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CT- 2022-002

Sara Pelletier for / pour  
REGISTRAR / REGISTRAIRE

**CT-2021-002**

OTTAWA, ONT.

Doc. # 552

**THE COMPETITION TRIBUNAL**

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

**AND IN THE MATTER OF** the 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*;

**BETWEEN**

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

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

Respondents

-and-

**ATTORNEY GENERAL OF ALBERTA and VIDEOTRON LTD.**

Intervenors

**AMENDED NOTICE OF MOTION OF BCE INC., BLAIK KIRBY and  
STEPHEN HOWE and MARK GRAHAM**  
(Motion to Quash Subpoenas Issued on October 3 & 5 14, 2022)

**TAKE NOTICE THAT** BCE Inc. (“**Bell**”) will make a motion to the Competition Tribunal (“**Tribunal**”) on ~~a date to be set by the Tribunal~~ October 28, 2022, in response to the subpoenas issued at the request of Rogers Communications Inc. (“**Rogers**”) and Shaw Communications Inc. (“**Shaw**”) dated ~~October 3 14, 2022 and October 5, 2022~~, respectively.

**THIS MOTION IS FOR:**

- (a) An order quashing the Respondent Subpoenas (as defined below) insofar as they would require Bell to produce the documents listed therein;
- (b) In the alternative, to the extent any portion of the document production demands as set out in the Respondent Subpoenas is upheld, an Order extending the time for compliance to at least ninety (90) days from the date this motion is heard;
- (c) Bell’s costs of this motion; and
- (d) Such further relief as Bell may request and the Tribunal may permit.

**THE GROUNDS FOR THIS MOTION ARE:**

**Background**

- (e) Rogers is a publicly traded company that provides wireline internet services to customers in Ontario, New Brunswick, and Newfoundland, and wireless cellular data services to customers across Canada.
- (f) Shaw is a publicly traded company that provides wireline services to customers in Western Canada and Northern Ontario. It also provides wireless services in British Columbia, Alberta, and Ontario.

- (g) Bell is a Canadian communications company that competes directly with Rogers and Shaw. Bell is not a party to this application.
- (h) On March 31, 2021, Rogers and Shaw entered into an Arrangement Agreement. Rogers agreed to purchase all issued and outstanding shares of Shaw for approximately \$26 billion (the “**Proposed Transaction**”).
- (i) On August 2, 2021, Bell was served with an order made on August 1, 2021 under section 11 of the *Competition Act*, ordering Bell to produce documents<sup>1</sup> to the Commissioner to assist him in his inquiry regarding the Transaction. This order was varied with the consent of Bell and the Commissioner to extend the deadline for Bell to produce certain documents to the Commissioner (the order as varied is referred to below as the “**Section 11 Order**”).
- (j) Bell complied with the Section 11 Order and produced documents to the Bureau on September 15, November 1, and November 29, 2021. In total, Bell produced 863,211 responsive documents and 706 GB of data.
- (k) In addition to the documents Bell produced under the Section 11 Order, in 2016, Bell produced to the Commissioner pursuant to a notice under section 114(2) of the Competition Act documents relating to Bell’s 2017 acquisition of Manitoba Telecom Services (the “**MTS Transaction**”).

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<sup>1</sup> The term “documents” to refer to both documents and data unless otherwise specified.

- (l) On May 8, 2022, the Commissioner commenced an application under s. 92 of the *Competition Act* (the “**Section 92 Application**”) for an order blocking the Proposed Transaction in its entirety, alleging that it would substantially prevent or lessen competition in the wireless services markets in Ontario, British Columbia and Alberta.
- (m) On or about July 15, 2022 the Commissioner provided an affidavit of documents, listing, among other things, documents produced by Bell in the Section 11 Order.
- (n) On or about September 23, 2022, the Commissioner filed witness statements of two Bell employees, Blaik Kirby and Stephen Howe, as part of the Section 92 Application (the “**Kirby Affidavit**” and the “**Howe Affidavit**”, together the “**Bell Affidavits**”).
- (o) Effective October 4, 2022, Bell was served with a summons to Messrs. Kirby and Howe, issued at the request of Rogers, requiring Messrs. Kirby and Howe to attend at the hearing of the Section 92 Application on November 7, 2022 and to bring with them a large volume of documents set out in 12 specifications (the “**First Rogers Subpoena**”).
- (p) Effective October 6, 2022 Bell was served with a further summons to Mr. Kirby and Mr. Howe, issued at the request of Shaw, requiring Messrs. Kirby and Howe to attend at the hearing of the Section 92 Application on November 7, 2022 and to bring with them a large volume of documents set out in 6 specifications (the “**First**

**Shaw Subpoena**” and together with the First Rogers Subpoena, the “**Respondent First Subpoenas**”).

~~(q) Despite the wording on the face of the Respondent Subpoenas, Rogers and Shaw have demanded that Bell produce the documents listed in the Respondent Subpoenas to them by an arbitrary deadline in advance of the hearing, namely by October 14, 2022.~~

(r) On October 7, Bell advised that it would be moving to quash the First Subpoenas and set out its concerns in a detailed letter to Rogers’ and Shaw’s counsel. These included that the First Subpoenas were overly broad, sought production of highly confidential and commercially sensitive documents, sought documents that were irrelevant and amounted to a fishing expedition, and constituted an abuse of the Tribunal’s process. Bell also highlighted that it would take several months for it to collect, review, and produce the documents sought even if the First Subpoenas were otherwise proper.<sup>2</sup>

(s) Rogers and Shaw maintained their position that the First Subpoenas were proper, and went so far as to suggest that the First Subpoenas sought a small number of documents falling within “discrete” categories. Rogers and Shaw also insisted that Bell should begin the process of collecting the documents sought pending disposition of its motion to quash the First Subpoenas.<sup>3</sup>

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<sup>2</sup> Affidavit of Jennifer Maringola affirmed October 18, 2022, Exhibit A [“**Maringola Affidavit**”].

<sup>3</sup> Maringola Affidavit, Exhibit B.

- (t) Bell served its motion to quash the First Subpoenas on October 13, 2022. The motion was supported by an affidavit from Mark Graham, Vice President, Legal and Regulatory of Bell.<sup>4</sup> The following day, Rogers and Shaw advised that they would be withdrawing the First Subpoenas in favour of a new set of subpoenas that would delete several of the specifications in the First Subpoenas and narrow others. Rogers and Shaw served the subpoenas (the “**Second Subpoenas**”) later that day, addressed to the Bell Witnesses and to Mr. Graham (who has not provided a witness statement in the Section 92 Application).
- (u) The Second Subpoenas direct Messrs. Kirby, Howe, and Graham to attend at the hearing of the Section 92 Application on November 7, 2022, and to bring with them:
- i. In the case of the Second Rogers Subpoena, all memoranda or presentations to Bell’s Board of Directors or executive leadership team:
    1. considering the proposed divestiture of Freedom Mobile Inc. to Videotron Inc., dated on or after May 7, 2022; and
    2. containing analysis of Rogers’ network outage that occurred on July 8, 2022 (the “Rogers Outage”).

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<sup>4</sup> Bell sought to quash the First Subpoenas only insofar as they purported to require production of documents. Bell has never objected to Messrs. Kirby and Howe attending at the trial of the Section 92 Application to be cross-examined on their witness statements. See Initial Graham Affidavit at para 15.

3. These revised specifications overlap with specifications 1 and 4 of the First Rogers Subpoena.

(v) In the case of the Second Shaw Subpoena:

- i. written submissions dated on or after March 15, 2021 provided by Bell or its subsidiaries or affiliates to the Bureau or Industry, Science and Economic Development Canada (“ISED”) concerning the Proposed Transaction, including written submissions provided to the Bureau on September 13, 2021, September 24, 2021, September 29, 2021, October 27, 2021, November 17, 2021 and November 30, 2021;
- ii. written submissions dated on or after June 17, 2022 provided by Bell or its subsidiaries or affiliates to the Bureau or ISED concerning a proposed transaction involving Shaw, Rogers and Quebecor Inc.;
- iii. written submissions dated on or after July 1, 2020 provided by Bell to representatives of the Bureau or ISED concerning Bell’s proposed plans to acquire Shaw; and
- iv. network reciprocity agreements between Bell and TELUS.
- v. These revised specifications overlap with specifications 2, 3, 5, and 6 of the First Shaw Subpoena.

**Bell, Kirby, Graham and Howe Have Standing to Object to the Respondent Second Subpoenas**

(w) Messrs. Kirby, Graham and Howe are named in the ~~Respondent~~ Second Subpoenas, and are subject to legal obligations thereunder until they are quashed. As the subjects of the ~~Respondents~~ Second Subpoenas, Messrs. Kirby Graham and Howe have legal standing to assert any objections to the validity or scope of the Respondent Subpoenas

(x) Messrs. Kirby Graham and Howe are employees of Bell. The ~~Respondent~~ Second Subpoenas seek the production of proprietary, confidential and competitively-sensitive documents that belong to Bell. As such, Bell has legal standing to assert any objections to the validity or scope of the Respondent Subpoenas.

**The Respondent Subpoenas are an Abuse of Process**

(y) Bell does not object to Messrs. Kirby and Howe attending at the hearing of the Section 92 Application to be cross-examined on their affidavits and the issuance of subpoenas was unnecessary to secure their attendance at the hearing. Insofar as the ~~Respondent~~ Second Subpoenas purport to require Messrs. Kirby and Howe to produce the documents listed in the specifications set out in the subpoenas, they are (separately and together) an abuse of process for the reasons below.

(z) The ~~Respondent~~ Second Subpoenas amount to nothing more than a fishing expedition and an attempt to circumvent the limitations of the *Competition*



*Tribunal Rules*, which do not provide for third-party discovery in merger review proceedings.

(aa) ~~The specifications of the documents to be produced are set out in overly broad and imprecise language. They seek documents that span a potentially unbounded time period (and specifically seek documents that are more than five and in some cases more than ten years old) and reach across multiple different business units within Bell, from strategic business documents prepared for Bell's leadership and executive teams, to technical analyses of Bell's network architecture, as well as competitive impact analyses, and volumes of efficiencies documents relating to the MTS Transaction. The Second Subpoenas seek a number of documents from a large number of potential custodians.~~ Bell estimates that it would take at least 90 to 150 60 to 90 days to comply with the Respondent Subpoenas, at considerable expense to Bell.

(bb) Further, the Respondent Subpoenas demand, in part, documents that the Respondents already have in their possession, or which could and should have been sought through the Respondents' discovery of the Commissioner. For example, many of the documents sought in the Respondent Subpoenas were produced to the Competition Bureau through Bell's compliance with the Section 11 order, ~~or during the review of the MTS Transaction,~~ and thus these documents are already in the Respondents' possession through the Commissioner's production in this application or otherwise should have been sought by the Respondents during the discovery process contemplated by the timetable for the Section 92 Application,

which has now concluded. Subpoenas *duces tecum* cannot properly be used to avoid a review of all the documents in a party's possession or to demand production of documents already in a party's possession.

(cc) Further, the Respondent Subpoenas are not timely. Even if third party discovery were available through subpoenas *duces tecum*, which it is not, the Respondents should have sought such discovery during the discovery process of the Section 92 Application, and certainly prior to a date less than five weeks before the commencement of the hearing.

(dd) Finally, many of the Bell Documents are not in the possession, power or control of Messrs. Kirby, Graham or Howe, to whom the ~~Respondent~~ Second Subpoenas are addressed.

**The Respondent Subpoenas Seek Documents Not Relevant or Significant to The Bell Affidavits**

(ee) The ~~Respondent~~ Second Subpoenas, in their overbreadth, seek production of documents that are not relevant or significant to any matters addressed in the Bell Affidavits, and in some cases that are not relevant or significant to the underlying Section 92 Application at all. Such requests are improper and are not permitted by the *Competition Tribunal Rules*.

(ff) The ~~Respondent~~ Second Subpoenas seek production of documents over which the Commissioner has asserted litigation privilege, as well as documents which may potentially be solicitor-client privileged.

**Bell Must be Given Sufficient Time to Comply With the Respondent Subpoenas**

(gg) In the alternative, if any portion of the document production demands in the Respondent Subpoenas is upheld, Bell must be provided with sufficient time to comply. As noted above, Bell estimates that it would take at least ~~90 to 120~~ 60 to 90 days to comply with the Respondent Subpoenas' document production demands.

**Rules Relied Upon**

(hh) Rules 2, 60-65, 71, and 81 of the *Competition Tribunal Rules*;

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- (a) The affidavit of Mark Graham affirmed October 13, 2022;
- (b) The supplementary affidavit of Mark Graham affirmed October 18, 2022
- (c) The pleadings that have been exchanged in the Section 92 Application;
- (d) The productions that have been made by the Commissioner in the Section 92 Application pursuant to Bell's production in response to the Section 11 Order and otherwise;
- (e) The Kirby and Howe Affidavits; and
- (f) such further and other evidence as Bell may advise and the Tribunal may permit.

October 13 25, 2022

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