PUBLIC

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

VIDEOTRON LTD.

Intervenor

CLOSING SUBMISSIONS

of

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

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TABLE OF CONTENTS

PART I - OVERVIEW

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

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

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

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

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

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

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

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

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

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

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

PART II - SHAW'S PURSUIT OF A STRATEGIC SALE

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

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

A. Shaw's Significant Competitive Challenges

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

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

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

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

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

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

B. The Strategic Review and Decision To Sell

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

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

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

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

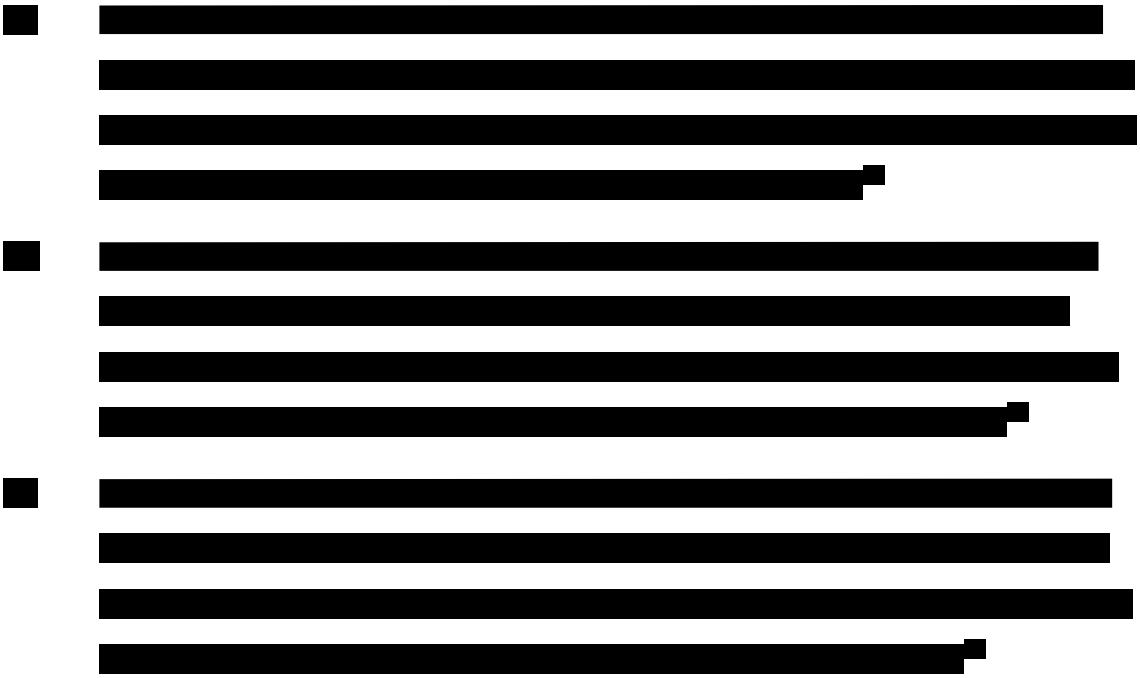
20. In March 2021, Rogers and Shaw entered into an arrangement agreement for Rogers to acquire all of Shaw's shares for approximately $26 billion (inclusive of debt). It was overwhelmingly accepted by Shaw's shareholders, considered "fair and reasonable" by the Alberta Court of Queen's Bench, and approved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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

[redacted]

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

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

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

[redacted]

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

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

36. [redacted]

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

PART V - WIRELINE OWNERSHIP UNNECESSARY TO COMPETE IN WIRELESS

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

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

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

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

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

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

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

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

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

[redacted]

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

[redacted]

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

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

47. The patent inconsistency of Bell and Telus' evidence with the reality of the market and their businesses prompted Rogers and Shaw to subpoena additional documents. Bell and Telus, supported by the Commissioner, said this effort was an abusive fishing expedition. On the eve of the motion, the Commissioner disclosed a redacted version of Telus' December 2021 submission. The problematic content of these documents will be more fully addressed in oral submissions.

A. Bell and Telus Are Concerned About More, Not Less, Competition

48. The Tribunal ordered production, and Telus responded with a dubious claim of privilege. Predictably, the documents contradict the evidence of Bell and Telus, confirming that [redacted] Their real concern is the immediate intensification of competition the Transaction will bring in Western Canada, with Rogers as a stronger wireline competitor than Shaw and Videotron super-charging Freedom.

49. Bell and Telus are Rogers' closest competitors. They collaborate extensively in the provision of wireless services across Canada. They have the most to lose if this Transaction is approved. The notion that their behaviour is motivated by a genuine desire to protect competition in wireless and to spare Videotron from failure is absurd. Their strident opposition and changing narrative is strong evidence of the pro-competitive effects of the Transaction.

50. This irony of their stance should not be lost on the Tribunal. Telus is unquestionably concerned that Rogers' acquisition of Shaw's wireline business will disrupt competition in the West. If Bell and Telus genuinely believe Videotron will fail, they would not be opposing its

acquisition of Freedom. They are not concerned *for* Videotron. They are concerned *about* Videotron and its disruptive track record. This is manifest in their documents:

(a) In an internal email to executives on May 27, 2021, Bell's CEO expressed [redacted];[57]

(b) An August 4, 2022 presentation to Bell's Board of Directors commented that Rogers' acquisition of Shaw's wireline network would give it [redacted];[58] and

(c) In an email to colleagues (including Mr. Kirby), an executive in Bell's wireless division described [redacted]".[59]

51. Telus' documents reveal that alarm bells were ringing at its highest levels, prompting a "top-of-house" GR and PR strategy to "kill, slow and shape" the deal:[60]

(a) In a brainstorming session on February 13, 2021, Telus executives expressed concern that [redacted]";[61] and

(b) In immediate response to the Transaction's announcement, Telus launched [redacted], focussed on "[redacted]." On August 4, 2022, Telus' Board received a presentation on Project Fox, which referred to the company's "advocacy" aimed at "highlight[ing] the danger of PKP [Mr. Péladeau] as remedy partner", and "leverag[ing] the 8 July outage" with ISED.[62] Telus asserted an untenable claim of privilege over this document, and the Commissioner objected to marking it as an exhibit.

52. The documentary record confirms that Bell and Telus do not view the Transaction as lessening competition. The opposite is true. They rightly see it as creating a more robust competitive environment. That is why they have made every effort to influence the outcome of the Commissioner's investigation, implored the Commissioner to commence these proceedings, and

participated actively as his witnesses. Their objective in doing so is obvious: to advance their commercial interests at the expense of competition both in wireline and wireless services in Western Canada.

B. Bell and Telus Witness Statements Do Not Withstand Scrutiny

53. Cross-examination also laid bare the omissions in the Bell and Telus witness statements. The theory that wireline ownership is necessary for effective competition did not hold up:

(a) ***Blaik Kirby (Bell President, Consumer Services)***: Mr. Kirby argued that success in wireless depends on wireline ownership. When presented with statements from Bell's CEO to investors that Bell is "able to compete in the west without wireline infrastructure", Mr. Kirby tried to explain that his CEO [redacted] His cross-examination confirmed that [redacted] His choice of exhibits was designed to [redacted]

(b) ***Stephen Howe (Bell Chief Technology Officer)***: Mr. Howe testified to the importance of wireline ownership for Bell's network resiliency. But he admitted that [redacted]

(c) ***Nazim Benhadid (Telus SVP, Network Build & Operate)***: Mr. Benhadid was called to speak to "the importance of Telus' wireline ownership." But he admitted that "[m]any carriers, including Telus, lease fibre for the purpose of transport, and backhaul", that leases are "very common in the industry", and wholesale backhaul "is an effective tool when available to provide [wireless network] footprint." He conceded that Telus buys fibre access from [redacted] wireline operators at an annual cost of [redacted] million, which he observed was "[redacted]" for Telus [redacted]." Mr. Benhadid also testified that [redacted][66]

(d) ***Charlie Casey (Telus VP, Finance)***: Mr. Casey was evasive, untruthful, and thoroughly discredited. He denied involvement in [redacted] which he described as "business as usual" financial modelling—until confronted with his direct participation in [redacted].[67]

C. The Commissioner's Approach to the Evidence

54. The Commissioner is "not a normal adversary", but "a public officer with a statutory obligation to act fairly." He is a "guardian of the public interest" and "must be motivated by goals of fundamental fairness and not by achieving a strategic advantage."[68]

55. In certain respects, the Commissioner's approach to the evidence was lacking. His litigation strategy included efforts to exclude probative documents from Bell and Telus. He supported their efforts to quash these subpoenas as an abusive fishing expedition, then objected to the admissibility of internal documents contradicting their witness statements. The Commissioner's approach led the Tribunal to express some concern about his keeping documents from its view.

56. Likewise, the witnesses the Commissioner called from the Bureau were unhelpful. Strangely, none had any recollection of lengthy, important meetings with industry representatives—including with Telus' executives in June 2021. They were unable to provide a complete account of the Commissioner's review of Videotron's purchase of Freedom. His failure to call knowledgeable Bureau officials, such as the team leads who led his investigation, became a basis for objecting to the admissibility of his own case team's summaries from these meetings.

57. While the Commissioner may be entitled to call his case as he sees fit, there are consequences to his tactical decisions that court the risk of impairing its merits. Here, these decisions compromised the reliability and persuasiveness of his case.

PART VI - STATEMENT OF LAW

58. The *Competition Act* is practical, market-focused legislation. Its purpose is to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy … and provide consumers with competitive prices and product choices."[69]

59. The *Act* is concerned with the real-world consequences of market activity. The Tribunal's decisions must be grounded in common sense and market realities.

60. Section 92 mandates an inquiry into whether a "proposed merger … *is likely to* prevent or lessen competition substantially." Section 93 lists as factors to be considered "any *effect* of the … proposed merger on price or non-price competition" and "any other factor … relevant to competition in a market that is or *would be affected* by the … proposed merger." Section 96 requires an inquiry into whether a proposed merger "is likely to bring about" gains in efficiencies that outweigh any lessening of competition.

61. The Commissioner asks the Tribunal to take a completely different approach:

(a) ***First***, he asserts his only burden is to show that a non-existent transaction—in which Rogers acquires Shaw's wireline business *and* Freedom—will result in a substantial lessening of competition.[70]

(b) ***Second***, he asserts that the appropriate "but for world" involves turning back the clock two years to assess what *would have happened* had the Transaction never been announced, as opposed to *what will happen* if the Transaction is blocked.[71]

(c) ***Third***, he asserts the Tribunal does not have jurisdiction to consider the contractual commitments Videotron secured from Rogers.[72]

62. The Commissioner's position contravenes the plain language of the *Act* and the case law. He asks the Tribunal to ignore the actual competitive effects of the Transaction in the real-world and engage in a theoretical exercise. That is wrong as a matter of law.

A. The Commissioner's Onus under Section 92

63. The Commissioner "bears the onus to prove 'that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially' under s. 92."[73] He must do so on "clear and convincing evidence."[74]

i. The Commissioner Improperly Seeks to Reverse His Burden

64. This is the first time that an *uncompleted* "proposed merger" has been reviewed by the Tribunal. Every other case decided under s. 92 concerned a *completed* merger that the Commissioner impugned as anticompetitive.[75] In those cases, the Commissioner had the onus to prove that the completed merger substantially lessened or prevented competition compared to what had existed before, and that the relief he sought was appropriate.

65. In some of them, the responding parties proposed alternative remedial orders as a defence against the relief the Commissioner sought, including proposed "remedy" transactions.[76] Having done so, the responding parties bore the onus of demonstrating that their proposed order was more appropriate than the remedial order proposed by the Commissioner.[77]

66. That is not this case. The respondents are not proposing a remedial order or "remedy" transaction. Videotron's acquisition of Freedom is not an "alternative remedy" to the relief sought by the Commissioner; it is *the only transaction* the respondents propose. Rogers has no intention or ability to acquire Freedom and never will.[78]

67. The Commissioner's position is contradicted by leading authorities, which hold that subsequent and intervening events must be considered:

(a) In *Hillsdown*, a key facility belonging to the merged entity was closed after the merger was announced. Although the Tribunal found no SLPC, it considered this post-merger event in the alternative and found that it would have declined to issue a

divestiture order because of the closure. The intervening event arising after the merger had been completed was directly relevant to the Tribunal's assessment under s. 92.[79]

(b) In *Canadian Waste Services*, the Tribunal found an SLPC and ordered a divestiture based on the understanding that key waste disposal facilities had received environmental approvals for expansion. Shortly before the s. 92 hearing, environmental groups sought to judicially review these approvals. CWS did not bring this judicial review to the Tribunal's attention at the hearing, but subsequently sought to vary the decision on the basis of it. The Tribunal admonished CWS for not adverting to the review at the s. 92 hearing and refused to vary its order. Even though they occurred after the merger in question had been completed, the Tribunal clearly viewed these intervening events as important.[80]

(c) The Commissioner's approach has also been rejected by U.S. courts. In *Arch Coal*, the Court was "unwilling simply to ignore the fact of the divestiture" and held that "excluding evidence and argument regarding the [divesture] would be tantamount to *turning a blind eye to the elephant in the room*." It concluded that whether "the challenged transaction may substantially lessen competition … require[d] the Court to review the *entire* transaction in question".[81]

(d) In light of *Arch Coal*, the FTC jettisoned its previous (erroneous) position. It now accepts that where a "merger [is] unconsummated and would occur simultaneously or almost simultaneously with the divestiture" and "the parties entered into the divestiture agreement before the [antitrust authority] filed the complaint or soon after", "the divestiture could be deemed part of the transaction being challenged."[82]

68. The Commissioner cannot sidestep his onus by pretending the respondents are proposing a transaction abandoned months ago and which the Minister has made impossible.[83] The "proposed merger" this Tribunal must consider—and that the Commissioner must show lessens competition substantially—is the Transaction that includes Videotron's acquisition of Freedom.

69. Although the onus properly lies with the Commissioner, the result would be no different if it were shifted to the respondents to show that the proposed divestiture cures any SLC. The evidence on the pro-competitive impacts of the sale of Freedom to Videotron is overwhelming, even before taking into account the pro-competitive impacts of Rogers acquiring the wireline business of Shaw. The Tribunal should find that the result would be the same regardless of how the burden is allocated.

ii. Commissioner Cannot Meet his Burden on "Prevention" In Any Event

70. The "prevention" branch of s. 92 addresses mergers that would have the effect of preventing an independent competitor from entering the market.[84] The only prevention claim pleaded by the Commissioner concerns the alleged prevention of competition in the business services market.[85] The Commissioner has abandoned this claim.[86] He led no evidence that Shaw was a "poised competitor" in the business services market. [redacted].[87]

71. None of the remaining allegations properly relate to prevention. They are in substance claims that the Transaction will lead to a lessening of wireless competition.

B. <u>The "But For" World is Forward-Looking</u>

72. In *Tervita*, the Supreme Court held that the but-for analysis is "*forward-looking*".[88] Chief Justice Crampton explained, in his concurring opinion for the Tribunal, that the appropriate comparison in respect of a proposed merger is "(i) the state of competition that would likely exist if the merger were to proceed, with (ii) the state of competition that would likely exist *if the merger did not proceed*."[89] The Tribunal recently affirmed this approach in *Parrish v. Heimbecker*, holding that "[t]he issue is whether competition would likely be substantially greater, 'but for' the implementation of the merger or proposed merger."[90]

73. The Commissioner has also argued before the Supreme Court of Canada that the Tribunal should "apply a forward-looking approach in its assessment of the likely anti-competitive effects of mergers."[91] But here, he takes the opposite approach.

74. The Commissioner urges a backward-looking view of the "but for" world based on what would have happened *if the merger had never been announced*.[92] He asks the Tribunal to turn the clock back prior to March 2021 and ignore everything that has happened since. This makes no sense and is legally untenable. It precludes the Tribunal from "full[y] assess[ing] . . . all factors relevant in the particular fact situation at issue," [redacted].[93]

75. The Tribunal must evaluate the actual market and commercial realities and assess the likely impact on competition of the Transaction and of any order it may consider issuing.

C. Contractual Commitments Must be Considered

76. The Commissioner accepts the Tribunal's jurisdiction to prohibit Rogers' non-existent acquisition of Freedom. But he takes the position that in evaluating the effects of the Transaction, the Tribunal cannot consider the contractual arrangements between Rogers and Videotron.[94] In other words, the Commissioner is seeking to circumscribe the scope of facts the Tribunal may even "consider" in evaluating the Transaction.

77. There is no authority for that proposition. It is contrary to ss. 92 and 93 of the *Act* and makes no commercial or common sense. The Tribunal's role is to evaluate the likely real-world effects of the Transaction.

78. In his Opening Statement, the Commissioner cites to *Canadian Waste*,[95] but that case does not stand for the proposition that, in considering the competitive effect of a transaction, the Tribunal must ignore concluded contractual arrangements. As noted above, in *Canadian Waste*:

(a) The merger had already closed. The Tribunal had found an SLPC, and was being asked to consider what would be an effective remedy;

(b) The respondent did not propose selling any business or asset—it was only offering to enter into a hypothetical contract with one or more unidentified third parties; and

(c) In those circumstances, the Tribunal concluded that a purely contractual remedy was not available, likely would not be effective in any event, and an asset sale likely would be. That conclusion has no bearing on this case.

79. Nothing in *Canadian Waste* holds that, where the Tribunal is considering a proposed merger that involves the transfer of a business or assets to a third party, as here, it must blind itself to the commercial arrangements that will be enjoyed by that third party in operating the business going forward, or any other relevant facts.

80. The Commissioner's position is also contrary to the language of the *Act*, which requires the Tribunal to consider the likely state of competition post-transaction and all relevant factors:

(a) Under s. 92, the Tribunal must assess, factually, the likely state of the market and competition if the impugned merger were to close. The binding, voluntary agreements between Rogers and Videotron are highly relevant to the likely state of competition following implementation of the merger, as they will allow Freedom to compete more aggressively with a lower cost base.

(b) This is confirmed by the factors set out in s. 93 of the *Act*, including the express provision that the Tribunal may have regard to "any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger." Freedom's enhanced ability and incentive to compete as a result of the

> agreements between Rogers and Videotron are clearly "relevant to competition" in British Columbia, Alberta, and Ontario.

81. The Commissioner may make arguments about the quality or consequences of the agreements, but he cannot ask the Tribunal to pretend they do not exist.

D. Commissioner's Misplaced Reliance on Section 69 of the *Competition Act*

82. The Commissioner puts weight on s. 69(2) of the *Act*, which grants a limited right to have the respondents' records admitted into evidence. This provision provides only a rebuttable presumption that the respondent had knowledge of a record and its contents, and that anything recorded in it as having been done, said, or agreed to was in fact done, said, or agreed to.[96]

83. Section 69 does not allow the Commissioner to unilaterally admit documents for the truth of their contents. Nor does it require the Tribunal to give these documents any weight. In *Sears*, Dawson J. explained that it is for the Tribunal to consider the documentary evidence—including the Commissioner's s. 69 list—in light of the record as a whole:

> … [I]t is for the Tribunal to interpret [the respondent's] documents and to determine what "facts" documents are evidence of and to consider whether those facts, when viewed in the context of the entire body of evidence, establish reviewable conduct. The meaning, weight and the conclusions to be drawn from any document must be assessed by the Tribunal.[97]

84. The Commissioner's reliance on s. 69 is not consistent with its scope. He has submitted over 750 documents—asserting they "speak for themselves"— without putting the overwhelming majority of them to Rogers and Shaw witnesses, who could explain them.[98] The Tribunal has never endorsed this approach to s. 69.

85. The Commissioner's approach is also contrary to the rule in *Browne v. Dunn*, which requires that evidence intended to contradict an opposing witness be put to that witness.[99] This is a

rule of trial fairness that, respectfully, was not followed by the Commissioner in the presentation of his case. Only 32 of the Commissioner's s. 69 documents—less than 4%—were put to fact witnesses, as illustrated by the table and set of examples found at **Appendix 3**.

PART VII - TRANSACTION IS PRO-COMPETITIVE; NO SLPC IN ANY MARKET

86. This application could not be more different from previous cases decided by the Tribunal. Every prior merger decision from the Tribunal has involved a reduction in the number of competitors in some or all of the affected markets, alleged post-merger market shares at least in the range of 60% and often nearly 100%, and alleged price increases of at least 7% and as high as 347%, with typical cases falling in the range of 10-20%.[100]

87. Here, the total number of wireless competitors post-closing remains the same at four, and the number of competitors in bundled services increases, from two to three; Rogers' post-merger share will be [redacted] in Alberta and British Columbia respectively, [redacted];[101] and even the Commissioner's best evidence establishes an average price increase across BC and Alberta of just 1.7%.

88. The Commissioner's economic expert, Dr. Miller, takes an improperly narrow approach to assessing competitive effects with a flawed economic model. He fails to consider its positive effects on the market as a whole and the significant improvement it will bring to Freedom's competitive position.

89. First, the Transaction does not reduce the number of competitors on any dimension. It *increases* them. There are currently four wireless competitors in British Columbia and Alberta and that will be the same post-closing. There are currently three national (or near-national) competitors in British Columbia, Alberta, and Ontario, which will increase to four. And there are currently two

bundled competitors in British Columbia and Alberta, which will increase to at least three. The competitive landscape following the Transaction will be *better* than it is today.

90. Second, the Transaction greatly improves Freedom's competitive position and its incentives to compete vigorously. Mr. Lescadres described the benefits of combining with Freedom and becoming a near-national carrier. His evidence was not challenged. Even, the Commissioner's industry expert, Mr. Davies, acknowledged that the combination of Freedom's network with Videotron's spectrum, and the removal of Shaw Mobile subscribers, will give Freedom's network enormous excess capacity.[102] This means Freedom under Videotron will have near-zero network marginal costs and can grow significantly before incurring material build costs. Dr. Israel explained that excess capacity is the most important driver of aggressive wireless competition.[103]

91. Because of this excess capacity, Freedom will be in a similar position post-closing as it was in 2017, when it launched its Big Gig plans.[104] Dr. Miller points to the Big Gig plans as epitomizing aggressive competition, but fails to acknowledge that this Transaction enables Freedom to replicate that earlier success.

92. Third, the Transaction will enhance wireline competition. Shaw's competitive position relative to Telus has steadily declined over the past several years, as it diverted resources to its wireless business and under-invested in its wireline business.[105] Rogers will be a financially stronger competitor, bringing national scale and an already well-established wireless network.

93. These factors all point to the same conclusion: the Transaction will be pro-competitive in both the wireless and wireline markets. That is supported by competitive responses in the period since the Transaction was announced. To combat the threat they perceive from Videotron in wireless and Rogers in wireline, Bell and Telus have taken aggressive competitive steps:

(a) Shortly after Rogers announced its acquisition of Shaw, Telus announced the closing of a $1.3 billion equity offering, and Bell announced its $1.7 billion "biggest ever" network acceleration plan;[106]

(b) Telus used its sizeable war chest to [redacted];[107] and

(c) Bell developed a detailed post-Transaction competitive plan—elevated to its Board of Directors—that included [redacted].[108]

94. Against that backdrop, the Commissioner seeks to block the entire $26 billion transaction on the basis of: (i) a flawed and overstated, yet still unprecedentedly small, quantification of harm allegedly arising from the transfer of Shaw Mobile's subscribers to Rogers; and (ii) unquantified and theoretical allegations regarding Freedom's competitiveness that do not reflect commercial reality and defy common sense.

95. Even taking the Commissioner's case at its highest, the merger does not result in the elimination or prevention of any competitor, a significant increase in market power, or a material price increase. The alleged effects of this Transaction are minimal and do not rise to the level of "substantiality".

A. The Commissioner Cannot Meet the High "Substantiality" Threshold

96. As explained in *Tervita*, and recently confirmed in *Parrish & Heimbecker*, "it is not enough to demonstrate that an actual or likely lessening of competition will result, or the mere creation of or enhancement of market power." Rather, the "substantial" lessening of competition required under section 92 concerns whether the merged company is likely to be able to "exercise materially

greater market power than in the absence of the merger."[109] In evaluating this, the Tribunal considers the following factors: the degree (or magnitude), the scope, and the duration of any change to competition.[110]

97. Taking his economic case at its highest, the Commissioner has failed to establish that any alleged lessening of competition in this case is "substantial":

(a) ***Degree (or Magnitude)***: Dr. Miller estimates a weighted average price increase across British Columbia and Alberta of just 1.7%. As held in *Parrish*:

> . . .[t]he Tribunal is not aware of any merger cases, in Canada or in any other jurisdiction, where a court or tribunal has recognized that a predicted price effect revolving around 1% could be enough to meet the test of substantiality.

And earlier,

> On the contrary, the Tribunal finds that predicted price variations representing such a small fraction… are immaterial, <u>especially in light of the fact that a merger simulation will always predict a price increase</u>.[111]

The Commissioner has not presented any evidence that a price increase of 1.7% should be considered material on the specific facts of this case.[112] And even that minimal price effect is clearly overstated given the flaws in Dr. Miller's analysis.

The same is true in respect of any non-price dimensions to competition. There will be no decrease in the number of wireless providers or bundled offerings; no reduction in the quality of Freedom's wireless network; Shaw Mobile customers will realize the benefit of Rogers' superior network; and no reduction in service as Videotron [redacted] on roaming and has been rated as the best company for customer service in its territory for 17 years in a row. Instead, there will be increased innovation as Videotron [redacted] use the TPIA framework to offer wireless/wireline bundles, and deploy the technologies it acquired through its acquisition of VMedia.[113]

(b) ***Scope***: The price effects estimated by Dr. Miller are province-wide in British Columbia and Alberta, but many consumers, especially low-income ones, will experience a price decrease through Freedom, while Shaw Mobile customers are protected against any increase by Rogers' pricing commitment. Dr. Miller's analysis also takes no account of the CRTC-mandated low-cost plans available to all consumers. These plans mean that a segment of the market will not be affected at all by the Transaction, as they already subscribe to, or will switch to, these low-cost plans, the prices of which remain fixed.

(c) ***Duration***: Dr. Miller conceded in cross-examination that his forecast price increase would not occur immediately, but rather would play out over time.[114] [redacted] It is equally clear from [redacted] The Commissioner has failed to establish when, or for how long, his alleged price effects will arise, or to consider the competitive responses of Bell and Telus that will curtail any such effects.

98. The Commissioner cannot meet his burden, even accepting Dr. Miller's analysis without question. For the reasons set out below, that analysis must be rejected and the only reasonable assessment of the Transaction is that it will be pro-competitive.

B. Unilateral Effects Are Positive and Pro-Competitive

99. The Commissioner alleges unilateral anti-competitive effects arising from the transfer of Shaw Mobile to Rogers and the transfer of Freedom to Videotron. Those allegations do not withstand scrutiny. Dr. Miller attempted to quantify the harm arising from the transfer of Shaw Mobile to Rogers, but did not quantify any harm associated with Videotron's acquisition of Freedom. Indeed, he acknowledged that his model is agnostic as to whether Freedom remains with Shaw or transfers to Videotron.[116]

100. By contrast, Dr. Israel *did* quantify the effect of Videotron acquiring Freedom and the result is unequivocally positive. [redacted] Dr. Israel quantifies these benefits, concluding they will make Freedom a more effective competitor under Videotron.[117]

101. The Commissioner has also conceded there is no SLC in Ontario. As set out below, that concession affects equally his argument that Videotron's acquisition of Freedom is anti-competitive in British Columbia and Alberta. If the acquisition does not result in an SLC in Ontario, it cannot do so in the West, where Freedom's market share is [redacted] *lower*.[118] The Commissioner's case therefore rests on Shaw Mobile.

C. No Anti-Competitive Effects from Shaw Mobile

i. Shaw Mobile Not Competitively Significant

102. Before focusing on the fundamental errors in Dr. Miller's econometric model regarding Shaw Mobile, some context is necessary. Although Shaw Mobile was popular in the first several months following its launch, its initial success faded and never translated into a sustainable, profitable path forward.

103. [redacted] It offered attractive pricing for wireless customers who were also Shaw Internet subscribers (**Appendix 1, Table 1**), but not for the market more broadly. Shaw Mobile's "rack rate" for non-bundled customers has always been in line with that of Bell, Rogers, and Telus, even though those carriers provide faster and lower-latency wireless services with much better coverage.[120] [redacted]

104. [redacted] In order to "drive more of Shaw's wireline customers to [its] fastest, most expensive and highest value wireline Internet plan", Shaw Mobile offered discounted wireless services as a value-add. But looking only at that discount is misleading: those same customers are paying a premium for their wireline services, such that the bundled price of Shaw Mobile has never been materially discounted relative to Telus.[123]

105. That bears directly on why Shaw Mobile is not part of Videotron's acquisition of Freedom. [redacted]

106. [redacted] (**Appendix 1, Figure 4**).[125]

107. Although the Tribunal heard evidence from multiple senior executives of Bell, Telus, Rogers, Shaw, and Videotron, none testified that Shaw Mobile had a sustained, meaningful impact on wireless prices. None said that they offered lower prices in Western Canada in response to Shaw Mobile.

108. Dr. Miller asserts that Shaw Mobile had a wider market impact, but conceded that this was unsupported by any empirical analysis. Although Dr. Miller acknowledged that Shaw Mobile

"drives a good part of the action" in his merger simulation, he contended that it was "too much to ask" of the data for it to show any impact as a result of Shaw Mobile's entry.[126]

109. His analysis also fails on its own terms. As demonstrated by Dr. Israel in Figures 9 to 12 of his initial report, the trends in price and data consumption Dr. Miller pointed to as evidence of Shaw Mobile's market-wide impact clearly preceded its introduction.[127] Dr. Paul Johnson's analysis also demonstrated the obvious empirical flaws in Dr. Miller's assessment of Shaw Mobile's impact.[128]

ii. Dr. Miller's Analysis is Fundamentally Flawed

110. Shaw Mobile is a bundled [redacted]—and Dr. Miller acknowledged that its customers are tied to their Shaw wireline service, which is the "stickier" part of the bundle.[129] Yet his model treats Shaw Mobile as if it were a wireless-only product, ignoring the more important wireline dimension. As a result, Dr. Miller's model cannot capture the *actual* market dynamics at play.

111. This leads to a related problem: his model is incoherent. In treating Shaw Mobile as a wireless-only product, Dr. Miller assumes that Rogers is acquiring the *wireless* assets of Shaw Mobile. It is not. Videotron is acquiring Freedom's network assets (through which Shaw Mobile provides service). Dr. Miller attempts to escape this problem by arguing that it is the *wireline* assets that matter most to Shaw Mobile subscribers.[130] But this leads back to the first problem: treating Shaw Mobile as a wireless-only product when it is in fact a bundled product driven by wireline service.

112. Dr. Miller developed his model for the s. 104 application on the understanding that Rogers was acquiring Shaw and Freedom. But he failed to properly update his analysis to account for

Videotron's acquisition of Freedom. Dr. Miller's model is therefore irrelevant and the Commissioner has failed to meet his burden.

113. But even if Dr. Miller's model were accepted, his erroneous inputs and assumptions significantly overstate the alleged harm. These include: (i) using Share of Gross Adds ("**SOGA**") instead of share of subscribers; (ii) ignoring marginal cost savings; (iii) ignoring the introduction of a new bundled product; and (iv) ignoring preferences for bundled products.

114. Correcting these problems, as Dr. Israel did, shows the Transaction is welfare-positive.[131]

iii. SOGA vs. Share of Subscribers

Conceptual Flaws with Dr. Miller's Use of SOGA

115. Dr. Miller acknowledges that the appropriate input for his model is the long-run steady-state share of subscribers for each product in the market. Nevertheless, he uses Shaw Mobile's share of gross adds (SOGA) from January to April 2021, when Shaw Mobile was still a new and growing product, instead of Shaw Mobile's share of subscribers from March 2022, when its growth had leveled out (as Dr. Israel did).[132]

116. SOGA measures a firm's share of consumers who switch providers each month or are new to the market. It does not measure a firm's share of all *actively shopping* customers, including customers who consider leaving their provider but decide not to. Dr. Miller acknowledges the correct measure, even on his approach, is share of active shoppers—*not* share of gross adds—but he assumes these things are equivalent.[133] They are not.

117. Dr. Miller concedes that using SOGA will overstate the share of a new firm, like Shaw Mobile, if established firms have large customer bases who are more likely to stay with their current provider than are switchers.[134] That is common sense—firms with large customer bases are

successful at retaining many of those customers—and Dr. Miller provides no support for his assumption to the contrary. The *only* evidence on this point comes from the Commissioner's witness, Mr. Kirby, who testified that roughly [redacted] of Bell customers who consider leaving ultimately decide to stay.[135] This undermines Dr. Miller's assumption and leads to the very problem he concedes can arise: that his use of SOGA overstates the share of a small firm like Shaw Mobile, relative to large firms like Bell, Telus, and Rogers.

118. This alone is enough to reject Dr. Miller's use of SOGA as biased and unreliable, and to prefer an approach based on share of subscribers. But there is a more fundamental problem with Dr. Miller's use of SOGA as an input for his model. As Dr. Israel explained, the model assumes that pricing incentives are determined not just by the effect of price changes on switching customers, but also on their existing subscriber base.[136]

119. This is important in the wireless market, where every subscriber pays for service every month. As Dr. Miller acknowledges, his model is premised on firms making profit-maximizing decisions across their entire subscriber base. Specifically, when considering price increases, the model assumes firms will balance increased revenue from subscribers who stay against decreased revenue from those who leave.[137]

120. Because Dr. Miller uses SOGA as an input, rather than share of subscribers, his model cannot reflect firms' actual pricing incentives. Firms are no longer making pricing decisions across their entire subscriber base (because Dr. Miller's model has not been given that information); instead, they are making them solely on the basis of switchers. As a result, the model assumes firms are solving the wrong profit-maximization problem and therefore cannot accurately predict post-merger pricing decisions.[138]

121. It also forced Dr. Miller to concede that even the minimal annual harm his model predicts will only arise gradually over time as customers switch.[139] On re-examination, he tried to reverse himself, claiming the harm would instead arise "quite fast" because firms would reprice their existing subscribers.[140] But this brings back the problem of not having accounted for those existing subscribers in his model of the firms' pricing incentives. It also contradicts his assertion that customers shop very rarely—once every eight years on average—as that would suggest the alleged harm will not reach the annual level he calculates until eight years post-closing.[141]

122. These contradictions highlight the problem Dr. Israel identifies at the outset of his report: the model Dr. Miller uses *requires* share of subscribers as an input. Using anything else violates the premise of the model and leads to irreconcilable problems.

Data Problems with Dr. Miller's Use of SOGA

123. Even if these conceptual problems are set aside, the SOGA data Dr. Miller uses significantly overstate Shaw Mobile's share and cannot be justified.

124. Dr. Miller acknowledges that Shaw Mobile was a new product with [redacted]"[142] But he assumes that: (i) this period of unusually high growth had run its course by January 2021 (just five months after launch); and (ii) Shaw Mobile's performance over the next four months (January to April 2021) was representative of its long-term competitive significance. Both assumptions are contradicted by the evidence.

Shaw Mobile Price Change was Bona Fide and Profit-Maximizing

125. Shaw Mobile's initial prices were introductory, as is common practice. Dr. Miller acknowledged that carriers often engage in early-stage promotions to attract customers.[143]

126. These introductory prices were revised twice, which Mr. McAleese explained in detail:[144]

(a) First, in October 2020, to introduce "9 Box Pricing" (**Appendix 1, Table 2**); and

(b) In November 2021, Shaw Mobile moved from 9-Box to 12-Box pricing (**Appendix 1, Table 3**) to drive customers to higher wireline tiers. By Dr. Miller's admission, this is precisely the sort of decision his model assumes will be made by profit-maximizing firms.[145]

127. Dr. Miller asserts, without foundation, that Shaw adopted 12-Box pricing in November 2021 to drive down Shaw Mobile's gross adds in a deliberate attempt to circumvent the Bureau's analysis on competitive impacts.[146] Dr. Miller's only support for this assertion is a reference to an alleged meeting on October 18, 2021 that he did not attend, that no witness has testified to or been cross-examined on, and that appears nowhere in the evidentiary record.[147] Mr. McAleese emphatically rejected Dr. Miller's unsubstantiated allegations, and contemporaneous documents confirm Mr. McAleese's evidence:[148]

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128. Confronted with these documents, Dr. Miller admitted he "doesn't know what to make of this price increase" and was unable to identify any documents consistent with his claims on 12-Box pricing. He conceded that every document he reviewed indicated that Shaw believed the price change was profitable, and that he undertook no analysis concerning the manner in which the adoption of 12-Box Pricing in November 2021 affected the profitability of Shaw Mobile.[152]

Evidence on Shaw Mobile's Competitiveness

129. The evidence on Shaw Mobile's competitiveness is reflected in the data. Figure 2 in Dr. Israel's first report uses Dr. Miller's backup data to calculate the month over month change in Shaw Mobile's market share growth over time. [redacted].

130. By March 2022, Shaw Mobile was gaining only [redacted] market share per month. Its growth had plateaued.

131. There is no plausible scenario in which Shaw Mobile ever would have reached the 26% market share Dr. Miller asserts. The only way he can arrive at that conclusion is by assuming SOGA is equivalent to market share, taking an average over a period of steady decline, and assuming that average would continue in perpetuity while Bell, Telus, and Rogers sat on their hands. None of this makes sense.

132. Figure 3 from Dr. Israel's initial report demonstrates this. The solid lines at the bottom show Shaw Mobile's actual market share over time. [redacted]

133. The reason Dr. Miller gave in his reports for cutting off his analysis in April 2021 was that he did not have access to data after that time.[153] Cross-examination revealed that:

(a) Dr. Miller needed and specifically asked the Commissioner for the updated gross adds data from Bell and Telus for his analysis. The Commissioner did not provide this data or give Dr. Miller any reason for not doing so;[154]

(b) As set out above, Dr. Miller could not point to a single document suggesting the price change was anything other than profit-maximizing;[155] and

(c) If the November 2021 price change was profit-maximizing, that would mean it was an ordinary course decision that Dr. Miller could have and should have taken into account in assessing Shaw Mobile's subsequent performance.[156]

134. The Tribunal should draw an inference that the data Dr. Miller requested, and that the Commissioner failed to obtain for him, would have undermined the Commissioner's claims about Shaw Mobile's growth trajectory.

135. [redacted]

	Consumer Surplus	Total Surplus
Miller Original	- $78	- $42
With SoS	- $55	- $22

136. Lastly, on this point, SOGA cannot be justified by reference to porting data which, as Dr. Israel explained, is not the same as diversion and efforts to undermine this reality were rejected by him in cross-examination.[158] It also bears mention that Dr. Miller's porting analysis in his initial report relies on Comlink data which was ultimately struck by the Tribunal.

iv. Freedom's Marginal Cost Savings

137. Videotron led evidence of marginal cost savings Freedom will realise in two categories: [redacted]. Dr. Israel quantified Freedom's marginal cost savings and their impact

on Dr. Miller's analysis. Incorporating these savings further reduces the predicted harm by more than half for both consumer and total surplus.[159]

Videotron's Uncontested Evidence

138. In his reply report, Dr. Miller describes Dr. Israel's reliance on Videotron's marginal cost savings as "speculative"[160] because they are "information obtained from Videotron without clear support."[161] This is wrong.

139. Mr. Lescadres gave detailed evidence regarding the nature and quantum of Freedom's marginal cost savings. The Commissioner did not lead any contrary evidence and did not cross-examine Mr. Lescadres on this point. These savings will help Freedom compete more effectively than it can today by reducing its post-merger marginal costs.

140. Videotron's projected savings are conservative:

(a) ***Handsets***: The handset savings are based solely on Freedom taking advantage of Videotron's current prices with manufacturers, without accounting for any further discounts based on the increased volume.[162] [redacted] which will further lower Freedom's handset costs.[163] Dr. Miller admitted he had not actually reviewed any of Freedom's handset contracts.[164]

(b) ***Roaming***: Videotron estimated that user data usage would grow by only [redacted],[165] when the compound annual growth rate from 2015-2019 was [redacted].[166] The Commissioner did not lead any contrary evidence (despite having ready access to Bell and Telus), nor cross-examine Mr. Lescadres on this point. Not only is Mr. Lescadres' evidence unchallenged, but when the Commissioner put Videotron's projections to Dr. Israel, he explained that they are consistent with the company's plans [redacted][167]

Dr. Israel Incorporates Freedom's Marginal Cost Savings

141. Dr. Israel quantified Videotron's average marginal cost savings per subscriber as between [redacted].[168] This range does not account for marginal cost savings that clearly exist but that Dr. Israel was unable to quantify based on the information available—*e.g.* [redacted]. Not including these additional savings makes even his upper bound conservative.[169]

142. Incorporating Freedom's uncontested marginal cost savings into Dr. Miller's model, together with using Share of Subscribers instead of SOGA, reduces the predicted harm to near-zero: consumer surplus loss of only $4 million and total surplus loss of only $13 million:

	Consumer Surplus	Total Surplus
Miller Original	- $78	- $42
With MC Savings Alone	- $6	- $21
With MC and SoS	- $4	- $13

143. Dr. Miller took issue with the quantum of Freedom's marginal cost savings because he did not accept Videotron's uncontested evidence on this point, but Dr. Miller did not dispute the manner in which Dr. Israel incorporated these savings into the model. Nor was Dr. Israel cross-examined on that point. His analysis is unchallenged.

Ontario Must Be Taken Into Account

144. In his rebuttal report, Dr. Miller says he does not consider the marginal cost savings in Ontario because benefits to consumers in Ontario "do not help a consumer in Alberta or British Columbia."[170] There is no basis to disregard Ontario consumers and focus only on those in British Columbia and Alberta.

145. The Commissioner is seeking a full block, including Videotron's acquisition of Freedom in Ontario, which will prevent Freedom from realizing the marginal cost savings that would otherwise arise in Ontario and benefit Ontario consumers. These benefits must be taken into account in assessing the competitive impact of the Transaction. If Dr. Miller's approach were accepted, the Tribunal would be disregarding the interests of Ontario consumers in favour of consumers in British Columbia and Alberta, when it should be treating all consumers equally.

146. Dr. Miller's position is also contrary to section 93 of the *Act*, which allows the Tribunal to consider "any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger." As a result of Freedom's marginal cost savings, and the introduction of a new bundled product (discussed below), Ontario is a market that will be positively affected by the proposed merger.

v. New Bundled Product

147. As set out above, Videotron led extensive evidence of its plan to offer a new bundled product using TPIA in British Columbia, Alberta, and Ontario. The Commissioner did not challenge this evidence and there can be no dispute that Videotron will pursue this strategy post-closing. Nor did the Commissioner challenge Videotron's projections for the growth and success of that bundled product.

148. Despite this unchallenged evidence, Dr. Miller's model fails to account for the new bundled product. This omission ignores gains in consumer surplus that make the Transaction significantly pro-competitive.

Dr. Miller's Unfounded Criticisms

149. Dr. Miller does not account for this new bundled product because he does not believe it can fully replicate the competitiveness of Shaw Mobile.[171] But that misses the point. The Shaw Mobile

bundled product will remain in the market post-closing, and Videotron's TPIA bundle will be an additional bundled product. So long as it achieves some measure of success—and the uncontested evidence is that it will—competition will *improve* and consumers will benefit.

150. Dr. Miller also claimed that Videotron could not bundle profitably, but admitted in cross-examination that he had not analyzed this part of Videotron's business plan and was relying solely on the evidence of Mr. Hickey, Distributel's Director of Regulatory Affairs.[172] Mr. Hickey conceded he had no knowledge of Videotron's plans or the [redacted] it will receive from Rogers, and was unable to comment on whether Videotron would be able to offer TPIA profitably.[173] As a result, there was no foundation for Dr. Miller's assertion that Videotron's TPIA bundle would not be profitable. The uncontested evidence is that it will be.

Dr. Israel Incorporates New Bundled Product

151. Dr. Israel incorporated Videotron's new bundled product into Dr. Miller's model to assess its impact on consumer and total surplus. He did so using Videotron's conservative and unchallenged projections, and ran sensitivities assuming more or less success than Videotron projected.[174]

152. The results are dramatic. Incorporating the new bundled product shows the Transaction will bring substantial benefits to consumers. Consumer surplus increases to $214 million and total surplus increases to $220 million:

	Consumer Surplus	Total Surplus
Miller Original	- $78	- $42
With New Bundle Alone	+ $52	+ $165
With Bundle, MC, SoS	+ $214	+ $220

153. Dr. Miller took issue with the premise that Videotron would launch even a moderately successful new bundled product, but he did not dispute the manner in which Dr. Israel incorporated this new product into his model. Nor was Dr. Israel cross-examined on the point.

vi. Bundled Preferences and Nested Model

154. The Commissioner's case was replete with documents that noted some customers prefer bundled products and that carriers compete with their bundled offerings. Yet Dr. Miller's model disregards this. He assumes that bundled products compete equally with non-bundled products, implying that bundled customers have no particular preference for bundled products.

155. That is not only contrary to the Commissioner's case, but also common sense.

156. All else being equal, a consumer with a bundled product is more likely to choose another bundled product than a non-bundled one. That basic intuition renders Dr. Miller's model unreliable because it fails to account for the fact that bundled providers compete more closely with each other than they do with non-bundled providers.

157. Dr. Israel incorporated "nests" into Dr. Miller's model to allow for differentiated competition between bundled and non-bundled competition. That does not mean there is no, or even minimal, competition between bundled and non-bundled competition. It just allows for somewhat greater competition between products of the same type.[175]

158. Incorporating even a mild preference for bundled products has a significant effect on the results of Dr. Miller's model, generating positive consumer surplus of [redacted] and positive total surplus of [redacted]:

	Consumer Surplus	Total Surplus
Miller Original	- $78	- $42
With Nest Alone	- $61	- $36
Nest, Bundle, MC, SoS	+ $311	+ $317

159. Again, Dr. Miller took issue with the premise that there is more competition between bundled products, but did not dispute the manner in which Dr. Israel incorporated this into his model. Nor was Dr. Israel cross-examined on the point.

vii. Conclusion on Quantified Effects

160. Taken at face value, Dr. Miller's model predicts only *de minimis* anticompetitive effects. If his model is corrected for just one of the significant flaws identified above, the predicted effects fall substantially. If all four flaws are corrected, the model predicts large welfare *gains*.

D. No "Qualitative" Harm from Videotron's Purchase of Freedom

161. Dr. Miller did not quantify any anti-competitive effects from the sale of Freedom to Videotron. No attempt was made to model the allegation that Freedom will be a "less effective" competitor if its wireless network is "separated" from Shaw's wireline network, due to:

(a) The alleged advantageous "cost structure of owned wireline" versus TPIA for bundled services, and the "cost disadvantage" of leased backhaul;

(b) The "loss of owned wi-fi and access to private wi-fi sites"; and

(c) An alleged "dependency" created by term sheets in the Definitive Agreement.[176]

162. The only quantitative evidence on the effects of Videotron's acquisition of Freedom is in Dr. Israel's interactive model, which proves that this acquisition is highly pro-competitive. Even if all inputs in Dr. Miller's model are accepted, and it is adjusted only for Dr. Israel's calculated marginal cost savings, the model shows that Videotron's acquisition of Freedom will increase consumer and total surplus.[177]

163. The Commissioner instead resorts to an amorphous claim that the wireline/wireless "separation" creates *qualitative* harms for which no dollar value need be ascribed. But qualitative effects are those that *cannot* be measured, not those he *chose not* to measure.[178]

164. Nor can the Commissioner prove that his subjective theories of harm *substantially* outweigh the manifestly pro-competitive benefits quantified by Dr. Israel. Even assessed qualitatively, the harm asserted by the Commissioner rests on a theory—that ownership of wireline assets is "essential" to compete in the wireless market—that was thoroughly debunked.

i. Commissioner's Concession Regarding Ontario

165. The Commissioner's concession in his opening statement—that the sale of Freedom to Videotron will not result in an SLC in Ontario—is fatal to his claim of qualitative effects.[179] Because there is no overlap in Ontario between Shaw's wireline network and Freedom's wireless network, Freedom will be in precisely the same position post-Transaction as it is now: a successful wireless competitor without self-supply of backhaul, bundled wireline services, or a network of wi-fi hotspots in that province. Videotron's acquisition changes nothing in Ontario and the Commissioner's concession acknowledges this.

166. But the concession goes further. Freedom's experience in Ontario shows that its wireless business model succeeded independently of wireline ownership. It is impossible to reconcile the concession that no SLC arises in Ontario (where Shaw has no wireline network in Freedom's wireless footprint) with the allegation of an SLC in British Columbia and Alberta where Freedom has a smaller market share.

ii. No Harm From Leasing Fibre Backhaul

167. The Commissioner's argument that Videotron-Freedom would be at a significant (but unquantified) competitive disadvantage without Shaw's "self-supply" of fibre backhaul is unsupported, inconsistent with the evidence, and contrary to commercial realities.

168. The Commissioner overstates the importance of Shaw's fibre to Freedom. Freedom's backhaul consists of a combination of owned microwave facilities ([redacted]) and fibre leases [redacted]) from nine wireline operators, including Shaw, at market rates.[180] Of that [redacted] leased fibre backhaul, only [redacted] of its spend is with Shaw.

169. In fiscal 2021, Freedom's backhaul lease costs represented only [redacted] of its annual operating expenses. [redacted] of this is payable to Shaw.[181] The Commissioner's arguments on backhaul concern a relatively modest line item.

170. Freedom will benefit from a lower backhaul cost base. Videotron will acquire all of Freedom's microwave facilities and backhaul leases, such that Freedom will continue to operate under Videotron's ownership in exactly the same manner as it does currently. [redacted]

171. Videotron carefully considered Freedom's backhaul needs in choosing long-term leases over fibre acquisition. In the judgment of its executive leadership, [redacted] rates was clearly preferable to buying. Mr. Lescadres testified that "a long-term transport agreement with necessary protections and favourable pricing provided the data transport we needed for the wireless network but [redacted]

[redacted]." Mr. Drif testified to the [redacted]

[redacted].[183] Neither was challenged in their evidence.

172. Leased backhaul is industry standard. Videotron's decision to seek attractive long-term backhaul leases *in lieu* of acquiring or building out a fibre backhaul network aligns with a ubiquitous industry practice, confirmed by witnesses from Bell, Telus, Rogers, Shaw and Videotron:

(a) Rogers' Chief Technology Officer, Ron McKenzie, testified that "no one operator owns all their assets" and "there's a very healthy wholesale market and availability of last mile", which is used to supply backhaul to wireless cell sites. Rogers leases and supplies fibre access, including over [redacted] circuits to Telus at approximately [redacted]. This was not challenged or contradicted;[184]

(b) Videotron's Mr. Drif explained [redacted];[185]

(c) Distributel's Director of Regulatory Affairs, Christopher Hickey, confirmed that fibre transmission facilities are "readily available" in urban centres from many suppliers, including the telephone and cable companies, as well as Zayo and Beanfield. Distributel chose to lease network access rather than build its own;[186]

(d) Telus' Mr. Benhadid told the Tribunal in his witness statement that "network ownership is critical to wireless network performance and reliability." But on cross-examination, he acknowledged that:

- "Many carriers, including Telus, lease fibre for the purpose of transport and backhaul." Telus spends approximately [redacted] million annually on fibre access from 29 operators. Mr. Benhadid described this as [redacted]";
- This practice of leasing fibre backhaul is "common in the industry", with "many wireline carriers hav[ing] reliable, well-performing networks outside of their wireline footprint"; and
- "Wholesale [backhaul] is an effective tool when available to provide [wireless] footprint" and is "very common in the industry";[187]

(e) Bell's Stephen Howe spoke of "significant advantages [of] deploying a wireless network within your wireline network footprint" in his witness statement—but like Mr. Benhadid, he acknowledged on cross-examination that Bell has high market shares in British Columbia and Alberta, where it has no wireline assets, and Freedom has succeeded as a wireless competitor in urban Ontario, where Shaw has no wireline infrastructure;[188]

(f) Mr. English and Mr. McAleese both testified that backhaul arrangements are readily available in Canada and are commonplace.[189]

173. The Commissioner knows this. Telus executives told him at the June 2021 meeting that [redacted]." As excerpted above, notes from Bureau staff make this clear.[190]

174. <u>CRTC decided to forbear from regulating backhaul given the healthy, competitive market.</u> As the expert regulator in the field of telecommunications, the CRTC made the reasoned policy decision *not* to regulate wireline transport market due to the "high incidence of competitor self-supply or alternative supply of fibre-based access and transport facilities", "demonstrat[ing] the existence of competition in the upstream market for such facilities."[191] The CRTC's decision to forbear from backhaul/transport regulation is a "polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake."[192] It is owed deference.

175. Yet the Commissioner asks the Tribunal to second-guess this policy choice and to find that backhaul leases will weaken Freedom and damage competition in the wireless market. Respectfully, this is not consistent with the deference owed to the CRTC on matters within the core of its jurisdiction and expertise. Accepting his position would undermine over a decade of industrial policy aimed at encouraging shared fibre resources.

176. The suggestion that leased backhaul is disadvantageous to ownership is wrong and flies in the face of market realities. In an efficient market, a wireless operator can make a rational decision to lease rather than build or acquire fibre when existing fibre providers have capacity that they rent at attractive rates. That is consistent with Videotron's business plan and its experience in Abitibi where it leases [redacted].[193]

iii. No Harm from Videotron's Reliance on TPIA for Bundled Services

177. The Commissioner suggests that Videotron will "not have the incentive nor the ability" to profitably offer competitive bundled plans and that "the cost structure of owned wireline cannot be replicated through TPIA."[194] This claim cannot succeed in the face of the Videotron's detailed and fully costed plans, which are uncontradicted. As with the Commissioner's arguments on backhaul, it also amounts to an improper collateral attack on the CRTC's regulatory framework.

178. There is no basis to second-guess the CRTC's framework on TPIA. It was instituted decades ago to promote competition, efficiency, and affordability. The most recent rates were set following a rigorous costing process aimed at "provid[ing] Canadians with more choice for high-speed connectivity" and "driv[ing] competition" to bring "high-quality telecommunications networks, innovative service offerings, and reasonable prices for consumers." These rates were found to be "just and reasonable" under s. 27 of the *Telecommunications Act*.[195] As with the CRTC's determination on backhaul, its regulation of TPIA commands strong deference.

179. The TPIA framework is successful in meeting the CRTC's objectives. Collectively, TPIA resellers—like Distributel, VMedia and TekSavvy—provide internet to over 1.3 million households nationwide. The Bureau has described them as "fulfill[ing] a meaningful competitive presence in the marketplace" and acting "as an alternative for countless others, who use the presence of wholesale-based competitors to negotiate better terms from other competitors in the

marketplace."[196] This has not gone unnoticed by incumbent wireline operators. Bell, Telus and Videotron have each taken steps to enter the TPIA markets outside their wireline footprints, through the acquisition of Distributel (Bell), VMedia (Videotron) and, in [redacted].[197]

180. Videotron will use TPIA to offer wireline services at competitive prices in the West and Ontario, "at least [redacted]% below comparable wireline services offered by Telus, Bell and Rogers."[198]

181. Mr. Davies has no basis to question the TPIA framework. He admitted on cross-examination that he was not aware of "the specifics of [the CRTC's] remit" and could not recall what TPIA stands for. The Commissioner engaged Videotron to brief him because "he does not have detailed knowledge of the Canadian network infrastructure or practical knowledge of wholesale access in Canada." Still, Mr. Davies felt entitled to call into question the CRTC's policy determination regarding TPIA.[199]

182. Videotron gets a [redacted] if it exceeds 200,000 subscribers. Mr. Lescadres explained that this [redacted] gives Videotron a "big advantage on that side of the business." Bell's CEO noted his "[redacted]" about precisely this outcome in an email to other Bell executives:

[redacted]

183. Videotron has succeeded as a TPIA reseller in Abitibi. Videotron began operating TPIA services in Abitibi on the Bell network, without a volume discount. Within two years, Videotron has taken a [redacted]% share of this market, with prices up to [redacted]% cheaper than Bell. Mr. Lescadres testified that this "exceeded [Videotron's] expectations" and "confirmed management's belief in Videotron's ability to provide wireline services under the TPIA framework."[201]

184. The Commissioner's only response was to downplay this success as applicable only to a [redacted]", but Mr. Lescadres was unequivocal that Videotron's TPIA foray in Abitibi was "[redacted]" and earned "a [redacted]."[202]

185. Distributel's evidence on TPIA margins is not relevant to Videotron. Mr. Hickey testified that "it would not be feasible to use Shaw's regulated wholesale services" to bundle "as doing so would result in insufficient or negative margins." But his evidence was flawed in two key ways:

(a) First, he only spoke to the ability of Distributel (not Videotron) to offer attractive and financially viable bundles. In answer to a question from the Chief Justice, he acknowledged that he "d[id] not know any of the terms" of the Definitive Agreement" and "wouldn't be able to speak to or address [those] issues";

(b) Second, Mr. Hickey's evidence was contradicted by [redacted]."[203]

186. Videotron will increase the number of competitive bundles in British Columbia, Alberta, and Ontario. Today, there are only two bundled options in the West: Telus and Shaw Mobile, the latter of which does not offer 5G. Again, if the Transaction is approved, consumers can choose between three bundled offerings—Telus, Rogers, and Videotron—all of which will have 5G.

187. The Commissioner fails to appreciate this manifestly pro-competitive outcome. After four weeks of trial, he cannot answer why Videotron should be precluded from building upon Freedom's success and capitalizing upon the TPIA framework implemented by the CRTC for the very purpose of increasing competition, using hard-bargained rates it secured from Rogers.

188. At best, he can say that the operating costs of the wireline aspect of Videotron's bundle will be higher than Shaw's. But, this completely misses the point: Videotron is not proposing to replicate Shaw Mobile's bundle. It will offer a cheaper bundle—priced [redacted]—to disrupt the market and aggressively expand its market share. Mr. Lescadres testified that Videotron is [redacted].[204] And, Videotron does not have the high cost of wireline ownership to maintain. Dr. Israel explained that this is exactly what he would expect from Videotron: offering at-cost TPIA service as a low-risk way to attract wireless customers on a network with excess capacity.[205] This is a win for consumers.

iv. No Material Benefits from Access to Shaw's Go Wi-Fi Network

189. The Commissioner claims that post-Transaction Freedom will lose the benefit of Shaw's "Home Hotspot" network and will become "dependent" on Rogers for access to Shaw's public network of Go Wi-Fi hotspots. His claim grossly overstates the benefits of this service.

190. Go Wi-Fi allows Shaw and Freedom subscribers to authenticate automatically to a network of public hotspots (*i.e.* in shopping centres, areas, malls and restaurants) and residential hotspots (*i.e.* subscribers' home internet modems). Automatic access to Shaw's public hotspot network is available to any user who signs into the wi-fi connection from their mobile device. Non-Shaw subscribers can also connect to Shaw's network of wi-fi hotspots, but only if they manually authenticate. Rogers' President of Integration, Dean Prevost, described this as a "[redacted]

[redacted]

191. Mr. McAleese and Mr. English both testified that Shaw's network of hotspots uses legacy technology developed more than a decade ago, performs poorly, and is now used much less by consumers who can instead take advantage of ubiquitous unlimited data plans. They also testified that the network of hotspots is not used for "offload" purposes, or to operate Freedom's wireless network.[207]

192. Videotron [redacted]

194. Rogers has decided to keep the Go Wi-Fi service and hotspot network post-close, and maintain it for Freedom and Videotron subscribers [redacted]. Mr. Lescadres' unchallenged evidence is that Videotron "[redacted]."[210] Under the Definitive Agreement, [redacted].

195. As for the "Home Hotspot" network, the Commissioner's concerns regarding "offloading" are contrary to the evidence. The Home Hotspot network provides no meaningful offloading benefits:

(a) [redacted]

(b) Because of the minimal Go Wi-Fi usage of Freedom subscribers, Rogers' industry expert Kenneth Martin, determined that, on Mr. Davies' own evidence, the value of offload is minimal;[214]

(c) Home Hotspot traffic can easily be offloaded in other ways. [redacted];[215] and

(d) Videotron determined that the Home Hotspots were not important to Videotron post-closing. Mr. Drif testified: « [redacted][216]

[redacted]

v. No "Dependency" from Definitive Agreements & Network Access Rights

198. A persistent theme in the Commissioner's case is the alleged "dependency" he says Videotron will have on Rogers, due to the network access rights it secured at its option. He asks the Tribunal to accept his own views about the way wireless businesses work. He asks the Tribunal to reject the reasoned judgment of Videotron's executives, who committed a $2.85 billion after extensive due diligence, with billions more to come. He asks the Tribunal to embrace the witness statements of Bell and Telus, revealed to be at odds with the market, their businesses and internal documents they fought to keep from the Tribunal.

199. Full faith and credit should be given to Videotron's business judgment as to the assets and rights necessary to ensure its long-term viability. It represents the culmination of over a decade-long ambition for national expansion. It is to be accorded much deference—particularly given its consistency with standard industry an regulatory practice and the business realities in which new Freedom will operate.

200. Network access agreements are industry-standard. No Canadian carrier owns all of the infrastructure necessary to provide wireless services. Network access agreements are integral to the business model of every carrier for roaming (which is mandatory under ISED regulations) and for backhaul (for which no carrier can self-supply). There is nothing unusual about Videotron's decision to procure these network access services by contract and not to incur the significant upfront investment of purchasing or building an entire wireline network.

201. Freedom's larger post-Transaction footprint means less reliance on roaming contracts. At present, Videotron uses roaming agreements outside its wireless footprint in Quebec and Eastern Ontario, and Freedom uses roaming agreements outside its footprint in British Columbia, Alberta, and Ontario. The combined Videotron-Freedom will have a network across Canada's four most

populous provinces, meaning that subscribers will not need to roam in those provinces. Coupled with [redacted] on the Rogers network, the Definitive Agreement places Videotron-Freedom in a much better competitive position.[219]

202. Network access services are "no obligation", and entirely at Videotron's option. Nothing in the parties' agreement requires Videotron to purchase backhaul, roaming, or TPIA from Rogers. While these services are available to Videotron at [redacted] Videotron has the option to procure them from other parties or build out its own network for self-supply. [redacted].

203. The Definitive Agreement was extensively negotiated by sophisticated parties. Mr. Lescadres detailed the negotiations leading up to the Definitive Agreement, including Videotron's insistence on securing terms it judged necessary to operate Freedom competitively. The Commissioner did not challenge this evidence on cross-examination.

204. Videotron is perfectly capable of competing vigorously with network access agreements. [redacted] In 2021, it commenced proceedings against Rogers to assert its claimed rights under that agreement. While Mr. Lescadres [redacted],[221] it shows that Videotron has asserted itself when it perceives unfair treatment.

205. The Definitive Agreement contains [redacted]

206. Outside contractual dispute resolution, market participants already have recourse to the CRTC, to which Parliament granted broad powers to sanction problematic market behaviour:

(a) The Commissioner put to Mr. Martin (but not to any Rogers fact witness) a CRTC decision from 2014 in which Rogers was fined, in an effort to prove the potential for dominance over Videotron. But that decision and others like it prove the opposite: the existence of a strong regulatory framework.[223]

(b) The Commissioner did not point to a more recent decision in June 2022 in which the CRTC imposed a $7.5 million penalty on Bell for denying Videotron access to support structures. Nor did he refer to an August 2020 decision in which the CRTC found that Telus engaged in unjust discrimination by deliberately reducing the ability to complete calls to the Canadian Territories.[224] These decisions demonstrate that the CRTC regularly and effectively exercises enforcement powers to ensure market participants act in accordance with their obligations.

207. Bell & Telus Network Sharing Agreement: The Commissioner has never challenged the Bell/Telus wireless network sharing agreement as giving rise to inappropriate "dependency." Since as early as 2001, Bell and Telus have been partners in a long-term contractual relationship that creates a single nationwide wireless radio access network. This is the only national network sharing partnership in Canada of its kind and provides obvious competitive advantages to Bell and Telus:

(a) [redacted]

(b) [redacted]

(c) [redacted]

208. The reality is that Bell and Telus are and will remain far more reliant on one another than Videotron will ever be on Rogers. This acknowledged dependency appears to have been lost on the Commissioner, who has never scrutinized Bell and Telus' arrangement.

vi. Rogers Will Have the Same Incentive as Shaw to Offer Attractive Bundles

209. The Commissioner argues that Rogers will have reduced incentives to offer the attractive bundled services that Shaw Mobile does. This too is contrary to the evidence and market realities.

210. Post-closing, Rogers will face even greater competitive pressures in British Columbia and Alberta than those that led Shaw to introduce Shaw Mobile. The entry of Videotron's bundled products, at lower prices, will challenge Rogers more than Shaw is currently challenged. If Rogers fails to replicate any "disruptive" force that Shaw Mobile played, it risks losing its most valuable wireline subscribers. Dr. Israel's evidence was unchallenged that "[a]s a matter of economics, it would not make sense for Rogers to pay many billions of dollars to acquire Shaw's wireline business just to see its newly acquired subscribers migrate to Telus."[228]

211. [redacted]

212. The Transaction will be better for Shaw Mobile subscribers who will move to Rogers' superior network—a source of consumer surplus that Dr. Miller failed to account for. On cross-

examination, he acknowledged that (a) the "non-price" parameter in his model captures the quality of the wireless product; (b) Rogers' product is higher quality than Freedom's; and (c) his model did not adjust the quality parameter as it relates to the transfer of Shaw Mobile's 450,000 subscribers on to Rogers' superior network. Dr. Miller wrongly assumes that, post-Transaction, these subscribers will remain on Shaw's inferior network when the evidence is that they will enjoy a better product under Rogers.[230]

vii. Rogers' Network Outage Has No Bearing on the Tribunal's Task

213. The time spent by the Commissioner on Rogers' July 2022 outage—which Member Askanas rightly described as a "black swan" event—was an unfortunate distraction. It has no bearing on the Transaction or the landscape for wireless competition. It is in the exclusive jurisdiction of the CRTC, which has been fully responsive. If anything, Rogers' commitments to the CRTC and Parliament (which it is now implementing) will ensure a stronger, more resilient network than any other network in Canada. This is a tangible benefit to consumers.

214. The commercial reality is that outages can and do occur on even the best designed and most resilient networks. Like Rogers, Bell suffered a significant outage in 2020 that brought down its wireless and wireline services in Quebec and Ontario for several hours. [redacted].

215. But outages typically have "little impact on [wireless] competitive dynamics." Mr. Martin—who has advised ten of the top thirteen telecommunications companies in the U.S.—

testified that most outages occur unexpectedly and resolve quickly. This was confirmed by Rogers' Q3 2022 results, which showed substantial net adds in its wireless business—indicating that the outage is now behind Rogers.[232]

216. Mr. Martin also testified that "it is not typical for consumers to make purchasing decisions based on (much less be aware of) the relationship between wireless providers and their wireline backhaul providers."[233] It is simply not a factor that is relevant to Freedom's competitiveness post-Transaction. The outage was certainly not a concern for Videotron. [redacted]

217. The July outage will not mean less, but *more* reliable, networks. Rogers has committed to physically separate its "common core" currently shared by its wireless and wireline networks. As a result, if either of those networks experiences a system-wide outage, it would not cause material service interruption to the other. Rogers estimates that this is a $250 million investment over at least three years, and would be significantly facilitated by the acquisition of Shaw's wireline network.[235]

218. This is an unprecedented commitment that no other wireless carrier has given. Once complete, Rogers' fully separated IP core will be the industry benchmark, ensuring that its subscribers, customers, and third parties—including Freedom for roaming and backhaul—will access the most robust, redundant, and resilient network in the country.[236] The outcome is manifestly pro-competitive. The Commissioner's cynical attempt to capitalize on the outage was not a high point of this trial. It should be soundly rejected.

E. Commissioner Has Not Established Any Coordinated Effects

219. To meet his burden on coordinated effects, the Commissioner must establish both that the relevant market is susceptible to coordination and that the Transaction substantially increases the likelihood or effectiveness of coordination. He has not done either. Nor has he made any attempt at quantification.

i. Wireless Market Not Susceptible to Coordination

220. As a matter of standard economic theory, and as summarized in the MEGs, a market is only susceptible to coordination if firms (i) individually recognize mutually beneficial terms of coordination; (ii) are able to monitor each other's conduct and detect deviations; and (iii) have credible means of punishing such deviations.[237]

221. As Dr. Israel explained, the market for wireless services does not satisfy these conditions. Coordination is more readily met for commodity products, rather than multidimensional ones like wireless services, where providers compete on network quality, customer service bundling, handset discounts, and roaming rates, and many other factors. Indeed, the Commissioner has been at pains to point out the differences in network quality, customer service, and bundling offers between different carriers. These dimensions of competition make coordination unlikely in this industry.[238] The advent of 5G makes further product differentiation and innovation possible and co-ordination even less likely.

222. In addition, the Commissioner did not call any fact witnesses to provide evidence that the wireless market is coordinated, or elicit evidence from his Bell or Telus witnesses about the characteristics of the wireless market or coordination.

ii. Freedom's Competitiveness Will be Strengthened

223. For the reasons set out above, Freedom will be *stronger* under Videotron. To the extent the wireless market is susceptible to coordination and Freedom has disrupted that coordination, it will be better positioned to be disruptive post-Transaction. Freedom will now be in the hands of Videotron, an experienced and known disruptor. Its network will have significant excess capacity and near-zero network marginal costs. This will incent aggressive competition, similar to what Freedom achieved in 2017 with its Big Gig plans.

224. The Commissioner asserts that Freedom under Videotron will be more susceptible to coordination because Videotron would fear retaliation in its "home market" of Quebec. But this ignores two crucial facts.

(a) Videotron's prices in Quebec are already lower than Bell, Telus, and Rogers, so any attempt to undercut it would cause more harm to those carriers than to Videotron.

(b) Videotron's market share is lower than Bell's and Telus's, and equivalent to Rogers', meaning it has the *least* to lose from any retaliatory price war.

F. Shaw Not A Viable or Effective Competitor in But-For World

225. The Commissioner alleges that [redacted] The evidence proves otherwise. The Tribunal should have a clear-eyed view of the challenges Shaw would face were the Transaction blocked. Mr. Shaw testified that the company cannot survive on its own:

[redacted]

226. The Commissioner sidesteps this evidence by relying on speculation from Mr. Davies, who contended that Shaw is "well positioned to do 5G" (albeit "with some delay") because Shaw will supposedly receive a $1.2 billion break fee from Rogers if the Transaction is blocked, which could be used to purchase the necessary spectrum.[240]

227. [redacted].

228. This cascade of assumptions is untethered from reality. Shaw has no ready path to acquiring 3500 MHz spectrum licences. [redacted]

229. Even if Shaw could find a willing seller of spectrum, its deployment would involve considerable capital costs and take years. [redacted]

230. In the circumstances, Shaw's and Freedom's wireless offerings will become less competitive if the Transaction is blocked. 5G services are now available from the Big 3 to

approximately 70% of the Canadian population, including in all of Ontario, Alberta and British Columbia.[248] Freedom is thus "an outlier in not having 5G capability."[249] As Mr. Verma confirmed in his evidence, the inability of Freedom to offer 5G has "served as a significant competitive deterrent."[250] Mr. Kirby agreed.[251]

231. To make matters worse, without being able to provide 5G, Shaw risks losing the ability to sell the iPhone. Each new iPhone model since 2020 has been 5G capable—so long as the device is operating on a 5G network. [redacted] The consequences to Freedom associated with losing the right to sell iPhones would be "an existential event" and a "major setback."[253]

232. The challenges Shaw faces in the "but for" world contrast dramatically with Videotron's position in the post-merger world. Whereas Shaw's wireless business has not been cash flow positive, Videotron can immediately generate free cash flow to lower prices and invest in 5G because of the low purchase price. Whereas Shaw has an uncertain path to 5G, Videotron has 3500 MHz spectrum. Whereas Shaw needs to invest significantly in its wireline network, Videotron can compete under the TPIA framework without further up-front investments.

PART VIII - TRANSACTION WILL GENERATE SIGNIFICANT EFFICIENCIES

233. The efficiencies defence need not be considered because the transaction is clearly pro-competitive. But if the Tribunal accepts Dr. Miller's analysis, the respondents have proven cognizable productive efficiencies of at least [redacted] million per year, overwhelming any alleged anti-competitive effects. The efficiencies are transaction-specific and would be lost in the event of an order blocking the Transaction.

A. Efficiencies Evidence Amply Meets Canadian Requirements

234. The evidence of Rogers and Videotron demonstrates the nature, magnitude and likelihood of their forecasted efficiencies. The cognizable efficiencies are supported by ordinary course documents (integration plans, management consultant studies and accounting statements) and evidence from key Rogers and Videotron personnel, consistent with the MEGs[254], the Commissioner's guidance[255] and the jurisprudence.[256] Rogers' efficiencies expert, Andrew Harington, quantified the likely productive efficiencies, as he has done in multiple proceedings before this Tribunal acting for both the Commissioner and merging parties.[257]

235. The quantified cognizable efficiencies are conservative and likely to be achieved. Ms. Fabiano testified that Rogers' senior leadership will be measured against their synergy plans and therefore they "want to under promise and overdeliver."[258]

236. The U.S.-based approach to efficiencies advocated by the Commissioner and his expert, Professor Mark Zmijewsky, should be rejected. He has never testified before this Tribunal[259] , was unfamiliar with aspects of the defence[260], and admitted he had never been qualified as an expert in efficiencies "anywhere".[261] Prof. Zmijewsky did not disclose in his report that he developed his methodology over 20 years ago to be consistent with the U.S. Horizontal Merger Guidelines ("**HMG**").[262] Instead, he implied in his report that his methodology was based on the MEGs and claimed that he used them as his "framework".[263] On cross-examination, he admitted that his methodology is not based on the MEGs, but the HMG instead, relying heavily on U.S. principles.[264] He also admitted that the Commissioner had not brought to his attention to *Superior III*, which addressed the differences between the U.S. and Canadian approaches:[265]

> The Tribunal does not criticize the American antitrust regime, but it notes that it is the result of circumstances, policies, and judicial interpretation of the pertinent statutes that are unique to the United

> States. The opinions of American commentators on Canada's Act, whether cited by the Court or by the Commissioner, should be seen in the context of historical and continuing hostility toward efficiencies in merger review in the United States.
>
> . . . The adoption of the American approach to efficiencies under the Act would, without question, introduce the hostility that characterizes that approach.[266]

237. Prof. Zmijewsky's methodology does not reflect this Tribunal's approach to efficiencies, and it yields impractical and unlikely outcomes. This Tribunal should favour Mr. Harington's evidence and Prof. Zmijewsky's evidence should be given no weight.

[redacted]

[redacted]

[redacted]

[redacted]

PART IX - EFFICIENCIES OVERWHELM ALLEGED HARM

249. The efficiencies the Transaction will generate—at least [redacted] million per year in productive efficiencies alone—overwhelm even Dr. Miller's alleged anti-competitive effects, regardless of whether the Tribunal adopts a Total Surplus or a Balancing Weights approach.

250. Taking into account the specific benefits to low-income consumers (discussed below), and applying even the highest weight available on the evidence, yields a quantum of harm that is less

than the efficiencies *conceded* by the Commissioner's expert, Prof. Zmijewski. And that is without accounting for any of the flaws in Dr. Miller's analysis.

A. No Reason to Depart from Total Surplus Standard

251. The Total Surplus Standard is the default approach for conducting the trade-off between efficiencies and effects. The Commissioner must demonstrate a good reason to depart from that approach and he cannot do so here.

252. In *Superior Propane*, the Tribunal applied a balancing weights approach because some low-income Canadians purchased propane as a necessity to heat their homes and would have no alternative but to pay higher prices post-transaction to a monopolist supplier.[295] There is no similar rationale in this case.

253. First, the "necessary" component of wireless service was defined by the CRTC in Telecom Regulatory Policy 2021-130, which mandated large carriers, including Rogers, to offer plans with certain features for a maximum of $35 per month.[296] The CRTC concluded these plans would "enable Canadians to participate in the digital economy," allow cell phones to be "used as substitutes for landline telephones," and be "*responsive to a consumer's most significant needs*."[297]

254. The Transaction will have no impact on the availability or price of necessary wireless services, which will remain available to all Canadians at a fixed price of $35 per month.

255. Second, the Commissioner's own expert predicts that Freedom's prices will go *down* by 15-17% in British Columbia and Alberta as a result of the transaction.[298] The uncontested evidence from the Commissioner's own witnesses is that Freedom caters primarily to a lower-income market segment, and lower-income consumers are likely to choose the lowest-price option, which

is Freedom.[299] The evidence is clear that low-income consumers will be *better off* as a result of the transaction, and markedly so.

256. [redacted]

258. The Commissioner did not lead any contrary fact or expert evidence and did not cross-examine Mr. Prevost or Dr. Israel on these points. The unchallenged evidence is that this Transaction will bring significant benefits to low-income consumers.

B. Weight on Consumer Surplus is Small

259. In *Superior III*, the Tribunal set out the following balancing weights formula, where CS is the loss in consumer surplus, PS is the gain in producer surplus, EF is the efficiencies generated by the transaction, and *w* is the weighting to be applied to consumer surplus loss:

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

260. If X is greater than zero, then the efficiencies are greater than and will offset even the weighted effects and, pursuant to s. 96 of the *Act*, the transaction will not be blocked.[303]

i. Expert Evidence

261. The Tribunal made clear in *Superior III* that if the Commissioner intends to advocate for a balancing weights approach, he must adduce expert evidence on how to calculate the appropriate weight.[304] The Commissioner has failed to do so.

262. The Commissioner's expert, Dr. Lars Osberg, addressed the relative consumption of wireless services and predicted shareholdings in the combined Rogers/Shaw across income distributions, but did not attempt to establish a basis for any weighting. Similarly, Dr. Katherine Cuff discussed the Canadian income tax system and its progressivity across different income groups, but acknowledged that she had not been asked to calculate, and did not calculate, the weighting that can be inferred from the tax system.[305]

263. Dr. Cuff also acknowledged that there are two standard approaches for inferring distributional weights from the income tax system, that Rogers' expert, Dr. Michael Smart, had used one of those two approaches (the inverted optimum method), and that no other expert in this case had used the others.[306] Thus, the only evidence, expert or otherwise, on the appropriate balancing weight comes from Dr. Smart.

264. There is no foundation, expert or otherwise, for the Commissioner's approach to balancing weights or "socially adverse transfer", as reflected in the spreadsheet he submitted to the Tribunal on November 16, 2022. In particular, his approach is not supported, or even commented on, by any of his experts, and Drs. Smart, Israel, Ware, and Shaw's expert, Dr. David Evans, explained that it is economically incoherent and contrary to well-established economic principles.

ii. The Appropriate Weight

265. The Commissioner appears to take the position that the weighting on consumer surplus should apply across the entire income distribution, as opposed to only low-income consumers. There is no precedent or support for the Commissioner's approach and it invites the Tribunal to engage in a micro-redistribution exercise that ignores income mobility over time.

266. There is no basis to depart from the approach in *Superior III*, which applied the weighting only to the bottom 20% of the income distribution. This yields an overall weight on consumer surplus of 1.23. If the entire income distribution is considered, the weight rises slightly to 1.32.

iii. Applying the Weight

267. Dr. Osberg acknowledged that the balancing weights exercise should take into account the benefits to consumers the Transaction will generate.[307] [redacted]

268. Taking the Commissioner's case at its highest and applying it to the formula yields:

[redacted]

269. As a result, the respondents need only establish [redacted] million in efficiencies for the Transaction to be allowed, or [redacted] million if the higher weight of 1.32 is used. Both are well below the amount of efficiencies *conceded* by Dr. Zmijewski of [redacted] million per year.[308] If the Total Surplus Standard is used, no efficiencies are needed at all. Calculations using different inputs are set out in **Appendix 5**.

PART X - ORDER REQUESTED

270. The respondents respectfully ask that the Tribunal dismiss the Application with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of December, 2022

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[1] Transcript, Day 18 (Dec. 1), pp. 4644:23-4645:5 (Israel Cross).

[2] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 59(a); Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 14 & 19.

[3] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 12. See also: Transcript, Day 10 (Nov. 21), pp. 2616:18-2617:15, 2621:7-2622:20 (English Chief); Transcript, Day 11 (Nov. 22) pp. 2685:15-2687:4 (English Cross); Transcript, Day 11 (Nov. 23), p. 2893:8-25 (McAleese Chief).

[4] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 223-224.

[5] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 227, Exhibit 78, pp. 2785, 2965.

[6] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 223-224, 227; Transcript, Day 12 (Nov. 23), pp. 3120:17-3121:21 (McAleese Panel Questions).

[7] Ex. C-R-190, Amended Witness Statement of Rod Davies (September 23, 2022), Exhibit 1, p. 52; Transcript, Day 10 (Nov. 22), pp. 2617:16-2619:15 (English Chief).

[8] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 65; Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 11 & 13.

[9] Transcript, Day 4, pp. 922:3-923:5 (Kirby Cross).

[10] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 105-106, 115, 120. Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), paras. 96-97.

[11] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 65; Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 11.

[12] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 65; Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 11 & 13.

[13] Transcript, Day 10 (Nov. 21), pp. 2613:6-2614:4; pp. 2617:16-2619:15 (English Chief); Transcript Day 11 (Nov. 22), pp. 2682:6-2683:2, 2688:6-2689:20 (English Cross).

[14] Transcript, Day 10 (Nov. 21), pp. 2613:6-2614:4; pp. 2617:16-2619:15 (English Chief); Day 11 (Nov. 22), pp. 2682:6-2683:2, 2688:6-2689:20 (English Cross).

[15] Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), para. 115; Ex. CA-R-198, Amended Witness Statement of Brad Shaw (September 23, 2022), para. 27; Ex. CA-R-190, Witness Statement of Rod Davies (September 23, 2022), para. 17.

[16] Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), paras. 115-116; Ex. CA-R-198, Amended Witness Statement of Brad Shaw (September 23, 2022), paras. 27 & 34; Ex. CA-R-190, Witness Statement of Rod Davies (September 23, 2022), paras. 17 & 44.

[17] Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), para. 126.

[18] Ex. CA-R-198, Amended Witness Statement of Brad Shaw (September 23, 2022), paras. 35-40. Ex. CA-R-165, Amended Witness Statement of Trevor English (September 23, 2022), Exhibit 35, p. 49.

[19] Transcript, Day 3 (Nov. 9), p.775:2-777:2 (Kirby Cross).

[20] Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), paras. 72-73.

[21] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), Exhibit 160.

[22] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), paras. 105-106.

[23] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 55.

[24] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 64.

[25] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 136(b).

[26] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 136(a).

[27] Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), para. 84; Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 136(c).

[28] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 156.

[29] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 64.

[30] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 138.

[31] Ex. P-I-0145, Witness Statement of Jean-François Lescadres – Public (September 23, 2022), para. 3.

[32] Ex. P-I-0145, Witness Statement of Jean-François Lescadres – Public (September 23, 2022), para. 4.

[33] Ex. P-I-0160, Witness Statement of Pierre Karl Péladeau–Public (September 23, 2022) para. 23.

[34] Transcript, Day 4 (Nov. 10), p. 860:5-12 (Kirby Cross).

[35] Ex. CA-R-212, Responding Witness Statement of Dean Prevost (October 20, 2022), Exhibit 15, slide 2.

[36] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 5; CA-R-212, Responding Witness Statement of Dean Prevost (October 20, 2022), para. 63.

[37] Transcript, Day 9 (Nov. 18), p. 2335:8-18 (Lescadres Panel Question); Ex. CA-I-159, Witness Statement of Pierre-Karl Péladeau (September 23, 2022), paras. 15; Ex. P-R-008, Statement from Minister Champagne on competitiveness in the telecom sector dated October 25, 2022.

[38] Transcript, Day 2 (Nov. 8), pp. 486:14-10; p. 496 :18-22 (Verma Cross); Day 3 (Nov. 9), p. 536:10-25; p. 538:12-25 (Dhamani Cross).

[39] Transcript, Day 9 (Nov. 18), p. 2336:6-15 (Lescadres Panel Question).

[40] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 66.

[41] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 7.

[42] Ex. P-R-0009, Statement from Pierre-Karl Péladeau in response to the Minister's statement October 25, 2022.

[43] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 193.

[44] Transcript, Day 9 (Nov. 18), pp. 2172:3-2173:21 (Lescadres Chief).

[45] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), paras. 108-112.

[46] Ex. CA-I-0146, Responding Witness Statement of Jean-Francois Lescadres (October 20, 2022), para. 39.

[47] Ex. C-A-146, Responding Witness Statement of Jean-Francois Lescadres (October 20, 2022), paras. 56-58.

[48] Ex. P-I-0145, Witness Statement of Jean-François Lescadres – Public (September 23, 2022), para. 133.

[49] Transcript, Day 9 (Nov. 18), pp. 2163:1-2164:7 (Lescadres Chief).

[50] These include (i) Videotron's projected wireless subscriber growth and market share estimates; (ii) Videotron's projected ARPU figures; (iii) [redacted] (iv) Videotron's plan to roll out 5G, the timing of that roll out or Videotron's 10-year capital expenditure plan to support the roll out; (v) Videotron's projected wireline subscriber growth under the TPIA regime or the detailed cost breakdown for providing those services contained in its financial model; (vi) Videotron's projected cost savings with respect to roaming, including its estimates of future data usage; (vii) Videotron's projected cost savings related to handset manufacturers, or the increased rebates and marketing supports that it will receive as a national carrier; and (viii) Videotron's projected cost savings and the improved quality of service for customers in Eastern Ontario owing to the combination of the Freedom and Videotron networks and spectrum assets in that region.

[51] Transcript, Day 10 (Nov. 21), pp. 2368:22-2372:20 (Drif Chief).

[52] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres – (September 23, 2022), Exhibit 27, p. 895.

[53] Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), para. 49.

[54] Ex. CA-R-0232, Witness Statement of Kenneth Martin (September 23, 2022), para. 72.

[55] Ex. ID-034 (ABD #202456), Telus market contact meeting, 6 June 9, 2021, slide 4 (emphasis added); Ex. CA-R-0022, Summary of Bureau-TELUS call June 9, 2021 - Conf. A, pp.1-3.

[56] Ex. ID-027 (ABD # 201108), BCE Submission to Competition Bureau dated December 29, 2021, paras.9-10; Ex. ID-014 (ABD # 205028), Telus Submission to Bureau dated 6 December 3, 2021, pp. 4-5.

[57] Ex. CA-R-085, Email dated May 27, 2021 from M. Bibic to B. Kirby and others.

[58] Ex. CA-R-080, Post Sea Response Plan Update to BCE Board of Directors August 4, 2022, p.19.

[59] Ex. CA-I-083, Email re Vidéotron could take Fizz national as an MVNO dated September 17, 2020.

[60] Ex. ID-030 (ABD #100922), Redacted Telus Board presentation dated 11 August 4, 2022, slide 5.

[61] Ex. CA-R-059, Notes from February 13, 2021, internal Telus war games session, p.7.

[62] Ex. CA-R-067, E–mail from J. Bajic to internal recipients dated March 22, 2021, p.1; Ex. ID-030 (ABD #100922), Redacted Telus Board presentation dated 11 August 4, 2022, slide 3.

[63] Transcript, Day 4 (Nov. 10), p. 812:9-16, p.883:1-885:2 (Kirby Cross).

[64] Transcript, Day 4 (Nov. 10), pp.922:3-923:5 (Kirby Cross).

[65] Ex. CA-A-0111, Witness Statement of Stephen Howe (Bell) (September 23, 2022), para. 17; Transcript Day 6 (Nov. 15), pp.1331:17-1332:6, pp.1358:23-1359:8, p. 1363:10-17, pp.1389:22-1393:21 (Howe Cross).

[66] Ex. CA-R-102, E-mail exchange between Mr. Benhadid and Mr. Amery re Competition Bureau prep dated June 2-4, 202; Transcript Day 5 (Nov. 14), p.1150:2-20, pp.1173:22-1174:15 (Benhadid Cross).

[67] Transcript, Day 3 (Nov.9), pp. 572:14-574:25, pp.580:1-583:14, p.640:3-17, p.685:2-11, pp .696:1 - 700:13 (Casey Cross).

[68] *Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6, para. 68, rev'd on other grounds in 2018 FCA 24; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2004 Comp. Trib. 2, paras. 62-64.

[69] *Competition Act*, R.S.C., 1985, c. C-34, s. 1.1.

[70] Commissioner's Written Opening, paras. 185-188.

[71] Commissioner's Written Opening, paras. 69, 83-84.

[72] Commissioner's Written Opening, para. 189.

[73] *Tervita Corporation v. Canada (Commissioner of Competition*), 2013 FCA 28 paras. 107-109, *reversed on other grounds*, 2015 SCC 3, para. 193 (Karakatsanis J, dissenting, but not on this point). See also *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18, paras. 18, 179 & 180.

[74] *Tervita Corporation v. Canada (Commissioner of Competition*), 2013 FCA 28 paras. 107-109, *reversed on other grounds*, 2015 SCC 3, para. 193 (Karakatsanis J, dissenting, but not on this point). See also *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18, paras. 18, 179 & 180.

[75] *Canada (Director of Investigation and Research) v. Southam Inc.*, (1992) 43 C.P.R. (3d) 161 (Comp. Trib.), affirmed [1995] 3 F.C. 557 (C.A.), affirmed as to remedy, [1997] 1 S.C.R. 748 (SCC); *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd*, (1992), 41 C.P.R. (3d) 289 (Comp. Trib.); *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15 (Superior Propane #1)

and , *Commissioner of Competition v. Superior Propane Inc.*, 2001 FCA 104 (Superior Propane #2); *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib.3; *Tervita Corporation v. Canada (Commissioner of Competition*), 2015 SCC 3.

[76] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, paras. 14, 89; *The Commissioner of Competition v. Canadian Waste Services Holdings Inc*. (Remedy), 2001 Comp. Trib. 34 , para. 4.

[77] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, paras. 83-89.

[78] Rogers' Written Opening, para. 22, see also: Shaw's Written Opening, para. 4.

[79] *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd*, (1992), 41 C.P.R. (3d) 289 (Comp. Trib.), paras. 4, 5, 14-22, 44, 94, 137, 141 & 157-165.

[80] *Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2004 Comp. Trib. 10, paras. 1-4 & 18-38.

[81] *FTC v. Arch Coal, Inc.*, No. 1:04-cv-00534, ECF No. 67 (D.D.C. July 7, 2004) at pp. 2-5 & 7-8 (emphasis added).

[82] *In re Otto Bock HealthCare North America, Inc.*, 2019 FTC LEXIS 79 at p. [*126].

[83] Ex. P-R-0008, Statement from Minister Champagne on competitiveness in the telecom sector dated October 25, 2022, p. 1.

[84] *Tervita Corporation. v. Canada (Commissioner of Competition)*, 2015 SCC 3, para. 61.

[85] Commissioner's Notice of Application, paras. 90-93.

[86] Commissioner's Written Opening, para. 9.

[87] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 311-326.

[88] *Tervita Corporation v. Canada (Commissioner of Competition*), 2015 SCC 3, paras. 52 & 53.

[89] *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, para. 369 (Concurring reasons by Crampton C.J.), *rev'd on other grounds* 2015 SCC 3.

[90] *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18, para. 465 (emphasis added).

[91] *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 SCR 161, Factum of the Commissioner of Competition, paras. 44-47.

[92] Commissioner's Written Opening, para. 83.

[93] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, paras. 46-48.

[94] Commissioner's Written Opening, paras. 186-189.

[95] *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 34.

[96] *Canada (Commissioner of Competition) v. Sears Canada Inc.*, 2005 Comp. Trib. 2 para. 248.

[97] *Canada (Commissioner of Competition) v. Sears Canada Inc.*, 2005 Comp. Trib. 2, para. 249.

[98] See for example, Transcript, Day 18 (Dec. 1), pp. 4633:9-4634:15 (Israel Cross), Mr. Tyhurst: "…we're just going to let [the document] speak for itself". See also Transcript, Day 16 (Nov. 29), pp. 4240:21-4244:6 (Johnson Cross), Mr. Bitran presented a Rogers document to Shaw's expert, Mr. Johnson, without having shown the same document to any of Rogers' fact witnesses.

[99] *Green v Canada (Treasury Board)* (2000), 254 NR 48 (FCA), para 25.

[100] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1992] C.C.T.D. No. 7, rev'd [1995] 3 FC 557 (CA), rev'd [1997] 1 S.C.R. 748. *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd*., 1992 CanLII 2092 (CT). *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, remitted for redetermination by the FCA, 2001 FCA 104, confirmed 2002 Comp. Trib. 16, aff'd 2003 FCA 53. *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, aff'd 2003 FCA 131, leave to appeal to the SCC ref'd [2004] 1 S.C.R. vii. *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, aff'd (*sub nominee Tervita Corporation v. Commissioner of Competition*), 2013 FCA 28, rev'd 2015 SCC 3. *Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18.

[101] Ex. CA-A-0122, Expert Report of Nathan H. Miller (September 23, 2022), para. 229.

[102] Ex. CA-A-0137, Presentation of Michael AM Davies, p. 39.

[103] Transcript, Day 17 (Nov. 30), p. 4425 (Israel Chief).

[104] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 136.

[105] Ex. PR-R-0194, Amended Witness Statement of Trevor English (September 23, 2022), paras. 102-110.

[106] Exhibit P-R-0071, Telus Press Release Issued March 31, 2021. Exhibit CA-R-0080, Bell presentation, "Post Sea Response Update to BCE's Board of Directors" dated August 4, 2022, p. 21; Kirby Testimony, Transcript, vol. 4, pp. 808:14-818:9; Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), para 87(c).

[107] Exhibit CA-R-072, TELUS presentation, Rogers' Planned Acquisition of Shaw May Board Strategy Discussion May 5, 2021, p. 3**;** Transcript, Day 3, p. 640:18-641:17 (Casey Cross).

[108] Exhibit CA-R-0080, Bell presentation, Post Sea Response Update to BCE's Board of Directors dated August 4, 2022, Slides 18, 21.

[109] *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, para. 367. *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, para 54.

[110] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, paras. 470 – 475.

[111] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, para. 519

[112] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, para. 518.

[113] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres – (September 23, 2022), paras. 7(d) & 184-185.

[114] Transcript, Day 7 (Nov. 16), pp. 1640:15-1642:14 (Miller Cross). .

[115] Exhibit CA-R-0080, Bell presentation, "Post Sea Response Update to BCE's Board of Directors" dated August 4, 2022. Transcript, Day 4 (Nov. 10), p. 801:19-804:16 (Kirby Cross).

[116] Transcript, Day 6 (Nov. 15), pp. 1522-1524 (Miller Cross).

[117] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 10.

[118] [redacted]. See Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Table 3.

[119] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 236, 243, 245, Exhibits 88, 94; Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 88; Miller Testimony, Transcript, vol. 7, pp. 1670:14-1672:4.

[120] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 132 (table).

[121] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 292.

[122] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 234, 245, 292, Exhibit 123.

[123] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 117; Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 252.

[124] Ex. CA-I-0144, Lescadres Witness Statement, paras. 61(d), 66, 107-115; see also, Transcript, Day 9 (Nov. 18), pp. 2156:24-2157:21, 2220:24-2221:5 (Lescadres Cross).

[125] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 267.

[126] Transcript, Day 7 (Nov. 16), p. 1750:1-15 (Miller Panel Questions); Day 6 (Nov. 15), pp. 1452:13-1453:10 (Miller Chief); CA-A-127, Expert Presentation of Dr. Miller, slide 22.

[127] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Figures 9-12. See also Ex. CA-R-1835, Amended Expert Report of Paul Alan Johnson (September 23, 2022), pp. 18-28.

[128] Ex. CA-R-1840, Expert Presentation of Paul Johnson (November 29, 2022), slide 26.

[129] Ex. CA-R-0192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 292-293; Transcript, Day 6 (Nov. 15), p. 1455:15-20 (Miller Chief), 1635:1-13 (Miller Cross).

[130] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), paras. 31-32.

[131] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Table 7.

[132] Ex. CA-A-0122, Expert Report of Nathan H. Miller, paras. 58-61.

[133] Ex. CA-A-0122, Expert Report of Nathan H. Miller, para. 61 and fn. 114.

[134] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), para. 39.

[135] Transcript, Day 4 (Nov. 10), p. 954 (Kirby Panel Questions).

[136] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), at paras. 52-54.

[137] Transcript, Day 6 (Nov. 15), pp. 1524-1525 (Miller Cross).

[138] Ex. CA-R-1857, Expert Presentation of Mark Israel, p. 35; Transcript, Day 17 (Nov. 30), pp. 4450:23-4453:6 (Israel Chief).

[139] Transcript, Day 7 (Nov. 16), pp. 1643:2-1644:10 (Miller Cross).

[140] Transcript, Day 7 (Nov. 16), p. 1700:2-15 (Miller Re-Examination).

[141] Transcript, Day 7 (Nov. 16), p. 1597:5-15 (Miller Cross).

[142] Ex. C-A-122, Expert Report of Nathan H. Miller (September 23, 2022), para. 299.

[143] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 251; Transcript, Day 5 (Nov. 14), pp. 1216:20-1217:11 (Hickey Re-Examination); Transcript, Day 7 (Nov. 17), p. 1757:12-24 (Miller Panel Questions).

[144] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 92-127.

[145] Ex. C-A-122, Expert Report of Nathan H. Miller (September 23, 2022), para. 140.

[146] Ex. C-A-122, Expert Report of Nathan H. Miller (September 23, 2022), Section 8.4.

[147] Transcript, Day 7 (Nov. 16), p. 1663:3-25 (Miller Cross).

[148] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 92-93.

[149] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 101 (and accompanying table) & Exhibit 22.

[150] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), Exhibit 32; Transcript, Day 7 (Nov. 16), pp. 1680:18-1682:15 (Miller Cross).

[151] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 20, 2022), para. 107, Exhibit 28; Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 289.

[152] Transcript, Day 7 (Nov. 16), p. 1651:15-25; p. 1687:12-1688:8, p. 1690:5-13, 1692:24-1693:10 (Miller Cross).

[153] Ex. CA-A-0122, Expert Report of Nathan H. Miller (September 21, 2022), para. 299.

[154] Transcript, Day 6 (Nov. 15), pp. 1547:12-1548:20 (Miller Cross).

[155] Transcript, Day 7 (Nov. 16), pp. 1692:24-1693:10 (Miller Cross).

[156] Transcript, Day 7 (Nov. 16), pp. 1657-1658 (Miller Cross).

[157] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Table 4.

[158] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 58; Transcript, Day 17 (November 30), pp. 4462-4466 (Israel Chief). Transcript, Day 17 (November 30), pp. 4540-4548.

[159] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), Table 7.

[160] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), para. 61.

[161] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), para. 69.

[162] Transcript, Day 9 (Nov. 18), pp. 2162:16-2163:4 (Lescadres Chief); Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), paras. 93-95.

[163] Transcript, Day 9 (Nov. 18), pp. 2162:11-2164:7 (Lescadres Chief).

[164] Transcript, Day 7 (Nov. 16), pp. 1645-1646 (Miller Cross).

[165] Transcript, Day 9 (Nov. 18), pp. 2177:20-2178:24 (Lescadres Chief).

[166] Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 52, Slide 5. See also Ex. CA-I-0144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 66, "Roaming" Tab.

[167] Transcript, Day 17 (Nov. 30), p. 4581 (Israel Cross).

[168] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 95, Table 6.

[169] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), paras. 102-103.

[170] Ex. CA-A-0125, Rebuttal Expert Report of Nathan H. Miller (October 19, 2022), para. 68.

[171] Ex. CA-A-0122, Expert Report of Nathan H. Miller, paras. 241-244.

[172] Transcript, Day 7 (Nov. 16), pp. 1615-1616 (Miller Cross).

[173] Transcript, Day 5 (Nov. 14), pp. 1218 (Hickey Panel Questions).

[174] Transcript, Day 17 (Nov. 30), pp. 4520:3-4521:17 (Israel Cross).

[175] Ex. CA-R-1854, Amended Reply Expert Report of Mark Israel (October 20, 2022), paras. 36-37.

[176] Commissioner's Written Opening, paras. 99, 101, 113, 118, 124, 135, 142, 165; Notice of Application, para. 96.

[177] Using Dr. Israel's interactive merger simulation spreadsheet, the "No Assets Transferred" section isolates the effect of the Videotron-Freedom transaction, independent of Rogers' acquisition of Shaw Mobile. Accepting all Dr. Miller's inputs, but adding in marginal costs savings, shows the Videotron-Freedom transaction generates positive consumer surplus of $40-$64 million and positive total surplus of $13-$21 million.

[178] *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, paras. 100, 124-125.

[179] Commissioner's Written Opening, para. 5; Transcript, Day 1 (Nov. 7), pp. 29:24-30:8 (Commissioner's Opening).

[180] Ex. CA-R-232, Witness Statement of Kenneth Martin (September 23, 2022), para. 76.

[181] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 186.

[182] Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 364.

[183] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 120; Transcript, Day 10 (Nov. 21), p. 2372:3-20 (Drif Chief).

[184] Transcript, Day 13 (Nov. 24), p. 3447:2-21 (McKenzie Chief); Ex. CB-R-225, Witness Statement of Ron McKenzie (October 20, 2022), para. 14.

[185] Transcript, Day 9 (Nov. 21), pp. 2373:19-2374:23 (Drif Chief).

[186] Transcript, Day 4 (Dec. 10), pp. 993:15-997:21 (Hickey Cross).

[187] Ex. CA-A-100, Witness Statement of Nazim Benhadid (September 23, 2022), para. 4 (heading); Transcript, Day 5 (Nov. 14), pp. 1116:9-1117:16; 1119:17-1122:24; pp. 1144:1-1145:14; pp. 1148:10-1153:11 (Benhadid Cross).

[188] Ex. C-A-111, Witness Statement of Stephen Howe (September 23, 2022), para. 10; Transcript, Day 6 (Nov. 15), pp. 1331:17-1332:6; pp. 1358:23-1359:8 (Howe Cross).

[189] Transcript, Day 10 (Nov. 21), pp. 2610:22-24, 2611:23-2612:13 (English Chief); Transcript, Day 11 (Nov. 22), pp. 2867:16-2868:14 (McAleese Chief).

[190] Ex. ID-034, Telus market contact meeting, June 9, 2021; Transcript, Day 19 (Dec. 2), p. 4955:2-9 (Ruling). Ex. CA-R-022, Summary of Bureau-TELUS call, June 9, 2021.

[191] Telecom Decision CRTC 2008-17, paras. 117-119.

[192] *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, para. 38.

[193] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), paras. 117, 187-188.

[194] Commissioner's Written Opening, para. 101.

[195] Telecom Regulatory Policy CRTC 2015-326 (pre-amble); Telecom Decision CRTC 2021-181, para. 4.

[196] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), Exhibit 8, p. 57.

[197] Ex. P-R-061, "Notes from February 13, 2021, internal Telus war games session".

[198] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 144(e).

[199] Transcript, Day 8 (Nov. 17), p. 1970:15-21; p. 1977:1-8; p. 1981:12-20 (Davies Cross); Ex. ID-044, Email exchange between J. Rook and J. Tyhurst, January 28, 2022; Transcript, Day 19 (Dec. 2), p. 4962:5-22 (Ruling).

[200] Ex. CA-R-085, Email dated May 27, 2021 from M. Bibic to B. Kirby and others.

[201] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), paras. 41 & 43.

[202] Transcript, Day 9 (Nov. 18), p. 2229:5-11 (Lescadres Cross), pp. 2331:22-2332:20 (Lescadres Panel Questions).

[203] Transcript, Day 5 (Nov. 10), p. 1207:2-9 (Hickey Cross); p. 1219:6-15 (Hickey Panel Questions).

[204] Transcript, Day 9 (Nov. 18), pp. 2153:17-2154:21; (Lescadres Chief); p. 2323 :7-25 (Lescadres Panel Questions).

[205] Transcript, Day 17 (Nov. 30), pp. 4614:9-4615:10; 4437:16-4438:19 (Israel Cross).

[206] Transcript, Day 13 (Nov. 24), p. 3402:3-22 (Prevost Cross).

[207] Transcript, Day 11 (Nov. 22), pp. 2886:7-2888:1 (McAleese Chief); Amended Witness Statement of Paul McAleese (September 23, 2022), paras. 189-203; Amended Responding Witness Statement of Paul McAleese (October 20, 2022), paras. 155-170; Transcript, Day 10 (Nov. 21), pp. 2610:22-2611:22 (English Chief).

[208] Ex. CA-I-0152, Witness Statement of Mohamed Drif (September 23, 2022), paras. 140-141.

[209] Ex. CA-R-037, Summary of Facts, Bell Presentation July 7, 2022. (This exhibit also contains notes from the Bureau's meeting with Comcast. Mr. Nagel was examined thoroughly on this document.)

[210] Ex. CA-I-144, Witness Statement of Jean-Francois Lescadres (September 23, 2022), para. 136(d).

[211] Ex. CA-R-1818, Amended Expert Report of Dr. William Webb (September 24, 2022), para 132; Transcript, Day 15 (Nov. 28), p. 3891:2-3893:12; (Webb Cross).

[212] Ex. CA-R-1821, Amended Responding Expert Report of Dr. William Webb (October 20, 2022), para 69 (table); Ex. CA-R-192, Amended Witness Statement of Paul McAleese (September 23, 2022), para. 160 (table).

[213] Ex. CA-R-195, Amended Responding Witness Statement of Paul McAleese (October 21, 2022), para 166 (table).

[214] CA-R-232, Witness Statement of Kenneth Martin (September 23, 2022), paras. 90 & 94(b).

[215] Transcript, Day 15 (Nov. 28), p. 3962:3-3963:6 (Webb Cross).

[216] Transcript, Day 10 (Nov. 21), p. 2456:1-12 (Drif Cross).

[217] Commissioner's Written Opening, para. 128; Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), para. 117.

[218] Ex. CA-I-152, Witness Statement of Mohamed Drif (September 23, 2022), para. 138; Transcript, Day 10 (Nov. 21), pp. 2489:2-2590:9 (Drif Panel Questions).

[219] Transcript, Day 17 (Nov. 30), p. 4418:2-8 (Israel Chief).

[220] Ex. CA-R-212, Responding Witness Statement of Dean Prevost (October 20, 2022), para. 62.

[221] Transcript, Day 9 (Nov. 18), pp. 2201:19-2202:4; pp. 2204:16-2205:6 (Lescadres Cross).

[222] Transcript, Day 9 (Nov. 18), p. 2278:24-2279:20; pp. 2293:22-2294:6 (Lescadres Cross).

[223] Transcript, Day 13 (Nov. 25), pp. 3829:12-3830:12 (Martin Follow-Up from Mr. Leschinsky).

[224] Telecom Decision CRTC 2022-160 (Bell); Telecom Decision CRTC 2020-268 (Telus).

[225] Transcript, Day 4 (Nov. 10), p. 895:8-21 (Kirby Cross).

[226] Transcript, Day 5 (Nov. 11), pp. 1081:4-1085:25 (Benhadid Cross).

[227] Transcript, Day 5 (Nov. 11), p. 1086:1-16 (Benhadid Cross).

[228] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 163.

[229] Ex. CA-R-212, Responding Witness Statement of Dean Prevost (October 20, 2022), paras. 48-49.

[230] Transcript, Day 8 (Nov. 17), p. 1600:19-23; p. 1603:14-21; p. 1607:21-1608:8 (Miller Cross).

[231] Transcript, Day 7 (Nov. 16), pp. 1389:22-1394:11 (Howe Cross).

[232] Transcript, Day 8 (Nov. 17), pp.1963:16-1967:24 (M. Davies Cross).

[233] Ex. CA-R-235, Reply Witness Statement of Kenneth J. Martin (October 20, 2022), para. 24.

[234] Transcript, Day 10 (Nov. 21), pp. 2373:19-2374:8

[235] Ex. CA-R-209, Witness Statement of Dean Prevost (September 23, 2022), paras. 129-130.

[236] Transcript, Day 13 (Nov. 24), pp. 3300:22-3301:19 (Prevost Cross).

[237] Competition Bureau, Merger Enforcement Guidelines, para. 6.26; Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), para. 122.

[238] Ex. CA-R-1851, Expert Report of Mark A. Israel (September 23, 2022), paras. 122-129.

[239] Commissioner's Opening Slides, pp. 39-40; Commissioner's Opening Statement, Transcript, Day 1 pp. 49:20-50:10.

[240] Transcript, Day 8 (Nov. 17), pp. 1838:12-1839:14 (M. Davies Direct); Ex. CA-A-131, M. Davies Expert Report, para. 200.

[241] Transcript, Day 8 (Nov. 17), pp. 1915:13-1916:13 (M. Davies Chief).

[242] Ex. CA-I-144, Lescadres Witness Statement, paras. 224-228; Ex. CA-I-152, Drif Witness Statement, paras. 64-65; Transcript, Day 9 (Nov. 18), pp. 2194:1-12, 2310:12-2311:13 (Lescadres Direct); Transcript, Day 11 (Nov. 22), pp. 2763:12-2764:12 (English Direct) (noting that Videotron executive shave discussed pursuing MVNO and that "the ownership of 3,500 spectrum is very important to expand by MVNO"); Transcript, Day 15 (Nov. 28), pp. 3941:4-3944:7 (Webb Direct) (noting that operators in the U.K. and Australia have used 3500 MHz spectrum for stand-alone services and "[s]o I think there are alternatives open to [Videotron]").

[243] Transcript, Day 8 (Nov. 17), pp. 1916:22-1917:17 (M. Davies Chief).

[244] Ex. CA-I-144, Lescadres Witness Statement, paras. 76-82; 221-228; Transcript, Day 11 (Nov. 22), pp. 2763:12-2764:12 (English Chief).

[245]Transcript, Day 10 (Nov. 21), p. 2636:9-13 (English Direct); Ex. CA-R-192, McAleese Witness Statement, paras. 162, 379.

[246] Transcript, Day 11 (Nov. 22), pp. 2786:18-2787:14 (English Chief).

[247] Transcript, Day 11 (Nov. 22), pp. 2786:18-2787:18 (English Chief).

[248] Transcript, Day 4 (Nov. 10), p. 836:6-14 (Kirby Chief).

[249] Transcript, Day 11 (Nov. 22), p. 2877:6-16 (McAleese Chief).

[250] Ex. CA-A-43, Witness Statement of Sudeep Verma (September 23, 2022), para. 17.

[251] Transcript, Day 4 (Nov. 10), p. 837:10-16 (Kirby Chief).

[252] Ex. CA-R-192, McAleese Witness Statement, para. 381; Ex. CA-R-195, McAleese Responding Witness Statement, para. 73; Transcript, Day 11 (Nov. 22), pp. 2894:1-2897:1 (McAleese Chief).

[253] Transcript, Day 11 (Nov. 22), pp. 2896:24-2897:1 (McAleese Chief); Transcript, Day 2 (Nov. 8), p. 483:5-9 (Verma Cross); Ex. CA-A-262, McAleese Examinations for Discovery, QQ783-784.

[254] Competition Bureau, Merger Enforcement Guidelines, para. 12.11.

[255] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), fn.79, Lourdes DaCosta, Sr. Competition Law Officer, Competition Bureau, "Efficiencies Analysis in Canada," 2019, https://www.apeccp.org.tw/htdocs/doc/APECOECD/Seminar/03-Efficiencies%20Analysis%20in%20Canada.pdf.

[256] *Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18; *Tervita Corporation v. Canada (Commissioner of Competition)*, 2015 SCC 3.

[257] Transcript, Day 15 (Nov. 28), pp. 4001:5-21 (Harington Chief).

[258] Transcript, Day 14 (Nov. 25), pp. 3654:11-3655:15 (Fabiano Panel Questions).

[259] Transcript, Day 18 (Dec. 1), pp. 4813:7-10. (Zmijewski Cross).

[260] Transcript, Day 18 (Dec. 1), pp. 4864:17-4865:12 (Zmijewski Cross).

[261] Transcript, Day 18 (Dec. 1), pp. 4813:13-16 (Zmijewski Cross).

[262] US Horizontal Merger Guidelines.

[263] Transcript, Day 18 (Dec. 1), pp. 4823:15-4827:22 (Zmijewski Cross).

[264] Transcript, Day 18 (Dec. 1), pp. 4823:15-4837:7 (Zmijewski Cross).

[265] Transcript, Day 18 (Dec. 1), pp. 4837:11-25 (Zmijewski Cross).

[266] *Commissioner of Competition v. Superior Propane Inc.*, 2002 CACT 16, paras 158 -159. See also para. 116: "The Price Standard guided courts in the United States for much of the past century and created judicial hostility toward efficiency evidence and arguments."

[267] All values in this section are based on a 10-year discounted net present value unless indicated otherwise.

[268] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 178-182.

[269] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), para. 136.

[270] Ex. CA-A-1869, Expert Report of Mark E. Zmijewski (October 20, 2022), paras. 132, 173.

[271] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 154-156.

[272] Ex. CB-R-0223, Witness Statement of Alexandre Mercier-Dalphond (October 20, 2022), para. 4 & Exhibit A.

[273] Ex. CA-A-0134, Amended Reply Expert Michael AM Davies (October 20, 2022), para. 124.

[274] Transcript, Day 13 (Nov. 24), pp. 3307:12-3308:8 (Prevost Cross); 3440:1-20; 3441:17-3442:4 (Mercier-Dalphond Cross).

[275]Transcript, Day 13 (Nov. 24), pp. 3299:22-3301:19 (Prevost Cross); pp. 3475:12-3476:9 (McKenzie Cross).

[276] Transcript, Day 13 (Nov. 24), pp. 3307:12-3308:8 (Prevost Cross); 3441:17-3442:4 (Mercier-Dalphond Re-Examination).

[277] Ex. CA-A-0134, Amended Reply Expert Michael AM Davies (October 20, 2022), paras. 132-133.

[278] Transcript, Day 10 (Nov. 21), pp. 2000:14-2001:17; 2003: 4-24 (Davies Cross).

[279] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 157-158.

[280] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 185-187.

[281] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 128-135. Note that Mr. Harington conservatively reduced his quantification of the savings associated with redundant real estate holdings in direct examination after seeing a draft document in Prevost's cross-examination that suggested Rogers may have already given notice to abandon some facilities prior to the completion of the transaction. Transcript, Day 15 (Nov. 28), pp. 4006:7-20 (Harington Chief).

[282] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), para. 166.

[283] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 183-184.

[284] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 83-87

[285] Ex. CA-R-0227, Amended Witness Statement of M. Fabiano (September 23, 2022), Exhibit 8.

[286] Notably, while the Commissioner's counsel put it to Ms. Fabiano that Shaw did not have a communications department, he failed to show Ms. Fabiano the multiple places where it was clear in the document that Shaw *did* have communications staff. See Ex. CA-R-0227, Amended Witness Statement of M. Fabiano (September 23, 2022), cells x-y.

[287] Transcript, Day 15 (Nov. 28), pp. 4038:3-21 (Harington Cross).

[288] Transcript, Day 15 (Nov. 28), pp. 4084:7-25 (Harington Cross).

[289] Ex. CA-A-1869, Expert Report of Mark E. Zmijewski (October 20, 2022), para. 105.

[290] Transcript, Day 18 (Dec. 1), pp. 4862:13-4864:24 (Zmijewski Cross).

[291] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 118-127.

[292] Ex. CA-R-1854, Amended Reply Expert Report of Mark Israel (October 20, 2022), paras. 63-84.

[293] Transcript, Day 17 (Nov. 30), pp. 4638:22-4640:4, pp. 4644:12-4645:13 (Israel Cross).

[294] Ex. CA-R-1828, Expert Report of Andrew Harington (September 23, 2022), paras. 242-246.

[295] *Commissioner of Competition v. Superior Propane Inc.*, 2002 CACT 16, para. 367.

[296] Rogers' low-cost CRTC mandated plan is offered by its Fido brand in each of British Columbia, Alberta, and Ontario: https://www.fido.ca/phones/bring-your-own-device?icid=ba-lpmbcnac-pgpfcwrls-1021206&flowType=byod.

[297] *Telecom Regulatory Policy CRTC 2021-130*, paras. 529-531 & 545. The same decision established fixed-price occasional use plans that will not be affected by the Transaction.

[298] Ex.CA-A-0122, Expert Report of Nathan H. Miller (September 21, 2022), Exhibit 22 & para.227, pp.110-111.

[299] Transcript, Day 2 (Nov. 8), p.423:7-25 (Verma Chief), pp. 496:18-497:17 (Verma Cross); Transcript, Day 9 (Nov. 18), p. 2088:6-22, pp.2090:24-2093:19 (Osberg Cross).

[300] Ex. CA-R-0212, Responding Witness Statement of Dean Prevost (October 20, 2022), paras.70-72, 77-79.

[301] Ex. CA-R-0212, Responding Witness Statement of Dean Prevost (October 20, 2022), paras. 64-69, 75-76.

[302] Ex. CA-R-1854, Amended Reply Expert Report of Mark Israel (October 20, 2022) paras. 15, 106-119, table 5, p.29.

[303] *Commissioner of Competition v. Superior Propane Inc.*, 2002 CACT 16, paras. 92, 102-103.

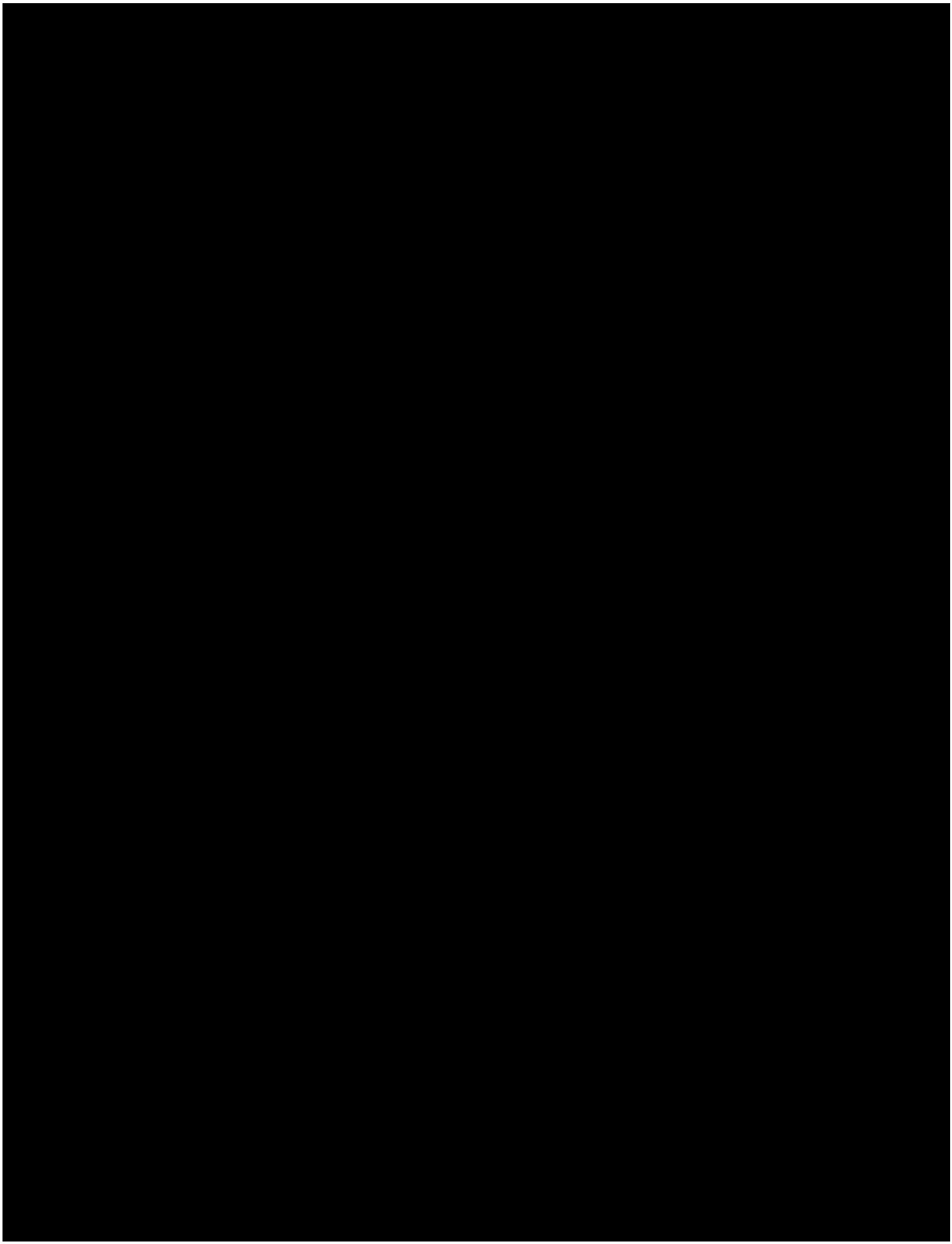
[304] *Commissioner of Competition v. Superior Propane Inc.*, 2002 CACT 16, para. 112.

[305] Transcript Day 9 (Nov. 18), pp. 2139:18-2140:23 (Cuff Cross).

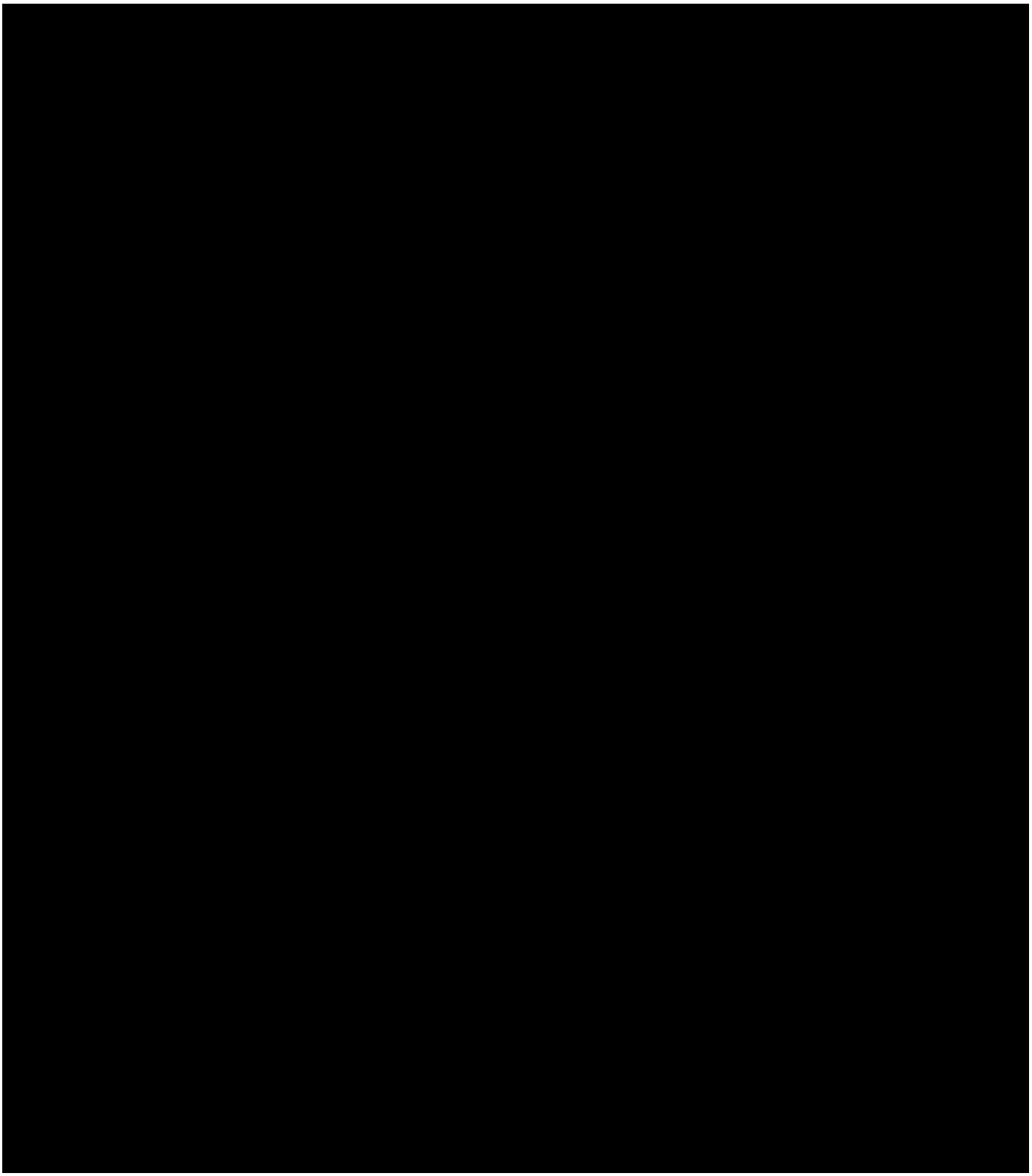
[306] Transcript, Day 9 (Nov. 18), pp. 2141:12-2143:1 (Cuff Cross); Ex. P-R-1868, Presentation of Michael Smart Public, slide 4. Note that the numbers in this slide are the updated numbers after Dr. Smart corrected for the calculation error identified by Dr. Cuff.

[307] Transcript, Day 9 (Nov. 18), p.2104:5-23 (Osberg Cross).

[308] Ex. CA-R-1854, Amended Reply Expert Report of Mark Israel (October 20, 2022), para. 119 & table 5, p.29.



[3] McAleese Responding Witness Statement, paras. 15-17.



4 McAleese Responding Witness Statement, para. 89 (table). Please note this figure was erroneously labeled “Freedom Postpaid Gross Adds” in Mr. McAleese’s Responding Witness Statement, although it was described as concerning Shaw Mobile repeatedly. That typographical error has been corrected here.

5 McAleese Responding Witness Statement, para. 97 (table).

6 McAleese Responding Witness Statement, para. 97 (table).

[redacted]

[7] McAleese Responding Witness Statement, para. 109 (table).

Appendix 2

Rogers' Response to Tribunal Questions During Openings

References below are to paragraphs or Parts from the Respondents' Closing Submission.

Question 1: To provide an overview of the key provisions of the Arrangement Agreement.

See paragraphs 20, 21 and 68. See also:

- *Transaction Structure – Section 2.3.* Under the Arrangement Agreement, Rogers has agreed to acquire 100% of the issued and outstanding shares of Shaw by way of a statutory plan of under section 193 of the *Business Corporations Act* (Alberta).

- *Consideration – Section 2.10.* Rogers will pay $40.50 per share in cash to all shareholders, except that the Shaw Family Living Trust (the controlling shareholder of Shaw) and related persons will a portion of the consideration for their shares in the form of Class B Non-Voting Shares Rogers and the balance in cash.

- *Conditions to Closing – Section 6.* Closing is conditional upon the receipt of all regulatory approvals required by the Arrangement Agreement including:

    - Approval from the Minister of Innovation, Science and Industry for the deemed transfer of spectrum under the *Radiocommunication Act*. The Minister has stated publicly that he will not approve this transfer if Shaw owns Freedom Mobile Inc. at the time Shaw is acquired by Rogers.

- *Financing – Section 4.15.* The Arrangement Agreement is not conditional upon Rogers' financing arrangements.

The Outside Date and the Consequences of Termination are discussed in response to the Tribunal's specific question (Question 3, below).

[redacted]

[redacted]

- [redacted]

- [redacted]

- [redacted]

[redacted]

Question 3: To address other aspects of the agreements that are relevant to the proceedings as they relate to outside date, assets and access rights that would be acquired by Rogers and Videotron respectively, as well as any spectrum that might be transferred to Shaw in the event the transaction does not proceed.

- *Outside Date(s).* Rogers and Shaw have extended the outside date under their Arrangement Agreement until December 31, 2022. That date can be further extended to January 31, 2023 at the option of either Rogers or Shaw, provided that Rogers continues to have in place committed financing available to complete the merger. Neither Rogers nor Shaw is obligated to extend the outside date beyond January 31, 2023.

    - On August 31, 2022, Rogers announced that it had obtained the consents required to extend its financing for closing of the transaction to December 31, 2023. Extending that financing past December 31, 2022 requires that Rogers pay its lenders a further fee of approximately CAD $264 million.

  Under the Freedom Share Purchase Agreement, the outside date is the same outside date as set out in the Arrangement Agreement, provided that the outside date of the Freedom Mobile sale cannot be extended beyond January 31, 2023 without Videotron's consent (which it is under no obligation to provide).

- [redacted]

Question 4: Could you address the Commissioner's position set out at para. 217 of his Opening that "Anything beyond prohibition (in whole or in part), including any contractual arrangements or other behavioural commitments proposed by the parties is beyond the scope of consideration of the Tribunal."

See paragraphs 76 to 81.

Question 5: Could you walk the Tribunal through your treatment of the alleged pro-competitive effects of the proposed transaction and their impact on the Commissioner's position under sections 92 and 96, including specifics of deadweight loss.

See Part VII to Part IX which discuss the effects of the transaction, s. 92, efficiencies and the approach to s. 96.

Question 6: Could you address the Commissioner's position regarding foreign shareholders.

The Commissioner's position regarding foreign shareholders is not clear. Paragraphs 175-176 of the Commissioner's Opening Statement read:

> *The Tribunal should not recognize gains by foreign shareholders or the gains to the families given their high incomes and extreme wealth*. …

It is not clear whether the Commissioner intends to assert that savings from operations in Canada that would flow through to foreign shareholders are not cognizable in addition to arguing (as he does in his letter dated November 16, 2022) that there is a need to apply a balancing weights standard on the basis of the redistribution of wealth that includes a "wealth transfer" to foreign shareholders. (see also, paras. 178 and 181 of the Commissioner's Opening Statement).

There is no support for either position in law or economics and there are good reasons to reject them.

First, no decision by the Tribunal or a Court has ever discounted the merging parties' efficiencies based on the proportion of their shareholders who are foreign. The focus when considering efficiencies from a merger is the real resource savings to the Canadian *economy* – not the transfer of wealth to shareholders.[1] As the MEGs state, the issue is whether the efficiency gains will benefit the Canadian economy,[2] not the

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[1] *Superior Propane I*, para 430.

[2] Competition Bureau Merger Enforcement Guidelines at footnote 66 ("The issue is whether the efficiency gains will benefit the Canadian economy rather than the nationality of ownership of the company").

nationality of ownership of the company. Further, this approach would ignore the tax benefits accruing to Canada as Dr. Ware explained.

Second, as has been raised in prior Tribunal proceedings,[3] excluding efficiencies based on the nationality of shareholders constitutes discrimination under Canada's international obligations/trade and investment treaties and would be inconsistent with Canada's treaty obligations (including the obligation under USCMA to provide "national treatment" to investors from the United States and certain other countries).

Third, as it concerns balancing weights, there is no case in which the Tribunal has treated a "transfer" to foreign shareholders differently from a transfer to domestic shareholder and no support in the Act.

Question 7: To explain the reasons Rogers says at paragraph 4 of its Opening Submissions that Shaw would be a weakened competitor if the transaction does not proceed.

See paragraphs 12 to 16 and 225 to 231.

[3] *Canada (Commissioner of Competition) v. Superior Propane Inc*, 2002 Comp. Trib. 16, paras. 194-195.

APPENDIX 3: COMMISSIONER'S USE OF SECTION 69 DOCUMENTS

	Total on s. 69 List		Fact Witnesses		Expert Witnesses		All Witnesses	
	No. of Documents	**Percentage**	**Put to Witness**	**Percentage**	**Put to Witness**	**Percentage**	**Put to Witness**	**Percentage**
Shaw	383	50%	15	2%	34	4%	47	12%
Rogers	324	42%	17	2%	13	2%	25	8%
Other documents	60	8%	0	0%	0	0%	0	0%
Total	**767**	**100%**	**32**	**4%**	**47**	**6%**	**72**	**9%**

NOTES:

The total number of documents shown to all witnesses (72) is less than the sum of (i) the total number of documents shown to fact witnesses (32) and (ii) the total number documents show to expert witnesses (47) because seven documents were put to more than one witness. These documents are not double counted for purposes of the total put to all witnesses, but are counted separately in each of the fact and expert witness categories.