Competition Tribunal | Tribunal de la concurrence

PUBLIC VERSION

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

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

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
Shaw Communications Inc.
(respondents)

and

Videotron Ltd.
(intervenor)

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

REASONS FOR ORDER AND ORDER

TABLE OF CONTENTS

I. INTRODUCTION

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

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

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

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

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

Quebec, would likely do the same in Alberta and British Columbia, within a time frame that will ensure that competition is not substantially prevented or lessened.

[6] It bears underscoring that there will continue to be four strong competitors in the wireless markets in Alberta and British Columbia, namely, Bell, Telus, Rogers, and Videotron, just as there are today. Videotron's entry into those markets will likely ensure that competition and innovation remain robust. Among other things, Videotron has a proven record of aggressive pricing in Quebec and parts of Eastern Ontario. Its expansion into Alberta, British Columbia, and the rest of Ontario will be facilitated by very favourable arrangements that it has negotiated as part of the Divestiture. That expansion will also be facilitated by the national rollout of its successful, digital "Fizz" brand. Moreover, instead of the two firms (Telus and Shaw) that offer bundled wireless and wireline products in those markets today, there will be at least three (Telus, Rogers, and Videotron).

[7] The strengthening of Rogers' position in Alberta and British Columbia, combined with the very significant competitive initiatives that Telus and Bell have been pursuing since the Merger was announced, will also likely contribute to an increased intensity of competition in those markets.

[8] Alberta and British Columbia were the only two geographic markets at issue in this proceeding. The Commissioner confirmed on the opening day of the trial, that the Divestiture would ensure that competition is not likely to be prevented or lessened in Ontario, where approximately 72% of Freedom's customers are located. Rogers' post-merger market share in Alberta (approximately 26%) will be well below the 35% "safe harbour" threshold set forth in the Competition Bureau's *Merger Enforcement Guidelines* ("**MEGs**") in relation to unilateral market power. Rogers' share in British Columbia (approximately 40%) will only be moderately above that threshold. The Tribunal expects that those market shares, as well as the market shares of Telus and Bell, will erode as Videotron grows.

[9] Given the conclusions reached by the Tribunal, the Application by the Commissioner for an order directing Rogers and Shaw (together, the "**Respondents**") *not* to proceed with the Merger will be dismissed. The Commissioner's Application for alternative relief will also be dismissed. For greater certainty, the dismissal of this Application is premised on the Tribunal's understanding that, as a result of the manner in which the Divestiture has been structured, "Rogers will never own Freedom or its assets."

[10] These reasons do not address competition in wireline services, except to the extent that such services are relevant to competition in wireless services in Alberta and British Columbia. This is because the Commissioner did not allege that Rogers' acquisition of Shaw's wireline business would likely prevent or lessen competition substantially in any wireline markets. In essence, Rogers is simply stepping into Shaw's shoes in Alberta and British Columbia, where it currently does not compete in the wireline business.

II. THE PARTIES

[11] The Commissioner is appointed under section 7 of the *Competition Act*, RSC 1985, c C-34, as amended, (the "***Competition Act***") and is responsible for the enforcement and administration of the Act.

[12] Rogers is a facilities-based communications and media company headquartered in Toronto, Ontario. It provides wireline and wireless services, as well as certain media services.

[13] Rogers' wireline services include the supply of Internet access, television distribution, telephony, and smart home monitoring for customers and businesses in Ontario, New Brunswick, and Newfoundland. Its wireless services are provided across the country, under the brands Rogers, Fido, Chatr, and Cityfone: Exhibit CA-R-209, at para 27. Its media portfolio includes sports media and entertainment, television and radio broadcasting, and digital media. Rogers also supplies certain business telecommunications services.

[14] Shaw is a facilities-based communications company headquartered in Calgary, Alberta. It provides wireline and wireless services to both consumers and businesses.

[15] Shaw's wireline services include the supply of Internet access, television distribution, and telephony in Western Canada and Northern Ontario. In fiscal 2021, the wireline business generated approximately 83% of Shaw's revenues. Shaw's wireless services are supplied under the Freedom and Shaw Mobile brands. Approximately 72% of Freedom's subscribers are in Ontario, with the remainder being located in Alberta and British Columbia. Prior to 2016, Freedom operated as Wind Mobile. The rebranding took place shortly after Shaw entered the wireless business, through its acquisition of WIND Mobile Corp. ("**Wind Mobile**"). The Shaw Mobile brand was launched in mid-2020 and is sold in Alberta and British Columbia.

[16] Videotron is a facilities-based telecommunications company headquartered in Montreal, Quebec. It provides wireline, wireless, and entertainment services. It also operates as a reseller in Abitibi, Quebec, under the third-party Internet access ("**TPIA**") framework established by the Canadian Radio-television and Telecommunications Commission ("**CRTC**").

[17] Videotron's wireline services include the supply of Internet access, television distribution, and telephony in Quebec. In July 2022, Videotron acquired VMedia, another TPIA reseller, which operates in throughout Canada. Videotron sells its wireless services under the Videotron and Fizz brands in Quebec and the Greater Ottawa Area. As with Rogers and Shaw, Videotron also supplies certain business telecommunications services. Videotron's entertainment services consist of two subscription-based "over the top" services, known as Club illico and VRAI, which provide on-demand French-language content.

III. THE INITIALLY PROPOSED TRANSACTION

[18] Pursuant to an Arrangement Agreement between the Respondents, dated March 13, 2021 (the "**Arrangement Agreement**" or the "**Initially Proposed Transaction**"), Rogers agreed to purchase all of the issued and outstanding shares of Shaw for approximately $26 billion, inclusive of debt. Among other things, that agreement requires Rogers to pay a termination fee of $1.2 billion to Shaw in certain circumstances, including the issuance of a final order prohibiting the completion of the Merger under the *Competition Act*.

IV. PROCEDURAL HISTORY

[19] In the weeks following the execution of the Arrangement Agreement, the Respondents submitted a request to the Commissioner for an advance ruling certificate. This was followed by a pre-merger notification filing under the *Competition Act*. They also made requests for approvals required for the transfer of the licences held by Shaw under the *Broadcasting Act*, SC 1991, c 11 and the *Radiocommunication Act*, RSC, 1985, c R-2 ("***Radiocommunication Act***"), to the CTRC and the Minister of Innovation, Science and Industry (the "**Minister**"), respectively.

[20] In early February 2022, a representative of the Commissioner informed the Respondents that a remedy would be required in Alberta, British Columbia, and Ontario. The Respondents were further informed that, based on the information available at that time, a prohibition of the Initially Proposed Transaction would be sought, subject to the Respondents establishing the efficiencies defence set forth in section 96 of the *Competition Act*: Exhibit CA-A-173. After the Respondents continued with their efforts to find a suitable divestiture buyer, the Competition Bureau sent them another letter, dated February 25, 2022, expressing concern about the fact that a sale process was proceeding in the midst of "unresolved issues for the Commissioner": Transcript, at 2661.

[21] On March 24, 2022, the CRTC approved Rogers' acquisition of Shaw's broadcasting services, subject to a number of conditions and modifications.

[22] The following day, Rogers entered into a letter of intent ("**LOI**") and term sheet with [redacted], an investment firm, regarding the divestiture of Freedom: Exhibit P-A-0178. Approximately two weeks later, Rogers entered into a second LOI and term sheet with a group of other financial buyers led by [redacted] and [redacted]: P-A-0180. However, Rogers abandoned those potential divestiture transactions after the Commissioner expressed concerns in late April 2022 about the proposed purchasers and other elements of the transactions in question: Transcript, at 2668 and 2670.

[23] The Tribunal pauses to note that, until approximately that point in time, Videotron's efforts to participate in the divestiture process do not appear to have been successful: Transcript, at 2663 and 2670.

[24] On May 9, 2022, the Commissioner filed this Application under section 92 of the *Competition Act*. The principal relief sought in that Application is an order prohibiting the completion of the Initially Proposed Transaction. Contemporaneously, the Commissioner also filed an Application for an interim order pursuant to section 104 of the *Competition Act*. Later that month, the Commissioner and the Respondents filed a Consent Agreement with the Tribunal. Pursuant to that agreement, the Respondents agreed not to proceed with the closing of the Initially Proposed Transaction until the Tribunal disposed of the Commissioner's Application under section 92, unless the Commissioner otherwise agreed. That Consent Agreement has remained in place, pending the issuance of these reasons.

[25] On June 17, 2022, the Respondents, Videotron, and Quebecor Inc. ("**Quebecor**", Videotron's ultimate parent company) entered into an LOI and term sheet concerning the sale of Freedom to Videotron for $2 billion, plus $[redacted]

[redacted]. Later that month, Videotron submitted requests to the Commissioner for an advance ruling certificate, as well as to the Minister for the approval of the deemed transfer to Videotron of the spectrum licences held by Freedom: Exhibit CA-I-144, Exhibit 57.

[26] On August 11, 2022, the Respondents, Videotron, and Quebecor entered into a definitive agreement for the sale of Freedom to Videotron (the "**Divestiture Agreemen**t") on substantially the same terms as previously announced on June 17, 2022. Among other things, that Agreement states that the Outside Date for the completion of that transaction "shall be no later than January 31, 2023 without [Videotron's] written consent": Exhibit CA-I-144, Exhibit 64, at 1327. During the hearing, counsel to Rogers confirmed that Rogers will be required to make a payment of approximately "$265 million that will go to largely American bondholders" if the Merger and Divestiture Agreement are not completed prior to December 31, 2022: Transcript, at 4903. He also confirmed that there is a "very, very, very grave or substantial risk that the transaction will fall apart if it is not closed by January 31," 2023: Transcript, at 4903; see also Transcript of Case Management Conference, 28 October 2022, at 23.

[27] On October 25, 2022, the Minister issued a statement in which he officially denied the Respondents' request to permit the transfer of wireless spectrum licences from Shaw to Rogers. He added that "any new wireless licences acquired by Videotron would need to remain in its possession for at least 10 years" and that he "would expect to see prices for wireless services in Ontario and Western Canada comparable to what Videotron is currently offering in Quebec, which are today on average 20 per cent lower than in the rest of Canada": Exhibit P-R-0008.

[28] Within hours, Mr. Pierre Karl Péladeau, President and Chief Executive Officer of Quebecor and President of Videotron, issued a statement in which he stated that Videotron "intend[s] to accept the conditions stipulated by the Minister": Exhibit P-R-0009. During the hearing, Mr. Péladeau described Videotron's responses to the Minister's two conditions in terms of "obligations": Transcript, at 2517.

V. THE DIVESTITURE AND ANCILLARY AGREEMENTS

[29] Pursuant to the Merger and Divestiture, Shaw would first transfer all of the issued and outstanding shares of Freedom to Videotron. Rogers would *only then* acquire the remainder of Shaw through an amalgamation arrangement.

[30] As explained by Mr. Kent Thomson, Shaw's lead counsel in this proceeding, the Merger and Divestiture are "two transactions but conjoined. In other words, there is no world in which Shaw is going to be selling Freedom Mobile to Vidéotron at the price at issue here and on the terms at issue here, in the absence of the overall transaction proceeding": Transcript, Case Management Conference, 28 October 2022, at 16; see also paragraph 21 above.

[31] To this end, the press release issued jointly by Shaw, Rogers, and Quebecor upon the execution of the Divestiture Agreement on August 12, 2022, stated that the sale of Freedom is "conditional on, and would close substantially concurrently with, closing of the Rogers-Shaw Transaction"[1]: Exhibit CA-R-0209, Exhibit 34.

[1] The Tribunal notes that one of the conditions to the closing of the Divestiture Agreement is that "[a]ll conditions to the completion of the [Initially Proposed Transaction] as set forth in Article 6 of the Arrangement Agreement have

[32] In his Witness Statement, Mr. Paul McAleese, Shaw's President, explained that the Divestiture Agreement provides for (i) the acquisition by Videotron of all of the issued and outstanding shares of Freedom, including the transfer to Videotron of all assets necessary to continue operating Freedom's wireless and wireline businesses, on a standalone basis; (ii) the provision by Rogers and Shaw of transition services to ensure a seamless transfer of ownership of Freedom to Videotron, without any operational or service-related disruptions; and (iii) the provision by Rogers of ongoing ancillary network access services that will lower Freedom's cost base: Exhibit CA-R-0192, at para 349.

[33] At paragraphs 350-354 of his Witness Statement, Mr. McAleese elaborated that the assets Videotron will receive include:

(a) Subscribers: All of Freedom's approximately 1.7 million wireless subscribers, as well as its approximately [redacted] Freedom Home Internet (Gateway) subscribers (as of March 2022);

(b) Spectrum: All of Freedom's spectrum licences, subject to an agreement between Rogers and Freedom to swap certain equivalent blocks of spectrum in Toronto and rural British Columbia;

(c) Network Infrastructure: Freedom's wireless core network and related core network assets (primarily Nokia equipment), macro cell sites, small cells, and in-building systems, including an assumption of related leaseholds and all related obligations, and radio access network equipment (i.e., radios, basebands and related IP network apparatus);

(d) Backhaul Assets: All of Freedom's backhaul microwave systems and contracts for fibre backhaul services with third parties;

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

(f) Brand: All Freedom-related intellectual property (including its websites) and goodwill;

(g) IT Systems: Operations support systems, business support systems, billing systems, customer care systems, call centre systems and HR systems, including hardware, software and related systems that are either dedicated to Freedom or separable from Shaw's other businesses and related to Freedom;

(h) OEM Inventory: All of the smartphone inventory of Freedom (store inventory or otherwise);

(i) Business Functions: Marketing, pricing, strategy, network, human resources (including

been satisfied or waived (where permitted) by the party or parties to the Arrangement Agreement entitled to the benefit of such condition." In turn, one of the latter conditions is that "[n]o Law is in effect that makes the consummation of the Arrangement illegal or otherwise prohibits or enjoins [Shaw] or [Rogers] from consummating the Arrangement." This includes an order issued by the Tribunal.

contractors), customer care and other business teams that are either dedicated to Freedom or separable from Shaw's other businesses; and

(j) Leases and Retail Distribution: Freedom's real estate leases, sufficient to conduct Freedom's business in the ordinary course, including all of Freedom's retail operations (branded stores, contracts with Freedom dealers/franchisees and contracts with national retailers).

[34] Regarding transition services, the Divestiture Agreement requires Rogers and Shaw to provide Freedom with various transition services at no charge for up to two years, with the option to extend for a third year, at cost, if required.

[35] Insofar as network access services are concerned, Rogers will provide Freedom with:

(a) a significant volume of free roaming services, as well as a rate for incremental usage that is substantially lower than the tariffed rates established by the CRTC that Freedom currently pays to the three national facilities-based carriers for the vast majority of its roaming requirements;

(b) access to Shaw's Go WiFi public hotspots for all Freedom subscribers and all subscribers of any other wireless brand owned by Videotron at no charge, for as long as this service is also provided to Rogers/Shaw customers [redacted]; and

(c) the same fibre backhaul services that Shaw currently provides to Freedom, except that such backhaul services will be [redacted] instead of being charged at market rates. Videotron will have the right to purchase additional backhaul services from Rogers [redacted].

[36] In addition to the foregoing, Rogers will provide aggregated and disaggregated TPIA services using Rogers and Shaw wireline network infrastructure (wherever Rogers and Shaw provide home Internet services) to Videotron at rates that are further discounted from the CRTC tariffed wholesale rates.

[37] The Tribunal pauses to note that much of the foregoing is provided for in separate agreements or term sheets that are Schedules to the Divestiture Agreement. Pursuant to section 1.3 of the Divestiture Agreement, the Schedules thereto form an integral part of the Divestiture Agreement "for all purposes of it." The evidence before the Tribunal is that the term sheets "are complete, final and enforceable upon closing" the Divestiture Agreement: Exhibit P-I-0145, at para 156.

VI. REGULATORY BACKGROUND

[38] The telecommunications industry is subject to regulation in various ways that are relevant to the present proceeding. They will be briefly summarized below.

[39] By way of introduction, the Tribunal observes that section 7 of the *Telecommunications Act*, SC 1993, c 38 ("***Telcommunications Act***"), sets out the various objectives of Canadian

telecommunications policy. The full text of section 7 is set forth in Appendix 1 to these reasons. For the present purposes, the Tribunal notes the following provisions:

7 It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives:	7 La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à:
(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;	b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;	c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;
(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;	f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

A. Wireline

[40] In *Telecom Regulatory Policy CRTC 2015-326* ("**CRTC 2015-326**"), the CRTC observed that its general approach towards wholesale services regulation has been to promote facilities-based competition wherever possible. The CRTC added that "facilities-based competition is best achieved by requiring incumbent carriers to make available facilities that are 'essential' for competition": Exhibit P-A-0029, Exhibit AA, at para 6. It appears that the CRTC continues to adopt this general approach today: Transcript, at 1006.

[41] To further this goal, one of the CRTC's core activities is to oversee the wholesale services regulatory TPIA framework that sets out the rates, terms, and conditions under which incumbent wireline telecommunications service providers are required to lease essential parts of their respective networks to their competitors. Mandated access to those facilities is designed to enable competitors to provide Internet, television/video, and local phone (landline) services to their retail end-customers, at competitive rates.

[42] In recent years, TPIA (also known as wholesale high-speed access ("**HSA**")) has been mandated on an "aggregated" basis. This has enabled competitors to lease a package of both (i)

the "last mile" facilities they need to connect to customer locations, and (ii) the "transport" facilities that move large amounts of traffic over somewhat longer distances.

[43] Access on an aggregated basis also permits lessees to connect to an incumbent carrier's facilities from a limited number of interfaces (e.g., one interface per province): Exhibit P-A-0029, Exhibit AA, at para 56. However, such mandated access has been limited to the technologies that existed at the time of the CRTC's decision in *Telecom Regulatory Policy 2010-632*. Notably, this includes all digital subscriber line ("**DSL**") facilities owned by incumbent local exchange carriers ("**ILECs**") and data over cable service interface specification ("**DOCSIS**") owned by cable companies. However, there is no obligation for ILECs or cable companies to provide wholesale TPIA services over fibre-to-the-premises ("**FTTP**") facilities: Exhibit P-A-0029, Exhibit AA, at para 60.

[44] In CRTC 2015-326, the CRTC considered whether this "aggregated" access approach continued to be the appropriate manner in which to foster retail competition for broadband services and made the following determinations:

- Wholesale high-speed access services, which are used to support retail competition for services, such as local phone, television, and Internet access services, would continue to be mandated. However, the provision of aggregated services would no longer be mandated and would be phased out in conjunction with the implementation of a disaggregated service. Incumbent carriers were directed to begin implementing disaggregated wholesale high-speed access services, in phases, beginning in Ontario and Quebec.

- The requirement to implement disaggregated wholesale high-speed access services would eventually include making them available over fibre-access facilities.

[45] To date, mandated access to FTTP facilities on an aggregated basis continues to be unavailable, and disaggregated wholesale access has not been extended to Alberta and British Columbia: Exhibit P-A-0098; Transcript, at 1008-1010. One consequence of this is that competitors such as Distributel Communications Limited ("**Distributel**"), who rely on the access regime, are not able to obtain mandated access to the higher speeds available over FTTP facilities: Transcript, at 1009-1010.

[46] An important aspect of the shift from mandating access on an "aggregated" basis to a "disaggregated" basis is that access to longer-haul "transport" facilities would no longer be part of the regulated regime: Transcript, at 414. Put differently, the mandated access would primarily be to "last mile" facilities: Transcript, at 971.

[47] Although the CRTC oversees mandated access to "last mile" and "transport" facilities, it appears that it has forborne from regulating access to intercity and national "backbone" facilities pursuant to section 34 of the *Telecommunications Act*: Transcript, at 995. The Tribunal notes that where the CRTC finds that a telecommunications service provided by a Canadian carrier is or will be subject to sufficient competition to protect the interests of users, it is required to refrain – to the extent that it considers appropriate – from exercising certain of its regulatory powers, including in respect of the rates to be charged for that service.

[48] In *Telecom Order CRTC 2016-396* and *Telecom Order CRTC 2016-448*, the CRTC established revised interim rates for TPIA/HSA. Lower "final" rates were then established in *Telecom Order CRTC 2019-288* ("**CRTC 2019-288**"). However, the implementation of the latter order was stayed, such that those "final" rates did not come into effect. Ultimately, in Telecom Decision CRTC 2021-181, the CRTC determined that the interim rates set in its above-mentioned 2016 orders would prevail on a final basis: Exhibit P-A-0029, at para 23. Those rates were established pursuant to what is known as the CRTC's Phase II costing methodology, which is currently subject to review: Exhibit P-R-1958 (*Telecom Notice of Consultation CRTC 2020-131*)**;** Transcript, at 2300.

[49] Notwithstanding any mandated rates that may be established by the CRTC, market participants have the flexibility to enter into bilateral "off-tariff" agreements providing for rates, terms, or conditions that are different from those established by the CRTC: Transcript, at 981.

B. Wireless

[50] A mobile wireless network typically consists of (i) a radio access network ("**RAN**"), which includes equipment such as towers and antennas; (ii) a core network, which includes equipment such as switches and routers; (iii) backhaul, which connects the RAN and the core network; (iv) billing and operational support systems; (v) interconnections to other networks; and (vi) an interconnection to the Internet: Exhibit P-A-0029, Exhibit S, at para 40.

[51] Between approximately the mid-1990s and 2015, the CRTC largely forbore from regulating mobile wireless services. However, as discussed below, that began to change in 2014.

(1) Wholesale roaming

[52] Wholesale roaming enables the retail customers of a wireless carrier (i.e., the home network carrier) to automatically access voice, text, and data services by using a visited wireless carrier's RAN network (also referred to as "the host network"), when they travel outside their home carrier's network footprint: Exhibit P-A-0029, Exhibit S, at para 42.

[53] In 2014, section 27.1 of the *Telecommunications Act* introduced a cap on domestic wholesale roaming rates. At the same time, subsection 27.1(5) was added to provide that the amount established by the CRTC in relation to the rate charged by one Canadian carrier to another Canadian carrier for roaming services prevailed over the amount determined pursuant to subsections 27.1(1) to (3).

[54] The following year, the CRTC issued its *Telecom Regulatory Policy CRTC 2015-177* ("**CRTC 2015-177**"). In that policy, the CRTC stated, among other things, that it was necessary to regulate the rates that the three national wireless carriers charge to other Canadian wireless carriers for domestic Global System for Mobile ("**GSM**") communications-based wholesale roaming. The CRTC made this determination after it concluded that GSM-based wholesale roaming was neither subject to a sufficient level of competition, nor an essential service. The CRTC added that continued forbearance from the regulation of GSM-based wholesale roaming provided by the three national carriers to other Canadian carriers was not consistent with the policy objectives set out in section 7 of the *Telecommunications Act*. Given those findings, the CRTC

established interim rates for wholesale roaming that prevailed over the caps set out in section 27.1, for the three national carriers. The CRTC also recommended the repeal of section 27.1, to allow for the return to market forces for the provision of all other wholesale roaming, as soon as possible: Exhibit P-A-0029, Exhibit S, at 1-2.

(2) Mobile virtual network operators ("MVNOs")

[55] MVNOs are branded resellers that provide mobile wireless services at the retail level. Although some MVNOs self-supply some of the components of a mobile network, it appears that all MVNOs require access to the RAN of a wireless carrier: Exhibit P-A-0029, Exhibit S, at para 43.

[56] In CRTC 2015-177, the CRTC determined that MVNO access provided by the three national wireless carriers is essential. However, it refrained from mandating wholesale MVNO access at that time. This was in part because such action would significantly undermine investments that were being made by recent entrants, several of whom who have since been acquired by the three national wireless carriers.[2]

[57] In April 2021, the CRTC announced that it intended to mandate the provision of a wholesale facilities-based MVNO service that would enable eligible regional wireless carriers to use the wireless networks of the three national carriers, and of Sasktel, where these carriers exercise market power: Transcript, at 341-342; Exhibit P-R-1935 (*Telecom Regulatory Policy CRTC 2021-130* ("**CRTC 2021-130**"). This policy is intended to assist regional carriers to serve new areas while they build out their own networks over a mandated access period of seven years: Transcript, at 2512-13. It is expected to have a considerable depressing effect on the pricing that regional carriers, such as Videotron, pay to the national carriers to access to their networks: Transcript, at 2292. However, the CRTC has yet to finalize the terms and conditions of this new framework and the tariff rates for the service, which must be negotiated by the parties, subject to final offer arbitration by the CRTC if negotiations fail: Transcript, at 2321: Exhibit P-R-1935, at para 390.

[58] In October 2022, the CRTC issued its *Telecom Decision CRTC 2022-288* ("**CRTC-2022-288**") as a further step towards implementing CRTC-2021-130. In that decision, the CRTC provided a number of directions about the details and tariffication of the wholesale MVNO access service, based on the submissions of concerned parties. The CRTC also clarified that wholesale MVNO access service will be available for use by regional wireless carriers that (i) are registered as such, (ii) have deployed a home public mobile network somewhere in Canada (including a RAN and a core network), and (iii) are actively offering mobile wireless services commercially to retail customers: CRTC 2022-288, at para 501. The decision directed the incumbents to file for approval revised tariff pages within 30 days.

[2] In 2013, Telus acquired Public Mobile. In 2015, Rogers acquired Mobilicity. In 2016, Shaw acquired Wind Mobile: Exhibit P-A-0029, at paras 11-13.

(3) Tower and site sharing

[59] In CRTC 2015-177, the CRTC determined that it was not in a position to make an assessment as to whether tower and site sharing were essential. Therefore, it refrained from mandating or requiring general wholesale tariffs for access to those facilities: CRTC 2015-177, at para 178.

(4) Spectrum

[60] Spectrum is regulated by the Minister of Innovation, Science and Industry under the *Radiocommunication Act.* In exercising his functions in this regard, he is supported by Innovation, Science and Economic Development Canada ("**ISED**").

[61] Pursuant to subparagraph 5(1)(a)(i.1) of that legislation, and subject to any regulations made under section 6, the Minister has broad discretion to issue spectrum licences in respect of the utilization of specified radio frequencies within a defined geographic area. This discretion extends to fixing the terms and conditions of such licences.

[62] ISED divides spectrum licences into geographic tiers.

[63] In 2011, Industry Canada, the predecessor to ISED, issued a *Framework for Spectrum Auctions in Canada*. Among other things, that framework states:

> Measures available to the government to promote a competitive post-auction marketplace include restricting the participation of certain entities in an auction and/or placing limits on the amount of spectrum that any one entity may hold by using spectrum set-asides or spectrum aggregation limits.
>
> Exhibit P-A-0029, Exhibit P, at section 4.

[64] Such spectrum set-asides were part of ISED's *Policy and Licensing Framework for Spectrum in the 3500 MHz Band* ("**ISED 3500 MHz Framework**"), which was issued in March 2020. That document described ISED's policy objectives for the 3500 MHz band as being to:

- foster innovation, investment and the evolution of wireless networks by enabling the development and adoption of 5G technologies
- support sustained competition, so that consumers and businesses benefit from greater choice
- facilitate the deployment and timely availability of services across the country, including in rural areas

ISED 3500 MHz Framework, at para 14.

VII. RELEVANT SECTIONS OF THE *COMPETITION ACT*

[65] Subsection 92(1) of the *Competition Act* provides the Tribunal with the authority to make an order in respect of a completed or proposed merger where it finds that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially. In the case of a proposed merger, and in the absence of the consent of the Commissioner and the merging parties, the Tribunal's powers are limited to ordering the merging parties not to proceed with all or part of their merger: *Competition Act*, para 92(1)(*f*).

[66] Section 93 sets forth a non-exhaustive list of factors to which the Tribunal may have regard in assessing whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

[67] Subsection 92(2) provides that the Tribunal shall not find that this statutory test is met, solely on the basis of evidence of market share or concentration.

[68] Pursuant to section 96, also known as the "efficiencies defence", the Tribunal is precluded from issuing an order under section 92 if it finds that the merger in question "has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger … and that the gains in efficiency would not likely be attained if the order were made."

[69] The full text of the above-mentioned provisions is set forth in Appendix 2 to these reasons.

VIII. ISSUES

[70] There are three principal issues in this proceeding. They are as follows:

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

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

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

IX. WITNESSES

A. Expert witnesses

[71] A total of 13 expert witnesses testified in this proceeding.

(1) The Commissioner's experts

[72] Five experts testified on behalf of the Commissioner. They were Dr. Nathan Miller, Mr. Michael Davies, Dr. Lars Osberg, Dr. Katherine Cuff, and Dr. Mark Zmijewski.

[73] Dr. Miller is a Professor at Georgetown University. His expertise is in the field of Industrial Organization and antitrust economics. He was the Commissioner's principal witness with respect to the likely effect that the Merger and Divestiture will have on competition. He was very knowledgeable and informed. However, the panel considered him to be less impartial than in the two other cases in which he recently appeared on behalf of the Commissioner. Among other things, Dr. Miller seemed to cherry-pick the facts that supported the Commissioner's case, he came across as being reluctant to answer certain questions on cross-examination, and he did not acknowledge the limitations of his analysis or other matters as readily as in his prior appearances before the Tribunal. The Tribunal was also surprised that he could not recall whether he requested the Competition Bureau to ask for additional data from Telus and Bell, within the last two weeks, the last two months, the last six months, or more. Ultimately, the Tribunal considered his testimony on key issues such as market shares and price effects to be less robust and persuasive than that of his counterpart, Dr. Israel, who testified on behalf of Rogers.

[74] Mr. Davies is the Founder and Chairman of Endeavour Partners, a consulting firm specializing in business strategy in the digital economy. That firm works with leading businesses throughout the high-tech, mobile, and telecom areas. Among other things, Mr. Davies has significant consulting and expert evidence experience with issues relating to the design, implementation, and management of wireless networks, competition in mobile services, and other digital technologies. Mr. Davies testified with respect to how wireless networks are constructed and operated, various aspects of the Merger and Divestiture, and the competitive strength of the Videotron/Freedom relative to that of Shaw/Freedom. As with Dr. Miller, Mr. Davies was very knowledgeable and informed. However, he was evasive and somewhat pedantic at times. He was also reluctant to acknowledge certain matters,[3] and he failed to consider the impact of the COVID-19 pandemic on Shaw's share of post-paid subscribers. Collectively, this undermined his credibility.

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

(2) Rogers' experts

[76] Five experts testified on behalf of Rogers. They were Dr. Mark Israel, Mr. Kenneth Martin, Mr. Andrew Harington, Dr. Roger Ware, and Dr. Michael Smart.

[77] Dr. Israel was Rogers' principal expert witness regarding the likely competitive effects of the Merger and Divestiture. He is a Senior Managing Director at Compass Lexicon, an economic consulting firm. He has a Ph.D. in economics from Stanford University. The panel found him to be knowledgeable, candid, and forthcoming. His evidence was generally well documented and presented. The panel found that Dr. Israel effectively set out a number of important shortcomings

[3] These matters included that (i) the CRTC has expertise in the field of backhaul regulation; (ii) Videotron is now better placed than Shaw with respect to 3500 MHz spectrum; (iii) there would be little difference between a combined Videotron/Freedom and the current Shaw/Freedom in Ontario; (iv) the loss of Shaw Mobile's distribution network would not be significant to the combined Videotron/Freedom, because Freedom's distribution network accounts for nearly all of Freedom's sales; and (v) the impact of the COVID-19 pandemic.

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

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

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

(3) Shaw's experts

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

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

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

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

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

concessions. However, on other occasions his testimony was somewhat undermined by his reluctance to acknowledge certain matters.[6] Nevertheless, on balance, where he and Mr. Michael Davies[7] did not agree, the panel found his evidence to be more robust and persuasive than Mr. Davies' evidence.

[83] Dr. Evans testified with respect to matters that are relevant to the efficiencies defence in section 96 of the *Competition* Act. Given the determination made in Part X below, it is unnecessary to address that defence or his testimony.

B. Lay witnesses

[84] A total of 27 lay witnesses testified in this proceeding.

(1) The Commissioner's witnesses

[85] 17 lay witnesses testified on behalf of the Commissioner.

[86] The first six of those witnesses are subscribers of wireless services – four of them with Shaw in Alberta or British Columbia, one with Telus in British Columbia, and one with Koodo (Telus' flanker brand) in Ontario.[8] With the exception of the latter witness, they all switched to Shaw Mobile shortly after Shaw launched Shaw Mobile and bundled its Shaw Mobile wireless product with its Internet service at an incremental price of $0, in July 2020. One of those witnesses then switched back to Telus in April 2021 when Telus made a new offering, and after he had experienced inconsistent coverage with Shaw Mobile. All six of these witnesses were straightforward during their very brief cross-examinations. However, none of them was aware of the Divestiture at the time they prepared their Witness Statements. This reduced the usefulness of their testimony.

[87] The next four lay witnesses who testified on behalf of the Commissioner are employed by the Competition Bureau.[9] They were also only subjected to very limited cross-examination. In each case, the purpose of their testimony was to provide helpful background and other information through their Witness Statements. With the exception of Mr. Mathew McCarthy, who provided very helpful information with respect to the regulatory framework, the *viva voce* evidence of the other three witnesses from the Bureau was not particularly noteworthy, largely because they were not knowledgeable about some details of the Commissioner's review of the Merger.

[88] The next two witnesses who testified on behalf of the Commissioner are Freedom dealers. Mr. Sudeep Verma is the owner of 15 Freedom stores (previously 19) in Ontario. Mr. Sameer

---

[6] For example, he was reluctant to acknowledge that cellphone users value WiFi, and that some people would be uncomfortable with accessing untrusted public hot spots.

[7] Mr. Michael Davies should not be confused with Mr. Rod Davies, discussed below.

[8] Messrs. Andre Bremault, Ryan Schumm, Mark Phaneuf, and David Bennett are Shaw customers. Mr. Shane Reimer switched to Shaw in April 2021 and then switched back to Telus in April 2021. Mr. Nimesh Chauhan is a Koodo customer in Ontario.

[9] They were Mr. Denis Albert (Acting Team Lead, Information Centre/Corporate Services), Ms. Stephanie Assad (Competition Law Officer), Ms. Jessica Fiset (Paralegal), and Mr. McCarthy (Competition Law Officer).

Dhamani is the owner of three Freedom stores (previously eight) in Alberta. They are both part of a Freedom dealers' trade association, known as the F-Branded Association, that was established shortly after the announcement of the Merger and that is currently suing Shaw: Transcript, at 460. Indeed, Mr. Verma is a member of the Board of Directors and the Executive Committee of that association. Mr. Verma's testimony focused on (i) Freedom's product offerings; (ii) how Freedom is positioned in the market; (iii) how it was built up by Shaw since it was rebranded from Wind Mobile; (iv) Freedom's planned launch of 5G services prior to the announcement of the Merger; (v) the changes in Freedom's competitiveness since that time; (vi) his lack of familiarity about the details of the Divestiture; and (vii) his "cautious optimism" about the Divestiture. Mr. Dhamani supplemented Mr. Verma's evidence, with which he agreed, with additional evidence pertaining to his experience in Alberta, before and after the announcement of the Merger. He seemed to be slightly more aware of the details of Divestiture than Mr. Verma. However, overall, both witnesses' lack of knowledge about the details pertaining to the Divestiture reduced the value of their testimony. Further, the panel observes in passing that an e-mail sent to Videotron's counsel on behalf of their association stated that [redacted]": Exhibit CA-R-0047, at 27.

[89] In addition to the foregoing witnesses, two senior executives at Telus testified on behalf of the Commissioner. The first was Mr. Charlie Casey, who holds the position of Vice President of Finance and Controller for Consumer Solutions. Mr. Casey testified with respect to (i) Telus' use of data from Comniscient Technologies LLC ("**Comlink**"); (ii) his perception that Shaw's competitive intensity has decreased materially since the announcement of the Merger; and (iii) records that Telus provided to the Commissioner in relation to the Merger, pursuant to an order issued by the Federal Court under section 11 of the *Competition Act*. The panel found Mr. Casey to be evasive and reluctant to answer several questions.[10] The panel also had concerns about his repeated inability to recall certain matters. In light of these shortcomings in his testimony, the panel had significant concerns about Mr. Casey's credibility. Those concerns were exacerbated by the evidence that revealed Telus' substantial efforts to "kill, slow and shape" the Merger and Divestiture: Exhibit CA-R-1940, at 5.

[90] The second witness from Telus was Mr. Nazim Benhadid, who is the Senior Vice President, Network Build & Operate. He testified with respect to (i) his view that wireline ownership is critical to wireless performance and reliability and (ii) the importance of competition based on network reliability and performance. As with Mr. Casey, the panel found Mr. Benhadid to be evasive and reluctant to answer a number of questions. This reluctance included his claimed unawareness of the fact that neither Rogers [redacted] has an extensive wireline network in Alberta or British Columbia. He also claimed to be unaware of other basic information about Rogers and Freedom, including where they own or lease fibre facilities in Alberta and British Columbia – both of which are Telus' home markets. Given his senior position at Telus, with responsibility for Telus' network, the panel considered that this testimony strained credulity. The panel also found that Mr.

[10] For example, Mr. Casey was evasive with respect to Project Fox and what it involved. On another occasion he initially could not recall an e-mail (Exhibit CA-R-0072), entitled [redacted], upon which he was copied, only to quickly reverse himself. There were also other e-mails that were sent to him which he did not recall receiving. In addition, he stated that he could not recall attending a wargaming session, the notes of which suggested he attended. He also claimed to be unaware of Project Peacock, even though several e-mails were sent to him about that project.

Benhadid overstated any shortcomings that may be associated with leasing facilities, relative to owning them. The panel's awareness of Telus' intense opposition to the Merger also adversely affected the weight the panel gave to Mr. Benhadid's testimony.

[91] Following the two witnesses from Telus, two senior executives from Bell proceeded to testify. The first was Mr. Blaik Kirby, who is Group President, Consumer and Small & Medium Business. In addition to addressing Bell's operations, he testified with respect to Bell's perceptions of (i) Shaw, Freedom, Shaw Mobile and their position/impact on the market; (ii) the change in Shaw's competitive behaviour since the announcement of the Merger; and (iii) Videotron's competitive strategy in Quebec. He also addressed information that Bell supplied to the Commissioner in response to an order issued by the Federal Court under section 11 of the *Competition Act*. He was knowledgeable and more forthcoming than were the two witnesses from Telus. He also readily conceded certain shortcomings in his Witness Statement. However, the panel's awareness of Bell's spirited opposition to the Merger adversely affected the overall weight that the panel gave to Mr. Kirby's testimony.

[92] The second Bell witness was Mr. Stephen Howe, who holds the position of Chief Technology and Information Officer. The panel found him to be knowledgeable and candid. However, he was reluctant to acknowledge certain things and claimed to be unaware of other matters that the panel considered he should have known.[11] This, together with the panel's awareness of Bell's opposition to the Merger, adversely affected the weight the panel gave to Mr. Howe's testimony.

[93] Another industry witness who testified on behalf of the Commissioner was Mr. Tom Nagel of Comcast Cable Communications LLC ("**Comcast**"), which is headquartered in Philadelphia, Pennsylvania. He testified with respect to Comcast's wireless offerings in the United States and the role of WiFi 'hotspots' in Comcast's network. The panel found Mr. Nagel to be straightforward, candid, and knowledgeable.

[94] The final lay witness who appeared on behalf of the Commissioner was Mr. Christopher Hickey, who holds the position of Director, Regulatory Affairs at Distributel. Distributel is a facilities-based telecommunications services provider of retail wireline and wireless services in various regions of Canada. To service its customers, it utilizes the facilities of other participants in the market, at both regulated and unregulated rates. Earlier this fall, Distributel entered into an agreement to be acquired by Bell. Among other things, Mr. Hickey testified with respect to (i) Distributel's operations, (ii) his perception of the importance of bundled offerings for Shaw, and (iii) the low/negative margins that Distributel would have if it priced at the same level as Shaw and if it did not have a favourable "off-tariff agreement." The panel found Mr. Hickey to be very knowledgeable, candid, and forthcoming.

[11] For example, he claimed to be unaware of an internal Bell announcement of a $1.5 billion equity offering that Telus launched shortly after the announcement of the Merger. He also could not recall important Bell network outages that occurred in November 2019 and in August 2020, although he then recalled the latter one after he was shown an internal Bell network engineering report.

(2) Rogers' witnesses

[95] Two lay witnesses testified on behalf of Rogers. The first was Mr. Dean Prevost, who is Rogers' President of Integration. He was the company's principal lay witness in this proceeding. His testimony covered a broad range of issues, including (i) Rogers' wireline and wireless networks; (ii) competition in wireless markets across Canada; (iii) the Merger and what Rogers hopes to achieve through it; (iv) the proposed Divestiture; (v) the predicted competitive reaction to the Merger and Divestiture; (vi) Rogers' integration plans with respect to Shaw; and (vii) Rogers' plans for Shaw Mobile. The panel found Mr. Prevost to be knowledgeable and candid, although he was reluctant to acknowledge certain things, such as the fact that consumers would be deprived of the benefits associated with the network that Rogers had planned to build in Alberta and British Columbia in the absence of the Merger.

[96] Rogers' second lay witness was Ms. Marisa Fabiano, who holds the position of Senior Vice President of Finance. She is also the Head of Shaw Integration for Rogers' Integration Management Office. In that capacity, she is responsible for reporting the quantification of potential synergies that Rogers expects to achieve through the Merger. Her testimony largely related to matters that are relevant to the efficiencies defence in section 96 of the *Competition Act*. Given the determination made in Part X below, it is unnecessary to address that defence or her testimony.

(3) Shaw's witnesses

[97] Five lay witnesses testified on behalf of Shaw. In each case, the panel found their testimony to be straightforward, candid, and forthcoming.

[98] Mr. Bradley Shaw is the Chief Executive Officer and Executive Chair of Shaw's Board of Directors. He testified with respect to (i) Shaw's history; (ii) the background to the Merger; (iii) the strategic review of Shaw's options that was conducted by TD Securities Inc. ("**TD Securities**"); (iv) the Merger and Divestiture; and (v) the impact of this proceeding on Shaw.

[99] As previously noted, Mr. McAleese is the President of Shaw. He testified with respect to a broad range of issues. These included (i) the Merger and the Divestiture; (ii) Shaw's business; (iii) how Shaw built Freedom's business after it was acquired in 2016; (iv) Shaw's efforts to prepare for 5G services; (v) the separation between Shaw's wireless and wireline networks; (vi) Shaw's efforts at bundling through Freedom and Shaw Mobile; and (vii) the future of Shaw.

[100] Mr. Trevor English is the Executive Vice President and Chief Financial and Corporate Development Officer of Shaw. He testified with respect to (i) Shaw's acquisition of Wind Mobile in 2016; (ii) Shaw's efforts to build-out wireless infrastructure; (iii) the extent of Shaw's investments in Freedom; (iv) the investments that Shaw considers are necessary on the wireline side of its business; (v) the Shaw family's decision to sell the business; (vi) the impact that the delay of consummating the Merger is having on Shaw's business; and (vii) Shaw's future if the Merger does not proceed.

[101] Mr. Donavan Annett holds the position of Principal Strategist of Strategy Architecture and Engineering at Shaw. Since the announcement of the Merger, he has worked with his peers at Rogers to identify underserved communities in Western Canada to which high-speed connectivity

will be expanded pursuant to a commitment made by Rogers in connection with the Merger. He testified very briefly with respect to Rogers' plans to expand high-speed connectivity into various rural areas if the Merger is completed.

[102] Mr. Rod Davies is a Managing Director and Head of the Canadian Communications, Media and Technology, Investment Banking at TD Securities. He testified with respect to (i) the financial performance of Shaw relative to its peers; (ii) the benefits of scale in the telecommunications business; (iii) the advice TD Securities provided to the Shaw family with respect to Shaw's strategic options; and (iv) the process relating to the sale of Shaw.

(4) Videotron's witnesses

[103] Three lay witnesses testified on behalf of Videotron.

[104] As has been mentioned, Mr. Péladeau is the President and Chief Executive Officer of Quebecor and President of Videotron. He testified with respect to (i) Videotron's history; (ii) the development of its wireless network in Quebec and the greater Ottawa area; (iii) Videotron's interest in expanding its wireless services business across Canada; and (iv) its reaction to the Merger. Mr. Péladeau was candid and readily acknowledged when he did not know about certain details or documents. Given the nature of his overall responsibilities, this was not a significant concern for the panel.

[105] Mr. Jean-François Lescadres is the Vice President of Finance at Videotron. Among other things, he provided additional information with respect to (i) Videotron's business; (ii) its experience as an MVNO; (iii) its entry into the wireline business in Abitibi pursuant to the TPIA framework; (iv) its Fizz digital brand; (v) its plans to expand outside Quebec; (vi) its participation in the 3500 MHz auction; (vii) the events leading to the Divestiture; (viii) its negotiations with Rogers relating to the proposed Divestiture; (ix) its plans and projections for Freedom; and (x) its plans if the Divestiture does not occur. The panel found Mr. Lescadres to be very knowledgeable about these topics. His testimony was straightforward, candid, and forthcoming.

[106] Mr. Mohamed Drif is the Senior Vice President and Chief Technology Officer of Videotron. He testified with respect to (i) the technical aspects of Videotron's wireline and wireless networks; (ii) Videotron's planned rollout of a wireless 5G network outside Quebec; (iii) Videotron's evaluation of Freedom; and (iv) Videotron's integration plans for Freedom. The panel found Mr. Drif's testimony to be straightforward, candid, and forthcoming.

X. ANALYSIS

A. What relevance does the Initially Proposed Transaction have for this proceeding?

[107] The Commissioner maintains that the Initially Proposed Transaction has two important implications for this proceeding. First, he asserts that it is the "merger" for the purposes of the Tribunal's assessment under section 92 of the *Competition Act*. Second, and as a consequence of this, he submits that the Respondents bear the burden of establishing that the Divestiture will ensure that the likely prevention and lessening of competition he alleges will result from that merger will no longer be "substantial".

[108] In support of the first of these positions, the Commissioner states that the Initially Proposed Merger is the "proposed merger" challenged in the present Application. In other words, he maintains that the Initially Proposed Transaction is the *proposed merger* that was the subject of this Application, as filed more than two months before the execution of the Divestiture Term Sheet and almost four months before the signing of the Divestiture Agreement. The Commissioner adds that the "proposed merger" as contemplated by section 92 is the "proposed merger in respect of which the Application is made," as set forth in section 96 of the *Competition Act*, which provides for the efficiencies defence. The Commissioner insists that there is no Application properly before the Tribunal about any other transaction in any other form. He adds that the Respondents have not resiled from or withdrawn from that proposed merger, which remains before the Tribunal in this Application. For greater certainty, the Commissioner states that the Divestiture is irrelevant and beyond the jurisdiction of the Tribunal when evaluating whether that proposed merger is likely to substantially lessen or prevent competition, under section 92.

[109] The Tribunal disagrees. The "proposed merger", as defined by the Commissioner, is *no longer being proposed*. It has been substantially modified, such that what Rogers proposes to acquire will no longer include the shares or assets of Freedom. In the words of Mr. McAleese, "Rogers will never own Freedom or operate Freedom": see Transcript, at 5327:15-16; Exhibit CA-R-0192, at para 359. Moreover, the Minister has publicly confirmed that he "would – under no circumstances – permit the wholesale transfer of wireless spectrum from Shaw to Rogers" and that this decision "formally closes that chapter of the original proposed transaction": Exhibit P-R-0008.

[110] To the extent that the future ownership of Freedom is a major focus of this proceeding, the Commissioner's insistence that the Tribunal spend scarce public resources assessing something that will never happen is divorced from reality. The Tribunal is not "obliged to pretend such an ignorance of realities": *Sask Govt Ins Office v Anderson*, [1967] MJ No 35, at para 5 (CA). Put differently, it "cannot ignore objective facts": *Sebastian v Vancouver Coastal Health Authority*, 2019 BCCA 241, at para 45. Nor should it be expected to do so. On the contrary, the Tribunal should be appropriately concerned with "the true state of affairs": *Commissioner v Canadian Waste Services Holdings Inc*, 2004 Comp Trib 10, at para 34.

[111] Given that intervening events occurring after the filing of an application can have a material impact on a proceeding before the Tribunal, they cannot be ignored. This would be inconsistent with the forward-looking analysis contemplated by section 92: *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, at paras 52-54 ("***Tervita SCC***"). Among other things, the Tribunal can only make an order under section 92 in respect of a proposed merger where it finds that the proposed merger "prevents or lessens, or <u>is likely</u> to prevent or lessen, competition substantially" (emphasis added). It is axiomatic that a previously proposed transaction that will never occur due to intervening developments cannot <u>be likely</u> to prevent or lessen competition substantially.

[112] This construction of section 92 is consistent with language in section 96, which contemplates the assessment of efficiencies that a proposed merger "<u>is</u> likely to bring about" and that "<u>will be</u> greater than and <u>will</u> offset, the effects of any prevention or lessening of competition that <u>will</u> result or <u>is</u> likely to result from the … proposed merger" (emphasis added). This contrasts with the conditional tense language ("would") that appears elsewhere in the merger provisions of

the *Competition Act*, including in sections 94 ("would be"), 95 ("would result") and 100 ("would substantially impair" and "would be difficult to reverse").

[113] The Commissioner's position – that the intervening change to the nature of the proposed merger is irrelevant for the purposes of the initial stage of its assessment under section 92 – is also inconsistent with subsection 106(1) of the *Competition Act*. That provision explicitly recognizes the potential significance of changes to circumstances that existed at the time an application was made.

[114] The Commissioner submits that it would be unfair for the Tribunal to treat the Merger and Divestiture as the "proposed merger" for the purposes of the present Application because he only received a copy of the Divestiture Agreement on August 13, 2022. He adds that this was after the Scheduling Order had been issued, after the parties had exchanged documents, and only 10 days before the commencement of discoveries in this proceeding.

[115] The Tribunal disagrees. Videotron first informed the Commissioner of its interest in purchasing Shaw's wireless business on April 9, 2021. After several meetings with staff in the Competition Bureau, Videotron confirmed its interest in purchasing that business in a letter to the Commissioner dated December 17, 2021. After further exchanges and an additional meeting, Videotron reiterated that position in a letter to the Commissioner dated March 11, 2022. Videotron then informed the Commissioner on April 7, 2022, that it had made a proposal to Rogers to acquire the assets and shares relating to Shaw's wireless business. That was a full seven months prior to the commencement of the hearing of this Application. Approximately two months later, on June 17, 2022, Rogers informed the Commissioner that it had entered into a Letter Agreement and Term Sheet with Quebecor for the sale of Freedom. At the same time, Rogers provided copies of those documents to the Commissioner. The following week, Quebecor requested that the Commissioner issue an advance ruling certificate in respect of the Divestiture: Exhibit P-I-0145, at paras 84-96 and 139-140.

[116] Based on the above, the Tribunal considers that it would not be unfair to the Commissioner to treat the Merger and Divestiture as the proposed merger for the purposes of the present Application.

[117] Considering all of the foregoing, the Tribunal finds that the "proposed merger" for the purposes of the present Application is the only merger that is currently being *proposed* between Rogers and Shaw, namely, their three-way, two-step, arrangement involving Videotron.

[118] The Tribunal notes that this finding is consistent with a U.S. authority directly on point. In *Federal Trade Commission v Arch Coal, Inc*, No 1:04-cv-00534, ECF No 67 (DDC July 7, 2004), the Commission made a motion to exclude, for the purposes of a preliminary injunction proceeding, all evidence and argument on the issue of a divestiture of one of two mines to be purchased by Arch Coal, Inc. ("**Arch**"). In its decision, the Court observed, "In effect, the FTC asks this Court to assess the proposed merger as if Arch would retain both the North Rochelle and Buckskin mines" owned by the acquiree, Triton Coal Co. ("**Triton**"). On that issue, the Defendants argued that ignoring the divestiture "would be tantamount to the Court assessing 'a purely hypothetical transaction of the Commission's making – that none of the parties are proposing'." Ultimately, the Court agreed and stated that it was "unwilling simply to ignore the fact of the

divestiture of Buckskin to Kiewit". The Court concluded that "the challenged transaction [consists] of both the acquisition of Triton by Arch and the divestiture of the Buckskin mine to Kiewit."

[119] The Tribunal's similar finding in the present proceeding has two important consequences. First, the Commissioner's submissions with respect to the impact of Rogers' acquisition of Freedom are not particularly relevant, as that aspect of the Initially Proposed Transaction is never going to happen. They will therefore not be further addressed below.

[120] Second, the Tribunal's finding has an important bearing on the issue of who bears the burden under section 92. The Commissioner recognizes that he bears the burden with respect to the Merger. However, he insists that the Respondents bear the burden of demonstrating that the Divestiture will restore competition to the point at which the alleged prevention and lessening of competition that would likely have been brought about by the Initially Proposed Transaction would no longer be substantial.

[121] In support of this argument, the Commissioner relies on *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at paras 85 and 89 ("***Southam***"). There, the Court found that the parties to the merger bore the burden of demonstrating the effectiveness of their proposed remedy. This finding was rooted in the fact that it was they who asserted that the remedy would eliminate the substantial lessening of competition that the Tribunal found *had* resulted from the merger: *Southam*, at paras 14, 20, and 82. In that context, the relevant issue was whether the remedy proposed by the merging parties would *restore* competition to the required degree. The Commissioner had already discharged his burden of demonstrating that the merger had substantially lessened competition.

[122] The present situation can be distinguished from the facts in *Southam*. There is no completed merger from which to carve out a remedy that may or may not restore competition to the point at which an established lessening or prevention of competition can no longer be said to be substantial. There is only a proposed, two-step merger that *the Commissioner asserts* will likely prevent and lessen competition substantially. He makes that assertion *both* because Videotron will acquire Freedom and because Rogers will then acquire what remains of Shaw – i.e. the Shaw Mobile brand and its associated customer contracts.

[123] In these circumstances, the burden appropriately falls on the Commissioner to prove his allegations.

[124] Ultimately, nothing turns on this finding, as the Tribunal has determined that even if the burden was upon the merging parties, that burden would be satisfied.

B. Is the Merger likely to prevent or lessen competition substantially?

(1) Applicable legal principles

[125] Pursuant to subsection 92(1) of the *Competition Act*, the Tribunal may make an order where it finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

[126] The "prevent" and "lessen" branches of subsection 92(1) are distinct. However, the ultimate test under each branch is essentially the same. That test is whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger: *Tervita SCC, above*, at para 54. This involves comparing the state of competition if the merger proceeds with the state of competition that is likely to prevail "but for" the merger: *Tervita SCC*, above, at paras 50-51; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, at paras 464-465 ("***P&H***"); *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14, at para 369 ("***Tervita CT***").

[127] Often, the state of competition that is likely to prevail in the counterfactual "but for" world is that which exists immediately prior to the merger. However, where the evidence demonstrates that the market is likely to change, the relevant comparison is between the likely future with the merger, and the likely future without the merger. It bears underscoring that this analysis is *forward-looking* in nature: *Tervita SCC*, above, at paras 52-53.

[128] Market power is the ability to profitably influence price or non-price dimensions of competition for an economically meaningful period of time: *Tervita*, above, at para 44; *Tervita CT*, above, at para 371

[129] Accordingly, the assessment of whether competition is likely to be prevented or lessened generally involves an evaluation of whether the merged entity will likely have the ability to increase prices, or to reduce meaningful dimensions of non-price competition, relative to levels that would likely prevail "but for" the merger: *Tervita SCC*, above, at para 51; *Tervita CT*, above, at para 373. Without such effects, section 92 will not generally be engaged: *Tervita SCC*, above, at para 44.

[130] The non-price dimensions typically assessed include service, quality, variety, and innovation: *Tervita SCC*, above, at para 44.

[131] In assessing whether competition is likely to be *prevented*, the focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that likely would have otherwise taken place if the merger did not occur: *Tervita SCC*, above, at para 55. Common examples of such prevention of future competition in the merger context include:

> [374] […] (i) the acquisition of a potential or recent entrant that was likely to expand or to become a meaningful competitor in the relevant market, (ii) an acquisition of an incumbent firm by a potential entrant that otherwise likely would have entered the relevant market *de novo*, and (iii) an acquisition that prevents what otherwise would have been the likely emergence of an important source of competition from an existing or future rival.
>
> *Tervita CT*, above, at para 374

[132] For greater certainty, where the Tribunal concludes that one or more other firms likely would enter or expand on a scale similar to what was prevented or forestalled by a merger, and within the requisite time frame described below, it is unlikely to conclude that the merger is likely

to prevent competition substantially: *Tervita SCC*, above, at para 68; *Tervita CT*, above, at para 385.

[133] In assessing whether competition is likely to be *lessened*, the focus of the assessment is upon whether the merger in question is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals: *Tervita SCC*, above, at para 55.

[134] In determining whether a merger is likely to lessen competition *substantially*, the Tribunal's focus is upon whether the merged entity, acting alone or interdependently with one or more other firms, is likely to be able to exercise *materially* greater market power than in the absence of the merger: *Tervita SCC*, above, at para 54; *P&H*, above, at para 464.

[135] This involves an evaluation of the likely magnitude, scope, and duration of any adverse effects on prices or on non-price dimensions of competition that may be likely to result from the merger: *Tervita SCC*, above, at para 45; *Tervita CT*, above, at para 375; *P&H*, above, at para 467. In conducting that evaluation, the Tribunal may sometimes employ the term "price" as shorthand for all dimensions of competition: *Tervita SCC*, above, at para 44.

[136] With respect to magnitude, or degree, the Tribunal generally assesses the likely effect of a merger on both price and non-price dimensions of competition. It also considers the overall economic impact of the merger in the relevant market. Insofar as prices are concerned, the Tribunal focuses upon whether they are likely to be materially higher than in the absence of the merger. In conducting its assessment, the Tribunal has not found it useful to apply rigid numerical criteria, such as a 5% difference in prices. Instead, the magnitude required to establish a material price increase will depend on the facts of each case. Insofar as non-price dimensions of competition are concerned, the Tribunal's focus will be upon whether levels of service, quality, variety, innovation, etc., are likely to be materially lower than in the absence of the merger: *Tervita SCC*, above, at paras 54 and 80-81; *Tervita CT*, above, at paras 376-377; *P&H*, above, at paras 468-470.

[137] Regarding scope, the Tribunal typically considers whether the merged entity would likely have the ability to impose such effects in a material part of the relevant market, or in respect of a material volume of sales.

[138] Turning to duration, the Tribunal will ordinarily evaluate whether the merged entity would likely have the ability to sustain a material price increase, or a material reduction in non-price benefits of competition, for approximately two years or more, relative to the "but for" scenario: *Tervita CT*, above, at para 379.

[139] If the requisite magnitude, scope, and duration are not demonstrated to be *likely*, the Tribunal will generally conclude that the "substantiality" requirement is not met, even if there is likely to be *some* non-substantial prevention or lessening of competition: *P&H*, above, at para 458.

[140] It bears underscoring that what matters is the *ability* of the merged entity – unilaterally or interdependently with one or more of its rivals – to exercise a materially greater degree of market power than "but for" the merger. It is not necessary for the Tribunal to find that such market power is, in fact, likely to be exercised in relation to price or non-price dimensions of competition: *Tervita SCC*, above, at paras 44, 51, and 80-81; *P&H*, above, at para 473.

[141] The burden of establishing that a merger is likely to prevent or lessen competition substantially falls on the Commissioner: *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28, at paras 107-108 ("***Tervita FCA***"). To satisfy that burden, the Commissioner must establish this likely effect of the merger, as well as the "but for" counterfactual, on a balance of probabilities, and with clear and convincing evidence: *P&H*, above, at para 476. For the purposes of section 92, the Commissioner is not required to go further and quantify the overall "deadweight loss" to the Canadian economy: *Tervita SCC*, above, at para 166.[12]

[142] Pursuant to subsection 92(2) of the *Competition Ac*t, the Tribunal is not permitted to find that a merger lessens, or is likely to lessen, competition substantially solely on the basis of evidence of concentration or market share.

[143] Consequently, it is necessary to consider qualitative assessment factors. As previously noted, a non-exhaustive list of factors that the Tribunal may consider is set forth in section 93 of the *Competition Act*. For the present purposes, the relevant section 93 factors are discussed in Parts X.B.(8)-(12) below.

(2) Summary of the Commissioner's allegations

[144] The Commissioner alleges that the Merger and Divestiture are likely to prevent and lessen competition substantially.

[145] Regarding the alleged substantial *prevention* of competition, the Commissioner maintains that Shaw (i) has a track record as a maverick disruptor and innovator; (ii) was on a growth trajectory until the Merger announcement; (iii) had plans to purchase 3500 MHz spectrum and begin offering 5G services; (iv) had network expansion plans; and (v) was poised to enter into other markets, such as business services. The Commissioner states that the Merger would prevent this future competition, such that competition would likely be substantially prevented.

[146] With respect to the alleged substantial *lessening* of competition, the Commissioner asserts that this is likely to result from the elimination of close competition between Shaw and Rogers, as well as from the removal of Shaw as a disruptor of price coordination in the relevant markets.

(3) The relevant markets

(a) Product market

[147] In his Application, the Commissioner defined two relevant markets for the purposes of this proceeding, namely, the provision of wireless services to (i) consumers; and (ii) business customers. However, at paragraph 9 of his Written Opening Statement, the Commissioner stated that he was no longer alleging a substantial prevention or lessening of competition in the latter market. The Commissioner confirmed this position at paragraph 10 of his Final Written Argument.

[12] This contrasts with the Commissioner's burden in relation to the efficiencies defence under section 96 of the *Competition Act*.

[148] For the purposes of this proceeding, the Respondents do not contest that the sole relevant product market is the provision of wireless services to *consumers*. Nevertheless, they maintain that there are important aspects of differentiated competition, such as bundled offerings, which impact competition for wireless services to non-business consumers. The Tribunal agrees. This will be further discussed later in these reasons.

[149] It appears to be common ground between the parties that the term "wireless services" has the meaning described at paragraph 3 of the Commissioner's Application, namely, "those services provided over a radio network permitting both voice and data communication (including text messaging, internet and mobile application services) without being tethered to a fixed location." This will be the meaning ascribed to the term "wireless services" in the analysis below.

[150] In summary, the sole relevant product market for the purposes of the present analysis is the provision of wireless services to consumers.

(b) Geographic markets

[151] In his Application, the Commissioner defined three relevant geographic markets, namely, the provinces of British Columbia, Alberta, and Ontario. However, at the outset of the hearing of the Application, he conceded that the Divestiture would ensure that competition is not likely to be prevented or lessened *substantially* in Ontario. The trial then proceeded on the basis of that understanding.

[152] For the purposes of this proceeding, the Respondents do not contest the Commissioner's approach to defining relevant markets at the provincial level. However, they note that there are important aspects of competition that transcend provincial boundaries. These include (i) the reduced dependency on roaming that Freedom and Videotron will enjoy as a result of the Divestiture; (ii) the marginal cost savings that will be realized by Videotron, and (iii) the introduction of new bundled competition by Videotron. The Tribunal agrees with the first two of these points and does not understand the third. This will be further discussed later in this decision.

[153] In summary, the two relevant geographic markets for the purposes of the present assessment are the provinces of British Columbia and Alberta, respectively.

(4) The relevant "but for" counterfactual

(a) The general framework

[154] As discussed at paragraphs 126-129 above, the assessment of whether a proposed merger is likely to prevent or lessen competition involves comparing the state of competition if the merger proceeds with the state of competition that is likely to prevail "but for" the merger. Given the forward-looking nature of this assessment, it is important to consider any evidence relating to the future trajectory of the market and its participants. This is required to enable the Tribunal to assess whether the merged entity will likely have the ability to increase prices, or to reduce meaningful dimensions of non-price competition, relative to levels that would likely prevail "but for" the merger.

[155] The Commissioner maintains that the relevant date for the commencement of the forward-looking "but for" analysis is the date upon which Rogers and Shaw executed their Arrangement Agreement, namely, March 13, 2021. The Commissioner asserts that to hold otherwise would incentivize actions designed to wear down or diminish competitors before adjudication is possible.

[156] The Respondents disagree. They characterize the approach suggested by the Commissioner as amounting to a legally untenable "backward-looking" approach. They submit that such an approach would preclude the Tribunal from fully assessing all relevant factors, including what has happened since March 13, 2021. In this latter regard, they note that the signing of the Arrangement Agreement precluded Shaw from participating in the 3500 MHz spectrum auction and that Freedom's business has steadily weakened.

[157] The Tribunal agrees with the Commissioner's position on this issue. Where the execution or announcement of a merger agreement leads to changes in the behaviour of the merging parties, or to a weakening of the party to be acquired, for example, as a result of the departure of customers or employees, the appropriate date *for the commencement of* the forward-looking "but for" analysis is the date of the execution or announcement of the merger agreement. The same is true where the execution of the merger agreement has another important impact on competition. In this case, such an impact was Shaw's ineligibility to participate in the auction for the 3500 MHz set-aside spectrum.

[158] Shaw knew full well that its execution of the merger agreement would have this effect. Accordingly, this was analogous to a "self-inflicted wound." For the purposes of the "but for" analysis, Shaw cannot have the benefit of this. Nor can it have the benefit of any weakening of Freedom or Shaw Mobile that resulted from the departure of employees, customers, suppliers, etc., *due to* the proposed merger.

[159] In these circumstances, the proper approach to the assessment of the likely state of affairs in the counterfactual "but for" world is to determine the *likely trajectory* of Shaw Mobile and Freedom if the Respondents had not signed their Arrangement Agreement. In assessing that likely trajectory, the Tribunal will consider any evidence of likely changes to prices or non-price behaviour that has been adduced in this proceeding.

[160] Ultimately, the burden is on the Commissioner to establish the relevant parameters of the "but for" counterfactual, including the prices or the approximate range of prices that likely would have been offered by Shaw Mobile and Freedom "but for" the execution of the Arrangement Agreement between Shaw and Rogers: *Tervita CT*, above, at paras 59 and 125.

[161] Once a determination of the relevant parameters of the "but for" counterfactual has been made, the Tribunal will then assess whether prices will likely be materially higher than those in that counterfactual if the Merger and the Divestiture proceed. The Tribunal will also assess whether the benefits of non-price competition will likely be materially lower than they would likely be in the "but for" counterfactual, if the Merger and the Divestiture proceed.

(b) Assessment

(i) Prices

[162] During the hearing, the focus of the parties' submissions regarding prices in the "but for" counterfactual world was upon Shaw Mobile's prices. The Commissioner maintained that Shaw Mobile's prices would not likely have increased "but for" the execution of the Arrangement Agreement between Rogers and Shaw on March 13, 2021. Dr. Miller supported this position.

[163] For the reasons set forth below, the Tribunal has concluded that the Commissioner has not met his burden of establishing the relevant "but for" price with respect to Shaw Mobile's offerings. Stated differently, he has not demonstrated that Shaw Mobile's prices would likely have remained the same between March 13, 2021 and the present time. Indeed, Shaw has demonstrated, on a balance of probabilities and with clear and convincing evidence that the prices of Shaw Mobile's various offerings on March 13, 2021 were introductory in nature and likely would have increased prior to now.

[164] Shaw Mobile was launched on July 30, 2020, just prior to the busy "back to school" season and the annual launch of Apple's latest iPhone. At that time, Shaw Mobile had three offerings: (i) $0 for talk and text only, with the option to pay $10 per GB of data (which could be rolled over from month to month until that limit was reached); (ii) $45 for "unlimited" calling in Canada and 25GB of data; and (iii) $55 for "unlimited" calling in Canada, the U.S., and Mexico. The latter two plans included 2GB of nationwide roaming.

[165] Mr. McAleese testified that this pricing was always intended to be introductory in nature: Transcript, at 2880; Exhibit CA-R-0192, at para 253; Exhibit CA-R-0195, at para 94. This is corroborated by a document prepared for a conference call with market analysts in connection with Shaw Mobile's July 30, 2020 launch: Exhibit CA-R-192, Exhibit 95, Among other things, that document characterized the pricing of Shaw Mobile's offerings as being "intro pricing" that would be available "for a limited time." The document reiterated that message in the following statement: "Shaw Mobile pricing is 'introductory' for an undetermined period as we see how competitors react". The document then proceeded to state, "Post intro period, segmentation will inform wireless offers depending on the level of wireline services subscribed to." Part of the uncertainty in this regard was attributable to the COVID-19 pandemic, which had resulted in reduced "store traffic/activity levels."

[166] The link with the wireline side of Shaw's business was reinforced through messaging that underscored that "pricing is anchored in the wireline bundle" and that one of the key objectives was to "reduce broadband churn." Shaw's messaging explained that it aspired to protect its "50/50" split of broadband Internet subscribers with Telus, by "get[ting] 50% of net new broadband adds." Pricing for standalone wireless services was at "market rates", also referred to as "rack rate pricing", namely, $15 for talk and text, $85 for "unlimited", and $95 for "unlimited U.S. and Mexico": Exhibit CA-R-0192, Exhibit 95. A number of analyst reports issued on Shaw Mobile's launch date reflect that Shaw's messaging regarding the "introductory" nature of Shaw Mobile's offerings was in fact delivered.

[167] In late October 2020, Shaw launched an additional offering, while maintaining the prices of its existing plans. That new offering consisted of unlimited roaming within Canada and 25GB of data for $25. This offering was exclusively for customers who subscribed to Shaw's fastest and

most expensive wireline Internet plan at the time, known as "Fibre + Gig." At that time, Shaw Mobile also launched what it called 9-box pricing, reflected in the nine boxes in the table below:

October 2020 Shaw Mobile Pricing				
Plan	**Mobile Only**	**Internet Subscriber**	**Fibre+ Gig Subscriber**	
By The Gig	$15	$0	$0	
25 GB Canada	$85	$45	$25	
25 GB U.S./Mexico	$95	$55	$35	

[168] The pricing in the table immediately above did not change until November 16, 2021, when Shaw Mobile introduced its "Fibre + Gig 1.5" mobile-only plan at $0. At the same time, Shaw Mobile implemented what amounted to a price increase for (i) the two bundled offerings in the first row of the table above, and (ii) the "Fibre + Gig" option in the second row.[13] However, those price increases appear to have been designed to incentivize customers to purchase the new "Fibre + Gig 1.5" product, in order to be eligible for the wireless offer of $0 in the "By the Gig Plan" and $25 in the "Unlimited $25GB Canada" plan. To the extent that this initiative was an extension of the strategy previously adopted, it appears that Shaw Mobile implemented its "price increase" in the ordinary course of business.

[169] The Commissioner maintains that this price increase resulted from a change in strategy, from "growth" to "steady state," pending the completion of the Merger. In support of this position, the Commissioner relies on internal Shaw documents that refer to that shift, both in those terms and in a diagram depicting a shift from the passing lane to the middle lane on a highway. Some of those documents refer to an internal expectation that "continued consumer softness" would be associated with this change in strategy.

[170] However, one of those internal documents, which was delivered to Shaw's Board of Directors on October 28, 2021, stated that one of Shaw's strategic objectives for fiscal 2022 was to "deliver a healthy business" to Rogers. It also explained that an objective of the "middle lane" strategy was to "balance growth and profit." An internal e-mail to Mr. McAleese from Ms. Sara Murray, Vice President of Commercial Finance, dated July 29, 2021, also identified this objective: Exhibit CA-R-0195, Exhibit 32. The purpose of that e-mail was to identify a number of options for improving Shaw's contribution margin. One of those options was to increase Shaw Mobile pricing. The e-mail indicated that this would increase the contribution margin by [redacted], after taking account of reduced sales. On cross-examination, Dr. Miller conceded that if Shaw's decision to increase prices was profit-maximizing, that decision would have been made regardless of whether the Merger was happening: Transcript, at 1656-1657.

[13] The price increases were for the two internet plans in the first row, and the "Fibre + Gig" column in the middle row. The prices in the "Mobile Only" column of those two rows were left unchanged. It is not clear if any changes were made to the "U.S./Mexico" offerings in the third row.

[171] Mr. McAleese maintained that Shaw began discussing plans to increase the prices of its Shaw Mobile offerings well before the Merger was contemplated. In support of this position, he attached to his Reply Witness Statement an internal Shaw e-mail, dated October 9, 2020, which discussed two options, namely: (i) introducing 12-box pricing with a price increase on select customers (namely, those paying less than $100/month); and (ii) introducing simpler 9-box pricing with a discount for one group of customers and no change in pricing for others: Exhibit CA-R-0195, Exhibit 22. He also attached a slide deck entitled "Shaw Mobile 9/12 Box Introduction," dated October 13, 2020, which included a chart for future 12-box pricing that contained the letters "TBA" in five of the boxes. That indicated that the prices remained to be announced: Exhibit CA-R-0192, Exhibit 121. No further evidence was adduced to corroborate Mr. McAleese's position that price increases were planned well before the Merger. Mr. McAleese acknowledged on cross-examination that he was not aware of any other evidence in support of his position: Transcript, at 3014-3015.

[172] Mr. McAleese explained that "there was little point in discussing the specifics" of price increases until Shaw's IT department found a way to integrate Shaw's wireless pricing into the eligible wireline rate plan for the purposes of Shaw's billing system: Transcript, at 3006 and 3015. The ongoing work in that regard was corroborated in one of the documents attached to his Reply Witness Statement: Exhibit CA-R-0195, Exhibit 26, at 2.

[173] Mr. McAleese attached another document to his Witness Statement, entitled "Virtual SLT Retreat, Pre-Read Materials," dated November 4, 2020, which reported that approximately [redacted]% of Shaw Mobile's customers had opted for the "By the Gig" plan, meaning that they were on $0 plans: Exhibit CA-R-0192, Exhibit 104, at 22. Mr. McAleese noted that this did not translate into long-term business success for Shaw.

[174] Parenthetically, the document discussed immediately above also described Shaw Mobile's initial pricing as being "introductory": Exhibit CA-R-0195, Exhibit 104, at 20. Mr. Rod Davies of TD Securities also testified that his team understood from Shaw's management that Shaw Mobile's pricing was introductory and could not be sustained indefinitely: Exhibit CA-R-190, at para 37.

[175] Notwithstanding Mr. McAleese's statement regarding the longer-term implications of Shaw Mobile's pricing, the Commissioner maintained that Shaw Mobile's introductory pricing was profitable. In this regard, he referred to an internal Shaw document that described how [redacted] Customer Lifetime Value ("**CLV**") [redacted]: Exhibit CA-A-0594, at 53. That same document forecasted "[redacted]",[14] but noted that the [redacted]": Exhibit CA-A-0594, at 38 and 44. It also indicated that [redacted]: CA-A-0594, at 38 and 44.

[176] In response to the Commissioner's emphasis on the document described above, Mr. McAleese explained that the CLV and churn data in question were not realistic, because they

[14] ARPU is an acronym for average revenue per user.

reflected the fact that most people were working from home (due to COVID-19) and so were signing up for enhanced wireline packages and unwilling to take the risk of a multi-day disruption that might be associated with changing wireless providers: Transcript, at 3119-3120. The Tribunal considers this explanation to be persuasive.

[177] In addition to the foregoing, the Commissioner referred to a [redacted]: Exhibit CA-R-0190, Exhibit 1, at 124.[15]

[178] In another document sent to TD Securities during its review, Shaw projected that Shaw Mobile would continue to grow its subscriber base [redacted]: Transcript, at 2987.

[179] Despite the foregoing, Mr. Davies of TD Securities testified that [redacted]: Transcript, at 2838-2839. Mr. Davies added, "[redacted]": Transcript, at 2849.

[180] Considering all of the foregoing, the Tribunal finds that the Commissioner has not met his burden of establishing, on a balance of probabilities with clear and convincing evidence, that "but for" the execution of the Arrangement Agreement, the prices of Shaw Mobile's offerings would likely have remained essentially unchanged from those that existed on March 13, 2021. In particular, he has not established that the November 2021 increase of some of Shaw Mobile's prices was attributable to the execution of the Arrangement Agreement.

[181] The Tribunal finds that Shaw has demonstrated that the price increases it implemented in November 2021 occurred in the ordinary course of business. The Tribunal accepts that Shaw implemented these price increases both as part of Shaw Mobile's original plan to enter the market with a lower "introductory" price that would eventually be increased, and as part of a subsequent plan to increase Shaw Mobile's profitability.

[182] The Tribunal notes that during the trial, the Commissioner's counsel pressed one of Videotron's witnesses to concede that "[redacted]: Transcript, at 2244, (emphasis added). Counsel added, "[redacted]Transcript, at 2251 (emphasis added). After the Tribunal pointed this out during final submissions, the Commissioner suggested that the exchange in question related to wireline pricing. However, it is clear from the context reflected on page 2244 of the Transcript that the exchange in question pertained to Shaw Mobile. More generally, the Tribunal notes that raising

[15] ABPU is an acronym for average billing per user.

prices that are offered during the entry period is a very common practice, especially when such pricing is explicitly characterized as being "introductory" in nature.

[183] Insofar as Freedom is concerned, and in the absence of any material submissions regarding the likely evolution of its prices "but for" the merger, the Tribunal is prepared to treat the prices that prevailed immediately prior to the execution of the Arrangement Agreement as the appropriate counterfactual benchmark for the purposes of this proceeding.

(ii) Non-price competition

[184] In the Commissioner's Application, it is alleged that "but for" the Merger, Shaw likely would have continued growing in competitive significance, including by expanding and upgrading its network to 5G. In this latter regard, the Commissioner alleged that Shaw planned to participate in the 3500MHz spectrum auction and to launch 5G in key markets, such as [redacted].

[185] The Tribunal agrees that "but for" the Merger, Shaw likely would have participated in the 3500 MHz auction. Based on Mr. McAleese's statements that Shaw expected to be able to acquire 3500 MHZ spectrum in that auction and that Shaw was confident in that regard, the Tribunal accepts that "but for" the execution of the Arrangement Agreement, it is more probable than not that Shaw would have been successful in that auction, at least to a significant extent.[16] In reaching this finding, the Tribunal also considered that [redacted]: Exhibit CA-R-190, at Exhibit 1, at 6. Success in that auction would have enabled Shaw Mobile to eventually launch full 5G service. In the meantime, Shaw would likely have proceeded with its plans to launch 5G "lite" service, pending the auction and the various steps it would have had to take to launch a "full" 5G service with 3500 MHz spectrum.

[186] As it turned out, Shaw's plans to pursue the launch of its 5G "lite" service, using its existing 600 MHz spectrum, "changed with the execution of the Arrangement Agreement." Mr. McAleese explained that this was because Shaw would no longer be eligible to bid for 3500 MHz spectrum that was "set aside" for regional competitors. Without the ability to obtain such spectrum, Shaw made a decision not to launch its 5G "lite" service because it did not want its customers to "buy a product that was never going to step up the way our peers' experience was going to do": Transcript, at 2876-2877.

[187] Given this finding, an important aspect of the Tribunal's assessment of the Divestiture will be upon whether Videotron would likely launch "full" 5G service within approximately two years of when Shaw Mobile would likely have done so, in essentially the same areas. The Tribunal will also assess the extent to which Videotron likely would launch an intermediate 5G "lite" product in the relevant time frame.

[16] The Tribunal recognizes that the results of spectrum auctions are inherently difficult to predict. While Shaw was optimistic and well positioned financially, it may well have failed to obtain all of the spectrum it sought in the auction.

[188] For greater certainty, in comparing the "but for" counterfactual world in which Shaw planned to participate in the 3500MHz auction with what is likely to occur if the Merger and Divestiture proceed, the issue of whether Shaw is likely to obtain 3500 MHz or 3800 MHz spectrum if the Merger and Divestiture do not proceed is not relevant. This is because Shaw was well aware, at the time it entered into the Arrangement Agreement with Rogers, that one of the consequences would be that it would not be able to participate in the "set-aside" auction for 3500 MHz spectrum: see para 186, above.[17]

[189] The Tribunal pauses to observe that despite Shaw's inability to benefit from this adverse consequence in the Tribunal's assessment of the "but for" counterfactual, the Tribunal will consider the fact that Videotron obtained the 3500 MHz spectrum that Shaw had hoped to obtain, in its assessment of the likely effect of the Merger and Divestiture. The Tribunal will also consider the very significant competitive initiatives that Bell and Telus have undertaken in the wake of the announcement of the Merger and Divestiture.

[190] With respect to other aspects of Shaw's expansion in the relevant "but for" world, the Commissioner's Final Written Argument referred to evidence which demonstrates that Shaw had plans to expand its wireless footprint into [redacted].

[191] Once again, the Tribunal will assess Videotron's plans against this evidence in coming to its determination. However, in considering the weight to give to that evidence, the Tribunal will bear in mind that the Commissioner did not cross-examine any of Shaw's witnesses regarding that evidence. Instead, the Commissioner simply asked Mr. McAleese to confirm that Shaw "had plans on the drawing board to continue [its] geographic expansion": Transcript, at 2907. Mr. McAleese responded in the affirmative.

[192] The Tribunal will also take into account Rogers' plan to expand high-speed connectivity to several areas in Western Canada, as part of a $1 billion commitment it has made to expand rural service if the Merger and Divestiture proceed: Exhibit CB-R-0207, at paras 12-13 and 21.

[193] In addition, the Tribunal will consider the extent to which Shaw likely would have continued to commit the very large investments it has been making since 2016, to grow and expand its wireless business.

(5) Market shares and concentration

(a) Introduction

[17] In any event, given the importance of 5G, [redacted], the Tribunal considers that it is more probable than not that Shaw would use the proceeds of the "break fee" that is provided for in the Arrangement Agreement, to obtain 3500 MHz spectrum on the secondary market, or to obtain 3800 MHz spectrum in the upcoming auction.

[194] Market shares and the level of concentration in a relevant market can be helpful indicators of the likely impact of a merger. The same is true with respect to changes in market shares and the level of concentration. However, as previously noted, subsection 92(2) of the *Competition Act* provides that the Tribunal shall not find that a merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of market share or concentration. Such evidence is therefore generally only the starting point in the post-market definition stage of the Tribunal's assessment of a merger or proposed merger.

[195] The MEGs state that "[i]n the absence of high post-merger market share and concentration, effective competition in the relevant market is generally likely to constrain the creation, maintenance or enhancement of market power by reason of the merger": MEGs, at para 5.8. The Tribunal agrees with this statement.

[196] Having regard to the foregoing, the MEGs articulate what are colloquially known as "safe harbour" thresholds "to identify and distinguish mergers that are unlikely to have anti-competitive consequences from those that require a more detailed analysis": MEGs, at para 5.9. Those thresholds are (i) a 35% market share in relation to potential concerns related to the unilateral exercise of market power, and (ii) a four-firm concentration ratio ("**CR4**") of 65% in relation to potential concerns regarding the interdependent or coordinated exercise of market power – provided, however, that a CR4 in excess of this threshold will generally not be challenged if the post-merger market share of the merged firm would be less than 10 %: MEGs, at para 5.9.

[197] The foregoing thresholds have remained unchanged for over 30 years: Director of Investigation and Research, *Merger Enforcement Guidelines* (March 1991), at para 4.2.1. To the extent that they have stood the test of time and provided helpful guidance to the Canadian public, the Tribunal considers that it is appropriate to embrace them to distinguish between mergers that are unlikely to prevent or lessen competition substantially and mergers that require additional analysis: see also *P&H*, above, at paras 567-569.

[198] These thresholds can be helpful in the present proceeding.

(b) Assessment

[199] In his Application, the Commissioner provided market share and concentration data based on shares of subscribers ("**SOS**"). However, in his Written Opening Statement, he adopted a different measure, namely, share of gross additions ("**SOGA**") during a defined period of time. In support of that position, he noted that the MEGs state as follows:

> When a regulated or historical incumbent firm is facing deregulation or enhanced competition, shares based on new customer acquisitions may be a better indicator of competitive vigor than are shares based on existing customers.
>
> MEGs, above, at para 5.4

[200] Dr. Miller supported this approach, observing:

> The best approximation of "new customer acquisitions" that is available to me is the same measure that mobile wireless carriers often use to assess their

> competitive success, their share of "gross adds." Gross adds are the new customers that a wireless carrier gains during a particular period of time.
>
> Exhibit CA-A-0122, at para 61.

[201] Dr. Miller defended the SOGA approach on the basis that only a fraction of current subscribers update their wireless plans or switch carriers in any given month. Stated differently, a significant portion of a wireless carrier's installed customer base is not actively shopping in any given month. Consequently, Dr. Miller maintained that the SOGA during a particular period of time provides a better indicator of competitive vigor and future competitive significance of market participants than the SOS. He suggested that this would be particularly true for a new entrant such as Shaw Mobile, which has a small installed base, but a high SOGA. In his view, the SOGA is a good approximation of the choices made by customers that are actively shopping among the available competitive options in the market. He added that the Respondents themselves use data on gross additions ("**Gross Adds**") to measure their performance in the ordinary course of business: Exhibit CA-A-0122, at footnote 113.

[202] The Commissioner argued that a further reason why SOGA is superior to SOS as a measure of market share is that, to the extent that SOS implicitly includes customer decisions that were made far in the past, SOS is a poor reflection of customers' current choices and current competitive conditions, including new products.

[203] Having regard to the foregoing, Dr. Miller calculated the following market shares based on SOGA:[18]

Table 1 – Market Shares based on Gross Adds between January and April 2021

Province	Rogers	Shaw Mobile	Freedom	Bell	Telus
Alberta	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
British Columbia	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Ontario	[redacted]		[redacted]	[redacted]	[redacted]

Source: Exhibit CA-A-0122, Exhibits 2 and 18.

[18] This data is reproduced from Exhibit 2 and Exhibit 18 to Dr. Miller's initial report, which also included SOGA data for Rogers and Shaw Mobile/Freedom combined, as well as more detailed brand-level data. Dr. Miller excluded new subscriptions to non-phone mobile service (e.g., connectivity for tablets), to allow for the possibility that adding a device to an existing consumer account may not reflect the same competitive situation as a new phone subscription for a consumer. He also excluded new subscriptions for business accounts that are distinguished from consumer accounts.

[204] Dr. Miller chose the period between January and April 2021 because it was the most recent period in respect of which the data he used to conduct his merger simulation was consistently available for all of the above-noted carriers.

[205] When Dr. Miller calculated diversion ratios based on the SOGA figures in Table 1 above, he found that they [redacted]: Exhibit CA-A-0122, at para 359 and Exhibit 34 at 171.

[206] As further discussed in the next section below, Dr. Miller's market share estimates based on the SOGA data reflected in Table 1 above played a crucial role in his merger simulations, which he relied on to estimate the price and welfare effects of the Merger and the Divestiture.

[207] Dr. Israel criticized the SOGA approach to calculating market shares on several grounds: Exhibit CA-R-1851, at paras 55-67. Generally speaking, he maintained that the use of SOGA data so soon after Shaw Mobile's launch inflates Shaw Mobile's current and ongoing competitive significance in Alberta and British Columbia. This is because a new product can be expected to get a burst of new subscribers who would have already purchased this product earlier had it been available. This is particularly so for a product that is significantly differentiated from existing products. In this context, using the new product's SOGA assumes that it will always maintain its "newness." In addition, a new product is often offered for a low introductory price that is not representative of its longer-term steady state price.

[208] Beyond the foregoing, Dr. Israel pointed out that SOGA does not capture the choices of all shoppers. Instead, it only captures the choices of shoppers who ultimately make a decision to switch brands. This fails to account for the many active shoppers who choose to stay with their existing brands. During cross-examination, Mr. Kirby stated the following, which suggests that the number of active shoppers who ultimately decide to stay with their carrier is approximately [redacted]imes greater than the number who switch:

[redacted]

Transcript, at 954-955.

[209] This testimony corroborates Dr. Israel's position that using SOGA does not provide a reliable measure of the share of active shoppers, let alone all subscribers.

[210] Regarding the [redacted] between SOGA and the data concerning port-ins and port-outs between Rogers and Shaw, Dr. Israel explained that this should be no surprise because porting data captures the same thing as SOGA: short-term switching behaviour prompted by short specific competitive initiatives, such as Shaw Mobile's entry and Rogers' response.

[211] Using actual wireless subscriber data from the same period used by Dr. Miller to calculate his SOGA estimates, Dr. Israel calculated Shaw Mobile's "share of active shoppers" in Alberta and British Columbia under three alternate assumptions, namely (i) that all wireless subscribers shop every 12 months, (ii) that they shop every 24 months, and (iii) that they shop every 36 months. His results are set forth in Table 2 below:

Table 2: Illustration of Shaw Mobile Share of Shoppers Under Alternative Assumptions for Frequency of Subscriber Shopping

Frequency of Shopping by Existing Subscribers	Shaw Mobile Share of Active Shoppers	
	AB	BC
[redacted]		

Source: Prof. Miller's backup materials.

[212] In addition to the criticisms set forth above, Dr. Israel prepared the following three charts, based on more comprehensive data, to convey the shortcomings of Dr. Miller's SOGA estimates:

Figure 1: Shaw and Rogers gross adds in AB and BC, August 2020 – April 2022

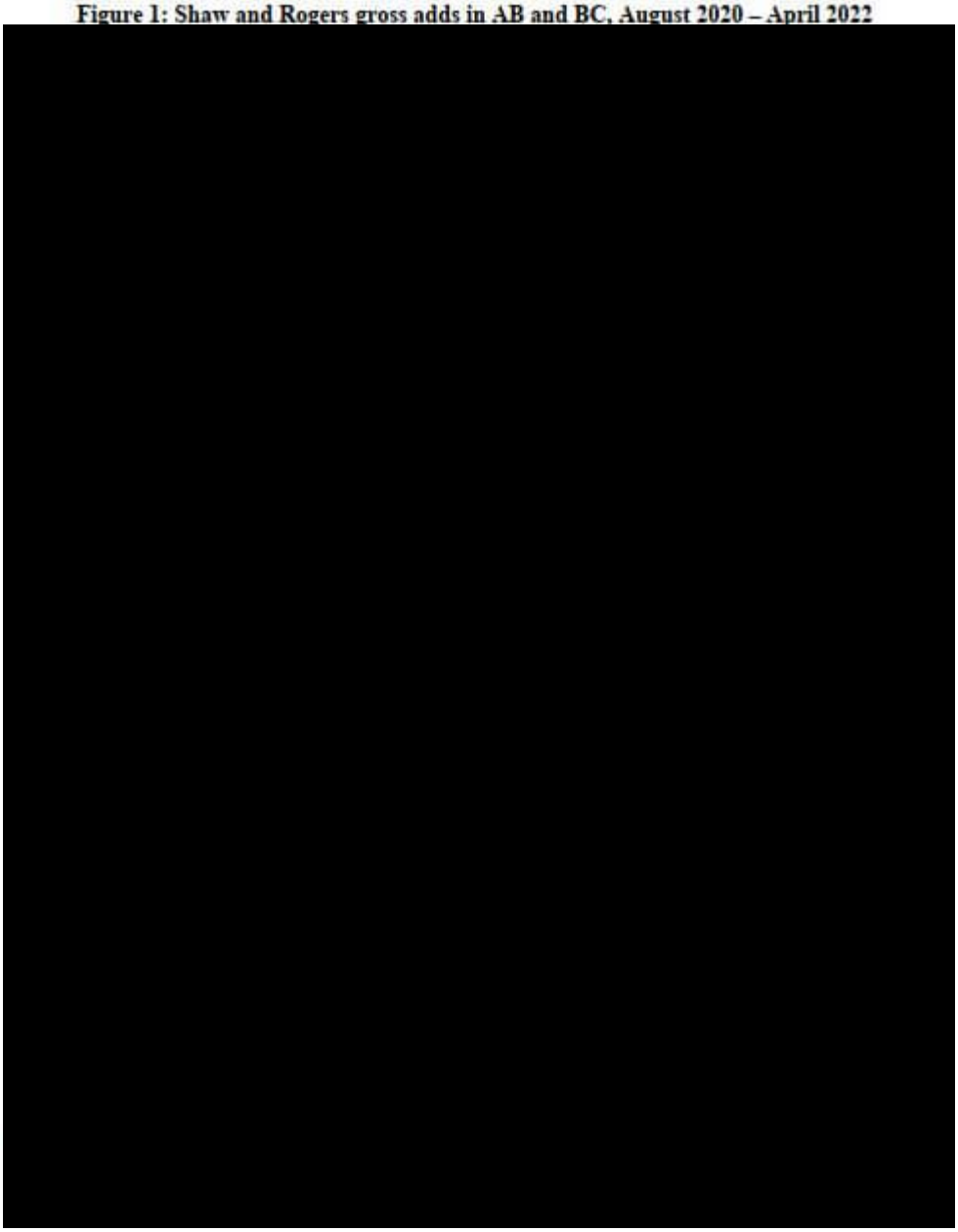


Figure 2: Shaw Mobile's monthly market share growth, percentage points, July 2020 – March 2022

Figure 3: Shaw Mobile share of subscribers in AB and BC, July 2020 – April 2022

[213] Regarding Figure 3 immediately above, Dr. Israel maintained that there is no plausible scenario in which Shaw Mobile could bridge the gap between the solid lines at the bottom and the dotted lines at the top, in order to achieve the [redacted]%+ "market shares" reflected in SOGA data for the period July 2020 to April 2022. The Tribunal agrees.

[214] In reply, Dr. Miller noted that he agreed with Dr. Israel that it would not make sense to measure competitive significance shortly after a one-off event. He explained that this is why he excluded the first few months after Shaw Mobile's launch in July 2020. He maintained that his selection of the period between January and April 2021 best reflected Shaw's ongoing competitive significance after the initial months of particularly high subscriber additions. With respect to the longer period (July 2020 – April 2022) used by Dr. Israel, Dr. Miller asserted that this included price increases that were implemented in November 2021, after the Merger was announced, and therefore could not be interpreted as representing the competitive strength of Shaw Mobile before that announcement.

[215] Dr. Miller also acknowledged that an important shortcoming of the SOGA approach was the inability to observe how often active shoppers decide to remain with their existing carrier. Despite this, Dr. Miller continued to assert that although neither SOS, nor SOGA are perfect measures of market share, the likely errors associated with the latter are much more limited than that which is associated with SOS. As it turned out, Mr. Kirby's above-mentioned testimony on cross-examination significantly undermined Dr. Miller's position. To some extent, the same is true of Dr. Miller's own acknowledgement on cross-examination that the churn rate and the rate at which people shop are not the same thing: Transcript, at 1598.

[216] Elsewhere in his Reply Report, Dr. Miller noted that data regarding Rogers' post-paid subscribers in 2021 indicates that [redacted] Exhibit CA-A-0122, at footnote 15. This data shows that the percentage of Rogers' customers who are free to actively shop around for a better deal – and may well be doing so – [redacted]%). The absence of similar data for other carriers prevents the Tribunal from making a more general observation in this regard.

[217] In Reply to Dr. Miller, Dr. Israel maintained his position that market shares based on SOS provide a better reflection than SOGA of the "ongoing competitive significance" of Shaw Mobile and its competitors. As to the November 2021 price changes,[19] he asserted that Shaw's SOGA was on a downward path even before that time, and indeed before the announcement of the Merger. The sole exception was a short spike that other carriers also enjoyed in connection with the "back to school" season. This is reflected in Figures 1 and 2 of Dr. Israel's report above. It is also reflected in the following chart from Dr. Israel's presentation during the hearing, which simply made some additions to a similar slide contained in Dr. Miller's presentation.[20]

[19] Dr. Israel also maintained that the November 2021 price increases implemented by Shaw Mobile were consistent with profit maximization on Shaw's part. That price increase is discussed at paragraphs 168-181 above.

[20] The adjustments consisted of the addition of the blue line, an extension of the horizontal dotted line beyond April 2021, and the reference to seasonal demand.

[218] Considering all of the foregoing, the panel finds that market shares based on SOS provide a better reflection than market shares based on SOGA, of the ongoing competitive significance of Shaw Mobile and the other market participants in the relevant markets. The panel reaches this finding essentially for the reasons given by Dr. Israel. Nonetheless, the panel accepts that market shares based on SOS somewhat understate Shaw Mobile's competitive significance, though nowhere near to the extent suggested by Dr. Miller.

[219] The Tribunal pauses to observe that Dr. Miller appears to have recognized that data extending beyond the January – April 2021 period that he used for his SOGA calculations would have been helpful. To this end, he made a request for additional Bell and Telus data extending beyond that period. The Tribunal found it very surprising that, on cross-examination, he could not recall who he asked or when he made his request, and he did not know why he did not ultimately receive that data: Transcript, at 1548.

[220] Although the evidence reveals that market participants often use SOGA, it equally establishes that SOS is more frequently used when discussing market shares. SOGA appears to be more commonly used to track the impact of specific promotions or other initiatives, or to track what is happening on a very short-term basis. In this regard, the Tribunal accepts Dr. Israel's testimony that "Gross Adds along with churn … can be looked at together in certain contexts to see how things are changing, but it is not a correct measure of market share": Transcript, at 4527.

[221] The Tribunal notes that the CRTC also reports market shares based on SOS: see for example, Exhibit P-A-0241.

[222] Having regard to its conclusion that SOS is the appropriate basis upon which to calculate market shares, the Tribunal accepts the following shares calculated by Dr. Israel:

Table 3 – Market Shares based on March 2022 Share of Post-paid Subscribers					
Province	**Rogers**	**Shaw Mobile**	**Freedom**	**Bell**	**Telus**
Alberta	19.4%	6.8%	7.0%	19.7%	47.1%
British Columbia	33.6%	6.5%	6.7%	15.0%	38.2%
Ontario	42.5%		12.4%	26.1%	19.1%

Source: Exhibit CA-R-1851, at Table 3.

[223] The total market shares for Alberta, British Columbia, and Ontario (in each row) sum up to 100 because Dr. Miller and Dr. Israel excluded smaller competitors, who collectively account for a tiny market share. The Tribunal considers that the exclusion of those smaller competitors does not have a material impact on its assessment of the likely impact of the Merger and Divestiture.

[224] Based on the foregoing market shares, the post-Merger CR4 would be 100% in each of the above-noted provinces. The post-Merger CR3 for Rogers, Telus, and Bell (the "**National Carriers**) combined would be 93% in Alberta, 93.3% in British Columbia, and 87.6% in Ontario.

[225] Unfortunately, Dr. Israel did not include pre-paid subscribers in his market share estimates. This was because he focused on Dr. Miller's eight-brand simulation, which was confined to the post-paid brands of the above-noted market participants,[21] and which Dr. Miller considered to be superior to his 11-brand simulation (that included the pre-paid brands of Bell, Rogers and Telus):[22] Exhibit CA-R-1854, at para 48; Exhibit CA-A-0122, at para 177; Transcript, at 4668.

[226] The exclusion of pre-paid subscribers from the market share estimates provided above is not likely to have a material impact on the Tribunal's analysis. This is because Shaw Mobile does not have pre-paid subscribers, and Freedom only has a modest number of pre-paid subscribers in Alberta and British Columbia.[23] Accordingly, the shares attributed to Shaw Mobile in Table 3 above are *higher* than they would be if pre-paid subscribers had been included, while the shares attributed to Freedom are, at most, marginally lower. Given that Videotron has no subscribers in Alberta and British Columbia, the combined market share of Videotron and Freedom would in any

[21] The eight brands comprise two brands for each of Rogers (Rogers Wireless & Fido), Bell (Bell Wireless & Virgin Mobile), Telus (Telus Wireless & Koodo) and Shaw (Shaw Mobile and Freedom).

[22] The three additional pre-paid brands included in Dr. Miller's 11-brand model are Chatr (Rogers), Public Mobile (Telus) and Lucky (Bell).

[23] The total number of Freedom pre-paid subscribers as of May 31, 2022 was only [redacted] in Alberta and [redacted] in British Columbia. The corresponding figure for Ontario is [redacted]: Exhibit CA-R-0192, at Exhibit 72. According to Mr. Verma, Freedom has a higher percentage of pre-paid subscribers, relative to its competitors: Transcript, at 429. The Tribunal understood this statement as applying to Ontario, where Mr. Verma owns 15 Freedom stores. Accordingly, the exclusion of pre-paid subscribers from Table 3 above likely has the effect of understating Freedom's market share in that province.

event fall well below the 35% threshold that distinguishes mergers that are unlikely to prevent or lessen competition substantially from those that require further analysis.

(6) Predicted price effects

[227] Dr. Miller estimated that the Merger and Divestiture are likely to result in weighted average price increases in the range of 0.8% to 3.4% in Alberta and 2.5% to 5% in British Columbia. In each case, the lower bound of the range represents the weighted average price increase for the eight post-paid brands mentioned above, whereas the upper bound represents the weighted average price increase for all 11 post-paid and pre-paid brands combined. As noted above, Dr. Miller considered his estimates in relation to the eight post-paid brands to be superior to his estimates in relation to all 11 brands: Exhibit CA-A-0122, at para 177.

[228] Dr. Miller considered his estimated weighted average price increases to be conservative. Among other things, he believed that he adopted a generous approach to the classification of variable costs, which reduced the level of the margins that would otherwise have been inputted into the model: Transcript, at 1727. He also believed his model understated the extent of diversion between Rogers and Shaw: Transcript, at 1751.

[229] In running his eight and 11 brand simulations, Dr. Miller used a unilateral effects model with two parts: the logit demand system, which describes the behaviour of consumers, and the Nash-Bertrand market equilibrium, which describes the behaviour of firms. The four key inputs into that model were market shares (calculated in terms of SOGA), markups (obtained from Rogers and Shaw), prices (as measured by ARPU), and market elasticities (obtained from mainly primarily academic literature): Exhibit CA-A-0122, paras 152-167 and 251.

[230] Dr. Israel maintained that Dr. Miller's estimates of price increases (and corresponding welfare effects) were substantially overstated for several reasons, and therefore unreliable. But before addressing those reasons during the hearing, he observed that models, such as the one Dr. Miller used for his analysis, will always predict a price increase. In his experience, and given the low level of weighted average price increases reported by Dr. Miller, Dr. Israel opined that Dr. Miller's model is "finding very little": Transcript, at 4449-4450. He added that the model's prediction of price increases for Bell and Telus was not consistent with the evidence, indicating that those carriers "seem to be reacting to the transaction as though they need to compete more aggressively … [rather than]… pull[ing] back with a price increase": Transcript, at 4450.

[231] Turning to Dr. Israel's more specific critiques of Dr. Miller's estimated price effects, he maintained that Dr. Miller ought to have used SOS data, rather than SOGA data, to calibrate his model. To the extent that Dr. Miller's SOGA estimates were more than [redacted] higher than Shaw Mobile's actual SOS-based market shares ([redacted]% versus 6.8% in Alberta and [redacted]% versus 6.5% in British Columbia)[24], this had the effect of "overstat[ing] by a large amount any prediction of harm": Transcript, at 4451. This is because the model assumes that diversion is proportionate to market share: Exhibit CA-R-1851, at para 52. Therefore, increased market shares produce increased diversion ratios.

[24] See Tables 1 and 3 above.

[232] As noted at paragraph 210 above, Dr. Israel was not surprised that the SOGA [redacted] the port-in and port-out data that he had available because the latter data [redacted] as SOGA data: short-term switching behaviour prompted by short, specific competitive initiatives. However, he underscored that port-in and port-out data cannot be used to validate diversion ratio estimates. This is because "diversion ratios measure the degree to which buyers would substitute to other products in response to a price or quality change" (emphasis added), whereas "switching rates capture all consumer movements between products, including those that have nothing to do with price or quality changes": Exhibit CA-R-1851, at footnote 38; Transcript, at 4463-4464. Dr. Israel added that, in some situations, porting data can reflect "pull" factors such as Shaw Mobile's entry with its new bundled product, whereas diversion ratios measure the "push" factor associated with a price increase that causes customers to switch to another service provider: Transcript, at 4465-4466.

[233] In Reply, Dr. Miller maintained, as he did with respect to his use of SOGA data to calculate market shares, that this data was superior to SOS data. As with the explanation he provided in that context, the Tribunal once again finds his position to be unpersuasive.

[234] Dr. Israel's second principal critique of Dr. Miller's estimated price effects is that it ignored the fact that some customers appear to prefer to bundle wireless services with their purchases of wireline services. Dr. Israel observed that the failure to recognize such preferences, and indeed other preferences (such as for premium or non-premium products), is a well-known limitation of the flat logit model used by Dr. Miller. To the extent that Dr. Miller's model assumes that all products are equally close to each other, such that market shares determine diversion ratios, it overestimates diversion from Shaw Mobile's bundled customers to Rogers. This is because there are only two providers of bundled products in Alberta and British Columbia. Given this, people who prefer a bundle are more likely to switch between those two providers (Shaw Mobile and Telus). The panel considers that the fact that almost all of Shaw Mobile's wireless customers purchase their wireless services as part of a bundle would strongly suggest that this would be the case. Notwithstanding the emphasis that Dr. Miller placed on Shaw's bundling strategy in his report, and his recognition that the launch of Shaw Mobile would permit Shaw to compete more directly with Telus (including on bundled offerings), he omitted to adjust his model to account for consumer preferences for bundles.

[235] Dr. Israel suggested that the significance of Dr. Miller's failure to address such preferences was amplified by the fact that he did not account for the bundled product that Videotron plans to introduce either: Transcript, at 4471.

[236] Dr. Israel added that Dr. Miller ought to have adapted his flat logit model to better reflect the more realistic assumption that a consumer who has a bundled product is, all things being equal, more likely to switch to another bundled product than to a standalone wireless product. In this regard, he noted that Dr. Miller could have used a "nested" logit model, consisting of a nest for bundled products and a second nest for standalone products. Although Dr. Israel did not have a good empirical estimate of the proper value to use for the nest parameter, he demonstrated that even a moderate value, such as 0.25 (which implies only mild preferences for products in the two nests) has a large positive effect on the results produced by the model: Exhibit CA-R-1854, at paras 38-46.

[237] In Reply, Dr. Miller stated that Dr. Israel did not demonstrate that grouping products into predefined "nests" would significantly affect the results of the simulations he performed. During the hearing, Dr. Miller added that the inclusion of the two nests suggested by Dr. Israel would have artificially increased the diversion between Shaw Mobile and Telus, and artificially reduced the diversions between Shaw Mobile and Rogers. The Tribunal disagrees and accepts Dr. Israel's position that adapting Dr. Miller's model to account for bundling and indeed other consumer preferences (such as for premium or non-premium brands) would have better reflected market dynamics and would have produced more reliable results. The Tribunal accepts Dr. Israel's view that accounting for bundling would reduce the upward pricing pressure predicted by Dr. Miller's model. The Tribunal also accepts Dr. Israel's estimate of the significant impact that this would have had on Dr. Miller's estimates, using even the moderate 0.25 parameter that he relied on.

[238] The Tribunal pauses to add that, during the hearing, Dr. Miller appeared to suggest that he did not adapt his model to account for bundling on the demand-side because he sees the role of bundling as a supply-side consideration since it reduces churn: Transcript, at 1486. The panel considers that omitting to account for the demand-side role of bundling in this context was a significant shortcoming in Dr. Miller's model. It was also inconsistent with the inclusion of data that was intimately linked to the demand-side of bundling.

[239] Dr. Israel's third principal critique of Dr. Miller's estimates of price effects is that Dr. Miller failed to take into account the marginal cost savings that Freedom and Videotron will achieve pursuant to the Divestiture. Dr. Israel explained that, as a general principle, if the cost of providing a wireless service decreases, this will put downward pressure on prices and upward pressure on output. Yet, Dr. Miller ignored these effects in his merger simulations.

[240] Specifically, Dr. Israel noted that Dr. Miller did not account for the lower costs for Freedom subscribers to roam (i) in Quebec (where Videotron is based), (ii) elsewhere in Canada (where Freedom subscribers will benefit from the [redacted]% lower rate that Videotron has negotiated with Rogers), and (iii) internationally (in countries where Quebecor has negotiated rates that are lower than those currently paid by Freedom subscribers). In addition, Dr. Miller did not account for the fact that [redacted]. Indeed, he considered the [redacted] to be unrelated to the marginal costs associated with providing customers with wireless service.

[241] In Reply, Dr. Miller stated that when he incorporated into his model the predicted marginal cost savings "that have some foundation and relevance," he found that they did not materially change his conclusions: Exhibit CA-A-0125, at para 60. Unfortunately, he did not explain which marginal cost savings satisfied that test. Ultimately, the Tribunal accepts Dr. Israel's estimates of the impact of those cost savings on Dr. Miller's estimates of price effects.

[242] In addition to his three principal criticisms of Dr. Miller's estimates, Dr. Israel maintained that Dr. Miller's model generates unreasonable margins and marginal costs. In this regard, he noted that Freedom's accounting marginal cost in Alberta is $[redacted], yet Dr. Miller's model implies a marginal cost of $[redacted]. Dr. Israel stated that the mismatch between the cost used for calibration and the costs implied by the model means that the model does not remotely fit the data. He also pointed to figures with respect to Shaw Mobile's margins and implied marginal costs that he characterized as being "even more striking": Exhibit CA-R-1851, at para 77.

[243] In Reply, Dr. Miller asserted that by allowing for a calibration of relatively low marginal costs for Shaw's wireless products in Alberta and British Columbia, his model incorporated the bundling strategy adopted by Shaw, the revenue Shaw earns on its wireline products, and Shaw incentives. He added that he designed his model's "calibration routine to match the empirical markups of Rogers, Fido, and Freedom correctly *on average* in each of the relevant provinces": Exhibit CA-A-0125, at para 53. Once again, the Tribunal did not find these explanations to be persuasive. Among other things, more accurate margins and marginal costs would have improved Dr. Miller's estimates. The Tribunal considers that Dr. Miller's reliance on SOGA, rather than SOS, contributed to the calibration of unreasonably low marginal costs for Shaw and Freedom.

[244] In summary, the Tribunal finds that, after adapting Dr. Miller's model to address the shortcomings discussed above, Dr. Israel persuasively demonstrated that the model would not have predicted a material price increase in Alberta or British Columbia. In other words, the Tribunal finds that the Commissioner's quantitative evidence of predicted price effects of the Merger and Divestiture are not reliable and substantially overstated. The Tribunal agrees with Dr. Israel that Dr. Miller's predicted post-Merger price increases are highly doubtful, for the reasons set forth above. Overall, the Commissioner has not met his burden of establishing such effects. Nonetheless, the Tribunal will proceed to consider the qualitative factors under section 93 of the *Competition Act* that are relevant in this proceeding.

[245] The Tribunal observes that despite predicting a weighted average price increase of 0.8% in Alberta and 2.5% in British Columbia, Dr. Miller's model predicted that Freedom's prices in those provinces would be *reduced* by 17.3% and 15.1%, respectively.[25] His predicted weighted average price increase across all Bell and Telus brands in those provinces was only 0.2% and 0.3%, respectively. This is well below the "materiality" threshold.

[246] It bears underscoring that the only "material" predicted price increases were for Shaw Mobile (5.5% and 11.8% in Alberta and in British Columbia, respectively), Rogers (12.1% and 9.6%, respectively), and Fido (14.3% and 12.8%, respectively). The Tribunal is satisfied that once Dr. Miller's model is adjusted to address the shortcomings identified by Dr. Israel – which have a substantial impact on the diversion ratios between Rogers/Fido and Shaw Mobile – those predicted price increases also diminish below the materiality threshold.

(7) Closeness of competition between Rogers and Shaw

[247] The Commissioner alleges that Rogers and Shaw are each other's closest competitor and that the elimination of competition between them is likely to substantially lessen competition.

---

[25] These predicted price increases were for Dr. Miller's 8-brand model, which focused on premium and flanker brands. Dr. Miller stated that he considered that model to be superior to his 11-brand model, which also included the pre-paid brands of Rogers (Chatr), Bell (Lucky) and Telus (Public Mobile). This was because the 8-brand model "appear[ed] to better match the data inputs as it is not required to reconcile the prices, market shares, and markups for an additional group of brands … that is somewhat differentiated from the other two groups … Accordingly, the 8-brand model is likely to deliver more informative predictions about the merger of Roger with a competitor that does not operate a prepaid brand": Exhibit CA-A-0122, at para 177. The weighted average price increases predicted in Dr. Miller's 11-brand model were only slightly higher than in his 8-brand model, namely, 3.4% for Alberta and 5.0% for British Columbia.

[248] In support of this allegation, the Commissioner maintains that industry porting data reflects a higher level of switching between Rogers and Shaw, compared to levels of switching between other firms.

[249] To the extent that some of the porting data relates to port-outs to Freedom, this evidence is favourable to Videotron, subject to the Tribunal's consideration of Videotron's ability to replace Shaw to the requisite degree. That will be discussed in the next section below. The Tribunal will adopt the same approach to the other evidence adduced by the Commissioner with respect to competition between Rogers and Freedom. In this section, the Tribunal will focus on the Commissioner's allegations of closeness between Rogers and Shaw Mobile.

[250] In Exhibit 4 to his initial report, Dr. Miller provides porting data that reflects a [redacted] of customer switching from Rogers to Shaw, and vice versa, in the period January – April 2021. More specifically, this data reflects that approximately [redacted]% of consumers in Alberta and British Columbia who ported out of Rogers chose to switch to Shaw; and that the port-outs from Shaw to Rogers were approximately [redacted]% for Alberta and [redacted]% for British Columbia. However, that data includes port-ins to Freedom and port-outs from Freedom. Data for Shaw Mobile alone was not provided.

[251] In Exhibit 33 to that report, Dr. Miller presented a chart showing that port-outs from Rogers to Shaw (i) spiked from close to [redacted], after the launch of Shaw Mobile, and (ii) remained higher than prior to that launch, albeit on a declining trend from the initial spike in August 2020 for the ensuing 16 month period, particularly after Shaw Mobile's price increase in November 2021.

[252] Dr. Israel testified that when a new product is launched, port-outs to that product tend to come from customers who are looking for something different. He added that the fact that Rogers does not have a bundle would help to explain why customers who are interested in a bundle would switch to Shaw Mobile. In his view, "That's not at all the same thing as closeness of substitution going forward or diversion": Transcript, at 4547-4548.

[253] The Tribunal agrees. Other evidence demonstrates that 97% of Shaw Mobile's customers also have Shaw Internet: Exhibit CA-R-0192, at para 292. Mr. Kirby added that, according to surveys conducted by Bell [redacted]. These statistics support the view that customers who port-in to Shaw are primarily persons who already have Shaw's internet service and are interested in a bundled offering.

[254] The Commissioner also referred to evidence that [redacted], in the month or so following Shaw Mobile's launch: see e.g., Exhibit CA-A-0474. With respect to Telus, this can be explained by the fact that Telus already had a bundled offering, so its mobile customers who were interested in such an offering did not have to switch carriers to avail themselves of the benefits of bundling. The explanation for the [redacted] is less apparent. In any event, this data was for a very short period of time, so it does not demonstrate long-term closeness between Rogers and Shaw Mobile, relative to Bell and Telus.

[255] The fact that Shaw Mobile accounts for a high percentage of Rogers' port-outs likely also reflects that Rogers has a disproportionate share of Shaw's wireline customers. The Commissioner recognized this fact, as well: Transcript, at 5002. Mr. Kirby also noted that approximately 60% of Rogers' wireless customers in the West are Shaw wireline households: Transcript, at 738.

[256] The [redacted] of Rogers' port-outs to Shaw also likely reflects that Rogers does not offer a bundled product in Alberta and British Columbia. Consequently, when Shaw Mobile began to offer a bundled product at an attractive price, those who were interested in a bundled offering and were not committed under a contract switched. Others then followed suit, perhaps as their contracts expired. The declining trend in such port-outs is not consistent with the Commissioner's theory of a longer-term relationship of particular closeness between Rogers and Shaw Mobile.

[257] Shaw's uncontested evidence is that Shaw Mobile has always been a wireline retention tool, designed to halt the steady loss of wireline customers to *Telus*. Shaw's internal documentation clearly reflects that it is Telus, rather than Rogers, that is Shaw's closest competitor, including for bundled offerings: see for example, Exhibit CA-R-0198, Exhibits 2 and 3; Exhibit CA-R-0190, at paras 32-36, 43, and Exhibit 1; Exhibit CA-R-0192, at paras 9 and 35-37; Exhibit CA-R-0165, at paras 101-111.

[258] The Commissioner also asserts that Rogers and Shaw have frequently targeted their marketing activities at one another. However, the evidence he cites in support of this statement simply demonstrates that Rogers was responding to new market initiatives, such as the launch of Shaw Mobile, as competitors often do: see, for example, Mr. Prevost's explanation of a particular document cited by the Commissioner, Transcript, at 3371. The evidence with respect to Shaw's targeting of Rogers largely relates to Freedom and does not establish any particular closeness between Rogers and Shaw Mobile to any sustained degree.

[259] In addition to the foregoing, the Commissioner alleges that [redacted]. However, the evidence he adduced in support of this allegation falls well short of establishing any particular closeness between Rogers and Shaw Mobile. One of the two documents relied upon by the Commissioner is an internal Rogers document that simply addresses [redacted] Exhibit CA-R-0212, Exhibit 38, at 18. The other document discusses initiatives directed towards both Shaw Mobile and Telus: Exhibit CA-R-0209, Exhibit 20, at 8.

[260] The Commissioner also alleges that, since the announcement of the Merger, Shaw has lost customers to Rogers. However, the evidence in this proceeding demonstrates that competitors regularly lose customers to each other. In the absence of something more, this is not evidence of sustained and particular closeness between Rogers and Shaw Mobile. The Tribunal pauses to observe that insofar as any diminishment of Shaw since the announcement of the Merger is relevant in the assessment of the Divestiture, it will be addressed later in these reasons.

[261] Finally, the Commissioner alleges that the closeness of competition between Rogers and Shaw is reflected [redacted]: CA-A-0864, at 8. This is not evidence of *closeness* of

competition between Rogers and Shaw Mobile. It is simply evidence of [redacted].

(8) Barriers to entry (s. 93(d))

[262] In his Application, the Commissioner maintained that barriers to entry faced by a prospective provider of wireless services are high. He then identified several reasons why he believes this to be so.

[263] The Respondents do not agree that the factors identified by the Commissioner constitute high barriers to entry, particularly given the CRTC's MVNO regime. Nevertheless, for the purposes of this proceeding, the Respondents conceded that new entry on a scale sufficient to meet the test established in the Tribunal's jurisprudence is unlikely to occur within a two-year period following the Merger and Divestiture. In other words, the Respondents conceded that future entry is unlikely to occur on a scale sufficient to ensure that any material adverse price or non-price effects potentially resulting from the Merger and Divestiture could not be sustained for the period of time that would typically be considered to constitute a substantial prevention or lessening of competition: *Tervita CT*, above, at paras 122-125 and 377-379; see also *Tervita SCC*, above, at para 78.

(9) Availability of acceptable substitutes and effectiveness of remaining competition (ss. 93(c) and (e))

(a) Freedom

[264] The Commissioner asserts that the divestiture of Freedom to Videotron would result in Freedom being a less effective competitor than it was immediately prior to the announcement of the Merger. Stated differently, the Commissioner asserts that the Divestiture would not likely restore the level of competition remaining in the relevant markets to the point at which the prevention and lessening of competition he has alleged would no longer be substantial. The Tribunal disagrees.

[265] The Commissioner bases his assertion on several grounds. In summary, he states the following:

a) The reduction in the scale of Freedom's operations, relative to the combined scale of Freedom and Shaw Mobile, will reduce its ability to invest in and expand its network, increase Freedom's capital requirements as a standalone entity, and result in slower deployment of 5G.

b) The separation of Freedom from Shaw's network infrastructure will reduce its ability to offer bundled services by cross-subsidizing and cross-marketing between its product lines with promotions and discounts.

c) Freedom will have a degree of dependency on Rogers that will hamper its incentive and ability to compete and that will provide avenues for Rogers to undermine Freedom's competitiveness. This will further limit Freedom's ability

to offer discounted bundled wireless plans, attract new customers, and keep any bundled customers that it may obtain. This will also likely lead to higher customer churn and lower customer lifetime value for Freedom, which will undermine Freedom's ability to invest in its network in the future.

d) Freedom will lose access to Shaw's in-home WiFi "hotspots".

e) Freedom will lose access to Shaw's corporate retail locations.

[266] The Tribunal will assess each of these allegations below:

(i) Freedom's reduced scale and ability to invest in and expand its network, including 5G, as well as its alleged increased costs.

[267] The Commissioner asserts that if Freedom is separated from Shaw, it will have a reduced scale and ability to carry out Shaw's growth and expansion plans, as well as increased capital or operating costs. The Commissioner adds that, prior to the announcement of the Merger, Shaw had planned to make 5G investments, enter new markets and expand into the business services market. He maintains that, under Videotron's ownership, those 5G investments and other plans will be reduced and delayed.

[268] Regarding Freedom's scale, the evidence demonstrates that Freedom would not in fact have a smaller scale under Videotron's ownership than it would have if it remained with Shaw. Among other things, Videotron will have more revenue, more wireless subscribers across the country, and more spectrum: Exhibit CA-I-0146, at para 49; Transcript, at 3678.[26] In addition, Videotron's national presence will give it the ability to offer new incentives to businesses that operate nationally: Transcript, at 2159; Exhibit CA-I-0144 at para 179.

[269] With respect to Freedom's ability to invest in and expand its network, as well as its allegedly increased costs, the Tribunal notes that the $2.85 billion price Videotron has negotiated for Freedom is substantially less than the more than $4.5 billion investment Shaw has made in Freedom since 2016: Transcript, at 2608, 2609, and 2612. This will effectively give Freedom a much more advantageous cost-base from which to compete, relative to that which is currently the case for Shaw: Exhibit CA-R-0232, Exhibit B, at 4 and paras 38, 44 and 56-57. Freedom will further benefit from reduced costs with respect to roaming [redacted]; see paragraphs 235-236 above and Transcript, at 2158-2159, 2162, and 2173; and Exhibit CA-I-0144, at paras 136, 179, and 217-220. The Tribunal expects that to the extent that Videotron is able to realize any of the considerable additional cost savings it expects to achieve through the Divestiture, this will further improve Videotron's cost position: Exhibit CA-I-0144, at paras 201-220.

[270] The Tribunal pauses to note that Telus opposed Videotron's participation in the 3500MHz "set aside" auction on the basis that such participation would permit Videotron to purchase such

[26] As of May 31, 2022, Shaw Mobile and Freedom combined had approximately [redacted] subscribers: approximately [redacted] for Shaw Mobile and approximately [redacted] million for Freedom: Exhibit CA-I-0192, Exhibit 73. By comparison, Videotron currently has approximately [redacted] wireless subscribers, to which it would be adding Freedom's [redacted] subscribers. Videotron also has approximately [redacted] wireline subscribers, in comparison to [redacted] for Shaw: Exhibit CA-I-0146, at para 49; Exhibit CA-R-195, at para 14.

spectrum at a significantly lower cost than what the National Carriers would have to pay, thereby enabling Videotron to gain a significant cost advantage: Exhibit CA-R-0232, Exhibit B, at para 32. During cross-examination on an affidavit in a judicial review proceeding before the Federal Court, Mr. Eric Edora, Telus' Director of Regulatory Affairs, testified that "when there's market entry it does create disruption. I think Videotron is certainly a little bit different than other competitors that might enter […] Videotron would be a more formidable competitor …": Exhibit CA-I-0144, Exhibit 21, at 32-33.

[271] Bell's similar view in this regard is reflected in two internal e-mails. The first was sent by [redacted]: Exhibit CA-R-0085

[272] Insofar as 5G is concerned, Videotron obtained an extensive portfolio of 3500MHz spectrum licences in the recent "set aside" auction. Its 5G rollout plan provides for [redacted].

[273] In the first phase, it intends to begin by rolling out the plan that Freedom had in place, based on 600 MHz, when Shaw entered into the Arrangement Agreement with Rogers. The Tribunal understands that this will be essentially the same "5G "lite" service that Freedom/Shaw had been planning to introduce to approximately 700 sites across Canada in April 2021, or soon thereafter. Messrs. Drif and Lescadres both testified that this service will be launched within three or four months of Videotron's acquisition of Freedom: Transcript, at 2495 and 2192; Exhibit CA-I-144, at para 193; Exhibit CA-I-0152, at para 83(a). In other words, it will be launched approximately within the two-year time frame used for assessing whether a prevention or lessening of competition is "substantial": see para 138 above. [redacted].

[274] [redacted]: Exhibit CA-R-0192, at para 72. [redacted]: Exhibit CA-R-1092, Exhibit 46, at 9-11, 17.

[275] [redacted]: Exhibit CA-I-0152, at para 83(b); Transcript, at 2381.

[276] [redacted]: CA-I-0152, at para 83(c); Transcript, at 2381.

[277] The Tribunal considers it important to note that Videotron is already operating and building a 5G network in Quebec. This experience will provide Videotron with an advantage relative to Shaw, in terms of its rollout of that network in Alberta, British Columbia, and Ontario. Videotron

also has a detailed [redacted] investment plan that contemplates expenditures totalling nearly $[redacted], to roll out a 5G network across Freedom's footprint to better compete against the National Carriers' 5G networks: Exhibit CA-I-0146, at para 36.

[278] Based on the foregoing, as well as the fact that Videotron appears to have obtained essentially the same spectrum that Shaw had been planning to seek in the auction, the Tribunal finds that consumers are not likely to be materially worse off with respect to 5G services, as a result of the Merger and Divestiture. Although Videotron's rollout of 5G "lite" and then full 5G services might ultimately take slightly longer than what likely would have occurred "but for" Shaw's execution of the Arrangement Agreement, the evidentiary record is very thin regarding the timing of (i) Shaw's full 5G rollout, (ii) the nature of the additional services that would be made available to consumers, and (iii) how they would value those services. Consequently, the Tribunal does not consider that any delays that might be associated with Videotron's rollout of full 5G services, relative to Shaw's corresponding deployment, warrant substantial weight in the assessment of whether competition is likely to be prevented or lessened substantially.

[279] For the reasons set forth at paragraphs 268-269 above, the Tribunal also finds that Freedom, under Videotron's ownership, would not have a reduced scale or ability to invest in and expand its network. Moreover, Freedom will have a very favourable cost position, relative to Shaw.

(ii) The separation of Freedom from Shaw's network infrastructure

[280] The Commissioner alleges that there is a significant degree of integration of Freedom within Shaw's organizational structure. The Commissioner further maintains that Freedom benefits from Shaw's related businesses and operations, including Shaw's network infrastructure and backhaul. He submits that Freedom's separation from Shaw will reduce its ability to compete, including by bundling or cross-selling multiple services.

[281] Freedom was a standalone business when it was acquired by Shaw in 2016: Transcript, at 2606. According to Mr. English's testimony, which the Tribunal accepts, Freedom has not been integrated into Shaw's business to any material degree since that time: Transcript, at 2609-2610. Although Shaw explored the extent to which it might be able to achieve integration synergies, the synergies that it has been able to obtain have been "fairly small": Transcript, at 2610. On the "[redacted]": Transcript, at 2767.

[282] The Tribunal's understanding of the Divestiture Agreement is that Videotron would acquire Freedom's entire business, except for (i) certain assets relating to Shaw Mobile's business, Shaw's Go Wi-Fi sites and various other assets that are not significant for the present purposes, (ii) Freedom's lease at [redacted], and (iii) other assets that are leased, licensed or made available to Freedom or its affiliate Freedom Mobile Distribution Inc.: Exhibit CA-R-0192, at Exhibit 165 (including, Articles 2.1 and 18, and Schedule F thereto, at Articles 2.1 and 2.2). This understanding was confirmed during the hearing: Transcript, at 76, 2777, and 5240. See also paragraph 32 above.

[283] With respect to Shaw's network infrastructure and backhaul, Videotron has negotiated very favourable arrangements with Rogers. This includes [redacted] and the right to

purchase additional backhaul services from Rogers for [redacted] of (i) current rates, or (ii) the market rates that prevail at the time the services would be purchased: see para 35(c) above, and the discussion below with respect to roaming services and access to Shaw's Go-Wifi public hotspots. The Tribunal notes that when Videotron scrutinized Freedom's current backhaul arrangements with various suppliers across the country, it determined that the rates Freedom currently obtains from Shaw are "[redacted]" than what it pays to its other backhaul providers: Exhibit CA-A-0230; Transcript, at 3925-3926. Pursuant to its agreement with Rogers, Freedom would continue to have the benefit of these preferential rates.

[284] Backhaul accounts for approximately [redacted]% of overall operating expense costs for Freedom: CA-R-0232, at para 77. The majority of Freedom's backhaul is provided by microwave systems, which the evidence suggests is technologically equivalent to fibre backhaul: Transcript at 1112 and 5468. Those microwave systems are, and will continue to be, owned by Freedom: Exhibit CA-R-0232, at para 76. As to the balance, approximately [redacted]% of Freedom's backhaul requirements is procured [redacted] from third parties: Transcript, at 2612; Exhibit CA-R-0232, at paras 77-79.[27] With respect to TPIA, Rogers has contractually committed to providing Videotron/Freedom with aggregated and disaggregated TPIA services (wherever Rogers and Shaw currently provide home Internet services) [redacted]. Mr. Lescadres testified that Videotron currently projects that it will reach that benchmark in approximately two to three years, and that "10 years from now, we're going to be at [redacted] customers": Transcript, at 2271-2272.

[285] Based on Videotron's detailed financial modelling and business plan (see Exhibit CA-I-0144, Exhibit 66), the Tribunal is satisfied that it will likely be able to achieve its goal of attaining the [redacted] subscriber threshold within approximately the timeframe that it has estimated.

[286] The Tribunal's understanding is that Videotron/Freedom would remain free to opt out of its favourable arrangements with Rogers for the supply of TPIA and backhaul, at any time: Transcript, at 2423, 2441, 2325, and 2373. It would also have the flexibility to expand the capacity it obtains from Rogers to accommodate its growth: Transcript, at 2329, 2370 and 2373.

[287] With respect to bundling, the Commissioner pressed Mr. Lescadres during cross-examination regarding Videotron's ability to bundle profitably. Based on Mr. Lescadres' responses, as supported in particular by his Reply Witness Statement, the Tribunal is satisfied that Videotron will be able to profitably bundle wireless and wireline (Internet, television and landline home phone) services at prices materially below what Shaw is offering today: see e.g., Transcript, at 2268-2276; and Exhibit CA-I-0146, at paras 5-26. The Tribunal's finding in this regard is reinforced by the fact that Videotron took a conservative approach to its modelling, in various respects: see e.g., Transcript, at 2166 and 2169; Exhibit CA-I-0144, at paras 63, 113, 116, 168, 177, 178, 186, and 215.

[288] The Tribunal notes that Mr. Lescadres explained that Videotron's approach to the pricing of its bundled offerings would be essentially the opposite of Shaw's approach. Whereas Shaw

[27] Other evidence suggests that Shaw only supplies [redacted]% of Freedom's wireline backhaul across the country: Transcript, at 3036 and 5468.

Mobile combines relatively expensive wireline services with very low-priced wireless services – indeed as low as $0 – [redacted]: Transcript, at 2323. Videotron considers that this strategy would assist it to achieve the twin objectives of reducing customer churn and attracting customers to its bundled offers. The Tribunal understands that Videotron would be able to do this because, in contrast to Shaw, it does not have to incur the risk of having to re-price an installed base of Internet subscribers in Alberta and British Columbia.

[289] The Tribunal notes that Videotron's recent acquisition of VMedia will assist it to expedite the rollout of its bundled offerings. V-Media is a TPIA-based reseller of Internet services in Quebec, Ontario, Alberta, and British Columbia. It was acquired to provide Videotron with TPIA experience outside Quebec and to assist Videotron to have an impact with its bundled offerings more quickly: Transcript, at 2278 and 2338. This is because it has advanced technology, including billing and servicing systems, as well as established TPIA connections with Rogers: Transcript, at 2337-2339. The Tribunal further notes that, in an internal document, Bell corroborated Videotron's expectation when it observed, "[redacted]": Exhibit CA-R-0080, at 18.

[290] The Tribunal acknowledges that Dr. Miller opined that Videotron's favourable TPIA arrangement would not enable Videotron/Freedom to price its bundled offerings at rates that are similar to what Shaw Mobile currently provides. In advancing that position, Dr. Miller relied upon Mr. Hickey's statement that it would not be feasible for Distributel to offer competitive bundles based on a TPIA arrangement with Shaw at the wholesale rate mandated by the CRTC: CA-A-0122, at paras 241-242. However, on cross-examination, Mr. Hickey qualified his position by stating that Distributel would need an off-tariff arrangement with Shaw in order to be able to compete with Shaw Mobile's pricing: Transcript, at 1206. He proceeded to confirm that if Distributel had been able to acquire Shaw's wireless business and continue with a discounted TPIA arrangement, it could be potentially successful in competing with other carriers in Western Canada: Transcript, at 1207. He then added that the favourable TPIA arrangement that Videotron has negotiated with Rogers is such an off-tariff arrangement and that he was unaware of it when he prepared his Witness Statement: Transcript, at 1218-1219.

[291] The Tribunal also notes that, in preparing his expert report, Dr. Miller did not engage with Videotron's detailed business plan and could not recall that it contained detailed cash flow projections and operating expenses, as well as other information: Transcript, at 1615-1616.

[292] Regarding Freedom's ongoing access to towers, telephone/utility poles, light standards, and cell sites, the Tribunal notes that, in opposing the Initially Proposed Transaction, Telus told the Bureau that Rogers did not need to acquire Shaw. It explained, "Rogers has access, as of right, under CRTC rules, to all ILEC poles across the country and existing ISED/CRTC protections enable Rogers' access to support structures (e.g., towers, telephone/utility poles, light standards)": Exhibit CB-R-1936, at 43.

[293] The Commissioner also maintains that Freedom's challenges under Videotron's ownership would be heightened by a loss of access to Shaw's support for small cells.

[294] However, the Tribunal notes that Videotron has entered into a Binding Term Sheet for Small Cell Licensing Agreement that requires [redacted]: Exhibit CA-I-0144, at Exhibit 64. During cross-examination, Mr. Drif maintained that this type of agreement is common in the telecommunications industry and that it would not affect Videotron's ability to be competitive: Transcript, at 2472-2475. In his Witness Statement, Mr. Drif added that Videotron intends to roll out small cells, just like it has done in Quebec: Exhibit CA-I-0152, at para 87.

[295] Based on all of the foregoing, the Tribunal has concluded that Freedom's separation from Shaw and its purchase by Videotron would not materially reduce its ability to compete, including in the manner the Commissioner has alleged.

(iii) Freedom's alleged "dependency" on Rogers, and its ability to offer competitive bundles

[296] The Commissioner alleges that Freedom will have a degree of dependency on Rogers as a result of the numerous contractual arrangements that form part of its Divestiture arrangement with Rogers. The Commissioner asserts that this will include being reliant on Rogers for critical assets and services for an indeterminate and potentially unlimited period of time. The Commissioner maintains that this will adversely impact Freedom's ability and incentive to compete, and will further provide Rogers with avenues to undermine Freedom's competitiveness.

[297] In advancing these positions, the Commissioner places particular emphasis on the advantages of owning, relative to leasing, backhaul, and other infrastructure.

[298] However, it is significant to note that the CRTC has forborne from the regulation of backhaul: Transcript, at 995. According to Mr. Martin, there is a robust, competitive market for backhaul, with multiple providers available in most areas: Transcript, at 3677; Exhibit CA-R-0232, at paras 80-81. This was corroborated by Dr. Webb: Transcript, at 3928-3929. This is also confirmed by the widespread use of leased facilities in the wireless business in Canada: see, for example, Exhibit CA-R-0102. Indeed, in cross-examination, one of the Commissioner's witnesses conceded that leasing was "done all the time" and represented "business as usual" for the industry: Transcript, at para 1139. The Transcript is replete with examples of industry players leasing fibre outside of their own wireline footprints: see for example, Transcript, at 1120 (Mr. Benhadid on both Bell and Telus); Transcript, at 995, 997 (Mr. Hickey on Distributel).

[299] Some of the more noteworthy examples of market participants competing successfully without owned backhaul or other wireline infrastructure include Telus in Eastern Canada and Saskatchewan, Bell in Western Canada, Rogers in Western Canada, Freedom in most of Ontario, Freedom in Western Canada, and Videotron in Abitibi, Quebec: See Exhibit CA-R-0232, at paras 67-74; Transcript, at 3730, 3733, 3741; Exhibit P-A-0241 (for CRTC market share data).

[300] Despite this competitive market for backhaul, Mr. Benhadid stated that wireline ownership is critical to wireless network performance and reliability: Exhibit CA-A-0100, at para 4. He explained that when one leases backhaul, one has less control over the reliability and performance

of the traffic one carries; a reduced ability to contain disruptions from outages; an [redacted]; and a reduced ability to adapt to sudden spikes in demand and performance anomalies; Transcript, at 1064-1065. Similarly, Mr. Howe of Bell highlighted four advantages to deploying a wireless network within one's wireline network footprint, including (i) the possibility to leverage a single construction process to build infrastructure for both the wireline and wireless networks; (ii) the ability to take advantage of strong relationships with the local municipality based on an established history of operating a wireline network; (iii) the provision of lower costs, improved support, and the ability to create a more resilient overall network architecture; and (iv) the creation of additional opportunities for innovation: Exhibit CA-A-0111, at paras 8, 10-14.

[301] [redacted]

[302] [redacted]

[303] [redacted]

[304] [redacted]

[305] [redacted]

[306] Having regard to the foregoing, the Tribunal considers the more recent, contradictory, evidence provided by Telus and Bell witnesses not to be credible. The Tribunal finds that the other evidence referenced in the immediately preceding paragraphs above, as well as at paragraphs 282-291, establishes that Freedom's loss of access to Shaw's wireline facilities would not materially

weaken its ability to compete, relative to its current ability as part of Shaw: see Transcript, at 2610-2612 and 2867-2868; Exhibit CA-R-0232, at paras 60, 67-68, and 72. See also Exhibit CA-R-1818, at para 20.

[307] The Tribunal considers that this conclusion is broadly supported by a 2019 Competition Bureau study to assess the performance of Canada's wholesale access regime. Among other things, that study found that "the wholesale access regime appears to be fulfilling its promise to bring about greater consumer choice and increased levels of competition": Exhibit CA-I-0144, Exhibit 8, at 7. It also found, "Wholesale-based competitors typically price cheaper than facilities-based competitors" and that "wholesale-based competitors have been able to obtain market shares in the order of 15-20% across the areas where they focus their marketing efforts": Exhibit CA-I-0144, Exhibit 8, at 17 and 21.

[308] The Tribunal notes that Videotron actively explored purchasing fibre assets from Rogers. However, it ultimately determined that a long-term agreement that included "necessary protections and favourable pricing" would meet its needs, and avoid "[redacted]": Exhibit CA-I-0144, at para 120; Transcript, at 2331-2332.

[309] The Tribunal further notes that there are important trade-offs between owning and leasing. While owning provides an additional degree of control and more flexibility, relative to leasing, it also requires a large up-front capital investment. With that in mind, Videotron considered it to be preferable to enter and expand into Western Canada by leasing backhaul and TPIA, as it did in Abitibi, [redacted]: Transcript, at 2496 and 2591-2594: Exhibit CA-I-0144, at paras 187-190.

[310] With respect to the Commissioner's allegation regarding the avenues that would be available to Rogers to undermine Freedom's competitiveness, the Commissioner put evidence to Mr. Lescadres on cross-examination regarding Rogers' past discrimination of third party traffic. [redacted]: Exhibit CA-I-0144, at 1326. [redacted] Armed with this information, Mr. Lescadres explained that Videotron negotiated for contractual protections to protect itself in this regard. These included [redacted]: Transcript, at 2277-2280 and 2324-2325.

[311] Mr. Lescadres also testified that Videotron and Rogers have a long history of contractual relationships. He noted that although Videotron was at one time entirely dependent on Rogers when Videotron operated as an MVNO, he is not aware of any steps Rogers took to use its network ownership position to disadvantage Videotron. He added that although Videotron has continued to be highly dependent on Rogers as a result of some of their ongoing arrangements, this has not prevented Videotron from continuing to successfully compete against Rogers. In this regard, he stated that over the ten-year period between December 2011 and December 2021, Videotron

estimates that approximately [redacted] of Videotron's total gains in wireless market share have come at the expense of Rogers and its flanker brands: Exhibit CA-I-0146, at paras 64-72.

[312] The Commissioner also alleges that Freedom will have a reduced ability to bundle and that this will increase its churn rate and lower the CLV of Freedom's customers. Based on the evidence discussed at paragraphs 287-291 above, the Tribunal does not accept these allegations.

[313] The Commissioner further alleges that the Merger and Divestiture would likely result in Videotron/Freedom being dependent upon a less reliable network, namely, Rogers' network. In support of this allegation, the Commissioner pointed to three network disruptions in the past three years. The first occurred for approximately 11 hours on July 7, 2019, when Freedom customers experienced intermittent issues placing or receiving voice calls to Rogers' customers nationally. 3G voice calls, VoLTE calls, and WiFi calling were impacted, but data services were not. 911 calling across the country was also intermittently impacted. The second incident occurred on April 19, 2021, when Rogers experienced nationwide network issues for approximately 16 hours. It appears that this primarily impacted Freedom customers attempting to connect with Rogers customers. The third incident occurred on July 8, 2022, when Rogers experienced a major service outage affecting more than 12 million users.

[314] In the wake of the latter outage, Rogers committed to the following network resiliency measures:

a) [redacted];

b) [redacted]; and

c) A Memorandum of Understanding between telecommunications carriers that will allow them to more effectively work together in the event of an emergency, including to ensure that the 9-1-1 system is not vulnerable to an outage or other network disruption. This Memorandum of Understanding was finalized and delivered to ISED on September 7, 2022. Rogers, Videotron, Shaw, Bell and Telus are among the twelve signatories.

[315] Based on the foregoing, and the degree of public attention that the most recent outage received, the Tribunal is satisfied that the resiliency of Rogers' network is likely to improve, and that the adverse consequences of potential future outages on consumers are likely to be reduced.

[316] The evidence in this proceeding also establishes that other carriers also experience outages. For example, Bell experienced an important one in November 2019 and another in August 2020, although neither was as significant as Rogers' most recent outage: Transcript, at 1368-1374.

[317] The evidence further establishes that Freedom's wireless service has had a history of dropped calls and non-seamless handoff, when its customers have left Freedom's service area: see for example, Transcript at 2172; Exhibit P-A-017, at para 10.

[318] In addition, the evidence demonstrates that carriers compete on the basis of network reliability. However, it is far from clear how periodic network outages impact the intensity of competition.

[319] Beyond the foregoing, Mr. McKenzie's unchallenged evidence is that the CRTC has the authority and responsibility for ensuring that carriers have reliable networks: Transcript, at 3450.

[320] Considering all of the foregoing, the Tribunal finds that it has not been established that Rogers' network is likely to be materially less reliable or resilient than Shaw's network. It has also not been established that any difference between the two networks in this regard would likely have a material impact on the future competitiveness of Videotron/Freedom, or more generally on competition in the relevant markets.

(iv) Freedom's loss of access to Shaw's in-home WiFi "hotspots"

[321] The Commissioner alleges that Freedom currently derives a significant benefit from access to Shaw's Wi-Fi hotspots, which improve network coverage and reduce network costs, including by reducing network traffic. The Commissioner adds that Freedom's customers obtain significant value from these hotspots, which have been a central feature of Shaw's marketing materials and strategy. The Commissioner further notes that Shaw had planned to expand its WiFi hotspot network, and viewed WiFi and small-cell deployment as complementary.

[322] Shaw has two types of WiFi hotspots, namely, public hotspots and home hotspots.

[323] Pursuant to a Binding Term Sheet for Go WiFi Services, Videotron/Freedom would continue to have access to over 100,000 public hotspots, located in malls, restaurants and other locations for no charge for [redacted]: Exhibit CA-I-0144, Exhibit 64; Exhibit CA-R-0192, at paras 191, 353(b) and 387.

[324] However, Videotron/Freedom will lose access to over 900,000 home hotspots that Shaw has deployed across Western Canada. The Tribunal understands that the principal value of these home hotspots for customers of Shaw Mobile and Freedom is that they allow for data downloading in any home where such hotspots are present, without having to manually authenticate their mobile device. Mr. Prevost described this as a "small feature" because without such hotspots, the customer would simply have to manually authenticate with their password, or the password of their host: Transcript, at 3401-3402. Mr. Martin added that mobile phones, with the WiFi radio turned on, will prioritize more frequently used WiFi networks first. For most mobile users, the most frequently used WiFi network is their home WiFi, rather than a Go WiFi hotspot: Exhibit CA-R-232, at paras 92-93

[325] Mr. McAleese testified that Shaw's network of hotspots is based on 10-year-old technology that was developed before the rollout of "large bucket" and unlimited data plans and low band spectrum that permits multi-residential WiFi coverage to pass through concrete walls. It was also developed before LTE, which provides a considerably higher download speed, relative to that of the Go-Wifi network: Transcript, at 2887. Mr. McAleese added that Freedom does not rely in any way on home hotspots to operate its wireless network: Transcript, at 2887-2889.

[326] Mr. Lescadres stated that Videotron does not consider access to Go WiFi, whether public or within the home, to be necessary or valuable but does not see any harm in that service being available to its customers: Exhibit CA-I-0144, at para 157(d).

[327] In cross-examination, Mr. Drif explained that Shaw's home hotspots were of little interest to Videotron because Videotron plans to launch 5G service relatively soon after acquiring Freedom, and that such service would obviate any need for those hotspots. This is because of the greater speed and capacity of 5G service: Transcript, at 2455-2456. [redacted]: Exhibit CA-I-0152, at paras 139-140. [redacted]: Transcript, at 2458, 2461, and 2462.

[328] [redacted]: Transcript, at 2460-2461.

[329] Having regard to the foregoing, the Tribunal finds that Freedom's loss of access to Shaw's home-hotspots would not materially impact its ability to compete post-Merger and Divestiture. The Tribunal makes the same finding with respect to the fact that Freedom would no longer own the public hotspots to which it will nevertheless have access for [redacted].

(v) Freedom's loss of access to Shaw's corporate retail locations

[330] The Commissioner alleges that Freedom would be weakened as a result of its loss of access to Shaw's retail locations and distribution network.

[331] However, the uncontested evidence is that no Freedom products or services have ever been sold through Shaw branded stores or online. Transcript, at 2882.

[332] The Tribunal also notes that Videotron executives have met with representatives of the F-Branded Association to express support for the dealer channel, should Videotron acquire Freedom: CA-I-0146, at para 58. An e-mail sent to Videotron's counsel on behalf of that association stated that its [redacted]": Exhibit CA-R-0047, at 27. This was broadly corroborated by Mr. Verma, who testified that "on a personal level and at the association also for Freedom dealers, we are cautiously optimistic … about the proposed divestiture of Freedom to Videotron.": Transcript, at 443.

(vi) Separation from Shaw Mobile

[333] The Commissioner maintains that Freedom will be a less effective competitor due to its separation from Shaw Mobile. However, subsequent to Shaw Mobile's launch, [redacted]: Exhibit CA-R- 0132, at 21.

[334] Moreover, while Shaw Mobile's current subscriber base adds approximately [redacted] subscribers to the combined scale of Shaw Mobile and Freedom, the loss of that subscriber base will be more than offset by the addition of Videotron's 1,661,000 subscribers in Quebec and Eastern Ontario.

[335] Consequently, Freedom's separation from Shaw Mobile is not likely to adversely impact its scale or effectiveness as a competitor.

[336] The Tribunal finds Mr. Lescadres' explanation for why Videotron did not acquire Shaw Mobile to be compelling. After initially being interested in acquiring Shaw Mobile together with Freedom, Videotron discovered that Shaw Mobile's customers were "low ARPU customers" who were being "heavily subsidized" by very high Internet prices, relative to what Videotron charges in Quebec. Videotron then decided that it would be more consistent with its business plan to compete for those customers with a lower overall bundled price, than to purchase them as "wireless only" customers: Transcript, at 2156-2157.

[337] The Tribunal notes that representatives of [redacted] were also of the view that it would not be necessary for the purchaser of Freedom to also purchase Shaw Mobile. [redacted]: Exhibit CA-A-1948.

(vii) [redacted]

[338] The Commissioner alleges that competition is likely to be prevented and lessened as a result of the [redacted]. In support of this allegation, the Commissioner drew the Tribunal's attention to internal Rogers documentation which suggested that [redacted]: Exhibit CA-R-0212, Exhibit 38, at 18.

[339] The Tribunal acknowledges that the Shaw Mobile brand provides additional variety and choice in the relevant markets. However, to the extent that the vast majority of Shaw Mobile customers also purchase Shaw's Internet services, it would appear that the value of the Shaw Mobile brand is overwhelmingly limited to the bundling segment of the market, where there currently are only two providers: Telus and Shaw. If the Merger and Divestiture proceed, there will be at least three such providers – Telus, Rogers and Videotron/Freedom/VMedia. In essence, Freedom, which does not currently have a significant presence in the market segment for bundled offerings, will move into that segment, together with VMedia, thereby ensuring that the number of brands in that market segment does not diminish.

[340] Indeed, to the extent that Videotron intends to roll out its successful Fizz brand across Ontario and Western Canada, this will add to the number of brands available to consumers in those areas: Exhibit CA-I-0144, at paras 173-174. The Tribunal notes that the Fizz brand has achieved a market share of 5% in Quebec since it was launched in 2018: Transcript, at 2267.

[341] Moreover, while Freedom currently is marketed as [redacted] Videotron intends to reposition it as a [redacted]

[redacted]: Transcript, at 2871: Exhibit CA-I-0144, at paras 173 and 192.

(viii) Expansion into new areas

[342] As noted at paragraph 190 above, the Commissioner alleges that "but for" the Merger, Shaw likely would have geographically expanded its wireless footprint. In this regard, he referred to evidence reflecting that [redacted].

[343] The Tribunal notes that the Commissioner did not cross-examine any of Shaw's witnesses regarding that evidence. Instead, the Commissioner simply asked Mr. McAleese to confirm that Shaw "had plans on the drawing board to continue [its] geographic expansion": Transcript, at 2907. Mr. McAleese responded in the affirmative. As a result, the specifics of those plans were not subjected to the important testing function of cross-examination. This reduces the weight to which it might otherwise have merited.

[344] The Commissioner also did not provide any information whatsoever regarding competitive conditions in the areas mentioned above. As a result, it is not possible to assess the likely competitive impact of Shaw not expanding into those areas.

[345] In any event, Mr. Péladeau testified that Videotron plans to use the new MVNO policy framework to expand beyond Freedom's current footprint, and then to eventually expand its own network into those areas within the seven year time-frame required by that policy framework: Transcript, 2512-2513. Mr. Lescadres added that Videotron is already negotiating with third parties who would be providing such service, although it is not clear whether that is for service in Western Canada or elsewhere: Transcript, 2321. The Tribunal observes that Videotron will have a strong incentive to pursue geographic expansion, so that it can reach the [redacted] threshold at which it will qualify for the [redacted]% discount that it has negotiated with Rogers: see paragraph 284 above.

[346] In addition, Rogers has committed to establishing a new $1 billion Rogers Rural and Indigenous Connectivity Fund dedicated to connecting rural, remote and Indigenous communities across Western Canada to high-speed Internet and closing critical connectivity gaps faster for underserved areas: Exhibit P-R-0208, at para 12. Mr. Annett testified that based on analysis that has been conducted to date, five areas in Western Canada have been selected as areas to which high speed connectivity will be extended. Those areas are: [redacted].

[347] Having regard to the foregoing, the Tribunal considers that the evidence does not establish that any prevention of future competition that might be associated with Shaw not entering into the areas identified at paragraph 335 above is likely to be substantial, particularly having regard to the geographic expansion plans of Videotron and Rogers.

(ix) Summary (Freedom)

[348] In summary, for the reasons set forth above, the Tribunal does not accept the Commissioner's various allegations in support of his proposition that the divestiture of Freedom to Videotron would result in Freedom being a less effective competitor than it was immediately prior to the announcement of the Merger.

[349] Videotron would be acquiring Freedom's entire business, except for certain assets that relate to Shaw Mobile's business or that would not be material to Freedom's ability to continue providing essentially the same degree of vigorous and effective competition that Freedom and Shaw Mobile together would likely have provided "but for" the Merger.

[350] Indeed, to the extent that Videotron is much more committed than Shaw to be a long-term participant in the relevant markets, the Tribunal expects that Videotron would be a more aggressive and effective competitor than Freedom and Shaw Mobile likely would have been in the absence of the Merger.

[351] Videotron is an experienced market disruptor that has achieved substantial success in Quebec. It has drawn upon that experience to develop very detailed and fully costed plans for its entry into and expansion within Alberta and British Columbia. Those plans were buttressed when Videotron acquired VMedia earlier this year, with a view to accelerating the rollout of new bundled offerings. The Tribunal is persuaded that the bundled offerings of Freedom and VMedia will be priced at a level that is at least as competitive as the offerings of Shaw Mobile and Freedom likely would have been in the absence of the Merger. That is to say, the Tribunal finds that Freedom's and VMedia's overall bundled prices for Internet and wireless services combined will be at least as favourable as the bundled offerings of Shaw Mobile and Freedom likely would have been "but for" the Merger. The Tribunal finds that the same is also likely to be true for the "wireless only" offerings of Freedom and Fizz, relative to the corresponding offerings of Shaw Mobile and Freedom.

[352] The Tribunal's conclusion in this regard is reinforced by several additional considerations. These include the fact that Freedom only has a trivial presence in the bundled segment of the relevant markets,[28] while the same is true for Shaw Mobile in the "wireless only" segment of the market.[29] In addition, as discussed at paragraph 385 below, Shaw was likely going to have to redirect its limited investment funds away from its wireless business towards its wireline business, and increase the free cash flow generated by its wireless business. The Tribunal finds that this likely would have adversely impacted the competitiveness of Shaw's wireless business. Moreover, Videotron has committed to offering "prices for wireless services in Ontario and Western Canada comparable to what Videotron is currently offering in Quebec, which are today on average 20 per cent lower than in the rest of Canada": Exhibit P-R-0008; Transcript, at 2517 and 2336-2337.

[28] According to Mr. McAleese, bundled customers make up less than [redacted]% of Freedom's total subscriber base: Exhibit CA-R-0192, at para 386.

[29] Approximately [redacted]% of Shaw Mobile's wireless customers also purchase Internet services from Shaw. Transcript, at 365-366; Exhibit CA-R-0192, at para 292.

[353] Although price commitments typically are irrelevant to the Tribunal's analysis of the likely effects of a Merger, the nature of Videotron's commitments is distinguishable from what merging parties sometimes propose. This is because, to the extent that merging parties are found to have a greater *ability* to increase prices materially, relative to the counterfactual "but for" scenario, the test for a likely substantial prevention or lessening of competition would be met, regardless of any commitment that might be made not to exercise that market power. By comparison, the Commissioner has not alleged, nor could he reasonably maintain, that the Divestiture would likely result in Videotron being able to exercise any market power in the relevant markets. Moreover, the Tribunal understands that the Minister will retain leverage over Videotron. The Tribunal considers that this will increase the likelihood that Videotron will meet its pricing commitment.

[354] The Tribunal pauses to observe that while Videotron plans to offer prices at least [redacted]% below existing prices for Freedom branded wireless and wireline services offered on a standalone basis, it plans to offer bundled prices that are [redacted]% below existing levels. It also plans to offer prices for Fizz that are [redacted]% lower than prices offered by the current flanker brands in the market, and [redacted]% lower for other services: Exhibit CA-I-0144, at para 175.

[355] A further consideration that is relevant in assessing Videotron's likely competitiveness is that Telus and Bell have both been taking steps to increase their competitiveness as a result of the Merger and Divestiture. This will be discussed in the next section below. For the present purposes, the Tribunal will simply observe that whereas only two firms (Telus and Shaw) currently have bundled offerings in Alberta and British Columbia, there would be at least three (Telus, Rogers and Videotron) if the Merger and Divestiture proceed. Indeed, the Tribunal expects that [redacted], there will be four firms providing bundled offerings: Exhibit CA-R-0080, at 21; Transcript, at 801-804.

(b) Telus

[356] [redacted]: Exhibit CA-R-0067.

[357] The following week, Telus announced the closing of a $1.3 billion equity offering. Telus explained this initiative as follows:

> Proceeds of the Offering will be used to further strengthen the Company's balance sheet and, principally, to capitalize on a unique strategic opportunity to accelerate its broadband capital investment program, including the substantial advancement of the build-out of TELUS PureFibre infrastructure in Alberta, British Columbia and Eastern Quebec, as well as an accelerated roll-out of the Company's national 5G network.
>
> Exhibit P-R-0071.

[358] [redacted]

[redacted]: Exhibit CA-R-1912.

[359] The Tribunal considers that these initiatives will help to increase the competitive intensity in the relevant markets and make an important contribution to undermining the emergence of any conditions that might otherwise be conducive to coordinated behaviour.

(c) Bell

[360] On May 31, 2021, Bell announced its "biggest-ever network acceleration plan", which involved an additional $1.7 billion investment, relative to the plans announced earlier in the year, after the Shaw sale process had commenced.

[361] Bell explained this initiative as follows:

[redacted]

Exhibit CA-R-209, Exhibit 43.

[362] In anticipation of the Merger, Bell prepared an extensive plan detailing numerous competitive initiatives that it is already pursuing or is planning to pursue: CA-R-0080; Transcript, at 801. After the announcement of the Divestiture, those plans were updated on the assumption that Videotron would begin bundling Internet with wireless services: Exhibit CA-R-0080, at 2. Among other things, those plans describe a [redacted]: Exhibit CA-R-0080.

[363] More recently, Bell announced that it had acquired Distributel. In its press release, it explained its rationale as follows:

> With Bell's investment, Distributel will benefit from expanded resources and access to technology required to support the next stage in its business growth

> and to continue to enhance the services it already successfully delivers to customers.
>
> Exhibit CA-R-209, Exhibit 44.

[364] Once again, the Tribunal considers that these initiatives will help to increase the competitive intensity in the relevant markets and make an important contribution to undermining the emergence of any conditions that might otherwise be conducive to coordinated behaviour.

(d) Overall summary (effectiveness of remaining competition)

[365] For the reasons set forth in parts X.B.(9)(a)-(c) above, the Tribunal finds that the level of competition that would likely remain subsequent to the Merger and Divestiture would be sufficient to ensure that competition is not prevented or lessened substantially. In other words, the Tribunal finds that remaining competition would likely be sufficiently effective to ensure that prices would not likely be materially greater than they would be "but for" the Merger and Divestiture. It would also likely be sufficiently effective to ensure that non-price benefits of competition, including 5G services, would not likely be materially less than they would be "but for" the Merger.

(10) Removal of a vigorous and effective competitor (s. 93(f))

[366] The Commissioner alleges that the Merger is likely to eliminate Shaw as a vigorous and effective competitor that was disrupting wireless services markets to the benefit of consumers.

[367] In this regard, the Commissioner maintains that Shaw has been a growing competitive force, more than doubling its subscriber base since acquiring Wind Mobile in 2016. The Commissioner asserts that Shaw has achieved this success by introducing a number of innovations, including being the first carrier to eliminate overage fees, as well as the first carrier to offer devices for free on term contracts, Wi-Fi offloading (access to numerous locations for free Wi-Fi by its customers), and $0 phone plans with internet bundles. In addition, Shaw has introduced other innovations to Canada, such as WiFi hotspots. The Commissioner further notes that Shaw has made significant long-term investments to transform the Freedom network from a 3G network into a competitive LTE-Advanced network and a 5G capable network between 2016 and 2020.

[368] The Commissioner adds that Shaw's competitive initiatives have forced its rivals to respond by offering enhanced wireless plans and promotions and by targeting customers lost to Shaw.

[369] The evidence supports these positions advanced by the Commissioner. The Tribunal accepts that Shaw has been a vigorous and effective competitor, including by forcing Rogers, Bell, and Telus to respond with offerings that they likely would not otherwise have offered.

[370] However, the evidence also demonstrates that prior to pursuing a potential sale of its business, Shaw seriously assessed whether it could continue to justify committing the very large investments that it had been making in pursuit of its growth.

[371] After receiving an unsolicited expression of interest from the former CEO of Rogers in July 2020, Shaw's Board of Directors discussed the company's 3-year strategic plan as well as

other developments and trends in the telecommunications industry, at its regularly scheduled meeting in October 2020. The following month, Messrs. Shaw, and English requested TD Securities to prepare an overview of key telecommunications sector trends and potential strategic alternatives for Shaw in light of key sector trends and developments. TD Securities was also requested to address future wireline and wireless network strategies and capital requirements, as well as the particular strengths and challenges of the company's business and operations: Exhibit CA-R-0198, at Exhibit 1, at 36.

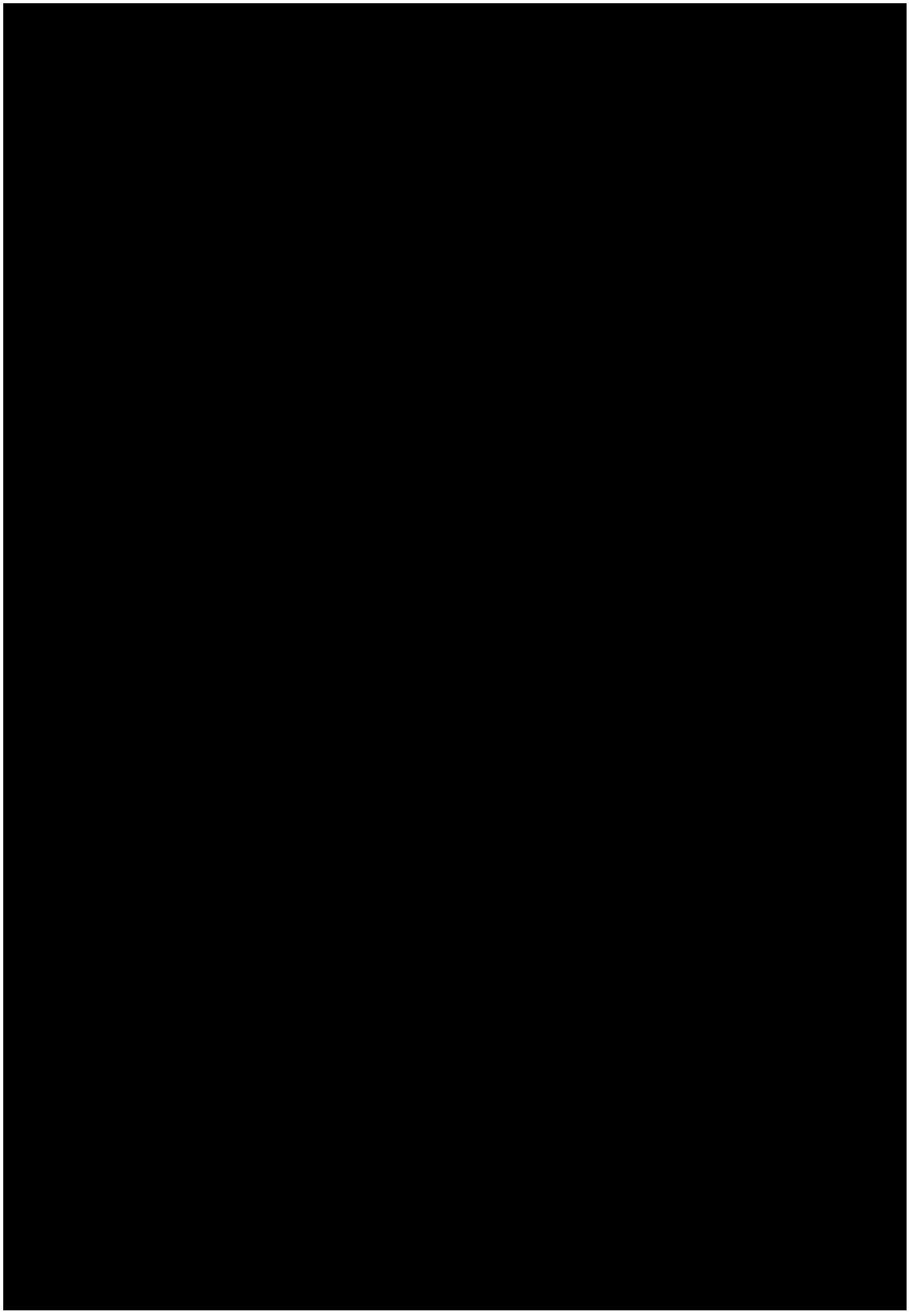
[372] Mr. Rod Davies was one of the individuals who led the TD Securities team that prepared this assessment. He explained his understanding of the broader context underlying his mandate as follows:

Exhibit CA-R-190, at para 19.

[373] Mr. Davies and one of his colleagues at TD Securities presented the results of their team's analysis and strategic review to the members of the Shaw Family and to the Shaw Family Living Trust ("**SFLT**") on February 1 and 5, 2021.

[374] The Tribunal pauses to observe that, in the meantime, Shaw received a second unsolicited expression of interest from another potential strategic purchaser.

[375] The highlights of the extensive TD Securities analysis are as follows:



[30]

See Exhibit CA-R 190, at paras 19, 29, 30, 32, 34, 35, 39, 40, 42, 43 and Exhibit 1, at 25, 27 and 40.

[376] In the intervening period, Shaw's wireline business has continued to account for effectively all of Shaw's Free Cash Flow: Exhibit CA-R-192, at para 59(c); Transcript, at 2683.

[377] That wireline business also accounts for approximately 83% of Shaw's "services revenues" and approximately 84% of its "Adjusted EBITDA": Exhibit CA-R-192, at para 59(a) and (b).

[378] However, as a result of increased competition from Telus and Shaw's under-investment in its wireline business, [redacted]: Exhibit CA-R-195, at para 14.

[379] In this context, Mr. McAleese stated that "[redacted]": Exhibit CA-R-0195, at para 12. He added, "[redacted]."

[380] By way of further context, Mr. English explained that after having invested roughly $5 billion in its wireless business since purchasing Wind Mobile in 2016, that business is "still net negative by about $3.3 billion."[31]: Transcript, at 2612.

[381] In cross-examination, Mr. English was pressed as to why Shaw would not be able to reduce its dividend to free up funds for investment. Mr. English replied that this "would have significant implications on our share price" and that Shaw has to keep in mind that it is "competing for capital as well in this business." When further pressed, he stated that reducing the dividend would be very detrimental to Shaw's share price, which had "underperformed for the better part of 10 years." He added that "[Shaw has been]… under a lot of pressure from our shareholders about additional return of capital initiatives and the outlook for our company": Transcript, at 2688-2689.

[382] [redacted]: Transcript, at 2700. [redacted]: Transcript, at 2721. When asked by the panel about the possibility of issuing more equity, Mr. English repeated that, as with the possibility of issuing more debt, Shaw would need to show that there would be a long-term sustainable return for investors. He added that any incremental investments that might be made would need to make a significant difference in assisting Shaw to meet the challenges it has been facing over the last decade: Transcript, at 2783-2784.

[31] Other evidence tendered by Shaw suggests that its total investment in the wireless side of its business may have been closer to $4.5 billion. See for example, Exhibit CA-R-0165, at para 156.

[383] In addition, Mr. English was pressed about an internal document dated April 9, 2020, that included a reference to Shaw's "strong balance sheet and liquidity position to support [Shaw's] operations through this uncertain [COVID-19] environment": Transcript, at 2689. Mr. English explained that this was true for the uncertain "near term," in part due to the sale of two businesses: Transcript, 2696 and 2699. Those businesses were (i) Shaw Media, which was sold for $2.65 billion in 2016 to fund Shaw's acquisition of Wind Mobile, and (ii) Shaw's U.S. data centre business called ViaWest, which was sold for US$1.7 billion in 2017: Transcript, at 2608-2609. Mr. English returned to this at the end of his testimony, when questioned by a member of the panel about Shaw's ability to generate financing from capital markets. He explained that Shaw does "not have significant non-core assets to fund the required investments over the long term to create network parity with Telus, or frankly, to invest in a 5G world over the long term…": Transcript, at 2782. Mr. Shaw made the same point when he observed:

> "[redacted]"
>
> Transcript, at 3138.

[384] Mr. Shaw also noted that while Shaw is currently in "fine" shape, Shaw's management does not believe it has the scale and size to make the required investments over the next several years, to compete and keep pace with Telus: Transcript, at 3132; see also Transcript, at 2623.

[385] In summary, the Tribunal accepts the Commissioner's submission that Shaw has been a vigorous and effective competitor, including by forcing the National Carriers to respond with offerings that they likely would not otherwise have offered. However, the evidence also demonstrates that Shaw is facing serious challenges in maintaining the capital intensity that it has allocated to the wireless side of its business. The Tribunal accepts Shaw's position that going forward, Shaw will likely have to recalibrate the balance between its investment in its wireline business and its investment in its wireless business, if the Merger and Divestiture do not proceed. The Tribunal also accepts that Shaw would likely have had to make that shift, "but for" the Merger. The evidence demonstrates that this recalibration will likely involve diverting the limited funds that Shaw has available for future investments from its wireless business to its wireline business, which generates substantially all of Shaw's Free Cash Flow, but has declined in recent years as Shaw focused on its wireless business. The same likely would have been the case "but for" the Merger.

[386] The Tribunal considers it to be reasonable to infer from this that the competitiveness of Shaw Mobile and Freedom likely will decline if the Merger does not proceed, and likely would have declined in the absence of the Merger.

(11) Nature and extent of change and innovation (s. 93(g))

[387] The nature and extent of change and innovation in a market can have a significant bearing on the Tribunal's assessment of the likely effect of a merger on competition. Broadly speaking, the greater the level of actual or likely change and innovation in a market, the less likely it will be that a merger will prevent or lessen competition substantially, at least when there are a number of strong competitors competing in a highly dynamic environment.

[388] Based on the evidence considered in the preceding sections of these reasons, the Tribunal considers that the markets for the supply of wireless services in British Columbia and Alberta are in a highly dynamic state that is likely to persist for the foreseeable future. Among other things, the National Carriers and Videotron/Freedom are rapidly positioning themselves for, and heavily investing in, 5G, which will represent a "new industrial frontier" and a "true game-changer": Transcript, at 2874 and 98.

[389] In addition, the Merger will result in Rogers injecting a new and substantial source of competition into Telus' home markets. In anticipation of that, Bell and Telus are pursuing major competitive initiatives. Adding to all of this will be the entry of Videotron, a proven market disruptor.

[390] The Tribunal finds that the foregoing considerations will reduce the potential for the Merger and the Divestiture to prevent or lessen competition substantially.

(12) Any other factor that is relevant to competition in a market that is or would be affected by the Merger (s. 93(h)

[391] The regulated nature of the telecommunications industry in Canada is a factor that is relevant to an assessment of the likely impact of the Merger and Divestiture on competition.

[392] As discussed in Part VI of these reasons, a number of aspects of the wireline and wireless services businesses are regulated by the CRTC, which appears to be committed to encouraging greater competition in those businesses.

[393] At least two ongoing and pending regulatory initiatives can reasonably be expected to stimulate increased competition in the relevant markets and elsewhere in Canada. These include (i) the upcoming transition to a disaggregated model of wholesale high-speed access, to help increase competition and give smaller competitors greater control over the services they offer to Canadians: and (ii) the pending regime of mandated wholesale MVNO access, upon which Videotron has stated it intends to rely: see paragraph 345 above.

[394] In addition, as discussed at paragraph 319 above, the CRTC has authority and responsibility for ensuring network reliability.

[395] Apart from the CTRC's oversight role, the Minister has broad discretion, under the *Radiocommunication Act* and regulations, to issue spectrum licences and to set the terms and conditions of such licences. The Minister imposes conditions on spectrum licences, and has the power to suspend or revoke spectrum licences if the licence holder contravenes the terms and conditions of the licence: Transcript, at 324-325.

[396] As previously mentioned, the Minister must approve the proposed spectrum transfer from Shaw to Videotron. In this regard, he has made "very clear the lens through which [he] will consider this proposed spectrum transfer." First, he stated that any new wireless licenses acquired by Videotron would need to remain in its possession for at least 10 years. Second, he has expressed an expectation "to see prices for wireless services in Ontario and Western Canada comparable to what Vidéotron is currently offering in Quebec, which are today on average 20 per cent lower than

in the rest of Canada": Exhibit P-R-0008. Although this does not appear to be a legally enforceable condition, it is also not something that the Tribunal expects would be taken lightly by Videotron, especially given that it will have to deal with the Minister in the future. The Tribunal expects that Videotron will endeavour to honour what Mr. Péladeau describes as its "obligation", and what Mr. Lescadres describes as its "commitment", in this regard: Transcript, at 2517 and 2335-2336.

[397] More generally, the Minister committed earlier this year to "push aggressively to generate innovation, improve coverage and reduce the costs of telecommunications services using every tool we have": Exhibit P-R-0046. This followed a statement he made in March 2020 to "take action with other regulatory tools to further increase competition and help reduce prices": Exhibit P-R-0045.

(13) Coordinated effects

(a) The Commissioner's allegations

[398] The Commissioner maintains that the Merger is likely to facilitate increased coordination between the National Carriers, notwithstanding the Divestiture.

[399] In support of this allegation, the Commissioner states the following:

a) Pricing behaviour is very transparent, the National Carriers actively monitor each other's plans, prices, and promotions;

b) The National Carriers can and do signal their future pricing intentions by using tactics such as promotional pricing with pre-specified end dates or by publicly announcing their future pricing.

c) The National Carriers sometimes interpret price movements as signals about competitor intentions and react with their own price signals meant to communicate their intention to accede to a price increase or to punish a competitor for lowering its price.

d) The National Carriers often refer to the need to maintain "price discipline" and to avoid "irrational pricing".

e) There is a history of parallel or coordinated behaviour in this industry.

f) The threat of retaliation is a significant factor in pricing decisions by the National Carriers. Among other things, they recognize that they each compete across many product and geographic markets. This leads them to weigh the risk of retaliation not only in the same areas in which a promotion may be offered, but also in other areas.

g) The National Carriers recognize that competitive initiatives may carry a risk of having to re-price their existing customer base. This discourages both the likelihood and scale of competitive initiatives and responses.

[400] In addition to the foregoing, the Commissioner states that the following market characteristics substantially increase the likelihood of successful coordination among the National Carriers post-Merger:

a) Consumers of Wireless Services lack buyer-side market power.

b) There are high barriers to entry and expansion;

c) The Merger would result in a substantial increase in concentration.

d) There will be an increase in cost symmetry among the National Carriers.

e) The underlying service costs of competitors are generally well-known to the National Carriers.

f) The Merger will eliminate Shaw as a maverick competitor.

(b) Assessment

[401] The lynchpin of the Commissioner's position with respect to coordinated effects is that the Merger "is likely to lead to enhanced anticompetitive coordination by removing [Shaw, which is] a highly disruptive player from the market". In this regard, the Commissioner describes Shaw as being "a disruptor of coordination, driving down prices and fostering service enhancements such as higher limit plans": Application, at para 89.

[402] However, Videotron also has a long history of being a highly disruptive, innovative competitor. This is how it has managed to gain a market share of approximately 22% of wireless subscribers in Quebec: Exhibit CA-I-0144, at para 5. The competitive dynamic that it has stimulated has led to much lower prices in Quebec, relative to other provinces: Exhibit CA-R-0232, at para 24. Indeed, the Minister estimates that prices in Quebec "are today on average 20 per cent lower than in the rest of Canada": Exhibit P-R-0008.

[403] Considering the foregoing, and for the additional reasons provided in part X.B.(9) – (12) above, the Tribunal finds that the Merger and the Divestiture are not likely to give rise to an increased likelihood of coordinated behaviour, as the Commissioner has alleged.

(14) Conclusion

[404] For all of the reasons set forth in Parts X.B.(1)-(13) above, the Tribunal has determined that the Merger and Divestiture are not likely to prevent or lessen competition substantially in the markets for wireless services in Alberta and British Columbia. In other words, the Merger and Divestiture are not likely to result in materially higher prices for those services, relative to those that would likely prevail in the absence of the arrangement. The Merger and Divestiture are also unlikely to result in materially lower levels of non-price dimensions of competition, relative to those that would likely exist in the absence of the arrangement.

[405] In the course of making this determination, the Tribunal rejected various allegations made by the Commissioner in support of several propositions, including that: (i) Shaw's divestiture of

Freedom to Videotron would result in Freedom being a less effective competitor than it was immediately prior to the announcement of the Merger; (ii) Rogers' acquisition of Shaw Mobile would likely give rise to anti-competitive unilateral effects; and (iii) the Merger and Divestiture would likely facilitate the exercise of collective market power by the National Carriers.

[406] To the extent that Videotron is much more committed than Shaw to be a long-term participant in the relevant markets, the Tribunal expects that Videotron would be a more aggressive and effective competitor than Freedom and Shaw Mobile likely would have been in the absence of the Merger. For much the same reason that determined, upstart boxers often do better than incumbents who are already casting their eyes towards retirement, the Tribunal expects the same would be true for Videotron/Freedom, relative to Freedom/Shaw Mobile and their trajectory under Shaw's ownership, at the time the Merger was announced.

[407] Videotron is an experienced market disruptor that has achieved substantial success in Quebec, where it has grown to having a 22% share of wireless subscribers. It has drawn upon its experience to develop very detailed and fully costed plans for its entry into and expansion within the relevant markets in Alberta and British Columbia, as well as in Ontario. Those plans were buttressed when Videotron acquired VMedia earlier this year, with a view to accelerating its rollout of new bundled offerings. The Tribunal has concluded that the evidence establishes that the bundled offerings of Freedom and VMedia will likely be priced at a level that is at least as competitive as the level at which the bundled offerings of Shaw Mobile and Freedom likely would have been priced in the absence of the Merger. The Tribunal has determined that the same is also likely to be true for the "wireless only" offerings of Freedom under Videotron and Videotron's digital "Fizz" brand, relative to the corresponding offerings of Shaw Mobile and Freedom under Shaw's control. In addition, the Tribunal has found that Videotron, which is in the process of rolling out 5G services in Quebec, is likely to do the same in Alberta and British Columbia within a time-frame that will ensure that competition is not substantially prevented or lessened.

[408] It bears underscoring that there will continue to be four strong competitors in the wireless markets in Alberta and British Columbia, namely, Bell, Telus, Rogers and Videotron, just as there are today. Videotron's entry into those markets will likely ensure that competition and innovation remain robust. Among other things, Videotron has a proven record of aggressive pricing and innovation in Quebec and parts of Eastern Ontario. Its expansion into Alberta, British Columbia and the rest of Ontario will be facilitated by the very favourable arrangements that it has negotiated as part of the Divestiture. That expansion will also be facilitated by the national rollout of Videotron's "Fizz" brand. Moreover, instead of the two firms (Telus and Shaw) that offer bundled wireless and wireline products in those markets today, there will be at least three (Telus, Rogers, and Videotron).

[409] The Tribunal has also determined that the strengthening of Rogers' position in Alberta and British Columbia, combined with the very significant competitive initiatives that Telus and Bell have been pursuing since the Merger was announced, will also likely contribute to an increased intensity of competition in those markets.

C. The efficiencies defence

[410] Given the Tribunal's conclusion that the Merger and Divestiture are unlikely to prevent or lessen competition substantially, it is unnecessary to consider whether the Respondents have satisfied the requirements of the efficiencies defence in section 96 of the *Competition Act*.

XI. DISPOSITION

[411] For the reasons set forth in Part X.B. above, and summarized in Part X.B.(14), the Commissioner's application will be dismissed.

[412] The Tribunal will address the issue of costs in a subsequent decision.

XII. ORDER

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

DATED this 31st day of December, 2022

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Paul Crampton C.J. (Presiding Member)
(s) Wiktor Askanas
(s) Ramaz Samrout

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

John S. Tyhurst
Derek Leschinsky
Alexander Gay
Paul Klippenstein
Katherine Rydel
Ryan Caron
Antoine Lippe
Jonathan Bitran
Kevin Hong
Irene Cybulski
Jasveen Puri

For the respondents:

Rogers Communications Inc.

Jonathan Lisus
Crawford Smith
Matthew Law
Bradley Vermeersch
Zain Naqi
John Carlo Mastrangelo
Ronke Akinmyemi
Patrick Wodhams

Shaw Communications Inc.

Kent E. Thomson
Derek D. Ricci
Steven G. Frankel
Chanakya A. Sethi

For the intervenors:

Videotron Ltd.

John Rook
Emrys Davis
Pascale Dionne-Bourassa
Kyle Donnelly
Alysha Pannu
Christina Skinner

APPENDIX 1 – Section 7 of the *Telecommunications Act*

Canadian Telecommunications Policy	Politique canadienne de télécommunication
Objectives	**Politique**
7 It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives	**7** La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :
(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;	**a)** favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;
(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;	**b)** permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;	**c)** accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;
(d) to promote the ownership and control of Canadian carriers by Canadians;	**d)** promouvoir l'accession à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

e) promouvoir l'utilisation d'installations de transmission canadiennes pour les télécommunications à l'intérieur du Canada et à destination ou en provenance de l'étranger;

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

g) stimuler la recherche et le développement au Canada dans le domaine des télécommunications ainsi que l'innovation en ce qui touche la fourniture de services dans ce domaine;

(h) to respond to the economic and social requirements of users of telecommunications services; and

h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

(i) to contribute to the protection of the privacy of persons.

i) contribuer à la protection de la vie privée des personnes.

APPENDIX 2 – Relevant provisions of the *Competition Act*

Mergers	Fusionnements
[…]	[…]
Order	**Ordonnance en cas de diminution de la concurrence**
92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially	**92 (1)** Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :
(a) in a trade, industry or profession,	**a)** dans un commerce, une industrie ou une profession;
(b) among the sources from which a trade, industry or profession obtains a product,	**b)** entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;
(c) among the outlets through which a trade, industry or profession disposes of a product, or	**c)** entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;
(d) otherwise than as described in paragraphs (a) to (c),	**d)** autrement que selon ce qui est prévu aux alinéas a) à c),
the Tribunal may, subject to sections 94 to 96,	le Tribunal peut, sous réserve des articles 94 à 96 :
(e) in the case of a completed merger, order any party to the merger or any other person	**e)** dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci

	soit partie au fusionnement ou non :
(i) to dissolve the merger in such manner as the Tribunal directs,	**(i)** de le dissoudre, conformément à ses directives,
(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or	**(ii)** de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,
(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or	**(iii)** en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;
(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person	**f)** dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :
(i) ordering the person against whom the order is directed not to proceed with the merger,	**(i)** à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,
(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or	**(ii)** à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,
(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both	**(iii)** en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :
(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the	**(A)** à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire

prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux

of the parties to the merger or proposed merger;

entreprises des parties au fusionnement réalisé ou proposé;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

(d) any barriers to entry into a market, including

d) les entraves à l'accès à un marché, notamment :

(i) tariff and non-tariff barriers to international trade,

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) interprovincial barriers to trade, and

(ii) les barrières interprovinciales au commerce,

(iii) regulatory control over entry,

(iii) la réglementation de cet accès,

and any effect of the merger or proposed merger on such barriers;

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

(f) any likelihood that the merger or proposed merger will or would result in the

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un

removal of a vigorous and effective competitor;

concurrent dynamique et efficace;

(g) the nature and extent of change and innovation in a relevant market;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

(g.1) network effects within the market;

g.1) les effets de réseau dans le marché;

(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;

g.2) le fait que le fusionnement réalisé ou propose contribuerait au renforcement de la position sur le marché des principales entreprises en place;

(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and

g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

[…]

[…]

Exception where gains in efficiency

Exception dans les cas de gains en efficience

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result

96 (1) Le Tribunal ne rend pas l’ordonnance prévue à l’article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l’objet de la demande a eu pour effet ou aura vraisemblablement pour effet d’entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l’empêchement ou de la diminution de la

from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

Factors to be considered

Facteurs pris en considération

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

(a) a significant increase in the real value of exports; or

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

(b) a significant substitution of domestic products for imported products.

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.