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Annie Ruhlmann for / pour
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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

**AMENDED RESPONSE OF THE COMMISSIONER OF COMPETITION
dated October 26, 2022
(CROSS-MOTION served OCTOBER 18, 2022)**

THE GROUNDS ON WHICH THE COMMISSIONER OF COMPETITION OPPOSES THE RESPONDENT'S CROSS-MOTION ARE:

1. Shaw Communications Inc. (**Shaw**) moves for an order directing the Commissioner of Competition (**Commissioner**) to produce all documents responsive to any one of 11 “categories of documents” that Shaw has enumerated: the “categories” are crafted to capture certain documents that Shaw is seeking from BCE Inc. (**Bell**) and TELUS Communications Inc. (**TELUS**) by way of contested subpoenas *duces tecum*.
2. The Commissioner opposes the requested relief on the basis that: (i) Shaw has not met its evidentiary and legal burden establishing, among other things, the relevancy and/ or materiality of the sought-after documents; and (ii) Shaw has already received all relevant non-privileged documents that are in the Commissioner’s power, possession or control. If, however, the Tribunal were to revisit the Commissioner’s claims of privilege over certain documents, any resulting order should be limited to directing the production of fact(s) summaries.

(1) A Threshold Issue: the time for Shaw’s cross-motion has passed

3. Shaw brings this cross-motion nearly two months after the deadline for filing motions arising from examinations for discovery, answers to undertakings or refusals; and three months after the deadline for filing any motions arising from Affidavits of Documents and/ or productions, including challenges of privilege. The section 92 hearing is scheduled to commence in two weeks. The Commissioner’s submission is simple: the time for Shaw’s cross-motion has long since passed; the discovery phase is done.
4. On June 17, 2022, the Tribunal issued a Scheduling Order governing the pre-hearing steps in this proceeding. In issuing this Order, the Competition Tribunal (**Tribunal**) was satisfied that the timetable set out therein was appropriate under the circumstances, having regard to the resources that are being devoted to this proceeding, and the Parties’ request to have the matter expedited. The Tribunal was also satisfied that the Scheduling Order aligned with its *Practice Direction Regarding Timelines and Scheduling for Proceedings before the*

Tribunal, and Practice Direction Regarding an Expedited Proceeding Process Before the Tribunal.

5. The deadlines for completion of the discovery and pre-hearing disclosure steps of the Commissioner's application are unequivocal. Discovery was to have been completed on, or before, September 13, 2022— at the latest:

July 28, 2022: last date for filing any motions arising from Affidavits of Documents and/ or productions, including motions challenging claims of privilege;

August 4, 2022: hearing of any motions arising from Affidavits of Documents, productions and/ or claims of privilege (if necessary);

August 15 to August 26, 2022: dates for oral examinations for discovery, with undertakings to be completed on the date of the undertaking plus 10 days;

September 7, 2022: deadline for filing any motions arising from examinations for discovery, answers to undertakings or refusals; and

September 13, 2022: deadline for hearing any motions arising from examinations for discovery, answers to undertakings or refusals.

6. In fact, Rogers Communications Inc (Rogers) and Shaw brought two unsuccessful motions challenging the Commissioner's litigation privilege.

July 22, 2022. Rogers brought a motion seeking production of "records to, from, or copying third parties outside the Commissioner and his staff, except for those communications specifically and solely concerning the preparation of affidavits sworn by such third parties in support of the Commissioner's s. 104 Application." This motion was eventually abandoned.

September 7, 2022. Shaw and Rogers jointly brought a motion arguing for a further and better affidavit of documents. The issue was argued and the Tribunal dismissed this motion.

7. With respect, Shaw has had ample time to raise any concerns it may have had with the sufficiency of the Commissioner’s disclosure. It cannot now look to circumvent the prescribed timelines (above) by way of a cross-motion brought against the Commissioner, on the back of motions by third-parties Bell and TELUS to quash subpoenas *duces tecum*. To allow otherwise renders impotent the Tribunal’s Scheduling Order and reopens the discovery phase of the proceedings.
8. Shaw’s response to the above critique is to focus on the procedural mechanism it is trying to employ to get at the additional discovery—the subpoena process. Subpoenas, they say, allow it to obtain the sought-after document production. That is to say, Shaw suggests that subpoenas are a complete answer to allegations that it is doing an “end-run around” the discovery process.
9. The jurisprudential support on which Shaw relies in support of its position is the Federal Court of Appeal’s decision in *Tseil-Wauthuth Nation v Canada (Attorney General)*.¹ With respect, its reliance on this case is misplaced. It is not difficult to see that *Tseil-Wauthuth Nation* is factually and legally different from the situation before the Tribunal.
10. In *Tseil-Wauthuth Nation*, the Court was faced with a challenge to the adequacy of the evidentiary record placed before the lower court in the context of fifteen applications for judicial review in which 27 parties sought to quash certain administrative decisions approving the Trans Mountain Expansion Project. Specifically, the Court was faced with considering how (and when) “exceptional evidence” (evidence not before the decision-maker at the time of the decision) might be placed before a court on an application for judicial review.

¹ *Tseil-Wauthuth Nation v Canada (Attorney General)*, [2017 FCA 128](#) (CanLII).

11. In its reasons, the Court recognized the unique nature of judicial review applications, and the general rule that a limited evidentiary record is to be put before the reviewing court. Faced with this, the Court took to considering different ways/ procedural mechanisms in which parties might be able to place “exceptional evidence” before the reviewing court. One way was to have the judicial review “treated and proceeded with as an action, thereby allowing for discovery and live witnesses.”² Another, albeit in rare cases, is *via* subpoena.
12. The decision in *Tseil-Wauthuth Nation* does not advance Shaw’s argument. It is, at best, a recognition by the Federal Court of Appeal that in rare cases subpoenas are an option for placing a particular type of evidence (i.e., “exceptional evidence”) before a reviewing court in judicial review applications.

(2) Shaw has not met its evidentiary or legal burdens

13. By way of the cross-motion, Shaw implies that the Commissioner is in possession, power or control of documents responsive to one of the 11 categories of documents that it enumerates. To the extent the Commissioner claims privilege over any such documents, Shaw simply states that there is no valid basis on which the Commissioner could make such a claim.
14. If the Tribunal is satisfied that the cross-motion is properly contemplated by the Scheduling Order and/ or otherwise in-line with this proceedings timetables, Shaw must still convince the Tribunal that the Commissioner is in possession, power or control over non-privileged documents that are relevant and material to the Commissioner’s section 92 application.
15. On the issue of relevance and materiality, Shaw leaves this Court with little to no evidence as to how documents caught by one of the categories might be relevant and material to the Commissioner’s section 92 application. It is not enough, for example, simply to assert relevance and materiality. That is to say, the evidentiary burden cannot be discharged through speculation and unsupported assertions, there must be some grounding in evidence.

² *Ibid* at [para 104](#).

For whatever reason, Shaw has provided the Tribunal with little or no evidence from which it could conclude that the categories relate to relevant and material matters.

16. The same argument applies with respect to Shaw's claim that the Commissioner has no valid claims for privilege over documents responsive to the enumerated categories. To be sure, the Commissioner recognizes that the burden of establishing privilege typically rests on the party claiming it. However, the Commissioner submits that before it is required to meet any such legal burden, the challenging party must put some minimal evidence (or argument) before the Court in support of its challenge. Again, it is not enough, for example, simply to assert that the Commissioner cannot claim privilege over any document. In the instant case, this is what Shaw does. It makes a blanket claim that the Commissioner could never substantiate a privilege claim over a document that is responsive to the categories.

(3) Shaw has been provided with all relevant, non-privileged, documents

17. The Shaw cross-motion identifies 11 categories of documents for which it seeks production. On review of these categories, and at the outset, the Commissioner has no documents in his power, possession or control responsive to seven of the categories:

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

(a)(iv). Written submissions dated on or after June 17, 2022 provided by or on behalf of Bell to representatives of ISED concerning a proposed transaction involving Shaw, Rogers and Quebecor Inc.;

(a)(vi). Written submissions dated on or after July 1, 2020 provided by or on behalf of Bell to representatives of ISED concerning Bell's proposed plans to acquire Shaw;

(a)(vii). Agreements between Bell and TELUS concerning the network reciprocity arrangement described in the Witness Statement of Stephen Howe;

(b)(ii). Written submissions dated on or after March 15, 2021 provided by or on behalf of TELUS to representatives of ISED concerning the proposed transaction involving Shaw and Rogers;

(b)(iii). 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

(b)(iv). 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.

18. All told, the Commissioner has identified a few unproduced documents that might be responsive to the remaining categories of documents. That said, these documents are either publicly available, have already been produced, were previously identified for Shaw in Schedule B of the Commissioner's Affidavit of Documents (**Commissioner's AoD**), and/or are privileged. Specifically,

(a)(i): submissions from Bell to the Bureau concerning the proposed transaction involving Shaw and Rogers. Namely,

- the confidential version of submissions provided by Bell to the CRTC dated [REDACTED] (RBDC00004_000000002), which were attached to a covering email from Bell to the Bureau (RBDC00004_000000001). The Commissioner asserts litigation privilege over the submissions, and accompanying covering email. The documents are listed in Schedule B to his Affidavit of Documents;

- comments filed by Bell in connection with the Petition to the Governor in Council regarding CRTC TRP 2021-130 dated September 22, 2021 (RBCH00007_000000891), which were attached to a covering email from Bell to the Bureau dated [REDACTED] (RBCH00007_000000890). The documents are listed in Schedule B to the Commissioner's Affidavit of Documents. The Commissioner continues to assert litigation privilege over the covering email, but the comments filed by Bell (RBCH00007_000000891) have since been produced.
- reproduction of an article from *The Wire Report* titled "Shaw-Rogers deal would decrease competition, even with Freedom divestiture to Quebecor: analyst" dated September 28, 2021 and provided by Bell to the Bureau by way of a (non-substantive) email dated September 29, 2021 (RBCH00007_000000839). This document was listed and produced as part of Schedule A to the Commissioner's Affidavit of Documents.
- email from Bell to the Bureau dated [REDACTED] responding to questions posed by the Bureau in connection with the Bureau's section 11 order of August 1, 2021 (RBCH00007_000003581). The Commissioner asserts litigation privilege over the document. The document is listed in Schedule B to his Affidavit; and
- email from Bell to the Bureau dated [REDACTED] discussing data and documents produced by Bell in response to the Bureau's section 11 order issued August 1, 2021, making further comments about the proposed transaction, and referencing submissions that Bell intended (at that time) to provide to the Bureau in due course (i.e., the submissions that were provided December 29, 2021) (RBCH00014_000000562). The Commissioner asserts litigation privilege over the document. The document is listed in Schedule B to his Affidavit.

(a)(ii): submissions from Bell to ISED concerning the proposed transaction involving Shaw and Rogers. Namely,

- submissions from Bell to ISED dated [REDACTED] (RBCH00008_000001835), which were attached to a covering email from Bell to the Bureau (RBCH00008_000001834). The Commissioner asserts litigation privilege over the covering email. The document is listed in Schedule B to his affidavit. The Commissioner has produced the submissions to ISED as part of Schedule A to his Affidavit of Documents.

(a)(v): submissions from Bell to the Bureau concerning Bell's proposed plans to acquire Shaw. Namely,

- submissions from Bell to the Bureau dated December 29, 2021 (RBCH00010_000003709). This document was listed and produced as part of Schedule A to the Commissioner's Affidavit of Documents.

(b)(i): submissions from TELUS to the Bureau concerning the proposed transaction involving Shaw and Rogers, including any submissions provided to the Bureau on [REDACTED] Namely,

- submissions from TELUS to the Bureau dated [REDACTED] (RBHC00005_000000007). The Commissioner asserts litigation privilege over the submissions; however, at the time of providing the parties with Schedule B to his Affidavit of Documents, this document was (inadvertently) not listed.

19. The documents identified in Schedule B and the document inadvertently not listed in Schedule B, are properly subject to litigation privilege and therefore not disclosable. All of the documents were provided to the Commissioner by third-parties, and in contemplation of litigation.
20. While certain of the documents over which litigation privilege is claimed are (in part) publicly available, they are nonetheless privileged if provided to the Commissioner by a

third-party and reflect the Commissioner's applied knowledge, skill and thought such that it reveals the Commissioner's litigation strategy and preparations for litigation.³

21. The subpoena process is not an avenue by which parties are able to circumvent claims of privilege. It is not a tool that parties can use to access privileged documents and/ or challenge privilege claims.
22. To the extent Shaw takes issue with documents over which the Commissioner claims privilege, it had the opportunity to bring corresponding motions pursuant to the timelines set out in the Scheduling Order.

(4) The Commissioner has provided Shaw with broad disclosure

23. On May 9, 2022, the Commissioner of Competition filed concurrently an application under section 92 of the *Competition Act* contesting a proposed merger between Rogers Communications Inc and Shaw Communications Inc., and an application under section 104 seeking an interim order for an interlocutory injunction to maintain the status quo pending the outcome of the section 92 proceeding.
24. In line with the above, the Commissioner of Competition provided Shaw Communications Inc. with hundreds of thousands of documents (including dozens of summaries of privileged communications, as well as several privileged documents over which the Commissioner voluntarily waived privilege) and made Ms Kristen McLean, his representative, available for three days of oral discovery.
25. Despite the foregoing, Shaw takes the view that it's entitled to more disclosure. Specifically, Shaw brings this cross-motion (two weeks before trial) seeking the production of an additional 11 categories of information.

³ See *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at [paras 62-64](#).

(5) Any order favouring Shaw should be limited to summaries of fact

26. If the Tribunal were inclined to revisit the Commissioner's claims of privilege over certain documents, any resulting order should be limited to directing the production of fact(s) summaries. Namely, Shaw cannot be entitled to more than what they would otherwise have been during the discovery phase—the underlying facts in respect of privileged communications.
27. This approach is consistent not only with the process that governed the discovery phase, but is also consistent with Shaw's own requests of the Commissioner wherein Shaw has asked that the Commissioner provide certain summaries of documents over which privilege is claimed. It is also consistent with past Tribunal practice in other cases.⁴

(6) The Cross-Motion should be dismissed, with costs to follow the event

28. Since its inception, the Tribunal has been challenged to find an appropriate balance between efficiency, expediency and procedural fairness. The *Competition Tribunal Rules*, which govern the Tribunal practice and procedures, were amended in 2002 in response to criticisms that Tribunal proceedings had become overly judicialized and cumbersome.⁵ For instance, interlocutory wrangling surrounding the disclosure rules prolonged proceedings such that little progress was made towards the Tribunal's expediency objective.
29. As a result, the Tribunal has undertaken to amend its Rules and processes to address these concerns and to attempt to strike a better balance between fairness to all parties, on the one

⁴ *Director of Investigation and Research v AC Nielsen Company of Canada Limited*, 1994 CanLII 1901 (CT), [at 12](#), *Director of Investigation and Research v Canadian Pacific*, 1997 CanLII 3738 (CT), [at 5](#), *Director of Investigation and Research v Southam Inc*, 1991 CanLII 2396 (CT), at [37](#).

⁵ *Competition Tribunal Rules*, SOR/2008-141, [Rule 2](#) permits the Tribunal to dispense with, vary or supplement the application of any of the Tribunal's rules of procedure in a particular case in order to deal with the matter as informally and expeditiously as the circumstances and considerations of fairness permit.

hand, and efficiency and expediency of proceedings on the other. Special attention has been paid to the discovery process.

30. In its January 2019 Practice Direction regarding an “Expedited Proceeding Process before the Tribunal” the Tribunal notes its view that “the best way to expedite its proceedings is to apply certain parameters and limitations on the discovery process.”⁶ In fact, parameters and limitations on the discovery process in this proceeding were put into place and discovery was to have been completed on, or before, September 13, 2022— at the latest.
31. Shaw’s cross-motion undermines the Tribunal’s Scheduling Order, as well as frustrates and disrupts the proceeding. It is reminiscent of the types of interlocutory matters that historically led to drawn-out and protracted litigation before the Tribunal. It would be appropriate in the instant case to deny Shaw its cross-motion and have the parties proceed with moving forward towards the hearing date.

The following provisions and documentary evidence will be used at the hearing of the cross-motion:

32. Sections 92, 93 and 96 of the *Competition Act*, R.S.C., 1985, c. C-34.
33. Sections 8 and 8.1 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.).
34. Rules 2, 7, 34, 60-64, 68-70 and 82-88 of the *Competition Tribunal Rules*, SOR/2008-141.
35. Rules 3 and 4 of the *Federal Courts Rules*, SOR/98-106.

⁶*Practice Direction Regarding an Expedited Proceeding Process Before the Tribunal*, Ottawa, [January 2019](#).

36. Affidavit of Jessica Fiset affirmed October 17, 2022;
37. Scheduling Order issued by Justice Little dated June 17, 2022;
38. Discovery Plan dated June 28, 2022; and
39. such further or other grounds or documents as counsel may raise and the Tribunal may permit.

DATED AT OTTAWA, ONTARIO, this 21st day of October, 2022.



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