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

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. and SHAW COMMUNICATIONS INC.

Respondents

- and -

ATTORNEY GENERAL OF ALBERTA and VIDEOTRON LTD.

Intervenors

FACTUM

(Motion to Quash Subpoenas Issued on October 14, 2022)

October 24, 2022

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PART I - OVERVIEW

1. This is a motion to quash:
 - (a) a subpoena issued by the Registrar of the Tribunal on October 14, 2022 to Messrs. Nazim Benhadid (“**Benhadid**”), Charlie Casey (“**Casey**”), and Daniel Stern (“**Stern**”) pursuant to Section 7(1) of the Competition Tribunal Rules, SOR/2008-141 (the “**Competition Tribunal Rules**”) at the request of Rogers Communications Inc. (“**Rogers**”, and the “**Rogers Second Subpoena**”); and
 - (b) a subpoena issued by the Registrar of the Tribunal on October 14, 2022 to Benhadid, Casey and Stern pursuant to Section 7(1) of the *Competition Tribunal Rules* at the request of Shaw Communications Inc. (“**Shaw**”, and the “**Shaw Second Subpoena**”).
2. The Rogers Second Subpoena and Shaw Second Subpoena (the “**Second Subpoenas**”) replace earlier subpoenas obtained by the Respondents on October 3 and 5, respectively (the “**Original Subpoenas**”).
3. The Second Subpoenas are an abuse of process. They seek to do an end run around the discovery and pre-hearing process that is set out in the *Competition Tribunal Rules* and which has been rigorously managed by the Competition Tribunal (the “**Tribunal**”) over a period of many months through its case management orders.
4. The Second Subpoenas are also a fishing expedition, seeking the production of highly confidential and commercially and competitively sensitive information from one of the Respondents’ main competitors, including materials prepared for TELUS’ Board of

Directors (“**Board**”) and executive leadership team (“**ELT**”), and submissions made to the Competition Bureau (the “**Bureau**”) pursuant to Section 29 of the *Competition Act* (the “**Act**”).¹

5. The Respondents have not satisfied their burden to show the information sought by the Subpoenas is relevant and significant to the issues in the case and the factual determinations that the Tribunal must make. Indeed, their only evidence are two law clerk affidavits attaching a number of documents without explanation.

6. The Respondents’ entire theory of relevance appears to be that they hope to fish for documents that they will use to impeach the credibility of Benhadid and Casey (the “**TELUS Witnesses**”). However, they have not sought documents that actually relate to the substance of the TELUS Witnesses’ evidence (respectively, the “**Benhadid Witness Statement**” and the “**Casey Witness Statement**”, and collectively the “**TELUS Witness Statements**”). Thus, even if it were a proper use of a subpoena to fish for documents going solely to credibility – which it is not – the documents sought are not relevant to the credibility of the TELUS Witnesses, given that the documents have nothing to do with the facts in the TELUS Witness Statements themselves.

7. In substance, the Second Subpoenas are simply an attempt to obtain third party discovery, and to impose costs and burdens on a third party who has come forward to provide evidence to the Tribunal. This is evident, among other things, from the fact that the Second Subpoenas seek documents that (a) were not authored by Benhadid or Casey; (b) are not in either of Benhadid or Casey’s possession, power or control; (c) relate

¹ [R.S.C. 1985, c. C-34.](#)

to matters that Benhadid and Casey cannot speak to; and (d) name Stern, one of TELUS' in-house counsel, for the sole purpose of obtaining production of TELUS documents, when Stern did not otherwise author the documents, did not provide a witness statement, and the Respondents concede they have no intention of asking him to testify.

8. Moreover, the Second Subpoenas effectively seek hearsay and opinion evidence that is inadmissible.

9. Further, the Shaw Second Subpoena seeks documents from TELUS that are already in the Commissioner's possession, and are either irrelevant, and/or subject to a claim of privilege by the Commissioner. It is an abuse of process to attempt to compel production of these documents through the backdoor, via a subpoena *duces tecum*, when Shaw failed to seek these documents directly from the Commissioner through the discovery and pre-hearing process that the parties agreed to. Moreover, and critically, these documents are irrelevant and/or privileged. They are not compellable by subpoena or otherwise and are not admissible as evidence in the proceedings in any circumstance.

10. Finally, although the Respondents have indicated that production of the documents in question should be made to them in advance of the hearing, there is no basis under the *Competition Tribunal Rules* or otherwise at law to compel production of the documents demanded by the Respondents prior to the attendance of the TELUS Witnesses at the hearing of the Section 92 Application.

11. Accordingly, the Second Subpoenas should be quashed, with costs. In any event, TELUS should be awarded its costs for the time spent to respond to the Original

Subpoenas, which were voluntarily abandoned by the Respondents after receiving TELUS' motion record.

PART II - FACTS

A. TELUS

12. TELUS Communications Inc. is a national telecommunications company that provides a wide range of products and services, including wireless services.² TELUS Communications Inc. is a subsidiary of TELUS Corporation, a public holding company incorporated under the laws of British Columbia.³ For ease of reference, TELUS Communications Inc. and TELUS Corporation are referred to collectively as "**TELUS**".

13. Benhadid, Casey and Stern are employees of TELUS.⁴

B. Background

14. On March 15, 2021, Rogers announced its proposed acquisition of Shaw (the "**Proposed Transaction**").⁵

15. On May 5, 2021, the Bureau determined that the Proposed Transaction raised a reasonable prospect of litigation and commenced the implementation of a litigation hold.⁶

16. On June 18, 2021, the Commissioner initiated a Section 10 inquiry under the *Act* in respect of the Proposed Transaction (the "**Inquiry**").⁷ In furtherance of this Inquiry, on

² Affidavit of Daniel Stern, sworn October 13, 2022 ("Stern Affidavit"), para. 3, Motion Record of Telus dated October 13, 2022 ("*Telus MR*"), Tab 2.

³ Stern Affidavit, para. 3, *Telus MR*, Tab 2.

⁴ Stern Affidavit, para. 1, *Telus MR*, Tab 2.

⁵ Stern Affidavit, para. 4, *Telus MR*, Tab 2.

⁶ Email of Melissa Fisher dated May 5, 2021, Exhibit "A" to the Affidavit of Daniel Stern, sworn October 24, 2022 ("Second Supplementary Stern Affidavit").

⁷ Stern Affidavit, para. 5, *Telus MR*, Tab 2.

August 1, 2021, the Commissioner obtained an Order from the Federal Court issued to TELUS under Section 11 of the *Act* (the “**Section 11 Order**”).⁸

17. Pursuant to the Section 11 Order, TELUS was compelled to produce to the Bureau an enormous volume of records and data covering the period of January 1, 2017 to July 1, 2021 and relating primarily to the TELUS wireless business and the Proposed Transaction.⁹

18. On November 29, 2021, TELUS completed the production of the records and data required by the Section 11 Order. In response to the Section 11 Order, TELUS produced approximately 488,209 documents and approximately 33 gigabytes of data, covering a period of over four years.¹⁰ The collection, review and production of these documents and data required the commitment of significant resources over a four month period, involved dozens of TELUS employees, external counsel and third-party eDiscovery teams, and entailed significant cost.¹¹ TELUS’ response to the Section 11 Order included a significant amount of confidential and competitively sensitive information relating to its businesses and strategies.¹²

19. In addition to complying with the Section 11 Order, over the course of the Commissioner’s Inquiry, TELUS also produced additional documents and information to the Bureau relating to its businesses in response to information requests and/or as part of submissions to the Bureau.¹³

⁸ Stern Affidavit, paras. 1 and 5 *Telus MR*, Tab 2.

⁹ Stern Affidavit, para. 6, *Telus MR*, Tab 2.

¹⁰ Stern Affidavit, para. 7, *Telus MR*, Tab 2.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Stern Affidavit, para. 8, *Telus MR*, Tab 2.

20. All of TELUS' submissions to the Bureau included a significant amount of confidential and highly competitively sensitive information relating to TELUS' businesses (particularly businesses other than its wireless business) and current and future business strategies.¹⁴

21. Given the confidential and competitively sensitive nature of these submissions, and the fact that the Respondents are two of TELUS' direct competitors and one, Rogers, is a significant supplier of broadcast content to TELUS, at the time these submissions were made to the Bureau TELUS requested: (i) confidential treatment in respect of its productions and/or submissions pursuant to Section 29 of the *Act* and the Bureau's policies and practices relating to confidentiality; and (b) that the Commissioner not waive any applicable privilege and vigorously assert public interest privilege and all other applicable forms of privilege in response to any third party's attempts to gain access to its productions and or submissions (or any information therein).¹⁵

22. Accordingly, at the time such submissions were made to the Commissioner, they were made on the basis that TELUS expected that the Commissioner would vigorously contest any attempt by the Respondents or any other third party to gain access to these submissions.¹⁶

23. Similarly, TELUS also made submissions to Innovation, Science and Economic Development Canada ("**ISED**") in connection with ISED's enforcement of the *Radiocommunication Act*¹⁷ as it relates to the application to transfer Shaw's spectrum

¹⁴ Stern Affidavit, paras. 7-9 *Telus MR*, Tab 2.

¹⁵ Stern Affidavit, paras. 7-9, *Telus MR*, Tab 2.

¹⁶ Stern Affidavit, para. 9, *Telus MR*, Tab 2; Supplementary Affidavit of Daniel Stern, sworn October 17, 2022 ("Stern Supplementary Affidavit"), paras. 11-12.

¹⁷ [R.S.C., 1985, c. R-2](#).

licenses to Rogers. Those submissions include confidential and competitively sensitive information and were made on the explicit basis that they would be treated confidentially, not be disclosed to any third party, and would be subject to a claim of public interest privilege.¹⁸

24. On May 8, 2022, the Commissioner commenced an application under Section 92 of the Act for an order to enjoin the Proposed Transaction (the “**Section 92 Application**”). Following a number of case management conferences, on June 17, 2022, the Tribunal issued a scheduling order (the “**June Scheduling Order**”) that set out all of the pre-hearing, hearing, and post-hearing steps related to the Section 92 Application (the “**Proceedings**”).¹⁹

25. The Proceedings are being conducted on an expedited schedule and have been actively case managed over a period of many months, with the object of ensuring that the matter is adjudicated in a timely manner.²⁰

26. On July 15, 2022, the Commissioner delivered his Affidavit of Documents and associated productions in support of his Section 92 Application (“**AoD**”). In the Commissioner’s AoD, the Commissioner identified approximately 487,787 items that were records or data produced by TELUS pursuant to the Section 11 Order.²¹ The Commissioner also identified approximately 135 additional documents relating to TELUS that were obtained through other channels and means outside of the Section 11 Order.²²

¹⁸ Stern Supplementary Affidavit, para. 14.

¹⁹ Stern Affidavit, para. 10, *Telus MR*, Tab 2.

²⁰ Stern Affidavit, para. 11, *Telus MR*, Tab 2.

²¹ Stern Affidavit, para. 12, *Telus MR*, Tab 2.

²² *Ibid.*

The Commissioner claimed privilege over certain TELUS submissions that are captured by the Shaw Second Subpoena (in particular a submission dated December 3, 2021).

27. Pursuant to the June Scheduling Order, examinations for discovery were to be completed by August 26, 2022 and any motions arising from examinations for discovery were to be heard by September 13, 2022. The *Competition Tribunal Rules* do not provide for third-party discovery, and Rogers and Shaw did not request or seek any third-party discovery of TELUS or its employees as part of the pre-hearing proceedings related to the Section 92 Application.²³

28. As part of the Section 92 Application, the Commissioner requested that TELUS provide witness statements on certain discrete topics relevant to the Proceedings. In response to this request, on September 21, 2022, TELUS provided two separate witness statements – one from Benhadid and one from Casey. The Commissioner filed the TELUS Witness Statements with the Tribunal on Friday September 23, 2022.²⁴

29. The TELUS Witness Statements are limited in scope. The Casey Witness Statement describes changes in Shaw's competitive intensity since Rogers announced the Proposed Transaction, with a focus on certain data that reflects a change in Shaw's "net ports" (the number of ports into a carrier minus the number of ports out from the carrier during a particular period). The Benhadid Witness Statement is limited to describing the importance of TELUS' wireline network to its wireless network performance and reliability.²⁵

²³ Stern Affidavit, paras. 19 and 25, *Telus MR*, Tab 2.

²⁴ Stern Affidavit, para. 13, *Telus MR*, Tab 2.

²⁵ Stern Affidavit, para. 14, *Telus MR*, Tab 2.

30. The hearing of the Commissioner's Section 92 Application is scheduled to commence on November 7, 2022 (the "**Hearing**").²⁶

C. The Rogers Second Subpoena

31. On October 3, 2022, Rogers obtained a subpoena (the "**Rogers Original Subpoena**") that was sweeping in its scope. Among other broad and far-reaching demands, the Rogers Original Subpoena demanded (at paragraph 2(1)) that TELUS produce: "All documents dated on or after May 7, 2022, reviewed, discussed or prepared by or for Telus Communications Inc.'s ("Telus") board of directors, executive leadership team or senior leadership team that consider the proposed divestiture of Freedom Mobile Inc. to Videotron Inc."²⁷ After receiving TELUS' motion materials moving to quash the Rogers Original Subpoena, Rogers promptly abandoned it, and issued the Rogers Second Subpoena.²⁸

32. The Rogers Second Subpoena contains a variation of the demand previously set out at paragraph 2(1) of the Rogers Original Subpoena. More particularly, the Rogers Second Subpoena demands that TELUS produce:

1. All memoranda or presentations dated on or after May 7, 2022 to Telus Communications Inc.'s ('Telus') board of directors or executive leadership team considering the proposed divestiture of Freedom Mobile Inc. to Videotron Inc.²⁹

33. Given the nature of the Rogers Second Subpoena, the documents sought will necessarily contain highly confidential, competitively sensitive forward-looking

²⁶ Stern Affidavit, para. 15, *Telus MR*, Tab 2.

²⁷ Rogers Cover Letter and Subpoena dated October 3, 2022, Exhibit B to the Stern Affidavit, *Telus MR*, Tab 2.B.

²⁸ Stern Supplementary Affidavit, para. 4.

²⁹ Rogers Second Subpoena, Exhibit A to the Supplementary Stern Affidavit.

information regarding TELUS' commercial plans in light of a potential divestiture of Freedom Mobile to Videotron. Such information is highly confidential even within TELUS itself. The TELUS Witnesses are not on the TELUS Board or ELT. It is highly unlikely they would have been involved in the preparation of any such documents, nor will they be in a position to speak to them.³⁰

D. The Shaw Subpoena

34. Like Rogers, on October 5, 2022, Shaw obtained a subpoena (the "**Shaw Original Subpoena**") demanding several broad categories of documents. More particularly, paragraph 2 of the Shaw Original Subpoena required Benhadid and Casey to produce, at the time of their attendance at the Hearing, the following documents relating to TELUS:

1. All emails and other documents dated on or after May 7, 2022 that were sent or received by Darren Entwistle or Charlie Casey that consider the proposed divestiture of Freedom Mobile Inc. to Videotron Inc.
2. All documents dated on or after March 15, 2021 provided by or on behalf of Telus Communications Inc. and/or its various subsidiaries and affiliates ("TELUS") to the Competition Bureau prior to, during, or after meetings and/or calls between representatives from TELUS and representatives from the Competition Bureau concerning or addressing a proposed transaction involving Shaw communications Inc. ("Shaw") and Rogers Communications Inc. ("Rogers").
3. All documents dated on or after March 15, 2021 provided by or on behalf of TELUS to Industry, Science and Economic Development Canada ("ISED") prior to, during, or after meetings and/or calls between representatives of TELUS and representatives of ISED concerning or addressing a proposed transaction involving Shaw and Rogers;
4. All documents dated on or after July 1, 2020 provided by or on behalf of TELUS to the Competition Bureau prior to, during, or after meetings and/or calls between representatives from TELUS and representatives from the Competition Bureau concerning or addressing plans of BCE Inc. or its subsidiaries or affiliates (collectively "Bell") to acquire Shaw, including all notes from any such meetings and/or calls, as well as any written

³⁰ Stern Supplementary Affidavit, para. 19.

communications between representatives of TELUS and representatives of the Bureau concerning or addressing Bell's plans to acquire Shaw; and

5. All documents dated on or after July 1, 2020 provided by or on behalf of TELUS to ISED prior to, during, or after meetings and/or calls between representatives from TELUS and representatives from ISED concerning or addressing Bell's plans to acquire Shaw, including all notes from any such meetings and/or calls, as well as any written communications between representatives of TELUS and representatives of ISED concerning or addressing Bells' plans to acquire Shaw.³¹

35. After receiving TELUS' motion materials seeking to quash the Shaw Original Subpoena, including TELUS' evidence that it in fact had no documents responsive to Paragraphs 2(4) and 2(5) of the Shaw Original Subpoena, Shaw abandoned it. In its place, Shaw obtained the Shaw Second Subpoena. Paragraph 2 of the Shaw Second Subpoena now demands that TELUS produce the following documents:

1. Written submissions dated on or after March 15, 2021 provided by or on behalf of TELUS Communications Inc. and/or its various subsidiaries and affiliates ("TELUS") to representatives of the Competition Bureau concerning the proposed transaction involving Shaw Communications Inc. ("Shaw") and Rogers Communications Inc. ("Rogers"), including any written submission provided to representatives of the Competition Bureau on December 3, 2021;

2. Written submissions dated on or after March 15, 2021 provided by or on behalf of TELUS to representatives of Industry, Science and Economic Development Canada ("ISED") concerning the proposed transaction involving Shaw and Rogers;

3. Written submissions dated on or after June 17, 2022 provided by or on behalf of TELUS to representatives of the Competition Bureau concerning the proposed transaction involving Shaw, Rogers and Quebecor Inc.; and

4. Written submissions dated on or after June 17, 2022 provided by or on behalf of TELUS to representatives of ISED concerning a proposed transaction involving Shaw, Rogers and Quebecor Inc.³²

³¹ Stern Affidavit, para. 24 and Exhibit "C", *Telus MR*, Tabs 2 and 2.C.

³² Stern Supplementary Affidavit, para. 19 and Exhibit "B".

36. Thus, Paragraph 2(1) of the Shaw Second Subpoena overlaps with Paragraph 2(2) of the Shaw Original Subpoena; Paragraph 2(2) of the Shaw Second Subpoena overlaps with paragraph 2(3) of the Shaw Original Subpoena; and Paragraphs 2(3) and 2(4) of the Shaw Second Subpoena are new requests, focused on submissions regarding the proposed transaction involving Shaw, Rogers and Quebecor.

E. Shaw Second Subpoena Demands Documents Already Provided to the Commissioner

37. Paragraphs 2(1) and 2(3) of the Shaw Second Subpoena, by their terms, exclusively demand submissions that TELUS previously provided to the Commissioner. TELUS understands that the Commissioner determined that only one such submission, a submission dated December 3, 2021, is relevant, but is subject a claim of litigation privilege by the Commissioner. It is important to note that, as reflected in the Commissioner's AoD, the Commissioner did provide to the Respondents, on a Confidential Level A basis, the ordinary course business documents attached to this submission which related to wireless matters. TELUS has no authority to waive the litigation privilege asserted by the Commissioner over the submissions. But, to be clear, TELUS vehemently opposes any such waiver by the Commissioner, given the highly confidential, commercially and competitively sensitive nature of the document, and the fact that it was produced on a confidential basis pursuant to Section 29 of the *Act*, and with the full expectation that it would be protected by privilege at all times.

38. TELUS' other submissions to the Bureau, which are not included on the Commissioner's AoD, are not relevant to the Proceedings. These submissions are not related to the wireless markets, matters covered by the Section 92 Application, or the matters covered by the TELUS Witness Statements.

39. Again, these submissions are highly confidential, and contain commercially and competitively sensitive information relating to TELUS' businesses (particularly other than TELUS' wireless business) and TELUS' current and future business strategies. If this information was disclosed, it would cause severe prejudice and competitive harm to TELUS. As indicated above, these submissions were made to the Bureau on a confidential basis pursuant to Section 29 of the *Act* and most importantly with the full expectation that they would also be protected by privilege at all times.

PART III - ISSUES, ARGUMENT AND LAW

40. The Second Subpoenas should be quashed because they are an abusive fishing expedition and undermine the Tribunal's rules and processes.

A. Legal Framework

41. In *Commissioner of Competition v. Canada Pipe* ("**Canada Pipe**"), the Tribunal confirmed that using a subpoena *duces tecum* to make broad requests for documents from a third-party witness once a proceeding is underway is tantamount to an abuse of the Tribunal's process.³³

42. In granting the Commissioner's motion to quash the subpoena, the Tribunal held that it was "axiomatic" that documents not relied on by the Commissioner and which the Commissioner is not obligated to disclose cannot be otherwise ordered produced at the hearing through a subpoena *duces tecum*.³⁴

³³ *Commissioner of Competition v. Canada Pipe Company*, [2004 CACT 5](#) (CanLII), 2004 CarswellNat 6992.

³⁴ *Canada Pipe* at [para. 7](#).

43. As the Tribunal held, granting such a subpoena would undermine the Tribunal's authority to oversee the evidentiary basis upon which its proceedings would be conducted, would improperly extend the disclosure of documents beyond the standard established by the *Competition Tribunal Rules* (and affirmed by the Tribunal), and would lengthen the hearing considerably, in contrast to the purpose and object of the *Competition Tribunal Rules*.³⁵

44. Although *Canada Pipe* was decided under the prior version of the *Competition Tribunal Rules*,³⁶ and the Commissioner's disclosure obligations were limited to the documents that the Commissioner intended to rely upon at the hearing because it was not a Section 92 application,³⁷ the Tribunal's reasoning has even more force and effect in this case, where the Commissioner is under an obligation to make full disclosure of all relevant documents.

45. The Tribunal's decision in *Canada Pipe* reflects the fact that the Tribunal was established as a specialized statutory tribunal with expertise in competition matters with a mandate to provide for the expeditious and timely adjudication of applications under the *Act*.³⁸ To reflect and achieve these goals, the Tribunal is subject to a set of rules that provide for a streamlined discovery process and active case management in respect of all pre-hearing matters leading up to the hearing of an application under the *Act*, as well

³⁵ *Canada Pipe* at [para. 7](#).

³⁶ *Competition Tribunal Rules*, [SOR/94-290](#).

³⁷ See Rules 4.1 and 4.2 (reliance disclosure for all applications) and Rules 13-16 (broader discovery for only section 92 applications) of the *Competition Tribunal Rules*, [SOR/94-290](#).

³⁸ *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at [paras. 46-52](#) and Rule 2(1) of the *Competition Tribunal Rules*, "deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit."

as processes to ensure an efficient hearing in accordance with the parties' agreed upon timetable.

46. The Tribunal's holding in *Canada Pipe* is consistent with the jurisprudence of the Federal Court. That jurisprudence confirms that a subpoena should be quashed, among other reasons, where:

- (a) it seeks material that is privileged or other evidence that would be inadmissible at the hearing;³⁹ or
- (b) the evidence from the witness subpoenaed is not relevant and significant in respect of the issues the Court must decide.⁴⁰

47. The burden is on the party seeking to sustain the subpoena to establish the relevance and significance of the sought-after testimony and documents.⁴¹ A party must do more than merely assert relevance; they must establish that the evidence will likely be relevant.⁴²

48. A subpoena will also be quashed if it is an abuse of process, for example, because it amounts to a fishing expedition.⁴³ In fact, even if a subpoena comes close to being an abuse of process, it may be quashed.⁴⁴

³⁹ *Canada (Citizenship and Immigration) v. Mahjoub*, [2010 FC 1193](#) ("Mahjoub") at [para. 7](#), cited with approval in *Yeager v. Canada (Attorney General)*, [2015 FC 978](#) and *Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333) v. Viterra Inc.*, [2021 FC 187](#) at [paras. 16-17](#).

⁴⁰ *Zundel (Re)*, [2004 FC 798](#) at paras. [5-7](#) and *Laboratoires Servier v. Apotex Inc.*, [2008 FC 321](#) at [para. 19](#).

⁴¹ *Mahjoub* at [para. 9](#).

⁴² *Mahjoub* at [para. 8](#).

⁴³ *Canada Pipe* at [para. 7](#); *Laboratoires Servier v. Apotex Inc.*, [2008 FC 321](#) at [para. 21](#), cited with approval in *Agnaou c. Canada (Services des poursuites pénales)*, [2022 CAF 140](#) at [para. 81](#).

⁴⁴ *Laboratoires Servier v. Apotex Inc.*, [2008 FC 321](#) at [para. 21](#)

49. These principles from *Canada Pipe* and the Federal Court jurisprudence are wholly dispositive of this motion.

B. The Second Subpoenas Do an End-Run around the Tribunal Rules and Processes

50. First, the Second Subpoenas attempt to do an end run around the *Competition Tribunal Rules* and processes.

51. These Proceedings have been the subject of robust and active case management by the Tribunal over a period of many months and are proceeding on an expedited timetable. The Tribunal's June Scheduling Order contemplated comprehensive discovery and pre-hearing disclosure processes that governed all Parties to the Proceedings.

52. The Tribunal issued the June Scheduling Order to satisfy the Parties' requests that this matter proceed to a hearing as soon as practicable. As set forth in the June Scheduling Order, it was issued having regard to, among other things, the Tribunal's *Practice Direction Regarding Timelines and Scheduling for Proceedings before the Tribunal*, and the Tribunal's *Practice Direction Regarding An Expedited Proceeding Process Before the Tribunal* (January 2019).

53. The June Scheduling Order further provided particulars relating to, *inter alia*, the dates for which the Parties were to: approve of discovery plans, conduct oral examinations for discovery, conduct follow-up examinations for discovery, file any motions arising from examinations for discovery, provide answers to undertakings or refusals, file and serve documents relied upon including witness statements and expert reports, and to respond to other Parties' witness statements and expert reports. The June

Scheduling Order set out the established process for the Proceedings, to which all Parties agreed.

54. To date, the Respondents have had ample opportunity to participate in the discovery and pre-hearing disclosure processes established by the Tribunal. The Respondents have had numerous opportunities to attempt to seek the documents in question through the available discovery channels set out under the *Competition Tribunal Rules*. If, for example, Shaw had any concern with the scope or sufficiency of Commissioner's AoD, or the Commissioner's claim of privilege over the specific document(s) that it now seeks, it was incumbent on Shaw to address that issue directly with the Commissioner through a challenge to the sufficiency of the Commissioner's AoD, or a motion arising from discovery. It is not appropriate, and abuses the Tribunals' rules and processes, for the Respondents to attempt to obtain these documents through the backdoor, via a subpoena *duces tecum*, served on the eve of trial. The Tribunal's findings in *Canada Pipe* are dispositive.

55. Moreover, Section 71 of the *Competition Tribunal Rules* provides that if a document has not been disclosed in an affidavit of documents or in pre-hearing disclosure, or if privilege has not been waived for a document, the document "shall not be received in evidence at the hearing of an application unless the Tribunal orders otherwise" (emphasis added).

56. To the extent that the Second Subpoenas seek the production of documents that have not been disclosed in the Commissioner's AoD or through pre-hearing disclosure, or are subject to a claim of privilege, these documents cannot be received into evidence,

absent an order of the Tribunal. The Respondents have not sought and have not obtained any such order, reinforcing the improper nature of their demands.

C. The Respondents Have Not Shown the Documents Sought are Relevant and Significant. They Are Engaged in a Fishing Expedition.

57. Second, the Respondents have not met their burden of establishing that the documents in question are relevant and significant to the issues the Tribunal must decide. This burden is not to be taken lightly in a case like this, where the Respondents are seeking information of the most confidential, competitively sensitive nature from their direct competitor, a non-party to these proceedings. The Respondents have failed to adduce any evidence to sustain their request, beyond two law clerk affidavits.

58. The evidence set out in the TELUS Witness Statements is narrow and speaks only to discrete factual issues: Casey's evidence is limited to porting data and observations about Shaw's competitive intensity based on such porting data, and Benhadid's evidence is limited to the technical and operational relationship between wireline and wireless network infrastructure, the benefits of network ownership from the perspective of reliability and performance and the fact that TELUS competes for customers with Rogers, Bell, Shaw, and others on the basis of network reliability and capability. The Subpoenas do not seek documents that relate to this evidence in any manner.

59. Moreover, with respect to the Shaw Second Subpoena and TELUS' submissions to the Commissioner, with the exception of one document, these submissions do not even relate to the wireless market. They have nothing to do with the issues on the Section 92 Application. Leaving aside any other argument, this provides a complete answer with

respect to the request for these documents. As the Tribunal recognized in *Canada Pipe*, it is “axiomatic” that documents that the Commissioner has no obligation to disclose to the Respondents (e.g., because they are irrelevant), cannot be ordered to be produced at the hearing by a third party through a subpoena *duces tecum*. Even in the case of the one submission that is arguably relevant, significant portions of the document have nothing to do with the wireless market and the Commissioner has already produced the TELUS business documents that were exhibits to this submission that it determined to be relevant to the Proceedings.

60. In fact, the only purported basis for relevance asserted by the respondents thus far is to allegedly test the credibility of the TELUS witnesses. The Respondents apparently aim to do this by fishing for evidence to show the TELUS Witnesses’ employer, TELUS, was opposed to the Proposed Transaction. Even if this was a proper use of a subpoena – which it isn’t – the Second Subpoenas are neither necessary, nor relevant, to achieving this objective. The documents sought can have no bearing on the TELUS Witnesses’ credibility, given that the documents have nothing to do with the facts that the TELUS Witnesses speak to. Moreover, TELUS has never denied that it opposes the Proposed Transaction and does not believe it to be good for TELUS or in the best interests of ordinary Canadians – it has already taken this position publicly in its submissions and testimony before the CRTC.⁴⁵ However, that does not make the documents necessary, relevant or significant to the substantive issues that the Tribunal must decide on the

⁴⁵ Transcript from the Cross-Examination of Daniel Stern, October 20, 2022 “Stern Cross”, p. 77, lines 2-25; p. 78; p. 79, lines 1-10.

Section 92 Application. Again, the Respondents' requests are nothing more than a fishing expedition.

D. The Respondents are Effectively Seeking Third-Party Discovery

61. The purpose of a subpoena *duces tecum* is to compel production of documents into court for the purpose of proving relevant facts at issue; the purpose is not to allow for discovery of documents of persons who are not parties to the action.⁴⁶

62. The *Competition Tribunal Rules* do not contemplate any production or discovery of third parties. To the extent the Federal Court Rules apply to fill the gap (an issue that to TELUS' knowledge has never been directly addressed in the case law), production and discovery of third parties is an exceptional remedy and may only be granted with leave.⁴⁷ No such motion was brought by the Respondents at any stage of these Proceedings.

63. The Rogers Second Subpoena seeks all memoranda or presentations over a six-month period, made to TELUS' Board or ELT considering the proposed divestiture of Freedom Mobile Inc. to Videotron Inc. The materials sought are of a highly confidential nature, containing competitively sensitive, forward-looking information. Such information is highly confidential within TELUS and will likely include a considerable amount of information that is protected by solicitor-client privilege.⁴⁸

⁴⁶ *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1990 CanLII 5609](#), 112 A.R. 197 at [para. 13](#) (AB QB).

⁴⁷ See [Rules 233 and 238](#) of the *Federal Courts Rules*, SOR/98-106.

⁴⁸ Stern Supplementary Affidavit at para. 19.

64. Similarly, the Shaw Second Subpoena seeks documents prepared by counsel that are highly confidential and contain commercially and competitively sensitive information relating to TELUS' current and future business strategies.⁴⁹

65. As noted above, the Second Subpoenas go well beyond the scope of the TELUS Witness Statements, which are limited in each case to narrow and discrete issues that are unrelated to the subject matter of the specific demands. In fact, the Second Subpoenas do not purport to be directed at evidence in Benhadid or Casey's possession, power or control, or which they can actually speak to. It is telling that the Second Subpoenas name Stern, one of TELUS' in-house counsel, solely for the purpose of obtaining access to these documents, when Stern did not otherwise author the documents, did not provide any witness statement, and the Respondents concede they have no intention of calling him to testify at trial. The Second Subpoenas are nothing more than an attempt to obtain third party discovery of TELUS — not an attempt to prove relevant facts that the TELUS Witnesses can speak to.

66. Further, the Second Subpoenas, by design, seek documents that are inadmissible hearsay and opinion evidence. Again, this provides a complete basis on which to quash them.

E. Shaw Second Subpoena Seeks Privileged Information

67. Moreover, the Shaw Second Subpoena seeks documents that TELUS understands are subject to claims of litigation privilege by the Commissioner.

⁴⁹ Stern Supplementary Affidavit at paras. 10-15.

68. This claim of privilege is well-founded.

69. TELUS understands that the Commissioner anticipated litigation in May 2021.⁵⁰ Accordingly, the Commissioner is fully within his rights to assert litigation privilege over any communications with third parties after May 2021. Moreover, at the time the submissions were made to the Bureau, TELUS expected that the Commissioner would assert privilege over them.

70. In a prior enforcement proceeding regarding Rogers (*Chatr*), the Commissioner asserted that litigation privilege should apply to protect any communications with third-party industry participants, even if public interest privilege was not available.⁵¹ The Ontario Superior Court upheld that the Commissioner's claims of litigation privilege for all communications between the third party industry participants and the Commissioner after September 27, 2010, which was the point at which the Competition Bureau contemplated bringing proceedings, but well before the application was formally commenced in November 2010.⁵² Similarly, in this case, there is no basis for Shaw to challenge the Commissioner's claim of litigation privilege with respect to TELUS' submissions to the Commissioner, all of which were made after May 2021.

71. Again, for this reason alone, the Shaw Subpoena should be quashed.⁵³

⁵⁰ Email of Melissa Fisher dated May 5, 2021, Exhibit "A" to the Second Supplementary Stern Affidavit.

⁵¹ *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, [2013 ONSC 5386](#) ("*Chatr*").

⁵² *Chatr* at [para. 1](#).

⁵³ *Mahjoub* at [para. 7](#).

F. Rogers Second Subpoena Also Seeks Privileged Information

72. The Rogers Second Subpoena seeks solicitor-client privileged documents. The subpoena asks for “all memoranda or presentations” about the “proposed divestiture”, which may include communications TELUS prepared for the purpose of obtaining legal advice and actual legal advice. Although TELUS asserts that the entire Rogers Second Subpoena should be quashed, in any scenario, the Rogers Second Subpoena cannot compel the production of documents that are subject to a claim of solicitor-client privilege by TELUS.

G. Rogers Second Subpoena Imposes a Significant Burden

73. During his cross-examination of Stern, external counsel for Rogers suggested for the first time that the Rogers Second Subpoena should not be interpreted in accordance with its plain meaning to be limited to documents that were sent to or prepared for the ELT (i.e., as a whole), but rather is intended to compel TELUS to produce documents going individually to *any member* of the ELT.⁵⁴

74. First, if this was the intent, it is not clear why the Rogers Subpoena is not drafted in these terms, or why Rogers failed to lead any evidence of this intended meaning in response to the Supplementary Stern Affidavit, which expressly set out TELUS’ understanding of the intended scope of the subpoena.⁵⁵ If Rogers intended to request documents going to each and every member of the ELT, or to specific members, they could and should have stated this clearly and expressly.⁵⁶

⁵⁴ Second Supplementary Stern Affidavit, para. 5; Stern Cross, p. 55, lines 23-25; p. 56, lines 1-5.

⁵⁵ Stern Supplementary Affidavit, paras. 17-18.

⁵⁶ Notably, the Shaw Original Subpoena, which contains a nearly identical request as the Rogers Second Subpoena, specified that it was seeking documents “that were sent or received *by Darren Entwistle or*

75. Second, if this is the intent of the Rogers Second Subpoena, it flies in the face of assurances provided by counsel at the last case conference that the Rogers Second Subpoena was intended to be narrow in its application and scope. In fact, if TELUS is required to produce memorandums or presentations presented individually to *any* of the eleven ELT members on the proposed divestiture of Freedom Mobile to Videotron (as opposed to documents presented to the executive leadership *team*, as stated in the Rogers Second Subpoena), it will impose a significant burden on TELUS.

76. The Rogers Second Subpoena covers a six-month period. Based on TELUS' inquiries, TELUS believes that it would take TELUS and its external advisors and e-discovery teams approximately 30 days to: (i) collect potentially relevant presentations and memoranda from all individuals and load this data onto technology platforms to perform a de-duplication process; (ii) review all potentially relevant documents to ensure responsiveness; (iii) conduct a privilege review; and (iv) further redact unrelated, privileged, and/or competitively sensitive information, as there is likely to be a considerable volume of competitively sensitive and privileged information in such documents given their very nature.⁵⁷

77. This assumes a large external review team working full-time, as well as significant input from numerous TELUS employees and external counsel. The cost to TELUS to complete this process would be significant.⁵⁸

Charlie Casey that consider the proposed divestiture of Freedom Mobile Inc. to Videotron Inc.” (emphasis added).

⁵⁷ Second Supplementary Stern Affidavit, para. 10.

⁵⁸ Second Supplementary Stern Affidavit, para. 11.

78. Where compliance with a subpoena would be oppressive, given the number, nature and breadth of the documents required, or would work an unnecessary hardship, as where the documents may not be easily or readily retrievable and the expense does not justify their production considering their importance to the case, their potential availability from other sources, and the importance of the privacy interests at stake, the subpoena constitutes an abuse of process.⁵⁹ This is the case with the Rogers Second Subpoena.

H. The Second Subpoenas Are a Tactic

79. In sum, the Second Subpoenas are a tactic, intended as a fishing expedition and to impose significant burdens on a competitor who has come forward to provide evidence to the Tribunal. If the Tribunal upholds the Second Subpoenas and sanctions these tactics, it will set a dangerous precedent, as the Tribunal should expect similar subpoenas to be issued to third party witnesses in every case before it. This is contrary to the expedited and efficient process that the *Competition Tribunal Rules* are intended to foster and will have a chilling effect on the willingness of third-party witnesses to provide evidence to the Tribunal in contested proceedings. The Tribunal should not condone this tactical behaviour.

I. No Basis in Law to Shorten the Timeline of Production Under Section 7 of the *Competition Tribunal Rules*

80. Finally, if the Second Subpoenas are not quashed, a subpoena that is issued under Section 7 of the *Competition Tribunal Rules* only requires that the witness bring and/or

⁵⁹ *Caroll (Re) (a.k.a. Kent v. Kent)*, [2010 NLCA 53](#) at [para. 78\(4\)](#) (“Carol”).

produce the documents in question at the date of his or her attendance.⁶⁰ Although the Respondents have indicated that production of the documents in question should be made to them in advance of the hearing, there is no basis under the *Competition Tribunal Rules* or otherwise at law to compel production of the documents demanded by the Respondents prior to the attendance of the TELUS Witnesses at the hearing of the Section 92 Application.

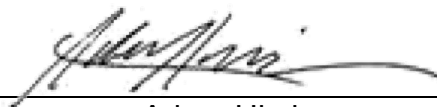
PART IV - CONCLUSION

81. TELUS respectfully requests this motion be granted, with costs, including costs thrown away in responding to the Original Subpoenas.

All of which is respectfully submitted this 24th day of October, 2022



Christopher P. Naudie



Adam Hirsh

⁶⁰ [S.O.R. /2008-141, s. 7](#). See also, *Carol* at [para. 10](#); *Law Society of Saskatchewan v Abrametz*, [2016 SKQB 134](#) at [para. 46](#); and *Reflection Productions v. Ontario Media Dev. Corp.*, [2022 ONSC 64](#) at [para. 72](#) (Div. Ct.) discussing the limits of subpoena *duces tecum* more generally.

SCHEDULE “A”**List of Authorities**

1. *Agnaou c. Canada (Services des poursuites pénales)*, [2022 CAF 140](#)
2. *Canada (Citizenship and Immigration) v. Mahjoub*, [2010 FC 1193](#)
3. *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, [2013 ONSC 5386](#)
4. *Canada (Director of Investigation and Research) v. Southam Inc.*, [\[1997\] 1 S.C.R. 748](#)
5. *Caroll (Re) (a.k.a Kent v. Kent)*, [2010 NLCA 53](#)
6. *Commissioner of Competition v. Canada Pipe Company*, [2004 CACT 5](#), (CanLII), 2004 CarswellNat 6992
7. *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1990 CanLII 5609](#), 112 A.R. 197 (AB QB)
8. *Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333) v. Viterra Inc.*, [2021 FC 187](#)
9. *Laboratoires Servier v. Apotex Inc.*, [2008 FC 321](#)
10. *Law Society of Saskatchewan v Abrametz*, [2016 SKQB 134](#)
11. *Reflection Productions v. Ontario Media Dev. Corp.*, [2022 ONSC 64](#) (Div. Ct.)
12. *Yeager v. Canada (Attorney General)*, [2015 FC 978](#)
13. *Zundel (Re)*, [2004 FC 798](#)

SCHEDULE "B"**Excerpts of Statutes and Regulations*****Competition Act, R.S.C. 1985, c. C-34*****Confidentiality**

29 (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

(a) the identity of any person from whom information was obtained pursuant to this Act;

(b) any information obtained pursuant to section 11, 15, 16 or 114;

(b.1) any information obtained under any of sections 53.71 to 53.81 of the *Canada Transportation Act*;

(c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;

(d) any information obtained from a person requesting a certificate under section 102; or

(e) any information provided voluntarily pursuant to this Act.

Exception

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

Communication to Minister of Transport

29.1 (1) Notwithstanding subsection 29(1), the Commissioner may, if requested to do so by the Minister of Transport in accordance with subsection (3), communicate or allow to be communicated to that Minister any information referred to in subsection (2) that is specifically requested by that Minister.

Information

(2) The information that may be communicated under this section is

(a) the identity of any person from whom information was obtained under this Act;

(b) any information obtained in the course of an inquiry under section 10;

- (c) any information obtained under section 11, 15, 16 or 114;
- (c.1) any information obtained under any of sections 53.71 to 53.81 of the *Canada Transportation Act*;
- (d) any information obtained from a person requesting a certificate under section 102;
- (e) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; and
- (f) any information collected, received or generated by or on behalf of the Commissioner, including compilations and analyses.

Contents of request

- (3) Requests under this section must be in writing and must
 - (a) specify the information referred to in any of paragraphs (2)(a) to (f) that is required; and
 - (b) state that the Minister of Transport requires the information for the purposes of section 53.1 or 53.2 or any of sections 53.71 to 53.81 of the *Canada Transportation Act* and identify the transaction being considered under that section.

Restriction

- (4) The information communicated under subsection (1) may be used only for the purposes of section 53.1 or 53.2 or any of sections 53.71 to 53.81, as the case may be, of the *Canada Transportation Act*.

Confidentiality

- (5) No person who performs or has performed duties or functions in the administration or enforcement of the *Canada Transportation Act* shall communicate or allow to be communicated to any other person any information communicated under subsection (1), except to persons who perform duties or functions under section 53.1 or 53.2 or any of sections 53.71 to 53.81 of that Act.

Communication to Minister of Finance

- 29.2 (1) Notwithstanding subsection 29(1), the Commissioner may, if requested to do so by the Minister of Finance in accordance with subsection (3), communicate or allow to be communicated to the Minister of Finance any information referred to in subsection (2) that is specifically requested by the Minister of Finance.

Information

- (2) The information that may be communicated under this section is

- (a) the identity of any person from whom information was obtained under this Act;
- (b) any information obtained in the course of an inquiry under section 10;
- (c) any information obtained under section 11, 15, 16 or 114;
- (d) any information obtained from a person requesting a certificate under section 102;
- (e) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; and
- (f) any information collected, received or generated by or on behalf of the Commissioner, including compilations and analyses.

Contents of request

- (3) Requests under this section must be in writing and must
 - (a) specify the information referred to in any of paragraphs (2)(a) to (f) that is required;
 - (b) state that the Minister of Finance requires the information
 - (i) to consider a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*, or
 - (ii) to permit the Minister of Finance to determine whether he or she should provide the Commissioner with a certificate described in paragraph 94(b) in respect of such a merger or proposed merger;
- and
- (c) identify the merger or proposed merger.

Restriction

- (4) The information communicated under subsection (1) may be used only for the purpose of making a decision in respect of the merger or proposed merger.

Confidentiality

- (5) No person who performs or has performed duties or functions, in the administration or enforcement of the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* shall communicate or allow to be communicated to any other person any information communicated under subsection (1), except to other persons who perform those duties or functions.

Competition Tribunal Rules, SOR/94-290 (Repealed)**Disclosure Statement - Application**

4.1 (1) The Commissioner shall, within 14 days after the notice of application other than an application for an interim order is filed, serve on each person against whom an order is sought the disclosure statement referred to in subsection (2).

(2) The disclosure statement shall set out

- (a) a list of the records on which the Commissioner intends to rely;
- (b) the will-say statements of non-expert witnesses; and
- (c) a concise statement of the economic theory in support of the application, except with respect to applications made under Part VII.1 of the Act.

(3) If new information that is relevant to the issues raised in the application arises before the hearing, the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement referred to in subsection (2).

(4) The Commissioner shall allow a person who wishes to oppose the application to inspect and make copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained.

4.2 Unless the Tribunal orders otherwise, the Commissioner shall serve on each person against whom an order other than an interim order is sought a notice identifying each witness referred to in paragraph 4.1(2)(b) by name and address, at least two days before the date that the witness is called to testify.

Discovery of Documents

13. (1) In the case of an application referred to in section 92 of the Act, a party shall, within 20 days after the expiry of the period for filing a response to a notice of application,

- (a) serve an affidavit of documents on each other party; and
- (b) file the affidavit of documents with proof of service.

(2) An affidavit of documents shall include

- (a) a list of the documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party;
- (b) a brief description of each document;
- (c) an indication of whether the party intends to move pursuant to subsection 16(2) for an order restricting the inspection or copying of a document;

(d) any claim that a document is privileged; and

(e) a statement of the grounds for each claim for privilege.

13.1 Sections 13 and 14 to 16 apply to an application only if permission is granted by the Tribunal for the purposes of paragraph 21(2)(d.1).

13.2 The Commissioner shall provide a list of the records to be admitted in evidence without further proof in accordance with section 69 of the Act.

14. Upon the motion of a party who has filed an affidavit of documents and who opposes a claim for privilege of another party, the Tribunal may inspect the document and determine the validity of the claim.

15. A party who has filed an affidavit of documents and who comes into possession or control of or obtains power over a relevant document, or who becomes aware that the affidavit of documents is inaccurate or deficient, shall serve and file a supplementary affidavit of documents listing the document or correcting the inaccuracy or deficiency.

16. (1) Subject to subsection (2), a party who has served an affidavit of documents on another party shall allow the other party to inspect and make copies of the documents listed in the affidavit, other than those documents which are subject to a claim for privilege or which are not within the party's possession, power or control.

(2) Upon the motion of a party who has filed an affidavit of documents, the Tribunal may, if it is of the opinion that there are valid reasons for restricting the disclosure of a document listed in the affidavit that could otherwise be inspected and copied, make such order as it deems appropriate.

(3) The party making the motion referred to in subsection (2) shall include in the grounds for the motion the details of the specific, direct harm that would allegedly result from unrestricted disclosure of the document and shall attach a draft order restricting disclosure to the notice of motion.

Competition Tribunal Rules, SOR/2008-141

Dispensing with Compliance

Variation

2(1) The Tribunal may dispense with, vary or supplement the application of any of these Rules in a particular case in order to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit.

Subpoena

7(1) The Registrar or the person designated by the Registrar may issue a writ of subpoena for the attendance of witnesses and the production of documents.

In blank

(2) The Registrar may issue a writ of subpoena in blank and the person to whom it is issued shall complete it and may include any number of names.

Evidence at the Hearing**Sanctions**

71 If a document has not been disclosed in the affidavit of documents and in the pre-hearing disclosure, or if privilege has not been waived for such a document, it shall not be received in evidence at the hearing unless the Tribunal orders otherwise.

Federal Court Rules, SOR/98-106**Production from non-party with leave**

233 (1) On motion, the Court may order the production of any document that is in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial.

Personal service on non-party

(2) Notice of a motion for an order under subsection (1) shall be personally served on the person who is in possession of the document.

Preparation of certified copy

(3) The Court may, in an order under subsection (1), give directions for the preparation of a certified copy of the document to be used instead of the original.

Examination of non-parties with leave

238 (1) A party to an action may bring a motion for leave to examine for discovery any person not a party to the action, other than an expert witness for a party, who might have information on an issue in the action.

Personal service on non-party

(2) On a motion under subsection (1), the notice of motion shall be served on the other parties and personally served on the person to be examined.

Where Court may grant leave

(3) The Court may, on a motion under subsection (1), grant leave to examine a person and determine the time and manner of conducting the examination, if it is satisfied that

(a) the person may have information on an issue in the action;

(b) the party has been unable to obtain the information informally from the person or from another source by any other reasonable means;

(c) it would be unfair not to allow the party an opportunity to question the person before trial; and

(d) the questioning will not cause undue delay, inconvenience or expense to the person or to the other parties.