

**FILED / PRODUIT**

Date: October 26, 2022

CT- 2022-002

Sara Pelletier for / pour  
REGISTRAR / REGISTRAIRE

**CT-2022-002**

OTTAWA, ONT.

Doc. # 543

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

Respondents

**ATTORNEY GENERAL OF ALBERTA AND VIDÉOTRON LTD.**

Intervenors

---

**MEMORANDUM OF FACT AND LAW OF ROGERS COMMUNICATIONS INC.**

(Applicant's Motion to Strike and Rogers' Cross-Motion)

---

**PUBLIC**

**TABLE OF CONTENTS**

	<b>Page No.</b>
<b>PART I - INTRODUCTION .....</b>	<b>1</b>
<b>PART II - SUMMARY OF FACTS .....</b>	<b>2</b>
<b>PART III - STATEMENT OF ISSUES, LAW &amp; AUTHORITIES .....</b>	<b>3</b>
<b>A. The Tribunal should permit the filing of the McKinsey Witness Statement. .</b>	<b>4</b>
<i>i. The Commissioner can cross-examine on the McKinsey Witness Statement .....</i>	<i>4</i>
<i>ii. No Prejudice .....</i>	<i>4</i>
<b>B. No basis to strike the BCG Report from Ms. Fabiano’s witness statement... </b>	<b>7</b>
<b>ORDER REQUESTED .....</b>	<b>9</b>

# PUBLIC

## PART I - INTRODUCTION

1. The Commissioner of Competition moves to strike seven paragraphs in Rogers' witness statements of Marisa Fabiano and Dean Prevost on the basis that the statements are hearsay. They are not.

2. The impugned paragraphs in Marisa Fabiano's statement are not hearsay on a plain reading of the evidence. The paragraphs outline Rogers' plan to [REDACTED] [REDACTED] and the manner by which it arrived at that plan. The paragraphs should not be struck.

3. The statements in Dean Prevost's statement are not hearsay. They reflect Rogers' plan to achieve [REDACTED] [REDACTED]. In any event, Rogers has moved for leave to file a 2-page witness statement of Mr. Mercier-Dalphon, which attaches one of the documents that the Commissioner seeks to strike (and that the Commissioner has included in its list of documents to be admitted without proof).

4. Mr. Mercier-Dalphon's statement will not cause any prejudice to the Commissioner. The Commissioner's experts have responded substantively to the document attached to Mr. Mercier-Dalphon's statement. The new statement does not change or add any evidence that was not otherwise articulated in Mr. Prevost's statement.

**PART II - SUMMARY OF FACTS**

5. On September 23, 2022, Roger delivered its witness statements and expert reports. Rogers delivered two fact witness statements from Dean Prevost, President of Integration and Marisa Fabiano, Senior Vice-President of Finance.

6. In Mr. Prevost's statement, he discusses some of the cost synergies that Rogers expects to achieve and have been developed as part of its normal course integration planning. Mr. Prevost describes an analysis performed in collaboration with the consulting firm McKinsey & Company ("**McKinsey**"). [REDACTED]

[REDACTED]. This analysis itself was within an internal Rogers presentation and based on Rogers' data.<sup>1</sup> Mr. Prevost deposes that Rogers used the analysis to assist in its integration planning, to quantify its expected synergies.<sup>2</sup> Notably, the Commissioner seeks to admit the Rogers presentation in evidence without further proof pursuant to section 69 of the Competition Act, R.S.C., 1985 c. C-34, which was revealed to Rogers on September 23.<sup>3</sup>

7. In Ms. Fabiano's statement, she discusses Rogers' plan to [REDACTED], which Rogers has developed as a result of its normal course integration planning. Rogers' plan was developed using a report that was prepared by the Boston Consulting Group ("**BCG**"). Ms. Fabiano attaches the BCG report to her statement.<sup>4</sup> Notably, the

---

<sup>1</sup> Witness Statement of Alexandre Mercier-Dalphonc dated October 20, 2022, p. 3, paras. 4-5.

<sup>2</sup> Witness Statement of Dean Prevost dated September 23, 2022, pp. 42-44, paras. 111-117.

<sup>3</sup> Letter from D. Leschinsky to C. Smith and others, dated September 23, 2022, p. 237, Row 1600.

<sup>4</sup> Witness Statement of Marisa Fabiano dated September 23, 2022, pp. 6-7, paras. 22-25.

# PUBLIC

-3-

Commissioner seeks to admit the BCG report in evidence without further proof pursuant to section 69 of the Competition Act, R.S.C., 1985 c. C-34, which was also revealed to Rogers on September 23.

8. On October 12, 2022, the Commissioner delivered a Notice of Motion seeking to strike certain paragraphs and documents in Mr. Prevost and Ms. Fabiano's statements, along with other paragraphs in Shaw's witness statements. The Commissioner argued that he would be deprived of the opportunity to cross-examine the person who prepared the analysis.<sup>5</sup>

9. Rogers disagreed with the Commissioner's characterization of the evidence but it served a witness statement from Alexandre Mercier-Dalphon, the partner at McKinsey who supervised the analysis Mr. Prevost describes (the "**McKinsey Statement**"). It is two pages long. Mr. Mercier-Dalphon attaches the Rogers presentation (which was also attached to Mr. Prevost's statement) and confirms its accuracy. Mr. Mercier-Dalphon deposes that the analysis was based on Rogers' data. There is no new information about the analysis in the McKinsey Statement.<sup>6</sup>

## **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

10. This motion raises two related issues.

- (a) First, should the Tribunal permit the filing of the McKinsey Witness Statement? Yes.

---

<sup>5</sup> Commissioner's Notice of Motion, Appendix "A", p. 2.

<sup>6</sup> Witness Statement of Alexandre Mercier-Dalphon dated October 20, 2022, p. 3, paras. 4-5.

- (b) Second, should the Tribunal strike the BCG report from Ms. Fabiano's witness statement? No.

**A. The Tribunal should permit the filing of the McKinsey Witness Statement.**

11. The McKinsey Statement will assist the Tribunal in its truth-seeking function with the benefit of a complete evidentiary record. The witness that swore the McKinsey Statement will be available for cross-examination and the Commissioner will be afforded an opportunity to examine the witness. There is no prejudice to the Commissioner.

*i. The Commissioner can cross-examine on the McKinsey Witness Statement*

12. The Commissioner's only complaint about the inclusion of the Rogers presentation in Mr. Prevost's statement is that he would not have an opportunity to cross-examine its author.<sup>7</sup>

13. The McKinsey Witness Statement is a full answer. The Commissioner already had the opportunity to and did discover Rogers on the content of the Rogers presentation. Now, the Commissioner will additionally have the ability to cross-examine Mr. Mercier-Dalphonc, who supervised the collaborative analysis with Rogers.

*ii. No Prejudice*

14. The Commissioner will not suffer any unfairness from the filing of a witness statement that merely attests to the truth and reliability of the analysis. The Commissioner's experts have had ample opportunity to address its contents and have in fact done so.

---

<sup>7</sup> Commissioner's Notice of Motion, Appendix "A", p. 2.

## PUBLIC

-5-

15. The Rogers presentation containing the analysis—which was attached to Mr. Prevost’s witness statement—was included in the Commissioner’s list of documents that he will adduce without further proof served on September 23, 2022.<sup>8</sup> The Commissioner included the presentation in his list of documents upon which he intends to rely at the hearing.<sup>9</sup>

16. The presentation is also cited in the Report of Michael Davies dated September 23, 2022, no fewer than three times.<sup>10</sup>

17. The Commissioner also addressed the presentation in his responding material delivered October 20, 2022. The presentation is cited by the Expert Report of Mr. Davies dated October 20, 2022, no fewer than five times.<sup>11</sup> Mr. Davies analyzes the content of the Rogers presentation in detail.

18. The Commissioner’s opposition to the McKinsey Statement is an attempt to deprive Rogers the opportunity to respond to documents that the Commissioner intends to rely on. Rogers did not know until September 23 that the Commissioner intended to admit the Rogers presentation into evidence without proof. The McKinsey Statement is appropriate evidence in response to the Commissioner’s own reliance on the document.

---

<sup>8</sup> Letter from D. Leschinsky to C. Smith and others, dated September 23, 2022, p. 237, Row 1600.

<sup>9</sup> Letter from D. Leschinsky to C. Smith and others, dated October 20, 2022, p. 84, Row 1630.

<sup>10</sup> Expert Report of Dr. Michael Davies dated September 23, 2022, pp. 54-55, 85, fns. 126-127, 203.

<sup>11</sup> Expert Report of Dr. Michael Davies dated October 20, 2022, pp. 24, 35-36, fns. 67, 103-106.

Excluding the McKinsey Statement, which speaks to the accuracy of the Rogers presentation, would not be a fair result.

19. The Commissioner argues that *Parrish & Heimbecker, Limited*, 2020 Comp. Trib. 15 (“***Parrish & Heimbecker***”), precludes the filing of the McKinsey Statement. In *Parrish & Heimbecker*, the Tribunal denied the Respondent’s request to file new witness statements to address the hearsay statements contained in the witness statement of the Respondent CEO.<sup>12</sup>

20. The Commissioner fails to acknowledge:

- (a) That the Respondent in that matter had not properly sought this relief in its responding record on the motion, and only raised this “request” at the hearing of the motion;<sup>13</sup>
- (b) That the Respondent in that matter had not even provided drafts of the proposed additional witness statements that would be filed;<sup>14</sup>
- (c) That the Respondent in that matter had not even provided a date by which the additional witness statements would be delivered;<sup>15</sup>
- (d) That, as a result of the above, there was a concern that the Commissioner would not have time to challenge the new witness statements on their merits;<sup>16</sup> and,
- (e) That the hearsay evidence the Respondent sought to rehabilitate in that matter was arguably offered to challenge evidence led by the Commissioner’s witnesses, and that the Respondent would be able to test the evidence on cross-examination even if the Respondent’s witness statements were not admitted.<sup>17</sup>

---

<sup>12</sup> *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, [2020 Comp Trib 15](#).

<sup>13</sup> At para. 66.

<sup>14</sup> At para. 66.

<sup>15</sup> At para. 68.

<sup>16</sup> At para. 69.

<sup>17</sup> At para. 69.



21. None of the above factors are present in this matter. The Commissioner has had the McKinsey Statement, which is five paragraphs long, since October 20. The McKinsey Statement provides no additional information that would require additional further evidence from the Commissioner. The Commissioner can challenge the McKinsey Statement on its merits at this hearing. Finally, the analysis was not tendered to challenge evidence led by the Commissioner. This is not the same situation as in *Parrish & Heimbecker*.

**B. No basis to strike the BCG Report from Ms. Fabiano's witness statement.**

22. The Commissioner argues that those paragraphs of Ms. Fabiano's witness statement that describe and attach the BCG Report are hearsay because no witness statement from BCG has been produced in these hearings.

23. First, the Commissioner proposes to admit the BCG Report without further proof. The Commissioner intends to rely on the BCG Report at trial.<sup>18</sup> He has no basis to complain about its inclusion in Ms. Fabiano's statement or her explanation of what the document is.

24. Second, Ms. Fabiano has not put the BCG Report forward for the truth of its contents. Ms. Fabiano's evidence makes this plain in setting out the background to the BCG Report and the use to which it has been put in Rogers:

[REDACTED]

[REDACTED]

---

<sup>18</sup> Letter from D. Leschinsky to C. Smith and others, dated September 23, 2022, p. 180, Row 35.

[REDACTED]

[REDACTED]

[REDACTED]<sup>19</sup>

25. Ms. Fabiano describes and attaches the BCG Report as part of the narrative. She uses it to contextualize Roger’s actual plans [REDACTED] between Rogers and Shaw on closing. Specifically, she deposes as to how Rogers’ finance team arrived at its own [REDACTED]<sup>20</sup>

26. Mr. Harington also notes in his report that he does not use the BCG Report or Rogers’ [REDACTED] as the “starting point” for his own quantification of

---

<sup>19</sup> Witness Statement of Marisa Fabiano dated September 23, 2022, pp. 6-7, paras. 22-25.

<sup>20</sup> Witness Statement of Marisa Fabiano dated September 23, 2022, pp. 6-7, paras. 22-25.



**PUBLIC**

**-10-**

October 25, 2022

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

**Jonathan C. Lisus** (LSO#: 32952H)  
jlisus@lolg.ca

Tel: 416 598 7873

**Crawford G. Smith** (LSO#: 42131S)  
csmith@lolg.ca

Tel: 416 598 8648

**Matthew R. Law** (LSO#: 59856A)  
mlaw@lolg.ca

Tel: 416 849 9050

**Bradley Vermeersch** (LSO# 69004K)  
Tel: 416.646.7997

bvermeersch@lolg.ca

**Zain Naqi** LSO#: 67870U  
znaqi@lolg.ca

Tel: 416 645 3789

Counsel for the Respondent,  
Rogers Communications Inc.

**TO: The Commissioner of Competition**  
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**  
**Suzanie Chua**  
**Marie-Hélène Gay**  
**Kevin Hong**

Tel: (819) 956-2842 / (613) 897-7682

Fax: (819) 953-9267

Counsel for the Applicant/Responding Party,  
The Commissioner of Competition

**PUBLIC**

-11-

**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: GOVERNMENT OF ALBERTA**  
Justice and Solicitor General Government of Alberta  
4th Floor, Bowker Building  
9833-109 Street  
Edmonton, AB T5K 2E8

**Kyle Dickson-Smith**

Tel: 780.644.4880

Email: kyle.dickson-smith@gov.ab.ca

**Opeyemi Bello**

Tel: 587.985.0564

Email: opeyemi.bello@gov.ab.ca

Counsel for the Intervenor,  
Attorney General of Alberta

**PUBLIC**

-12-

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

**John F. Rook Q.C.** (LSO# 13786N)

Tel: 416.777.4885

Email: rookj@bennettjones.com

**Emrys Davis** (LSO# 57391B)

Tel: 416.777.6242

Email: davise@bennettjones.com

**Alysha Pannu** (LSO# 743690)

Tel: 416.777.5514

Email: pannuaa@bennettjones.com

Counsel for the Intervenor,  
Videotron Ltd.

# PUBLIC

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, [2020 Comp Trib 15](#).

**PUBLIC**

**SCHEDULE "B"**

**TEXT OF STATUTES, REGULATIONS & BY-LAWS**