

Complaint of
TekSavvy Solutions Inc.

Seeking an Inquiry and Enforcement Action by the
Commissioner of Competition

In respect of the anti-competitive practices of
Bell Canada
and
Rogers Communications Canada Inc.

February 20, 2020

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Public Version

Public Version

TekSavvy submitted this formal Complaint to the Competition Bureau seeking an urgent inquiry and enforcement action for the anti-competitive practices of Bell and Rogers.

This is a public version of the Complaint, abridged for confidential information which has been identified with ###

Competitors that provide retail Internet services to Canadians using wholesale high-speed services must have access to these services at just and reasonable prices. The **fact** that these large companies did not respect accepted costing principles and methodologies is **very disturbing**.

- *Jean-Pierre Blais,*
CRTC Chairman and CEO, 2016

[W]e had negative wholesale... subscriber additions, which of course we would be very comfortable with... Of course, part of **that is our strategy** with the roll-out of the Virgin Internet brand.

- *George Cope, Bell CEO, 2018*

Broadband Internet access is, and will continue to be, the engine of the digital economy. Canadians use broadband services to work and play, to be entertained, and to participate fully in a wide range of economic and social activity. Accordingly, **healthy competition in the broadband sector is key** to ensuring that all Canadians can benefit from all that the Internet brings to our lives.

- *Competition Bureau,*
2019 Broadband Study

1. INTRODUCTION

a. Bell and Rogers' anti-competitive practices

1. Bell Canada ("Bell") and Rogers Communications Canada Inc. ("Rogers") are abusing their dominant positions in wholesale and retail markets for wireline Internet services in their incumbent serving territories in Ontario and Quebec¹: Canada's largest retail markets.
2. Specifically, Bell and Rogers are abusing their dominant position in wholesale markets to increase competitors' costs, while targeting those same competitors in retail markets with fighting brand offerings priced below competitors' costs. This abuse has resulted in substantially higher retail prices for Internet service—costing millions of Canadians hundreds of millions of dollars—and if left unchecked, is likely to result in TekSavvy Solutions Inc. ("TekSavvy") and other competitors exiting retail markets across Canada.

i. 78(1)(a) Margin Squeezing

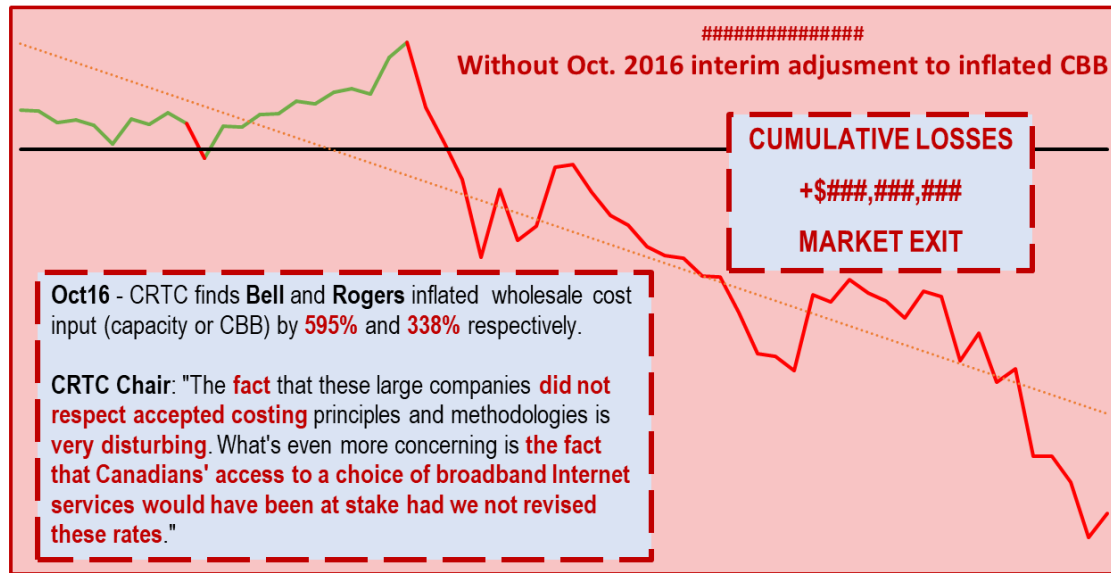
3. TekSavvy requires wholesale access to the wireline facilities of incumbent cable and telephone carriers² ("Incumbents"), such as Bell and Rogers, to provide its competing retail Internet services. The wholesale rates that TekSavvy pays Incumbents to access their wireline facilities is by far and away TekSavvy's largest single cost in providing its competing retail services. As depicted in the figure below, by the end of TekSavvy's fiscal 2020, it will have paid Incumbents in excess of \$1 billion for wholesale access to their networks.

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4. Between 2016 and 2019, the Canadian Radio-television and Telecommunications Commission ("CRTC"), determined that Bell and Rogers deviated from its wholesale costing rules a combined total of 56 times, and that in each case, such deviations wrongfully increased, or wrongfully would increase, TekSavvy's costs in providing retail services that compete with the retail services of Bell and Rogers. These are findings of fact.
5. For example: Bell and Rogers accept, and do not contest, the CRTC's unequivocal finding of fact, that Bell and Rogers deviated from the CRTC's rate-setting rules and inflated the capacity component of Bell and Rogers' wholesale rates (CBB) by 595% and 338%, respectively.
6. Based on this finding of fact, the CRTC issued an interim order revising Bell and Rogers' then-current CBB rates in October 2016, in the course of an ongoing rate-setting proceeding. The anti-competitive impact of Bell and Rogers' costing deviations, and the urgency of the CRTC's interim order adjusting their inflated CBB rates, cannot be overstated:

¹ This Complaint focuses on the anti-competitive conduct of Bell and Rogers. However, as discussed in section 5(g), Vidéotron has engaged and continues to engage in much of the same anti-competitive activities.

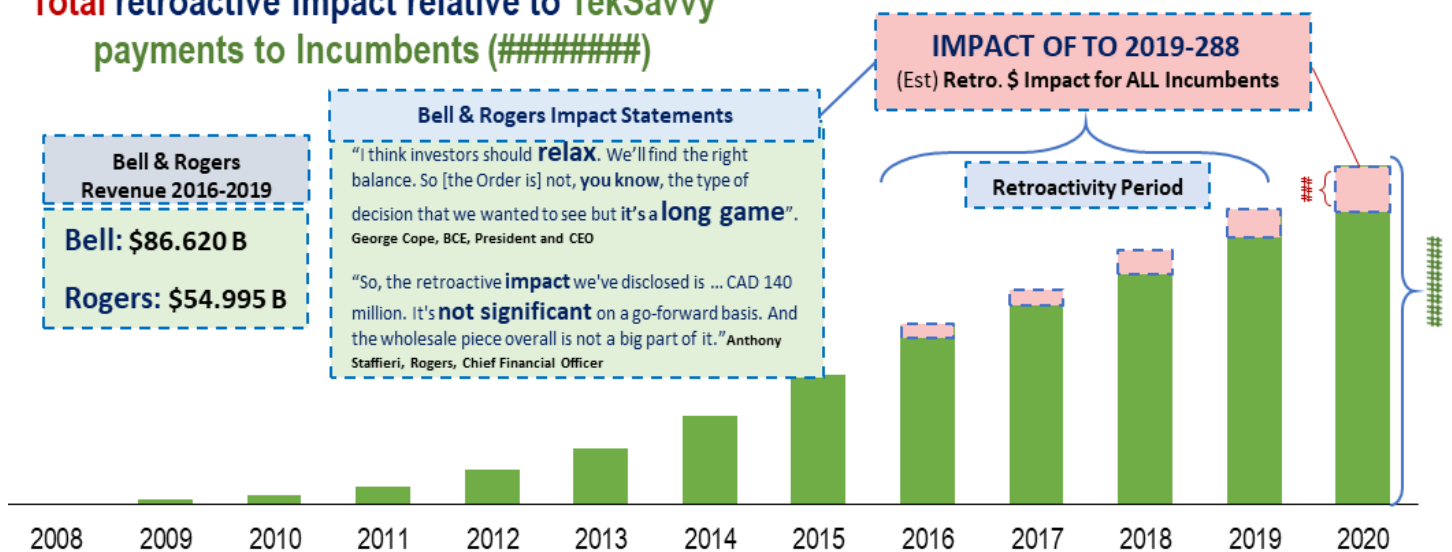
² Incumbents include Bell, Rogers, Vidéotron G.P. (Vidéotron); Cogeco Communications Inc.; Bell MTS.; Saskatchewan Telecommunications; Shaw Cablesystems G.P.; TELUS Communications Company and Bragg Communications Incorporated, carrying on business as Eastlink.



7. This uncontested finding of fact, starkly shows the extent of Bell and Rogers' dominance in wholesale markets, and their abuse of that dominance in unjustly imposing ruinous costs on their retail competitors.
8. The CRTC's October 2016 order, cited above, revised just *one* element of Bell and Rogers' inflated rates, and only revised that one element *in part*, on an *interim* basis, because it would have soon *annihilated retail competitors*. In its final rate decision, issued in August 2019, the CRTC determined, on the basis of Bell and Rogers' own evidence, that *all* of Bell and Rogers' wholesale rates, *including* the CBB element it revised on an interim basis in 2016, were and are unjustly inflated due to deviations from its costing rules.
9. Accordingly, Bell and Rogers' wholesale divisions are systematically driving up costs for competitors of their retail divisions.
10. The CRTC ordered Bell and Rogers to correct their inflated wholesale rates to comply with its rules and to return amounts they unjustly extracted from competitors between March 2016 and August 2019. However, Bell and Rogers obtained a stay of that decision, so those corrections have not taken effect and those amounts have not been returned. Bell and Rogers appealed the decision, claiming it will have catastrophic impacts for their businesses, and attack the requirement to refund those amounts as a "regulatory windfall" for "resellers".³
11. At the same time, Bell and Rogers reassure their investors that the CRTC's decision, and its retroactive impact, are "not significant" - they are merely playing the "long game", while their wholesale divisions continue to overcharge competitors of their retail divisions.

³ E.g. Bell Canada, Petition to the Governor in Council to Vary Telecom Order CRTC 2019-288, "these rates, which are now **below our actual costs** ... would have a **significant negative impact on investment...**" at pp. 10

Total retroactive impact relative to TekSavvy payments to Incumbents (#####)



ii. 78(1)(d) Fighting Brands/78(1)(i) Selling Below Cost

12. Rogers' fighting brand, Fido, and Bell's fighting brand, Virgin, have been present in the retail markets for mobile wireless services for many years. It was only after the CRTC began reviewing the wholesale rates charged by Rogers and Bell for wireline Internet services (May 2015), that Rogers and Bell added wireline *Internet* services to their fighting brands *retail* offerings (November 2015, and July 2016, respectively).
13. While leveraging their dominant positions in the wholesale market to inflate competitors' costs, Bell and Rogers use their retail fighting brands to target and undercut competitors' retail prices, regularly offering *retail* prices for a given level of Internet service at a price below the *wholesale* prices they inflated for competitors. The following table illustrates this phenomenon:

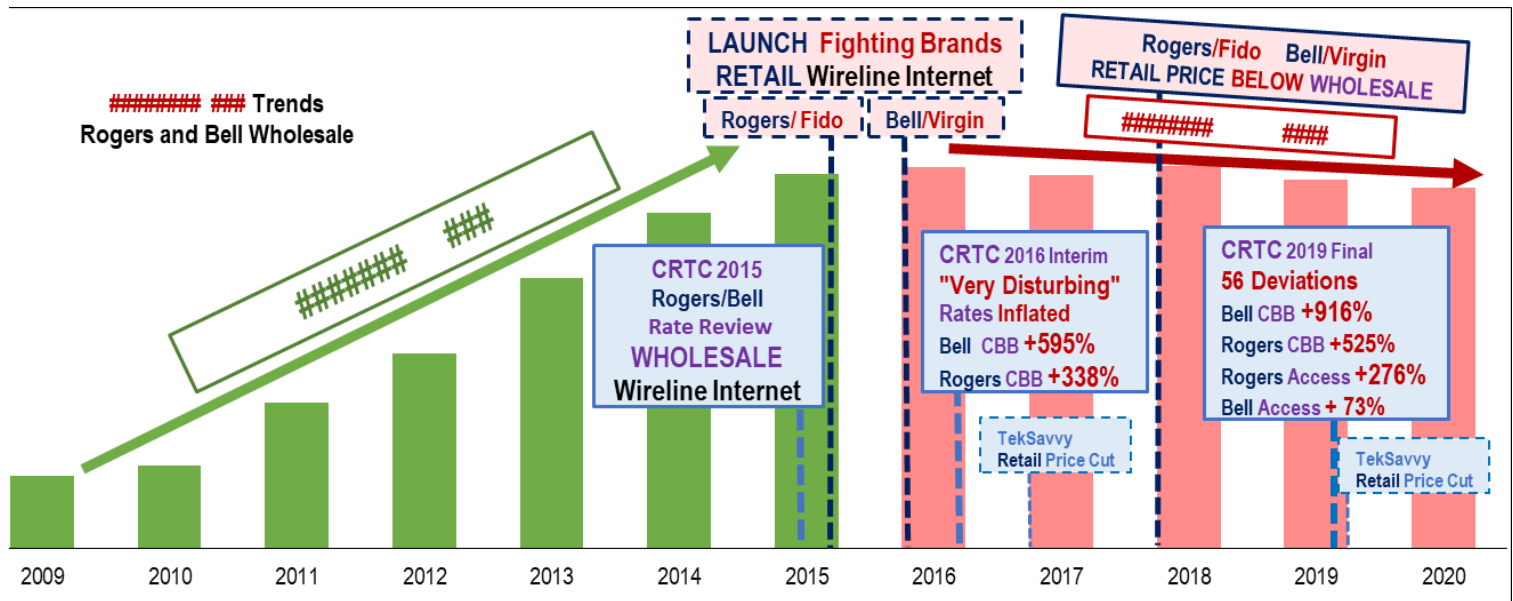
	Fighting Brand Retail Promo Price	Wholesale Tariffed Cost
Bell (Virgin)	\$30/month ⁴ (50Mbps retail service)	\$36/month (50Mbps wholesale service)
Rogers (Fido)	\$32.50/month ⁵ (75Mbps retail service)	\$33.50/month (75Mbps wholesale service)

14. Note that these wholesale cost figures include *only* the regulated (tariffed) prices charged by Bell and Rogers' wholesale divisions to retail competitors, and do not include other regulated costs, mandatory product and service inputs, business overhead, or any profit margin at all.

⁴ Since at least March 2018, Virgin has regularly and for significant periods of time offered a 50Mbps package for \$30/month for an introductory period of 12 months.

⁵ Since at least February 2018, Fido has regularly and for significant periods of time offered a 75Mbps package for \$32.50/month for an introductory period of 12 months.

15. Even when Bell and Rogers set their fighting brands' retail prices *above* TekSavvy's wholesale price for the corresponding Internet service, they regularly set those retail prices at levels which leave TekSavvy with little or no room to price its retail services at a competitive level, while permitting it to cover its costs of doing business and earn a reasonable rate of return.



b. Substantial prevention and lessening of competition in Canada's largest retail markets

16. Bell and Rogers' anti-competitive practices have prevented and lessened competition substantially, are preventing and lessening competition substantially, and are likely to have that effect, in their incumbent serving territories in Ontario and Quebec: Canada's largest retail markets for broadband wireline services.

i. Higher Retail Prices

17. First, by inflating wholesale prices and increasing TekSavvy's wholesale costs (and the costs of other competitors that require wholesale access to provide competing retail services), Bell and Rogers have, in effect "raised the floor" on retail prices for Internet service and, as a result those prices, have been, are now, and are likely to continue to be substantially higher than they would be but for their anti-competitive conduct. Several studies, discussed below, confirm that Canadians pay among the highest retail prices in the world for telecom services, including for broadband Internet.

ii. Competitors Exit Internet

18. Second, by charging TekSavvy inflated wholesale rates, while also targeting it with fighting brand offerings at retail prices below TekSavvy's wholesale costs - in effect, squeezing TekSavvy from both sides - Rogers and Bell have deliberately made TekSavvy's and other wholesale-based competitors, or ("WBCs") continued presence in the retail markets in Ontario and Quebec increasingly unsustainable. As a direct result, TekSavvy's and other WBCs exit from those markets

is increasingly likely. In that event, Ontario and Quebec would be served by only the relevant Incumbent telephone company and cable company. Experience from the market for wireless services indicates that the absence of non-incumbent competition enables and facilitates coordination by Incumbents and leads to even higher retail prices for consumers.

iii. Competitors Do Not Enter Mobile

19. Third, if TekSavvy were to exit retail Internet markets, which is the base upon which other retail services are built, it will also exit all markets in which it participates, as well as scrap plans to enter new markets, such as mobile. Should TekSavvy not enter the mobile market, for most Canadians there would remain only three choices: Bell, Rogers, and TELUS, all firms that the Competition Bureau concluded have engaged in coordinated behavior leading to higher wireless prices for consumers.

c. The Commissioner must conduct an inquiry and take enforcement action

20. There is ample jurisdiction for the Commissioner to inquire into Bell and Rogers' conduct as outlined in this Complaint. Moreover, given the nature of the Complaint and the competition issues it raises under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"), it is appropriate and essential that the Commissioner conduct that inquiry and take enforcement action.
21. The CRTC's role in regulating certain aspects of wireline broadband service, does not supplant the Commissioner's role in enforcing the Act, nor do proceedings arising from CRTC proceedings, whether appeals to the Federal Court of Appeal or Petitions to the Governor-in-Council.
22. In assessing Bell and Rogers' conduct, it is critical to remain mindful of two facts: (i) Bell and Rogers unquestionably knew and know that the cost of wholesale access to their networks was and is the biggest single cost that TekSavvy was and is required to pay in order to provide its competing retail services to consumers; and, (ii) Bell and Rogers were specifically found to have vastly inflated those wholesale costs by the CRTC in 2016 and 2019. This knowledge and that conduct has allowed Bell and Rogers to calibrate their fighting brand retail price offers for the purpose of having a predatory, exclusionary and/or disciplinary effect on TekSavvy, as well as other WBCs, while keeping Canadian retail rates for wireline Internet service among the very highest in the world.
23. Bell and Rogers' ongoing and systematic abuse of the wholesale rate-setting process, together with Bell and Rogers' use of fighting brands, is central to TekSavvy's complaint. This abuse is not part of a "Goldilocks" problem⁶ of seeking to fine tune or tweak rates by a percentage point or two so as not to chill investment, while ensuring WBCs can obtain wholesale service at rates which allow them to compete. Rather, this abuse is part of an ongoing, deliberate strategy to impose massively inflated costs on competitors, and in turn, drive up retail prices – and then to *maintain* those high costs for competitors and high retail prices for consumers.

⁶ The Bureau referred to the "Goldilocks problem" at page 48 of its Broadband Study. Competition Bureau, *Delivering Choice: A Study of Competition in Canada's Broadband Industry*, August 7, 2019, [the "**Broadband Study**" or the "**Study**"] [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CSBP-BR-Main-Eng.pdf/\\$file/CSBP-BR-Main-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CSBP-BR-Main-Eng.pdf/$file/CSBP-BR-Main-Eng.pdf).

24. Accordingly, the fact that there are currently appeals and petitions in respect the CRTC's most recent final wholesale rate decision - TO 2019-288⁷ - is simply further *evidence* of Bell and Rogers' abuse. It is the specific reason why today, four years after the CRTC began a proceeding which expressly determined that Bell and Rogers' wholesale rates were massively inflated—due to numerous deliberate deviations from its costing rules—Bell and Rogers *continue* to gouge Canadians with among the highest retail prices in the world, and *continue* to siphon hundreds of millions of dollars from competitors with severely inflated wholesale rates.
25. But for those appeals and petitions, TO 2019-288 would have been implemented and Bell and Rogers' inflated wholesale rates would have been corrected, and reflected in lower retail prices from direct retail competitors of Bell and Rogers.⁸ Bell has admitted, in submissions filed in connection with its Stay Application at the Federal Court of Appeal, that as a result of the CRTC's decision to correct Bell's wholesale rates, Bell would have to lower its own retail prices to meet the competition:
- Because Resellers are reducing prices in response to the Decision, Carriers, including Bell, will be forced to do the same. This will have the immediate effect of reducing the price Bell can charge subscribers for its Internet services.⁹
26. Of course, if Bell lowered its retail prices, other Incumbents, like Rogers and Vidéotron would also have been forced to lower their retail prices. In other words: competition in Canada's largest retail market for wireline broadband services would have resulted in lower prices to the benefit of millions of households and businesses.
27. If the Commissioner fails to act now, Bell and Rogers will be free to continue to implement their two-part strategy of squeezing retail competitors from both sides and Canadian consumers will continue to pay among the highest wireline broadband prices in the world.
28. While TekSavvy is of the view that there is clear and compelling evidence which supports the allegations set out above (as further detailed in this Complaint); it submits that, at a bare minimum, the evidence detailed in this Complaint gives rise to reason to believe that grounds exist for making an order under section 79 of the Act and, as such, it is appropriate and essential that the Commissioner conduct an inquiry in this case.
29. TekSavvy acknowledges that the precise form of relief that is appropriate in any given matter is squarely within the Commissioner's discretion. However, TekSavvy submits that any relief the Commissioner seeks should preclude Bell and Rogers from employing their above and below "pincer" strategy, as well as impose an administrative monetary penalty of \$10 million against each of Bell and Rogers to promote practices by those companies which comply with section 79 of the Act.

⁷ Telecom Order CRTC 2019-288 ["**TO 2019-288**"], <https://crtc.gc.ca/eng/archive/2019/2019-288.htm>

⁸ In fact, a number of WBCs, including TekSavvy, did cut their retail prices after TO 2019-288 was issued. However, in the face of the Stay, most WBCs reversed those cuts. TekSavvy has not yet done so.

⁹ *Bell Canada v. BCBA et al*, Written Representations contained within a Motion Record filed on behalf of Bell on 17 September 2019, at para. 46 (FCA - CFN 19-A-59).

d. About TekSavvy

30. TekSavvy is Canada's largest independent Internet service provider, based in Chatham, Ontario and Gatineau, Quebec, and has been providing Canadian consumers with wireline broadband Internet services since 2002. The company has won numerous awards for the quality of its user experience.¹⁰
31. TekSavvy provides retail Internet and other telecom services¹¹ to residential and business customers across Canada. Though the majority of its retail customers are located in major urban centers in southern Ontario and Quebec, between 2018 and 2019, TekSavvy expanded its retail wireline broadband footprint to include higher speed cable-based Internet services in Manitoba, Saskatchewan, Alberta, British Columbia, the Maritimes and Newfoundland and Labrador.
32. TekSavvy now provides, in every province in Canada, a competitive retail wireline Internet service alternative to those provided by incumbent Canadian telephone and cable companies like Bell, Rogers, Vidéotron G.P. (Vidéotron); Cogeco Communications Inc.; Bell MTS.; Saskatchewan Telecommunications; Shaw Cablesystems G.P.; TELUS Communications Company and Bragg Communications Incorporated, carrying on business as Eastlink. (the "Incumbents"), who collectively have a national retail wireline Internet market share of 86%.¹²
33. In addition to TekSavvy, there are a number of other WBCs (i.e., non-Incumbent wholesale-based wireline Internet firms) in Canada, which also provide retail Internet service to end-user consumers. TekSavvy is, by a significant margin, the largest WBC in Canada.¹³
34. TekSavvy is currently building a high-speed fibre broadband network in Chatham-Kent which, when completed, will provide 38,000 residences and businesses in that region with state of the art, high-speed FTTP Internet service, capable of download speeds in the range of 1.0 Gbps. In addition, TekSavvy built and operates its own facilities-based fixed wireless access network, covering a 5,000 square kilometer area in southwestern Ontario. With this system, TekSavvy offers wireless Internet connectivity to rural consumers that were previously underserved by wireline broadband infrastructure.
35. In addition, on February 1, 2019, TekSavvy and its affiliate Hastings Cable Vision Ltd. launched TekSavvy TV in Ontario and will be rolling out the service across Canada in 2020.¹⁴ TekSavvy TV, which offers consumers a choice of up to 105 HD channels and cloud-based PVR service,

¹⁰ e.g. Toronto Star, Reader's Choice 2019, Diamond Winner, Internet Service Provider; Now Magazine Best Internet Provider 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019; St. Catherine's Standard – Reader's Choice 2019, Platinum Winner, Internet Service Provider.

¹¹ For residential customers, these telecom services include Internet Protocol Television and Voice over Internet Protocol ("VoIP") home phone and long-distance services. For business customers, they include VoIP, Cloud and Web-Hosting services.

¹² CRTC, *Communications Monitoring Report 2019* - <https://crtc.gc.ca/pubs/cmr2019-en.pdf>, Infographic 9.3 - Points of interest in residential Internet service subscriptions, 2018, at p. 254.

¹³ Based on subscriber count.

¹⁴ TekSavvy TV is an Internet Protocol Television service which delivers content over TekSavvy's Internet Protocol network.

provides Canadian consumers with a much needed competitive alternative to television services offered by Incumbents.

36. Finally, TekSavvy is seeking to expand its core retail product offerings to include mobile wireless services. To that end, TekSavvy has intervened in CRTC 2019-57,¹⁵ a proceeding convened by the Commission to review the regulatory framework for the retail mobile wireless market in Canada. The Commission has expressed a preliminary view,¹⁶ and TekSavvy has taken the position in that proceeding, that to create real competition in the wireless market, a mandated Mobile Virtual Network Operator (“MVNO”) regulatory framework is required.¹⁷ At present, Bell, Rogers and TELUS, have a combined national wireless market share of 90%.¹⁸

2. COMPETITION IN RETAIL MARKETS FOR WIRELINE INTERNET SERVICES

a. Wholesale and retail markets are inextricably linked

37. There are two inextricably linked markets germane to TekSavvy’s complaint: the wholesale market for wireline Internet services that enable TekSavvy to deliver retail Internet services to end-user consumers; and, the retail market for wireline Internet services sold to end-user consumers.
38. Historically, telecommunications services in Canada were provided almost exclusively by telephone companies that operated on a monopoly basis within their given geographic service territory, with retail prices being regulated by the CRTC.
39. However, beginning in the 1990s, the CRTC established regulatory frameworks¹⁹ to facilitate competition in markets for telecommunications services, which required incumbent telephone companies and, in time, cable companies, to make available to new competitors, on a wholesale basis, certain network facilities “essential” to allowing those competitors to offer competing retail services.
40. In its Review of Wholesale Wireline Services and Associated Policies, the CRTC characterized wholesale network services and their role in fostering competition as follows:

The provision of wholesale services primarily supports competition in various retail service markets, such as local phone, television, and Internet access service markets, by enabling competitors to access certain telecommunications

¹⁵ Telecom Notice of Consultation CRTC 2019-57, February 28, 2019 - <https://crtc.gc.ca/eng/archive/2019/2019-57.htm>

¹⁶ Telecom Notice of Consultation CRTC 2019-57, February 28, 2019, at p. 39.

¹⁷ An MVNO is a wireless service provider that does not own spectrum or operate its own radio access network (RAN); instead, it relies on the spectrum and RAN of a wireless carrier and, in some cases, other facilities and/or services, to provide mobile wireless services to consumers. MVNOs encompass a variety of service-based providers that rely on wholesale services to varying degrees to support their retail businesses. (Telecom Notice of Consultation CRTC 2019-57, footnote 8).

¹⁸ 91% market share by revenue, 89% market share by subscriber count - CRTC, Communications Monitoring Report 2019 - <https://crtc.gc.ca/pubs/cmr2018-en.pdf>, at pp. 248 and 257.

¹⁹ E.g., Telecom Decision CRTC 97-8 (local phone services); Telecom Decision 98-17 (overseas long distance); Telecom Decision CRTC 98-8 (pay telephone).

facilities and network components from incumbent carriers, such as incumbent local exchange carriers (ILECs) and cable companies, so that competitors can extend their networks where necessary to provide their own services to consumers...

Over the years, the Commission has established various policies, rules, and regulations to govern the provision of wholesale services. These regulatory measures are necessary because incumbent carriers have had considerable advantages over competitors. Without wholesale regulation, fewer competitive service options would be available to Canadians.

...

Conceptually, facilities-based competition is best achieved by requiring incumbent carriers to make available facilities that are “essential” for competition. These facilities, sometimes referred to as bottleneck facilities, are, generally speaking, network components that cannot be readily duplicated and that are controlled by incumbent carriers, which gives them the market power to substantially prevent or lessen retail competition if they were to deny competitors access to those facilities. To determine whether to mandate facilities, the Commission has applied a specific set of criteria, set out in paragraph 15 of this decision.

... The desired outcome is that once competitors are given access to certain facilities (for example, access facilities), they are incented to enter the market and invest in other parts of the network, eventually leading to lower prices, innovative service offerings, and greater choice for consumers.²⁰ [Emphasis added]

b. Wholesale prices determine retail prices


41. As the CRTC began requiring that Incumbents provide wholesale access to their network facilities, it ceased retail price regulation of telecommunications services, on the rationale that regulated wholesale access would lead to new competitors entering various retail markets and that with increased competition, retail prices would be best set by market forces, including in the market for retail wireline Internet services.²¹
42. However, the CRTC continued to regulate certain aspects of wholesale wireline broadband service, including wholesale pricing, given the essential nature of that service to retail competition and the fact that the Incumbents possess market power in the market for that service.²²
43. In terms of wholesale wireline broadband pricing, the CRTC’s regulatory process required (and continues to require) Incumbents to, from time to time, file tariff-rate applications, along with cost

²⁰ CRTC, Review of Wholesale Wireline Services and Associated Policies, Telecom Regulatory Policy CRTC 2015-326, July 22, 2015 [“CRTC 2015-326”], <https://crtc.gc.ca/eng/archive/2015/2015-326.htm>, at paras. 2, 3, 6, 7

²¹ CRTC, Internet - Our Role, Fostering Competition in The Internet Services Market, (undated) - <https://crtc.gc.ca/eng/Internet/facbill.htm>.

²² CRTC 2015-326.

studies performed in accordance with a detailed set of decisions, principles and methodologies prescribed by the CRTC.

44. The CRTC's wholesale pricing decisions, principles and methodologies were intended to allow Incumbents to recover their costs in providing a given wholesale service to WBCs, plus a reasonable mark-up,²³ while at the same time ensuring that WBCs could (and can) obtain wholesale access at "just and reasonable" wholesale rates, thereby enabling them to offer competing retail Internet services at competitive prices to consumers.
45. These underlying principles of the CRTC's regulatory framework for wholesale broadband access, including the requirement that the Incumbents provide WBCs access to their facilities at regulated rates and the notion of cost recovery, were established in the late 1990s and remain in place today. The CRTC continues to regulate the terms and conditions under which Incumbents provide wholesale service to TekSavvy, including the wholesale rates that Incumbents can charge. In fact, the wholesale rates TekSavvy pays cover the Incumbent's direct cost of providing wholesale service and include a markup to reflect the Incumbent's fixed and common costs, such as overhead expenses.
46. Wholesale rates for wireline Internet services consist of two components: capacity and access. The Capacity rate is a monthly charge for the data used by each WBC retail subscriber (per 100Mbps) and the Access rate is a "per subscriber monthly fee" to connect each WBC retail subscriber to an Incumbent's network. The wholesale tariff also sets out any fees for service installation and end-user hardware requirements.
47. Importantly, TekSavvy is both a retail competitor and a wholesale customer of the Incumbents, given that the Incumbents own and control the underlying wireline access facilities that enable the provision of retail telecom services (such as Internet access, IPTV and VoIP) to Canadian homes and businesses. TekSavvy requires wholesale access to Incumbent wireline facilities to provide competing retail services. The wholesale cost that TekSavvy pays for access to the Incumbents' wireline facilities is by far and away its largest single cost in providing its retail Internet services.
48. As noted above and as depicted in the figure below, by the end TekSavvy's fiscal 2020, it will have paid Incumbents in excess of \$1 billion for wholesale access to their networks.

49. Accordingly, wholesale rates are a primary driving factor in determining the retail price at which TekSavvy and other WBCs are able to offer a competitive option for retail telecom services to Canadian consumers.

²³ Markups have varied over time depending on a number of factors, including whether the wholesale service is essential and whether there may be additional risk to network investment if the wholesale service is mandated. Telecom Order CRTC 2019-288, 15 August 2019 at para. 284. (<https://crtc.gc.ca/eng/archive/2019/2019-288.htm>)

c. Canadian retail prices remain among the highest in the world

50. On August 7, 2019, the Competition Bureau released the Broadband Study. The Study concluded that WBCs, like TekSavvy, provide important benefits to consumers:

Wholesale-based competitors fulfill a meaningful competitive presence in the marketplace. They currently serve more than 1,000,000 Canadian households, and act as an alternative for countless others, who use the presence of wholesale-based competitors to negotiate lower prices and better terms from other competitors in the marketplace.²⁴

51. TekSavvy wholeheartedly agrees with the Bureau that Canadian consumers have benefitted from the competition that WBCs have brought to retail wireline broadband markets. In that regard, the Broadband Study found:

Wholesale-based competitors typically price cheaper than facilities-based competitors. According to CRTC statistics, facilities-based competitors receive, on average, revenues of \$58.32 per subscriber per month, whereas wholesale-based competitors offer services at approximately a 15% discount to this figure. Other studies indicate even greater discounts by wholesale-based competitors, ranging up to 35% for certain types of plans.²⁵

52. Regrettably however, notwithstanding the contribution that TekSavvy and other WBCs have made in bringing competitiveness to the retail wireline broadband market that market has not been and is not as competitive as it could be.
53. The Broadcasting Telecom Legislative Review Panel, in a section of its Report entitled “Fostering a Competitive Market”, considered the relative competitiveness of Canada’s telecommunications sector, as compared to other countries.²⁶
54. After noting that “[p]rice is a key competitive variable”, the Panel found that a number of studies have concluded that retail prices for both mobile and Internet services are generally higher in Canada than in comparator jurisdictions, and in some cases, are the highest such prices.
55. In that regard, the Panel noted that a pricing report prepared for Innovation, Science and Economic Development Canada (“ISED”) in 2018 found that average Canadian mobile wireless service prices were consistently at the upper end among the countries surveyed. The Panel further noted prices for wireless services differ across Canada and that market structure appears to play a role in explaining those differences. The Panel observed:

The 2018 ISED pricing report finds that regional mobile wireless carriers such as SaskTel, Eastlink, Freedom, and Vidéotron offered mobile wireless service

²⁴ CB Broadband Study, at p. 57.

²⁵ CB Broadband Study, at p. 17.

²⁶ Canada's Communications Future: Time To Act [the “**Review Panel Report**” or the “**Report**”]
[https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/\\$file/BTLR_Eng-V3.pdf](https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/$file/BTLR_Eng-V3.pdf).

prices that were significantly lower than those of the incumbent wireless carriers Bell, Rogers, and TELUS. The 2018 ISED pricing report also showed that Saskatchewan and Quebec, two provinces with a strong regional competitor, had lower mobile wireless service prices across all but one mobile wireless price basket, sometimes significantly so.

56. In short, in markets where the market power of large Incumbents goes unchecked, prices for wireless services are higher. The Review Panel's finding aligns with the conclusion the Competition Bureau reached in the context of its review of Bell's acquisition of Manitoba Telecom Services. In terms of retail wireless prices, the Bureau found as follows:

Based on an analysis of information collected during this inquiry, the Competition Bureau (Bureau) concluded that as a result of coordinated behaviour among Bell, TELUS and Rogers, mobile wireless prices in Canada are higher in regions where Bell, TELUS and Rogers do not face competition from a strong regional competitor. Conversely, the Bureau concluded that where Bell, TELUS and Rogers face competition from a strong regional competitor, prices are substantially lower. The Bureau concluded that the lower prices are caused by the presence of a strong regional competitor who can disrupt the effects of coordination among Bell, TELUS and Rogers.²⁷

57. With respect to retail *wireline* broadband Internet prices, the Review Panel found that for a significant majority of Canadians, prices for fixed wireline broadband services were on average higher than most other surveyed countries and, for some speed/usage combinations, Canadian prices were the highest among all countries surveyed.²⁸
58. As detailed below, despite the competitive impact that TekSavvy and other WBCs have had, competition in retail markets for wireline broadband services has been, is being, and is likely to continue to be substantially prevented and lessened by the anti-competitive practices employed by Bell and Rogers. This prevention and lessening is particularly acute in Ontario and Quebec, where the impact of Bell and Rogers' anti-competitive practices has had, continues to have, and is likely to have, the greatest impact on competition.

3. THE ACT

59. Pursuant to section 79(1) of the Act, the Tribunal may make an order which, among other things, prohibits a person or persons from engaging in a practice of anti-competitive acts. To obtain an order under section 79(1), the Commissioner must persuade the Tribunal that each of the three requisite elements of that section is satisfied. Specifically, the Commissioner must demonstrate that:

²⁷ Competition Bureau statement regarding Bell's acquisition of MTS February 15, 2017 - <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html>.

²⁸ *Ibid*, at pp. 78-79.

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

60. Each of these three elements must be independently assessed, though the same evidence can be relevant to more than one element.²⁹

61. Section 78(1) of the Act sets out a non-exhaustive list of acts which can constitute an "anti-competitive act" for purposes of section 79(1). Particularly relevant to this complaint, are the following:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

...

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

...

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

62. It is important to note that in the discussion that follows, TekSavvy has relied on its own information and data, as well as its general knowledge of the markets for wholesale and retail wireline broadband Internet services. However, only the Bureau is in a position to gather the information and data required to establish each of the elements of an abuse of dominance case.

²⁹ *The Commissioner of Competition v Vancouver Airport Authority*, 2019 CACT 6 (CanLII) ["VAA"], at para. 8 - <http://canlii.ca/t/j36c1>; *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.*, 2006 FCA 233 ["*Canada Pipe FCA*"], at paras 27-28.

4. BELL/ROGERS AND BELL/VIDÉOTRON³⁰ ARE JOINTLY DOMINANT IN WHOLESALE AND RETAIL MARKETS IN THEIR INCUMBENT TERRITORIES

a. The Law: Section 79(1)(a)

63. Section 79(1)(a) of the Act requires an assessment of whether "one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business." In other words, this first element requires a consideration of the issue of dominance. The Bureau's Abuse of Dominance Guidelines identify the following four factors as relevant to assessing dominance:

- a "class or species of business" – generally, a product market;
- "in Canada or any area thereof" – generally, a geographic market;
- "control" – a substantial degree of market power; and
- "one or more persons" – joint dominance.³¹

64. The Bureau's Abuse of Dominance Guidelines recognize the possibility of dominance in one market and a substantial prevention and lessening in a different market. The Guidelines state:

When assessing competitive effects pursuant to paragraph 79(1)(c) the Bureau analyzes effects in reference to a market, which in turn engages the concepts of market definition. The Bureau is of the view that the markets for the purposes of paragraphs 79(1)(a) and 79(1)(c) need not be the same; that is, section 79 may apply where a firm is dominant in one market but substantially lessens or prevents competition in another.³² [emphasis added]

65. For the reasons set out below, TekSavvy submits that Bell and Rogers are jointly dominant in both wholesale and retail markets for wireline Internet services.

66. Accordingly, TekSavvy submits that Bell and Rogers' use of fighting brands to target TekSavvy and other WBCs, combined with their use of inflated wholesale prices to increase TekSavvy's costs, has caused and is causing a substantial lessening and prevention in retail markets for wireline Internet services in Ontario and Quebec.

67. However, if the Bureau does not find that Bell/Rogers and Bell/Vidéotron are jointly dominant in retail markets for broadband service in Ontario and Quebec, TekSavvy submits that conclusion is not dispositive for the purpose of taking enforcement action in response to Bell and Rogers' brazen

³⁰ As discussed below, though Vidéotron engaged in many of these same anti-competitive behaviors as Bell and Rogers, the conduct of Bell and Rogers has had, is having and is likely to have the greatest impact on TekSavvy. Consequently, in addressing sections 79(1)(b) and 79(1)(c), the Complaint focuses on Bell and Rogers. Vidéotron's position as a supplier of wholesale services and its position in the retail market is relevant to the discussion of product and geographic markets.

³¹ Competition Bureau, Abuse of Dominance Enforcement Guidelines, March 7, 2019, at p. 4. - [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-ADEG-Eng.pdf/\\$file/CB-ADEG-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-ADEG-Eng.pdf/$file/CB-ADEG-Eng.pdf).

³² Competition Bureau, Abuse of Dominance Enforcement Guidelines, March 7, 2019, at p. 28, footnote 51 - [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-ADEG-Eng.pdf/\\$file/CB-ADEG-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-ADEG-Eng.pdf/$file/CB-ADEG-Eng.pdf).

anti-competitive conduct. As explained below, Bell and Rogers' dominance in wholesale markets, which they have used to impose inflated wholesale prices on WBCs, combined with their use of fighting brands to target WBCs, has led to substantially higher retail prices for Internet services. If left unchecked, this combination of circumstances is likely to lead to TekSavvy and other WBCs exiting the retail market for wireline broadband services, which is almost certain to lead to substantially higher prices in retail broadband markets in Ontario and Quebec, as well as the rest of Canada.

68. As explained below, Bell and Rogers have leveraged, are leveraging and are likely to continue to leverage their dominance in the wholesale market to exercise market power in the retail market for wireline broadband services, to the detriment of competition in that market.
69. First, by inflating wholesale prices and increasing TekSavvy's and other WBCs' costs, Bell and Rogers have, in effect, "raised the floor" for retail prices for wireline broadband service. Consequently, those prices have been, are and are likely to be substantially higher than they would be but for Bell and Rogers' anti-competitive conduct.
70. Second, by charging TekSavvy inflated wholesale rates, while also targeting TekSavvy with fighting brand offerings at retail prices below TekSavvy's wholesale costs—in effect, squeezing TekSavvy from both sides—Bell and Rogers have deliberately made TekSavvy's continued presence in the retail market increasingly unsustainable. As a direct result, TekSavvy's exit from that market is increasingly likely.

b. Wholesale Market Dominance

i. Relevant Product Market

71. The relevant wholesale product market is wholesale fixed wireline Internet services.
72. The wireline high-speed Internet access technologies used by Bell and Rogers to deliver wholesale services to TekSavvy - DSL, cable and fibre - are functional and competitive substitutes for one another. Each of these technologies is capable of providing standard broadband transmission services suitable for a wide range of typical mass market applications, including web browsing, home streaming, gaming and standard business applications. As noted by the CRTC in CRTC 2015-326:

These services represent variants of high-speed access facilities that enable similar downstream retail services to be provided to end-users, and represent sufficiently close substitutes in that they have the potential to enable competition in the various associated downstream markets. Moreover, end-users may be unaware of the specific underlying wholesale service/facility that is being used to provide their retail services, and may be indifferent so long as their needs are met and there is reasonable overlap in the spectrum of retail services that are enabled by the various upstream services.³³

³³ CRTC 2015-326, at para 122.

73. There are no *competitive* substitutes for these wholesale wireline broadband services. The possible alternative technologies - mobile wireless, fixed wireless and satellite - are not competitive substitutes for fixed wireline, owing to the cost and technological limitations of those technologies.
74. In respect of the foregoing technologies as possible substitutes for wireline broadband services, in the Broadband Study, the Bureau stated as follows:
- Given current pricing levels and certain technological limitations, it is not likely that consumers who have wired connections are likely to switch to fixed wireless, mobile wireless, or satellite technologies.
 - Fifth generation wireless services may offer a new inroad into households at speeds and pricing comparable to wired connections. However, at this point, it remains to be seen precisely how this technology will be deployed in Canada.³⁴
75. While the foregoing observations were made regarding the retail market, they are also true, for the same reasons as enumerated by the Bureau, for the wholesale market.
76. The Bureau's views as expressed above, are consistent with views expressed by the CRTC in respect of the same issue. In its 2015 Review of Wholesale Wireline Services and Associated Policies, the Commission stated as follows regarding substitutes for wholesale wireline services:

There are limited economical substitutes for wholesale HSA services provided over wireline technologies, including those over FTTP access facilities. Based on the significant disparity in price, quality, speed, and capacity, reliance on wireless wholesale alternatives would not enable competitors to effectively compete with the wireline broadband services offered by the incumbent carriers within their serving regions.³⁵

ii. Relevant Geographic Market

77. For purposes of this Complaint, the two relevant geographic markets for wholesale fixed wireline Internet services are the combined Bell/Rogers' wireline service territory in Ontario and the combined Bell/Vidéotron wireline service territory Quebec.
78. Incumbents operate exclusively within their traditional wireline serving territories.³⁶ In Ontario, Bell's incumbent territory overlaps substantially with Rogers' incumbent territory. In Quebec, Bell's incumbent territory overlaps substantially with Vidéotron's incumbent territory. The areas covered by the Bell/Rogers and Bell/Vidéotron's overlap in Ontario and Quebec, respectively, capture the vast majority of the population in each of those two provinces and encompass most major population centres, including the Greater Toronto area, Montreal, Ottawa and Quebec City.

³⁴ Competition Bureau, Delivering Choice: A Study of Competition in Canada's Broadband Industry, August 7, 2019, at pp 36-42.

³⁵ CRTC 2015-326, at para 122.

³⁶ CRTC 2015-326, at para 122

79. In any specific geographic location or geographic area in Ontario and Quebec where Bell's network overlaps with Rogers' or Vidéotron's network, as applicable, if TekSavvy (or any other WBC) wishes to offer retail wireline broadband services, it can only purchase fixed wireline wholesale broadband services from the incumbent telephone company (Bell) or the incumbent cable company (Rogers or Vidéotron). From TekSavvy's perspective, it is immaterial whether the geographic market for wholesale broadband services is viewed narrowly as a series of individual locations or aggregated as including the entirety of each of Bell/Rogers' overlapping footprints (for Ontario) and Bell/Vidéotron's overlapping footprints (for Quebec).

iii. Joint Dominance

80. Bell/Rogers and Bell/Vidéotron, jointly, substantially or completely control, the wholesale markets for wireline broadband services in Ontario and Quebec, respectively, where their wireline serving territories overlap. As noted by the CRTC in 2015-326:

The ILECs and the Cablecos own and control the underlying wireline access facilities associated with wholesale HSA services that competitors rely upon to provision retail Internet access services, including those associated with FTTP access facilities. Together, the incumbent carriers are the sole suppliers of the underlying wholesale services available to competitors, and together have the entire upstream market. In general, wholesale HSA services have not been provided voluntarily by the industry, requiring regulatory intervention to do so, and there is no convincing basis upon which the Commission could conclude that this will change in the foreseeable future.³⁷

81. In those parts of Ontario where Bell/Rogers' and those parts of Quebec where Bell/Vidéotron's networks overlap, they are the only two firms offering wholesale broadband services to WBCs. In Ontario, Bell/Rogers are jointly dominant in the market for wholesale wireline broadband services and in Quebec, Bell/Vidéotron's are jointly dominant in the market for wholesale wireline broadband services. This joint dominance is evidenced by, among other things, the following.
82. *100% Combined Market Share.* For any specific location or geographic area where Bell/Rogers' (Ontario) and Bell/Vidéotron's (Quebec) networks overlap, Bell/Rogers and Bell/Vidéotron, as applicable, have a combined wholesale wireline broadband market share of 100%.
83. *No third-party rivals or potential rivals.* In the areas where Bell/Rogers' and Bell/Vidéotron's footprints overlap in Ontario and Quebec, there are no other suppliers of wireline broadband services other than Bell/Rogers and Bell/Vidéotron. Moreover, there are no potential rivals in the form of new wireline entrants, owing to the high barriers to entry stemming from the prohibitive cost of overbuilding new telephone or cable networks. As the Bureau noted in the Broadband Study:

Given the significant costs of deploying wired networks, it is likely not economical for a new enterprise to "overbuild" a new network on top of

³⁷ CRTC 2015-326, at para. 121

existing telephone and cable networks. This is, in part, because simply placing wires does not come with any guarantee that those wires will be used. Once the wires are placed, that new network still must compete with existing networks in order to attract a sufficient number of customers at sufficient levels of revenue to pay off their investments. At the current cost of deployment, it does not appear economically viable for additional wired networks to provide additional choice for Canadian consumers.³⁸

84. *Limited or no wholesale competition.* In Ontario, Bell and Rogers do not vigorously compete against one another in offering wholesale services to WBCs. The same is true for Bell/Vidéotron in Quebec. In the context of its Review of Wholesale Wireline Services and Associated Policies, the CRTC found:

In addition, there is limited competition for wholesale HSA services between the ILECs [Incumbent phone companies] and the Cablecos, and what competition that does exist today is largely, if not entirely, a result of regulatory intervention. Consequently, there is limited rivalrous behaviour to constrain upstream market power.

In light of the above, the Commission finds that the incumbent carriers collectively have upstream market power in the provision of wholesale HSA services, including those over FTTP access facilities, within their serving regions.³⁹

85. Consistent with the foregoing finding, Bell has publicly indicated that it does not compete with other Incumbents for wholesale business, as it sees the requirement to provide wholesale access as a regulatory obligation, not a business strategy. In November 2018, George Cope, President and CEO of BCE made the following statements in the context of a market call:

Yes. So, I would say, first of all, your observation about our focus is correct, our focus is on retail. And one of the reasons we launched the Virgin Internet brand is it is competing at a different price market that was there in the wholesale market [i.e., with WBCs], we might as well compete for that, and also compete at the retail price, not at the wholesale price. ... our focus is 100% on retail. The wholesale is a regulatory obligation, not a business strategy for us. ... our focus is 100% on retail. The wholesale is a regulatory obligation, not a business strategy for us.⁴⁰

...

³⁸ CB Broadband Study, at p. 13.

³⁹ CRTC 2015-326, at paras. 123, 124.

⁴⁰ BCE, [Q3 2018 Results Conference Transcript](#) (1 November 2018), George Cope at pp. 17-18.

“[W]e had negative wholesale loading, or subscriber additions, which of course we would be very comfortable with...Of course, part of that is our strategy with the roll-out of the Virgin Internet brand.”⁴¹

86. For greater clarity: “negative wholesale loading, or subscriber additions,” means that the number of subscribers obtaining Internet service from WBCs on Bell’s network decreased in the previous quarter. In other words, Bell lost wholesale business in the previous quarter. Mr. Cope indicates that Bell is “very comfortable” with that circumstance because Bell is not losing wholesale business to other Incumbents; rather, Bell is harvesting Bell’s own wholesale business by converting WBC retail subscribers into retail subscribers of Bell’s fighting brand, Virgin.
87. At a technology media conference in September 2019, Mr. Cope described Bell’s view of the wholesale broadband part of its business:

Analyst Question: If the CRTC doesn't change the wholesale broadband pricing, are there ways to compete, because you can't compete on price—besides customer service and bundling? Are there other ways to compete, differentiate with wholesale pricing?

Cope: ... One of the reasons we don't even report wholesale Internet subs anymore, frankly, because it's a regulatory requirement we have no strategic interests in the business at all.⁴² [emphasis added]

88. Rogers’ Chief Financial Officer, Anthony Staffieri, expressed a similar sentiment in terms of how Rogers sees the relative insignificance of wholesale access sales to WBCs to its overall broadband business. Mr. Staffieri stated:

Wholesale has never been a significant part of our business, and it continues to not be very significant.⁴³

-and-

We don't break out the split between retail and wholesale. But what I can tell you consistent with what I've said in the past, the wholesale piece of it continues to be extremely small. Almost all of our Internet adds are on the retail side of it.⁴⁴ [emphasis added]

89. *Control over pricing.* Even though the maximum prices Bell, Rogers and Vidéotron can charge WBCs for wholesale services must be approved by the CRTC, they have the ability to control these

⁴¹ BCE Q3 2018 Results Conference Call Transcript, 1 November 2018, at p. 8, <http://www.bce.ca/investors/financial-reporting/2018-Q3/2018-q3-transcript.pdf>

⁴² [2019 BMO 20th Annual Technology Media Teleconference](#), George Cope at 26:03 to 27:52.

⁴³ Rogers Communications, [4Q16 Investment Community Teleconference Transcript](#) (26 January 2017), Anthony Staffieri, Chief Financial Officer at p. 10.

⁴⁴ Rogers Communications, [1Q17 Investment Community Teleconference Transcript](#) (18 April 2018), Anthony Staffieri, Chief Financial Officer at p. 9.

maximum prices, in at least the short and medium terms.⁴⁵ This ability flows from, among other things, the regulatory lag associated with the rate-setting process and the fact that that Bell and Rogers' wholesale rates are based on confidential information and submissions they make to the CRTC regarding their costs of supplying wholesale service. Parties to CRTC proceedings, as well as their outside counsel and experts, have limited access to this information and these submissions, which compromises their ability to scrutinize and test Bell and Rogers' claims.

90. In view of the foregoing, Bell/Rogers and Bell/Vidéotron jointly substantially or completely control the wholesale markets for wireline broadband services supplied to WBCs in the geographic locations and areas in Ontario and Quebec, as applicable, where their networks overlap.

c. Retail Market Dominance

i. Relevant Product Market

91. The relevant product market is retail fixed wireline Internet service.
92. Canadian consumers can access Internet broadband services through fixed wireline technologies (i.e., DSL, cable and fibre) and, in fact, approximately 90% of Canadians access Internet services by one of these three means.
93. In addition, consumers can access the Internet by means of mobile wireless, fixed wireless, and satellite. However, as the Bureau concluded in the Broadband Study, none of these alternatives are competitive substitutes for fixed wireline:

Given current pricing levels and certain technological limitations, it is not likely that consumers who have wired connections are likely to switch to fixed wireless, mobile wireless, or satellite technologies.

Fifth generation wireless services may offer a new inroad into households at speeds and pricing comparable to wired connections. However, at this point, it remains to be seen how this technology will be deployed in Canada.⁴⁶

⁴⁵ Note: Though wholesale rates approved by the CRTC represent the maximum rates Incumbents can charge WBCs, Incumbents, including Bell and Rogers, from time to time enter into "off tariff agreements" pursuant to which they provide discounts off their approved wholesale rates. All wholesale figures cited in this Complaint are net of any off-tariff discount, unless noted otherwise.

⁴⁶ Broadband Study, at p. 36. In respect of the potential for 5G wireless technology to offer a competitive alternative to wireline broadband, the Broadband Study stated at p. 42:

"New, fifth generation (5G) wireless services are currently being deployed around the world, and may ultimately deliver high speed, high capacity fixed wireless connections that are similar to those currently available through wired networks. What is unclear at this early stage of 5G deployment is how and whether this will translate into new competitive options for Canadians. If 5G enables new providers to compete for a significant number of Canadian households, this additional choice could result in the lower prices and increased levels of innovation that are characteristic of greater competition. At this point, so early in the deployment of 5G in Canada, it is difficult to predict exactly what the future holds."

ii. Relevant Geographic Market

94. For purposes of this Complaint, the relevant geographic markets for retail fixed wireline Internet services is those parts of Ontario and Quebec, respectively, where Bell/Rogers' and Bell/Vidéotron's incumbent wireline serving territories overlap.
95. In those parts of Ontario and Quebec where Bell/Rogers' and Bell/Vidéotron's serving territories overlap, and TekSavvy and/or other WBCs offer retail service, any given end-user household or business has a choice of wireline service providers comprising Bell/Rogers or Bell/Vidéotron, as applicable, and the WBC(s) offering service at that location.
96. To the extent that most of those retail end-users in each of Ontario and Quebec have the same or substantially the same competitive alternatives for retail wireline broadband Internet service, the geographic areas represented by that collective of end-users in each of Ontario and Quebec can be viewed as single geographic markets.

iii. Joint Dominance

97. In those parts of Ontario where Bell/Rogers' networks and Quebec where Bell/Vidéotron's footprints overlap, Bell/Rogers and Bell/Vidéotron are, respectively, jointly dominant in the retail market for wireline broadband services. This joint dominance is evidenced by, among other things, the following.
98. *Combined Market Share:* For any given overlapping location or area, Bell/Rogers and Bell/Vidéotron, as applicable, have at a minimum, a combined market share of 80%; and in many areas, their combined market share is in excess of 90% or even 95%. Notably, these very high combined market shares have remained relatively constant over time.
99. *Third Party Rivals and Potential Rivals:* For any given overlapping location or area, Bell/Rogers and Bell/Vidéotron, face limited competition from existing WBCs and potential WBCs, given, among other things, their ability to, in large measure, control the cost of *the* key input (i.e., wholesale service) to their rivals' retail offerings in the short and medium term, as well as their ability to control and/or substantially influence other terms of wholesale access.
100. Barriers to entry into the retail wireline Internet market as an owner of a wired network are extremely high, for the same reasons as entry into the wholesale service market are high. Simply put, the costs of overbuilding another fixed wireline network are prohibitive.
101. Barriers to entry and expansion into the fixed wireline market as a WBC are high, owing to, among other things:
 - a. the sunk costs required to enter the wireline broadband market and the substantial sunk costs required to expand to a commercially viable minimum scale;
 - b. reputational barriers, owing to the importance consumers place on reliable Internet service;
 - c. relative market maturity, as the vast majority of Canadian households and businesses are already receiving Internet service from existing service providers;

- d. the high cost and relative difficulty of subscriber acquisition.⁴⁷
102. *Supra-profitable margins:* For Incumbents with at least 80% of total revenues represented by telecommunications services, profitability as measured by earnings before interest, taxes, depreciation, and amortization (“EBITDA”) is extremely high.⁴⁸ For example, for those firms in 2017, average margins for broadband wireline services were 37%.^{49,50} By this measure, the telecommunications industry in Canada is more than 2.5 times more profitable than other industries, the average EBITDA margin of which stood at 15.1 per cent for 2017.⁵¹ By contrast, TekSavvy’s EBITDA for fiscal 2019 was ###% and for the first quarter of fiscal 2020 was ###%.
103. *Bell, Rogers and Vidéotron Retail Price Competition Focused on WBCs:* For any given overlapping location or area, to the extent that Bell, Rogers and Vidéotron compete in the retail wireline broadband market using price discounting as a means of competition, the primary focus of that price competition is on WBCs, as opposed to on each other. In that regard, in the medium-high to high speed part of the wireline broadband market where WBCs do not, at present, offer services, there is virtually no price discounting as between Bell/Rogers and Bell/Vidéotron. Conversely, in that part of the market where WBCs do compete with Bell, Rogers and Vidéotron, Bell/Rogers in Ontario and Bell/Vidéotron in Quebec, have consistently engaged in parallel conduct, involving very aggressive price discounting by their fighting brands, Virgin (Bell), Fido (Rogers) and Fizz (Vidéotron).⁵² As discussed below, this aggressive pricing conduct and the targeting of TekSavvy and other WBCs is facilitated by, among other things, price transparency in the retail market and is confirmed by express statements made by senior Bell, Rogers and Vidéotron executives.
104. In view of the foregoing, as well as given their decades of incumbency advantage and brand recognition, their vast marketing resources, economies of scale, and their ability to offer various

⁴⁷ In the context of the CB Broadband Study, the Bureau examined consumer switching behavior. Experts retained by the Bureau conducted a survey to examine this issue. More than half of the consumers surveyed considered switching from their current ISP to another during the preceding two years. Of those who considered switching, only 30% actually made the switch. Moreover, approximately one quarter of switchers did so because they moved from one location to another, and either were required to choose a new provider, or used that opportunity to switch.

⁴⁸ Review Panel Report, at p. 80.

⁴⁹ *Id.* For wireless service, that same figure in 2017 was 39.5%

⁵⁰ The precise breakdown as between retail wireline revenues and wholesale wireline revenues is unclear. However, in its Report, the Review Panel noted that the CRTC has estimated that by 2017, 96 per cent of Canadian telecommunications revenues were generated by services “forborne” or exempted, from tariff requirements. Broken out by service segment, this ranged from 83 per cent of revenues for local telephone and related public switched telephone network access, to 97 per cent of fixed Internet, and 100 per cent of mobile service revenues. As noted above, the CRTC has forborne from regulating prices in the retail wireline broadband market (see pps. 83 and 84 Review Panel Report).

⁵¹ *Id.*

⁵² TekSavvy notes that paragraph 49 of the Bureau’s Abuse of Dominance Guidelines state that: “Similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position. Further, evidence of coordinated behaviour by firms in the allegedly jointly dominant group may be probative insofar as it may explain why members of the allegedly dominant group are not vigorously competing. However, the Bureau does not consider such evidence as necessary to establish that a group is jointly dominant, if there is other evidence that competition among members of the allegedly dominant group is not sufficient to discipline their exercise of a substantial degree of market power.”

bundles of services to increase the “stickiness” of subscribers, Bell/Rogers and Bell/Vidéotron, respectively, jointly substantially or completely control the retail markets for wireline broadband services in their incumbent serving territories in Ontario and Quebec.

5. BELL AND ROGERS HAVE ENGAGED IN A PRACTICE OF ANTI-COMPETITIVE ACTS INTENDED TO HAVE A PREDATORY, NEGATIVE, EXCLUSIONARY, OR DISCIPLINARY EFFECT ON TEKSAVVY

a. The Law: Section 79(1)(b)

105. Section 79(1)(b) of the Act requires an assessment of whether "that person or those persons have engaged in or are engaging in a practice of anti-competitive acts." In its decision in *VAA*, the Tribunal reproduced the following passages from its *TREB* decision, which sets out the “most basic parameters of the analytical framework applicable to paragraph 79(1)(b)” of the Act:

[272] [...] the focus of the assessment under paragraph 79(1)(b) of the Act is upon the purpose of the impugned practice, and specifically upon whether that practice was or is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor (*Canada Pipe FCA* at paras 67-72 and 77).

[273] The term “practice” in paragraph 79(1)(b) is generally understood to contemplate more than an isolated act, but may include an ongoing, sustained and systemic act, or an act that has had a lasting impact on competition (*Canada Pipe FCA* at para 60). In addition, different individual anti-competitive acts taken together may constitute a “practice” (*NutraSweet* at p. 35).

[274] In this context, subjective intent will be probative and informative, if it is available, but it is not required to be demonstrated (*Canada Pipe FCA* at para 70; *Laidlaw* at p. 334). Instead, the Tribunal will assess and weigh all relevant factors, including the “reasonably foreseeable or expected objective effects” of the conduct, in attempting to discern the “overall character” of the conduct (*Canada Pipe FCA* at para 67). In making this assessment, the respondent will be deemed to have intended the effects of its actions (*Canada Pipe FCA* at paras 67-70; *Nielsen* at p. 257).

[275] It bears underscoring that the assessment is focused on determining whether the respondent subjectively or objectively intended a predatory, exclusionary or disciplinary negative effect on a competitor, as opposed to on competition. While adverse effects on competition can be relevant in determining the overall character or objective purpose of an impugned practice, it is not necessary to ascertain an actual negative impact on competition in order to conclude that the practice is anti-competitive, within the meaning contemplated by paragraph 79(1)(b). The focus at this stage is upon whether there is the requisite subjective or objective intended negative impact on one or more competitors. An assessment of the actual or likely impact of the impugned practice on competition is reserved for the final stage of the analysis,

contemplated by paragraph 79(1)(c) (*Canada Pipe FCA* at paras 74-78).
[emphasis in original]⁵³

106. In VAA, the Tribunal went on to note that in discerning the overall character of an impugned practice, it is important to weigh all relevant factors, including any legitimate business considerations. Those considerations must then be weighed against any subjectively intended and/or reasonably foreseeable predatory, exclusionary or disciplinary negative effects on a competitor. The Tribunal then referenced the following passage from its reasons in *TREB*:

[293] In conducting this balancing exercise, the Tribunal will endeavour to ascertain whether, on a balance of probabilities, the actual or reasonably foreseeable anti-competitive effects are disproportionate to the efficiency or procompetitive rationales identified by the respondent; or whether sufficiently cogent evidence demonstrates that the respondent was motivated more by subjective anticompetitive intent than by efficiency or pro-competitive considerations. In other words, even where there is some evidence of subjective anti-competitive intent on the part of the respondent, such evidence must convincingly demonstrate that the overriding purpose of the conduct was anti-competitive in nature. If there is evidence of both subjective intent and actual or reasonably foreseeable anticompetitive effects, the test is whether the evidence is sufficiently clear and convincing to demonstrate that such subjective motivations and reasonably foreseeable effects (which are deemed to have been intended), taken together, outweigh any efficiencies or other pro-competitive rationale intended to be achieved by the respondent. In assessing whether this is so, the Tribunal will assess whether the subjective and deemed motivations were more important to the respondent than the desire to achieve efficiencies or to pursue other pro-competition goals.⁵⁴

107. In VAA, the Tribunal went on to note that in discerning the overall character of an impugned practice, it is important to weigh all relevant factors, including any legitimate business considerations. Those considerations must then be weighed against any subjectively intended and/or reasonably foreseeable predatory, exclusionary or disciplinary negative effects on a competitor. The Tribunal then referenced the following passage from its reasons in *TREB*:
108. Bell and Rogers have engaged in, and are continuing to engage in, practices of anti-competitive acts with the intention of having a predatory, exclusionary and/or disciplinary negative effect on TekSavvy and other WBC competitors in the retail broadband wireline market.

b. Bell and Rogers violated CRTC rules to massively inflate TekSavvy's costs

109. Bell and Rogers have, over time, deliberately and systematically leveraged their dominant position in the broadband wholesale wireline market to raise TekSavvy and other WBCs' costs, by charging them grossly inflated prices for wholesale network service. Bell and Rogers have simultaneously used fighting brands to undercut TekSavvy and other WBC retail prices.

⁵³ VAA, at para 515.

⁵⁴ VAA, at paras. 516, 517.

110. Bell and Rogers have accepted, and do not contest, the CRTC's unequivocal finding of fact that they deliberately inflated their CBB rates. Recall that wholesale rates have a Capacity and an Access component.⁵⁵ In 2016, before the CRTC issued its decision in TO 2016-396, the Capacity component of the wholesale rate, (CBB), had been growing exponentially in the preceding years. In the 12-month period ending on September 30, 2016 (i.e., immediately before the CRTC made its interim correction to Bell and Rogers' inflated CBB rates), TekSavvy's CBB payments represented ###% of its total costs of goods sold for delivering retail Internet.
111. In May 2015, the CRTC initiated TNC 2015-225 to streamline the tariff application process, noting issues with the way tariff notices were being filed, and the timelines and process by which the Commission was approving those tariff notices.
112. Following TNC 2015-225, the Commission arrived at Telecom Decision CRTC 2016-117⁵⁶. In that decision, in response to what it learned in the 2015 consultation, the Commission found that Bell and Rogers' then-current wholesale rates were not likely just and reasonable, made all those rates interim from that date forward, and directed Bell and Rogers to file new tariff applications, with clear instructions as to how the costing inputs were to be applied. Notably, Bell and Rogers did not dispute or appeal the Commissions' determinations in TD 2016-117.
113. Following the Commission's direction in TD 2016-177, Bell and Rogers filed their revised tariff applications in June 2016. In October 2016, the Commission issued TO 2016-396 and TO 2016-448. In those orders, the Commission found that the wholesale rates proposed in Bell and Rogers' tariffs were, on their face, not based on reasonable costs.⁵⁷
114. Instead, the Commission expressed "its significant concern"⁵⁸ that certain Incumbents, including Bell and Rogers, "chose to disregard"⁵⁹ and "deviated from"⁶⁰ its well-established costing requirements, as they sought to impose wholesale rates on wholesale-based competitors that were significantly higher than the Incumbents' own retail rates.⁶¹
115. The Commission further determined that the Bell and Rogers' then-existing wholesale rates were, *prima facie*, inflated by 595% and 338% respectively, due non-compliance with its costing rules, and revised their existing CBB rates on an interim basis:

⁵⁵ Note: In respect of TO 2016-396, the Bell and Rogers (?) requested certain deviations from TD 2016-117 and TO 2016-396, but they did not challenge the CRTC's finding that they deviated from well-established principles and methodologies.

⁵⁶ *Review of costing inputs and the application process for wholesale high-speed access services*, Telecom Decision CRTC 2016-117, 31 March 2016 <https://crtc.gc.ca/eng/archive/2015/2015-326.htm> ["TD 2016-117"].

⁵⁷ *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, Telecom Order 2016-396, 6 October 2016, at para 19, <https://crtc.gc.ca/eng/archive/2016/2016-396.htm> [TO 2016-396]; and, *Bragg Communications Incorporated, operating as Eastlink – Revised interim rates for aggregated wholesale high-speed access service*, Telecom Order CRTC 2016-448, 10 November 2016, at para 13, <https://crtc.gc.ca/eng/archive/2016/2016-448.htm> ["TO 2016-448"].

⁵⁸ TO 2016-396, at para 22.

⁵⁹ TO 2016-396, at para 22.

⁶⁰ TO 2016-396, at para 18 and TO 2016-448 at para 12.

⁶¹ TO 2016-396, at para 7.

The Commission considers that the **current interim monthly rates** for wholesale HSA service providers **should be revised to more accurately reflect the established costing principles**.

In Telecom Procedural Letter dated 31 March 2016, Commission staff provided guidance with respect to the new tariff applications for banded non-legacy aggregated wholesale HSA service speeds. **It was expected** that wholesale HSA service providers **would follow the guidelines** when preparing their respective cost studies and filing their respective tariff applications. In addition, **it was expected** that wholesale HSA service providers **would comply with the Manual and relevant past Commission determinations**.

The **Commission expresses its significant concern** that most wholesale HSA service providers **chose to disregard Commission staff's guidance, the Manual, and relevant past Commission determinations**.

In order to ensure that **the interim rates are based on proper costing principles and reasonable costs**, the Commission has made **a number of adjustments** to the proposed costs related to the capacity costing approach and additional adjustments related to other issues. These adjustments, with rationale, are provided in Appendix 2 of this order.⁶² [emphasis added]

116. As a result of the CRTC's decision in TO 2016-396, Rogers' CBB was revised on an interim basis from \$1,400.00 to \$320.00; and, Bell's CBB rate was revised on an interim basis from \$1,036.00 to \$149.08. In respect of the CRTC's interim corrections to these massively inflated CBB rates, Jean-Pierre Blais, the CRTC's then Chairman and CEO, was unequivocal:

Competitors that provide retail Internet services to Canadians using wholesale high-speed services must have access to these services at just and reasonable prices. The fact that these large companies did not respect accepted costing principles and methodologies is very disturbing. What's even more concerning is the **fact that Canadians'** access to a **choice** of broadband Internet services would have been **at stake** had we not revised these rates.³¹ [emphasis added]

117. Importantly, Bell and Rogers did not dispute any of those findings with respect to the CRTC's interim decision correcting only CBB (capacity charges) in 2016. In other words Bell and Rogers have accepted, and do not contest, the CRTC's unequivocal finding of fact that they chose to disregard, "double count" and deliberately deviate from the CRTC's rate-setting rules and vastly overstated their cost of supplying wholesale services to TekSavvy.
118. In TekSavvy's fiscal year 2016, which ended on September 30, 2016, TekSavvy paid Bell \$## and Rogers \$## in CBB charges. These amounts reflect 1706% and 696% increases from the amounts that TekSavvy paid Bell and Rogers, respectively, for CBB in its fiscal year 2013. In the year

⁶² TO 2016-396, at para 10.

following the issuance of CRTC TO 2016-396, TekSavvy's monthly CBB payments to Bell fell from \$## (September 2016) to \$## (October 2017); and, to Rogers from \$## (September 2016) to \$## (October 2017). TekSavvy's CBB payments to Bell and Rogers from November 2016 (i.e., the first full month after the TO 2016-396 was issued) to October 2017, were \$## and \$## respectively. These CBB amounts now represent ##% (versus ##% prior to the rate change) of its total COGs in delivering retail Internet services.

119. As a direct result of the 2016 interim CBB correction flowing from TO 2016-396, TekSavvy lowered its retail prices and lowered bills for ## existing customers. TekSavvy estimates that, it has passed on approximately over \$## million in savings, monthly, to consumers as a direct result of the interim correction of the capacity component of the wholesale rates its pays Bell and Rogers. In other words – after a *single* component of the wholesale rates were determined to be “*prima facie*”, massively inflated and were revised on an interim basis, TekSavvy alone has passed on nearly \$## million in savings to Canadian consumers – who, it bears repeating, pay among the highest retail prices in the world for Internet and cell phone services.

c. Bell and Rogers' wholesale rates remain massively inflated

120. It is important to note that the CRTC's October 2016 decision corrected just *one* wholesale rate component (CBB), on an *interim* basis, *pending* its final rate decision. The CRTC further indicated that the access component of Bell and Rogers' wholesale rates remained unchanged at that time, and would be dealt with when the CRTC issued its final rate decision, as would the matter of retroactivity:

These interim approved monthly [CBB] rates reflect the wholesale HSA service providers' **cost estimates** submitted in response to Telecom Decision 2016-117, **adjusted** by the Commission to reflect the **costing principles** the wholesale HSA service providers **should have applied**, together with an appropriate markup.

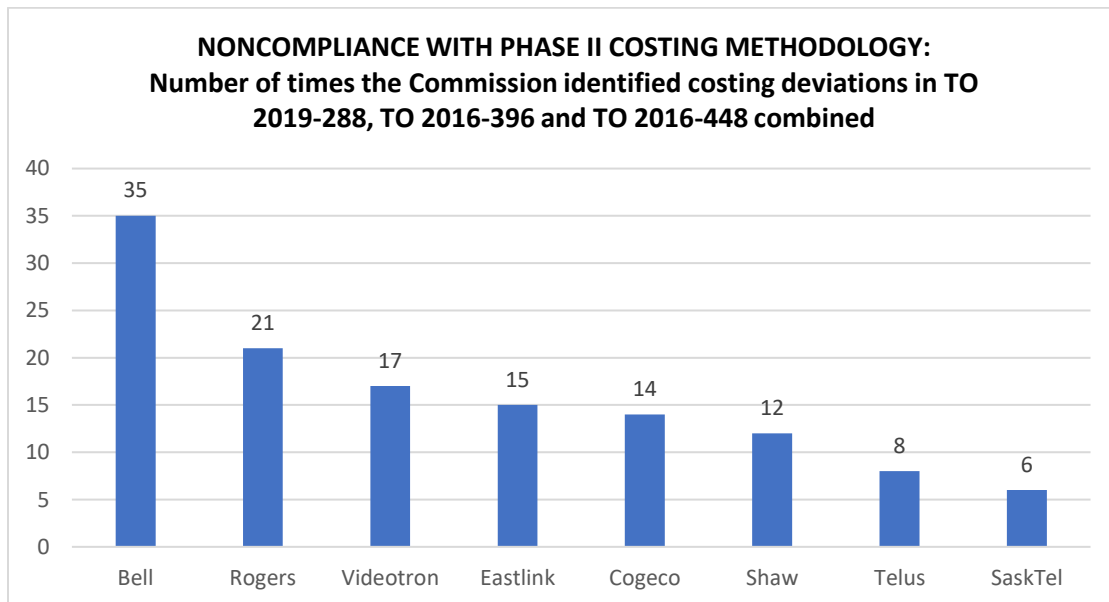
These interim [CBB] rates are **based on an examination that is necessarily less than fully comprehensive**. The establishment of the **final rates** will be based on a **full review and assessment of the relevant cost inputs** and costing methodologies.

The **access portion** of the aggregated wholesale HSA service rates of Bell Canada, Cogeco, MTS, RCCI, and Videotron, **made interim on 31 March 2016** in Telecom Decision 2016-117, **remain unchanged at this time**.

The Commission will **assess** the extent to which, if at all, **retroactivity** will apply **when** wholesale HSA service rates **are set on a final basis**.⁶³ [emphasis added]

⁶³ TO 2016-396, paras 25-28

121. The CRTC issued its final wholesale rate decision, TO 2019-288,⁶⁴ on August 15, 2019 after nearly three years of further submissions, cost studies, and replies.
122. On the basis of the CRTC's full review and years-long assessment of the relevant cost inputs, its established costing rules and the Incumbents' cost studies, in TO 2019-288, the CRTC determined that Bell and Rogers' CBB rates had in fact been inflated, in total, by 916% and 525% respectively, and so made further corrections to CBB rates it had approved on an interim basis in October 2016.
123. In addition to the CBB component, the CRTC determined that Bell and Rogers' access rate component were also massively inflated, by 73% and 276% respectively.
124. In making the foregoing finding regarding CBB and access rates, the CRTC cited numerous evidentiary lacunae and inconsistencies, as well as failures to adhere to the established rate-setting rules that in each case, resulted in extremely overstated costs. In terms of such lacunae, inconsistencies and failures to adhere rate-setting rules, Bell and Rogers were the worst of all offenders: claiming wholesale costs for infrastructure that support their own retail businesses, and failing to produce any evidence to substantiate the magnitude of the costs being claimed. The CRTC ordered the final rates effective back to March 2016, when those rates were first made interim, such that Incumbent carriers would be required return overbilled amounts for that time period.



125. In light of ongoing retail pricing pressure from Bell and Rogers' fighting brands, and in anticipation of the *further* corrections to the CBB component of Bell and Rogers' inflated wholesale rates and the corrections to the access component of those rates flowing from TO 2019-288 taking effect, TekSavvy lowered retail prices and lowered bills for ## out of ## customers and upgraded ## customers to unlimited usage plans without charge. As a result of the bill reductions alone,

⁶⁴ Follow-up to Telecom Orders 2016-396 and 2016-448 - Final rates for aggregated wholesale high-speed access services, Telecom Order CRTC 2019-288, 15 August 2019.

TekSavvy estimates that it has passed on approximately \$### in total monthly savings to consumers in anticipation of those corrections going forward from September 2019. Several other WBCs also lowered their prices and upgraded services as a direct consequence of the CRTC's decision.

126. Note: TekSavvy's retail price reductions were less substantial than they would have been but for the continuing climate of extreme regulatory uncertainty following TO 2019-288. Bell and Rogers (and other Incumbents) have challenged certain aspects of TO 2019-288 in the Federal Court of Appeal, by application to the CRTC and by Petition to the Governor-in-Council. In particular, Bell and Rogers have challenged the further reductions the CRTC made to their inflated wholesale rates and have obtained a stay from the Federal Court of Appeal, such that the corrections in TO 2019-288 have not taken effect.
127. However, Bell and Rogers have not challenged the corrections that the CRTC made to their CBB rates on an interim basis in 2016 (TO 2016-396), which the CRTC made final in TO 2019-288. Recall that in TO 2016-396, the CRTC determined that Bell and Rogers had so egregiously deviated from its costing rules that their CBB rates were *prima facie* inflated by *at minimum* 595% and 338%, respectively, and that this determination was based on an interim examination was "necessarily less than fully comprehensive".⁶⁵
128. Bell and Rogers' characterization of the errors that the CRTC allegedly made in making further corrections to their inflated wholesale rates in TO 2019-288, on the basis of the CRTC's "full review and assessment of the relevant cost inputs and costing methodologies" over the 3 years that followed its interim correction in 2016-396, is revealing and relevant for purposes of this Complaint. In short, they allege that the further reductions the CRTC made to wholesale rates in TO 2019-288 would result in Incumbents having to supply wholesale service to WBCs at below cost.
129. For example, in its Application to the Federal Court of Appeal for leave to appeal TO 2019-288, Bell asserts that in imposing the "further cuts", the CRTC erred, including by setting rates at an unreasonable level. Bell states that the further corrections in TO 2019-288 require:
- ...Bell and Other Carriers⁶⁶ to provide their telecommunications services at wholesale rates ***below cost***. This happened because the CRTC's reasoning is riddled with errors, which caused it to greatly underestimate the costs of Bell's services. [emphasis in the original]⁶⁷
130. Bell's Leave Application goes on to canvass various alleged errors in reasoning that the CRTC allegedly made in deciding to correct Bell's and other Incumbents' wholesale rates. After canvassing those alleged errors, Bell asserts that:

The foregoing defects are reason enough to ground a legal error and warrant leave to appeal. However, they also create the ***additional*** problem that they led

⁶⁵ i.e., 74% reduction to Bell's CBB (\$1,030 to \$149.08); and, 86% reduction to Rogers' CBB (from \$1,251 to \$320).

⁶⁶ "Other Carriers" is defined in Bell's Leave Application as "incumbent local exchange carriers and cable companies."

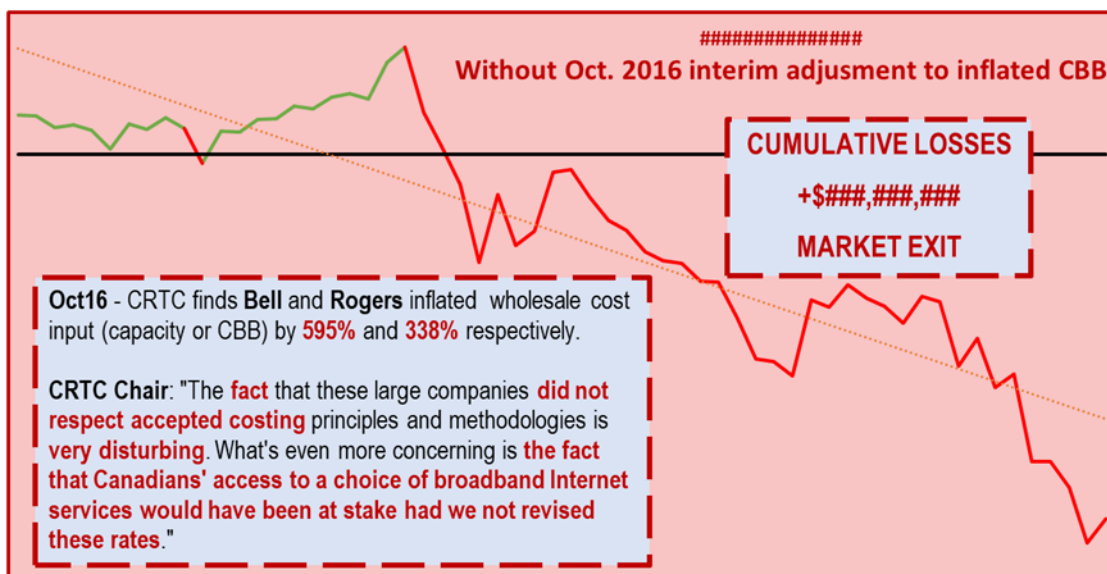
⁶⁷ Bell - Application for Leave to Appeal, filed in Federal Court of Appeal, September 12, 2019, at para 40.

the CRTC to impose rates which were *below* Bell's *actual costs* of providing service

...

Thus, the decision requires Bell to provide wholesale access at rates that are *below cost*.⁶⁸ [emphasis in the original]

131. The fact that Bell and Rogers have not challenged the corrections the CRTC made to their rates in 2016 on an interim basis and made final in 2019, indicates that Bell and Rogers accept those corrections and the reasoning underpinning them as not being in error. Had those initial corrections resulted in Bell and Rogers being required to provide wholesale service at below their costs, then Bell and Rogers would surely have appealed that aspect of TO 2019-288 as well. In other words, logic and common sense indicate that Bell and Rogers have, in effect, admitted that the first round of corrections did not lower wholesale rates *below* their costs.
132. In thinking about the course of events as between the CRTC and Bell/Rogers, the temptation may be to regard disagreements between Bell, Rogers and the CRTC as normal course disputes which occur in a regulated environment. That argument might have some credibility were it not for the fact that the disputes involved here represent not disagreements over the interpretation of a particular aspect of some costing principle or another, but rather a systematic, deliberate and ongoing disregard by Bell and Rogers of multiple fundamental costing principles, past CRTC decisions and established methodologies.
133. Moreover, TekSavvy submits that the order of *magnitude* of Bell and Rogers' overstatement of their costs and the resulting inflation of their rates, for example CBB, Bell 916% and Rogers 535%, per the CRTC's determinations in 2019-288, or Bell 595% and Rogers 338%, per the CRTC's "less than fully comprehensive" interim assessment in TO 2016-396, which *Bell and Rogers do not contest*, represent something other than an ordinary course regulatory dispute:



⁶⁸ *Ibid*, at paras. 47 and 49.

134. Rather, seen in context, this phenomenon is part of Bell and Rogers deliberate and ongoing strategy to impose crippling wholesale rates on TekSavvy, while leaving themselves room to offer low-priced fighting brand retail prices that they know TekSavvy and other WBCs cannot match. Bell and Rogers can engage in this conduct with relative impunity because, at worst, they may at some distant future date be required to adjust their rates to align with their true costs and, possibly be required to pay back some of the overcharges that they have imposed on WBCs and their customers, as in fact just happened with TO 2019-288. In the meantime, Bell and Rogers are free to reap the benefits of their anti-competitive conduct, in the form of higher retail prices for Internet service, as well as weakened competitors in the retail market.
135. In the meantime: TekSavvy is now approaching four years without any financial certainty on the fundamental cost inputs that underpin its business, while it continues to pay Bell and Rogers' massively inflated wholesale rates to deliver its competing retail services.

d. Introduction of retail fighting brands to discipline or exclude TekSavvy

136. Bell's fighting brand, Virgin and Rogers' fighting brand, Fido, have been present in the *wireless* market for many years.
137. In May 2015, the CRTC initiated its proceeding to examine the *wholesale* rates Incumbents charged TekSavvy and other WBCs for wireline Internet access⁶⁹, canvassed above. Shortly thereafter, Rogers and Bell added *wireline* Internet service to Fido and Virgin's *retail* service offerings.⁷⁰
138. Investor analysts understood the rationale for the launch of Virgin Home Internet in 2016, as well as its significance for WBCs. In an investor report cited by The Wire Report, Desjardins equity analyst Maher Yaghi wrote:

We estimate this launch is designed both to **create confusion among customers** and to **fill the market ahead** of what [WBCs] could do with the **new tariffs** that will be implemented by the CRTC in early 2017, **without affecting the bundle prices on BCE's traditional high-end brand**.⁷¹
[emphasis added]

139. In November of 2017, Mr. Cope discussed the economics of its fighting brand, stating Bell's main focus was to increase retail revenues and indicating that its fighting brand was specifically intended to target "wholesalers" (i.e., TekSavvy and other WBCs) within Bell's incumbent wireline territory "only", without jeopardizing Bell's ability to continue charging higher retail prices on its primary brand. It is notable that Mr. Cope did not mention Rogers' discount brand, Fido:

In terms of **that space area strategically** [what] we have done is to **launch Virgin Internet** on the **wireline** side and really that's **really an economic and**

⁶⁹ Telecom Notice of Consultation CRTC 2015-225, Review of costing inputs and application process for wholesale high-speed access services, 28 May 2015 - <https://crtc.gc.ca/eng/archive/2015/2015-225.htm>.

⁷⁰ Rogers' Fido brand first began offering wireline Internet services over Rogers' network in Ontario in November 2015, and Bell's Virgin brand began offering wireline Internet access services over Bell's network in July 2016.

⁷¹ The Wire Report, Virgin Internet could hurt Videotron: Desjardins, November 25, 2016

financial model decision that says, if there is going to be a discount segment on the Internet, we might as well use one of our brands to pursue that segment and **compete with the wholesalers** so then we **get full retail price at the Virgin price versus the wholesale** price we would have got for that subscribers. **For us the trick only there is to watch the re-rate of your own base**, all those type of things where but we've had experience in Canada and how to do that and the wireless business, see the consumer get the benefit of lower price product and see us get the competitive benefit whether someone is choosing those services, Bell is getting that customer through one of our brands, one of our channels. I think that's maybe **the most strategic development in that space in the next 12 to 15 months** and **we're doing it obviously really where we have Internet footprint only, it's not something we would have in outside our footprint** because **that's not what Virgin Internet is**, it's a product that we sell on the Bell Internet Services.⁷² [emphasis added]

140. In November 2018, Mr. Cope again detailed Bell's strategy in launching Virgin to target wholesale-based competitors in the retail market:

Maher Yaghi – Desjardins Securities – Analyst: "So, less focus on wholesale, but still decent revenue coming from that segment of the market. Why has it changed, in your view, going from, let's say, telco ISPs, telco-delivered ISPs to cable?"

George Cope – President and CEO: "... On our focus, it is the launch of the **Virgin Internet brand to compete with wholesale**, but we access the **retail revenue** stream. Canadians get the benefit of competition and **we get the benefit** of a revenue stream that would be **double what we would get through the wholesale market**, and **that is really our strategy there**.

Basically, it is **retail pricing** for us and **retail top line growth against wholesale growth**, and **as everyone knows, it is a regulatory requirement for wholesale, not a strategy of Bell's.**" [emphasis added]⁷³

141. With respect to Rogers, in an article covering the launch of the November 2015 launch of Fido's Internet service, Canadian Business reported:

Fido's move fills a gap in the Rogers connectivity portfolio, with the parent brand's home Internet offerings more suited to multi-person family consumption patterns. It allows the company to compete with ISPs like upstart Teksavvy [sic], which has aggressively targeted a younger demographic with ads on mass transit and social media campaigns.

⁷² Seeking Alpha Transcript, BCE CEO George Cope BMO's Annual Media and Telecom Conference Call September 12, 2017 <https://seekingalpha.com/article/4106218-bce-bce-ceo-george-cope-presents-bmos-annual-media-and-telecom-conference-transcript>

⁷³ BCE, [Q3 2018 Results Conference Transcript](#), (1 November 2018), George Cope at pp. 17-18.

Doshi won't comment on the competition specifically, but he does see the customer trajectory the new move creates. "The focus for the Fido brand [is] serving the millennial segment in particular," he notes. "I believe if a Rogers brand serves the family better and that is what you are now into as a life stage, that's what a customer would expect to do."⁷⁴

142. In addition, in its website advertising, Rogers' Fido brand has specifically targeted TekSavvy (see for example, the screenshot re-produced below). TekSavvy is not aware of Fido targeting Virgin or any other incumbent wireline Internet service provider in its advertising.

All-in-one affordable price

Our advertised pricing **includes powerful Wi-Fi modem rental** so you don't have to find and buy another device for Wi-Fi--with TekSavvy the modem and activation charges can add up to \$219.90 in upfront costs and requires technician install.³



143. In respect of the screenshot above, TekSavvy notes that Rogers' "all-in-one affordable price" comparison to TekSavvy's leaves the customer with the impression that both the activation charges and requirement for a technician for installation are within TekSavvy's control. However, these requirements were created by Rogers, which has sole control over these terms of service and the power to impose these costs and conditions on TekSavvy and its customers.

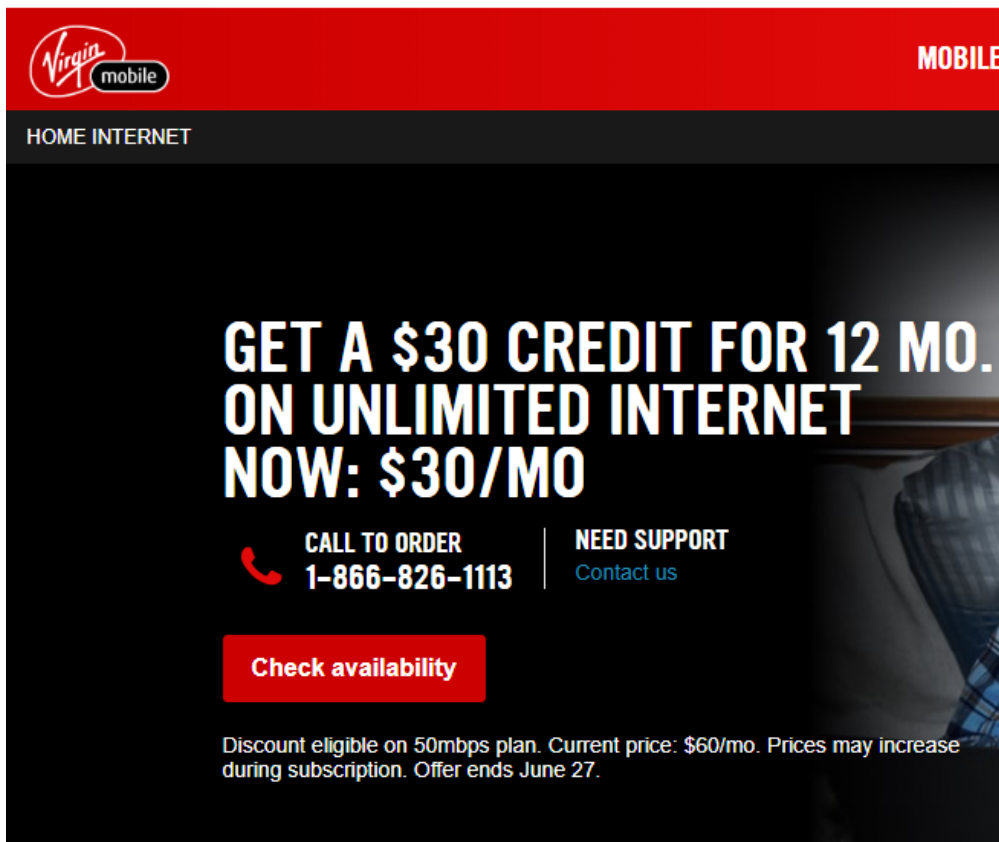
e. Fighting brands setting retail prices lower than TekSavvy's wholesale cost

144. As noted, in view of the Stay they obtained from the Federal Court of Appeal, Bell and Rogers continue to charge TekSavvy significantly inflated wholesale rates, as they have done since October 2016. Those inflated wholesale rates of course determine the retail rates that TekSavvy and other WBCs charge to their customers.
145. Not only have Bell and Rogers, over time, deliberately and systematically leveraged their dominant position in the broadband wholesale wireline market to raise TekSavvy and other WBCs' costs, by charging them grossly inflated *wholesale* prices; Bell and Rogers have simultaneously used fighting brands to undercut TekSavvy and other WBC *retail* prices, which are based on the wholesale costs that Bell and Rogers deliberately inflated.
146. Since launching wireline Internet services on their fighting brands, Bell and Rogers have regularly set Virgin and Fido's *retail* prices for a given Internet service, below the *wholesale* prices Bell and Rogers charge TekSavvy to deliver that same retail service. Moreover, even when Bell and Rogers set Virgin and Fido's retail prices above TekSavvy's wholesale price for the corresponding service, they regularly set those retail prices at levels which leaves TekSavvy with little or no room to price its retail services at a competitive level, while permitting it to cover all its costs of doing business and earn a reasonable rate of return.

⁷⁴ Canadian Business, [Rogers doubles down on millennial customers with Fido Internet](#), Murad Hemmadi Nov 15 2019

Public Version

147. Bell and Rogers' position as suppliers of wholesale services to TekSavvy provides them with knowledge of TekSavvy's wholesale costs, which as described above, they do not dispute inflating. They have used this knowledge to price their fighting brands' retail offers at levels which they know TekSavvy can only match if it sells its competing retail Internet services at a loss.
148. Since at least March 2018, through Virgin, Bell regularly and for significant periods of time, offered Internet service at 50Mbps speeds for 12-month rates of \$30 per month, with no modem cost and no activation charge.



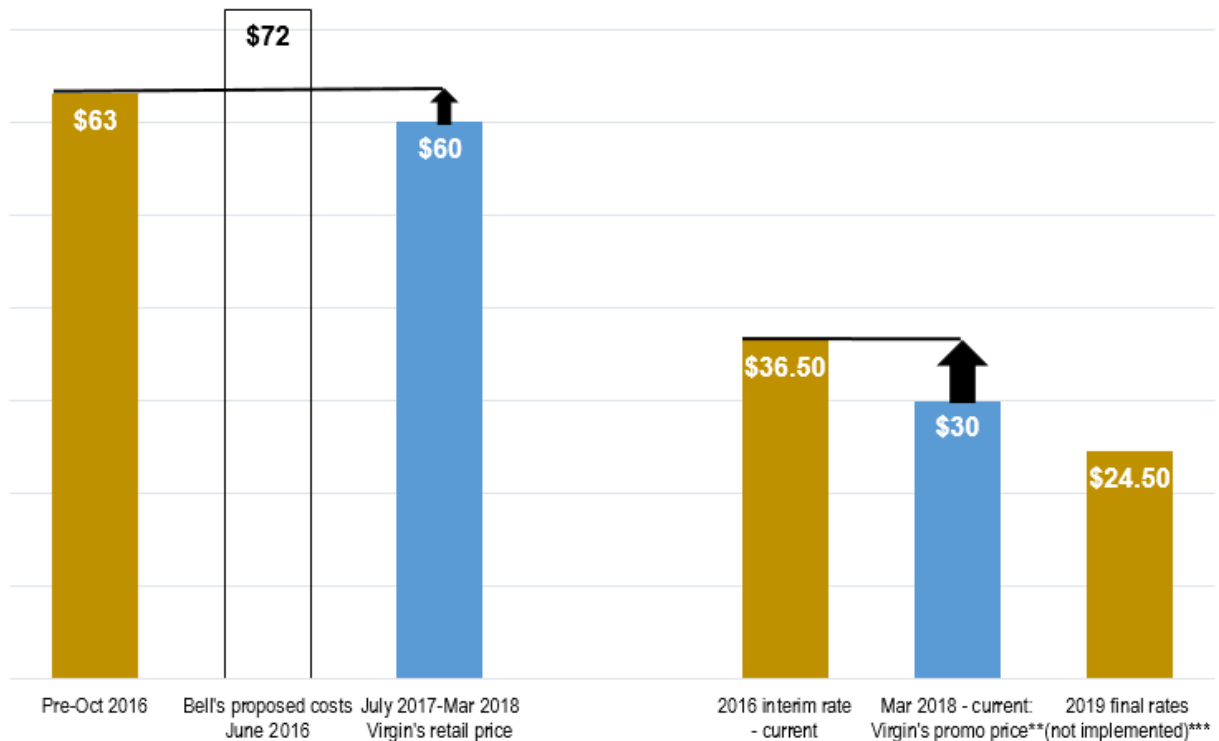
The screenshot shows the Virgin Mobile website's 'HOME INTERNET' section. At the top, there is a red header with the Virgin Mobile logo on the left and the word 'MOBILE' in white on the right. Below the header, the text 'HOME INTERNET' is displayed in white on a dark background. The main promotional text reads: 'GET A \$30 CREDIT FOR 12 MO. ON UNLIMITED INTERNET NOW: \$30/MO'. Below this, there are two columns of text: 'CALL TO ORDER 1-866-826-1113' with a red phone icon, and 'NEED SUPPORT Contact us' with a blue link. A red button labeled 'Check availability' is positioned below the call to order. At the bottom, a disclaimer states: 'Discount eligible on 50mbps plan. Current price: \$60/mo. Prices may increase during subscription. Offer ends June 27.'

GOOD TO KNOW:

- Promotion of \$30/mo. on a 50 Mbps Unlimited plan is based on a \$30 credit applied to the current price for 12 months and continued subscription to an eligible Home Internet plan. The current price can increase during your subscription. If the current price increases, your monthly price will increase but you will continue to receive your monthly credit during the promo. This credit is available to eligible Members in Ontario only on new activations. May not be combined with other offers; subject to change without notice.

149. Based on known network usage, the tariffed wholesale cost for 50 Mbps service would be \$63/month at pre-2016 rates; \$72 /month at rates Bell proposed in 2016; \$36.50/month at currently in-effect interim rates from TO 2016-396; and \$24.50/month at final rates from TO 2019-288.

Wholesale tariffed costs* exceed Virgin's retail price for 50 Mbps package



* Wholesale tariffed costs

- Included: 1) access rates; 2) capacity rates; and 3) dry loop rates.
- Excluded regulated costs: 1) install fee (one-time); and 2) other per-customer tariffed costs (e.g. modem swap, repair ticket).
- Other excluded non-regulated costs: 1) network services (e.g. usage-sensitive transport, transit, co-location, peering, backbone); 2) customer premise equipment (e.g. modem); 3) operational costs (e.g. sales and support staff, internal systems, payment processing costs, etc.); 4) marketing costs; and 5) administrative costs.

** Virgin offers this promotional price on a frequently recurring basis.

*** When Aug 2019 rates come into effect, TekSavvy estimates this is the likely wholesale cost.

150. Note that the final rates above include only the regulated wholesale costs required to provide the competing retail service, and do not include other product and service inputs, business overhead, or any profit margin at all. They also do not include tariffed installation charges (Bell \$90.65 under the GAS tariff). In total, after adding TekSavvy's additional network and other costs, even at the final rates from TO 2019-288, TekSavvy cannot compete with Bell's 50 Mbps retail offering.
151. It is important to note while the regulated cost of wholesale access is the largest cost TekSavvy incurs in delivering retail Internet services to its customers, it is far from the only cost. To supply retail Internet to end-users, TekSavvy also incurs other material, non-tariffed direct costs for critical inputs such as basic network services and customer modems. When these costs are included, as depicted in the figure below, Virgin's retail offer is priced well below TekSavvy's direct costs in providing the equivalent service.

##

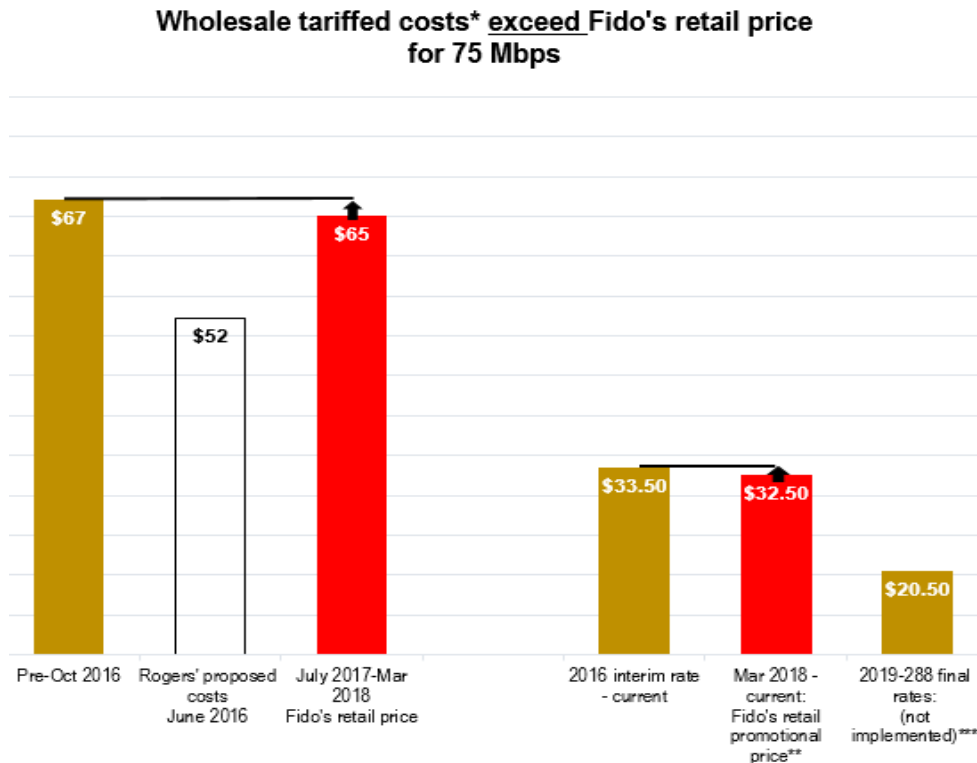
152. In addition, beyond tariff and non-tariff direct costs reflected above, TekSavvy also has general sales, marketing and administrative costs associated with running its business, which TekSavvy must recover to turn a profit. As discussed below, Bell was and is of course aware that the cost of wholesale access was and is not TekSavvy's only cost of doing business.
153. Given all of the foregoing, when Bell had and has its low-price 50Mbps offer in the market, TekSavvy had and has the choice of selling its 50 Mbps service at below its wholesale cost and take a loss on each package sold, or lose subscribers due to uncompetitive retail prices. #####
154. Moreover, even when through Virgin, Bell does not have its lowest priced offering in the market for 50Mbps service, it still offers that service at a highly discounted rate. For example, Virgin is now offering a 50Mbps package for a 12-month introductory rate of \$40/month, plus offering new subscribers a \$100 credit on their bill, effectively lowering the 12-month introductory rate to \$31.67. This low fighting brand rate leaves TekSavvy in a near equally impossible position of having to offer its services at an uncompetitive price or selling at a loss.

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155. Rogers has engaged in substantially the same anti-competitive practices as Bell in terms of the use of its fighting brand, Fido, to attack TekSavvy.
156. Consider Rogers' 75 Mbps service. In the period since at least February 2018, through Fido, Rogers has regularly offered Internet service at the 75 Mbps speed for 12-month introductory rates of \$32.50, with no modem cost or activation charge for self-installs (which are not part of the wholesale service).

The screenshot displays a promotional offer for Fido Internet service. At the top, the heading "INTERNET PACKAGES" is shown. Below it, a teal banner indicates a "Limited-Time Offer". The main heading "FIDO INTERNET" is followed by a "Details" link and a refresh icon. The offer specifies a "Download speed up to 75Mbps¹" with a speedometer icon. A dashed line separates this from the text "Your data is", which is followed by a large box labeled "Unlimited". Another teal banner states "Get 50% off for 12 months. Now only \$32.50/month". The current price is shown as "\$65.00₂/mo." with a red "BUY NOW" button next to it. A disclaimer at the bottom reads "Prices subject to rate increase."

157. Based on known network usage, the tariffed wholesale cost for 75 Mbps service would be \$67/month at pre-2016 rates; \$52/month at rates Rogers proposed in 2016; \$33.50/month at interim rates from TO 2016-396; and \$20.50/month at final rates from TO 2019-288.



* Wholesale tariffed costs

- Included: 1) access rates; and 2) capacity rates.
- Excluded regulated costs: 1) install fee (one-time); and 2) other per-customer tariffed costs (e.g. modem swap, repair ticket).
- Other excluded non-regulated costs: 1) network services (e.g. usage-sensitive transport, transit, co-location, peering, backbone); 2) customer premise equipment (e.g. modem); 3) operational costs (e.g. sales and support staff, internal systems, payment processing costs, etc.); 4) marketing costs; and 5) administrative costs.

** Fido offers this promotional price on a frequently recurring basis.

*** When Aug 2019 rates come into effect, TekSavvy estimates this is the likely wholesale cost.

158. Note that the final rates above include only the regulated wholesale costs required to provide the competing retail service and do not include other product and service inputs, business overhead, or any profit margin at all. They also do not include tariffed installation charges, for which Rogers charges \$63.53 under their TPIA tariff, other service inputs, business overhead, or any profit margin at all. In total, after adding TekSavvy's additional network and other costs, even at the final rates from TO 2019-288, TekSavvy cannot compete with Rogers' own retail offering on the 75 Mbps speed tier.
159. It is important to note while the regulated cost of wholesale access is the largest cost TekSavvy incurs in delivering retail Internet services to its customers, it is far from the only cost. To supply retail Internet to end-users, TekSavvy also incurs other material, non-tariffed direct costs for critical inputs such as basic network services and customer modems. When these costs are

included, as depicted in the figure below, Fido's retail offer is priced well below TekSavvy's direct costs in providing the equivalent service.

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160. In addition, beyond tariff and non-tariff direct costs reflected above, TekSavvy also has general sales, marketing and administrative costs associated with running its business, which TekSavvy must recover to turn a profit. As discussed below, Rogers was and is of course aware that the cost of wholesale access was and is not TekSavvy's only cost of doing business.
161. Accordingly, the same observations made with respect to the juxtaposition of Bell's retail price and the wholesale price it charged and charges to TekSavvy, can be made with respect to Rogers/TekSavvy.

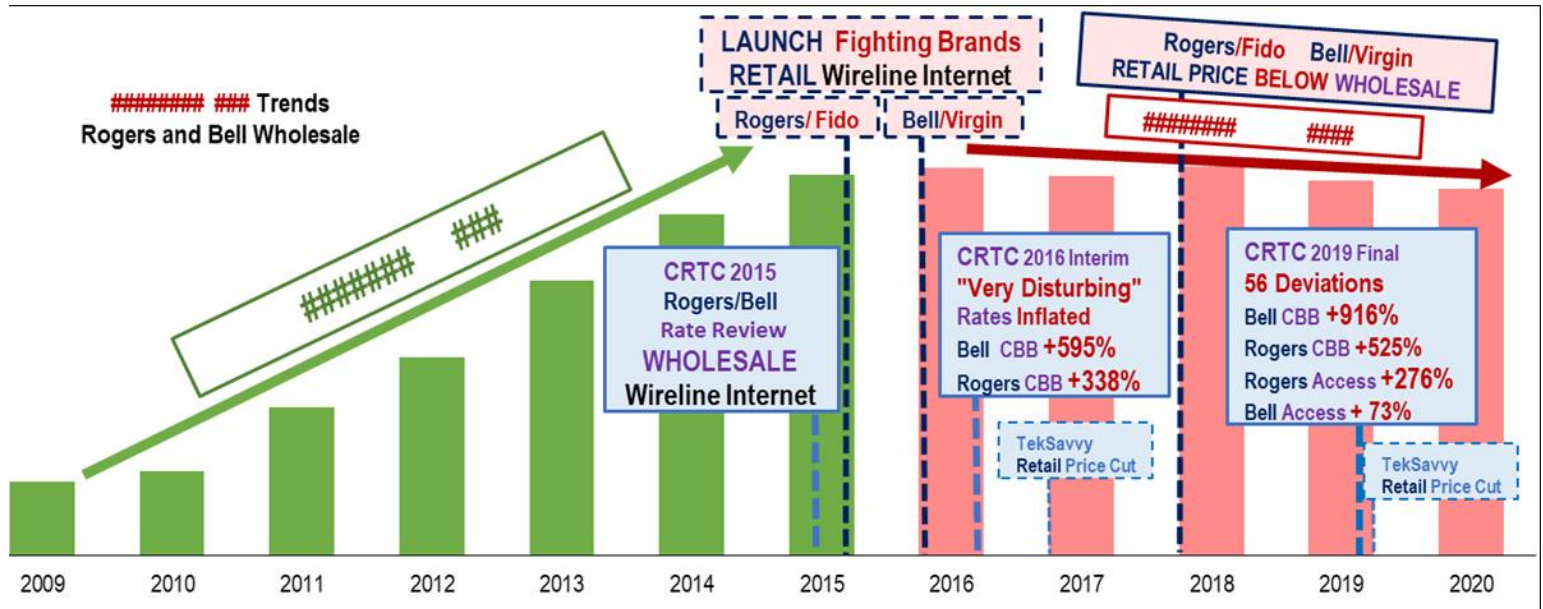
f. Clear evidence of anti-competitive intent

162. As set out above, in ascertaining a party's intention, subjective intent is probative and informative, if it is available, but it is not required to be demonstrated.⁷⁵ In addition to subjective intent, the "reasonably foreseeable or expected objective effects" of the conduct, are relevant in discerning its "overall character".⁷⁶ In making this assessment, a person will be deemed to have intended the reasonably foreseeable effects of its actions.⁷⁷
163. There is both evidence in the form of reasonably foreseeable or expected objective effects of Bell and Rogers' conduct, as well as subjective evidence of Bell and Rogers' predatory, exclusionary, and/or disciplinary intent.
164. In assessing Bell and Rogers' conduct, it is critical to remain mindful of the facts that:
 - Bell and Rogers knew wholesale access was the biggest single cost that TekSavvy was required to pay to them, in order to deliver its competing retail services;
 - Bell and Rogers knew TekSavvy's actual wholesale costs in delivering any given competing retail service;
 - Bell and Rogers added wireline Internet services to their fighting brands' retail offerings after the CRTC initiated a review of the wholesale rates Bell and Rogers charged TekSavvy in delivering its competing retail services; and
 - Bell and Rogers were caught inflating those wholesale costs by the CRTC.
165. Bell and Rogers' knowledge allowed them to calibrate their fighting brand retail offers for the purpose of having a predatory, exclusionary and/or disciplinary effect on TekSavvy and other WBCs.

⁷⁵ VAA at para. 515; *Canada Pipe FCA* at para 70; *Laidlaw* at p. 334.

⁷⁶ VAA at para. 515; *Canada Pipe FCA* at para 67.

⁷⁷ VAA at para. 515; *Canada Pipe FCA* at paras 67-70; *Nielsen* at p. 257.



166. In terms of reasonably foreseeable or expected objective effects, as detailed above, Bell and Rogers charge TekSavvy inflated wholesale rates, while at the same time competing with them using fighting brands with retail prices set below those wholesale rates which they knew TekSavvy could only match by selling its services at a loss.
167. Bell and Rogers imposed high costs on TekSavvy and other WBCs, while leaving themselves ample room on the retail side to undercut TekSavvy's pricing, with aggressive, targeted, fighting brand retail offers that they knew that TekSavvy would never be able to match.
168. They were and are able to undercut TekSavvy pricing and offer cut-rate retail prices, because their purported wholesale costs, which are supposed to reflect their actual costs of supplying wholesale services, are grossly inflated. Were that not the case, both Bell and Rogers would be selling their discounted fighting brand Internet packages at a loss. The very generous 37.5% margins they enjoy in respect of the broadband wireline Internet part of their business indicate that they are clearly not selling Internet packages at a loss.
169. By any reasonable measure, Bell and Rogers would have to have known the natural consequence of their conduct would be exclusionary in that it would make TekSavvy a less effective competitor by substantially increasing its costs and by forcing it to choose between selling its service at a loss or pricing its service at a level which would allow it to cover its costs, but which would make it uncompetitive in the retail market. Bell and Rogers' conduct also had a disciplinary effect on TekSavvy in that TekSavvy's efforts to compete on price were met with aggressive fighting brand discounting by Bell/Virgin and Rogers/Fido below TekSavvy's wholesale costs.
170. Moreover, given that both Bell and Rogers have stated that they do not see the wholesale part of the broadband market as a business opportunity the only possible explanation for disregarding the CRTC's established methodology and inflating wholesale rates is to raise the costs of TekSavvy and other WBC rivals and exclude them from the market by making it difficult, if not impossible,

for them to compete at the retail level. This is confirmed by George Cope's statements after the CRTC's August 2019 final rate decision:

Analyst Question: If the CRTC doesn't change the wholesale broadband pricing, are there ways to compete, because you can't compete on price—besides customer service and bundling? Are there other ways to compete, differentiate with wholesale pricing?

Cope: Well, here's what I would say: we launched the Virgin Internet brand, two, maybe three years ago now. And it **completely focused on** if there's a value segment for broadband that **wholesalers** are competing in, **Virgin's competing head to head with that**. And **that's what it was designed to do**. One of the reasons **we don't even report wholesale Internet subs anymore, frankly**, because **it's a regulatory requirement we have no strategic interests in the business at all**. Our strategic businesses is our brands, and so we've created the Virgin brand. ... you're better to be in this space yourself, obviously, **in preserving some of that revenue stream than preserving it at a wholesale level**. And **making it also extremely difficult for other competitors** to beat. ...⁷⁸ [emphasis added]

171. What Mr. Cope is describing is Bell's strategy of converting customers of WBCs, like TekSavvy, that use wholesale access on Bell's network to deliver retail service, to customers of Virgin. As Mr. Cope says expressly, that process of converting those customers was part of Bell's strategy in launching Virgin.
172. That conversion process is made possible by pincer strategy of hamstringing TekSavvy and other WBCs with severely inflated wholesale prices, while using fighting brands with retail prices that are regularly below TekSavvy's wholesale costs and almost always at levels that both Bell and Rogers would have known would leave TekSavvy with the choice to sell its services at a loss or price those services at uncompetitive levels.
173. Indeed, Mr. Cope repeatedly boasts of the success of this strategy in harvesting WBCs' customers:

"So, on our churn rates on broadband **wholesale** is **by far our highest churn rate...**"⁷⁹

"[W]e had **negative wholesale** loading, or subscriber additions, which **of course** we would be **very comfortable** with...**Of course**, part of that is **our strategy** with the roll-out of the **Virgin** Internet brand."⁸⁰

⁷⁸ [2019 BMO 20th Annual Technology Media Teleconference](#), George Cope at 26:03 to 27:52.

⁷⁹ BCE Q3 2018 Results Conference Call Transcript, 1 November 2018, at page 19 <<http://www.bce.ca/investors/financial-reporting/2018-Q3/2018-q3-transcript.pdf>>.

⁸⁰ *Ibid.*, at page 8.

“[O]ur **wholesale** additions **declined year-over-year** and is not a focus of our business...”⁸¹ [emphasis added]

174. Bell and Rogers’ conduct is also exclusionary in the broader sense that, if left unchecked, it will force TekSavvy from the market by imposing conditions which make it impossible for TekSavvy to compete.
175. Put in stark terms, if any upstream supplier provides an essential input for which there are no substitutes to a customer for a price of \$X, and then that supplier competes with that customer in the downstream market at a price lower than \$X, all other things being equal, there can be no doubt that the supplier knows with certainty that it will force its customer from the market.
176. However, in this case, all things are not equal – the field is tilted in Bell and Rogers’ favour, given, among other things, the enormous brand equity they enjoy, the massive marketing budgets they wield, as well as the advantage of being able to bundle wireless services with their wireline and television offerings.⁸²

g. Vidéotron has engaged in a similar practice of anti-competitive conduct

177. This Complaint focuses on the anti-competitive conduct of Bell and Rogers. However, TekSavvy notes that Vidéotron has engaged and continues to engage in much of the same anti-competitive conduct as Bell and Rogers. For example, the CRTC’s uncontested determinations in Telecom Order 2016-396 that the Incumbents “chose to disregard” and “fail to comply” with its well established costing rules to charge TekSavvy and other WBCs massively inflated wholesale rates based on “overstated costs”, show Vidéotron to be among the worst offenders.⁸³
178. Similarly, Vidéotron added wireline Internet services to its existing wireless fighting brand – Fizz – to undermine TekSavvy and other WBCs that purchase wholesale services from Vidéotron, as well as compete with them at the retail level. Vidéotron’s CEO, Jean-Francois Pruneau, explicitly linked the launch of Fizz Internet to the CRTC’s corrections to wholesale rates and described the addition of wireline Internet service to its wireless fighting brand as “the right weapon to fight [TekSavvy and other WBCs]” in retail markets:

⁸¹ BCE Q2 2018 Results Conference Call Transcript, 2 August 2018, at page 8, <<http://www.bce.ca/investors/financial-reporting/2018-Q2/2018-q2-transcript.pdf>>.

⁸² As noted previously, the Broadband Study found that WBCs typically price cheaper than Incumbents, according to CRTC statistics, on average offering their services at approximately a 15% discount. The Broadband Study noted that “[o]ther studies indicate even greater discounts by wholesale-based competitors, ranging up to 35% for certain types of plans.” (Broadband Study, p. 17).

⁸³ In that decision, the CRTC reduced Vidéotron’s capacity rate from \$2,031 to \$395, or by 80% and in its final rate decision, the CRTC reduced Vidéotron’s capacity rates by an additional 43%, below the capacity rates it had approved on an interim basis in October 2016. The CRTC also corrected the access rates for Vidéotron, on average, by 44% citing numerous evidentiary lacunae and inconsistencies, as well as failures to adhere to the established rate-setting methodology.

“What we're aiming for with Fizz Internet is really... the resellers market,” said Pruneau. “They are getting traction thanks to CRTC with their new (wholesale) rates that are much lower than they were before.

“So, **with Fizz Internet I believe we have the right weapon to fight the resellers** essentially, and... if Fizz Internet works as well as Fizz Mobile, I think we're in very good shape for 2019.”⁸⁴ [emphasis added]

179. However, given that Bell and Rogers are by far TekSavvy's largest wholesale suppliers, Vidéotron's anti-competitive conduct has had a less severe impact on TekSavvy than that of Bell and Rogers. TekSavvy appreciates that the Competition Bureau's investigation will focus on competition, as opposed to competitors, and that the Bureau will decide on the appropriate reach of the investigation and whether or not, for example, to examine Vidéotron's anti-competitive conduct and the extent to which that conduct has or is substantially preventing or lessening competition.

h. Conclusion re: Bell and Rogers' anti-competitive acts

180. The statements set out in the foregoing section, together with the reasonably foreseeable consequences of Bell and Rogers' actions, demonstrate Bell and Rogers' intention to discipline and exclude TekSavvy and other WBCs from the retail markets in Ontario and Quebec. At a bare minimum, they raise ample reason to believe that Bell and Rogers intended to discipline TekSavvy and exclude it from the retail Internet market.
181. While TekSavvy remains stranded on inflated wholesale rates, Bell and Rogers' practices leave TekSavvy with the unenviable choice between raising retail prices so as to cover its rising costs of doing business, in which case, it will lose subscribers to lower priced retail services offered by Bell and Rogers' fighting brands; or, matching Bell and Rogers' fighting brand offers and selling its retail services at a loss.
182. In thinking about this market dynamic, it is important to recall that Bell and Rogers enjoy the brand equity that comes with incumbency and enormous marketing budgets funded by the 37.5% margins they enjoy on broadband wireline services. They also enjoy the advantage of being able to bundle wireless services with their wireline offerings. In view of this, it is not sufficient for TekSavvy to simply match Bell and Rogers' retail Internet offers, to attract and retain consumers' business.
183. There is no credible pro-competitive or efficiency enhancing rationale for Bell and Rogers' conduct. That Bell and Rogers have added wireline Internet services to their fighting brands to generally compete aggressively in the retail market cannot, in all of the circumstances, serve as a pro-competitive rationale. To accept such an explanation as a pro-competitive rationale in this case, would amount to reading the fighting brand head of “anti-competitive acts” out of the Act.

⁸⁴ Fizz Internet the “right weapon” to beat back resellers, says Vidéotron March 28, 2019 - <https://cartt.ca/fizz-Internet-the-right-weapon-to-beat-back-resellers-says-videotron/>

6. BELL AND ROGERS' ANTI-COMPETITIVE CONDUCT HAS RESULTED IN SUBSTANTIAL LESSENING AND PREVENTION OF COMPETITION IN RETAIL MARKETS FOR WIRELINE INTERNET SERVICES

a. The Law - s. 79(1(c))

184. In VAA, the Tribunal set out the analytical framework for section 79(1)(c) of the Act. It began by noting that section 79(1)(c) contemplates a two-stage assessment. First, the level of competition that exists in the presence of the impugned practice must be compared to the level of competition that likely would have prevailed in the past, present and future but for the impugned anti-competitive practice. The assessment focuses on the “comparative and relative state of competition in past, present and future time frames, as opposed to the absolute state of competition at any of these points in time.” (emphasis in the original) Second, it must be determined whether the difference between the level of competition in the presence of the impugned conduct, and the level that would have existed “but for” the impugned conduct, is substantial.⁸⁵
185. Paragraph 79(1)(c) has two branches: lessening and prevention.
186. To assess whether competition has been, is or is likely to be lessened, the focus is on whether the impugned practice has facilitated, is facilitating or is likely to facilitate the exercise of new or increased market power. This assessment typically involves a determination of whether the intensity of rivalry has been, is being or is likely to be diminished or reduced, as a result of the anti-competitive practices in issue. A determination that this is not likely the case, generally means that competition has not been, is not and is not likely to be lessened at all, let alone substantially.⁸⁶
187. A determination of whether competition is likely to be prevented, focuses is on whether the impugned practice has preserved, is preserving or is likely to preserve any existing market power enjoyed by a firm, by preventing or impeding new competition that otherwise likely would have materialized in the absence of the impugned practice, i.e., would the intensity of rivalry likely would have increased, “but for” the impugned ant-competitive practice. Again, where that this is not likely to be the case, generally means that competition has not been, is not and is not likely to be prevented at all, let alone substantially.⁸⁷
188. In considering “substantiality” under section 79(1)(c), both the degree of the prevention or lessening of competition, as well as its duration, are relevant.
189. “Degree” involves an assessment of whether the impugned practice has enabled, is enabling or is likely to enable the respondent to exercise materially greater market power than in the absence of the practice. What constitutes “materially” greater market power will vary from case to case and will depend on the facts of the case. In assessing whether the degree of prevention or lessening of competition is sufficient to be considered “substantial,” it is important to consider the overall economic impact of an impugned practice in the relevant market.

⁸⁵ VAA, at paras. 633, 634.

⁸⁶ VAA, at para 636.

⁸⁷ VAA, at para. 637

190. “Duration” involves an assessment of whether the material increase in prices or material reduction in non-price dimensions of competition resulting from an impugned practice has lasted, or is likely to be maintained, for approximately two years.⁸⁸ Importantly, if a firm with a high degree of market power is determined to have engaged in anti-competitive conduct, “smaller impacts on competition resulting from [the anti-competitive] conduct will meet the test of being ‘substantial’ than where the market situation was less uncompetitive to begin with.”⁸⁹
191. As described below, Bell and Rogers’ anti-competitive practices have facilitated, are facilitating and are likely to facilitate the exercise of increased market power in the retail market for wireline Internet service in their incumbent wireline serving territories in Ontario and Quebec, where those firms compete with TekSavvy and other WBCs. These practices have substantially prevented and lessened competition, are substantially preventing and lessening competition and are likely to have that effect in the retail market for wireline Internet services. In addition, those practices are likely to have the anti-competitive knock-on effects described below, to the detriment of competition and consumers.

b. Substantially higher retail prices for consumers

192. By inflating wholesale prices and increasing WBCs’ costs, Bell and Rogers have, in effect “raised the floor” on retail prices for wireline Internet service. As a consequence, those prices have been, are, and are likely to continue to be substantially higher than they would have been but for Bell and Rogers’ anti-competitive conduct.
193. In both 2016 and 2019 when Bell and Rogers were “caught” systematically inflating their wholesale rates by the CRTC and those wholesale rates were reduced, that reduction has found reflection in TekSavvy’s, as well as other market participants’ retail prices.
194. Had Bell and Rogers’ wholesale rates not been based on their massively overstated cost figures , Canadian consumers would have enjoyed the benefit of those lower prices over that period of time. In other words, but for the grossly inflated wholesale rates Canadian consumers in Canada’s largest retail markets for wireline Internet services would have been enjoying substantially lower retail prices at that time.
195. In its Written Submissions filed in connection with its Stay Application in respect of TO 2019-288, Bell noted that as a result of that decision, WBCs “are reducing prices” and moving retail market prices lower, with the result that absent a stay, Bell would have to reduce its retail prices to meet the competition. Bell also indicated that, if a stay was not granted and it was ultimately successful in the appeal, it would seek to raise retail prices back up to the supra-competitive levels they are now at, which prices of course drive Bell’s and other Incumbents broadband wireline margins of close to 40%. Bell asserted:

⁸⁸ VAA, at paras. 640, 641.

⁸⁹ *Competition Act, Director of Investigation and Research v. Tele-Direct (Publications Inc.)*, [1997] C.C.T.D. No. 8, 73 C.P.R. (3d) 1 at para. 247 (Comp. Trib.).

Because Resellers are reducing prices in response to the Decision, Carriers, including Bell, will be forced to do the same. This will have the immediate effect of reducing the price Bell can charge subscribers for its Internet services.

If Bell reduces its retail prices, it will be unable to recover the retail fees it would have charged during the time the Decision was in effect. Further, regardless of whether Bell reduces its rates, Bell's retail FTTN subscribers will become accustomed to lower prices, rendering it virtually impossible to raise prices back to pre-Decision levels if the Decision is overturned. Unsurprisingly, while subscribers have no resistance to having their retail rates **decreased**, they are highly resistant to having their retail rates **increased**. If the Decision is not stayed, the market will have been permanently changed. [emphasis in original]⁹⁰

196. The critical point here is that, but for the inflated rates being imposed on TekSavvy and other WBCs by the Incumbents, including Bell and Rogers, *wholesale rates* charged to TekSavvy and other WBCs from October 2016 to present would have been *substantially lower*. By extension, *retail* prices for end-user consumers would also have been *substantially lower* during that period and would be substantially lower today.
197. By “gaming” the rate-setting process, Bell and Rogers have been and are able to impose inflated costs on TekSavvy (and other WBCs), effectively keeping wholesale costs high as the regulatory process, including appeals, petitions, and requests for reconsideration by the CRTC play out over the years. As noted above, Bell and Rogers know that the worst that may happen to them is that ultimately, three of four years on, they may be required to pay back some portion of the excessive wholesale fees they extract from TekSavvy and other WBCs. Moreover, even the terms of retroactive payments themselves can be subject to objection, review and appeal.
198. The distinction between ordinary course regulatory disputes alluded to above and what Bell and Rogers have done with the CRTC's rate setting process is important. In effect, Bell and Rogers have weaponized the CRTC's regulatory rate-setting process and are using it as a means of crushing TekSavvy and other WBC's participation in the retail market, while keeping retail prices high for millions of consumers in Canada's largest retail market for wireline internet services.

c. Competitors exit market

199. By inflating the rates TekSavvy is required to pay for wholesale inputs, while also targeting TekSavvy with low-priced retail fighting brand offerings, including offerings below wholesale costs - in effect, squeezing TekSavvy from both sides - Bell and Rogers have deliberately created circumstances where TekSavvy's continued presence in the retail market is increasingly unsustainable and TekSavvy's exit from that market is increasingly likely.
200. Simply put, providing a retail service where an essential wholesale input controlled by a dominant rival is priced at the levels referenced above, makes the wholesale-based service model unsustainable as an ongoing business proposition. If allowed to continue, Bell and Rogers' practice

⁹⁰ *Bell Canada v. BCBA et al*, Written Representations contained within a Motion Record filed on behalf of Bell on 17 September 2019, at paras 46, 47 (FCA - CFN 19-A-59).

of using fighting brands to sell wireline broadband services at retail either below TekSavvy and other WBCs' wholesale costs for that same service or at a price that does not permit TekSavvy or other WBCs to cover their costs, is likely to result in TekSavvy and other WBCs exiting the market for retail wireline broadband services in Ontario and Quebec.

201. If TekSavvy and other WBCs exit the retail Internet market in Ontario and Quebec, TekSavvy and other WBCs, which have the bulk of their subscribers in those provinces, will almost certainly exit retail markets across Canada. Were that to occur, the price competition that TekSavvy and other WBCs have brought to the market would disappear and there would remain only two choices for consumers: the incumbent phone company and the incumbent cable company. In those circumstances, retail prices for wireline broadband Internet service would almost certainly increase substantially.
202. As referenced above, a report commissioned by ISED in respect of Wireline, Wireless and Internet Services Prices in Canada is consistent with the Bureau's findings regarding higher wireless pricing for consumers where only Incumbents are in the market.⁹¹ The Broadcasting Telecom Legislative Review Panel described the findings of the Report as follows:

The 2018 ISED pricing report finds that regional mobile wireless carriers such as SaskTel, Eastlink, Freedom, and Vidéotron offered mobile wireless service prices that were significantly lower than those of the incumbent wireless carriers Bell, Rogers, and TELUS. The 2018 ISED pricing report also showed that Saskatchewan and Quebec, two provinces with a strong regional competitor, had lower mobile wireless service prices across all but one mobile wireless price basket, sometimes significantly so.⁹²

203. Moreover, if TekSavvy exits the retail wireline Internet market, there will be a dramatic "knock-on" effect on the other competitive services that it currently offers, as well as services it plans to offer in the future. Current services include services such as IPTV that provide a competitive alternative to Incumbent television services.⁹³
204. If TekSavvy exits the retail broadband market, which is the base upon which other services are built, it will also scrap plans to enter new markets, such as the market for retail wireless services. Should TekSavvy not enter the wireless market as planned, there would remain only three choices for most Canadians: Bell, Rogers and Telus; firms which the Competition Bureau concluded have engaged in coordinated behavior leading to higher wireless prices for consumers.⁹⁴

⁹¹ Wall Communications Inc., Price Comparisons of Wireline, Wireless and Internet Services in Canada and with Foreign Jurisdictions (Prepared for ISED, 29 August 2018). <https://www.ic.gc.ca/eic/site/693.nsf/eng/00169.html>
See also *Canada's Communications Future: Time To Act*, at p. 79.

⁹² [https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/\\$file/BTLR_Eng-V3.pdf](https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/$file/BTLR_Eng-V3.pdf)

⁹³ On February 1, 2019, TekSavvy launched TekSavvy TV in Ontario and will be rolling out the service across Canada in 2020. TekSavvy TV offers consumers a choice of up to 105 HD channels and cloud-based PVR service.

⁹⁴ Competition Bureau statement regarding Bell's acquisition of MTS February 15, 2017 - <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html>.

205. But for Bell and Rogers' anticompetitive practices, retail prices for wireline broadband Internet Canada's largest retail markets would have been substantially lower. If Bell and Rogers' anticompetitive practices are allowed to continue unchecked, TekSavvy, and in all likelihood other WBCs with their primary base of operations in Ontario and Québec, will exit those markets and, in time, the retail Internet market in Canada generally. The result of that occurrence will be both a substantial lessening and a substantial prevention of competition in the retail market for wireline broadband services, first in Ontario and Québec and then nationally.

7. THE COMMISSIONER MUST CONDUCT AN INQUIRY AND TAKE ENFORCEMENT ACTION

206. There is ample jurisdiction for the Commissioner to inquire into the anti-competitive conduct as outlined in this Complaint. Moreover, given the nature of TekSavvy's Complaint and the competition issues it raises under section 79 of the Act, it is appropriate and essential that the Commissioner conduct that inquiry and take enforcement action.
207. The CRTC's role in regulating certain aspects of wireline Internet service, does not supplant the Commissioner's role in enforcing the Act.

a. No regulated conduct defense

208. As the Bureau itself recognized in its 2010 Regulated Conduct Bulletin (the "RCD Bulletin"),⁹⁵ the Act is a law of general application and its operation will not be ousted save in exceptional circumstances.
209. In terms of the operation the Act and other Federal legislation, the RCD Bulletin provides:

The Bureau will read the Act and the other federal law(s) in their ordinary sense harmoniously with the scheme and objects of the statutes in which they appear. As Parliament is presumed to enact legislation that is coherent, the Bureau will, of course, consider whether the provisions can stand together and both operate without either interfering with the other, i.e. whether a party may reasonably comply with both the Act and the other federal law(s). The Bureau will apply the Act as it reads unless it can confidently determine that Parliament intended that the other federal law prevail, either by clear language in the Act or by the other federal law authorizing or requiring the particular conduct or, more generally, providing an exhaustive statement of the law concerning a matter. Parliament's intention in the other federal law may be express or implied; in the latter situation, the Bureau will generally conclude that the enactment by Parliament of specific provisions to address the conduct in question is intended to take precedence over a law of general application such as the Act.⁹⁶ [cites omitted]

⁹⁵ Competition Bureau, Regulated Conduct Bulletin, September 27, 2010, p. 1, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html>

⁹⁶ RCD Bulletin, at p. 7.

210. Although the CRTC regulates telecommunications services in Canada pursuant to the *Telecommunications Act* (S.C. 1993, C. 38), Parliament has not articulated an intention in the *Telecommunications Act* to displace competition law enforcement, nor has Parliament provided the CRTC with authority to authorize any person to take action inconsistent with the Act.
211. In terms of wholesale broadband services, Bell and Rogers must reasonably comply with *Telecommunications Act* as well as the Act. Moreover, in respect of retail wireline broadband, as noted, the CRTC has elected to forbear from regulating retail prices.
212. In addition, the Competition Tribunal recently held that the regulated conduct defense has no application in the context of matters arising under s. 79 of the Act.⁹⁷

b. Complaint is consistent with Competition Bureau/CRTC Interface Agreement

213. Recognizing that their jurisdictions could overlap, in 2001 the Competition Bureau and the CRTC entered into an agreement in the form of the CRTC/Competition Bureau Interface (the “Interface Agreement”),⁹⁸ to address their respective roles.
214. The Interface Agreement provides:
- Nothing in this document is intended to limit the responsibility or authority of the Commission or the Bureau to administer the respective legislation for which they are responsible. It is recognized that in addition to competition issues, the Commission has many other statutory objectives, while the focus of the Bureau is on matters related to competition.⁹⁹
215. The Interface Agreement addresses the CRTC and the Competition Bureau’s respective roles in the review of mergers between entities subject to the *Broadcasting Act* (S.C. 1991, c. 11). Though this part of the Interface Agreement applies only to mergers of firms subject to the *Broadcasting Act*, it is nonetheless instructive in articulating how the two agencies have agreed to manage the interface when both of them have jurisdiction in respect of a given matter. The Interface Agreement provides:

Under the *Broadcasting Act*, prior approval of the Commission is required for changes of control or ownership of licensed undertakings. Whereas the Bureau's examination of mergers relates exclusively to competitive effects, the Commission's consideration involves a broader set of objectives under the *Act*. This may encompass consideration of competition issues in order to further the objectives of the [*Broadcasting*] *Act*. The Bureau's concern in radio and television broadcast markets relates primarily to the impact on advertising

⁹⁷ *The Commissioner of Competition v Vancouver Airport Authority*, 2019 CACT 6 (CanLII) [“VAA”], at para. 186 - <http://canlii.ca/t/j36c1>.

⁹⁸ CRTC/Competition Bureau Interface, 2001 - <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01598.html>.

⁹⁹ Interface Agreement, at p.1.

markets and, with respect to broadcast distribution undertakings, to the choices and prices available to consumers. The Commission's concerns include those of the Bureau except that its consideration of advertising markets relates to the broadcasters' ability to fulfill the objectives of the [*Broadcasting*] Act.¹⁰⁰

216. Consistent with the foregoing, as well as the notion of the Act being a law of general application, the Bureau has in the past taken enforcement action under the Act in respect of matters where the CRTC also had jurisdiction. For example, the Bureau conducted an extensive review of Bell Canada Enterprises Inc.'s ("BCE") 2013 acquisition of Astral Media Inc., notwithstanding that the CRTC also had jurisdiction to review that transaction.¹⁰¹
217. As a result of the Bureau's review, the Commissioner entered into a Consent Agreement with BCE pursuant to which it was required to divest certain assets. The Consent Agreement contained additional competition-related conditions, including a condition which prohibited BCE from imposing certain restrictive bundling requirements.^{102,103}
218. The CRTC reviewed the BCE/Astral transaction under the *Broadcasting Act*, having regard to the relevant aspects of Canada's broadcasting policy, as set out in s. 3 of that Act.¹⁰⁴ In short, the CRTC reviewed the transaction through a different lens than the Bureau's competition-centric lens.¹⁰⁵ As a result of its review, the CRTC approved the transaction, but subject to different conditions than those imposed by the Bureau. The conditions imposed by the CRTC reflected the policy considerations that the CRTC had identified under subsection 3(1) of the *Broadcasting Act*.¹⁰⁶

¹⁰⁰ Interface Agreement, at p. 3.

¹⁰¹ Competition Bureau Review of the proposed acquisition of Astral by Bell, Backgrounder, March 4, 2013 - <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03544.html>.

¹⁰² Bureau Review of the Proposed Acquisition of Astral by Bell, Backgrounder, March 4, 2013, at pp. 4-5.

¹⁰³ In the BCE Astral Consent Agreement, the Commissioner also reserved for himself ongoing jurisdiction under the Act to approve any reacquisition of assets divested pursuant to the Agreement. In 2018, the Commissioner considered an application by BCE to reacquire certain of those divestiture assets. In other words, notwithstanding that the assets in question were, from a *broadcast* perspective, squarely within CRTC jurisdiction, the Commissioner considered the reacquisition under the Act, having regard to the public interest in competition. Ultimately, the Commissioner declined to approve the reacquisition sought by BCE on the basis that the competitive conditions that led to the making of the agreement in the first instance, had not materially changed to the point where the remedy in the Agreement was no longer necessary. See Backgrounder: Commissioner of Competition's decision regarding Bell's proposed acquisition of Historia and Séries+, May 31, 2018.

¹⁰⁴ Broadcasting Decision CRTC 2013-310, June 27, 2013.

¹⁰⁵ In the course of its decision in CRTC 2013-310 re the Bell/Astral transaction, the Commission did touch on competition concerns that had been raised by some parties.

¹⁰⁶ The Commissioner has also taken enforcement action in telecom matters involving parties, such as Bell and Rogers, where the CRTC is without jurisdiction. For example, the Commissioner reviewed Bell's acquisition of Manitoba Telecom Services <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04199.html>.

219. With respect to what are described as “Marketing Practices”, the Interface Agreement provides as follows:

Depending upon the specific circumstances, marketing practices can be addressed by the Commission or the Bureau.

The Commission will, for example, deal with slamming complaints in the telephone market. However, the Bureau may act in cases where the slamming practice involves an element of false or misleading advertising. The Competition Act applies to all false or misleading advertising in the communications industry, as well as to telemarketing fraud.

The Bureau considers that the Competition Act will apply to exclusive dealing, tied selling and other trade restraints not covered by regulatory safeguards imposed by the Commission.

220. Section 79 and the notion of abuse of dominance is notable by its absence from the immediately preceding item and from the Interface Agreement more generally. It is submitted that in view of that fact, the guiding principle underpinning the Interface Agreement should govern, i.e., nothing in the Agreement limits the responsibility or authority of the CRTC or the Commissioner to administer the legislation for which they are each responsible.
221. Moreover, from a legal perspective, the Interface Agreement is not law and cannot serve as a basis for the Commissioner to decline to exercise jurisdiction where the exercise of that jurisdiction is appropriate, as in this case, to address a competitive issue in a market.

c. *Ex Ante* regulation and *Ex Post* intervention

222. It is also important to distinguish between *ex ante* regulation, such as that represented by the CRTC and the *Telecommunications Act*, which creates a regulatory framework touching on aspects of the environment within which firms in that sector operate; and, *ex post* intervention, which involves intervention by, for example, a competition authority, to specifically address a competition concern arising as a consequence of the anti-competitive conduct of such firms.
223. That distinction has been recognized repeatedly by the European Commission in a series of abuse of dominance cases dealing with anti-competitive practices employed by incumbent phone companies against wholesale-based entrants in the retail broadband market.
224. In one case, the incumbent phone company, Telefónica, argued that given the presence of a telecommunications regulatory authority (much like the CRTC) which was responsible for, among other things, approving wholesale broadband rates, there was no role for the relevant competition enforcement authority to play in respect of an abuse of dominance allegation that had been made

against Telefónica.¹⁰⁷ That argument was flatly rejected by the European Commission. It stated at paragraphs 665-667 of its decision:¹⁰⁸

In its Reply, Telefónica recalled that the Spanish broadband market has been supervised through ex ante and ex post resolutions by the Spanish regulator and that it therefore lacked autonomy in setting the relevant prices.

In this respect, the Court of Justice and the Court of First Instance have consistently held that competition rules may apply where sector specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distort competition.¹⁰⁹

On related markets on which competitors buy wholesale services from the established operator and depend on the established operator in order to compete on a downstream product or service market, there can very well be a margin squeeze between regulated wholesale and retail prices. The key question is whether the undertaking subject to price regulation has the commercial discretion to avoid or end the margin squeeze on its own initiative.¹¹⁰

225. The foregoing approach is reflected in a number of other decisions of the European Commission in similar incumbent phone company/wholesale wireline competitor cases.^{111,112}

¹⁰⁷ *Wanadoo España vs. Telefónica*, Commission Decision of 04.07.2007 relating to proceedings under Article 82 of the EC Treaty (Case COMP/38.784).

(https://ec.europa.eu/competition/antitrust/cases/dec_docs/38784/38784_311_12.pdf); affirmed on appeal, Judgment of the General Court (Eighth Chamber), 29 March 2012

(<http://curia.europa.eu/juris/document/document.jsf?text=&docid=121143&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6021150>).

¹⁰⁸ Note: Cites to cases cited by the European Commission in its *Telefonica* decision are included for ease of reference.

¹⁰⁹ Court of Justice in Joined Cases C-359/95 and C-379/95 *P Commission and France vs. Ladroke Racing* [1997] ECR I-6225, paragraph 34; Court of First Instance in Case T-228/97 *Irish Sugar vs. Commission* [1999] ECR II-296, paragraph 130; Court of First Instance in Case T-513 *Consiglio Nazionale degli Spedizionieri Doganali* [2000] II-1807, paragraphs 59 et seq.

¹¹⁰ Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 - *Deutsche Telekom AG*).

¹¹¹ See for example, Case AT 39523 – Slovak Telekom – trial decision Brussels, 15.10.2014 C(2014) 7465, Public version Commission Decision of 15.10.2014 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (AT.39523 - Slovak Telekom); affirmed on appeal Judgment Of The General Court (Ninth Chamber, Extended Composition), 13 December 2018.

¹¹² It should be noted that in similar matters involving incumbent telephone companies and TekSavvy or similarly situated retail entrants, the US Courts have for the most part declined to impose anti-trust liability, save in cases where predatory pricing is made out. The US courts' decisions have turned largely on their rejection of the "essential facilities" doctrine, save for in the limited circumstances contemplated by *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585, 608-611. See for example *Verizon v. Trinko*, 540 U.S. 398 (2004). And see *Pacific Bell Telephone Co., et al., v. Linkline Communications et al.*, 129 S. Ct. 1109 (Feb. 25, 2009). TekSavvy notes that in a concurring judgment in *Linkline*, in a concurring judgment, doubt was cast on the wisdom of imposing anti-trust liability in a context where a "regulatory structure exists to deter and remedy anticompetitive harm", Breyer J.

d. Conclusion

226. Given the competition-centric nature of TekSavvy's Complaint, there is ample jurisdiction for the Commissioner / Competition Bureau to inquire into the conduct of Bell and Rogers as described above. Moreover, given the impact of that conduct has had, is having and is likely to have on competition in Canada's largest retail market for broadband services, and the competition issues it raises under section 79 of the Act, it is both appropriate and essential that the Commissioner conduct that inquiry and take enforcement action.

stating that in those circumstances, "the costs of antitrust enforcement are likely to be greater than the benefits." (see p. 2 of concurring judgment).