 of the *Competition Act* (“Act”). Neither behavioral remedies, such as implementing the terms of a post-merger contract,<sup>4</sup> nor a remedy that would place the Tribunal in a monitoring or resolution role in respect of such behavioural requirements, are available. For good reason, structural remedies are heavily preferred by competition agencies around the world.<sup>234</sup> They create a more permanent change. Behavioral remedies rely on ongoing cooperation of the parties, with the result that the competition agency (and applicable tribunal) must expend significant resources on monitoring compliance.

## **2. The Proposed Merger has Already Harmed Shaw’s Competitiveness**

65. The Proposed Merger has diminished Shaw’s competitiveness. The Proposed Divestiture does not make up this lost competitive ground.

66. As noted above, the starting point for assessing whether the lessening of competition is still “substantial” after the Proposed Divestiture is the “but for” world of Shaw at the time the Proposed Merger was concluded and in view of its growth trajectory and plans for 5G expansion.

67. A number of decisions have diminished the competitive position of both Shaw and Freedom. A remedy proponent would have to overcome this new handicap as part of remedying the effects of the Proposed Merger. Shaw made the decision to enter into the Proposed Merger, knowing that the legal consequence would be that it would not be allowed to bid on the 3500 MHz spectrum. Shaw had to abandon the planned roll-out of 5G services across its wireless footprint,

---

<sup>231</sup> *Canada (Director of Investigation & Research) v Southam Inc*, 1997 1 SCR 748 (“*Southam SCC*”), BOA Tab 12, *The Commissioner of Competition v CCS Corporation* (et al), 2012 Comp Trib 14, at para 216, BOA Tab 25, *Canada (Director of Investigation & Research) v Hillsdown Holdings (Canada) Ltd*, 41 CPR (3d) 289 (Comp Trib) at para 106, BOA Tab 10, *Canada (Commissioner of Competition) v Superior Propane Inc*, 2000 Comp Trib 15 at paras 127-128, BOA 6.

<sup>232</sup> *Southam SCC*, at para 89, BOA Tab 12.

<sup>233</sup> *Southam SCC* at para 89, BOA Tab 12: “As for the claim that the Tribunal wrongly required the appellants to demonstrate the effectiveness of their proposed remedy, no more need be said than that he who asserts should prove”; see also *Tervita CT* at para 321, BOA Tab 25.

<sup>234</sup> OECD Policy Roundtables – Remedies in Merger Cases (2011) at p 11, BOA Tab 33; Merger Remedies Notice, paras 15 and 17; ACCC Merger Guidelines, page 59, BOA Tab 34; Competition and Markets Authority, Australian Competition and Consumer Commission and Bundeskartellamt, Joint statement on merger control enforcement (20 April 2021), at 4, BOA Tab 35.

which had an anti-competitive impact.<sup>235</sup> Other decisions have impaired Shaw's competitive stance. Shaw adopted a passive competitive stance as it relates to the Freedom Dealers, including, but not limited to, the reduction of promotional activity and device subsidies.<sup>236</sup> Nothing more than a holding pattern in anticipation of the Proposed Merger. The passive competitive stance of Shaw was felt by Rogers, Bell and Telus, all of which confirm that the competitive intensity in British Columbia, Alberta and Ontario decreased after March 15, 2021.<sup>237</sup> Videotron made the same observations.<sup>238</sup> The number of new wireless subscribers speak to the decrease in competitive activity. In fiscal 2021, Freedom ██████████ postpaid wireless subscribers, compared to a gain of ██████████ in fiscal 2020.<sup>239</sup>

68. Videotron will acquire a diminished Freedom Mobile. Videotron would have to overcome the diminished competitiveness in order to remedy the resulting SLPC. The Proposed Divestiture would not make up this lost ground.

### **3. Maverick Competitor Shaw Mobile Will be Lost**

69. The disruptive benefits of a maverick competitor, Shaw Mobile, in the British Columbia and Alberta will be forever lost once in the hands of Rogers.

70. The transfer of the Shaw Mobile subscribers to Rogers will reduce competition in the wireless marketplace and put upward pressure on the Rogers price plans.<sup>240</sup> The internal records of Rogers disclose that ██████████

██████████  
 ██████████  
 ██████████  
 ██████████ p. 242

<sup>235</sup> Testimony of P McAleese, Hearing Transcript, Vol 11, Nov 22, 2022, p 2875:19 - p 2877:5.

<sup>236</sup> CA-A-0043, Verma Statement, p 2 para 7 – p 3 para 10 and Testimony of S Verma, Transcript, Vol 2, Nov 8, 2022, p 433:25 – p 434:3.

<sup>237</sup> CB-A-0051, Casey Statement, p 4–6 para 8; CA-A-0074, Kirby Statement, p 15 para 36 – p 16 para 41; Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p 742:25 - p 744:12; Testimony of C Casey, Transcript, Vol 3, Nov 9, 2022, p 561:9 - p 562:3; CA-A-0406, RCI April KBI Report, May 2, 2022, p 24.

<sup>238</sup> CA-A-1891, Read-Ins relating to Videotron Examination, p 78:12 - p 79:6.

<sup>239</sup> CA-A-0654, Audit Committee Q4 and Fiscal 2021 Financial & Operational Performance Review, Oct 27, 2021, p 14.

<sup>240</sup> CA-A-0122, Miller, Report, p 92 para 180 and p 45 para 84.

<sup>241</sup> CA-A-0358, Email Jan 21, 2022 re Heads-up - COLOR OF THE FLAG...and ACTION PLAN, p 1.

<sup>242</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3379:13 – p 3384:22 ; CB-A-0410, Rogers Presentation titled Base Price Increase dated Nov 2021, p 2.

71. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] p. 244

#### **4. Shaw Mobile was on a Growth Trajectory; Videotron is an Unproven Competitor in Western Canada**

72. Shaw Mobile was on a growth trajectory, outperforming all wireless competitors. Financial indicators confirm the health of Shaw. In contrast, Videotron, a much smaller entity, is an unproven competitor in British Columbia and Alberta.

73. The contribution of Shaw Mobile in the West is significant. Shaw Mobile's disruptive impact and upward growth trajectory prior to the announcement of the Proposed Merger is confirmed by public financial performance records. The self-serving words of the senior executives of Shaw stand in contradiction to this objective evidence.

74. Videotron is an unproven competitor lacking experience in Western Canada. Videotron will be a weakened competitor in the West that will not have the benefit of: (a) an existing wireline infrastructure, together with an installed base of wireline customers, which have been essential to its expansion into the Wireless Services market in Quebec;<sup>245</sup> and (b) Shaw's established brand.<sup>246</sup> It will take Videotron years to establish a trusted brand reputation, particularly given their lack of media assets in the West.<sup>247</sup>

#### **5. Videotron will not Recapture Shaw's Disruptive Success**

##### **a) Freedom, as acquired by Videotron, will not have access to its own wireline network**

75. Freedom receives advantages from the integration with Shaw's wireline assets.<sup>248</sup> The same benefits will not flow to Videotron under new ownership.

<sup>243</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3384:23 – p 3386:20, CA-A-0318, Converged MBR ELT Notes July 8, 2021, p 1; CA-A-0336, Nov 11, 2020 re Bundling at Rogers; CA-A-0298, Feb 18, 2021 re Soundbites on Converged, p 1. <sup>244</sup> CA-A-1879, Read-Ins relating to Rogers' Examination, p 780:18 - p 782:4; CB-A-0992, Rogers & Shaw Customer Day 1 Update: Consumer dated Mar 8, 2022, p 10; CB-A-0392, Rogers Presentation titled Back Pocket, Consumer Day 1 – Wave 1 & 2 Discussion, March 2022, p 16; CB-A-0390, Rogers Presentation titled Rogers x Shaw Integration Management Office: Converged Value Proposition on Customer Day 1, p 4 and 18; Testimony of D Prevost, Transcript, Vol 12, Nov 23, 2022, p 3238:5 – p 3240:1.

<sup>245</sup> Testimony of P Péladeau, Transcript, Vol 10, Nov 21, 2022, p 2577:24 – p 2578:24, referencing Exhibit P-A-163 at p 77 para 9024 and p 83 para 9075.

<sup>246</sup> CA-A-0468, Two Brand Strategy Brand & Positioning dated August, 2019, p 11.

<sup>247</sup> Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2187:1 - p 2191:24; Testimony of Blaik Kirby, Transcript, Vol 4, Nov 10, 2022, p 856 3:6.

<sup>248</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3033:3-18.

76. Advantages will be lost to Freedom under Videotron ownership, including: (a) greater scale of operations over which it can share common costs, such as back-office support and retail distribution; (b) structural advantages, such as access to backhaul and transport;<sup>249</sup> (c) access to value-add utilities, such as Shaw's network of Go Wi-Fi hotspots; and (d) marketing benefits through cross-selling and bundling opportunities. Freedom benefits from the sharing resources between Shaw's wireline and wireless businesses.<sup>250</sup> Freedom and Shaw share, for example: (a)

77. The integration of Shaw and Freedom was assessed by Mr. M. Davies.<sup>251</sup> The evidence discloses that Freedom relies on: (a) Shaw's wireline assets for [REDACTED] of its fibre backhaul services;<sup>252</sup> and (b) Shaw's Go Wi-Fi network of hotspots to enhance the wireless experience of customers,<sup>253</sup> [REDACTED]<sup>254</sup> While the level of integration is contested, the evidence of the Respondents falls short. For example, Dr. Webb failed to account for the [REDACTED]

[REDACTED]<sup>255</sup> These are all material elements that go to the level of integration.

78. Wireline assets are integral to the success to the wireless business in Canada.<sup>256</sup> The wireless-only market share of the Big 3 is lower<sup>257</sup> and decreasing<sup>258</sup> in provinces where they own no wireline footprint.

79. The success of Bell or Telus in wireless-only regions is not comparable to Videotron due to the existence of their network sharing arrangement which helps to enable their wireless businesses to compete more effectively throughout their shared wireline footprint. [REDACTED]

---

<sup>249</sup> CA-A-0702, Rogers Shaw ARC Request, p 9.

<sup>250</sup> CA-A-0694, Scenario Planning, Feb 12, 2022, p 10; CA-A-0660, Project Campari Financial Due Diligence Report, dated Jan 23, 2022, p 18.

<sup>251</sup> CA-A-131, M Davies Report, p 87-88, para 255.

<sup>252</sup> CA-A-0446, Backhaul Strategy and Fiber Plan dated Feb 26, 2020, p 8; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3036:9 – 14.

<sup>253</sup> CA-A-0648, Fiscal 2022, p 43.

<sup>254</sup> CA-A-0662, Email dated July 29, 2021, re: Privileged and Confidential - WIFI Impact on Wireless customers.

<sup>255</sup> Testimony of W Webb, Transcript, Vol 15, Nov 28, 2022, p 3951:4–16.

<sup>256</sup> CA-I-0144, Lescadres Statement, p 8, para 32; CA-A-1891, Read-Ins relating to Videotron Examination, Sept 8, 2022, p 25:8 – p 26:20; Testimony of J-F Lescadres, Transcript, Vol 9, p 2207:22 - p 2208:13; CA-A-0326, Rogers Presentation titled EBU Wireline Strategy dated Jan 2017, p 26.

<sup>257</sup> Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3733:2–16.

<sup>258</sup> Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3737:21–p 3742:9.

259

80. The comparison between the Canadian and US markets that is offered by the Respondents is of little value. The competitive dynamics in the US bear little resemblance to that of Canada.<sup>260</sup> In Canada, incumbents own wireline/fibre assets. In the US, they do not.<sup>261</sup> The statements put forward by Mr. Martin where he invites the Tribunal to assess international comparisons are all anchored entirely on hearsay. The Respondents cannot use Mr. Martin's reports to establish facts that have not been proven by a fact witness.<sup>262</sup> Even the third-party sources employed use estimates and lack first-hand knowledge of the data that they report on.<sup>263</sup> The statements made by Dr. Webb are also to be taken with great caution as they are based on his experience with wireless market around the world generally and not specific to Canada.<sup>264</sup> Examples from other jurisdictions are not helpful given the very different context and issue here: i.e., whether Videotron, having acquired a competitively diminished Freedom, and without access to previously integrated wireline (and other) assets in British Columbia and Alberta, is likely to materially recapture the competitive spirit and impact of Shaw's combined wireless business.

**b) Freedom, as acquired by Videotron, will have reduced economies of scale and scope**

81. A new Freedom entity will have greatly diminished scale relative to Shaw with its Freedom Mobile and Shaw Mobile products in Alberta and BC, and relative the Big 3.<sup>265</sup> Videotron will have a smaller base of wireless subscribers in the relevant markets, and it will not own wireline assets.<sup>266</sup> Videotron will be less incentivized to make capital investments, because it will be spread over fewer subscribers with much smaller margins. Shaw is a larger and better resourced company than Quebecor, Videotron's parent company. The market capitalization of Shaw is \$12.25 billion while that of Quebecor is \$7.5 billion. Shaw's net leverage ratio is an industry low of 2.3, while that of Quebecor is 3.2 and would rise after the acquisition of Freedom.<sup>267</sup>

<sup>259</sup> Testimony of N Benhadid, Transcript, Vol 5, Nov 14, 2022, p 1081:4-20.

<sup>260</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1985:22–p 1986:17.

<sup>261</sup> CA-A-0134, Reply Expert Report of Michael A M Davies ("Reply M Davies Report"), p 29, para 58 Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 2035:16 – p 2036:19; CB-A-0486, 5G Americas Panel: Questions and Key Messages, p 1.

<sup>262</sup> *R. v Abbey*, [1982] 2 SCR 24, at 46, BOA Tab 20; *R. v Lavallee*, [1990] 1 SCR 852, at paras 66 and 99, BOA Tab 21; *Southwind v R*, 2016 FC 1132, at paras 47-49, BOA Tab 23.

<sup>263</sup> Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3727:22 - p 3729:18.

<sup>264</sup> Testimony of W Webb, Transcript, Vol 15, Nov 28, 2022, p 3898:21 – p 3900:3.

<sup>265</sup> CA-A-0131, M Davies Report, p 86, para 250.

<sup>266</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2002, p 1829:6 – p 1830:5.

<sup>267</sup> Testimony of P Péladeau, Transcript, Vol 10, Nov 21, 2022, p 2562:19 - p 2565:25; and CA-A-161, Presentation of JP Morgan, Aug 18, 2022, slide 5.

82. While Mr. Martin claims that Videotron has strong year-over-year growth,<sup>268</sup> S [REDACTED]

[REDACTED]<sup>271</sup> Mr.

Martin acknowledged that [REDACTED]

[REDACTED]<sup>72</sup> The size and scale of Shaw, when compared to Videotron, cannot be ignored and is material to this case.<sup>273</sup>

**c) Shaw has brand recognition in Western Canada; Videotron does not**

83. The Shaw brand has contributed to the success of the launch of their wireless service in their wireline footprint in Western Canada. Videotron has no brand recognition outside Quebec. Shaw's brand recognition bestows market benefits, including (a) enabling more rapid and less costly customer acquisition in Shaw's footprint; and (b) financial benefits, such as a "brand halo" in the West [REDACTED]

[REDACTED] as compared to the standalone forecast for its predecessor WIND.<sup>274</sup> Videotron will not receive the benefits of Shaw's brand recognition. Freedom also does not have the same brand recognition as Shaw Mobile.<sup>275</sup> Videotron is an unknown brand that has little to no recognition outside of Quebec, making it more difficult for the company to compete in the West.<sup>276</sup>

**d) Videotron will not have the benefit of cross-selling wireless services to an installed wireline base**

84. Videotron will not be able to cross-sell wireless services to an installed wireline base. Shaw's existing base of wireline customers has allowed it to: (a) gain a share of the wireless market at a reduced cost of acquisition; and (b) improve customer lifetime value overall.<sup>277</sup> Shaw had [REDACTED] existing wireline customers within its wireless footprint to which it could sell Shaw Mobile.<sup>278</sup> [REDACTED]

<sup>268</sup> CA-R-0232, Expert Report of Kenneth J Martin, Sept 23, 2022 ("Martin Report"), p 27, Figure 5.

<sup>269</sup> See CA-A-1212, at tab "Exec summary wireless", rows 473-47, columns T-Y; See also Appendix H, Table 1.2.

<sup>270</sup> Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3757:14 – p 3761:12.

<sup>271</sup> Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3761:13– p 3769:20.

<sup>272</sup> Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3769:19 – p 3770:7.

<sup>273</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1832:13 – p 1833:13.

<sup>274</sup> CA-A-0544, CIBC Presentation re Project Chinook, Dec 10, 2015, p 11.

<sup>275</sup> CA-A-0468, Two Brand Strategy Brand & Positioning dated August, 2019, p 11; Testimony of S Dhamani, Transcript, Vol 3, Nov 9, 2022 p 546:18, and p 547:1.

<sup>276</sup> Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2187:1 - p 2191:24.

<sup>277</sup> CA-A-0594, Shaw Presentation titled Consumer F22 Results Presentation dated April 2022, p 53.

<sup>278</sup> CA-A-1202, Shaw Presentation titled Project Ellipse Wireline & Wireless CBM Journeys, p 8.



█<sup>79</sup> – revenue synergies which, absent the Proposed Merger, would have been realized by Shaw-Freedom.<sup>280</sup> Videotron-Freedom will be a less effective competitor in British Columbia and Alberta than Shaw-Freedom due to the loss of these synergies.

85. Shaw Mobile was highly successful at bundling wireless with its wireline customer base, gaining over █ subscribers in the first year after launch<sup>281</sup> █ of which are bundled).<sup>282</sup> Comparatively, Shaw's attempt to cross-sell wireline services to existing Freedom wireless customers was less successful.<sup>283</sup> This, in part, is attributable to the composition of Freedom's customer base,<sup>284</sup> but is also partly owing to the greater ease of selling wireless to an installed wireline base.<sup>285</sup> Much like Shaw Mobile's success in Western Canada, Videotron leveraged its wireline assets to promote its wireless business in Quebec. 90% of Videotron's wireless customers in Quebec are also wireline customers.<sup>286</sup> Videotron has minimal wireline assets outside of Quebec and will not be able to replicate what it did in Quebec.<sup>287</sup>

**e) Videotron will have a diminished ability and incentive to bundle wireless and wireline services**

86. Videotron lacks Shaw's incentive to offer discounts on wireless services to reduce overall wireless/wireline churn.<sup>288</sup> Shaw can offer these highly discounted wireless plans by cross-subsidizing its Shaw Mobile offerings with revenue from its high-margin Shaw internet customers.

█

█

█

█

█

█<sup>289</sup>

<sup>279</sup> CB-A-0382, Rogers Presentation titled Project Scotch - Wireless April 19 VCO Submission, April 19, 2022, p 4.

<sup>280</sup> CA-A-0646, Shaw Presentation titled CBM Strategy dated July, 2021, pp 36-37.

<sup>281</sup> CA-A-0664, "Wireless KPI" tab.

<sup>282</sup> CA-R-0192, McAleese Statement, p 89 para 292.

<sup>283</sup> CA-A-1882, Read-Ins relating to Shaw's Examination 08-22, p 57:13 – p 59:20.

<sup>284</sup> CA-A-0134, M Davies Reply Report, p 17 para 32.

<sup>285</sup> Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p 745:4-17.

<sup>286</sup> Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2208:25 - p 2209:16.

<sup>287</sup> CA-I-0144, Lescadres Statement, p 8, para 32; CA-A-1891, Read-Ins relating to Videotron Examination, Sept 8, 2022, p 25:8-18.

<sup>288</sup> Testimony of M Drif, Transcript, Vol 10, Nov 21, 2022, p 2431:14 - p 2432:3; CA-A-0500, Wireless and Broadband Competitive Update, BDM dated Jan 13, 2021 at p 10; Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1475:15 - p 1476:1.

<sup>289</sup> CA-A-0157 p 7-8; Testimony of M Drif, Hearing Transcript, Vol 10, November 21, 2022, p 2464 lines 3 - 24.

87. TPIA does not provide a viable alternative.<sup>290</sup> Even with the [REDACTED] discount contemplated under the Proposed Divestiture, TPIA cannot replicate the economics of owning wireline assets.<sup>291</sup> Shaw was able to achieve a bundled customer lifetime value of \$ [REDACTED]<sup>292</sup> which significantly exceeds that of a TPIA customer, which is estimated to be at about [REDACTED]<sup>293</sup> Videotron will not be able to achieve the same result as its costs will be higher. [REDACTED]

[REDACTED]<sup>294</sup> This will take [REDACTED] to achieve.<sup>295</sup> Even with the anticipated volume discount, [REDACTED]<sup>296</sup>

88. In short, wholesale access to a wireline network replaces significant fixed costs with significant variable costs, which lowers the incremental margin on wireline. This disincentives Videotron to compete and even offer bundled services. In contrast, Shaw currently offers wireless services at low prices because it benefits from retaining wireline subscribers at a relatively high margin. Videotron would earn lower margins on wireline subscribers<sup>297</sup> and would not have the same incentive to offer aggressive wireless bundle plans to attract and retain wireline subscribers. Videotron is unlikely to sustain price competition when faced with competition from incumbents who have a “much more robust margin structure” than Videotron and can to come down and match it on price and still have strong positive margins.<sup>298</sup>

89. The market behaviour of Shaw, Rogers and Videotron reflect the false promise of relying on TPIA to offer bundled services, for example: (a) Shaw could use TPIA to offer bundled services

---

<sup>290</sup> CA-A-097, Hickey Statement, p 11, paras 24-25.

<sup>291</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 2034:21 - p 2037:25.

<sup>292</sup> CA-A-0594, Shaw Presentation titled Consumer F22 Results Presentation dated April 2022, p 53.

<sup>293</sup> Estimated using method of calculation described by Mr. Hickey in Testimony of C Hickey, Transcript, Vol 4, Nov 10, 2022, p 979:8–23, based on data from CA-A-0097, Hickey Statement, p 13, Table 2 at para 35, and Exhibit I, p 498.

<sup>294</sup> Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2272:3-10.

<sup>295</sup> Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2272:3-10.

<sup>296</sup> Mr. Martin contends that EBITDA margins are not the relevant measure to assess the value of a marginal customer, because it includes overhead (Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3695:6-13). Marginal considerations, as suggested by Mr. Martin, are applicable once fixed costs have been sunk and overhead has been established. Videotron does not have established TPIA operations or any such overhead in Alberta and BC and would incur incremental overhead to any of its existing TPIA operations. Because Videotron will incur fixed costs anew for TPIA entry, it must consider these costs in its decision to enter the wireline market in British Columbia and Alberta as a TPIA provider. See Appendix J. Mr. also Martin understates Videotron’s costs, overstates its post-merger margins and systematically overstated Shaw’s prices. Videotron. (Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3683:8 – p 3702:17 and p 3708:23 – p 3709:11). While Mr. Martin attempts to explain away Mr. Lescadres’ evidence on the basis that Mr. Lescadres includes SG&A costs, Mr. Martin’s explanation cannot distract from the fact that Videotron’s costs will be much higher than what Mr. Martin claims.

<sup>297</sup> CA-A-1891, Read-Ins relating to Videotron Examination - Sept 9, 2022, p 97:1-9; Testimony of P Péladeau, Transcript, Vol 10, Nov 21, 2022, p 2576:17 - p 2577:23.

<sup>298</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1827:21 - p 1828:1.

in Ontario, but chose not to, electing instead to offer bundles only within its wireline footprint;<sup>299</sup> (b) Rogers does not currently offer bundled services in British Columbia and Alberta via TPIA, yet expects to yield significant financial benefits from doing so if it acquires Shaw wireline business;<sup>300</sup> and (c) prior to its recent acquisition of VMedia, Videotron did not offer bundled services outside of its wireline footprint via TPIA, except in a single region, Abitibi.<sup>301</sup>

90. However, Abitibi provides a very poor analogy to what Videotron faces Alberta and BC. The market structure of Abitibi is unique in that there was only one incumbent supplier of wireline services when Videotron entered.<sup>302</sup> That is not the case in Alberta and BC where there are multiple competitors. [REDACTED]

[REDACTED],<sup>303</sup> but Alberta and BC are much larger and challenging markets and [REDACTED].<sup>304</sup>

**f) Videotron's 5G deployment will be more costly and less timely**

91. The ownership of wireless and wireline assets is important for the deployment of a 5G network. Videotron's 5G deployment is likely to be more costly and less timely without wireline assets.<sup>305</sup> For example, Rogers anticipates that its rollout of 5G in Western Canada will proceed more quickly and at a lower cost due to its ownership of wireline assets in that footprint. These benefits, which would have been realized by Shaw but for the Proposed Merger, will not accrue to Videotron in the future.<sup>306</sup> The lack of access to owned wireline assets will hamper Videotron's ability to compete in a 5G environment by reducing access to existing wireline infrastructure and Wi-Fi sites, which were both complementary to wireless services and, in some cases, [REDACTED]

[REDACTED]<sup>307</sup> This will increase costs for the divested entity.<sup>308</sup>

<sup>299</sup> CA-A-1882, Read-Ins relating to Shaw's Examination 08-22, p 57:9-25; Testimony of N Miller, Transcript, Vol 7, Nov 16, 2022, p 1766:8 - p 1767:15; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3048:6-19.

<sup>300</sup> CB-A-0382, Project Scotch - Wireless April 19 VCO Submission dated April 19, 2022, p 4.

<sup>301</sup> CA-A-1891, Read-Ins relating to Videotron Examination - Sept 9, 2022, p 94:9-19.

<sup>302</sup> CA-A-0149, Appearance before the Standing Committee on Transport, Infrastructure and Communities, April 20, 2021, p 1.

<sup>303</sup> CA-I-0144, Lescadres Statement, p 29, para 117; Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2232:15 – p 2233:8.

<sup>304</sup> CA-A-1891, Read-Ins relating to Videotron Examination, p 56:3–9. [REDACTED]

[REDACTED] CA-A-1891, Read-Ins relating to Videotron Examinations, p 56:17 – p 59:24 in reference to CA-I-0144, Lescadres Statement, Exhibit 10, p 296.

<sup>305</sup> CA-A-0442, Email dated Sept 24, 2020 re: Coax Backhaul for Wireless; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3031:12 - p 3032:2.

<sup>306</sup> CB-A-0700, ARC Request from Rogers and Shaw dated April 13, 2021, p 10.

<sup>307</sup> CA-A-0676, Shaw Presentation titled Wireless Network Architecture Overview dated July 2021, p 28.

<sup>308</sup> CA-A-0131, M Davies Report, p 80, para 230 (emphasis in original).

92. There are cost and time savings from owning fibre. Videotron will have to lease backhaul from Rogers instead of owning it, which generally puts Videotron at a cost disadvantage relative to Shaw.<sup>309</sup> For example, Mr. Benhadid of Telus confirms that ownership of backhaul facilities provides a competitor with many important advantages, including increased control over network performance, routings, timely maintenance of critical facilities and network reliability.<sup>310</sup> Mr. Benhadid also stated that a lessor of backhaul can discriminate against a lessee's traffic.<sup>311</sup> This is consistent with Videotron's evidence.<sup>312</sup> Moreover, Videotron would have few backhaul alternatives to Rogers in rural areas. While some regional carriers could provide backhaul services, none would be able to provide coverage over Shaw's entire footprint,<sup>313</sup> meaning Videotron would need to negotiate with multiple carriers to cover these areas.<sup>314</sup> With the growing convergence between wireline and wireless assets, it is increasingly important for wireless operators to own wireline assets.<sup>315</sup> Mr. Howe of Bell, for example, confirms that there are significant advantages to deploying a wireless network within a wireline network footprint, including reduced costs and deployment timelines, and greater opportunity to innovate.<sup>316</sup>

93. [REDACTED]

[REDACTED]<sup>318</sup> The only spectrum Videotron possesses that is complimentary to Shaw's wireless business is the 3500MHz spectrum it recently acquired.<sup>319</sup> Spectrum (including set-aside spectrum) is a tradeable commodity.<sup>320</sup> Should the Proposed Merger not proceed, the break fee can

<sup>309</sup> CB-A-0700, ARC Request from Rogers and Shaw dated April 13, 2021, p 54; Testimony of B Kirby, Transcript, Vol 3, Nov 9, 2022, p 744:13 - p 745:25.

<sup>310</sup> CA-A-0100, Witness Statement of Nazim Benhadid (Telus), Sept 23, 2022 ("Benhadid Statement"), pp 3-4 para 5.

<sup>311</sup> Testimony of N Benhadid, Transcript, Vol 5, Nov 14, 2022, p 1170:24 - p 1172:19.

<sup>312</sup> CA-I-0144, Lescadres Statement, Exhibit 30, p 953 and p 30 para 120; Testimony of P Péladeau, Transcript, Vol 10, Nov 21, 2022, p 2578:8-23.

<sup>313</sup> CA-I-0144, Lescadres Statement, Exhibit 30, p 960.

<sup>314</sup> CA-I-0144, Lescadres Statement, Exhibit 30, p 960; and Testimony of M Drif, Vol 10, Nov 21, 2022, p 2413:3 - p 2414:2.

<sup>315</sup> CA-A-0111, Howe Statement, p 2 and 6, paras 5 and 14; CA-A-0074, Kirby Statement, p 11-12 paras 23-27; CA-A-0556, Submission of Shaw Communications Inc to the House of Commons Standing Committee on Industry, Science and Technology - Study on the proposed acquisition of Shaw by Rogers, p 9; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3046:10 - p 3047:10; Testimony of B Kirby, Transcript Vol 3, Nov 9, 2022, p 744:19 - p 745:11.

<sup>316</sup> CA-A-0111, Howe Statement, p 2 para 4.

<sup>317</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1817:13-19; CA-A-1882, Read-Ins relating to Shaw's Examination 08-22, p 32:7 - 18.

<sup>318</sup> CA-I-0144, Lescadres Statement, p 13, para 53; CA-I-0159, Péladeau Statement, p 12-13, para 38; CA-A-1891, Read-Ins relating to Videotron's Examinations, p 1199.

<sup>319</sup> CA-A-0144, Lescadres Statement, Exhibit 57, p 1200, para 4(a)(i).

<sup>320</sup> Testimony of P Péladeau, Transcript, Vol 10, Nov 21, 2022, p 2522:1 - p 2525:21.

be applied to lease or purchase spectrum, a matter that is likely already priced into the break fee.<sup>321</sup> As noted by Mr. Davies, “[t]here are good prospects for it to be able to obtain the spectrum that it would in due course require to be as competitive as it could be in offering 5G services, but critically, that's not a matter of necessarily enormous urgency.”<sup>322</sup>

94. Videotron will either have to use the 3500MHz spectrum as an MVNO or, alternatively, lease or sell the said spectrum. In a context where Videotron does not have a customer base or presence in the West that would allow it to compete effectively as an MNVO, Videotron will likely have to sell or lease the spectrum, as it has done in the past.<sup>323</sup>

**g) Videotron will not own and will have reduced access to “Go Wi-Fi” hotspots**

95. Videotron will have reduced access to “Go Wi-Fi” hotspots under the Proposed Divestiture. “Go Wi-Fi” hotspots enhance the wireless experience of customers, provide data offload<sup>324</sup> and improve network coverage. Go Wi-Fi confers multiple benefits recognized in business documents of both Rogers and Shaw, which include high customer engagement and value,<sup>325</sup> network enhancement,<sup>326</sup> and churn benefits.<sup>327</sup> Videotron-Freedom will only have access to 100,000 public Wi-Fi hotspots and lose access to more than 350,000 home hotspots under the Proposed Divestiture. Freedom will be dependent on Rogers for access, which is guaranteed only so long as Rogers continues to offer the service to its own customers.

96. The Go Wi-Fi network is not of declining importance.<sup>328</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

. 329

<sup>321</sup> CA-A-0532, 3500MHZ Potential Risk Migration for the RCI Auction Strategy, p 1; CA-A-0530, 3500MHZ Risk Associated with an Aggressive Auction, p 1 and 3.

<sup>322</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1839:3-7.

<sup>323</sup> Testimony of P Péladeau, Transcript, Vol 10, Nov 21, 2022, p 2522:1 – p 2525:21.

<sup>324</sup> CA-A-0134, M Davies Reply Report, p 21, para 41; Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1833:14 – p 1834:17 and p 1834:18 – p 1835:12.

<sup>325</sup> CA-A-0424, Wi-Fi Strategy: Improvements, insights & path forward, July 2020, p 5; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3039:13 - p 3041:13.

<sup>326</sup> CA-A-0662, Email dated July 29, 2021 from Jay Gardner to Louis Leblanc et al re: Privileged and Confidential - WIFI Impact on Wireless Customers, p 2; CA-A-0850, Wireless Offsite "Win the West" Discussion dated April 12, 2022, p 25.

<sup>327</sup> CB-A-0382, Rogers Presentation Project Scotch - Wireless April 19 VCO Submission, April 19, 2022, p 4.

<sup>328</sup> CA-A-0648, Fiscal 2022, p 43; Testimony of D Bennett, Transcript Vol 2, Nov 8, 2022, p 258:10-24; CA-A-0516, Consumer Product Roadmap: Wireless and WiFi Q3 F2021 Update, April 30, 2021, pp 5-6; CA-A-0424, Wi-Fi Strategy: Improvements, insights & path forward dated July 2020, p 4; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3039:13 - p 3041:13; Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1833:14 – p 1835:12.

<sup>329</sup> CB-A-0404, Rogers Project Scotch: Small Cell Deployment, April 28, 2022, pp 8, 9, and 17.

330

**h) Videotron is not acquiring all of Shaw’s retail distribution network**

97. Videotron is not acquiring all of Shaw’s retail distribution network.<sup>331</sup> This creates a competitive disadvantage for Videotron under the Proposed Divestiture. Shaw services its combined wireless business through a combination of approximately [REDACTED] Shaw branded retail stores and Shaw.ca (which, together, service Shaw Mobile customers);<sup>332</sup> and (b) [REDACTED] Freedom branded retail stores and Freedommobile.ca.<sup>333</sup> [REDACTED]

[REDACTED]<sup>335</sup> These assets will instead accrue to Rogers.

**i) The divestiture agreements would make Videotron dependent on Rogers**

98. The series of contractual arrangements that are part of the “**Proposed Divestiture Agreement**” put Videotron in a position of dependence and enable Rogers to protect its consumer wireless and wireline businesses from competition by raising Videotron’s costs.<sup>336</sup> The large margins Rogers gets from its subscribers and the close competition between Rogers and Freedom provides Rogers with a strong incentive to raise Videotron-Freedom’s costs. [REDACTED]

[REDACTED] The effects of this dependency include: (a) vulnerability to and reliance upon the reliability and quality of the Rogers network, including traffic discrimination;<sup>337</sup> (b) inability to control, manage and expand key assets and infrastructure; (c) susceptibility to delays and service quality issues; and (d) the ongoing need for cooperation and goodwill.

<sup>330</sup> CA-A-0109, Nagel Statement, p 2 para 6-8, p 3 para 10; Testimony of T Nagel, Transcript, Vol 5, Nov 14, 2022 p 1244:14 - p 1248:1.

<sup>331</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1830:7 – p 1832:22.

<sup>332</sup> P-A-1411, Shaw 2021 Annual Report, p 3; CA-A-0414, Email, August 7, 2020 from Mathew Flanigan to Tyler Spring and Jillian Mullenix re: Shaw Mobile Highlights, p 2.

<sup>333</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022 at p 1949:18-20.

<sup>334</sup> CA-A-0131, M Davies Report, p 67, para 181.

<sup>335</sup> CA-A-0131, M Davies Report, p 67, para 182; Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1830:6 – p 1832:11.

<sup>336</sup> Krattenmaker, T. G.; Salop, S. C. (1986). Anticompetitive exclusion: Raising rivals’ costs to achieve power over price. *Yale Law Journal*, 96(2), 209-294.

<sup>337</sup> Testimony of N Benhadid, Transcript, Vol 5, Nov 14, 2022, p 1172:7-19.

99. One need look no further than the existing 20-year Network Operating Agreement between Videotron and Rogers in Quebec to confirm the dangers of Videotron's contractual dependence on Rogers.<sup>338</sup> There has been on-going litigation on what was once believed to be a sweetheart deal for Videotron.<sup>339</sup> This dispute is by no means a one-off with Rogers. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>341</sup> These instances of poor cooperation demonstrate the ineffectiveness of contractual arrangements among rivals which are characterized by a lack of commercial symmetry in the relationship between parties.<sup>342</sup> Driven by the margins it gets from its consumers, Rogers is likely to continue its pattern of raising its downstream rival's costs to soften competition.

100. The existence of these long-term contracts and the ability of Rogers to discipline Videotron also likely serve to heighten coordination. Under the oligopolistic market structure of the telecommunications industry in Canada, such coordination will result in a measurable softening of competition, result in information sharing, and increase the likelihood that Videotron will fall in line with the Big 3.

101. The contractual arrangements also result in a loss of control for Videotron in relation to network quality and reliability.<sup>343</sup> Mr. Davies notes that if the Rogers outage had occurred in the post divestiture world, "[REDACTED]

[REDACTED]<sup>344</sup> Mr. McKenzie agreed that during the July 8<sup>th</sup> outage, TELUS would not have had any control over the approximately 2,250 wireline circuits that they lease from Rogers.<sup>345</sup> Ownership is control over an asset which drives quality and service.

<sup>338</sup> CA-I-0144, Lescadres Statement, Exhibit 29 p 938-939, letter from Mr. Rook to the Commissioner, Dec 17, 2021; CA-A-1891, Read-Ins relating to Videotron's Examinations, p 27:6 – 37:17.

<sup>339</sup> CA-A-1891, Read-Ins relating to Videotron's Examinations, p 27:6-11, p 37:17 – p 38:18, and p 39:5-19; Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2203:11 – p 2205:6; CA-I-0144, Lescadres Statement, Exhibit 29, pp 938-939.

<sup>340</sup> CA-I-0144, Lescadres Statement, page 1326, Exhibit 63; Testimony of N Benhadid, Transcript, Vol 5, Nov 14, 2022, p 1172:7-19: traffic discrimination is very difficult to prove.

<sup>341</sup> Testimony of Stephen Howe, Hearing Transcript, Vol 6, Nov 15, 2022, p 1403:2-12.

<sup>342</sup> The ongoing success of relationships such as the network sharing arrangement between Bell and Telus is contingent on reciprocity and negotiations of parties of equal strength. Testimony of N Benhadid, Transcript, Vol 5, Nov 14, 2022, p 1081:4-20.

<sup>343</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1823:9 – p 1825:2; p 1835:15 – p 1836:22.

<sup>344</sup> CA-A-0131, Davies Report, p 77 para 218.

<sup>345</sup> Testimony of R McKenzie, Transcript, Vol 13, Nov 24, 2022, p 3484:24 - p 3485:12.

## **6. Existing Regulatory Frameworks Do Not Resolve Competition Concerns**

### **a) The ISED spectrum decision relates to spectrum transfer only, not prices**

102. The ISED Minister denied the application to transfer Shaw's spectrum to Rogers due to Rogers' ineligibility. While the Respondents have made much of the press release saying the Minister "expects" prices in Ontario, Alberta and BC to drop to the current price levels in Quebec,<sup>346</sup> the Minister does not set retail prices,<sup>347</sup> and there is no evidence of enforceability.

### **b) The CRTC TPIA regime does not promote competition**

103. Rates set by the CRTC for aggregated TPIA will not provide the margins essential for effective competition. Mr. Hickey of Distributel testified that by entering Alberta and BC, his company would incur minimal or negative profit margins in all but one case if it were to offer, using the regulated TPIA rates, wireline internet and wireless service bundles similar to those offered by Shaw.<sup>348</sup>

104. Market consolidation speaks volumes about the negative economics of TPIA in Canada. Even since the 2021 increase in TPIA rates, resellers have been acquired or are being acquired by incumbents. VMedia was acquired by Quebecor,<sup>349</sup> and Distributel is in the process of being acquired by Bell.<sup>350</sup>

105. The CRTC's process to adjust TPIA rates is lengthy, uncertain and subject to unpredictable. The most recent CRTC rate-setting process for aggregated TPIA began in 2015.<sup>351</sup> A year later, the CRTC set interim rates, and in 2019, the CRTC set what were supposed to be final rates, while expressing concerns about the cost submissions of the large carriers.<sup>352</sup> Large carriers, including Rogers, pursued three avenues to challenge the CRTC final rates. A petition to the Governor-in-Council, was declined;<sup>353</sup> an appeal to the Federal Court of Appeal<sup>354</sup> was denied; a request to have the CRTC reverse its decision was successful in 2021.<sup>355</sup> The increases in final rates between 2019

---

<sup>346</sup> P-R-0008, Statement from Minister Champagne on competitiveness in the telecom sector dated Oct 25, 2022.

<sup>347</sup> Testimony of J-F Lescadres, Transcript Vol 19, Nov 9, 2022, p 2294:9-12.

<sup>348</sup> CA-A-0097, Witness Statement of Christopher Hickey, Sept 23, 2022 ("Hickey Statement"), p 13, Table 2 and p 14, para 36.

<sup>349</sup> Testimony of J-F Lescadres, Transcript, Vol 9, Nov 18, 2022, p 2277:1-4.

<sup>350</sup> Testimony of C Hickey, Transcript, Vol 4, Nov 10, 2022, p 963:25 - p 964:7.

<sup>351</sup> Exhibit CA-A-0028, McCarthy Statement, p 8, para 23, CRTC 2015-326.

<sup>352</sup> Exhibit CA-A-0028, McCarthy Statement, p 8, para 23, CRTC 2019-288, CRTC 2016-396, CRTC 2016-448.

<sup>353</sup> Governor-in-Council, Order to decline to vary, rescind or refer back for reconsideration Telecom Order CRTC 2019-288, PC 2020-0553.

<sup>354</sup> *Bell Canada V British Columbia Broadband Association*, 2020 FCA 140, BOA Tab 1, leave to appeal to the SCC denied, case no 39423, JSCC (25 Feb 2021)).

<sup>355</sup> Exhibit CA-A-0028, McCarthy Statement, p 8, para 23, CRTC 2021-181.



and 2021 are significant.<sup>356</sup> Appendix I is a table comparing the final TPIA rates of Rogers, Shaw and Videotron from 2019 to 2020.

106. The 2021 rates may be subject to further change. The CRTC subsequently held a proceeding to determine if Phase II costing should be reconsidered and a different methodology be used instead. It has not yet issued a decision.<sup>357</sup> The same rate-setting methodology (*i.e.*, Phase II costing) is also used from disaggregated TPIA,<sup>358</sup> although the future of disaggregated TPIA is uncertain. The CRTC held a proceeding on disaggregated TPIA in 2020 for which a decision is still pending.

**c) MVNO entry will not constrain post-merger market power**

107. As noted above, entry as a mobile virtual network operator (“MVNO”), it is admitted, “is not likely in a time period or on a scale that is likely to constrain any increase in market power alleged by the Commissioner in connection with the Transaction coupled with the Divestiture.”<sup>359</sup>

**d) Wholesale roaming rates are higher than retail data rates**

108. Under the current CRTC framework, wholesale roaming rates (*i.e.*, \$13-14 per GB of roaming data) are many times higher than the retail price per GB of data.<sup>360</sup> Further to Mr. Lescadres’ evidence, the proposed cost of a [REDACTED]

[REDACTED]<sup>61</sup> The wholesale rates set by the CRTC would be close to [REDACTED] than Videotron would charge consumers. [REDACTED]

[REDACTED]<sup>362</sup>

**e) Mandated arbitration is an unrealistic dispute resolution mechanism in the face of unjust discrimination on wholesale roaming**

109. Mandated arbitration is not an effective means of resolving disputes. For example, Rogers was found by the CRTC in 2014 to have engaged in unjust discriminating against new entrants for

<sup>356</sup> Exhibit CA-A-0028, McCarthy Statement, p 8, para 23, CRTC 2019-288, CRTC 2021-181.

<sup>357</sup> Exhibit CA-A-0028, McCarthy Statement, p 6, para 19, CRTC 2020-131.

<sup>358</sup> Telecom Order CRTC 2017-312, Interim rates for disaggregated wholesale high-speed access services in Ontario and Quebec, Aug 29, 2017, para 27.

<sup>359</sup> CA-A-0262, Shaw's Responses to Undertakings at Examination of P McAleese dated Sept 2, 2022, p 26.

<sup>360</sup> Exhibit CA-A-0028, McCarthy Statement, p 6 para 18, CRTC 2018-99.

<sup>361</sup> CA-I-0144, Lescadres Statement, Exhibit 48, p 1123. [REDACTED]

<sup>362</sup> CA-I-0144, Lescadres Statement, p 33 para 136.

the wholesale roaming rates it charged them and imposing exclusivity clauses.<sup>363</sup> In this matter, Videotron asserted that: the roaming rates are abusive; and new entrants are at the mercy of the incumbents;<sup>364</sup> the arbitration process is an unrealistic dispute resolution mechanism due to the associated delays and costs.<sup>365</sup>

## 7. Merger Simulation Shows Proposed Divestiture will not remove the “S”

110. Dr. Miller’s merger simulation model reveals that the Proposed Divestiture will not remove the “S” from the SLPC. It identifies a “lower bound” estimate of the potential price increase to consumers, because the model assumes a “perfect transfer” of subscribers, a result which is unlikely to be achieved.<sup>366</sup> Dr. Miller explains that “a divestiture is unlikely to replicate so perfectly a divested product’s competitiveness. Consequently, there would be an unquantifiable portion of the harm that the model assumes the divestiture addresses which would, in practice, not be addressed.” The harm would result from such things as: (a) **Videotron’s dependence on Rogers** for key services under a relationship between competitors which carries “higher risks that the terms of these services will be abused—or at least not complied with as amicably as in the current state of affairs in which, instead, they are provided within the same integrated enterprise under Shaw’s ownership”;<sup>367</sup> (b) **Reduced control over assets**, which means “New Freedom will likely need to choose between lowering the quality they promise to customers or incur additional costs to deliver that quality”;<sup>368</sup> (c) **Reduced incentives**: With the loss of more than ██████ Shaw Mobile subscribers, New Freedom will have “less incentive to maintain and grow the Freedom brand to the same extent as Shaw did because the return on that investment will be lower”;<sup>369</sup> (d) “the **TPIA provisions would not give New Freedom the ability to offer bundled services** that are comparable to what Shaw currently offers, nor would it restore the same incentives for long-term investment”;<sup>370</sup> and (e) “**loss of the benefits of integration** between Freedom and Shaw [resulting

---

<sup>363</sup> CA-A-0030, Reply McCarthy Statement, Exhibit B, p 34 paras 3-5, p 38 paras 16, p 39 para 19; and ID-047, CRTC, Telecom Decision CRTC 2014-398, *Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference* (31 July 2014), paras 5, 29-31.

<sup>364</sup> P-A-0151, Quebecor Submissions to the CRTC, p 5 para 14.

<sup>365</sup> P-A-0151, Quebecor Submissions to the CRTC, p 8, paras 32-33.

<sup>366</sup> CA-A-0122, Miller Report, p 114 para 228.

<sup>367</sup> CA-A-0122, Miller Report, p 116 para 233.

<sup>368</sup> CA-A-0122, Miller Report, p 116-117 para 234.

<sup>369</sup> CA-A-0122, Miller Report, p 118 para 236.

<sup>370</sup> CA-A-0122, Miller Report, p 118 para 237.

in] higher costs of infrastructure, lower returns on the capital invested for an expansion, and less managerial incentive in building the brand's reputation for disrupting the market.”<sup>371</sup>

111. Another source of unquantified anti-competitive effects identified by Dr. Miller is the likelihood of increased coordination between the Big 3, especially given that the “divestiture makes Videotron more attuned to retaliation across provinces than either Shaw or Videotron currently are, [therefore] Videotron would be more similar to the Big 3 and less likely to disrupt coordination attempts among them.”<sup>372</sup> In sum, the evidence of Dr. Miller reinforces the conclusion that the Proposed Divestiture is not likely to alleviate the substantial prevention or lessening of competition from the Proposed Merger.

#### **E. ECONOMIC MODELLING AND OTHER EVIDENCE OF ANTI-COMPETITIVE EFFECTS**

112. The Respondents have argued that Dr. Miller's modelled price effects in the presence of the Divestiture “fall below the threshold” for substantial effect; their experts have also levied various critiques at Dr. Miller's model as well as on the events studies he carried out showing Shaw's impact on prices and data consumption. This section addresses these matters, by showing that the critiques are unfounded, that Dr. Miller's conclusions from the event studies are well supported, and that there exists a large body of qualitative evidence (already reviewed in large part above) which augments the “lower bound” price increases found by Dr. Miller. The Respondents have not discharged their burden to show that the Divestiture will alleviate the anti-competitive effects of the Proposed Merger.

113. It is noteworthy that Dr. Israel does not propose his own merger simulation model with which to analyse the Proposed Merger or Proposed Divestiture,<sup>373</sup> which he could have and should have done given that the Respondents have the onus of proving that the Proposed Divestiture eliminates the SPLC resulting from the Proposed Merger.<sup>374</sup> Dr. Israel has not satisfied the Respondents' onus given that in cross-examination, and in Dr. Miller's rebuttal evidence, his various critiques were revealed to be unfounded.

---

<sup>371</sup> CA-A-0122, Miller Report, p 119-120 para 239; CA-A-0097, Hickey Statement, p 6 para 15.

<sup>372</sup> CA-A-0122, Miller Report, p 123 para 249.

<sup>373</sup> Testimony of M Israel, Transcript, Vol 1, Nov 30, 2022, p 4482:13 – p 4483:14.

<sup>374</sup> *Canada (Director of Investigation & Research) v. Southam Inc.* (1995), 127 D.L.R. (4th) 329 (F.C.A.), at para 18, BOA Tab 11, aff'd [1997] 1 S.C.R. 748, at para 89, BOA Tab 12.

## **1. Dr. Miller's Merger Simulation Yields Reliable Results**

### **a) Dr. Miller's merger simulation model captures Shaw's wireline incentives**

114. Dr. Miller quantifies the price and welfare effects of the Proposed Merger using a standard merger simulation model.<sup>375</sup> This model reflects the wireline revenue Shaw gains when it sells wireless services in a bundle through a low calibrated marginal cost.<sup>376</sup>

### **b) The merger simulation uses reliable inputs**

115. Dr. Miller's model uses reliable and realistic inputs. Dr. Israel critiques Dr. Miller's use of share of gross adds ("SOGA"), suggesting the only legitimate measure is share of subscribers ("SOS").<sup>377</sup> In Dr. Miller's model, market shares correspond to the probability of a product being chosen by a consumer.<sup>378</sup> As Dr. Miller explained, SOGA is the closest available measure of current decisions being made by consumers; in contrast, SOS includes customers that are not actively shopping.<sup>379</sup> Dr. Israel admitted that it is difficult to identify an active shopper and that he did not seek data on active shoppers from Rogers.<sup>380</sup> Dr. Israel has also been involved in another wireless merger where his firm used SOGA as a measure of market share in a merger simulation and accepted that there are advantages and disadvantages of different measures.<sup>381</sup> Ordinary course documents show that both Rogers and Shaw use SOGA to assess their market position.<sup>382</sup>

116. SOGA is the correct measure to use in this case. Dr. Miller compares shares from gross adds and subscribers to the porting data, which reflects actual customer switching between carriers. He finds that the porting data supports the use of SOGA.<sup>383</sup>

117. In contrast, SOS is the wrong measure, as it includes consumers that are not actively shopping. This deficiency makes SOS a worse measure of competitive vigour and future competitive significance of market participants than SOGA.<sup>384</sup> Given that SOS includes decisions that were made far in the past, it is a poor reflection of consumers' current choices and the current

---

<sup>375</sup> CA-A-0122, Miller Report, p 77-78 paras 137-138.

<sup>376</sup> Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1464:13 – p 1465:2.

<sup>377</sup> CA-R-1851, Israel Report, Sept 23, 2022 ("Israel Report"), p 37 para 49.

<sup>378</sup> CA-A-0122, Miller Report, p 86 para 167.

<sup>379</sup> CA-A-0122, Miller Report, p 35-36, para 61; CA-A-0125, Miller Rebuttal Report, p 20, 21, paras 37, 39; Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1431:4-23 and p 1435:9–p 1437:9; CA-A-0480, Email Dec 19, 2017 re: Having Confidence in Ourselves.

<sup>380</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4552:11–20.

<sup>381</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4534:21–p 4535:2.

<sup>382</sup> Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1436:17–p 1437:9; CA-A-0122, Miller Report, p 35-36, para 61; CA-A-0480, Email Dec 19, 2017 re: Having Confidence in Ourselves, p 1.

<sup>383</sup> Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1437:6-9, p 1489:25–p 1490:8.

<sup>384</sup> CA-A-0122, Miller Report, p 35-36, para 61.

competitive conditions. This deficiency also means that SOS will underestimate the importance of new products such as Shaw Mobile as it includes consumer purchase decisions that were made when Shaw Mobile was not even available.<sup>385</sup>

118. SOS will understate the importance of new products. This point is well demonstrated by comparing British Columbia and Alberta, where Shaw Mobile recently entered, to Ontario, where it did not. In all three provinces, Freedom is an established carrier. In British Columbia and Alberta, SOGA matches the porting data better than SOS.<sup>386</sup> In Ontario, SOGA and SOS match the porting data similarly well.<sup>387</sup> Consistent with the MEGs, it is important to use SOGA when there are new competitive options in the market.<sup>388</sup>

119. Dr. Miller is careful to avoid the initial “spike” in Shaw Mobile’s gross adds following its entry and the decline in Shaw Mobile gross adds following the Arrangement Agreement (linked to subsequent price increases).<sup>389</sup> Once again, Dr. Miller corroborates his analysis with porting data, which show a similar pattern.<sup>390</sup> Contrary to Dr. Israel’s comments about push and pull diversions, Dr. Miller is using a period of time when porting and SOGA are stable.<sup>391</sup>

120. SOS ignores the fact that new entrants like Shaw Mobile can continue to grow subscriber share toward a steady-state level for a long time. Even Videotron, which launched wireless services as an MVNO in 2006 and deployed its own network in 2010, has a current SOS [REDACTED] well below its SOGA [REDACTED].<sup>392</sup>

### **c) The merger simulation generates sensible results**

121. Dr. Miller uses two versions of his model, an 8-brand model and an 11-brand model. The 8-brand model includes premium (e.g., Rogers) and flanker (e.g., Fido) brands while the 11-brand model adds the prepaid (e.g., chatr) brands. As Dr. Miller notes, the 8-brand model appears to

<sup>385</sup> CA-A-0125, Rebuttal Miller Report, p 20, para 37; Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1435:9 – p 1436:16.

<sup>386</sup> CA-A-0122, Miller Report, p 91, para 178; Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1462:20 – p 1463:3; CA-A-0304, Shaw Mobile Response Strategy dated Aug 14, 2020, pp 7-9.

<sup>387</sup> CA-A-0122, Miller Report, p 91, para 178; CA-A-0304, Shaw Mobile Response Strategy dated Aug 14, 2020, pp 7-9.

<sup>388</sup> MEGs, at 21 para 5.4.

<sup>389</sup> CA-A-0125, Miller Rebuttal Report, pp 24-25, paras 47-48; CA-A-127, Expert Presentation of Dr. N Miller, slide 37; CA-A-0122, Miller Report, p 163, Exhibit 31. See also: Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4544:18–p 4545:10.

<sup>390</sup> CA-A-0122, Miller Report, pp 166-167, para 352 and Exhibit 33.

<sup>391</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4465:1–p 4466:5.

<sup>392</sup> CA-A-0125, Miller Rebuttal Report, p 24 para 46; CA-I-0144, Lescadres Statement, Exhibit 57, pp 1193-1195. [REDACTED]

better match the data inputs and is likely to deliver more informative predictions about the Proposed Merger.<sup>393</sup>

122. Consistent with the qualitative evidence and event studies, the merger simulation predicts significant price effects from the Proposed Merger, with market wide price increases in the range of 7.1- 10%,<sup>394</sup> and of 0.8-5% for a “Perfect Transfer” divestiture to Videotron (a “lower bound” range).<sup>395</sup> These price effects would be felt by the entirety of the relevant markets. Post-divestiture, prices would increase 7.1-16.8% for identified Rogers brands and Shaw Mobile.<sup>396</sup> The affected volume of commerce is large given the high penetration and prices of wireless service, resulting in significant welfare effects.<sup>397</sup> The increases would also persist for an indefinite period given the extraordinarily high barriers to entry. These price increases do not include any additional qualitative anticompetitive effects<sup>398</sup> discussed below.

## **2. Dr. Israel Responding Evidence Demonstrated no “Flaws” in the Model**

123. Dr. Israel’s evidence involved multiple inconsistencies with his reports and earlier statements in his testimony. For these reasons, it is submitted that Dr. Miller’s evidence should be preferred in areas of conflict. Appendix E sets out a summary of these inconsistencies.

### **a) Rogers is actually acquiring Shaw Mobile**

124. Dr. Israel wrongly claims that Dr. Miller’s model implies that current Shaw Mobile customers are going to switch back to Freedom given that the wireless assets are not transferred to Rogers.<sup>399</sup> Dr. Israel incorrectly presents a merger simulation model in which Rogers does not acquire Shaw Mobile assets, but only subscribers.<sup>400</sup> Dr. Israel distanced himself from this assumption in cross-examination, given the evident contrary facts.<sup>401</sup>

125. Dr. Miller’s model is “agnostic” as to which assets Rogers will use to offer services to the current Shaw Mobile customers.<sup>402</sup> Given that Rogers will be in a better position than Videotron-

---

<sup>393</sup> CA-A-0122, Miller Report, p 91 para 177.

<sup>394</sup> CA-A-0122, Miller Report, p 93 Exhibit 20.

<sup>395</sup> CA-A-0122, Miller Report, p 113 Exhibit 22

<sup>396</sup> CA-A-0122, Miller Report, p 113 Exhibit 22

<sup>397</sup> CA-A-0122, Miller Report, pp 95 and 115, Exhibits 21 and 23.

<sup>398</sup> CA-A-0122, Miller Report, p 99 paras 195-197.

<sup>399</sup> CA-R-1851, Israel Report, p 35-36 paras 45-46.

<sup>400</sup> CA-R-1851, Israel Report, p 73 para 114.

<sup>401</sup> Testimony of M Israel, Transcript, Vol 1, Nov 30, 2022, p 4501:5-15.

<sup>402</sup> CA-A-0125, Miller Rebuttal Report, pp 16-17 para 29.

Freedom to offer a product similar to Shaw Mobile’s current offering, it is unlikely that Shaw Mobile subscribers would switch to Videotron-Freedom as Dr. Israel suggests.<sup>403</sup>

126. Videotron’s evidence also contradicts Dr. Israel’s assumption. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**b) The Use of “Bundled Nests” is Unsupported and Contrary to Evidence**

127. Dr. Israel critiques Dr. Miller’s model for not using a “nested logit” model which accounts for bundled and unbundled products. This critique is unfounded, contrary to the evidence, and results in a model that performs worse than Dr. Miller’s.<sup>407</sup> Dr. Israel admitted that his model is only an “illustration” and that he performed no analysis to ensure that wireless-wireline bundles are closer competitors to each other.<sup>408</sup> Furthermore, the suggestion of particularly close diversion between bundles and unbundled products is not supported by the weight of evidence. The evidence reviewed above showed that the closest rivalry occurred between Rogers and Shaw.<sup>409</sup> R [REDACTED]

[REDACTED]

[REDACTED]<sup>410</sup> This shows that customers, contrary to Dr. Israel’s suggestion, readily switch between bundled and unbundled products.

128. Dr. Miller cogently demonstrated during his direct testimony that Dr. Israel’s nested logit model predicts diversions much worse than Dr. Miller’s flat logit model. He displays a bar chart showing how close diversions from his flat logit models are to diversions from the porting data, compared to the poor match of Dr. Israel’s nested logit to the data.<sup>411</sup>

<sup>403</sup> CA-A-0125, Miller Rebuttal Report, pp 17-18 para 31.

<sup>404</sup> CA-I-0144, Lescadres Statement, p 27-28 paras 111-112.

<sup>405</sup> CA-I-0144, Lescadres Statement, p 27-28, para 112.

<sup>406</sup> CA-I-0144, Lescadres Statement, p 27, para 111.

<sup>407</sup> CA-A-0125, Miller Rebuttal Report, p 15, para 26.

<sup>408</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4514:13–p 4515:16.

<sup>409</sup> See section C.2.c above.

<sup>410</sup> CA-A-0122, Miller Report, pp 60 and 76 Exhibits 10 and 17. [REDACTED]

[REDACTED] in Miller Report Exhibit 17.

<sup>411</sup> Testimony of N Miller, Transcript, Vol 6, Nov 15, 2022, p 1486:7–p 1490:8; CA-A-127, Presentation by Dr. N Miller, slide 36.

**c) Marginal cost reductions are unsupported and incomplete; marginal costs could rise**

129. The Respondents have failed to establish that Videotron is likely to achieve any material marginal cost reductions. Dr. Israel simply incorporated Videotron's estimates of its roaming savings as marginal cost savings, without verifying them.<sup>412</sup> Dr. Israel incorporates future projections of roaming cost savings, which is inappropriate for two reasons.<sup>413</sup> First, these projections are taken from unsupported Videotron assumptions about roaming traffic growth.<sup>414</sup> Moreover, the cost projections were shown in cross-examination to be based on future data consumption that are extremely high and have no factual foundation in Videotron's actual decade-long experience in the market.<sup>415</sup> Second, these projected savings apply to a [REDACTED] [REDACTED].<sup>16</sup> Additionally, Dr. Israel does not consider sources of marginal cost increases such as [REDACTED]. The true change in Freedom's marginal costs is unknown and may increase.

130. In any event, Dr. Israel finds small marginal cost savings.<sup>417</sup>

**d) Videotron Bundle**

131. While Dr. Israel suggest a benefit of the Proposed Merger and Proposed Divestiture is that Videotron will introduce an additional wireless-wireline bundled product,<sup>418</sup> he ignores the existing Freedom wireless-wireline bundled product.<sup>419</sup> Freedom has bundled internet services with approximately [REDACTED] of its wireless subscribers.<sup>420</sup> In spite of this, he accepted without question Videotron's estimate that *one third* of Freedom subscribers will bundle internet with Videotron.<sup>421</sup> Dr. Israel applies his assumed 33% bundle rate to post-divestiture Freedom immediately upon closing. However, Videotron projects a Freedom bundle rate of about [REDACTED] in 2023.<sup>422</sup> Dr. Israel assumes the Videotron bundle is new when it is not, and he assumes it will be at least [REDACTED] times more popular than Freedom's current product or Videotron's 2023 estimate. This implausible assertion makes his results unreliable.

---

<sup>412</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4575:11–p 4577:23.

<sup>413</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4565:3–9.

<sup>414</sup> CA-A-0125, Rebuttal Witness Statement of N Miller, p 31 and 32, para 64 and 69.

<sup>415</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4584:4–11.

<sup>416</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4578:8–14.

<sup>417</sup> CA-R-1851, Israel Report, p 66, Table 6; CA-A-0125, Rebuttal Miller Report, p 33 para 70.

<sup>418</sup> CA-R-1854, Israel Reply Report, p 33 para 44.

<sup>419</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4522:4–22.

<sup>420</sup> CA-I-0144, Lescadres Statement, Exhibit 57, pp1193-1195.

<sup>421</sup> CA-R-1854, Israel Reply Report, p 33, para 44.

<sup>422</sup> CA-I-0144, Lescadres Statement, Exhibit 66, Tab "Wireline", row 46. [Note: Tab "Dashboard", Cell F8 = 'Management'.]



### 3. Qualitative evidence is consistent with significant merger effects

132. Dr. Miller's model conservatively quantifies the lower bound of the harm unaddressed by the Proposed Divestiture.<sup>423</sup> Various sources of qualitative effects demonstrate it will be much higher, starting with the basic point that merger effects are fundamentally driven by closeness of competition and pre-merger margins and that Rogers and Shaw wireless services are very close substitutes.<sup>424</sup> They earn high margins.<sup>425</sup> Eliminating this competition will have evident unilateral anti-competitive effects. The Respondents do not dispute Dr. Miller's calculated margins.

#### a) Event Studies Show Shaw's Competitive Impact

133. The likelihood of a post-merger price increase is corroborated by ordinary course and other evidence referred to by Dr. Miller. Dr. Miller's event studies show the competitive impact Shaw has had on the market, and thus the lessening of competition that would result from its removal by the merger. Shaw's introduction of Big Gig plans at Freedom was a significant competitive event.<sup>426</sup> Dr. Miller finds a significant decrease in price per GB and increase in data usage for subscribers who signed up during the Big Gig event.<sup>427</sup> The Respondents do not dispute Dr. Miller's analysis of the Big Gig event.<sup>428</sup>

134. Shaw Mobile's launch was another significant competitive event.<sup>429</sup> It helped Shaw reduce broadband churn and increase overall household lifetime value.<sup>430</sup> The Big 3's response spread to targeting Freedom in Ontario despite Shaw Mobile only being available in BC and Alberta.<sup>431</sup> Dr. Miller finds a statistically significant decrease in per GB data price and increase in data usage for subscribers who signed up after the launch of Shaw Mobile.<sup>432</sup>

135. The Respondents do not dispute these facts. They merely challenge their interpretation. Dr. Israel claims that pre-existing trends could cause the observed pattern;<sup>433</sup> Dr. Johnson claims that

---

<sup>423</sup> CA-A-0122, Miller Report, p 111, para 224.

<sup>424</sup> CA-A-0122, Miller Report, pp 39-41, paras 70-72, 73; CA-A-1158, Email dated Dec 16, 2017 We have an idea – and a competitive update; CA-A-0352, Freedom Analysis and Strategic Options for Consideration, pp 2-3, 5; CA-A-0304, Shaw Mobile Response Strategy dated Aug 14, 2020, p 7

<sup>425</sup> CA-A-0122, Miller Report, p 177, Exhibit 36.

<sup>426</sup> CA-A-0122, Miller Report, pp 47-48, paras 90-91; CA-A-0480, Email Dec 19, 2017 re: Having Confidence in Ourselves.

<sup>427</sup> CA-A-0122, Miller Report, pp 53-60, paras 98, 99, 102-104 and 109.

<sup>428</sup> CA-R-1851, Israel Report, pp 84-85, paras 131-132.

<sup>429</sup> CA-A-0122, Miller Report, p 61, para 111.

<sup>430</sup> CA-A-0460, Wireless F20 and 5Y Plan Overview, Preliminary Discussion Materials dated Sept 27, 2019, p 7.

<sup>431</sup> CA-A-0122, Miller Report, pp 62-63, 67-68, paras 114 and 120; CA-A-0304, Shaw Mobile Response Strategy dated Aug 14, 2020, p 18; CA-A-0342, Email dated Sept 25, 2020 re: Following the story on \$10/\$11x24; CA-A-0330, re Q3 2020, p 3

<sup>432</sup> CA-A-0122, Miller Report, pp 71, 73-76, paras 125-126, 130-132 and 135; CA-A-0342; CA-A-0354, p 5; CA-A-0324.

<sup>433</sup> CA-R-1851, Israel Report, p 89, para 143.

seasonal variation could be the cause.<sup>434</sup> Neither claim addresses Dr. Miller's analysis linking the data to other evidence on the record. For example, Rogers CEO wrote to Rogers' Board Directors that the "[REDACTED]

[REDACTED]"<sup>435</sup> If Shaw Mobile had no impact on the market and the patterns Dr. Miller reports were merely the result of pre-existing trends and normal seasonal variation, Rogers CEO would not alert Rogers' Board Directors to the significant competitive effects caused by the launch of Shaw Mobile.

136. The Respondents' economic experts' statistical suppositions cannot explain away the reality of Shaw Mobile and its continuing competitive impact. Dr. Israel's trend analysis is fundamentally flawed. It simply cannot distinguish between a trend and an event like Shaw Mobile's launch.<sup>436</sup> Correcting Dr. Israel's data handling error demonstrates that Bell did indeed lower its prices in response to Shaw Mobile, as the qualitative evidence indicates.<sup>437</sup>

137. Dr. Johnson admits that quantitative and qualitative evidence can corroborate each other but he only performed a data analysis.<sup>438</sup> Dr. Johnson then implausibly insists that he does not understand what ordinary course business documents mean.<sup>439</sup> This is not credible. He equivocates on whether or not Ontario is a valid control market despite the clear record that Ontario was itself affected by the event.<sup>440</sup> Likewise, Dr. Johnson simply raises a government announcement of 25% price reductions without even suggesting the announcement caused any effects.<sup>441</sup> Dr. Johnson acknowledges that there were such "one-off" events in every year that he studied.<sup>442</sup> Dr. Johnson simply proposes alternative explanations for the patterns Dr. Miller observes following Shaw Mobile's launch without anchoring these explanations in analysis. Dr. Miller's conclusions are unshaken by these critiques.

---

<sup>434</sup> CA-R-1838, Johnson Report, p 30, para 80.

<sup>435</sup> CA-A-0330, Rogers letter dated Oct 15, 2020 from Joe Natale to RCI Board Directors re: Q3 2020, p 3.

<sup>436</sup> CA-A-0125, Miller Rebuttal Report, pp 43-44, paras 88-89.

<sup>437</sup> Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4446:5-21; CA-A-0125, Miller Rebuttal Report, pp 46-48, paras 91-92, 94.

<sup>438</sup> Testimony of P Johnson, Transcript, Vol 16, Nov 29, 2022, p 4237:15-p 4240:9.

<sup>439</sup> Testimony of P Johnson, Transcript, Vol 16, Nov 29, 2022, p 4240:10-16 and p 4242:23-p 4244:6.

<sup>440</sup> Testimony of P Johnson, Transcript, Vol 16, Nov 29, 2022, p 4228:9-p 4229:16, p 4244:7-p 4245:19 and p 4233:24-p 4236:15.

<sup>441</sup> Testimony of P Johnson, Transcript, Vol 16, Nov 29, 2022, p 4282:22-p 4283:1; CA-R-1835, Johnson Report, pp 12-13, para 38.

<sup>442</sup> Testimony of P Johnson, Transcript, Vol 16, Nov 29, 2022, p 4262:20-p 4265:6.

**b) Elimination of the Shaw Brand, as Rogers Intends, Increases Welfare Loss**

138. Separating the Freedom and Shaw Mobile brands increases competition, just as combining Shaw Mobile with the Rogers brands decreases it.<sup>443</sup> Dr. Miller treats the Shaw Mobile brand (with its low marginal costs and specific non-price value) as an additional brand that Rogers will control after the merger and divestiture.<sup>444</sup> If, instead, Rogers discontinues the Shaw Mobile product, then there will be additional loss of welfare.<sup>445</sup> The Respondents have suggested that Shaw Mobile customers will benefit from being transferred to Rogers' wireless network because Rogers has a slightly higher non-price value than Shaw Mobile in Dr. Miller's merger simulation, but that is an incorrect understanding of merger simulation analysis.<sup>446</sup>

**c) Other Qualitative Effects**

139. Other significant qualitative effects not alleviated by the Proposed Divestiture include:

140. Areas where Shaw does not yet operate are omitted from the quantitative analysis. However, there is harm to consumers that would have benefited from the expansion of Shaw in the future but for the merger described above, which was clearly planned and likely.<sup>447</sup> The Proposed Merger, even with the Proposed Divestiture, prevents this likely competition.

141. Freedom-Videotron will not benefit from Shaw's "owner economics". As Dr. Miller explains, "loss of the benefits of integration between Freedom and Shaw likely means higher costs of infrastructure, lower returns on the capital invested for an expansion, and less managerial incentive in building the brand's reputation for disrupting the market."<sup>448</sup>

142. Reducing the unique facilities-based networks in the west from three to two means a loss of choice and reduced network resiliency. In the wake of the Rogers outages, competition based on network quality and reliability has become even more salient for consumers.<sup>449</sup>

143. Shaw would be removed as a poised competitor into business wireless services.<sup>450</sup>

---

<sup>443</sup> CA-A-0122, Miller Report, p 113-114, paras 227-228.

<sup>444</sup> CA-A-0125, Rebuttal Miller Report, p 16, para 28.

<sup>445</sup> CA-A-0125, Rebuttal Miller Report, p 17, para 30.

<sup>446</sup> Testimony of N Miller, Transcript, Vol 7, Nov 16, 2022, p 1604:20 - 25; p 1605:17 - 23; p 1606:5-12.

<sup>447</sup> CA-A-0122, Miller Report, p 99, para 195.

<sup>448</sup> CA-A-0122, Miller Report, p 119-120, para 239.

<sup>449</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1815:11-p 1816:23.

<sup>450</sup> CA-A-0122, Miller Report, p 99, para 197.

144. Rogers' subscribers have reported lower satisfaction and a lower quality of service relative to their peers.<sup>451</sup> Removing Shaw from the market, and introducing an unproven player in the form.

145. Eliminating a strong fourth competitor increases the likelihood of coordination.<sup>452</sup> As noted by Dr. Miller, provinces lacking a strong fourth competitor historically have exhibited behavior and outcomes consistent with coordination.<sup>453</sup> Freedom under Videotron's ownership would be a weaker fourth competitor than Shaw, as demonstrated in the previous section.<sup>454</sup> The various divestiture agreements create dependence which disincentivize Videotron from competing against Rogers aggressively given Rogers' ability to retaliate<sup>455</sup> and increases the likelihood of coordination in the west and in Quebec.<sup>456</sup>

#### **4. Conclusion – Anti-Competitive Effects Remain in spite of the Proposed Divestiture**

146. The combination of remaining quantified and quantified anti-competitive effects makes it clear the Respondents have not discharged their burden to show that that Proposed Divestiture alleviates the substantial impact of the Proposed Merger.

147. The Respondents suggest the framing of the merger can re-cast to require the Commissioner to carry this burden. As discussed in the last section below, this argument is without merit.<sup>457</sup> In the alternative, the evidence reviewed in the sections above reveals that the Commissioner has discharged any burden to show a substantial prevention or lessening of competition from the combination of the Proposed Merger and Proposed Divestiture.

#### **F. THE TRADE-OFF FRAMEWORK UNDER S. 96**

148. If the Tribunal agrees with the Commissioner that Rogers has not proven that its proposed remedy is adequate, then the trade-off under section 96, discussed in this section, becomes relevant.

149. Rogers invokes section 96 of the Act in order to justify its anti-competitive merger. Subsection 96(1) of the Act provides that the Tribunal shall not make an order to remedy an

---

<sup>451</sup> CA-A-0286, Letter from Anthony Staffieri letter re opinion on CEO of RCI, dated Oct 25, 2021, p 17; CA-A-0778, Answer to Undertaking Q. 167 - Rogers 2021 Q3 Quarterly Brand Health Dashboard, dated Oct 14, 2021, Excel tab Wireless Brand GP.

<sup>452</sup> CA-A-0122, Miller Report, p 99, para 196.

<sup>453</sup> CA-A-0122, Miller Report Sections 4.3, 6.3.2. and 7.4; Miller CA-A-0125, Rebuttal Miller Report, p -7-8, para 9 and p 35, para 76 – p 39, para 81.

<sup>454</sup> Rebuttal Miller Report, p 37-38, para 78.

<sup>455</sup> CA-A-0122, Miller Report, p 123, para 248.

<sup>456</sup> CA-A-0122, Miller Report, p 123, para 249.

<sup>457</sup> Section G.

otherwise anti-competitive merger where the merger is “likely to bring about gains in efficiency” that “would not likely be attained if the order were made”, and which are “greater than” and “will offset” the “effects” of any lessening of competition. Section 96 is in substance a balancing test intended to balance the potential for good against the potential for harm.<sup>458</sup>

150. As set out below, Rogers has failed to meet its burden on the “ultimate issue” of whether the efficiency gains are likely to be greater than, and to offset, the effects proven by the Commissioner.<sup>459</sup> The Commissioner has demonstrated the quantitative and qualitative effects that will result from the Proposed Merger, as set out above in section [E], as well as distributional effects below in section [F.1]. On the other hand, the vast majority of the claimed efficiencies are unsubstantiated for the reasons set out in section [F.2-6]. Therefore, the efficiencies defense in this case has not be satisfied.

### 1. Wealth Transfer

151. The evidence of Dr. Osberg and Dr. Cuff identifies the options available to the Tribunal for weighting and balancing the transfer of wealth the merger is likely to bring about according to the methodologies outlined by the Tribunal in *Superior Propane III*.<sup>460</sup> Unlike in *Superior Propane III*, where data on socio-economic profiles of the consumers and shareholders was unavailable,<sup>461</sup> Dr. Osberg’s report and its findings provide such a record, including Statistics Canada data (“StatsCan data”) certified under subsection 70(4) of the Act.<sup>462</sup>

152. Dr. Osberg shows that those standing to gain from the merger, shareholders of the post-merger Rogers, are disproportionately likely to be at the very top of the income and wealth distributions. They include members of the Rogers and Shaw families.<sup>463</sup> Despite questioning the

---

<sup>458</sup> *Tervita SCC*, para 90, BOA Tab 24; *Superior Propane II*, para 75, BOA Tab 7. See also Economic Council of Canada, *Interim Report on Competition Policy*, July 1969 at p 114, BOA Tab 36: The Tribunal is to balance potential harm against any potential good, from the standpoint of the economy as a whole and the general public interest.

<sup>459</sup> *Tervita SCC* para 122, BOA Tab 24; *Superior Propane II* at paras 157 and 177, BOA Tab 7.

<sup>460</sup> The Tribunal set out methodologies for weighting and balancing the transfer of wealth in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp Trib. 16 (“*Superior Propane II*”) BOA Tab 7, aff’d 2003 FCA 53, BOA Tab 8. These methodologies are (a) the socially adverse transfer methodology, which considers socially adverse transfers to be anticompetitive effects and (b) a balancing weights approach that identifies the weights for consumer and producer surplus. In his letter and excel spreadsheet of Nov 16, 2022, ID-055, the Commissioner set out his position on the application of these methodologies to the facts of this case (“Nov 16 Letter and Spreadsheet”).

<sup>461</sup> In *Superior Propane III*, supra at para 33, BOA Tab 8, the Tribunal held that in the absence of data on socio-economic profiles of the consumers and shareholders, the Tribunal was unlikely to be able to assess whether the redistributive effects of the merger would be fair and equitable.

<sup>462</sup> P-A-01431, Certificate Respecting Statistics - Greg Peterson dated April 25, 2022; P-A-1442, Certificate Respecting Statistics - Greg Peterson dated Sept 14, 2022; P-A-1444, Certificate Respecting Statistics - Josee Begin dated Sept 14, 2022; P-A-01435, Certificate Respecting Statistics - Lynn Barr Telford dated April 25, 2022; P-A-01428, Certificate Respecting Statistics - Stephane Dufour dated April 22, 2022.

<sup>463</sup> P-A-0140, Osberg Report, pp 6-16, paras 10-26, p 9, table 1.1, p 11, table 1.2, p 13, table 1.3.

ownership distribution of the 41.3% of shares going to other Canadian shareholders<sup>464</sup>, Dr. Ware concedes that he finds no errors in Dr. Osberg's analysis<sup>465</sup> and he provides no analysis or evidence that contradicts Dr. Osberg's distributional discussion<sup>466</sup> Dr. Osberg relies on distributional data on cell phone expenditures to demonstrate how consumers will be harmed from increases in the price of cell phone service.<sup>467</sup> Dr. Osberg's data and analysis on the distribution of cell phone expenditures are not challenged by the parties.

153. Wireless services have become a necessity good in Canada.<sup>468</sup> Due to the nature of wireless services in contemporary society, consumers in lower income groups are likely to be significantly and disproportionately harmed by a price increase. Contrary to the assertion of Dr. Ware, demand for wireless services is both income and price inelastic,<sup>469</sup> which is sufficient to satisfy an economic definition of necessity.<sup>470</sup> Wireless services are, additionally, included in the basket of goods deemed necessary to maintain a modest standard of living by Statistics when defining Canada's poverty line.<sup>471</sup>

154. Following the guidance from *Superior Propane* in respect of the "Socially Adverse Transfer Method", the Commissioner submits that 76% of the income transfer here is socially adverse. This is based on the nature of redistribution from consumers to more affluent shareholders, including the Rogers and Shaw families and foreign shareholders.<sup>472</sup> The redistributive effects from the Proposed Merger calculated by Dr. Miller's 8-brand model are significant and total \$472 million per year, with \$324 million per year in deadweight loss.<sup>473</sup>

155. With respect to the Proposed Divestiture, the redistributive effects under the Socially Adverse Transfer methodology using Dr. Miller's 8-brand model are still significant and total \$48 million per year, with \$42 million per year in deadweight loss.<sup>474</sup>

---

<sup>464</sup> CB-R-1847, Ware Report, p 25-26, para 53-56.

<sup>465</sup> Testimony of R Ware, Transcript, Vol 17, Nov 30, 2022, p 4378:4-17.

<sup>466</sup> Testimony of R Ware, Transcript, Vol 17, Nov 30, 2022, p 4379:2-8.

<sup>467</sup> P-A-0140, Osberg Report, p 23-24, para 37 and table 2.1.5.

<sup>468</sup> P-A-0140, Osberg Report, p 24-29, paras 38-50.

<sup>469</sup> P-A-0141, Osberg Presentation, slide 14.

<sup>470</sup> Testimony of R Ware, Transcript, Vol 17, Nov 30, 2022, p 4342:20 – p 4350:16.

<sup>471</sup> P-A-0141, Osberg Presentation, slide 7; P-A-0140, Osberg Report, p 27-28, para 47.

<sup>472</sup> ID-055, Commissioner Nov 16 Letter and Spreadsheet, Tab "Socially Adverse Transfer", cell B38.

<sup>473</sup> The Commissioner bases this application on the principle that an incremental dollar is valued more for a low-income individual than for a higher-income individual; ID-055, Commissioner Nov 16 Letter and Spreadsheet, Spreadsheet at Tab "Socially Adverse Transfer", cells B44 and B42.

<sup>474</sup> The Commissioner bases this application on the principle that an incremental dollar is valued more for a low-income individual than for a higher-income individual. ID-055, Commissioner Nov 16 Letter and Spreadsheet, Spreadsheet at Tab "Socially Adverse Transfer", cells B51 and B49.

156. The Respondents wrongly claim that other programs will negate the distributional effects of their merger. They will not. Rogers' post-merger investment commitments are speculative and uncertain. The fund it proposes to establish has multiple purposes, and there is no evidence that it is to be used for specific communities or what the distributive impacts of investment in such communities might be. There is no evidence that the merger is needed for such investments or that Rogers will invest in low-income communities.<sup>475</sup> Regardless, it would be contrary to the policy goal of the Act to allow profits from an anti-competitive merger to be used to “buy” a resolution, as they will not undo the anticompetitive effects of the merger. Low-cost and occasional-use wireless plans also do not resolve the impact of the merger on low-income consumers. These plans are merely an “expectation” of the CRTC and are not mandated.<sup>476</sup> In fact, [REDACTED] and uptake of these plans is trivial.<sup>477</sup> The income tax system will also not address the redistributive effects of the Proposed Merger.<sup>478</sup>

157. Dr. Cuff's evidence shows that the Canadian personal income tax system is progressive throughout the income distribution and reflects an underlying equity principle.<sup>479</sup> Evidence about the progressivity of the Canadian income system in this case goes well beyond what was available to the Tribunal in *Superior Propane III*, which suggested that the Tribunal should only be concerned with redistribution at the bottom 20% of the income distribution.<sup>480</sup> In this case, the Tribunal should consider redistributive effects throughout the income distribution because the evidence shows that average tax rates consistently increase throughout that range.<sup>481</sup> The evidence of Dr. Cuff is not challenged in this proceeding, and in fact Dr. Smart relies on the same information for his proposed methodology.<sup>482</sup>

---

<sup>475</sup> Testimony of D Annett, Transcript, Vol 12, Nov 23, 2022, p 3210:2 - p 3213:24; p 3214:24 - p 3215:7; and p 3224:3-20.

<sup>476</sup> CA-A-0028, McCarthy Statement, Exhibit U, Telecom Regulatory Policy CRTC 2021-130, Review of mobile wireless services, April 15, 2021, p 1226, para 544; and Testimony of Lars Osberg, Vol 9, Nov 18, 2022, p 2105:22 - p 2106:21.

<sup>477</sup> CA-A-1457, Answers to Undertaking - 2022 08 25-26 - Updated Answers to Undertakings of D. Prevost, p 15, question 64; P-A-1410, Rogers 2021 Annual Report dated May 6, 2022, p 15, Wireless subscribers at row 4; Testimony of R Ware, Transcript, Vol 17, Nov 30, 2022, p 4359:14 - p 4364:17.

<sup>478</sup> Testimony of D Evans, Transcript, Vol 16, Nov 29, 2022, p 4321:8-23.

<sup>479</sup> P-A-0142, Cuff Report, pp 39-40, paras 104-107. It is only around the 40th income percentile that individuals start facing positive average tax rates, and that is even without considering payroll taxes: Testimony of K Cuff, Transcript, Vol 9, Nov 18, 2022, p 2123:18 - p 2124:8.

<sup>480</sup> *Superior Propane III* at para 113, BOA Tab 8; CB-R-1847, Witness Statement of Roger Ware, Oct 20, 2022 (“Ware Statement”), p 11-12, para 12.

<sup>481</sup> Testimony of K Cuff, Transcript, Vol 9, Nov 18, 2022, p 2120 : 21 - p 2125:9; P-A-0143, Cuff Presentation, p 5; P-A-0142, Cuff Report, pp 27-38, paras 71-97.

<sup>482</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4684:13-21.

158. Consistent with the guidance in *Superior Propane III*, the Commissioner has provided the Tribunal with a series of distributional weights and applied them to consumer and producer surplus to arrive at a weight on consumer surplus relative to producer surplus.<sup>483</sup>

159. Dr. Smart has provided a related methodology to estimate distributional weights that is “broadly consistent” with the Commissioner’s weights based on individuals’ after-tax income (one minus their average tax rates or “1-ATR”).<sup>484</sup> The Commissioner and Dr. Smart find similar distributional weights across the income distribution. See Appendix K.

160. The Commissioner’s relative weight on consumer surplus is similar to Dr. Smart’s so long as taxpayers are not counted as stakeholders of the merger. The Commissioner calculates a relative weight of 1.51 using 1-ATR.<sup>485</sup> This is the lowest relative weight he calculates. His other relative weights equal 1.69 and 3.39.<sup>486</sup> A relative weight of 1.51 (1-ATR) is conservative because it does not include refundable tax credits nor any incidence of corporate taxes falling on shareholders. Dr. Smart finds a relative weight of 1.55 before adjusting for personal income tax paid on increased profits from the Proposed Merger, this increases to 1.72 when using Dr. Smart’s alternative distributional weights.<sup>487</sup>

161. The redistributive effects under the weighted surplus approach using Dr. Miller’s 8-brand model and the Commissioner’s 1-ATR relative weight of 1.51 are significant and total \$339 million per year, compared to \$324 million per year in deadweight loss.<sup>488</sup> Under an alternative framework where the relevant anticompetitive effects are those following the merger and divestiture, the redistributive effects under the weighted surplus methodology using Dr. Miller’s 8-brand model and the Commissioner’s 1-ATR relative weight of 1.51 total \$40 million per year, compared to \$42 million per year in dead weight loss.<sup>489</sup>

162. Dr. Smart’s method differs from the Commissioner’s by dividing the gain in producer surplus into tax revenues and after-tax profits to shareholders. This aspect of his analysis is not part of the “inverse optimum approach”.<sup>490</sup> Dr. Smart only finds a relative weight of 1.32 once he

---

<sup>483</sup> ID-055, Commissioner Nov 16 Letter and Spreadsheet.

<sup>484</sup> P-R-1867, Witness Statement of Michael Smart, Oct 20, 2022 (“Smart Statement”), p 26 para 77.

<sup>485</sup> ID-055, Commissioner Nov 16 Letter and Spreadsheet, Spreadsheet at Tab “Weighted Surplus”, cell G64.

<sup>486</sup> ID-055, Commissioner Nov 16 Letter and Spreadsheet, Spreadsheet at Tab “Weighted Surplus”, cell G67 and G61.

<sup>487</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4740:2-25 and p 4742:3 - p 4743:20.

<sup>488</sup> ID-055, Commissioner Nov 16 Letter and Spreadsheet, Spreadsheet at Tab “Weighted Surplus”, cells B78 and B71. Note: subtracting the deadweight loss from the total anticompetitive effects results in the redistributive effect.

<sup>489</sup> ID-055, Commissioner Nov 16 Letter and Spreadsheet, Spreadsheet at Tab “Weighted Surplus”, cells B90 and B83. Note: subtracting the deadweight loss from the total anticompetitive effects results in the redistributive effect.

<sup>490</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4744:21 - p 4745:16.



adjusts for personal income tax paid by shareholders.<sup>491</sup> Dr. Smart's personal income tax adjustment is incomplete and one-sided as it does not consider other tax revenue implications of the merger such as reduced income taxes and higher employment insurance payments due to job losses.<sup>492</sup> The result of this one-sided consideration is to decrease the weight of the consumer surplus relative to that of the producer surplus. The Tribunal cannot adequately assess all tax revenue effects, many of which will occur outside of the relevant markets. For these reasons, tax revenue effects should not be considered.

163. The inputs required for Dr. Smart's approach are simply too uncertain for the Tribunal to accept his method. Dr. Smart's method requires more inputs than the Commissioner's approach, but there is no clear data about what these inputs should be. In particular, his method requires a value for elasticity of taxable income (ETI) and an approximation of marginal tax rates.<sup>493</sup> A fatal weakness in Dr. Smart's methodology is that the ETI for Canada is not known. As Dr. Smart acknowledges, estimates of the ETI vary based on the country being studied and the methods employed by the researcher,<sup>494</sup> there is little published research about ETI in Canada,<sup>495</sup> and there is "no general agreement on what this number should be".<sup>496</sup> Despite this, Dr. Smart simply assumes that Canada's ETI is in the middle of the range for Western countries (0.25), despite recognizing that ETI in Canada's provinces is 0.6 or 0.7, which would place greater weight on consumer surplus.<sup>497</sup> Dr. Smart's approach to the calculation of effective marginal tax rates is also highly contentious<sup>498</sup> as his conclusion is that shareholders bear none of the burden of corporate taxes.<sup>499</sup> Were Dr. Smart's highly contentious assumption not to be accepted, this too would increase the weight on consumer surplus.<sup>500</sup>

164. Irrespective of whether there could be theoretical advantages to applying an inverted optimum approach, Dr. Smart lacks the data needed to reliably implement his approach and has

---

<sup>491</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4740:15-21. Dr. Smart confirmed that his calculations using his alternative weights should also be corrected to avoid double counting tax revenues so the weight he reports is incorrect and underweights consumers. Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4747:22 – p 4748:4.

<sup>492</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4745:21 - p 4747:14.

<sup>493</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4707:21 - p 4708:3 and p 4727:16-20; Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4710 : 4 - p 4711 : 4 and p 4738 : 14 - p 4740 : 1.

<sup>494</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4709:11-15.

<sup>495</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4711:17-22.

<sup>496</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4723:21 - p 4724:2.

<sup>497</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4712:11 - p 4713:8.

<sup>498</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4733:15 - p 4736:10.

<sup>499</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4727:6 - p 4733:14.

<sup>500</sup> Testimony of M Smart, Transcript, Vol 18, Dec 1, 2022, p 4737:3-8.

provided a one-sided treatment of the fiscal implications of the Proposed Merger. The Tribunal should therefore prefer the Commissioner's balanced, data-driven methods for weighting consumer surplus.

## 2. Efficiencies

165. Efficiency claims must be substantiated with clear and convincing evidence that proves they are “more likely than not” to be achieved.<sup>501</sup> There is no presumption that any merger will improve economic efficiency.

## 3. Rogers Has Not Met Its Burden of Substantiating Its Efficiency Claims

166. Rogers has failed to substantiate the majority of its claimed efficiencies. Rogers' burden includes showing that its projected cost savings are “likely” to occur,<sup>502</sup> that they are cognizable under section 96,<sup>503</sup> and that any cognizable gains are properly quantified.<sup>504</sup> Where any part of this burden is not met, no gains are proven.

167. The MEGs recognize that efficiency gains must be objectively verifiable and substantiated by documentation prepared in the ordinary course of business.<sup>505</sup> Parties must validate their claims with “detailed and comprehensive information that substantiates the precise nature, magnitude, likelihood and timeliness of the alleged efficiency gains” and a “detailed and robust explanation of how the quantification was calculated”.<sup>506</sup>

168. The importance of substantiation and objective verifiability comes from the fact that claimed efficiencies are difficult to verify.<sup>507</sup> Merging parties have far better access to the relevant

---

<sup>501</sup> *FH v McDougall*, 2008 SCC 53 at para 49, BOA Tab 17; *MEGs*, para 12.3: “parties must be able to validate efficiency claims...”. See also Written Opening Statement of the Commissioner of Competition, para 222.

<sup>502</sup> Which requires evidence to substantiate the claimed savings and the implementation process: *Commissioner of Competition v Superior Propane Inc.*, 2000 CACT 15 at paras 347-348 [*Superior Propane I*] BOA Tab 6, and *Commissioner of Competition v Parrish & Heimbecker Ltd*, 2022 Comp Trib 18, para 656, BOA Tab 4.

<sup>503</sup> The “screens” and underlying authority are set out in the Written Opening Statement of the Commissioner, para 223.

<sup>504</sup> See Written Opening Statement of the Commissioner, para 224.

<sup>505</sup> *MEGs*, para 12.11. The *MEGs* are a recognized persuasive authority: they are recognized to “contain a substantial degree of economic expertise”: *Superior Propane I*, para 439, BOA Tab 6; the *MEGs* should inform the Tribunal's reasoning in merger matters: *Canada v Southam*, 1995 CarswellNat 708 at para 160, [1995] 3 FC 557, BOA Tab 11, rev'd on other grounds [1997] 1 SCR 748 (FCA), BOA Tab 12. See also *Superior Propane I*, para 393, BOA Tab 6.

<sup>506</sup> *MEGs*, paras 12.10 and 12.13 (emphasis added).

<sup>507</sup> The Economic Council of Canada recognized in its *Interim Report on Competition Policy*, July 1969 that “[d]etermining the approximate size and nature” of the cognizable efficiencies “will be one of the most difficult tasks” facing those charged with administering the Act in a way that furthers efficient resource use: p 88, BOA Tab 36.

data and can use this advantage to put forward their efficiencies claims selectively.<sup>508</sup> In the US, courts have recognized and addressed the problem this information imbalance poses:

While reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the Court. If this were not so, [...] management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise.<sup>509</sup>

169. Management assertions are not sufficient to substantiate efficiency claims. The Tribunal should not accept self-serving assessments and projections of the merging parties as substitute for independent verification.<sup>510</sup> Neither a manager’s subjective view nor the manager’s ability to get it right can be verified by third parties.<sup>511</sup> Many mergers fail to achieve their targets.

170. Moreover, managers have a conflicting incentive to close the transaction.<sup>512</sup> Rogers’ management – including Rogers’ two efficiencies fact witnesses – have a personal financial stake in the outcome of this hearing.<sup>513</sup> The Tribunal must weight this interest in assessing the credibility of their evidence. The witnesses also know that their testimony regarding efficiencies may contribute to a favourable outcome.<sup>514</sup> Conflicting management incentives underscore, rather than obviate, the need for robust and objective analysis.

**a) The Commissioner’s Expert Witnesses Should be Preferred**

171. Professor Zmijewski is an expert in financial economics with nearly 20 years’ experience analyzing projected merger efficiencies.<sup>515</sup> Prof. Zmijewski’s “substantiation criteria” applied to assist the Tribunal are consistent with the MEGs and the general hallmarks of any verifiable and robust claim.<sup>516</sup>

---

<sup>508</sup> Crampton, Paul S Mergers and the Competition Act (1990 Carswell) at p 505, BOA Tab 31. See also the United States *Horizontal Merger Guidelines* (2010), section 10, BOA Tab 32: “Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms.”

<sup>509</sup> *US v H & R Block, Inc.*, 833 F Supp (2d) 36 at 30, BOA Tab 27.

<sup>510</sup> *FTC v Wilh Wilhelmsen Holding ASA*, 341 F Supp (3d) 27 at 78, BOA Tab 19.

<sup>511</sup> CA-A-1869, Expert Report of Professor Mark Zmijewski, Oct 20, 2022 (“Zmijewski Report”), p 21 para 39.

<sup>512</sup> CA-A-1869, Zmijewski Report, p 21 para 40.

<sup>513</sup> [REDACTED]

<sup>514</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3258:2-17; Testimony of M Fabiano, Transcript, Vol 13, Nov 24, 2022, p 3490:18-p 3492:1.

<sup>515</sup> CA-A-1869, Zmijewski Report, p 8, para 1 and p 117.

<sup>516</sup> CA-A-1869, Zmijewski Report, p 19-20, paras 34-35.

172. Prof. Zmijewski's testimony should be preferred to that of Mr. Harington. Prof. Zmijewski applied transparent and internally consistent criteria to assess the claimed efficiencies. In contrast, Mr. Harington deploys a various methodologies inconsistently, as set out below.

173. Mr. Michael Davies, an industry expert with over 30 years' experience in wireless networks, reviewed the claimed network efficiencies.<sup>517</sup> Given his technical background, Mr. Davies' testimony should be preferred to that of Mr. Harington. Mr. Harington does not have the expertise to assess the claimed efficiencies that rely on technical, scientific, or engineering inputs. This is a point Mr. Harington appears not to dispute.<sup>518</sup>

**b) Rogers' Claimed Labour Cost Savings Are Unsubstantiated, Exaggerated, and Use Unreliable Methodologies**

174. Rogers' labour cost savings are unsupported by evidence. Rather than disclosing any actual post-integration plan it may have, Rogers has chosen instead to rely on a "very simplified" "summary" spreadsheet based on "only very preliminary estimates",<sup>519</sup> prepared for the purpose of expert submission to the Bureau.<sup>520</sup> Ms. Fabiano confirmed that Mr. Shum's spreadsheet, which pre-dates the Proposed Divestiture, does not represent Rogers' headcount plan.<sup>521</sup> Rogers' actual headcount reduction plan is nowhere in evidence: the labour efficiencies therefore have no factual foundation.<sup>522</sup> This alone is fatal to Rogers' claimed labour efficiencies.

175. Further, the Shum spreadsheet provides no reliable foundation for an expert to project labour savings. Comparing two businesses to identify possible redundancies is a complex task, but the record does not disclose how the mapping was done or whether it was done properly in this case.<sup>523</sup> Ms. Fabiano agreed that Rogers and Shaw each have different organizational structures, different job titles, and different alignment of labour functions.<sup>524</sup> The Shum spreadsheet obscures

---

<sup>517</sup> CA-A-0134, Reply M Davies Report, p 1, para 1 and p 95.

<sup>518</sup> See e.g. Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4151:16-21.

<sup>519</sup> Testimony of M Fabiano, Transcript, Vol 13, Nov 24, 2022, p 3503:19-20: "very simplified"; p 3504:21-22: "summary"; Testimony of Andrew Harington, Transcript, Vol 16, Nov 27, 2022, p 4055:25 - p 4056:4: "only very preliminary estimates are available".

<sup>520</sup> CA-R-227, Witness Statement of Marisa Fabiano, Sept 23, 2022 ("Fabiano Statement"), Exhibit 8; Testimony of M Fabiano, Transcript, Vol 13, p 3498:2-5.

<sup>521</sup> The synergy number is no longer the number Rogers expects to achieve: Testimony of M Fabiano, Transcript, Vol 13, Nov 24, 2022, p 3498:13-16; the spreadsheet "has not been reviewed by anyone": Testimony of M Fabiano, Transcript, Vol 13, Nov 24, 2022, p 3545:1-2; Rogers has not committed to implementing the numbers in the spreadsheet: Testimony of M Fabiano, Transcript, Vol 13, Nov 24, 2022, p 3546:18-22.

<sup>522</sup> This is all the more surprising given that Rogers' counsel has stated they hope to close by the end of 2022.

<sup>523</sup> Mr. Harington did not adopt the synergies identified in the spreadsheet, but he did rely on Mr. Shum's functional mapping to determine equivalent labour functions at Rogers and Shaw.

<sup>524</sup> CA-R-227, Fabiano Witness Statement, p 7 para 26; Testimony of M Fabiano, Transcript, Vol 13, Nov 24, 2022, pp 3506-3510.

and omits any underlying assumptions, analyses, and calculations: it does not even set out the job descriptions for the functions that were “mapped”.<sup>525</sup> Mr. Shum’s spreadsheet fails to explain how these factors were accounted for, if at all.

176. On top of this unreliable factual foundation Mr. Harington overlays two arbitrary and unreliable methodologies to produce his own projection of labour savings.<sup>526</sup> Rogers must show the reductions are from the Proposed Merger.<sup>527</sup> Neither methodology addresses, much less solves, the problem that an unknown proportion of any labour savings are attributable not to the Proposed Merger but to a re-organization.<sup>528</sup>

177. Most of the labour savings are projected using an assumed percentage reduction for each function.<sup>529</sup> These percentages were based not on evidence but rather on Mr. Harington’s “judgment and experience” from unspecified prior mergers.<sup>530</sup> This Tribunal has found that basing estimates solely on an expert’s own experience in other matters is not sufficient.<sup>531</sup> The selected percentages are unsubstantiated and without foundation.<sup>532</sup>

178. Further, Mr. Harington takes no account of any impact of assumed percentage labour reduction on output.<sup>533</sup> To prove a gain in efficiency, Rogers must demonstrate that it will maintain output despite its projected cost savings.<sup>534</sup> It has failed to do so.<sup>535</sup>

---

<sup>525</sup> Rogers’ counsel represented that the missing analysis and information is contained in the back-up information to work done by the Boston Consulting Group: Testimony of M Fabiano, Transcript, Vol 13, Nov 24, 2022, p 3520:6-20. It does not. The evidence of what was provided to BCG consists of high-level financial information and employee listings that omit job descriptions and individual salaries: CA-R-0242; CA-R-0244; CA-R-0246; CA-R-0248; CA-R-1798; CA-R-1800; CA-R-1802; CA-R-1804; CA-R-1806; CA-R-1808; CA-R-1810; CA-R-1812; CA-R-1814; CA-R-1816; Testimony of M Fabiano, Transcript, Vol 15, Nov 28, 2022 p 3861:8-12 and p 3865:23 - p 3866:2.

<sup>526</sup> Testimony of A Harington, Transcript, Vol 15, Nov 28, 2022, p 4042:22 - p 4043:8.

<sup>527</sup> See *Canada (Director of Investigation & Research) v Hilldown Holdings (Canada) Ltd.*, 1992 CarswellNat 1630 at para 141, 1992 CanLII 2092 (Comp Trib), BOA Tab 10: “Many of the claimed efficiency gains... have not been proven to have arisen out of the merger as opposed to... the restructuring caused by the expropriation.”

<sup>528</sup> Mr. Harington could not quantify what proportion of headcount reduction was not from the merger: Testimony of A Harington, Transcript, Vol 15, Nov 28, 2022 p 4042:7-21. It would appear that at the s [REDACTED]

[REDACTED] in Fabiano Statement, Exhibit 11, [REDACTED]. Fabiano denied in her testimony that this term referred to restructuring, but also acknowledged not being the author of this document: Testimony of M Fabiano, Transcript, Vol 13, Nov 24, 2022 p 3537:7-11 and p 3534:5-17. See also Testimony of A Harington, Transcript, Vol 15, Nov 28, 2022, p 4013:13-18: “headcount savings exceed what... are [appropriately attributable to the merger]”.

<sup>529</sup> The “Assumed Percentage Reduction” method: CA-A-1869, Zmijewski Report, p 33, para 71; p 46 para 102.

<sup>530</sup> Mr. Harington candidly admitted his percentage was based on his judgment and not any evidence: Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4081:13-17; p 4083:2-25; p 4084:4-7.

<sup>531</sup> *Superior Propane I*, paras 347-348, BOA Tab 6: “...the estimates are based solely on [the expert’s] experience in negotiating... for other clients... The Tribunal finds that there is insufficient evidence...”.

<sup>532</sup> Testimony of M Zmijewski, Transcript, Vol 18, Dec 1, 2022, p 4769:18 - p 4770:3: not feasible to verify Harington’s business judgment.

<sup>533</sup> Testimony of M Zmijewski, Transcript, Vol 18, Dec 1, 2022, p 4775:9 - p 4776:4: no analysis of output in Brattle report.

<sup>534</sup> *MEGs*, paras 12.14 and 12.20; CA-A-1869, Zmijewski Report, p 22-23 paras 43-44; *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 at para 262, BOA Tab 25.

<sup>535</sup> Testimony of M Zmijewski, Transcript, Vol 18, Dec 1, 2022, p 4780:12 - p 4781:12.

179. Mr. Harington’s “Key Performance Indicator” (KPI) methodology is similarly unreliable. Although KPI is standard analysis, Mr. Harington applied it inconsistently and without investigating confounding factors.<sup>536</sup> Mr. Harington assumed without investigating that a favourable score for Rogers on a given KPI reflects Rogers’ alleged superior efficiency, and that that superior efficiency will be transferred to Shaw post-closing.<sup>537</sup> Without further investigation, this conclusion is speculative and without foundation.

180. By attributing differences in KPIs to differences in productive efficiency, Mr. Harington confuses correlation for causation. Mr. Harington fails to investigate any possible confounding factors that may explain the differences in KPIs.<sup>538</sup> Mr. Harington ignores other indicators the parties consider for staffing in the ordinary course of business.<sup>539</sup> Even if the KPI assumption were valid, neither Mr. Harington nor the parties have identified any specific efficient labour practices that would be transferable from Rogers to Shaw that would bring the legacy Shaw employees up to the “superior” level of their peers at Rogers.<sup>540</sup>

181. Mr. Harington himself recognized the presence of confounding factors, yet failed to control for them. For example, he claimed to control for differences in job classifications between the Respondents by applying Rogers’ supervisory ratio to the retained Shaw employees.<sup>541</sup> However, he failed, without credible reason, to do so aside from the [REDACTED] function.<sup>542</sup> If one accepts that post-close Rogers would apply its organizational structure and level of efficiency to Shaw, it follows that the application of Rogers’ supervisory ratio to all labour functions would result in an increase in the number of managers and a corresponding reduction in cost savings.<sup>543</sup> Alternatively, if the Tribunal accepts Mr. Harington’s explanation that a consistent application would lead to “non-sensical” results for any function other than [REDACTED] that only shows that his methodology is not rigorous.<sup>544</sup>

---

<sup>536</sup> Testimony of M Zmijewski, Transcript, Vol 18, Dec 1, 2022, p 4782:18 - 4784:21; CA-A-1869, Zmijewski Report, pp 34-44.

<sup>537</sup> CA-A-1869, Zmijewski Report, pp 35-37 paras 77-79.

<sup>538</sup> These are set out at length in CA-A-1869, Zmijewski Report, pp 37-44 paras 80-98.

<sup>539</sup> See e.g. CA-A-0906, Rogers Presentation Care Nation: Incremental FTE Required for Service Expansion, July 7, 2021, p 4; Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3321:11 - p 3322:5; and CA-A-1300, Shaw Presentation Operations Budget F22 Scenarios, July 29, 2021, p 2; Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3088:22 to p 3089:16.

<sup>540</sup> CA-A-1869, Zmijewski Report, p 35-37 paras 77-79.

<sup>541</sup> CA-R-1828, Harington Report, p 51 para 104 and footnote 104.

<sup>542</sup> Testimony of M Zmijewski, Transcript, Vol 18, Dec 1, 2022, p 4791:6 - p 4792:7; Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4107:22 - p 4108:4.

<sup>543</sup> Testimony of M Zmijewski, Transcript, Vol 18, Dec 1, 2022, p 4792:10-24.

<sup>544</sup> Testimony of A Harington, Transcript, Vol 15, Nov 28, 2022, p 4014:14-20.

182. Prof. Zmijewski demonstrated the unreliability of Mr. Harington’s estimates through a series of illustrative calculations.<sup>545</sup> Those calculations are illustrative of the significant uncertainty of Mr. Harington’s estimates, and the drastically lower result that obtains when Mr. Harington’s own methodology is applied consistently.

**c) Rogers’ Claimed Corporate IT Cost Savings Are Not Substantiated**

183. Mr. Harington admitted that he merely accepted Rogers’ management’s assertions with respect to the quantum of three of the four categories of IT cost savings.<sup>546</sup> Ms. Fabiano also admitted that her knowledge of the IT cost savings was limited to what is in her spreadsheet; she relied on the project owner, Nik Kershaw, for any other information.<sup>547</sup> No witness before the Tribunal had personal knowledge of the assertions relied on by Mr. Harington, much less a “detailed and robust explanation” of how the savings were calculated.<sup>548</sup> These savings are unsubstantiated.

184. Further, with respect to [REDACTED] is not merger-specific. Rogers plans to [REDACTED] [REDACTED]<sup>549</sup> All three [REDACTED] [REDACTED] is not an efficiency from the Proposed Merger. Ms. Fabiano guessed that there may be a link to the merger by way of some “domino effect”; this is unsupported speculation.<sup>551</sup> Rogers internal documents show no merger specificity: the immediate rationale was to [REDACTED] [REDACTED] [REDACTED]<sup>553</sup>

185. Second, the [REDACTED] savings are pecuniary in nature and should be excluded in whole or in part. This category of savings is described by Ms. Fabiano as relating

<sup>545</sup> CA-A-1869, Zmijewski Report p 43-44 paras 95-96 and Exhibit VI-2 (call centre negative efficiency); p 50 paras 110-111 and Exhibit VI-4 (KPI Analysis); pp 50-51, paras 112-114, Exhibit VI-5 and VI-6 (Illustrative Rogers Labour); p 53 para 119, Exhibit VI-7 (severance).

<sup>546</sup> [REDACTED] Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4133:24 - p 4134:2.

<sup>547</sup> Testimony of M Fabiano, Transcript, Vol 14, Nov 25, 2022, p 3587:1-19; p 3612:1-19.

<sup>548</sup> As required by the *MEGs* 12.13, third bullet: “...parties must provide a quantification of the gains in efficiency and a detailed and robust explanation of how the quantification was calculated...”.

<sup>549</sup> CA-R-1828, Harington Report, p 180, Schedule 5, row [62].

<sup>550</sup> Testimony of M Fabiano, Transcript, Vol 14, Nov 25, 2022, p 3598:10-22.

<sup>551</sup> Testimony of M Fabiano, Transcript, Vol 14, Nov 25, 2022, p 3600:15-23.

<sup>552</sup> CA-A-1527 at p 7; this document was put to Ms. Fabiano in re-examination: Testimony of M Fabiano, Transcript, Vol 14, Nov 25, 2022, p 3645:18 - p 3646:12.

<sup>553</sup> CA-A-1527 at p 6.

to the [REDACTED].<sup>554</sup> However, [REDACTED] does not prevent someone else from using it.<sup>555</sup> [REDACTED] does not free up resources for the Canadian economy and only results in a pecuniary saving for the merged firm.

186. Third, with respect to the planned [REDACTED] Ms. Fabiano conceded that Rogers has not yet identified which [REDACTED]<sup>556</sup> Rogers' estimate of its cost savings is based on a high-level conversation and an aggregate view of [REDACTED] "just what the historic spend has been".<sup>557</sup>

187. While Mr. Harington identifies [REDACTED]<sup>558</sup> his expertise does not extend to IT systems, nor does Rogers have any plan to [REDACTED] The cited source is a Shaw budget spreadsheet with vague [REDACTED]<sup>559</sup> It is also limited to projecting expenses until the end of fiscal year 2023. It is impossible to determine based on the evidence the "precise nature" of these [REDACTED]  
[REDACTED]<sup>560</sup> Mr. Harington's opinion is unsubstantiated.

188. The Commissioner's position with respect to the remaining categories of Rogers' claimed efficiencies is set out with the supporting evidence in Appendix F.

#### **4. Claimed Efficiencies from Proposed Divestiture are Not Cognizable**

189. Videotron's cost savings are from the Proposed Divestiture, not the Proposed Merger. Accordingly, on a proper interpretation of the text, context and purpose of section 96 and the merger review scheme of the *Act*, any related cost savings are not cognizable efficiencies.<sup>561</sup>

190. The text of section 96 refers to efficiencies brought about by the "merger in respect of which the application is made". On a plain reading, the "application" in question is the Commissioner's application under section 92. It follows that "merger in respect of which the application is made" refers to the merger identified in the Notice of Application.

---

<sup>554</sup> CA-R-227, Fabiano Witness Statement, p 9 para 33.

<sup>555</sup> CA-A-1869, Zmijewski Report, p 70 para 179.

<sup>556</sup> Testimony of M Fabiano, Transcript, Vol 14, Nov 25, 2022, p 3618:4-18.

<sup>557</sup> Testimony of M Fabiano, Transcript, Vol 14, Nov 25, 2022, p 3618:19-25; CA-R-1828, Harington Report, p 76 para 184(d).

<sup>558</sup> CA-A-1833, Harington Report Electronic Schedule, tab "2.10.1".

<sup>559</sup> For example: "BMA Managed service testing SOW": ABD201326, tab: F23 Bdgt Submission, Cell K27.

<sup>560</sup> *MEGs* para 12.10.

<sup>561</sup> Questions about the meaning of statutes are resolved with regard to their text, context, and purpose: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 paras 117-118, BOA Tab 14.



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

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

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

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

#### **a) Videotron’s Claimed Efficiencies Are Offset by Negative Efficiencies**

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

---

<sup>562</sup> Notice of Application dated May 9, 2022, CT-2022-002, document #2, p 6 para 14.

<sup>563</sup> *Competition Act*, ss 114-119 (notification); ss 123-123.1 (waiting periods), BOA Tab 28.

<sup>564</sup> The Commissioner’s review of the Proposed Divestiture is in progress as of the date of this submission.

<sup>565</sup> The Supreme Court has recognized in another context the importance of predictability to merger reviews: *Tervita SCC*, para 130, BOA Tab 24. The problem only becomes more acute in the context of an expedited proceeding.

<sup>566</sup> CA-A-0134, Davies Reply Report, p 48-50, paras 100-107.

<sup>567</sup> These gains may equal or exceed the claimed efficiencies in respect of the Proposed Divestiture: unlike Freedom and Videotron, Freedom and Shaw operate in the same markets, and therefore may have greater synergies.

**b) It is Unlikely Videotron Would [REDACTED] Absent the Proposed Divestiture**

196. In the further alternative, Videotron’s “[REDACTED]” are not cognizable for an additional reason. There are no cost savings unless, absent the Proposed Divestiture, [REDACTED]

[REDACTED] It is speculative, and therefore not “likely”, that both of these events would occur within any relevant timeframe.

197. Videotron’s counsel represented as recently as June 2022 that Videotron’s “[REDACTED]” [REDACTED] [REDACTED]<sup>568</sup> Counsel wrote that the Proposed Divestiture may represent the “[REDACTED]” [REDACTED]<sup>569</sup>

198. CRTC’s subsequent decision regarding MVNO access does not resolve this uncertainty. Videotron still must [REDACTED]

[REDACTED] (iii) determine where to build – or whether to build at all –based on factors described below.

199. [REDACTED]

200. [REDACTED]

<sup>568</sup> CA-I-0144, Lescadres Statement, Exhibit 57, Letter from John Rook to Matthew Boswell, June 24, 2022, p 1191.  
<sup>569</sup> CA-I-0144, Lescadres Statement, Exhibit 57, p 1199. Mr. Lescadres confirmed at his examination for discovery on Sept 9, 2022 that these representations still reflected Videotron’s assessment of its prospects: CA-A-1891, Read-Ins relating to Videotron’s Examinations, Q1035 p 102:11-14.  
<sup>570</sup> CA-I-0144, Lescadres Statement, Exhibit 31, Memo from John Rook to Bureau, February 8, 2022, p 967.  
<sup>571</sup> CA-I-0144, Lescadres Statement, Exhibit 57, p 1199.  
<sup>572</sup> CA-A-0028, McCarthy Statement, Exhibit U, Telecom Regulatory Policy CRTC 2021-130, Review of mobile wireless services, April 15, 2021, pp 2000-2001 paras 383-389.  
<sup>573</sup> CA-I-0144, Lescadres Statement, p 61 para 227.

████████████████████<sup>74</sup> Given these uncertainties, it cannot be said that the “████████████████████  
████████████████████ are “likely”.

**c) Spectrum Efficiencies are Speculative and Not Merger-Specific**

201. Also in the alternative, the so-called “spectrum efficiencies” said to arise from combining Videotron’s 3500 spectrum holdings with Freedom’s holdings are speculative, not merger-specific, and not properly quantified. Mr. Davies rebutted the claims set out in Dr. Israel’s reply report dated October 20, 2022.<sup>575</sup> The opinion of Mr. Davies, an industry expert, should be favoured over that of Dr. Israel, who is not a technical expert in the telecommunications industry.

202. As Mr. Davies points out, Dr. Israel’s calculations are flawed as they imply that spectrum alone can add capacity.<sup>576</sup> Band-specific radios are needed when deploying spectrum,<sup>577</sup> making additional radios necessary for Videotron to deploy the 3500MHz spectrum on Freedom’s cell sites.<sup>578</sup> Building capacity through the deployment of radios and spectrum requires significant investment, that Dr. Israel does not consider in his calculation.<sup>579</sup>

203. Moreover, the required investment would be undertaken only where needed.<sup>580</sup> ██████████

████████████████████<sup>81</sup> If the Proposed Merger and Proposed Divestiture were to proceed, additional capacity would result from the reduction in subscribers from Rogers retaining Shaw Mobile.<sup>582</sup> The move to 5G will make spectrum more efficient, which will only further increase the capacity of the Freedom network.<sup>583</sup> These facts mean that any alleged savings,

<sup>574</sup> CA-I-0144, Lescadres Statement, p 20 para 78 and Exhibit 24, p 724. ██████████

████████████████████ CA-I-0144, Lescadres Statement, p 20 para 78 and Exhibit 24, p 724.

<sup>575</sup> CA-A-0137, Presentation of M Davies, slide 39; Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1862:6 - p 1870:16.

<sup>576</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1864:20-24: “Spectrum is only useful to the extent that the radios that make use of it can provide coverage.” See also P-A-1866, FCC White Paper: The Public Safety Nationwide Interoperable Broadband Network, June 2010, at p 6: “...the amount of spectrum available to a network alone is not a meaningful measure of network performance and capacity.”

<sup>577</sup> Dr. Israel admitted in his testimony that radios are needed to increase capacity: Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4429:3-9.

<sup>578</sup> CA-I-152, Déclaration de Mohamed Drif dated Sept 23, 2022 (“Drif Statement”), Exhibit 5, p 56: “Un emplacement d’antenne additionnel sera nécessaire pour déployer le 3500 MHz...”

<sup>579</sup> For example, Videotron’s CTO, Mr. Drif estimates average annual capital costs of ██████████ for the rollout of 3500 and 3800 MHz spectrum: CA-I-152, Drif Statement, p 28 para 108.

<sup>580</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1863:21 - p 1864:1: “You only need extra radios if there is growth in demand and that growth in demand is so rapid that it’s outstripping the available capacity you already have and the improvements in how those radios use the spectrum...”

<sup>581</sup> CA-R-0195, McAleese Reply Statement, p 64 para 160: ██████████

<sup>582</sup> CA-R-1851, Israel Report, pp 86-87, para 136. Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4420:23 – p 4421:3.

<sup>583</sup> Testimony of M Israel, Transcript, Vol 18, Dec 1, 2022, p 4643:15-19.

if they occur, would only occur years into the future.<sup>584</sup> In the alternative, Dr. Israel has improperly quantified any savings by using non-set-aside prices to value set-aside spectrum, which inflates the alleged savings.<sup>585</sup>

204. Finally and most importantly, while the claimed efficiencies are speculative and not properly quantified, any benefit from combining Freedom with 3500 MHz spectrum would likely have been available to Shaw “but for” the Proposed Merger. Shaw did not acquire 3500 MHz spectrum because of the terms of the Arrangement Agreement.<sup>586</sup> Shaw’s failure to acquire spectrum is a self-inflicted wound resulting directly from the Proposed Merger. Recognizing synergies that arise from the competitive harm of a merger would create perverse incentives that undermine the purpose of the Act.<sup>587</sup>

### **5. The Alleged Efficiencies are Contrary to Parliament’s Intent**

205. The efficiencies defence was intended to help Canadian companies achieve the economies of scale needed to counter foreign competition, not to enable mergers between domestic competitors.<sup>588</sup> This intent is codified in section 1.1<sup>589</sup> and subsection 96(2)<sup>590</sup> of the *Act*, and recognized by the Supreme Court of Canada.<sup>591</sup>

206. The present merger is a purely domestic one. Rogers already benefits from restrictions on ownership and control that limit foreign competition.<sup>592</sup> Rogers is buying a domestic rival, not to compete internationally, but to consolidate its domestic position by removing an effective regional competitor. This factor merits qualitative consideration in favour of a blocking order.

---

<sup>584</sup> Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1866:17-25: “...the benefits from the additional spectrum would be postponed for at least a few years... if the calculation [is] done correctly...”.

<sup>585</sup> Testimony of M Israel, Transcript, Vol 18, Dec 1, 2022, p 4647:7 – p 4648:2. See also CA-A-0137, Presentation of M Davies, slide 39: “Assumptions about pricing...flawed.”

<sup>586</sup> Testimony of T English, Transcript, Vol 11, Nov 22, 2022, p 2759:12-22: “After signing the arrangement agreement... we were precluded from participating in the auction”.

<sup>587</sup> In any event, if the Proposed Merger is blocked then Shaw may purchase Videotron’s spectrum: see C.2 above.

<sup>588</sup> The “primary reason” for amending the Act in 1986 “was the need to strength Canadian business and provide an incentive for productivity in the face of aggressive international competition...”: *Superior Propane III*, para 81, BOA Tab 8. The efficiency defence was intended to allow Canadian firms to “compete more effectively with large foreign enterprises at home and abroad”: *Superior Propane III*, para 81, BOA Tab 8.

<sup>589</sup> *Competition Act*, s 1.1, BOA Tab 28: the purpose of the *Act* is “to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets.”

<sup>590</sup> Subsection 96(2) of the *Act* (BOA Tab 28) expressly requires the Tribunal (using the imperative “shall”) to consider whether the merger at issue will advance Parliament’s objective of allowing Canadian companies to compete more effectively internationally. The presence – or absence – of international considerations is a factor that must be considered.

<sup>591</sup> *Tervita SCC* at paras 87 and 167, BOA Tab 24.

<sup>592</sup> *Telecommunications Act*, SC 1993, c 38, Part II, BOA Tab 29.

## 6. Quantum of Substantiated Efficiencies

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

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

## 7. Timing of Effects

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

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

<sup>593</sup> CA-A-1869, Zmijewski Report, p 111, Exhibit VI-10, row [9], Net Efficiencies over 10 Years, Discounted.

<sup>594</sup> CA-A-1869, Zmijewski Report, p 112, Exhibit VI-11, row [5], Net Efficiencies over 10 Years, Discounted, adjusted for error in the Harington Report: Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4132:1-6; For example, the description for the project "Wireline Testing" simply reads "BMA Managed service testing SOW," CA-A-1833, Harington Report Electronic Schedule, tab "F23 Budget Submission," cell K27.

<sup>595</sup> CA-A-1869, Zmijewski Report, p 115, Exhibit VII-3, row [5], Net Efficiencies over 10 Years, Discounted, adjusted for missing "Costs related to Videotron Transaction" see: CB-R-1831, Presentation of Mr. Harington, p 4; Prof. Zmijewski corrects for the adding error with respect to costs to achieve non-labour related real estate savings; the error with respect to "savings relating to network separation initiative" does not relate to a substantiated efficiency; for NPV calculation, see Exhibit X – NPV Calculations (attached).

<sup>596</sup> CA-A-1869, Zmijewski Report, p 116, Exhibit VII-4, row [5], Net Efficiencies over 10 Years, Discounted.

<sup>597</sup> Testimony of N Miller, Transcript, Vol 7, Nov 16, 2022, p 1643:24 – p 1644:3.

<sup>598</sup> See, e.g., CA-A-1787, Answers to Undertaking Shaw Presentation Data Performance Benchmark & National Data Roaming Analysis, March 30, 2022 and CA-A-1759, Answers to Undertaking Shaw Appendix A: Terms of Service as of July 19, 2022.

<sup>599</sup> CA-A-1879, Read-Ins relating to Rogers' Examinations, pp 69-74, Q 390-410; pp77-79; Q. 423-430; pp 506-516. CB-A-0410, pp 6-7, 9. See also, CA-A-0122, Miller Report, p 175, para 372.

strategy. [REDACTED]

[REDACTED] 600

211. Additionally, it is important to recognize that the estimated welfare effects are based on current market conditions. The evidence in this proceeding shows that, over time, Shaw would have continued to grow and expand into new geographic and product areas. This means that the welfare loss in year five will be greater than in year one because the counterfactual Shaw would likely be a more significant competitor in five years' time and so the merger would have an even larger anticompetitive effect. [REDACTED]

[REDACTED] 501

212. Finally, to the extent anticompetitive effects “phase in” over time, they will also “phase out” over time in a manner that will affect the comparison to cognizable efficiencies. Assuming a five-year horizon, if the competitive harms only arise as consumers actively shop, then some consumers will only experience a price effect part way through the five-year period. But it is also the case that some consumers would experience harm extending beyond the five-year period. Imagine a consumer who keeps her plan for five years and shops halfway through the five-year period. She would have been on her pre-merger plan for two and a half years but when she selects her post-merger plan, she will continue to feel the effects of the merger for two and a half years after the five-year period. This issue arises for any length of time over which to consider efficiencies. To only count her harm for the two and a half years during the five-year period is to miss half the harm the consumer experiences from this merger.

213. Without good information on the specific manner in which increased market power will manifest itself, which information is unlikely to exist in any merger review, the sensible approach is to simply take the annual welfare effects and convert those figures to a net present value over the same period and using the same discount rate as for the cognizable efficiencies.

## **8. Efficiencies are not “Greater Than” and do not “Offset” the Effects**

214. As set out above, Rogers bears the burden on the “ultimate issue” of whether the efficiency gains are likely to be greater than, and to offset, the effects proven by the Commissioner.<sup>602</sup>

---

<sup>600</sup> CA-A-1879, Read-Ins relating to Rogers' Examinations, pp 69-74, Q 390-410; pp77-79; Q. 423-430; pp 506-516. CB-A-0410, Rogers 2021 Annual Report, May 6, 2022, pp 6-7, 9. See also, CA-A-0122, Miller Report, p 175, para 372. See also para 54 above.

<sup>601</sup> CA-A-0310, Email dated Sept 10, 2020 from Dan Golberg to Brent Johnson.

<sup>602</sup> *Tervita SCC* para 122, BOA Tab 24; *Superior Propane II* at paras 157 and 177, BOA Tab 7.

Together, the terms “greater than” and “offset” mandate that the Tribunal determine both quantitative and qualitative aspects of a merger, and then weigh and balance those aspects.<sup>603</sup>

215. The effects set out above exceed the amount of cognizable efficiencies that have been demonstrated by Rogers. The “greater than” aspect of the test requires that the efficiency gains be more extensive or of a larger magnitude than the anti-competitive effects.<sup>604</sup> A comparison of the quantitative effects and efficiencies is set out in Appendix G.

216. Section 96 of the *Act* also requires Rogers to prove that its claimed efficiencies “offset”, or compensate for, the adverse effects.<sup>605</sup> It has not done so. Rogers claimed benefits from the merger consist primarily of speculation and unenforceable promises. On the other hand, the Proposed Merger is likely to lead to material qualitative effects.

217. In this case, as set out above, the Respondents have substantially failed to substantiate its claimed efficiency gains as required under section 96 of the *Act*. In any event, any substantiated gains in efficiency are outweighed by the proven anti-competitive effects and wealth transfer.

## **G. RESPONSE TO RESPONDENTS’ ARGUMENTS**

218. This Section discusses certain arguments raised by the Respondents which are neither central to the issues before the Tribunal, nor well-founded. What follows also addresses certain questions raised by the Tribunal and lastly how the Tribunal should weigh contradictions between ordinary course documents and the Respondents’ and Videotron’s witnesses.

### **1. The “Proposed Merger” Before the Tribunal is Rogers’ Proposed Acquisition of Shaw**

219. The Respondents suggest that the Commissioner seeks to have the Tribunal assess “a merger that is no longer proposed – and will never occur”;<sup>606</sup> that the Proposed Divestiture Agreement somehow transforms matters in a way that obliges the Tribunal to ignore the “proposed merger” in respect of which the application was brought under section 92. This position is contrary to law and inconsistent with the facts. The Videotron remedy proposal is only the latest iteration in the Respondents’ on-going efforts to acquire as many assets of Shaw as possible; the AA in respect of which this application was brought remains in place. The Proposed Merger before the Tribunal has not been superseded by the Proposed Divestiture; ISED’s spectrum transfer denial

---

<sup>603</sup> *Tervita SCC*, para 145, BOA Tab 24. See also Written Opening Statement of the Commissioner of Competition at para 245.

<sup>604</sup> *MEGs* para 12.33.

<sup>605</sup> *MEGs* para 12.33. “[T]his requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects”: *Tervita SCC*, para 144, BOA Tab 24.

<sup>606</sup> Shaw’s Opening Statement, para 69.

does not preclude the acquisition of assets essential to the wireless business of Freedom. As the statute and case law requires and as applied above, the Tribunal must first assess the competitive effects of Proposed Merger (Commissioner's burden) and then turn to whether the Proposed Divestiture proposed removes any "substantial" effect (Respondent's burden).

**a) The Section 92 Application Defines the "Proposed Merger"**

220. Under the legal framework for sections 92 and 96,<sup>607</sup> the "proposed merger" challenged in the application is that arising from the March 13, 2021 AA.<sup>608</sup> If the Tribunal finds that the "proposed merger" is likely to result in an SPLC, the orders available to the Tribunal (without consent) are only "*not to proceed with the merger*", in whole or in part. The Respondents have not resiled from or withdrawn the "proposed merger" which is still before the Tribunal in this section 92 application.

221. Section 96 of the Act similarly focuses the assessment on efficiencies arising from "the merger or proposed merger *in respect of which the application is made*". Sections 92 and 96 cannot be read to contemplate different proposed mergers pursuant to a single application. Concluding otherwise would lead to an absurd result: the Tribunal would be tasked with analyzing the competitive effects of one proposed merger under section 92, and then repeating this exercise as part of the efficiencies trade-off analysis under section 96 for another proposed merger. This would render the statutory framework incoherent, contrary to the principles of statutory interpretation.<sup>609</sup>

**b) One Probability Standard: Balance of Probabilities**

222. There is no need for the Tribunal to find that a proposed merger is likely to be completed before it makes an order under section 92.<sup>610</sup> Section 92 contemplates two possible findings: that a merger or proposed merger: (i) prevents or lessens, or (ii) is likely to prevent or lessen, competition substantially. In response to the Tribunal's questions of November 7, 2022, there is no distinction between "is likely to" and "would likely";<sup>611</sup> nor does the phrase "will result"

---

<sup>607</sup> See Commissioner's Opening Argument, pp 56-73, paras 182-247.

<sup>608</sup> Application, prayer for relief; para 14.

<sup>609</sup> *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 S.C.R. 559, at paras 26-27, BOA Tab 37.

<sup>610</sup> As opposed to, for example, section 100(1)(a), which requires the Tribunal to find that in the absence of an order a person "is likely to take an action...".

<sup>611</sup> The phrase "would likely" typically expresses that a circumstance or event is conditionally likely (i.e., likely if another circumstance or event occurs). While "is likely to" can refer to something that is unconditionally likely, in the context of a proposed merger the phrase "is likely to prevent or lessen, competition substantially" in section 92 is implicitly conditional on the proposed merger being completed. The words "will result" in section 96 occur in the phrase "will result or is likely to result", which refers to "any prevention or lessening of competition" that the Tribunal has found pursuant to section 92.



contemplate a different probability standard than “is likely to result”.<sup>612</sup> Section 92 sets out a single test applicable to both mergers and proposed mergers. It refers to a finding, on a balance of probabilities, that a merger prevents or lessens competition substantially.

223. The use of “prevents or lessens” does not imply a different probability standard than “is likely to prevent or lessen”. Similarly, the phrase in section 96 “will be greater than, and will offset” does not imply a different probability standard than “would likely be greater than, and would likely offset” “There is only one civil standard of proof: proof on a balance of probabilities”.<sup>613</sup>

**c) Statutory Waiting Period for the Proposed Divestiture has not Expired**

224. An ARC request was filed with the Commissioner in respect of the Proposed Divestiture on June 24, 2022; however, notification forms were not filed under Part IX of the Act until October 17, 2022. A supplementary information request (“SIR”) was issued to Videotron on November 16, 2022. Videotron certified its SIR responses on November 24, 2022. The second 30-day statutory waiting period in respect of the Proposed Divestiture, therefore, does not expire until December 28, 2022. The Proposed Divestiture is distinct from the Proposed Merger and subject to separate statutory requirements. It is not one seamless transaction as the Respondents submit.

**d) The Challenge to the Proposed Merger is Not “Artificial” or Unnecessary**

225. The Proposed Divestiture Agreement explicitly states that it does not “amend, vary, modify or derogate from the rights and obligations” under the AA. It goes on to say that in the event of “any conflict, inconsistency or ambiguity”, the AA “shall prevail and be paramount.”<sup>614</sup> The AA has not been amended or terminated. The Divestiture Agreement contains termination provisions which could be invoked by either party.<sup>615</sup> The Proposed Divestiture is, in fact, the third proposed wireless divestiture; and contractual arrangements that have been, and can still be, changed.

---

<sup>612</sup> The Tribunal concluded in *Tervita* that a completed merger was likely to prevent competition substantially, and the Supreme Court of Canada upheld that finding *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, paras 53, 80 and 83, BOA Tab 24.

<sup>613</sup> *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, para 66, BOA Tab 24. This does not mean that the Tribunal must be certain that a merger causes a SPLC – although, as held in *Tervita*, however its assessment of future events must not be speculative.

<sup>614</sup> CB-A-710, Share Purchase Agreement between Videotron Ltd, Quebecor Inc, Rogers Communications, Shaw Communications, Shaw Telecom and Freedom Mobile dated August 12, 2022, pp 89-90 (section 8.7).

<sup>615</sup> CB-A-710, Share Purchase Agreement between Videotron Ltd, Quebecor Inc, Rogers Communications, Shaw Communications, Shaw Telecom and Freedom Mobile dated August 12, 2022, pp 82-83 (section 6.1(b)).

226. The chronology of events surrounding the Proposed Divestiture<sup>616</sup> highlights that it is not inextricably linked to the AA, but a subsequent add-on. In summary, the Respondents delayed both the efficiencies review and bringing forward divestiture proposals until well into 2022. The Proposed Divestiture was only proposed more than a month after the Commissioner's application was filed and the Proposed Divestiture Agreement was executed just 10 days before the commencement of examinations for discovery (less than three months prior to the commencement of the trial.)<sup>617</sup>

227. In view of the foregoing, it is critical that the Respondents' burden of proof on the remedy continues to rest with them. To do otherwise would be highly unfair to the Commissioner, who has only had a matter of months to obtain the necessary details, conclude discovery, share evidence with experts, and understand the case to meet.

228. Further, Rogers controls the regulatory strategy under both the AA<sup>618</sup> and Proposed Divestiture Agreement.<sup>619</sup> As a result, Rogers exerts significant control over what will end up happening to Shaw's wireless business, even if it does not acquire the spectrum assets or all of the wireless assets. The ISED Minister's transfer denial relates only to spectrum. ISED has not barred Rogers from acquiring any other assets held by Freedom, such as its brand name, subscribers, RAN, microwave backhaul and retail stores. But for its contract with Videotron, Rogers could effectively acquire Freedom and operate it with Rogers' existing spectrum.

229. In sum, there are multiple avenues through which the SPLC the Commissioner alleges in respect of the Proposed Merger could still occur, in whole or part. Hence, there is value in the Tribunal ruling on that transaction.

**e) The Respondents are Estopped from Denying that the Application Relates to the AA**

230. The AA is subject to a Consent Agreement between the Respondents and the Commissioner in respect of the section 104 application filed simultaneously with this section 92 application. The Registered Consent Agreement states in the recitals that the Commissioner has concluded that the agreement "is necessary to prevent irreparable harm from the Proposed Merger

---

<sup>616</sup> See Appendix C.

<sup>617</sup> The Commissioner brought, but ultimately did not pursue, a motion for additional time after scheduling orders were made which have severely compressed discovery and pre-trial steps, as the Tribunal is well aware.

<sup>618</sup> CB-A-0698, Rogers and Shaw Arrangement Agreement dated March 13, 2021, pp 53-54 (section 4.5(b)(v)).

<sup>619</sup> CB-A-710, Share Purchase Agreement between Videotron Ltd, Quebecor Inc, Rogers Communications, Shaw Communications, Shaw Telecom and Freedom Mobile dated August 12, 2022, p 48 (section 4.4(d)).

*pending the Tribunal's disposition of the Application.*" The Respondents have agreed "not to proceed with the Closing until either the Tribunal's disposition of the Application or with the agreement of the Commissioner."<sup>620</sup>

231. That Consent Agreement disposed of the section 104 application and defines the Proposed Merger for the section 92 application. The Respondents, by their conduct, are estopped from denying the scope of the application in respect of which they entered into a registered Consent Agreement. They have legally bound themselves to await a ruling on the Proposed Merger.<sup>621</sup> Alternatively, the doctrine of estoppel by representation prevents a promisor from denying the truth of a prior representation.<sup>622</sup>

232. In the present matter, the Respondents, through their signing of the Consent Agreement, positively represented to the Commissioner what the scope of the application is. The Respondents cannot resile from their position or claim that the application proposed is now an "artificial transaction". The Commissioner is in a detrimental position, since he relied on this representation in assessing the merits of the application and the timetable for this case.

#### **f) The Respondents' Burden Relating to Remedy Requires Its Separate Consideration**

233. It is settled law that the party that proposes a remedy – in this case, the Proposed Divestiture put forward by the Respondents – bears the burden of proving that it eliminates the substantiality of any SPLC.<sup>623</sup> The Proposed Divestiture is not akin to an intervening event like a change to barriers to entry – it is a matter within the Respondents' control and for which they bear the burden of proof because they proposed it, control its timing and know the facts. Switching the proposed merger before the Tribunal to the combination of the Proposed Merger and Proposed Divestiture would shift the burden of proof onto the Commissioner, who would then have to prove that the remedy causes a likely SPLC. To do so would violate the basic legal tenet that "he who asserts must prove."

## **2. Respondents' Claims About the Commissioner's Investigation are Unfounded and**

---

<sup>620</sup> Tribunal Record 43, Registered Consent Agreement, May 30, 2022, Recital para C; para 2.

<sup>621</sup> *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, para 17, BOA Tab 26.

<sup>622</sup> *Ryan v Moore*, 2005 SCC 38, para 5, BOA Tab 22.

<sup>623</sup> *Canada (Director of Investigation & Research) v Southam Inc*, 1997 1 SCR 748 at paras 26 and 85, BOA Tab 12; *Canada (Director of Investigation and Research) v Southam Inc*, [1995] 63 CPR (3d) 67, para 18, BOA Tab 11; *The Commissioner of Competition v Canadian Waste Services Holdings Inc*, 2001 Comp Trib 34 at paras 11, 34-35 and 107, BOA Tab 3.

### **Irrelevant**

234. The Respondents' vague references to the conduct of the Commissioner's investigation and contacts made to telecommunications service providers provide no issue requiring determination by the Tribunal.<sup>624</sup> It is typical and appropriate for the Commissioner to collect information from the full range of market participants in order to develop an understanding of the relevant markets. Parliament, however, created an adjudicative model which gives the Tribunal the ultimate say in respect of factual findings which permit it to assess evidence as appropriate.

235. **The Respondents' Claims are Vague and Undefined:** The Respondents raise concerns that Bell and TELUS are allegedly opposed to the Proposed Merger and have a network sharing agreement that the Respondents claim is somehow relevant to this case. Their concern with Distributel is that it was previously interested in being a divestiture buyer and is being acquired by Bell. The Respondents have not articulated why any of this prejudices them. These types of nebulous accusations were dismissed by the Tribunal in its most recent decision, in which it refused to draw inferences simply based on the scope of the evidence called by the Commissioner.<sup>625</sup>

236. **Conduct of the Commissioner's Investigation is Not Relevant:** The conduct of the Commissioner's investigation is simply not relevant to the Tribunal's task as the Tribunal made clear just this year.<sup>626</sup>

237. **The Agenda of Market Participants Do Not Taint the Commissioner:** It is commonplace for competitors to be canvassed about their views on merger transactions. It is essential for the Bureau to contact competitors and other market participants, because the Commissioner does not possess the facts; industry players provide valuable insight into the markets in question. In this case, the Commissioner has interviewed dozens of market participants and has the benefit of multiple perspectives on the evidence. None of this is unusual or worthy of the Tribunal's attention in its adjudication of the complex matters before it.

### **3. Ordinary Course Internal Documents Should Trump Self-Serving Testimony**

238. Counsel to the Respondents have argued that the say-so of executives at Rogers, Shaw and Videotron and the documents they have created with this litigation in mind are more credible than all other forms of evidence, including ordinary course internal documents created by them, for

---

<sup>624</sup> Shaw Opening Statements, Transcript, Vol 1, Nov 7, 2022, p 114:12-15, p 104:12-15;

<sup>625</sup> *Commissioner v Parrish & Heimbecker*, 2022 Comp Trib 18 at paras 154-155, BOA Tab 4.

<sup>626</sup> *Commissioner v Secure*, 2022 Comp Trib 3 at para 10, BOA Tab 5.

them (or their boards) or under their supervision.<sup>627</sup> To this effect, the Respondents also cite the “Business Judgment Rule” arguing that it was applied in *Tervita*.<sup>628</sup> Neither assists the Respondents.

239. First, the Business Judgment Rule is intended to protect directors and officers from liability arising from decisions they make in their corporate capacities.<sup>629</sup> That is simply not applicable to the context of this litigation which does not raise such issues. Second, the Respondents’ invocation of *Tervita* (which does not mention the rule) does not support their position. The context was determining the appropriate time period for considering future entry, and the Supreme Court said that factual findings about what a company might do must be based on evidence of the decision the company would make. The Commissioner agrees; ordinary course documents provide such evidence and should be believed above self-serving witness statements and testimony.

240. While experience in the telecommunications industry is valuable, several executives who testified are highly motivated to facilitate the closing of the Proposed Merger and Proposed Divestiture. For obvious reasons, Rogers is desperate to conclude its acquisition of Shaw. The Shaw family stands to gain billions,<sup>630</sup> and Shaw executives stand to gain multi-million-dollar golden parachutes<sup>631</sup> if the deal proceeds. Videotron executives are also keen to proceed with their deal. Ordinary course documents, including the internal documents of these companies, are far in many cases more credible sources of information for the Tribunal than evidence that is specially prepared for litigation.

241. Setting aside the aforementioned incentives and the evidence put forward by the Commissioner’s witnesses and experts, the testimony the executives have provided is often contradicted by their own documents, other witnesses put forward by the Respondents and, in some cases, their own evidence. They have made multiple bald assertions unsupported a single ordinary course record to substantiate certain claims and carefully presented a subset of information to the Tribunal. Appendix D contains some examples of such contradictions.

---

<sup>627</sup> Shaw Opening Statement, Transcript, Vol 1, Nov 7, 2022, pp 112:19-25, p 113:1-3, p 115:5-13, p 101:25 and p 102:1-4.

<sup>628</sup> Shaw Opening Statement, Transcript, Vol 1, Nov 7, 2022, pp 101:25-102:1-4; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, para 76.

<sup>629</sup> *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, paras 64 and 66-67, BOA Tab 38.

<sup>630</sup> Testimony of B Shaw, Transcript, Vol 12, p 3188:4-18.

<sup>631</sup> Testimony of T English, Transcript, Vol 11, pp 2674:11-16, p 2676:24-25 and p 2677:1-2; Testimony of P McAleese, Transcript, Vol 11, p 2914:21-25 and p 2915:1-17.

**H. CONCLUSION**

242. For the foregoing reasons, the Commissioner submits that the application should be allowed, and an order directing Rogers and Shaw not to proceed with the Proposed Merger should issue, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, December 8, 2022

---

**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

**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 an Order 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

**VIDEOTRON LTD.****Intervenor**

---

**FINAL WRITTEN ARGUMENT OF THE  
COMMISSIONER OF COMPETITION**

---

**ATTORNEY GENERAL OF CANADA**Department Of Justice Canada  
Competition Bureau Legal ServicesPlace du Portage, Phase I  
50 Victoria Street, 22<sup>nd</sup> Floor  
Gatineau, QC K1A 0C9  
Fax: 819-953-9267**John Tyhurst**

john.tyhurst@cb-bc.gc.ca

**Alexander Gay**

alexander.gay@cb-bc.gc.ca

**Derek Leschinsky**

derek.leschinsky@cb-bc.gc.ca

**Katherine Rydel**

katherine.rydel@cb-bc.gc.ca

**Ryan Caron**

ryan.caron@cb-bc.gc.ca

**Kevin Hong**

kevin.hong@cb-bc.gc.ca

**Counsel to the Commissioner of  
Competition**

## APPENDIX A - 5G AND 3500 MHZ CHRONOLOGY

Date	Event
Mar 2018	Shaw announces it had successfully completed its first 5G technical trials in Calgary. <sup>1</sup>
Sep 27, 2019	[REDACTED] <sup>2</sup>
Oct 30, 2020	Mr. McAleese advises analysts that Shaw expects 5G to be “live and in the market in early calendar ’21”. <sup>3</sup>
Jan 13, 2021	Mr. McAleese reaffirms Shaw is on track to launch 5G noting “we are confident that our 5G product is going to deliver exactly what customers are looking for and we’re still on track to start delivering that--later in this calendar quarter.” <sup>4</sup>
Feb 1 & 5, 2021	[REDACTED]
Mar 2, 2021	[REDACTED]
Mar 15, 2021	Proposed Merger is announced.
Apr 6, 2021	ISED publishes list of applicants to participate in the 3500 MHz spectrum auction; Shaw elects not to participate. <sup>7</sup>
Apr 8, 2021	Freedom store dealers are instructed to place the 5G signage in the window. <sup>8</sup>
Apr 12, 2021	Shaw advises Freedom dealers that 5G launch is paused indefinitely and requesting return of marketing materials. <sup>9</sup>
Apr 15, 2021	[REDACTED] <sup>10</sup>
Apr 23, 2021	[REDACTED] <sup>11</sup>
Jun - Jul, 2021	3500 MHz auction. <sup>12</sup>
Oct 24, 2023	ISED’s planned 3800 MHz auction. <sup>13</sup>

<sup>1</sup> CA-R-0190, McAleese Statement, p 46 para 148.

<sup>2</sup> CA-A-0460, Shaw Presentation Wireless F20 and 5Y Plan Overview, Preliminary Discussion Materials, Sept 27, 2019 slide 10-11.

<sup>3</sup> CA-R-0190, McAleese Statement, p 47 para 154.

<sup>4</sup> CA-R-0190, McAleese Statement, p 47 para 155.

<sup>5</sup> CA-R-0186, English Statement, Exhibit 36, p 2738; Testimony of R. Davies, Transcript, Vol 11, Nov 22, 2022, p 2840:19 - 25; Exhibit TR-309 slide 6.

<sup>6</sup> CA-A-0536, Shaw Presentation 5G Status March 2, 2021, slide 5, 9, 15.

<sup>7</sup> CA-R-0186, English Statement, Exhibit 27, p 1236.

<sup>8</sup> CA-A-0043, Witness Statement of Sudeep Verma, affirmed February 24, 2022, at p 31 and exhibit “O”.

<sup>9</sup> CA-A-0043, Witness Statement of Sudeep Verma (Freedom Dealers), Exhibit A, p 14, para 31.

<sup>10</sup> CA-R-0190, McAleese Statement, Exhibit 49, p 2063.

<sup>11</sup> CA-I-0144, Lescadres Statement, Exhibit 1, p 472.

<sup>12</sup> CA-I-0152, Drif Statement, p 15, para 53; CA-I-0144, Lescadres Statement, p 11, para 26.

<sup>13</sup> CA-I-0152, Drif Statement, p 15, para 54.



## APPENDIX B - "MIDDLE LANE" CHRONOLOGY

Date	Event
Mar 15, 2021	The Proposed Merger is announced.
Jun 30, 2021	A Q3 F21 presentation to Shaw' Board of Directors describes focus on "[REDACTED]" instead of growth. <sup>14</sup>
Aug 16, 2021	Shaw VP of Wireless Growth says they are looking at [REDACTED] <sup>15</sup>
Aug 24, 2021	Shaw Director of Shaw Mobile describes that [REDACTED] <sup>16</sup>
Sep 15, 2021	Shaw's SVP of Enterprise Business Solutions says they are "s[REDACTED]" and that "[REDACTED]" <sup>17</sup>
Sep 22, 2021	[REDACTED] <sup>18</sup>
Oct 27, 2021	Shift to a [REDACTED] described in presentation to Shaw Board. <sup>19</sup>
Oct 28, 2021	Plans to [REDACTED] <sup>20</sup>
Nov 25, 2021	Shaw's first F22 priority is [REDACTED] <sup>21</sup>
Nov 29, 2021	Shaw VP Wireless Growth: [REDACTED] <sup>22</sup>
Dec 9, 2021	Shaw VP Wireless Growth explains to Dir of Commercial Finance that "[REDACTED]" <sup>23</sup>
Jan 12, 2022	Shaw's current pricing strategy "[REDACTED]" to incumbents, resulting in [REDACTED] <sup>24</sup>
Feb 7, 2022	Shaw forecasts [REDACTED] <sup>25</sup>
Mar 7, 2022	Paul McAleese describes that Shaw Mobile [REDACTED] results are not as favorable due, in part, to Shaw's [REDACTED] <sup>26</sup>
May 2, 2022	Rogers' market report: [REDACTED] <sup>27</sup>

<sup>14</sup> CA-A-1324, Shaw Presentation Q3 F21 Review & Discussion Materials Board of Director's meeting dated June 30,2021, p 12.

<sup>15</sup> CA-A-0608, Spreadsheet F19-F2022 Consolidated Subscribers Gross Adds

<sup>16</sup> CA-A-0610, Chat between Tyler Spring and Mathew Flanigan dated August 24, 2021

<sup>17</sup> CA-A-0632, Shaw Chat between Candice McLeod to Dawit Ashafa, Chad Rumpel and Tanya Foster (Shaw) dated Sept 15, 2021 at 1.

<sup>18</sup> CA-A-0612, Email dated Sept 22, 2021 from Julie Gass to Aimee Debow et al re: Freedom/Shaw Mobile – Post Close Integration Planning

<sup>19</sup> CA-A-0616, Shaw Presentation Divisional Review – Consumer and Wireless Board Discussion Materials dated Oct 27, 2021, at 2.

<sup>20</sup> CA-A-0656, Shaw Presentation, Q4 F21 Performance Summary and F22 Budget presentation to Shaw's Board of Directors, p 28 and 32.

<sup>21</sup> CA-A-1320, Shaw Presentation Calendar 2022 Plan with Normalized Growth Rate, November 2021, pg 5

<sup>22</sup> CA-A-1270, Email dated Nov 29, 2021 re Aggressive Flanker,p 1: "Neither Freedom nor Shaw were aggressors in the market (quite the reverse after adjusting 12-box and the launch of TradeUp)".

<sup>23</sup> CA-A-0622, Freedom Mobile Chat log, at 1 (bottom of page) and 3: "The forecast provided reflects the current market trends, and given our middle lane approach it is appropriate."

<sup>24</sup> CA-A-0658, Shaw Presentation Q1/F22 Business Board of Directors, Jan 12, 2022, at pp 4

<sup>25</sup> CA-A-0668, Email dated Feb 8, 2022 from Paul McAleese to Katherine EMBERLY re ELT Update: 6+6 Forecast

<sup>26</sup> CA-A-0670, Email dated March 7, 2022 from Paul McAleese to Jeni McAleese re Research for Effies Case Study, at 2.

<sup>27</sup> CA-A-0406, Rogers Presentation RCI April KBI Report, May 2, 2022, at 24.

## APPENDIX C - PROPOSED MERGER CHRONOLOGY

Date	Event
Mar 23, 2020	Passing of Shaw patriarch, JR Shaw. <sup>28</sup>
Apr 22, 2020	[REDACTED] <sup>9</sup>
Jul 30, 2020	Shaw launches Shaw Mobile; Brad Shaw meets with then-Rogers CEO Joe Natale, who expresses interest in a business combination between Rogers and Shaw. <sup>30</sup>
Sept 10, 2020	Dan Goldberg (SVP Strategy & Corporate Development) to Brent Johnson (President, Wireless): [REDACTED] [REDACTED] [REDACTED] <sup>1</sup>
Nov 2020	Shaw mandates TD Securities (TD) to “prepare an overview of key telecommunications sector trends and potential strategic alternatives for the company [...] as well as the strengths and weaknesses of the Company’s business and operations.” <sup>32</sup>
Dec 16, 2020	First TD meeting: 5 options are presented: (i) pursue privatization with a private equity sponsor; (ii) solicit a sale to strategic buyer; (iii) pay a special dividend; (iv) carry out share buyback program; and (v) stay the course and execute on existing strategic plan. <sup>33</sup>
Jan 6, 2021	Brad Shaw meets with [REDACTED] CEO of BCE, to discuss a potential transaction. <sup>34</sup>
Jan 13, 2021	Board is informed Shaw is considering the future direction of the company and that Rogers and Bell had both expressed interest in a potential business combination with Shaw. <sup>35</sup>
Feb 1, 2021	TD presentation to members of the Shaw Family. <sup>36</sup>
Feb 5, 2021	TD presentation to the Shaw Family Living Trust (SFLT). [REDACTED] [REDACTED] Decision made to initiate a competitive process with Rogers and Bell to sell Shaw. <sup>37</sup>
Feb 8, 2021	Brad Shaw informs Lead Independent Director of Shaw that SFLT is interested in exploring sale of Shaw and advises Mr. Natale of Rogers and [REDACTED] of BCE that SFLT was willing to consider a potential transaction. <sup>38</sup>
Mar 2, 2021	Mr. Shaw contacts [REDACTED] to seek improved offer regarding the regulatory approach. The proposal is not amended, and [REDACTED] this prevents them from reaching agreeable terms with Shaw. <sup>39</sup>
Mar 13, 2021	The Arrangement Agreement and other transaction documents are finalized and executed. <sup>40</sup>

<sup>28</sup> CA-R-0186, English Statement, Exhibit 2, p 69, para 1

<sup>29</sup> CA-A-0864, Shaw Presentation Corporate Development, April 22, 2020, p 8

<sup>30</sup> P-A-1416, Global Newswire article dated July 30, 2020 re Shaw Mobile has arrived ; CA-R-0186, English Statement, p 38, para 114

<sup>31</sup> CA-A-0310, Note from Dan Golberg, then Senior Vice-President of strategy and corporate development, to Brent Johnston, then President of Wireless.

<sup>32</sup> CA-R-0186, English Statement, p 38, para 115

<sup>33</sup> CA-R-0186, English Statement, p 38, para 116

<sup>34</sup> CA-R-0186, English Statement, p 38, para 117

<sup>35</sup> CA-R-0198, Shaw Statement, p 7, para 30

<sup>36</sup> CA-R-0190, Davies Statement, p7, para 22 and Exhibit 1 (page 23)

<sup>37</sup> CA-R-0190, Davies Statement, p7, para 22 and Exhibit 1 (page 23); Testimony of R. Davies, Transcript, Vol 11, Nov 22, 2022, p 2830: 10-19; CA-R-0186, English Statement, p 42, para 129

<sup>38</sup> CA-R-0198, Shaw Statement, p 10, paras 39-40

<sup>39</sup> CA-R-0186, English statement, p 43, paras 133 and 136; ID-027, ABD 202702 p 37, paras 91-92

<sup>40</sup> CA-R-0186, English Statement, p 44, para 140

Mar 15, 2021	Rogers and Shaw announce the Proposed Merger. <sup>41</sup>
Apr 13, 2021	[REDACTED] <sup>2</sup>
May 3, 2021	Rogers and Shaw filed Pre-Merger Notifications with the CB. <sup>43</sup>
Oct 18, 2021	[REDACTED]
Nov 8, 2021	[REDACTED]
Nov 22, 2021	[REDACTED]
Jan 18, 2022	[REDACTED]
Feb 8, 2022	[REDACTED]
Feb 25, 2022	[REDACTED]
Mar 15, 2022	[REDACTED]
Mar 25, 2022	[REDACTED]
Apr 11, 2022	[REDACTED]
Apr 27, 2022	Meeting [REDACTED] regarding inadequacies of remedy proposal and concerns with a wireless-only remedy. <sup>53</sup>
Apr 28, 2022	Meeting with the Commissioner regarding inadequacies of remedy proposal and concerns with a wireless only remedy. <sup>54</sup>
May 9, 2022	Commissioner files Notice of Application with the Competition Tribunal. <sup>55</sup>
Jun 17, 2022	Binding letter agreement and term sheet agreed between Videotron, Rogers and Shaw. <sup>56</sup>
Jun 24, 2022	CB receives ARC request from Videotron, Rogers and Shaw. <sup>57</sup>
Aug 12, 2022	Definitive Share Purchase Agreement agreed between Videotron, Rogers and Shaw. <sup>58</sup>

<sup>41</sup> CA-R-0186, English Statement, p 44, para 140

<sup>42</sup> CB-A-0700, ARC Request from Rogers and Shaw dated April 13, 2021

<sup>43</sup> Testimony of Trevor English, Transcript, Vol 11, Nov 22, 2022, p 2652: 11-15

<sup>44</sup> CB-A-0173, Letter from the Bureau to Rogers and Shaw re concerns about a wireless-only remedy dated Feb 8, 2022, p 4

<sup>45</sup> CB-A-0173, Letter from the Bureau to Rogers and Shaw re concerns about wireless-only remedy dated Feb 8, 2022, p 1 para 2

<sup>46</sup> CB-A-0173, Letter from the Bureau to Rogers and Shaw re concerns about wireless-only remedy dated Feb 8, 2022, p 1 para 2

<sup>47</sup> CB-A-171, Letter from the Bureau to Rogers and Shaw re concerns in relation to the ETA, dated Jan 18, 2022

<sup>48</sup> CB-A-0173, Letter from the Bureau to Rogers and Shaw re concerns about wireless-only remedy dated Feb 8, 2022

<sup>49</sup> CB-A-175, Letter from the Bureau to Rogers and Shaw re sales processed commenced with unresolved issues dated Feb 25, 2022

<sup>50</sup> CA-I-0144, Lescadres Statement, para 93 and exhibit 33

<sup>51</sup> CB-A-177, Stone Peak letter of interest and term sheet dated March 25, 2022

<sup>52</sup> CA-A-179, LOI and term sheet RE Aquilini fiscal policy Fengate dated April 11, 2022

<sup>53</sup> Testimony of Trevor English, Transcript, Vol 11, Nov 22, 2022, p 2667:21- p 2668:22

<sup>54</sup> Testimony of Trevor English, Transcript, Vol 11, Nov 22, 2022, p 2668:25 – 2669:13

<sup>55</sup> Testimony of Trevor English, Transcript, Vol 11, Nov 22, 2022, p 2669:19-23

<sup>56</sup> CA-R-0198, Shaw Statement, p12, para 49

<sup>57</sup> Testimony of Trevor English, Transcript, Vol 11, Nov 22, 2022, p 2670:23 – p 2671:6

<sup>58</sup> CA-R-0198, Shaw Statement, p 12, para 49

**APPENDIX D - CONTRADICTIONARY STATEMENTS BY EXECUTIVES**

Statements by Executives	Contradictory Evidence
<p>Mr. English: [REDACTED] [REDACTED] [REDACTED]<sup>9</sup></p>	<p>Shaw’s submission to the INDU Committee notes “[REDACTED]”<sup>0</sup></p>
<p>Mr. English: You need backhaul to operate a business but you don’t need to own it, we have leveraged our wireline assets but it’s been fairly immaterial<sup>61</sup></p>	<p>ARC Request submitted in relation to the Rogers/Shaw Transaction: [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]<sup>2</sup></p> <p>Damian Poltz, Shaw SVP, Wireline Technology &amp; Strategy notes in September 2020: “[REDACTED]” [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]<sup>3</sup></p>
<p>Mr. English: [REDACTED] [REDACTED] [REDACTED]<sup>4</sup></p>	<p>Mr. McAleese e-mail to Jeni McAleese in March 2022 [16 months post launch of Shaw Mobile]<sup>65</sup> (Mr. McAleese agreed in discovery that this content is “[REDACTED]”<sup>6</sup>: [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>

<sup>59</sup> Testimony of T English, Transcript, Vol. 11, November 22, 2022, pg 2765:13 - pg 2768:1.

<sup>60</sup> CA-A-0556, Submission of Shaw to the House of Commons Standing Committee on Industry, Science and Technology – Study on the Proposed Acquisition of Shaw by Rogers, page 9; Testimony of P.McAleese, Transcript, Vol 12, Nov 23, 2022, p 3046:9 - p 3047:10.

<sup>61</sup> Testimony of T English, Transcript, Vol. 10, Nov 21, 2022, pg 2611:23 - pg 2612:13.

<sup>62</sup> CB-A-0700, ARC Request from Rogers and Shaw, April 13, 2021, p 2.

<sup>63</sup> CA-A-0442, E-mail dated Sept 24, 2020 from Damian Poltz to Jillian Mullenix and Jeff Carr re Coax Blackhaul for Wireless

<sup>64</sup> Testimony of T English, Transcript, Vol. 10, Nov 21, 2022, pg 2637:10-12.

<sup>65</sup> CA-A-0670, Email dated March 7, 2022 from Paul McAleese to Jeni McAleese, re Research for Effies Case Study, p 2, confirmed during discovery examination and in witness statement.

<sup>66</sup> CA-A-1882, Commissioner’s Read ins from the Examination of Paul McAleese, August 22, 2022, p 112:25 – p 113:6.

	... [Redacted] [Redacted] [Redacted] 7
Mr. English: [Redacted] [Redacted] [Redacted] 8	Mr. McAleese, March 2022: [Redacted] [Redacted] [Redacted] 9
Mr. English: [Redacted] [Redacted] [Redacted] 0	Mr. McAleese, March 2022: [Redacted] [Redacted] [Redacted] 1
Mr. McAleese: "We saw no material response to Shaw Mobile pricing." <sup>72</sup>	Mr. McAleese, March 2022: "[Redacted] [Redacted] [Redacted] 3
Mr. McAleese: [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] 4	There are several documents discussing Shaw Mobile [Redacted] [Redacted] 5

<sup>67</sup> CA-A-0670, Email from Paul McAleese re Research for Effies Case Study, p 2 confirmed during discovery examination and in witness statement.

<sup>68</sup> Testimony of T English, Transcript, Vol. 10, Nov 21, 2022, pg 2637:12-14.

<sup>69</sup> CA-A-0670, Email from Paul McAleese re Research for Effies Case Study, confirmed during discovery examination and in witness statement, p 2

<sup>70</sup> Testimony of T English, Transcript, Vol. 10, Nov 21, 2022, pg 2637:7-10.

<sup>71</sup> CA-A-0670, Email from Paul McAleese, confirmed during discovery examination and in witness statement, p 2

<sup>72</sup> Testimony of P McAleese, Transcript, Vol. 11, Nov 22, 2022, pg 2883:11-14.

<sup>73</sup> CA-A-0670, Email from Paul McAleese, , confirmed during discovery examination and in witness statement, p 2

<sup>74</sup> Testimony of P McAleese, Transcript, Vol 12, Nov 23, 2022, p 3015:4-8.

<sup>75</sup> CA-A-0522, Shaw Presentation Shaw Mobile 9/12 Box Introduction, Oct 13, 2020, p 3; CA-A-0520, Shaw Presentation titled 5G Pricing Approach Proposal, February 2021 (draft)pp 3-4; CA-A-0614, Email dated Oct 26, 2021 from Tyler Spring to Mathew Flanigan. Subject: RE: BOD Prep Data Points - TM Feedback.

<p>Mr. English: Shaw underinvested in wireline and has not been able to keep pace with Telus in Alberta and B.C.<sup>76</sup></p>	<p>Brad Shaw during Q42020 Investor call: “During the pandemic, we launched new broadband services including fiber-plus gig internet service [...] now available to over 1 million more customers than our main competitor, showcasing our leadership position with respect to the breadth and capability of our robust [robust] fiber plus network, the direct results of years of facilities-based investments. As a further validation, just last week Ookla named Shaw the fastest and most consistent internet provider in Western Canada.”<sup>77</sup></p> <p>Shaw Wireline Overview – Jun 23, 2021: [REDACTED] <sup>79</sup></p> <p>Shaw Fiscal 2022 Update – Oct 24, 2021: [REDACTED] <sup>80</sup></p> <p>“ [REDACTED] <sup>81</sup></p>
<p>Mr. English: Wi-fi is of little benefit to Shaw, its importance has diminished over time<sup>82</sup></p>	<p>Rogers expects [REDACTED] <sup>83</sup></p> <p>Rogers/Shaw ARC Request: [REDACTED] <sup>84</sup></p>

<sup>76</sup> Testimony of English, Transcript, Vol 10, Nov 21, 2022, pg 2619:23 – p 2620:3.

<sup>77</sup> CA-R-0192, McAleese Statement, Exhibit 47 p 2005 paras 2-3.

<sup>78</sup> CA-A-1451, Shaw Presentation - Wireline Overview, June 23, 2021, slide 19.

<sup>79</sup> CA-A-1451, Shaw Presentation - Wireline Overview, June 23, 2021, slide 29. Regarding the reliability of Ookla metrics, Mr. McAleese relies on Ookla in his WS at p 51 para 168.

<sup>80</sup> CA-A-0648, Shaw Presentation titled Fiscal 2022, slide 56.

<sup>81</sup> Testimony of R Davies, Transcript, Vol 11, Nov 22, 2022, p 2833:3 – p 2835:4.

<sup>82</sup> Testimony of T English, Transcript, Vol 10, Nov 22, 2022, p 2611:10–22.

<sup>83</sup> CA-R-0227, Fabiano Statement, Exhibit 5 slide 4.

<sup>84</sup> CB-A-0700, ARC Request from Rogers and Shaw, April 13, 2021, p 10.

	Testimony of Dean Prevost: [REDACTED] <sup>5</sup>
[REDACTED]	[REDACTED]

<sup>85</sup> Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3307:9-11.

<sup>86</sup> CA-I-0146, Reply Lescadres Statement, pp 8-9 paras 25-26; figures 1 and 2.

<sup>87</sup> Testimony of J-F Lescadres, Transcript, Vol 9, Nov 20, 2022, p 2270:4-12.

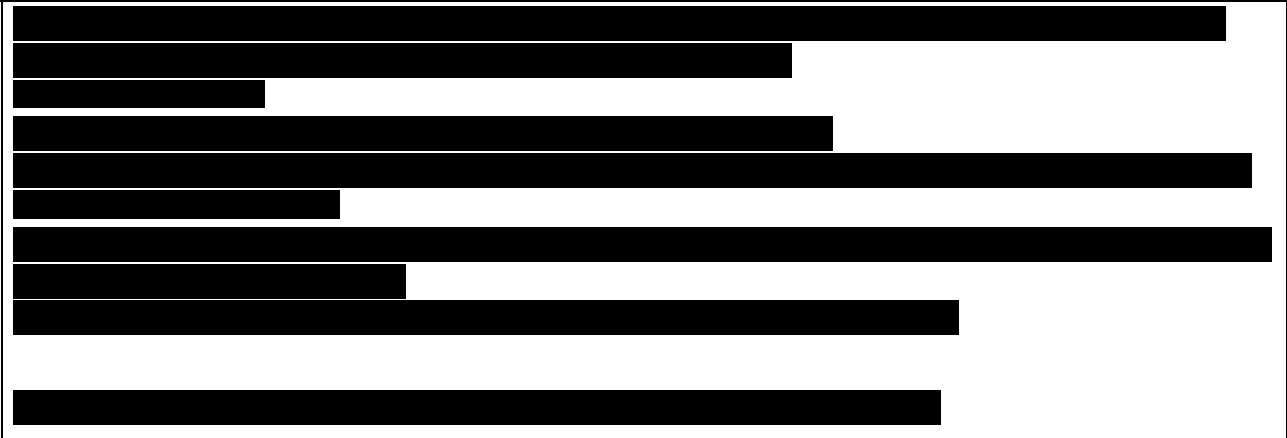
<sup>88</sup> Testimony of J-F Lescadres, Transcript, Vol 9, Nov 20, 2022, p 2272:5-23.

## APPENDIX E - DR. ISRAEL'S CONTRADICTORY STATEMENTS

Dr. Israel's Prior Statement	Dr. Israel's Later Statement
<p>As I explained in my Israel Initial Report, Prof. Miller's reliance on share of gross adds (SOGA) to calibrate his merger simulation model is incorrect as a matter of economics and leads him to substantially overstate the adverse unilateral effects of the transaction.</p> <p>(TR 504 Israel Reply Report, p 13, ¶11.)</p>	<p>MR. TYHURST: All right. But one of the measures he [Dennis Carleton of Compass Lexecon in AT&amp;T/T-Mobile] looked at was gross additions as a measure of diversion; correct? That's what this is saying.</p> <p>DR. ISRAEL: As I recall, he looked at the number of gross additions in addition to other metrics because he didn't have data on diversions. That's my recollection.</p> <p>(Testimony of Mark Israel, Transcript, Vol 17, November 30, 2022, p 4534:21 – p 4535:2)</p>
<p>Moreover, the timing of Shaw's change in strategy was unrelated to the merger announcement or the merger itself. Shaw's internal documents reflect discussions related to the strategy change that precede the merger announcement and the timing of the actual change to Shaw Mobile's pricing structure was driven by the resolution of technical hurdles and external factors</p> <p>(TR 504 Israel Reply Report, p 43, ¶61.)</p>	<p>MR. TYHURST: Are you aware that in cross-examination Mr. McAleese could not point to any evidence to back up his assertions that there was consideration, let alone a decision to increase prices in October of 2020? Do you know that, sir.</p> <p>DR. ISRAEL: I mean I read that, and I recall a discussion of when the decision was made. I don't recall the exact dates. But as I said, I think he -- as I'm recalling there is discussion of these technical issues about rolling out changes to bundle pricing.</p> <p>MR. TYHURST: Right. But that's not what we're -- you agreed initially that the strategy referring to is price related. So I'm going to let the transcript speak for itself. We'll move along, sir, thank you.</p> <p>(Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4563: 21 – p 4564:9)</p>
<p>Prof. Miller's merger simulation model also mischaracterizes the nature of the transaction by modeling a change of ownership structure over assets, while the Proposed Merger involves Rogers acquiring subscribers without the assets used to provide service to those subscribers. Fundamentally, Prof. Miller's wireless-only model cannot explain why the subscribers would stay with Rogers post-closing when Rogers does not acquire Shaw's wireless assets. Said differently, absent a transfer of assets, Prof. Miller's model predicts no change in concentration in any wireless</p>	<p>DR. ISRAEL: I'm not making a criticism that I think people will actually revert back. I think Shaw Mobile customers, if there are those who value a bundle, will stay where they get a better bundle. I think that Professor Miller's model can't explain that because it's a wireless-only model.</p> <p>(Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4501:7- 15)</p> <p>MR. TYHURST: Okay. But it's clear, sir, after this discussion that your statement that "in reality, only subscribers are transferred", that is incorrect, right, sir?</p> <p>DR. ISRAEL: I mean, wireline assets are transferred and some of them can be used to assist in the wireless service. I fully stand by the statement that the core wireless assets that define the quality and competitiveness of a wireless network are not being transferred.</p> <p>MR. TYHURST: Well, not just can be, sir. They are being used; correct? That's Mr. Prevost's evidence; right?</p>



<p>market – subscribers would simply return to their preferred option – and thus the harms that Prof. Miller’s model predicts are inconsistent with the true nature of the transaction (a transfer of subscribers).</p> <p>(TR 317 Israel Report, p 32, ¶38)</p>	<p>DR. ISRAEL: Some of them are being used, yes, certain of them, along with wireline assets that are leased.</p> <p>(Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4494:20 – p 4495:10)</p>
<p>I now show the effects of replacing Prof. Miller’s “flat logit” assumption (that implies all products are equally similar to each other) with the more realistic assumption that bundles are more similar to each other (from the perspective of consumers) than they are to standalone products. In other words, a consumer who is subscribed to a bundled product is, all things being equal, more likely to switch to another bundled product than to a standalone wireless product.</p> <p>(TR 504 Israel Reply Report, pp 26-27, ¶33.)</p>	<p>MR. TYHURST: And you provided, in fact, no empirical estimate at all of your nesting ¶meter; correct?</p> <p>DR. ISRAEL: That's the part that's an illustration. I can tell you my experience of what they tend to look like in industries that have these features, but just to make sure everyone's clear, that is not a direct empirical estimate here.</p> <p>MR. TYHURST: Right. And in fact, you've got no actual data which might -- available which might even be used to estimate such a nested ¶meter; correct? You don't provide that?</p> <p>DR. ISRAEL: Not to give it an exact number. Certainly there's data and documents to indicate that it's non-zero and that it matters, but I do not say that I have data to pin down the ¶meter.</p> <p>MR. TYHURST: And you've also performed no analysis of actual data to suggest that bundled products are closer substitutes to each other than to non-bundled products; correct?</p> <p>DR. ISRAEL: My analysis there is not based on data given. My analysis there is based on the qualitative evidence.</p> <p>(Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4514:19 – p 4515:16)</p>
<p>In the model below, I assume, based on Quebecor’s projection, that the new Quebecor bundle will get a market share equivalent to a third of Freedom Mobile’s pre-merger subscribers. (In Appendix C, I show the results are not qualitatively different if instead I assume that the new Quebecor bundle will get a market share equivalent to only a quarter of Freedom Mobile’s pre-merger subscribers.) I also assume the following regarding the new bundle: it has the same price as Freedom’s pre-merger price and has the same marginal cost and marginal cost savings as Freedom</p>	<p>MR. TYHURST: Now, your model does not involve a premerger bundled product for Freedom; correct?</p> <p>DR. ISRAEL: There is not a premerger Freedom product. I mean, if there was, it would be jointly owned with Shaw, so it still wouldn't be a third bundle provider. But you're right that Shaw has a Freedom has a very small bundled product today, and that is not in the model.</p> <p>MR. TYHURST: So you have not included the existing Freedom bundled product in your model; correct?</p> <p>DR. ISRAEL: Right. That's correct. I mean, it's very small. You could add it and then Vidéotron would become still the third provider and the fourth bundle, which would still benefit competition. But I have not included it because my understanding is its share is extremely small.</p> <p>...</p> <p>MR. TYHURST: All right. But the fact that the bundling rate gained by Freedom premerger is extremely low, don't you think that's a relevant factor in assessing whether the projected bundled rate that Vidéotron might be expected to obtain postmerger is reasonable? Don't you think that's fair?</p>

<p>post-merger. All the other assumptions of the model are unchanged relative to Table 4.</p> <p>(TR 504 Israel Reply Report, p 33, ¶44.)</p>	<p>DR. ISRAEL: I don't think so given the very different business plan and a very different approach to the bundle and the point I've been making, which is that the Vidéotron bundle would be the primary bundle being pushed by an independent competitor as opposed to a second bundle by Shaw, who is focused on Shaw Mobile.</p> <p>MR. TYHURST: All right. So that's based on a projection of the future. But if we go to history, history tells us that Freedom has had little success with bundling; correct?</p> <p>DR. ISRAEL: I mean, it had whatever success it had with Shaw Mobile. The Freedom product as it was positioned was not successful.</p> <p>(Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4521:22 – p 4522:11; p 4522:23 – p 4523:16)</p>
<p>Table 6 below summarizes the total marginal costs savings resulting from the transaction that I quantify (from roaming and handset purchasing):</p> <p>(TR 317 Israel Report, p 66, ¶95)</p>	
<p>This is just -- you see a statement here from Mr. McAleese recognizing that the Shaw Freedom network is just not as good in scope or in speed as the networks of Rogers, which is what matters here, are the other carriers.</p> <p>(Testimony of Mark Israel, Transcript, Vol 17, November 30, 2022, p 4440 lines 11-14)</p> <p>DR. ISRAEL: Yes, it's my evidence and it's why on that slide I've, on the left-hand side, referred to a quotation about the actual network and the right-hand side said that Professor Miller, based on his model, appears to agree. I certainly would put more weight on the general evidence about the</p>	<p>[McAleese] agreed with this assessment of January 2021 at that page reference: “Our LTE network, frankly, was never as fast or as wide as the big three, and as you all know, we’ve been more than capable of generating significant market share gains despite what I'll call deficits, but in practical terms for consumers really aren't that much of a deficit.” You weren't aware of that, sir?</p> <p>DR. ISRAEL: I have not read that statement. It’s specific to LT and so on, but not the statement will speak for itself and I had not -- I don't recall.</p> <p>(Testimony of M Israel, Transcript, Vol 17, Nov30, 2022, p 4616:18 – p 4617:6)</p>

<p>qualities of the network, but Professor Miller's model does not disagree.</p> <p>(Testimony of Mark Israel, Transcript, Vol 17, November 30, 2022, p 4506:24 – p 4507:5)</p>	
<p>I understand that Shaw Mobile's initial pricing structure was developed to retain existing Shaw wireline customers and to generate interest in both Shaw Mobile and Shaw's wireline products. It offered wireless plans at low rates compared to other wireless carriers, as long as subscribers also had a Shaw wireline broadband plan. I understand that those introductory prices, however, were unprofitable.</p> <p>(TR 504 Israel Reply Report, p 42, ¶59.)</p>	<p>'...the clarification would be what I just said, that they became unprofitable because the later price changes were profitable...'</p> <p>'...I think better wording here would have been they became unprofitable.'</p> <p>'They became unprofitable in the sense that there's substantial documents that the later price changes were profitable. It means these were inferior to the price changes that were made later.'</p> <p>'I suspect they were profitable at the time they were introduced.'</p> <p>'...the profitability of a strategy to use this product to support the wireline product, I'm aware of him saying that was the strategy and that was profitable.'</p> <p>(Testimony of M Israel, Transcript, Vol 17, Nov 30, 2022, p 4554:11-13 &amp; 22-23; p 4555:1-4 &amp; 17-18; p 4556:19-22)</p>

## APPENDIX F - COMMISSIONER'S POSITION ON CLAIMED EFFICIENCIES

Category	CoC Experts	Commissioner Position	Evidence to Highlight
<b>1. Labour</b>  (Harington Rep. pp 42-55 ¶83-)	Zmijewski Rep. pp 32-54 ¶70-120	<b>See paras 175-183 of Commissioner's Written Submissions.</b>	
<b>2. Real estate – labour related</b>  (Harington Rep. pp 55-58 ¶118-)	Zmijewski Rep. pp 54-55 ¶121-123 (“alternate calculation”)	This category of efficiencies is contingent on the headcount reduction estimates from category 1, above, which are not substantiated.	<ul style="list-style-type: none"> <li>• Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4126:23 - p 4127:5: “interconnected”</li> </ul>
		The breakdown of Shaw's real estate usage is based on an unsubstantiated assumption.	<ul style="list-style-type: none"> <li>• CA-R-1828, Harington Rep. p 56 ¶122.</li> </ul>
<b>3. Real estate – non-labour related</b>  (Harington Rep. pp 58-60 ¶128-135)	Zmijewski Rep. pp 55-57 ¶126-128 (“likely... absent Transaction”)	Many of the identified facilities would likely have been closed absent the Proposed Merger.	<ul style="list-style-type: none"> <li>• Testimony of D Prevost, Transcript, Vol. 13, Nov 24, 2022, p 3336:4 – p 3337:23.</li> </ul>
		Rogers' planned real estate synergies are based in part on [REDACTED] a lever available absent the Proposed Merger.	<ul style="list-style-type: none"> <li>• CB-A-1072, Presentation titled "Corporate Real Estate Integration", Nov 2021, p 3.</li> <li>• Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3337 lines 10-14.</li> </ul>
		Shaw considered [REDACTED]	<ul style="list-style-type: none"> <li>• CA-A-1178, Shaw Presentation titled "Shaw Communications Inc., Virtual SLT Retreat - Pre-Read Materials", Nov 4, 2020, p 15 and 45.</li> </ul>
<b>4. Marketing</b>  (Harington Rep. pp 60-63 ¶136-144)	Zmijewski Rep. pp 58 ¶130-132 (“conservatively... Substantiated”)	Marketing efficiencies result [REDACTED]	<ul style="list-style-type: none"> <li>• CA-R-1828, Harington Rep., p 60 ¶137.</li> </ul>
		Percentages applied to Shaw marketing spend to estimate savings are arbitrary amounts provided by Rogers management.	<ul style="list-style-type: none"> <li>• Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4156 lines 3-11.</li> </ul>
<b>5. Revisions to Rogers' [REDACTED]</b>	Zmijewski Rep. pp 59-60 ¶133-138 (“Engineering Input”)	Harington accepts management assertions based on a preliminary, draft analysis, providing no independent verification of the [REDACTED]	<ul style="list-style-type: none"> <li>• Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3296 lines 7-17; p 3297 lines 10-17.</li> <li>• Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4150:13 - p 4151:21.</li> </ul>

(Harington Rep. pp 63-65 ¶145-153)	Davies Reply Rep. pp 50-53 ¶108-117 (does “not consider the impact of... outage”)	The savings related to the █████ do not align with Rogers’ post-outage commitments.	<ul style="list-style-type: none"> <li>• Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1846:21 - p 1847:20.</li> </ul>
<p>6. █████ █████ █████</p> <p>(Harington Rep. pp 65-66 ¶154-156)</p>	<p>Zmijewski Rep. pp 61-62 ¶139-143 (“no analysis”)</p> <p>Davies Reply Rep. pp 53-56 ¶118-126 (“fails to consider accurate Radio Frequency planning”)</p>	<p>The claimed efficiencies are based on preliminary draft material from McKinsey; which itself is based on “preliminary” information from Rogers.</p> <p>The claimed efficiencies do not account for the limitations of █████ █████</p> <p>The estimated savings do not account for █████ █████</p>	<ul style="list-style-type: none"> <li>• Testimony of A Mercier-Dalphon, Transcript, Vol 13, Nov 24, 2022, p 3438:14 - p 3439:10.</li> <li>• Testimony of A Mercier-Dalphon, Transcript, Vol 13, Nov 24, 2022, p 3440:7-20.</li> <li>• Testimony of M Davies, Transcript, Vol 8, Nov 17, 2022, p 1999:21-22.</li> <li>• Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3311:1-18; p 3312:7-18.</li> <li>• CA-A-217, “Project Scotch Access Network LRP Appendix”, April 2022, p 5, p 9, p 11, p18.</li> </ul>
<p>7. Network - other</p> <p>(Harington Rep. pp 66-68 ¶157-165)</p>	<p>Zmijewski Rep. pp 62-65 ¶144-159</p> <p>Davies Reply Rep. pp 56-58 ¶127-133 (“fails to consider the post Rogers’ outage” commitments)</p>	<p>The Rogers document assessing these network savings is a preliminary draft, not a final analysis.</p> <p>Harington accepts management assertions and provides no independent analysis of the savings associated with █████ █████</p>	<ul style="list-style-type: none"> <li>• Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3296:7-17.</li> <li>• CA-A-1869, Zmijewski Rep., p 65 ¶157-159.</li> </ul>
<p>8. █████ █████</p> <p>(Harington Rep. pp 68-73 ¶166-177)</p>	<p>Zmijewski Rep. pp 67-68 ¶166-170 (█████ █████ █████ █████)</p>	<p>█████ are based on the assertions of Rogers management, with no documented plan provided.</p> <p>█████ are based on numbers provided by Rogers management with no underlying documentation.</p> <p>█████ will result in reduced capacity to serve customers.</p>	<ul style="list-style-type: none"> <li>• Testimony of A Harington, Transcript, Vol 16, Nov 29, 2022, p 4161:11 - p 4162:1.</li> <li>• CA-R-0209, Prevost Statement, p 46 ¶123.</li> <li>• CA-A-1869, Zmijewski Rep., p 66 ¶164.</li> </ul>

<b>9. General and administrative</b>  (Harington Rep. pp 73-75 ¶178-182)	Zmijewski Rep. pp 68 ¶171-173 (“conservatively... Substantiated”)	Savings resulting from reduced audit fees are estimated based on an arbitrary percentage of current audit fees.	<ul style="list-style-type: none"> <li>CA-R-1828, Harington Rep., p 74 ¶181.</li> </ul>
		Savings resulting from reduced insurance fees is a number provided by Rogers management with no underlying analysis.	<ul style="list-style-type: none"> <li>CA-R-0209, Prevost Statement, exhibit 58, p 2650.</li> </ul>
<b>10. IT</b>  (Harington Rep. pp 75-77 ¶183-)	Zmijewski Rep. pp 69-72 ¶174-185	<b>See paras 184-189 of Commissioner’s Written Submissions.</b>	
<b>11. Network separation initiative</b>  (Harington Rep. pp 77-78 ¶185-189)	Zmijewski Rep. pp 72-73 ¶186-190 (“numbers hard-coded... Engineering Opinion”)	Speculative: no network separation plan is in evidence. All that is provided is two outdated draft slides listing assumed quantum of savings with no detail, for example, of the amount that is attributable to outside of Canada.	<ul style="list-style-type: none"> <li>Testimony of D Prevost, Transcript, Vol 13, Nov 24, 2022, p 3277:13 - p 3278:25.</li> <li>CA-R-0212, Prevost Responding Statement, Exhibit 55, p 860.</li> </ul>
		Davies Reply Rep. pp 59-61 ¶134-138 (“not realistic...contradict Rogers’ post-outage commitment to separate” networks)	Existing Shaw infrastructure may not be sufficient to meet the commitments outlined in the network separation initiative.
<b>12. Other costs to achieve</b>  (Harington Rep. p 79 ¶190-191)	Zmijewski Rep. pp 73-74 ¶191-193 (“appropriate to deduct... but... Not Substantiated”)	Harington accepts management assertions and provides no independent analysis of any of the additional costs to achieve.	<ul style="list-style-type: none"> <li>CA-R-1828, Harington Rep., p 79 ¶190-191.</li> </ul>
		Bonuses and other incentives paid to Rogers and Shaw executives contingent on the Proposed Merger Closing or other integration milestones are costs to achieve ██████████	<ul style="list-style-type: none"> <li>Transcript, Vol 11, Nov 22, 2022, p 2674:2-24, p 2914:21 - p 2915:5</li> <li>Transcript, Vol 13, Nov 24, 2022, p 3491:1-11, p 3493:7-21</li> <li>CA-R-0168, English Statement, Exhibit 35, p 2602.</li> </ul>

<p><b>13. Videotron</b> [REDACTED] [REDACTED]</p> <p>(Harington Rep. pp 79-91 ¶192-241)</p>	<p>Zmijewski Rep. pp 75-89 ¶198-245</p>	<p>[REDACTED] accepted by Mr. Harington, are based on [REDACTED] [REDACTED] [REDACTED] [REDACTED] Videotron unable to determine the [REDACTED]</p> <p>Labour-related Real Estate efficiencies are contingent on headcount reduction estimates.</p> <p>Videotron [REDACTED] are based on [REDACTED] with no description of the [REDACTED] [REDACTED]</p> <p>Videotron's assumption that [REDACTED] [REDACTED] is an unsupported assumption from their engineering department.</p> <p>Videotron [REDACTED] are an unsupported assumption provided by management with no underlying analysis.</p> <p>The forecasted [REDACTED] [REDACTED] result in a loss of customer choice and a reduction in capacity to serve customers.</p> <p>Efficiencies resulting from the [REDACTED] [REDACTED] are based on inputs from engineers with no underlying documentation.</p>	<ul style="list-style-type: none"> <li>• Transcript, Vol 9, Nov 18, 2022, p 2302:17 - p 2303:19</li> <li>• Transcript, Vol 9, Nov 18, 2022, p 2304:17-23</li> <li>• Transcript, Vol 16, Nov 29, 2022, p 4172:10-17</li> </ul> <ul style="list-style-type: none"> <li>• CA-R-1828, Harington Rep., p 83 ¶205.</li> </ul> <ul style="list-style-type: none"> <li>• CA-A-1833, Harington Rep. Electronic Schedule, tab "B. Détails des budgets", cell P29.</li> <li>• Transcript, Vol. 16, Nov 29, 2022, p 4176:19 - p 4177:11.</li> </ul> <ul style="list-style-type: none"> <li>• CA-I-0144, Lescadres Statement, p 56-57 ¶210.</li> </ul> <ul style="list-style-type: none"> <li>• CA-A-1833, Harington Rep. Electronic Schedule, tab "D7", cell R9.</li> </ul> <ul style="list-style-type: none"> <li>• CA-A-1869, Zmijewski Rep., p 85 ¶229</li> </ul> <ul style="list-style-type: none"> <li>• CA-I-0144, Lescadres Statement, p 56 ¶207-209.</li> </ul>
<p><b>14. [REDACTED]</b> [REDACTED]</p> <p>(Harington Rep. pp 92-98 ¶242-)</p>	<p>N/A</p>	<p><b>See paras 197-205 of Commissioner's Written Submissions.</b></p>	

## APPENDIX G - TRADE-OFF TABLE (S 96 BALANCING EXERCISE)

Anticompetitive Effects Scenario	Quantified Anticompetitive Effects (\$MM, 10-year NPV) <sup>89</sup>	Quantified Efficiencies (\$MM, 10-year NPV) <sup>90</sup>
Proposed Merger (Weighted Surplus Approach)	Deadweight Loss: \$2,259 <sup>91</sup> Redistributive Effect: \$2,364 <sup>92</sup> Total: \$4,623 <sup>93</sup>	
Proposed Merger (Socially Adverse Transfer Approach)	Deadweight Loss: \$2,259 <sup>96</sup> Redistributive Effect: \$3,291 <sup>97</sup> Total: \$5,551 <sup>98</sup>	
Proposed Divestiture Order (Weighted Surplus Approach)	Deadweight Loss: \$293 <sup>99</sup> Redistributive Effect: \$279 <sup>100</sup> Total: \$572 <sup>101</sup>	
Proposed Divestiture Order (Socially Adverse Transfer Approach)	Deadweight Loss: \$293 <sup>102</sup> Redistributive Effect: \$335 <sup>103</sup> Total: \$628 <sup>104</sup>	

<sup>89</sup> Annual values converted to a net present value following the methodology used by Mr. Harington, see formula for cell S15 of CA-A-1833, Harington Report, Electronic Schedule 2.

<sup>90</sup> Net present value calculated following the methodology used by Mr. Harington, see formula for cell S15 of CA-A-1833, Harington Report, Electronic Schedule 2; Electronic Backup – NPV Calculations.

<sup>91</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Weighted Surplus”, Cell B71.

<sup>92</sup> Calculated from Total less Deadweight Loss.

<sup>93</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Weighted Surplus”, Cell B78.

<sup>94</sup> Total substantiated Rogers Efficiencies, see CA-A-1869, Zmijewski Report, p 111, Exhibit VI-10, row [9], Net Efficiencies over 10 Years, Discounted.

<sup>95</sup> Total substantiated Videotron Efficiencies: CA-A-1869, Zmijewski Report, p 115, Exhibit VII-3, row [5], Net Efficiencies over 10 Years, Discounted; *adjusted* to include Rogers’ costs related to the Videotron Transaction: CB-R-1831, Presentation of Mr. Harington, p 4; for calculation, see Electronic Backup – NPV Calculations, Tab “Summary”, Cell D8.

<sup>96</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Socially Adverse Transfer”, Cell B42.

<sup>97</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Socially Adverse Transfer”, Cell B44.

<sup>98</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Socially Adverse Transfer”, Cell B45.

<sup>99</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Weighted Surplus”, Cell B83.

<sup>100</sup> Calculated from Total less Deadweight Loss.

<sup>101</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Weighted Surplus”, Cell B90.

<sup>102</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Socially Adverse Transfer”.

<sup>103</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Socially Adverse Transfer”, Cell B51.

<sup>104</sup> ID-055, *Commissioner Nov 16 Letter and Spreadsheet*, Spreadsheet, Tab “Socially Adverse Transfer”, Cell B52.



## APPENDIX H - COMPARISON OF SHAW PRE-ANNOUNCEMENT TO QUEBECOR

**Table 1.0:** Shaw's financial metrics prior to announcement of Proposed Merger.

Financial Metric	Shaw Communications Inc. Position
Free Cash Flow	\$747 million (as of August 31, 2020). <sup>105</sup>
Cash and Cash Equivalents	\$571 million (as of November 30, 2020). <sup>106</sup>
Undrawn Credit Facility	\$ [REDACTED] (as of February 29, 2020). <sup>107</sup>
Net Leverage (Net Debt/EBITDA)	Shaw: [REDACTED] Rogers: [REDACTED] BCE: [REDACTED] Telus: [REDACTED] (As at the end of Q2 2020 for Shaw and December 31, 2019 for others). <sup>108</sup>
Debt-to-Total Market Capitalization	Shaw [REDACTED] Rogers [REDACTED] BCE [REDACTED] TELUS [REDACTED] Quebecor [REDACTED] (On or about January 21, 2021) <sup>109</sup>
Net Debt-to-Total Enterprise Value	Shaw [REDACTED] Rogers [REDACTED] BCE [REDACTED] TELUS [REDACTED] Quebecor [REDACTED] (On or about January 21, 2021) <sup>110</sup>

**Table 1.1:** Shaw and Quebecor prior to announcement of the Proposed Merger (\$MM CAD, % or ratio)<sup>111</sup>

Financial Metric	Shaw	Quebecor
Market Capitalization	[REDACTED]	[REDACTED]
Enterprise Value	[REDACTED]	[REDACTED]
Debt-to-Total Market Capitalization	[REDACTED]	[REDACTED]
Net Debt-to-Total Enterprise Value	[REDACTED]	[REDACTED]
Net Leverage (Net Debt/ LTM EBITDA)	[REDACTED]	[REDACTED]
Revenue	\$5,407 <sup>112</sup>	\$4,318 <sup>113</sup>
EBITDA	\$2,391 <sup>112</sup>	\$1,953 <sup>114</sup>
Book Value of Assets	\$16,165 <sup>112</sup>	\$9,862 <sup>115</sup>

**Table 1.2:** Shaw vs Videotron Subscribers as discussed in Martin Testimony (YOY growth)<sup>116</sup>

Mobile Subs	2017	2018	2019	2020	2021*
Videotron <sup>117</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Shaw <sup>118</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Shaw - SW ON	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Shaw - AB	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Shaw - BC	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

<sup>105</sup>P-A-1797, Shaw 2020 Annual Report, p 12.<sup>106</sup> P-A-0185, Shaw Consolidated Statements, Nov 30, 2020, p 1.<sup>107</sup> CA-A-0183, Shaw F20 Outlook & Scenario Analysis, April 9, 2020, p 19 para 2.<sup>108</sup> CA-A-0183, Shaw F20 Outlook & Scenario Analysis, April 9, 2020, p 20.<sup>109</sup> CA-R-168, English Statement, Exhibit 37, p 2965.<sup>110</sup> CA-R-168, English Statement, Exhibit 37, p 2986.<sup>111</sup> **Note:** All figures for Market Capitalization, Enterprise Value, Total Debt, Debt-to-Market Capitalization, Net Debt-to-Total Enterprise Value, and Net Leverage were compiled on or around Jan 21, 2021. Shaw's Undrawn Credit Facility was determined as at the end of its Q2, 2020, while Quebecor's was calculated as at Dec 31, 2020. Revenue, EBITDA and Book Value of Assets are presented as at the end of the respective 2020 fiscal years. (Aug 31, 2020 for Shaw and Dec 31, 2020 for Quebecor).<sup>112</sup> P-A-1797, Shaw 2020 Annual Report, p 12.<sup>113</sup> P-A-0099, Mathieu Statement, Exhibit 50, p 2141.<sup>114</sup> P-A-0099, Mathieu Statement, Exhibit 50, p 2141.<sup>115</sup> P-A-0099, Mathieu Statement, Exhibit 50, p 2137.<sup>116</sup> Testimony of K Martin, Transcript, Vol 14, Nov 25, 2022, p 3757:14–p 3763:20.<sup>117</sup> CA-R-232, Martin Statement, p 27 figure 5. Growth rate admitted in Martin Testimony.<sup>118</sup> CA-A-12125 at sheet "Exec summary wireless", rows 473-47, columns T-Y (must expand columns by hitting "+" symbol over column "V").

**APPENDIX I – AGGREGATED TPIA RATES COMPARISON 2019-2021<sup>119</sup>**

Capacity based billing – final monthly capacity rate per 100 Mbps service

<b>Company</b>	<b>2019</b>	<b>2021</b>	<b>Increase</b>
Rogers	\$224.32	\$319.68	<b>42.5%</b>
Shaw	\$251.14	\$296.10	<b>17.9%</b>
Videotron	\$227.05	\$395.36	<b>74.1%</b>

Cable carriers – final monthly access rate per end user

<b>Company</b>	<b>2019</b>	<b>2021</b>	<b>Increase</b>	<b>Speed band</b>
Rogers	\$13.44	\$19.25	<b>43.2%</b>	1
		\$22.50	<b>67.4%</b>	2
		\$28.65	<b>113.2%</b>	3
		\$23.32	<b>73.5%</b>	4
		\$49.06	<b>265.0%</b>	5
		\$49.06	<b>265.0%</b>	6
		\$49.06	<b>265.0%</b>	7
		\$49.06	<b>265.0%</b>	8
Shaw	\$11.47	\$9.34	<b>-18.6%</b>	1
		\$11.23	<b>-2.1%</b>	2
		\$14.91	<b>30.0%</b>	3
		\$20.52	<b>79.0%</b>	4
		\$28.17	<b>145.6%</b>	5
		\$41.36	<b>260.6%</b>	6
		\$50.84	<b>343.2%</b>	7
Videotron	\$14.30	\$12.79	<b>-10.6%</b>	1
		\$15.37	<b>7.5%</b>	2
		\$23.77	<b>66.2%</b>	3
		\$26.89	<b>88.0%</b>	4
		\$37.01	<b>158.8%</b>	5
		\$53.15	<b>271.7%</b>	6
		\$53.15	<b>271.7%</b>	7
		\$81.60	<b>470.6%</b>	8

<sup>119</sup> Exhibit CA-A-0028, McCarthy Statement, Exhibit BB, CRTC, Telecom Order CRTC 2019-288, *Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services* (15 August 2019), Appendix, & Exhibit EE, CRTC, Telecom Decision CRTC 2021-181, *Requests to review and vary Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services* (27 May 2021), Appendix 1.

APPENDIX J - VIDEOTRON EBITDA MARGINS<sup>120</sup>

Speed of internet bundled with 20GB wireless	Cost to provide bundle with volume discount <sup>121</sup>	Cost to provide bundle without volume discount <sup>122</sup>	Proposed selling price of Freedom under Videotron	EBITDA with volume discount	EBITDA without volume discount

## APPENDIX K - COMPARISON OF COMMISSIONER'S 1-ATR WEIGHTS TO DR. SMART'S WEIGHTS

Income Group	1-ATR Weight <sup>124</sup>	Dr. Smart's Weight <sup>125</sup>
Bottom 10%	1.452	1.416
P11-20	1.436	1.453
P21-30	1.423	1.622
P31-40	1.378	1.562
P41-50	1.315	1.609
P51-60	1.265	1.462
P61-70	1.222	1.310
P71-80	1.181	1.265
P81-90	1.150	1.198
P91-99	1.093	1.282
Top 1%	1.000	1.000
Tax revenues	Not Calculated	1.399

<sup>120</sup> Costs from: CA-I-0146, Lescadres Reply Statement, p 8 para 25 figure 1, Proposed Videotron pricing from: CA-I-0144, Lescadres Statement, Exhibit 48, p1123, also duplicated in CA-R-238, Martin Presentation, slide 7 (pricing in Martin slide 11 appear to contain errors, are understated and would provide even lower margins).

<sup>121</sup> Bundled cost taken from column 8 of Figure 1 in CA-I-0146, Lescadres Reply statement

<sup>122</sup> Bundled cost without discount add 10% of column 4 to column 8 of Figure 1 in CA-I,0146, Lescadres Reply statement

<sup>123</sup> Wireless only cost taken from column 8 of Figure 1 in CA-I-0146, Lescadres Reply statement

<sup>124</sup> ID-055, Commissioner Nov 16 Letter and Spreadsheet, Spreadsheet at Tab "Weighted Surplus", cells F3:F13.

<sup>125</sup> P-R-1867, Smart Statement , p 12, Table 1, column 6.

## Please see attachment NPV Calculations - Effects and Efficiencies

Step 1 - Click paperclip on left hand side

Step 2 - Double click attachment to open

