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CT- 2022-002

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CT-2022-002

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*,

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

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

Respondents

- and -

**ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.**

Intervenors

COMMISSIONER COMPENDIUM

ATTORNEY GENERAL OF CANADA

Department Of Justice Canada
Competition Bureau Legal Services

Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

Paul Klippenstein
Tel: 819-934-2672

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paul.klippenstain@cb-bc.gc.ca

**Counsel to the Commissioner of
Competition**

TO: LAX O'SULLIVAN LISUS GOTTLIEB LLP

Suite 2750
145 King Street West
Toronto, ON M5H 1J8

Jonathan C. Lisus (LSO# 32952H)

Tel: 416.598.7873
Email: jlisus@lolg.ca

Crawford G. Smith (LSO# 42131S)

Tel: 416.598.8648
Email: csmith@lolg.ca

Matthew R. Law (LSO# 59856A)

Tel: 416.849.9050
Email: mlaw@lolg.ca

Bradley Vermeersch (LSO# 69004K)

Tel: 416.646.7997
Email: bvermeersch@lolg.ca

**Counsel for the Respondent/Moving Party,
Rogers Communications Inc.**

AND TO: DAVIES WARD PHILLIPS & VINEBERG LLP

155 Wellington Street West
Toronto, ON M5V 3J7

Kent E. Thomson (LSO# 24264J)

Tel: 416.863.5566
Email: kentthomson@dwpv.com

Derek D. Ricci (LSO# 52366N)

Tel: 416.367.7471
Email: dricci@dwpv.com

Steven Frankel (LSO# 58892E)

Tel: 416.367.7441
Email: sfrankel@dwpv.com

Chanakya A. Sethi (LSO# 63492T)

Tel: 416.863.5516
Email: csethi@dwpv.com

**Counsel for the Respondent/Moving Party,
Shaw Communications Inc.**

AND TO: BENNETT JONES LLP
3400 One First Canadian Place
Toronto, ON M5X 1A4

John F. Rook Q.C.
Phone: 416-777-4885
Email: RookJ@Bennettjones.com

Emrys Davis
Phone: 416-777-6242
Email: DavisE@Bennettjones.com

Alysha Pannu
Phone: 416-777-5514
Email: PannuaA@Bennettjones.com

**Counsel for the Intervenor,
Videotron Ltd.**

AND TO: GOVERNMENT OF ALBERTA
Justice and Solicitor General
Legal Services Division
4th Floor, Bowker Building
9833 – 109 Street
Edmonton, AB T5K 2E8

Kyle Dickson-Smith
Phone: 780-644-5554
Email: kyle.dickson-smith@gov.ab.ca

Opeyemi Bello
Phone: 780-644-7176
Email: opeyemi.bello@gov.ab.ca

Andrea Berrios
Email: andrea.berrios@gov.ab.ca

**Counsel for the Intervenor,
Attorney General of Alberta**

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TAB 1

Date: 20110331

Docket: A-263-10

Citation: 2011 FCA 120

**CORAM: EVANS J.A.
DAWSON J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEHIGH CEMENT LIMITED

Respondent

Heard at Vancouver, British Columbia, on March 3, 2011.

Judgment delivered at Ottawa, Ontario, on March 31, 2011.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**EVANS J.A.
LAYDEN-STEVENSON J.A.**

[33] Finally, there is an abundance of jurisprudence from this Court which has interpreted the permissible scope of examination under Rule 240 of the *Federal Courts Rules*, SOR/98-106.

Like Rule 95(1), Rule 240 incorporates the test of whether a question is “relevant” to a matter which is in issue. Rule 240 states:

A person being examined for discovery shall answer, to the best of the person’s knowledge, information and belief, any question that (a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or

(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action. [emphasis added]

La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui : a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l’interrogatoire préalable ou par la partie qui interroge;

b) soit concerne le nom ou l’adresse d’une personne, autre qu’un témoin expert, dont il est raisonnable de croire qu’elle a une connaissance d’une question en litige dans l’action. [Non souligné dans l’original.]

[34] The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party’s case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, 381 N.R. 93 at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.

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TAB 2

**V. EFFICIENCIES ARISING FROM THE TRANSACTION AND THE
DIVESTITURE**

43. The Commissioner has given no consideration at all to the significant productive and dynamic efficiencies the Transaction and Divestiture will generate for the Canadian economy. These efficiencies will significantly outweigh any alleged anti-competitive effects and would be lost if the Transaction were blocked, as the Commissioner asks.
44. The Transaction, coupled with the Divestiture, will result in the following efficiencies:
- a. The significant cost savings that would come from combining the Respondents' wireline networks and operations;
 - b. Quality improvements that would arise from combining the Respondents' wireline networks;
 - c. Quality improvements that would arise from combining Videotron's and Freedom's wireless networks; and
 - d. Productive efficiencies arising from the divestiture of Freedom to Videotron, as follows:
 - i. Avoided costs relating to network infrastructure and related assets in British Columbia, Alberta, and/or Ontario;

- ii. Avoided costs related to retail operations in British Columbia, Alberta, and/or Ontario; and
- iii. Labour-related savings.

VI. RELIEF SOUGHT

45. Rogers respectfully requests that this Application be dismissed in its entirety. In the alternative, Rogers requests an order allowing the Transaction, subject to the Divestiture of Freedom. In either scenario, Rogers seeks its costs of this Application.

VII. CONCISE STATEMENT OF ECONOMIC THEORY

46. Rogers' Statement of Economic Theory is attached as Schedule A.

June 3, 2022

Amended August 8, 2022

Fresh as Amended August 18, 2022

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750
145 King Street West
Toronto, ON M5H 1J8

Jonathan Lisus (LSO# 32952H)
Tel: 416.598.7873
Email: jlisus@lolg.ca

Crawford Smith (LSO# 42131S)
Tel: 416.598.8648
Email: csmith@lolg.ca

Matthew Law (LSO# 59856A)
Tel: 416.849.9050
Email: mlaw@lolg.ca

Bradley Vermeersch (LSO# 69004K)
Tel: 416.646.7997

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TAB 6

This is **Exhibit "G"** to the affidavit of Darian Bakelaar, affirmed remotely by Darian Bakelaar stated as being located in the City of Ottawa in the Province of Ontario, before me at the city of Toronto in the province of Ontario, on September 7, 2022, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in blue ink, appearing to read "Jonathan Bitran", is centered within a white rectangular box. The signature is fluid and cursive.

Commissioner of Oaths etc.

Jonathan Bitran
LSO# 62117U

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TAB 8

16. The headings below correspond to the those set out in Appendix “A” to the Notice of Motion. Below, the relevance of each category is set out, as well as why there are no grounds for refusals even though the questions are relevant.

Category 1: Documents certain portions of which are illegible

17. Question 55 relates to the budgets that have been approved by Shaw’s Board of Directors for the past three fiscal years. Shaw has provided copies of such budgets in response to its undertaking. However, certain portions of the documents are illegible. For example, in respect of document SJRB-CCB00895907, high-quality colour copies are required in order to interpret:
- (a) pp5 and 6, which contain colour-coded bar charts;
 - (b) p7, which contains a chart in the lower left in which one of the two lines is invisible;
 - (c) p23, which contains data on the lower line of the left-hand chart which are illegible;
 - (d) pp31, 39042, 46, which have colour-coded charts.
18. Other documents in respect of which this issue has been flagged are identified in Appendix A.
19. Since Shaw has already provided copies of these documents, it is clear that this question was properly asked and must be responded to. It should be uncontroversial that legible copies of responsive documents must be produced.

Category 2: Shaw’s Efficiencies/Synergies Analyses

20. Questions 23-28 ask for Shaw’s analyses of efficiencies or synergies arising from the transaction undertaken since the examinations conducted on April 19 and 20, 2022 pursuant to the Efficiencies Timing Agreement between the Commissioner and Rogers and Shaw. Excluded from the Commissioner’s request are such analyses carried out by the Respondents’ experts.

21. As mentioned above, Rogers' Fresh As Amended Response pleads the applicability of the efficiencies defence, and Shaw's Fresh As Amended Response relies on Rogers' efficiencies submissions. The Commissioner disputes that the efficiencies defence applies in his Fresh As Amended Reply to Rogers. The analyses sought by the Commissioner are, therefore, relevant.
22. Shaw did not provide any of the requested analyses on the basis that it is "not aware of any additional non-privileged documents responsive to this request."³ Such analyses of efficiencies or synergies are not properly the subject of a privilege claim.
23. Solicitor-client privilege will only attach to those communications that fall along the continuum of communications in which a solicitor tenders advice.⁴ Preparing analyses of efficiencies or synergies, which is required for operational purposes (i.e., integration planning for the Proposed Transaction and proposed divestiture), is not part of the "necessary exchange of information of which the object is the giving of legal advice."⁵ The Federal Court of Appeal has made clear that operational documents, even those prepared pursuant to legal advice, are not privileged, except in very limited circumstances:
- Similarly, an organization might receive plenty of legal advice about how to draft a policy against sexual harassment in the workplace. But the operational implementation of that advice – the policy and its circulation to personnel within the organization for the purpose of ensuring the organization functions in an acceptable, professional and business-like manner – is not privileged, except to the extent that the policy communicates the very legal advice given by counsel.⁶
24. Although legal counsel may be involved in the preparation of analyses of efficiencies or synergies carried out by Shaw or its contractors (putting aside those undertaken

³ Appendix "D" of the Affidavit of Darian Bakelaar, at page 3.

⁴ *Samson Indian Nation and Band v Canada*, [1995] 2 FC 762 (FCA), at para 8.

⁵ *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at para 28.

⁶ *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at para 31.

by experts), such analyses are financial in nature and do not contain any legal advice. As such, they are not solicitor-client privileged.

25. Litigation privilege can only attach to “documents whose dominant purpose is preparation for litigation”.⁷ While preparation for litigation may be a purpose behind the creation of analyses of efficiencies or synergies by Shaw or its contractors (as opposed to those created by experts), it is not the dominant purpose. Undoubtedly, the dominant purpose for the preparation of such analyses of efficiencies or synergies is integration planning. To argue otherwise means taking the position that efficiencies are sought primarily for the efficiencies defence, rather than maximizing the value of the transaction.
26. In short, it is clear that there is no reasonable basis for Shaw to withhold the requested analyses of efficiencies or synergies on privilege grounds.

PART V – ORDER SOUGHT

27. The Commissioner respectfully requests that the Tribunal order Shaw to answer the questions listed in Appendix “A” of the Commissioner’s Notice of Motion.

DATED AT OTTAWA, ONTARIO, this 7th day of September, 2022.

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC
Fax: 819.953.9267

John Tyhurst
john.tyhurst@cb-bc.gc.ca

Jonathan Bitran
Tel: 416-605-1471
jonathan.bitran@cb-bc.gc.ca

Kevin Hong

⁷ *Lizotte c Aviva Cie d'assurance du Canada*, 2016 SCC 52 at para 1.

Tel: Tel: 819-665-6381
kevin.hong@cb-bc.gc.ca

Counsel to the Commissioner of Competition

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to produce its final estimates, identifying the draft estimates thereof is a limited amount of additional work.

Category 5: Rogers' Synergies or Efficiencies Analyses

34. The fifth category of questions related to Rogers' internal analysis of synergies or efficiencies. Rogers' representative testified at discovery as to the integration management office and the value capture office analyzing synergies and efficiencies, which, since approximately January has been done internally.¹⁰
35. Any internal analysis is clearly relevant to Rogers' efficiencies defence: it is the factual underpinning of same.
36. There is also evidence that internal analysis exists to be produced:
 - (a) Rogers representative testified that Rogers or its contractors, other than testifying experts, carried out further analysis or calculation of the efficiencies claimed in this case since the ETA examinations in April 2022;¹¹
 - (b) Rogers' representative testified that his belief was that work was under way to analyse and calculate any efficiencies/synergies claimed in respect of the proposed Videotron divestiture by Rogers or its contractors, other than testifying experts;¹²
 - (c) Rogers' representative testified that there would be "periodic roll-ups", aggregating information from different workstreams, that would permit the "summation of sources of synergies cost to achieve";¹³
37. In response to several of the Commissioners' questions, Rogers refused by advising it "will comply with its continuing production obligations" and that the

¹⁰ Transcripts from the Examination for Discovery of Dean Prevost August 25, 2022, pp 42-51 [Exhibit A to Affidavit]

¹¹ Ibid, question 40 p 25.

¹² Ibid, question 47 pp 29-30 and question 52, p 31.

¹³ Ibid, question 107, pp 56-57.

“complete set of documents on which it intends to rely for its efficiencies claims will be included in its expert report” or some variation thereof.¹⁴

38. With respect, Rogers is required to produce all facts and factual documents that are prepared for the purpose of planning its integration or other business purposes such as reporting to stakeholders on its anticipated synergies. Such internal business analyses are not privileged.
39. Solicitor-client privilege will only attach to those communications that fall along the continuum of communications in which a solicitor tenders advice.¹⁵ Preparing analyses of efficiencies or synergies, which is required for operational purposes (i.e., integration planning for the Proposed Transaction and proposed divestiture), is not part of the “necessary exchange of information of which the object is the giving of legal advice.”¹⁶ The Federal Court of Appeal has made clear that operational documents, even those prepared pursuant to legal advice, are not privileged, except in very limited circumstances:

Similarly, an organization might receive plenty of legal advice about how to draft a policy against sexual harassment in the workplace. But the operational implementation of that advice – the policy and its circulation to personnel within the organization for the purpose of ensuring the organization functions in an acceptable, professional and business-like manner – is not privileged, except to the extent that the policy communicates the very legal advice given by counsel.¹⁷

40. Although legal counsel may be involved in the preparation of analyses of efficiencies or synergies carried out by Shaw or its contractors (putting aside those undertaken by experts), such analyses are financial in nature and do not contain any legal advice. As such, they are not solicitor-client privileged.

¹⁴ See Appendix A.

¹⁵ *Samson Indian Nation and Band v Canada*, [1995] 2 FC 762 (FCA), at para 8.

¹⁶ *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at para 28.

¹⁷ *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at para 31.

41. Litigation privilege can only attach to “documents whose dominant purpose is preparation for litigation”.¹⁸ While preparation for litigation may be a purpose behind the creation of analyses of efficiencies or synergies by Rogers or its contractors (as opposed to those created by experts), it is not the dominant purpose. Undoubtedly, the dominant purpose for the preparation of such analyses of efficiencies or synergies is integration planning. To argue otherwise means taking the position that efficiencies are sought primarily for the efficiencies defence, rather than maximizing the value of the transaction.
42. In short, it is clear that there is no reasonable basis for Rogers to withhold the requested analyses of efficiencies or synergies on privilege grounds.

Category 6: Miscellaneous

43. Questions 169-175 relate to a document that is clearly relevant but which has not been produced in final form, which involves a search of two individuals within Rogers. The Commissioner is entitled to the final or most recent draft.
44. Questions 799-801 are clearly relevant as they speak to barriers to entry, both in terms of the capital and efforts required. It is not disproportionate. Given the importance of spectrum to Rogers’ business, it would be expected to have record-keeping in regard to its acquisition of spectrum.

PART V – ORDER SOUGHT

45. The Commissioner respectfully requests that the Tribunal order Rogers to answer the questions listed in Appendix “A” of the Commissioner’s Notice of Motion.

DATED AT OTTAWA, ONTARIO, this 7th day of September, 2022.

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC

¹⁸ *Lizotte c Aviva Cie d'assurance du Canada*, 2016 SCC 52 at para 1.

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TAB 10

THE COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF an Application by the Commissioner of
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COMMISSIONER COMPENDIUM

ATTORNEY GENERAL OF CANADA

Department Of Justice Canada
Competition Bureau Legal Services

Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

Paul Klippenstein

Tel: 819-934-2672
paul.klippenstein@cb-bc.gc.ca

**Counsel to the Commissioner of
Competition**