Competition Tribunal Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 16
File No.: CT-2022-002
Registry Document No.: 589

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
Shaw Communications Inc.
(respondents)

and

Attorney General of Alberta
Videotron Ltd.
(intervenors)

Date of hearing: September 13, 2022
Before: Justice Andrew D. Little (Chairperson)
Date of oral reasons for order and order: September 15, 2022

REASONS FOR ORDER AND ORDER ON MOTIONS TO COMPEL ANSWERS TO QUESTIONS REFUSED ON EXAMINATIONS FOR DISCOVERY

(Public Version of Reasons rendered orally on September 15, 2022)

I. INTRODUCTION

[1] This proceeding concerns the proposed acquisition by Rogers Communications Inc. ("**Rogers**") of Shaw Communications Inc. ("**Shaw**") (the "**Proposed Transaction**"). In general terms, the application by the Commissioner of Competition (the "**Commissioner**") claims that the Proposed Transaction has and will likely lessen or prevent competition substantially under section 92 of the *Competition Act*, RSC 1985, c C-34 as amended (the "**Act**"), by removing Shaw as a competitor in certain markets for the provision of certain services described by the Commissioner.

[2] By Notices of Motion dated September 7, 2022, the Commissioner filed motions to compel Rogers and Shaw to answer questions refused at examinations for discovery.

[3] By Notice of Motion dated September 7, 2022, Rogers and Shaw filed a motion to compel the Commissioner to answer questions refused at examinations for discovery.

[4] On September 12, 2022, the parties served and filed responding motion records.

[5] On September 13, 2022, the Tribunal heard the parties' motions and reserved its decisions.

[6] Follow-up discoveries were scheduled for September 15 and 16, 2022.

[7] As a result of discussions amongst counsel for all the parties, the issues originally raised in the Notices of Motion have narrowed. The remaining motions seek Orders:

(a) requiring answers to questions 40-46, 47-48, 49-53, 61-63, 64-66 and 67, and question 1155, asked at the examination for discovery of Mr. Dean Prevost on behalf of Rogers;

(b) requiring answers to questions 23-28 asked at the examination for discovery of Mr. Paul McAleese on behalf of Shaw; and

(c) requiring answers to questions 164, 165, 197, 199, 205, 206, 234, 265, 266, 294, 572 and 614-616 asked at the examination for discovery of Ms. Kristen McLean on behalf of the Commissioner.

[8] The issues on these motions require consideration of the relevance of certain questions at discovery and whether litigation privilege attaches to certain documents of the Commissioner.

[9] For the reasons that follow, the motions will be dismissed.

II. THE COMMISSIONER'S MOTIONS

A. Questions at Discovery

[10] Rules 240 and 242 of the *Federal Courts Rules*, SOR/98-106 apply to examinations for discovery in Tribunal proceedings:

Scope of examination

240 A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that

(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or

(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action

Étendue de l'interrogatoire

240 La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui :

a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;

b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action

Objections permitted

242 (1) A person may object to a question asked in an examination for discovery on the ground that

(a) the answer is privileged;

(b) the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;

(c) the question is unreasonable or unnecessary; or

Objection permise

242 (1) Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas :

a) la réponse est protégée par un privilège de non-divulgation;

b) la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge;

c) la question est déraisonnable ou inutile;

(d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.	d) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241.
Objections not permitted	**Objection interdite**
(2) A person other than a person examined under rule 238 may not object to a question asked in an examination for discovery on the ground that	(2) À l'exception d'une personne interrogée aux termes de la règle 238, nul ne peut s'opposer à une question posée lors d'un interrogatoire préalable au motif que, selon le cas :
(a) the answer would be evidence or hearsay;	a) la réponse constituerait un élément de preuve ou du ouï-dire;
(b) the question constitutes cross-examination	b) la question constitue un contre-interrogatoire.

[11] All parties agreed that the Federal Court of Appeal established the applicable legal test for relevance in *Canada v Lehigh Cement Limited*, 2011 FCA 120, at para 34. It was recently confirmed in *Canada v Thompson*, 2022 FCA 119, at para 30.

[12] The Tribunal has adopted this approach and other principles from *Lehigh* in several cases: *Commissioner of Competition v Secure Energy Services Inc*, 2022 Comp Trib 3, at para 6; *Commissioner of Competition v Live Nation Entertainment, Inc*, 2019 Comp Trib 3, at para 8; *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("***VAA***"), at paras 41-46.

[13] The *Lehigh* principle is a general and flexible standard. Doubts as to relevance will be resolved in favour of disclosure: *Live Nation*, at para 8.

[14] Earlier this year in *Secure*, Justice Phelan set out the following quotations from *Live Nation*, at para 6:

> [6] … It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each party has to meet (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("VAA") at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.

> [7] … FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person's knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings.
>
> [8] … At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper.
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> …
>
> [10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts known by such party, but it cannot ask for the facts or evidence relied on by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (FCTD) ("*Montana Band*") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("*Apotex*"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).
>
> [11] … The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles" (*Lehigh* at paras 24-25; see also *VAA* at paras 41 46).

[15] Justice Phelan also noted, at paras 7-8 and 15-16:

- the Commissioner is a unique litigant in proceedings before the tribunal, as a non-participant in the markets. All of the facts or information in the Commissioner's possession power or control arise from what he has gathered from market participants in the course of

his investigation. He and his representatives do not have direct and primary knowledge of the facts supporting the application;

- expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings. Proceedings before the Tribunal attract a high level of procedural fairness;

- the guiding principles for discovery are relevance and fairness;

- there is no magic formula for determining whether a question should be answered. It requires a review of the question as posed, subject matter and the context; and

- the discovery stage of the litigation generally favours disclosure.

[16] Justice Phelan also stated at paragraph 14:

> As with all motions regarding refusals, one must examine the questions at issue, the context, and their true nature. The Tribunal must determine the true nature of the question posed and ensure that questions are not a disguised manner of trying to obtain that which is not permitted. As acknowledged at para 63 of *VAA*, requiring the Commissioner to outline the facts and sources cannot be a disguised way of requiring disclosure of the "fact[s] relied upon" by the Commissioner.

[17] I will now address the two issues that remain from the Commissioner's motions.

B. Issue 1: Internal Analyses of Synergies and Efficiencies

[18] The Commissioner requested an Order that Rogers and Shaw each provide additional documents containing analysis of the expected synergies and efficiencies claimed in respect of the anticipated transaction that will integrate the two companies' businesses and related to the proposed divestiture to Videotron Ltd ("**Videotron**"). The questions posed by the Commissioner at discovery sought documents prepared by Rogers [or Shaw] and their respective contractors, other than testifying experts. The questions were therefore restricted to records created by Rogers's and Shaw's respective personnel who were working (as members of so-called "clean teams") and their contractors, but not including experts retained and working on efficiencies issues for this proceeding.

[19] The timeframe for these documents is after April 20, 2022, when an examination occurred in relation to such synergies and efficiencies.

[20] In the questions posed to Rogers, the Commissioner referred to documents containing "analysis" and "calculations", whereas the questions posed to Shaw referred to "analysis".

[21] Rogers provided an explanation for its refusal to provide additional documents, advising that it had produced many of the documents on which it will rely for purposes of its efficiencies

claims and that it was producing additional documents related to efficiencies elsewhere in its answers to undertakings. Rogers's explanation for its refusal also advised that it will comply with its continuing production obligations and that a complete set of documents on which it intends to rely for its efficiencies claims will be included in its expert report when that is delivered on September 23, 2022.

[22] One of the Commissioner's questions also asked for facts underlying a statement from Rogers's pleading, related to avoided costs relating to network infrastructure and related assets in British Columbia, Alberta and/or Ontario. Rogers provided an answer that included a statement that such costs were being investigated and that any supporting documents will be the subject of continuing production obligations and/or produced with its expert report on September 23, 2022.

[23] In oral argument, the Commissioner pointed to evidence from the examination for discovery indicating that as many as [redacted] people have been working on the integration, implying that it was unlikely that such personnel have not created any (or very few) responsive documents. The Commissioner provided examples of spreadsheets mentioned in documents produced, which spreadsheets have not themselves been produced.

[24] Also in oral submissions, Rogers advised that it had produced nine spreadsheets and that additional documents would be produced this week. Rogers also advised that these documents consisted of all of the information that Rogers has that is responsive to the Commissioner's questions.

[25] Shaw adopted a slightly different position in response to the Commissioner's motion. Shaw advised that it was only asked at discovery for records containing its "analysis" and that it was not conducting any "analysis" of the integration. Shaw was, effectively, only providing data and information to Rogers for its use. It therefore had nothing to produce in response to the Commissioner's questions at discovery at issue on this motion.

[26] With respect to the Commissioner's motion against Rogers, I conclude that the motion must be dismissed.

[27] I accept that there is a distinction between the disclosure and production requirements at the discovery stage based on a broad relevance standard from *Lehigh* and this Tribunal's cases, and the narrower class of documents on which Rogers and its expert will rely to support a claim for efficiencies under section 96 of the Act: see for example, *VAA*, at para 20 and the cases cited there. However, from the evidence in the motion records to which the Tribunal was directed in argument, it appears that there is only a small number of documents that are both responsive to the questions as posed by the Commissioner at the examination for discovery and over which Rogers has not asserted litigation privilege.

[28] The exchange at the discovery between counsel for the Commissioner and Rogers made it clear that some Rogers documents related to claimed efficiencies that came into existence since April 2022 were subject to a claim by Rogers for litigation privilege. However, there was no list before the Tribunal of the documents created and the issue of litigation privilege attaching to those documents has not been argued.

[29] Rogers also acknowledged the existence of its continuing production obligations. In a complex and fast-tracked Tribunal proceeding such as this one, those obligations necessarily include an expectation that parties will do so in a very timely manner.

[30] Through counsel, Rogers advised the Commissioner that it was to produce additional documents this week related to the questions posed at discovery about analysis and calculations related to efficiencies and synergies. It may have already done so since the hearing of these motions on Tuesday.

[31] Rogers advised that documents would also be produced with its expert report on September 23, 2022 – in about a week.

[32] In my view, Rogers's answers to the questions at discovery and in writing were not improper. The Commissioner's motion is therefore dismissed. Having said that, in light of the Commissioner's motion and the evidence on this motion, it may be beneficial to this proceeding for Rogers to confirm or reconfirm to the Commissioner that it has complied with its acknowledged continuing production obligations on these topics. Any additional production of non-privileged and relevant records should not wait until the exchange of evidence and expert reports on September 23, 2022.

[33] The Commissioner's motion against Shaw must be dismissed. There is insufficient basis in the record for an Order to produce documents created by Shaw that analyze efficiencies or synergies because, on the evidence to which the Tribunal was directed, Shaw has not created any such documents. It appears to me from the transcript that the reference to the existence of additional documents was to documents prepared by an outside expert firm for the purposes of the mediation in early July.

C. Issue 2: Unredacted Copies of Certain Rogers Letters

[34] The Commissioner requested an Order that Rogers provide unredacted copies of two letters dated July 22, 2022 and August 22, 2022, from Rogers to the Canadian Radio-television and Telecommunications Commission. The Commissioner advised that Rogers unilaterally redacted portions of the letters. The Commissioner also noted that the question posed at discovery also requested all documents provided to governmental and regulatory bodies and that Rogers did not answer the portion of the question concerning submissions to other such bodies.

[35] On the latter topic, Rogers advised at the hearing that there were no such other documents sent to governmental and regulatory bodies. If that answer has not been provided formally by Rogers's discovery representative, that should be done.

[36] With respect to the redacted parts of the letters, Rogers's written submissions on this motion explained its reasons for the redactions (at paragraph 12, which has been designated Confidential). The explanation was not the subject of an affidavit, nor did counsel refer to any specific evidence on this motion for further information. Rogers also requested the opportunity to seek amendments to the amended Confidentiality Order in this proceeding, if any of the information currently redacted were to be disclosed. I made a suggestion on a possible path to resolve the issue during the hearing, which did not succeed.

[37] In the circumstances, I am sympathetic to Rogers's general concern, including as mentioned in paragraphs 12(a) and (b) of its written submissions. Paragraph 12(c) appears to concern information relevant to issues in this proceeding which may already have been provided (or could be, if it has not). The information noted in the first sentence of paragraph 12(b) could be provided in another manner (i.e., not by disclosing the non-redacted letters). It is possible that some information arising in relation to the first sentence of paragraph 12(a) could be relevant, although no argument was made on the topic on this motion. In addition, some questions related to the issues in these three paragraphs may also have already been asked and answered.

[38] Because there will be additional follow-up discovery in this matter tomorrow, counsel are invited to consider their positions with the guidance above. Careful questions and answers should be able to elicit relevant (if confidential Level A) information that does not intrude upon the general concern raised by Rogers.

[39] With that in mind, the Commissioner's motion for unredacted copies of the letters will be dismissed.

III. THE RESPONDENTS' MOTION

[40] At the examination for discovery of the Commissioner's representative, Rogers asked questions about internal communications within the Competition Bureau related to the assessment of two divestiture remedies that would, according to Rogers, address the Commissioner's concerns under section 92 of the Act. Rogers moved for an Order that the Commissioner be compelled to answer 15 questions refused on the basis of irrelevance or litigation privilege. Rogers submitted that the Commissioner's refusals were improper.

[41] In its written submissions, Rogers characterized the questions as seeking production of:

(a) a written recommendation from Bureau staff to the Commissioner about the proposed divestiture of Freedom Mobile to Videotron, setting out the facts and analysis on which the Commissioner rejected this remedy; and

(b) The underlying facts and documents relied on in support of that recommendation, including any recommendation on earlier remedy proposals received by the Bureau from [redacted]

[42] Two of Rogers's 15 questions at discovery concerned [redacted] and the rest related to the proposed divestiture to Videotron. The written recommendation was a memorandum of less than 30 pages, and a number of attachments.

[43] Rogers essentially argued that no sustainable claim of litigation privilege could attach to the recommendation because it was made to fulfil the Commissioner's statutory obligation under subsection 102(2) of the Act to consider the proposed remedy in good faith, separate and apart from any litigation. Rogers also argued that the best evidence of the Commissioner's concerns arising from his investigation are recorded in the recommendation, distilled succinctly. Thus, according to Rogers, production of the recommendation would be of great assistance to the

Tribunal and the process, as well as to parties and their experts. With the support of Shaw, Rogers contended that its disclosure is also important to ensure that the respondents are aware of the case they have to meet as a matter of procedural fairness -- particularly in light of the Federal Court of Appeal's decision in *Vancouver Airport Authority v Commissioner of Competition*, [2018] 3 FCR 633, 2018 FCA 24.

[44] The Commissioner disagreed. The Commissioner submitted that the questions were improper and the answers to them were irrelevant and privileged. According to the Commissioner, the respondents' motion seeks to discern the advice received by the Commissioner about their proposals to avoid or end this litigation. The Commissioner also submitted that the questions were improper because they sought to know what the Commissioner relied upon in deciding not to resolve the litigation (citing the Tribunal's reasons in *VAA*, at para 20 and *Montana Band v Canada*, [2000] 1 FC 267). On relevance, the Commissioner submitted that a proceeding under section 92 of the Act is different from a judicial review application and, in substance, the recommendations to the Commissioner do not go to the decision that must be made by the Tribunal under sections 92 and 96, but only to the decision made by the Commissioner about proceeding ahead with the litigation.

[45] On privilege, the Commissioner submitted that evidence in the record, including an affidavit from the principal author of the written recommendation, demonstrates that litigation privilege attached to the recommendations made to the Commissioner. According to the Commissioner, the respondents' motion seeks a roadmap to the Commissioner's case and strategy that is privileged in a written memorandum prepared with input from Competition Bureau team, including economists and lawyers from the Department of Justice.

[46] After considering all of the parties' submissions on this motion, I have reached the following conclusions.

[47] First, the questions posed by Rogers were relevant as contemplated in *Lehigh* and the Tribunal cases that follow it. They concern matters raised in the pleadings that are at issue in the proceeding, namely, whether any substantial lessening or prevention of competition in a market(s) would be addressed by the respondents' proposed divestitures.

[48] I am mindful that the recommendation memorandum on the proposed divestiture was an internal communication and not a document collected from a market participant. In addition, the main recommendation memorandum at issue was made in late June 2022 (the earlier one was in April 2022). They were both made at a point in time after the Commissioner had been investigating the proposed merger for more than a year, but before discoveries in this proceeding, including documentary and oral discovery of the intervenor, Videotron. In my view, neither of these points renders the subject matter irrelevant in principle under the *Lehigh* test.

[49] Second, I agree with the Commissioner that the recommendations and associated communications were litigation privileged.

[50] Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation: *Lizotte v Aviva Cie d'assurance du Canada*, [2016] 2 SCR 521, 2016 SCC 52, at para 19.

[51] The purpose of litigation privilege is to ensure the efficacy of the adversarial process: *Blank v Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39, at para 27; *Lizotte*, at para 22. It maintains a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate: *Lizotte*, at para 24; *Blank*, at paras 32 and 34. To achieve the purpose of ensuring the efficacy of the adversarial process, parties to litigation, whether represented by legal counsel or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure: *Blank*, at para 27.

[52] Litigation privilege covers only those documents whose "dominant purpose" was litigation and not those for which litigation was a "substantial" purpose: *Lizotte*, at para 23.

[53] Litigation privilege is also a class privilege; once the conditions for its application are met, that is, once there is a document created for the dominant purpose of litigation, and the litigation in question or related litigation is pending or may be reasonably apprehended, there is a presumption of inadmissibility, i.e., immunity from disclosure: *Lizotte*, at paras 33-34.

[54] Documents and communications may be subject to litigation privilege, even if a lawyer is not involved: *Lizotte*, at para 22; *Blank*, at paras 27, 32 and 34.

[55] There are two elements to assess in order to determine whether litigation privilege attaches: (a) whether litigation is pending or reasonably apprehended, and (b) whether the document or group of documents was created for the dominant purpose of litigation:: *Lizotte*, at para 33; *Canada v Tk'emlúps te Secwépemc First Nation*, 2020 FCA 179, at para 37. This two-part approach is not in dispute on this motion.

[56] The cases also contemplate that either an individual document, or a group of like documents, may be considered under this test: *Alberta v Suncor Energy*, 2017 ABCA 221 ("***Suncor***"), at paras 35 and 43; *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289, at para 87; *Canada v Husky Energy Inc*, 2017 SKQB 383, at para 47.

[57] This proceeding was commenced by Notice of Application filed on May 9, 2022. The Commissioner concurrently filed an application for relief under section 104 of the Act, which included lengthy affidavits and expert reports that addressed the divestiture remedy proposed at the time [redacted].

[58] On this motion, the Commissioner filed the affidavit of Ms. McLean. She was the Commissioner's representative at the examination for discovery. Ms. McLean is the Team Lead for the Bureau team reviewing the Proposed Transaction, and is responsible for making recommendations to the Commissioner about proposed remedies.

[59] Ms. McLean's affidavit advised:

- [redacted]

[redacted]

- Work on the materials for the section 104 application began as early as January 2022.
- [redacted]
- [redacted]
- The evidence the Commissioner relied upon in support of the efficacy of the [redacted] remedy was included with materials the Commissioner filed in support of the section 104 application.
- On June 17, 2022, Rogers advised the Commissioner that Rogers and Shaw had entered into a letter of agreement for the sale of Freedom Mobile to Videotron.
- In mid-August 2022, Rogers provided the Commissioner with a copy of the resulting Share Purchase Agreement.

[60] Ms. McLean's affidavit also stated that she had reviewed the chart of refusals that are the subject of Rogers's present motion. The affidavit confirmed that the "dominant purpose for all those documents and all the information sought by Rogers was to prepare for the litigation under sections 92 and 104" of the *Competition Act*. The affidavit further stated that Rogers's questions pertain to recommendations that were the joint work of the Department of Justice Canada and the Competition Bureau, who worked together on making these recommendations.

[61] Ms. McLean's affidavit further stated that in view of the differences in the divestitures as proposed by Rogers and Shaw and the [redacted], the Bureau's consideration of the requests made for advance ruling certificates ("**ARC**") under section 102 of the Act in connection with the [redacted] and Videotron transactions "were always subordinate to the dominant purpose of preparing for the litigation with Rogers and Shaw". For context, Videotron had requested that the Commissioner issue an ARC under section 102 of the Act approximately three days before the recommendation memorandum in late June 2022.

[62] I turn now to the two elements of the legal test. On the first element, the present litigation was filed and pending more than six weeks before the creation of the main document at issue in this motion. In addition, I find on the evidence that litigation was reasonably apprehended by the time the [redacted] recommendation document was created [redacted]. I am also satisfied that the related documents requested at discovery that fed into or "speak to" the issues in the

recommendations fall into the same category as satisfying the first element of the legal test for litigation privilege.

[63] The second element is whether the document, or group of documents, at issue were created for the dominant purpose of litigation. The written recommendation made to the Commissioner about the Videotron divestiture was made with Ms McLean as the lead author. Others were involved, including in drafting some recommendations. It was reviewed by Ms. Sonley, as Ms. McLean's direct supervisor. Ms. McLean delivered the recommendation to the Commissioner and met with him to discuss it.

[64] Ms. McLean testified that all documents and information requested on this motion were for the dominant purpose of litigation, and that other purposes (including to fulfill a statutory duty under section 102 of the Act) were subordinate.

[65] Rogers noted that a request for an ARC was made under section 102 of the Act by letter dated June 24, 2022, a few days before the recommendation to the Commissioner in late June 2022. With respect to dominant purpose, Rogers argued that the written recommendation was made to satisfy the Commissioner's mandatory obligation under subsection 102(2) to consider any request for an ARC under section 102 "as expeditiously as possible". (Rogers took the same view in its submissions about the [redacted] remedy.) Rogers also pointed to evidence from Ms. McLean's examination for discovery that the Commissioner had a good faith obligation, quite apart from the litigation, to analyze any remedy proposal put forward by the merging parties. Following this argument, Rogers submitted that the recommendation would have been made regardless of the litigation, following the request for an ARC on June 24, 2022.

[66] Rogers also argued that the evidence of dominant purpose was essentially a bald allegation without sufficient detail to support it (citing *PMG Technologies v Transport Canada*, 2018 FC 344, at para 18, which quoted from two British Columbia decisions: *Gichuru v British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259, at para 32; *Keefer Laundry Ltd v Pellerin Milnor Corp et al*, 2006 BCSC 1180, at paras 96-99). Rogers submitted that the Commissioner's evidence did not meet the required standard for proof of a dominant purpose.

[67] I do not agree. In saying so, I am mindful of the passages relied on by Rogers, not only to guide the Tribunal's expectations for supporting evidence to show dominant purpose, but also the care that a party must take to avoid revealing information that may accidentally or inadvertently waive the privilege that is being claimed. See also *Husky Energy*, at para 28.

[68] The decided cases contemplate that in determining the existence of litigation privilege, the Tribunal may consider both evidence from the creator of a document (or someone with sufficient knowledge of the circumstances) and evidence of the broader context and circumstances: see *PMG Technologies*, at paras 23 and following; *Husky Energy*, at paras 48 and following; *Walsh Construction Company Canada v Toronto Transit Commission*, 2019 ONSC 5537, at paras 43 and following, and 53.

[69] In this case, there is evidence from Ms. McLean, who was the principal author, Team Lead for the Bureau's investigation team and the person who has the most knowledge about the creation of the key recommendation memorandum. The context and circumstances include the

[redacted] from the Proposed Transaction, the filed and pending litigation, and the disclosures about the Commissioner's position in the section 104 application, as set out above and in the record. I find the evidence in the record sufficient to discharge the onus to show the dominant purpose of the documents at issue was litigation, including, in particular, the written recommendations to the Commissioner.

[70] The law recognizes that a document may be created for multiple or mixed purposes: see e.g. *Husky Energy*, at paras 26 and 47. There may well have been more than one purpose to the recommendations to the Commissioner. Another purpose for the recommendation document may have been to fulfil the Commissioner's obligation under subsection 102(2) of the Act, as appears to be implicit in the last sentence of Ms. McLean's affidavit. However, the existence of a statutory duty to create a document does not preclude litigation privilege attaching to that document: *Suncor*, at paras 38 and 42, citing the Supreme Court's decisions in *Lizotte* and *Alberta (Information and Privacy Commissioner) v University of Calgary* [2016] 2 SCR 555, 2016 SCC 53. While subsection 102(2) did not expressly require the creation of a report (as was required in *Suncor*), the same principle should also apply to a memorandum or recommendation to the Commissioner prepared to respect the statutory obligation to consider a request for an ARC under subsection 102(2). The evidence may show that the dominant purpose of the memorandum or written recommendation was litigation. In this case, it does.

[71] I have considered Rogers's submissions that Ms. McLean's evidence at discovery and in her affidavit contained inconsistencies and should not be relied upon. Looking at her evidence, including the evidence mentioned by the Commissioner during his submissions, I find insufficient reason to have concerns about the contents of her testimony related to dominant purpose. I note that Rogers did not cross-examine Ms. McLean on her affidavit evidence or ask for a short adjournment to do so.

[72] For these reasons, I conclude that litigation privilege attached to the recommendation documents and the information requested by Rogers in its questions to the Commissioner's representative at discovery. It is not necessary to address the Commissioner's other submissions.

[73] For clarity, I note that this conclusion does not change the privileged or non-privileged status of any document attached to the recommendation memorandum. Presumably, any relevant, non-privileged document was listed in the Commissioner's affidavit of documents and has been produced. If not, appropriate steps should be taken to do so in accordance with all parties' continuing production obligations, already mentioned.

[74] The third and final conclusion on the respondents' motion is that I am not prepared to make an Order, at this time and on this motion, that the Commissioner provide a list of reasons why Rogers's proposed divestiture remedy is inadequate, or for a list of the documents relied upon to support that conclusion. I am conscious of the respondents' submissions about procedural fairness and knowing the case they have to meet. However, considering the focus of this motion on the narrower issue of production of specific communications existing more than two months ago and prior to discoveries, including the discovery of Videotron; the pleadings; the communications between the parties before and after this proceeding was commenced; and the volume of materials exchanged between them during the litigation, I find that such an alternative Order was not

canvassed on this motion sufficiently for me to render a just decision. In reaching this conclusion, I make no comment at all on the potential merits, one way or the other. The present Order is simply made without prejudice to any motion or other process on that issue.

IV. CONCLUSION

[75] The Commissioner's motions are dismissed. The respondents' motion is dismissed. Costs will be in the cause.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[76] The Commissioner's motions are dismissed.

[77] The respondents' motion is dismissed.

[78] Costs of all three motions are in the cause.

DATED at Ottawa, this 15th day of September, 2022.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

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