

PUBLIC

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: October 19, 2022
CT- 2022-002

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

Doc. # 435

CT-2022-002

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 one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATION INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

**ATTORNEY GENERAL OF ALBERTA
VIDEOTRON LTD.**

Intervenors

SHAW RESPONSE TO BELL AND TELUS MOTIONS TO QUASH SUBPOENAS

PART I – GROUNDS ON WHICH THE MOTION IS OPPOSED

1. On Thursday, October 13, 2022, Bell and TELUS moved to quash subpoenas that were served by Shaw upon Bell and TELUS witnesses (the “**Original Bell Subpoenas**” and the “**Original TELUS Subpoenas**”) on October 5, 2022. The Original Subpoenas, however, are no longer extant. They were withdrawn by Shaw on the

morning of Friday, October 14, 2022 and replaced with fresh subpoenas issued that same morning that were narrowed significantly to address concerns raised by Bell and TELUS in their motion materials (the “**Fresh Bell Subpoenas**” and the “**Fresh TELUS Subpoenas**”).

2. The Fresh Bell Subpoenas and Fresh TELUS Subpoenas seek a confined and limited set of documents that are directly relevant to evidence that has now been given in relation to the trial of this proceeding on behalf of the Commissioner by multiple witnesses of both Bell and TELUS, including to their credibility. These documents are properly sought through subpoenas in relation to the evidence of these witnesses at trial.

3. The Fresh Bell Subpoenas and the Fresh TELUS Subpoenas are not elements of the discovery process in this proceeding. Nor are any of the documents in question subject to valid claims of litigation privilege or public interest privilege of the Commissioner of Competition (the “**Commissioner**”).

4. Instead, these documents have been concealed improperly from disclosure by all of Bell, TELUS and the Commissioner of Competition. They have done so in an effort to shield from scrutiny by the Competition Tribunal an ongoing scheme that Bell and TELUS engaged in over a period of months in their efforts to entice and persuade the Commissioner to: (i) take steps to block the pending transaction between Rogers and Shaw; and (ii) continue with this proceeding even after Shaw and Rogers agreed to divest Freedom Mobile to Videotron in mid-June, 2022.

5. Moreover, in direct response to the motions to quash brought by Bell and TELUS, Shaw has brought a Cross-Motion against the Commissioner to require production from him of the very same documents that are the subject of the Fresh Bell Subpoenas and the Fresh TELUS Subpoenas.

6. In the circumstances, there is nothing remotely abusive about the approach Shaw has followed in seeking production of these important documents. Shaw wishes to conduct the trial of this matter on a fair and proper basis, including by ensuring that in considering evidence given by Bell and TELUS, members of the Tribunal are well aware of efforts both companies have made to advance their commercial self-interests by placing in jeopardy the completion of the transactions at issue.

7. In doing so, Bell and TELUS have manifestly sought to limit and impair competition rather than to enhance it.

8. In the circumstances, any assertion of privilege by the Commissioner might make in an effort to conceal from disclosure the documents in question would clearly be abusive in nature, and without merit.

9. The motions to quash should be denied.

10. *First*, as alluded to above, the Fresh Bell Subpoenas and the Fresh TELUS Subpoenas are not an attempt to circumvent elapsed discovery timelines, as Bell and TELUS strenuously argue. The Bell Subpoenas and TELUS Subpoenas were originally and properly served as a means to obtain documents in the possession of witnesses that will testify at trial. The Federal Court of Appeal has made clear that

witnesses in a proceeding may be subpoenaed to produce documents where: (i) the evidence is necessary; (ii) there is no other way of obtaining the evidence; (iii) the applicant is not engaged in a fishing expedition, but has raised a credible ground for review; and (iv) the witness is likely to have relevant evidence on the matter.¹

11. On September 23, 2022, weeks after examinations for discovery in this proceeding were completed, the parties to this proceeding delivered their respective Witness Statements and Expert Reports. The Commissioner delivered, among other things:

- (a) Witness Statements of Blaik Kirby and Stephen Howe of Bell (the “**Bell Witness Statements**”); and
- (b) Witness Statements of Charlie Casey and Nazim Benhadid of TELUS (the “**TELUS Witness Statements**”).

12. There was no basis or reason to subpoena representatives of Bell and TELUS until the Bell Witness Statements and TELUS Witness Statements were delivered.

13. On October 5, 2022, following receipt of the Bell Witness Statements and the TELUS Witness Statements, Shaw served the Original Bell Subpoenas on Mr. Kirby and Mr. Howe, and served the Original TELUS Subpoenas on Mr. Casey and Mr. Benhadid. These Subpoenas required Bell and TELUS witnesses to attend at the

¹ *Tseil-Wauthuth Nation v Canada (Attorney General)*, 2017 FCA 128 at para. 103, with respect to the Federal Court’s subpoena powers under Rule 41(1) of the *Federal Court Rules*. The Competition Tribunal possesses equivalent subpoena powers under Rule 7(1) of the *Competition Tribunal Rules*.

hearing of the merits of this proceeding, as well as to produce a number of specifically identified documents or categories of documents.

14. On the morning of Friday, October 14, 2022, the Original Bell Subpoenas and the Original TELUS Subpoenas were vacated voluntarily, and the Fresh Bell Subpoenas and the Fresh TELUS Subpoenas served in their place, in an effort to address and accommodate concerns and objections raised by Bell and TELUS in their motions to quash. In addition to the above-noted witnesses, the Fresh Subpoenas were served upon Mark Graham of Bell and Daniel Stern of TELUS. That is so because in Affidavits they swore in support of those motions, Messrs Graham and Stern made clear that they are custodians of many if not all of the documents Shaw seeks production of in the Fresh Bell Subpoenas and Fresh TELUS Subpoenas.

15. As counsel for Shaw confirmed during the Case Management Conference conducted by Chief Justice Crampton and Justice Little on the afternoon of Friday, October 2022, Shaw does not require that either of Mr. Graham or Mr. Stern testify at trial. Rather, they can fulfill their obligations under the Fresh Bell Subpoenas and Fresh TELUS Subpoenas by producing the documents in question to Shaw prior to or at the outset of trial.

16. *Second*, the continued prosecution by Bell and TELUS of their motions to quash stand in the face of repeated efforts by Shaw to address their concerns, and save time and resources by reaching a sensible agreement between the parties on this issue. In the days after counsel for Bell and TELUS advised Shaw that they intended to bring their present motions, counsel for Shaw invited counsel for Bell and counsel for TELUS

repeatedly to meet and confer with a view to addressing any legitimate concerns they might have, including by narrowing the scope of Shaw's requests for documents covered by the Subpoenas. Counsel for Bell and Counsel for TELUS did not accept or even respond to any of those repeated invitations before delivering the motions to quash.

17. Counsel for Shaw continued efforts to reach a mutually acceptable agreement between parties even after Bell and TELUS served their motions to quash. Both during and immediately following the Case Management Conference held to address this and other issues on October 14th, 2022, and in line with input from Chief Justice Crampton, counsel for Shaw proposed to counsel for Bell and TELUS a counsel-eyes only review of the documents in question.

18. Bell and TELUS rejected the counsel-eyes-only offer, as supposedly tantamount to producing the documents to Shaw. This is simply untrue. As Chief Justice Crampton evidently recognized during the October 14th, 2022 Case Management Conference, allowing review on a counsel-eyes only basis could narrow significantly or potentially even eliminate the issues between parties.

19. *Third*, the documents in question are limited in number and clearly relevant. They comprise submissions made by Bell and TELUS to the Competition Bureau regarding the proposed business combinations between Shaw, Rogers and Videotron. They are directly relevant to evidence that has now been given in relation to trial on behalf of the Commissioner concerning the merits of the Commissioner's complaints and concerns pertaining to the transaction at issue, including to their

credibility. Bell and TELUS actively lobbied the Bureau and the Commissioner of Competition over a period of months, in an effort to persuade the Commissioner to commence these proceedings against Rogers and Shaw. They did so during a series of meetings with representatives of the Competition Bureau in 2021 and 2022, as well as by filing “submissions” with the Bureau. The Fresh Subpoenas seek production of those submissions.

20. The only other documents sought by the Subpoenas are network-sharing agreements between Bell and TELUS that are plainly relevant in view of evidence provided by the Bell Witness Statements and TELUS Witness Statements, as well as in view of the issues raised in this proceeding.

21. There can be no serious suggestion that the Fresh Bell Subpoenas or Fresh TELUS Subpoenas are overbroad, or that complying with them would be time consuming, unduly complex or unduly burdensome. There are likely fewer than 20 documents that will be required to be produced by each of Bell and TELUS if the Fresh Subpoenas are enforced. Messrs Graham and Stern have easy and immediate access to all of them.

22. *Finally*, the documents in question are not subject to a valid claim of litigation privilege or public interest privilege by the Commissioner. It is a matter of basic fairness that Shaw should have these documents in advance, and for use, at trial. There is no tenable basis for resisting their production.

23. Even if none of this were true – and it certainly is – any claim of privilege the Commissioner might assert has clearly been waived, including by the production by

the Commissioner to Shaw and Rogers of a variety of documents provided to the Competition Bureau by Bell and TELUS. These include, among others, documents pertaining to the submissions in question as well as portions of the submissions themselves.

24. The Commissioner has no right to selectively waive privilege in this proceeding.

PART II – ORDERS REQUESTED

25. For all of these reasons, Shaw respectfully requests that the motions to quash the Fresh Subpoenas be denied and that the documents that are the subject of those Subpoenas be ordered to be produced forthwith.

PART III – DOCUMENTARY EVIDENCE TO BE RELIED ON

26. The Affidavit of Tanya Barbiero, sworn on October 19, 2022; and

27. Such further and other evidence as counsel may advise and the Tribunal may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of October, 2022.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Kent E. Thomson (LSO#24264J)
Tel: 416.863.5566
kentthomson@dwpv.com

Steven G. Frankel (LSO#58892E)
Tel: 416.367.7441
sfrankel@dwpv.com

Maureen Littlejohn (LSO#570100)
Tel: 416.368.6916
mlittlejohn@dwpv.com

Counsel for the Respondent,
Shaw Communications Inc.

TO: **DEPARTMENT OF JUSTICE CANADA**
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

John S. Tyhurst
Derek Leschinsky
Katherine Rydel
Ryan Caron
Jonathan Bitran
Kevin Hong
Jasveen Puri

Tel: 819.956.2842 / 613.897.7682
Fax: 819.953.9267

Counsel for the Commissioner of Competition

AND TO: **BLAKE, CASSELS & GRAYDON LLP**
199 Bay Street
Suite 400, Commerce Court West
Toronto, ON M5L1A9

Randall Hofley (LSO #31633L)

Tel: 416.863.2387
randall.hofley@blakes.com

Nicole Henderson (LSO #56799K)

Tel: 416.863.2399
nicole.henderson@blakes.com

Counsel for the Moving Party, BCE Inc.

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, On M5X 1B8

Christopher Naudie (LSO# 39596P)
Tel: 416.862.6811
cnaudie@osler.com

Adam Hirsh (LSO# 5523Q)
Tel: 416.862.6635
ahirsh@osler.com

Michelle Lally (LSO# 33337B)
Tel: 416.862.5925
mlally@osler.com

Kaeleigh Kuzma (LSO# 55271B)
Tel: 403.260.7046
kkuzma@osler.com

Danielle Chu (LSO# 78576V)
Tel: 416.862.6803
dchu@osler.com

Counsel for the Moving Party, TELUS Communications Inc.

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

Jonathan Lisus (LSO# 32952H)
Tel: 416.59878736
jlisus@lolg.ca

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

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

Bradley Vermeersch (LSO# 69004K)
Tel: 416.646.7997
bvermeersch@lolg.ca

Counsel for the Respondent, Rogers Communications Inc.