COMPETITION TRIBUNAL
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CT-2022-002

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

– and –

ATTORNEY GENERAL OF ALBERTA
and VIDEOTRON LTD.

Intervenors

FACTUM OF THE RESPONDENT, SHAW COMMUNICATIONS INC.
(Motions by Bell and TELUS to Quash Subpoenas Issued on October 14, 2022 and Cross-Motion for Production of Documents by the Commissioner)

October 26, 2022

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PART I – INTRODUCTION

1. These motions by BCE Inc. ("**Bell**") and TELUS Communications Inc. ("**TELUS**") to quash subpoenas served by Shaw Communications Inc. ("**Shaw**") and the related cross-motion by Shaw concern efforts by Bell, TELUS and the Commissioner to shield highly relevant documents that go to the heart of the Commissioner's Section 92 Application. These documents include statements that Bell and TELUS made [REDACTED] the proposed transaction between Rogers Communications Inc. ("**Rogers**") and Shaw (the "**Proposed Transaction**").

2. The subpoenas served by Shaw on Bell representatives (the "**Bell Subpoenas**") and TELUS representatives (the "**TELUS Subpoenas**", and together with the Bell Subpoenas, the "**Subpoenas**") on October 14, 2022 seek production of a limited number of documents that fall into the following categories:

   (a) Written submissions dated on or after March 15, 2021 provided by or on behalf of Bell to the Competition Bureau or to Innovation, Science and Economic Development Canada ("**ISED**"), concerning (i) the Proposed Transaction; or (ii) Bell's proposed plans to acquire Shaw (collectively, the "**Bell Submissions**");

   (b) Written submissions dated on or after March 15, 2021 provided by or on behalf of TELUS to the Competition Bureau or to ISED concerning the Proposed Transaction (the "**TELUS Submissions**", and together with the Bell Submissions, the "**Submissions**"); and

   (c) Agreements between Bell and TELUS concerning the network reciprocity arrangement described in paragraph 9 of the Witness Statement of Stephen Howe in this proceeding dated September 23, 2022 (the "**Network Sharing Agreements**").

3. The cross-motion seeks production from the Commissioner of the same documents.

4. The requests made by Shaw are tailored and specific. Complying with them would impose no meaningful burden on any of Bell, TELUS and the Commissioner. Indeed, the documents are few in number and can easily be gathered (if they have not already been gathered). The Commissioner estimates that he has only 10 responsive documents in his possession. Bell has not indicated how many responsive documents it has, but it is evident that the Bell Submissions are few in number and that the Network Sharing Agreements are available to Mr. Kirby and Mr. Howe – the representatives of Bell from whom the Commissioner has delivered Witness Statements. To the extent that it would be burdensome for Bell to gather and produce the Bell Submissions, that alone is telling.

5. There is no basis upon which to quash the Subpoenas. Shaw is not engaged in a fishing expedition or in an abuse of process. Two representatives on behalf of each of Bell and TELUS have agreed voluntarily to testify as witnesses on behalf of the Commissioner in this matter. Shaw is entitled as a matter of basic fairness to test their evidence in cross-examination, including their credibility. Significantly, the scope of relevance is not limited to the four corners of the Witness Statements in question.

6. There is simply no merit to the contention that the Submissions in question are privileged. [redacted] They were not prepared for the dominant purpose of litigation, and it is far from certain that litigation was reasonably in contemplation when many of them were prepared and provided to the Commissioner. Moreover, the Commissioner applied no skill and knowledge to the Submissions of Bell and TELUS.

7. The approach taken by the Commissioner, Bell and TELUS to litigation privilege in this case, if permitted to stand, would raise the spectre of the very sort of selective non-disclosure that used to be permitted under the rubric of "public interest privilege", which the Federal Court of Appeal has determined cannot properly be used to shield

from disclosure large swaths of documents gathered by the Commissioner during the course of an investigation.

8. Shaw respectfully submits that the Subpoenas were properly issued and do not meet the test to be quashed. The motions to quash must be dismissed, and to the extent necessary the cross-motion of Shaw should be granted.

PART II – SUMMARY OF FACTS

A. The Parties and the Section 92 Proceeding

9. Shaw is a publicly traded telecommunications company with residential and business wireline customers in Western Canada and Northern Ontario. Shaw also offers wireless services primarily through its wholly owned subsidiary Freedom Mobile ("**Freedom**"), which it acquired in 2016.

10. Rogers is a publicly traded telecommunications company providing wireline services to residential and business customers in Ontario, New Brunswick, and Newfoundland, and wireless services across Canada.

11. On March 13, 2021, Rogers and Shaw entered into an Arrangement Agreement whereby Rogers agreed to purchase all of the issued and outstanding shares of Shaw for approximately $26 billion (the "**Proposed Transaction**"). The Proposed Transaction was subject to premerger notification and review under the *Competition Act* (the "**Act**").

12. On June 18, 2021, the Commissioner began a formal inquiry into the Proposed Transaction pursuant to Section 10 of the *Competition Act*. A recommendation was made to the Commissioner to commence litigation on March 3, 2022.[1] On May 8, 2022, the Commissioner commenced an Application under Section 92 to block the Proposed Transaction.

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[1] Exhibit 28 to the Affidavit of Tanya Barbiero affirmed October 19, 2022 ("**Barbiero Affidavit**"), Excerpt of the Commissioner's Responses to Undertakings on the Examination of Kristen McLean.

B. Bell and TELUS Campaign Against the Proposed Transaction

13. Bell and TELUS are not parties to the Section 92 proceeding. They have, nonetheless, inserted themselves into this litigation. They have done so not as disinterested third parties, but in pursuit of their own commercial interests against a transaction that threatens their positions in the Canadian telecommunications industry by: (i) strengthening the wireless operations of Videotron; and (ii) enabling Rogers to challenge TELUS' supremacy in wireline in Western Canada.

14. Since the announcement of the Proposed Transaction, Bell and TELUS have worked actively to persuade the Commissioner of Competition to instigate this proceeding.[2] Their efforts have included a series of meetings with representatives of the Bureau in 2021 and 2022, and written submissions to the Bureau and other regulators advocating against the Proposed Transaction.

15. To be clear, the Submissions that Shaw is seeking production of are distinct from the provision of information ordered by the Bureau under Section 11.

(i) Submissions to the Bureau

16. On August 1, 2021, the Commissioner obtained Orders pursuant to Section 11 of the *Competition Act* compelling Bell and TELUS to produce documents to assist in its inquiry regarding the Proposed Transaction.[4]

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[2] During the cross-examination of Mr. Graham, Bell's affiant, questions concerning communications between Bell and TELUS in respect of positions they have taken before the CRTC, with ISED and with the Competition Bureau were refused. One of the bases for those refusals was an assertion of "common interest privilege". Mr. Stern, TELUS' affiant, confirmed in cross-examination that Bell and TELUS have been in communication concerning the Subpoenas. See Transcript of the Cross-Examination of Daniel Stern on October 20, 2022 ("**Stern Cross-Examination**"), pp. 112-113, lns 10-25, 1-3; Transcript of the Cross-Examination of Mark Graham on October 24, 2022 ("**Graham Cross Examination**"), Q 434, p. 112, lns 5-23; Stern Cross-Examination, p. 112, lns 3-9; Graham Cross-Examination, QQ 432-434, pp. 111-112, lns 15-25, 1-12, QQ 454-457, pp. 119-120, lns 23-25, 1-18, QQ 483-485, p. 129-130, lns 11-25, 1-14.

[3] Stern Cross-Examination, p. 68, lns 12-16.

[4] Factum of Bell dated October 25, 2022 ("**Bell Factum**") at para. 6; Factum of TELUS dated October 24, 2022 ("**TELUS Factum**") at para. 16.

17. In addition to these Section 11 documents, TELUS and Bell produced documents to the Bureau in response to requests for information, and also provided, on a number of occasions, Submissions explicitly advocating a position on the Proposed Transaction.[5]

18. Significantly, the Commissioner has produced a Submission

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[5] Affidavit of Mark Graham affirmed October 13, 2022 ("**Graham Affidavit**") at para. 9; Affidavit of Daniel Stern sworn October 13, 2022 ("**Stern Affidavit**") at para. 8.

[6] Stern Cross-Examination, at pp. 85-87, lns 9-25, 1-25, 1-6;

[7]

[8]

[9]

[10]

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20. TELUS has made similar Submissions.

21. .

22.

(ii) Submissions to the CRTC and to ISED

24. Bell and TELUS have actively lobbied two other federal regulators to deny approvals that are necessary for the Proposed Transaction to proceed: the CRTC and ISED.

25. The CRTC's approval was required in order for certain licensed broadcasting distribution undertakings to be acquired from Shaw by Rogers. Both Bell and TELUS

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provided multiple written Submissions to the CRTC imploring the regulator to deny its approval.[13]

26. In addition, both Bell and TELUS made oral submissions during the CRTC's public hearing in respect of the matter. In their submissions, Bell and TELUS again advocated that the CRTC deny Rogers' application to acquired the broadcasting distribution undertakings in question.[14] As Steven Schmidt, Vice-President of Telecom Policy and Chief Regulatory Legal Counsel of TELUS, submitted on behalf of TELUS:

> "The policy action most compatible with expanding rural and Indigenous connectivity in Western Canada is **the complete rejection of the transaction, <u>by all federal reviewers</u> including the commission,** followed by the repurposing of Shaw's unused rural spectrum".[15] [emphasis added]

27. Bell and TELUS also attempted to take advantage of litigation concerning the composition of the Board of Directors of Rogers by asking the CRTC to postpone its public hearing.[16]

28. The approval of the Minister of Innovation, Science and Industry is required under the *Radiocommunication Act* for the transfer of spectrum licences. TELUS has lobbied the Minister to reject the transfer to Rogers of spectrum licences issued to Freedom Mobile,

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13 BCE Intervention re CRTC 2021-281 dated September 13, 2021, Exhibit 2, Barbiero Affidavit; TELUS Comments re CRTC 2021 281 dated September 13, 2021, Exhibit 3, Barbiero Affidavit.

14 Transcript of TELUS Submissions at the CRTC Hearing dated November 23, 2021, Exhibit 15, Barbiero Affidavit; Transcript of BELL Submissions at the CRTC Hearing dated November 25, 2021, Exhibit 16, Barbiero Affidavit.

15 Transcript of TELUS Submissions to the CRTC dated November 25, 2021, Exhibit 15, Barbiero Affidavit, p. 6. Mr. Stern conceded on cross-examination that this accurately reflected the views of TELUS at the time: Stern Cross-Examination, pp. 78-79, lns 24-25 and 1-10.

16 Letter from Robert Malcolmson to Claude Doucet dated November 1, 2021, Exhibit 5, Barbiero Affidavit; Letter from Stephen Schmidt to Claude Doucet dated November 2, 2021, Exhibit 6, Barbiero Affidavit; Letter from Stephen Schmidt to Claude Doucet dated November 8, 2021, Exhibit 11, Barbiero Affidavit.

17 Stern Cross-Examination, p. 80, lns 2-7; , p. 81, lines 3-25, p. 82, lines 2-9.

18

[redacted] [redacted] [redacted]
[redacted].

C. The Competition Bureau Provided No Assurances to Bell and TELUS that the Submissions Would be Withheld from Production

29. It bears emphasis that neither TELUS nor Bell could have reasonably or properly expected the Commissioner to keep the Submissions – or any of the documents produced to the Bureau – confidential and withhold production of them. As reflected in the Bureau's Information Bulletin concerning "Communication of Confidential Information Under the Competition Act", the Commissioner cannot eliminate the possibility that information provided to the Competition Bureau will be disclosed if an enforcement proceeding is commenced.[20] This is so even with respect to information provided pursuant to s. 29 of the *Competition Act*, which provides expressly that confidentiality cannot be guaranteed if a proceeding is commenced.[21]

30. The affiants on behalf of Bell and TELUS are both experienced lawyers who have, at a minimum, a good working knowledge of competition law.[22] They knew or should have known that the Commissioner could provide no assurances in respect of the production of documents and information provided by Bell and TELUS. Both affiants were forced to concede in cross-examination that they have provided no contemporaneous records indicating that such assurances were given. To the contrary, the affiant on behalf of TELUS acknowledged in cross-examination that the Competition Bureau could not have provided any assurances in this regard.[23]

31. There is also no basis for any concerns with respect to the confidentiality of the Submissions and other documents in dispute. Leaving aside that concerns with

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19 [redacted].

20 Information Bulletin on the Communication of Confidential Information Under the Competition Act dated September 30, 2013, section 4.2.1.2; see also *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 at para. 102.

21 Competition Act, RSC, 1985, c C-34 ("**Competition Ac**t"), s. 29(1)

22 Graham Cross-Examination, Q 265, p. 62, lns 11-15, QQ 277-229, pp. 63-64, lns 11-25, 1; Stern Cross-Examination, pp. 65-67, lns 20-25, 1-25, 1-15.

23 Stern Cross-Examination, p. 98, lns 3-22. Similarly, Mr. Graham has not produced any contemporaneous evidence that Bell sought any such assurances from the Commissioner: Graham Cross-Examination, QQ 459-464, pp. 121-123, lns 7-25, 1-25, 1-5.

respect to confidentiality do not prevail over the truth-seeking exercise the Tribunal has been asked to engage in in this proceeding, there is no substance to the suggestion that producing the documents on a counsel's-eyes-only basis will give rise to harm to Bell or to TELUS. The Tribunal has issued a Confidentiality Order in this proceeding. The documents in question, if ordered to be produced, will be produced on a Level A basis and restricted to external counsel's eyes only. There is no suggestion that external counsel to Shaw, Rogers or Videotron will breach the Confidentiality Order.[24] Importantly, Bell and TELUS have both already produced significant volumes of confidential information in this proceeding.[25]

D. No Circumvention of the Discovery Process

(i) This Proceeding Has Been Litigated on an Expedited Basis

32. This proceeding has been conducted on an expedited basis. Pursuant to the Scheduling Order issued by the Tribunal on June 17, 2022 (the "**Scheduling Order**"), the parties had just under two weeks from receipt of Affidavits of Documents and initial productions (on July 15, 2022) to file motions arising from the Affidavits of Documents, including any motions challenging claims of privilege (on July 28, 2022). August 4, 2022, less than a week later, was set aside for the hearing of any motions arising from the Affidavits of Documents. Examinations for discovery were to be completed by August 26, 2022, and any motions arising therefrom were to be heard by September 13, 2022.

33. In view of the guidance contained in the Tribunal's *Practice Direction Regarding an Expedited Proceeding Process before the Tribunal*, it would have been inadvisable for any of the parties to chase every potentially relevant document through motions practice. The appropriate course of action was to take a focused approach to discovery and limit objections to privilege and requests for further production to only those demonstrably necessary at the time. That is what Shaw has done.

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24 Stern Cross-Examination, pp. 111-112, lns 17-25, 1-2.

25 Graham Affidavit at paras. 28-29.; [redacted]

34. As discussed further below, the documents sought by the Subpoenas only became relevant and necessary upon the Commissioner's filing of the Witness Statements of Bell and TELUS employees in support of his Section 92 Application. The Commissioner filed those Witness Statements on September 23, 2022, after the discovery process had concluded. Until the receipt of those Witness Statements, there was no reason for Shaw to seek production of the disputed documents.

(ii) Select Bell and TELUS Submissions Were Withheld from the Commissioner's Production of Documents

35. The Commissioner has taken an approach to the disclosure of the Submissions that is not justifiable. These documents have been withheld from production to Shaw notwithstanding their clear relevance and the production, without valid claims of privilege, of closely related documents.

36.

37. The Commissioner has provided no evidence to substantiate his claim of privilege, save for a bald assertion, in his written argument, that the Submissions are privileged because they reflect the applied knowledge, skill and thought of the Commissioner such that they would reveal his litigation strategy.[28] He has taken that position even though, as stated above,

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28 Commissioner's Response to Cross Motion at para. 20, citing *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at paras. 62-64.

38. The Commissioner's approach to the TELUS Submissions sought by the Subpoenas and the present cross-motion is similarly unjustified.

(iii) The Commissioner's Reliance on Bell and TELUS Witnesses Necessitated the Subpoenas

39. Bell and TELUS are not parties to this proceeding. They did not participate in the discovery process, and Shaw had no reason to seek documents from them in discovery. The Subpoenas have not been issued for the purposes of discovery. They are trial subpoenas. They became appropriate and necessary only once Shaw received the Commissioner's Witness Statements and Expert Reports, which included Witness Statements from representatives of Bell and TELUS.

40. On September 23, 2022, weeks after examinations for discovery in this proceeding were completed, the Commissioner filed witness statements of two Bell employees, Blaik Kirby and Stephen Howe (the "**Bell Witness Statements**") and two TELUS employees, Nazim Benhadid and Charlie Casey (the "**TELUS Witness Statements**").

41. The introduction of evidence from Messrs Kirby and Howe of Bell, and Messrs Benhadid and Casey of TELUS, altered the evidentiary landscape of this proceeding. Shaw requires access the Submissions in order to allow it to fully and fairly cross-examine Messrs Kirby, Howe, Behadid and Casey. Having now stood up to act as witnesses in support of the Commissioner's case, as a matter of procedural fairness the Bell and TELUS Witnesses cannot be insulated from proper cross-examination.

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E. Shaw Has Made Every Effort to Resolve this Dispute Expeditiously

42. On October 5, 2022, Shaw served subpoenas on Messrs Kirby and Howe (the "**Original Bell Subpoenas**") and on Messrs Benhadid and Casey (the "**Original TELUS Subpoenas**" and together with the Original Bell Subpoenas, the "**Original Subpoenas**"), requiring production in advance of the hearing a number of specifically identified categories of documents.[30]

43. On the afternoon of Friday, October 7, 2022, counsel for Bell and TELUS advised counsel for Shaw and counsel for Rogers that their clients intended to bring motions to quash the Original Subpoenas on the grounds that they were "framed in extremely broad terms" and required responses to "sweeping categories" of documents.[31]

44. Over the days that followed, counsel for Shaw repeatedly invited counsel for Bell and counsel for TELUS to meet and confer with a view to addressing any legitimate concerns they might have, including by narrowing the scope of the documents covered by the Original Subpoenas.[32]

45. Bell and TELUS did not accept, or even respond to, these efforts to save time and expense in an already-expedited proceeding. Instead, late in the day on Thursday, October 13, 2022, Bell delivered a Motion Record, including an Affidavit of Mark Graham affirmed October 13, 2022, seeking to quash the Original Bell Subpoenas. Also late in the day on Thursday, October 13, 2022, TELUS delivered a Motion Record, including an Affidavit of Daniel Stern sworn October 13, 2022, seeking to quash the Original TELUS Subpoenas.

46. In light of positions taken by Bell and TELUS in their Motions Records, Shaw notified Bell and TELUS immediately, on Friday, October 14, 2022, that it was withdrawing the Original Subpoenas and serving revised Subpoenas addressed to each of Mr. Howe,

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[30] Subpoena Served on Nazim Behadid and Charlie Casey dated October 5, 2022, Exhibit 33, Barbiero Affidavit; Subpoena Served on Stephen Howe and Blaik Kirby dated October 5, 2022, Exhibit 34, Barbiero Affidavit.

[31] Correspondence between Shaw and TELUS Counsel from October 7 to October 13, 2022, Exhibit 35, Barbiero Affidavit.

[32] Correspondence between Shaw and TELUS Counsel from October 7 to October 13, 2022, Exhibit 35, Barbiero Affidavit.

Mr. Kirby and Mr. Graham of Bell, and Mr. Benhadid, Mr. Casey and Mr. Stern of TELUS.[33] Shaw advised at the same time that it would bring a cross-motion to compel production from the Commissioner.[34]

47. The revised Subpoenas, which are the Subpoenas that are the subject of these motions to quash, narrow considerably the scope of Shaw's document requests. Indeed, the Commissioner has now identified only 10 unproduced documents in his possession that are responsive to the Subpoenas.[35] Similarly, it is clear from the evidence of Messrs. Graham and Stern in cross-examination that: (i) the Submissions and the Network Sharing Agreements captured by the Subpoenas are relatively few in number and can readily be collected and produced; and (ii) there are very few TELUS Submissions to ISED captured by the Subpoenas.[36]

48. Counsel for Shaw have also proposed to counsel for Bell and TELUS a counsel's-eyes-only review of the documents sought by the Subpoenas, without requiring their production, in an effort to potentially narrow or resolve this dispute. Unfortunately, Bell and TELUS rejected this offer.[37]

49. Despite Shaw's good faith efforts to resolve this motion or at least narrow the scope of disagreement, Bell and TELUS remain determined to prosecute their motions to quash and to avoid producing the documents in question.

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33 The Subpoenas were served on Mr. Graham of Bell and Daniel Stern of TELUS because in Affidavits they swore in support of those motions, Messrs Graham and Stern made clear that they are custodians of many if not all of the documents Shaw seeks production of in the Subpoenas.

34 Email from Derek Ricci to Nicole Henderson and Adam Hirsh dated October 14, 2022, Exhibit 36, Barbiero Affidavit.

35 Commissioner's Response to Cross-Motion at para. 18.

36 Stern Cross-Examination at pp. 80-81, lns 8-25, 1-18. [redacted].

37 Correspondence between Kent Thomson, Crawford Smith and Adam Hirsh from October 14, 2022 to October 17, 2022, Exhibit 41, Barbiero Affidavit; Stern Cross-Examination at p. 111, lns 6-16.

F. Supplementary Evidence of TELUS and the Commissioner Should be Disregarded

50. Following the completion of the cross-examination of Mr. Stern, TELUS delivered a new Affidavit from Mr. Stern in an effort to bolster the argument that the TELUS Submissions are privileged. TELUS did so by plucking an email from May 2021 that was filed by the Commissioner in another motion in this proceeding, and purporting to rely upon that email in connection with this motion. The delivery of this new Affidavit offends the rule against case-splitting. The new Affidavit should be disregarded in its entirety.[38]

51. The Commissioner has also attempted to rescue its case on privilege by delivering evidence after the deadline for him to do so had passed. This evidence should also be disregarded. By delivering his evidence just two days before the hearing of these motions, and after the applicable deadline had passed, the Commissioner has deprived Shaw of the opportunity to conduct a cross-examination of the Commissioner's affiant. Admitting this late-filed evidence would be procedurally unfair.

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Issues

52. The motions to quash brought by Bell and TELUS and the related cross-motion brought by Shaw raise the following issues:

    (a) Are Bell and TELUS entitled to avoid production of the Submissions and Network Sharing Agreements on the basis that the documentary discovery process is complete?

    (b) Have Bell and TELUS met the test to have the Subpoenas quashed?

    (c) Are the Subpoenas overbroad or a fishing expedition?

    (d) Are the documents in question subject to any valid claim of privilege?

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[38] *Immigration Consultants of Canada Regulatory Council v. CICC The College of Immigration and Citizenship Consultants Corp.*, 2020 FC 1191 at paras. 13-23.

(e) In the alternative, should the Commissioner of Competition be compelled to produce the documents covered by the Subpoenas to the extent that they are within his possession, power or control?

B. It is Reasonable and Appropriate for Shaw to Seek Production of the Submissions and the Network Sharing Agreements From Bell and TELUS Directly

53. Bell, TELUS and the Commissioner attempt to resist disclosure of the Submissions and the Network Sharing Agreements on the basis that through the Subpoenas, Shaw is attempting an end-run around the discovery timetable imposed by this Tribunal. The Commissioner refers to this in his Response as a "threshold issue".[39]

54. In taking this position, however, Bell, TELUS and the Commissioner ignore the separate purposes served by discovery evidence and a subpoena *duces tecum*, and purport to read into section 7(1) of the *Competition Tribunal Rules* a restriction that the Rules do not contain.

(i) Discovery Evidence and Subpoena Evidence Serve Different Purposes

55. There is no doubt that the right to obtain evidence (including both documentary and testamentary evidence) by subpoena and the right to obtain evidence through the discovery process exist in parallel. In an application under section 92 of the *Competition Act*,[40] the *Competition Tribunal Rules* provide for all of:

(a) Documentary discovery (section 60);

(b) Examination for discovery "as of right" (section 64); and

(c) The issuance of subpoenas (section 7).

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[39] Commissioner Response to the Cross-Motion, heading above para. 3.

[40] See section 35 of the *Competition Tribunal Rules*, which provides: "This Part applies to all applications to the Tribunal, except applications for interim or temporary orders (Part 4), applications for specialization agreements (Part 5), applications for leave under section 103.1 of the Act (Part 8) and applications for a loan order (Part 9)."

56. Notably, the availability of a subpoena under section 7(1) of the *Rules* is not tied in any way to the question of whether a party has or has exercised its discovery rights. Section 7(1) provides:

> **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.

57. The reason that these rights co-exist is clear: they serve <u>different</u> purposes and provide <u>different</u> ways of obtaining relevant documents and evidence in the course of a proceeding.[41]

58. Neither Bell nor TELUS is a party to this litigation. Notwithstanding that documents they produced to the Commissioner pursuant to Orders issued under section 11 formed part of the Commissioner's productions, Bell and TELUS have not been subject to the discovery process provided for under the Rules. Until September 23, 2022, from Shaw's perspective Bell and TELUS were strangers to this proceeding. There was simply no need for Shaw to attempt to obtain production of the documents in question, because the Commissioner had not yet disclosed that he intended to call multiple representatives of each of Bell and TELUS at trial.

59. It was only on September 23, 2022, after the discovery process had concluded, that the Commissioner delivered his Witness Statements. The Witness Statements of the Bell and TELUS representatives purport to address the alleged negative impacts of the Proposed Transaction, including the proposed sale of Freedom Mobile to Videotron, on the telecommunications market in Canada. As a matter of procedural fairness, Shaw must have the opportunity to test the Commissioner's evidence, including through cross-examination of Bell and TELUS.

60. If taken to its logical conclusion, the position of Bell, TELUS and the Commissioner would mean that in <u>any</u> case before the Competition Tribunal in which discovery has

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[41] *Ed Miller Sales And Rentals Ltd. v. Caterpillar Tractor Co.*, at paras. 13-15; *Kent v. Kent*, 2010 NLCA 53 at paras. 44-50.

occurred or will occur, a party has no right to obtain relevant documents from third parties who have surfaced as witnesses at trial, and that attempts to do so will be considered "abusive".

61. That is simply wrong in law and reads into the *Rules* a limitation that does not exist.

62. For example, in *Laboratoires Servier v. Apotex*, the Federal Court declined to quash a subpoena issued against a third party (seeking both testimony and documents) in circumstances where "recent responses by Servier to questions raised in discovery conducted January 22, 2008, state unequivocally that Mr. Landry played some role in an alleged 'clerical error' and in 'handwriting' that appears on a produced document" – issues that were relevant to the proceeding. Since, on the basis of the evidence obtained during examinations for discovery, the Federal Court found "there is evidence before me that suggests that Mr. Landry <u>may have testimony and documents</u> that are not subject to privilege…", the Court narrowed the scope of the subpoena, but declined to quash it.[42]

63. Provided that the documents sought by Shaw through the Subpoenas are relevant, material and narrowly focused, the Subpoenas are valid and should not be quashed. As set out below, the Subpoenas easily pass this threshold.

C. Bell and TELUS Have Not Met the Test to Quash the Subpoenas

64. The Federal Court has made clear on multiple occasions that there are two main considerations that apply when a motion is brought to quash a subpoena:[43]

    (a) "Is the evidence from the witnesses subpoenaed relevant and significant in regard to the issues the Court must decide?"

    (b) "Is there a privilege or other legal rule which applies such that the witness should not be compelled to testify?"

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42 *Laboratoires Servier v. Apotex*, 2008 FC 321 at para. 48.

43 See, for example, *Laboratoires Servier v. Apotex*, *supra* 42 at para. 19; *Re Mahjoub*, 2010 FC 1193 at para. 7; *Grain Workers' Union Local 333 ILWU v. Vitera Inc.*, 2001 FC 187 at paras. 16-17.

65. Shaw does not dispute that the burden of proof is on the party seeking to sustain the subpoena to establish that the witness would likely have evidence relevant to the issues before the Court.[44] That burden has been discharged with respect to each of: (i) the TELUS Submissions; (ii) the Bell Submissions; and (iii) the Network Sharing Agreements.

66. Moreover, Shaw submits that:

    (a) Bell, TELUS and the Commissioner have misconstrued the Tribunal's decision in *Commissioner of Competition v. Canada Pipe Company*;[45] and

    (b) there is no basis on which privilege could be maintained in respect of any of: (i) the TELUS Submissions; (ii) the Bell Submissions; and (iii) the Network Sharing Agreements.

(i) The Subpoenas are Narrowly Tailored and Seek Documents that Are Squarely Relevant

67. In *Laboratoires Servier v. Apotex*, the Federal Court stated: "the threshold to show relevance is not high. However, a party must do more than merely assert relevance".[46]

68. There is no question that the Commissioner believes the main witnesses who received the Subpoenas have relevant evidence in support of his case. The <u>only</u> question is whether they should also be required to produce the limited number of relevant documents sought by the Subpoenas that are known to be within their possession. With respect to Mr. Stern and Mr. Graham, Shaw does not seek their testimony at trial but served them with the Subpoenas in light of their clear ability – reflected in their Affidavits – to gather the limited categories of documents sought by the Subpoenas. Indeed, the evidence of Mr. Stern and Mr. Graham in cross-examination confirmed that they are in possession of many of the disputed documents.

69. The documents at issue fall into three categories:

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[44] *Re Mahjoub*, *supra* 42 at para. 9.
[45] 2004 Comp. Trib. 5 [*Canada Pipe No. 2*].
[46] *Laboratoires Servier v. Apotex*, *supra* 42 at para. 31.

(a) The TELUS Submissions;

(b) The Bell Submissions; and

(c) The Network Sharing Agreements.

70. Each of these categories of documents is limited in scope, readily ascertainable and directly relevant to the matters in issue in this proceeding.

(a) No "Fishing Expedition"

71. Repeatedly and without elaboration, the submissions of Bell and TELUS describe Shaw's efforts to obtain the documents at issue as a "fishing expedition".[47] There is no basis for this complaint.

72. Black's Law Dictionary defines the term "fishing expedition" as "[a]n attempt, through broad discovery requests or random questions, to elicit information from another party in the hope that something relevant might be found".[48] The Federal Court of Appeal has described it as pursuing documents "completely blind".[49]

73. There is no question that Shaw's narrow request for the TELUS Submissions, the Bell Submissions and the Network Sharing Agreements is not a "fishing expedition". Far from casting about for unknown information,

74. The Tribunal should regard with scepticism the assertions of TELUS and Bell that the documents in question are irrelevant. Leaving aside the incentive of TELUS and Bell to hamper the ability of Shaw to litigate its case effectively, TELUS and Bell *do not have access to the full record before the Tribunal* and therefore cannot have full

47 See for example: TELUS Factum at paras. 4, 6, 40, 60; Bell Factum at paras. 18, 22.

48 *Black's Law Dictionary*, 11th ed., s.v. "fishing expedition".

49 *Goguen v. Gibson*, 1984 CarswellNat 21 (Fed. CA) at para. 32 per Marceau J. in concurring reasons.

knowledge of all of the matters in issue in the Section 92 Application. This is particularly so in circumstances where they have denied counsel for Shaw the ability to assess the relevance of the documents through an *in camera* review.

(b) Relevance of the TELUS Submissions

75. Section 29 of the *Competition Act*", a provision that expressly allows information provided voluntarily pursuant to the Act to be disclosed "for the purposes of the administration or enforcement of this Act".[51]

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51 Competition Act, s. 29(1).

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78. [redacted]. If there is information in the Submission that goes beyond what is contained in the appendices, it is patently relevant and must be produced in advance of the TELUS witnesses' testimony.

79. Indeed, TELUS's argument lays bare the danger inherent in allowing parties who are not fully apprised of the matters in issue in the proceeding to determine unilaterally what may or may not be "relevant".[56] [redacted] TELUS itself has, through its witnesses, drawn connections between the wireline market and the wireless market. The main thrust of Mr. Benhadid's Witness Statement is his assertion that "Wireline Network Ownership is Critical to Wireless Network Performance and Reliability".[58]

80. Perhaps most significantly, the Commissioner's counsel has conceded that the [redacted]. That concession is a full answer to TELUS' arguments.

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55 [redacted]

56 Despite purporting to make submissions on relevance, both Mr. Graham and Mr. Stern conceded on cross-examination that Bell and TELUS do not have access to all of the witness statements and expert reports filed by the parties in this proceeding: Graham Cross-Examination, Q 486, p. 130, lns 16-24; Stern Cross-Examination, p. 105, lns 19-25.

57 [redacted]

58 Witness Statement of Nazim Benhadid affirmed September 20, 2022, Exhibit 30, Barbiero Affidavit, at paras. 4-6.

81. To be clear, TELUS' other Submissions to the Commissioner and ISED in respect of the Proposed Transaction are also relevant and must be produced.

(c) Relevance of the Bell Submissions

82. Notably, a significant proportion of Bell's argument is based on the premise that the Bell Subpoenas are over-broad and that the documents they cover are not easily able to be identified and collected. On the strength of that premise, Bell seeks to characterize the Bell Subpoenas as an improper attempt to evade limitations on conducting "third party discovery".[59]

83. The problem with Bell's argument is that the premise of the argument is incorrect. Mr. Graham's evidence in cross-examination indicates that the Bell Submissions are few in number and accessible to him, and that the Network Sharing Agreements are readily accessible to both Mr. Kirby and Mr. Howe.[60]

84. It is undisputed that Submissions falling within the scope of the Bell Subpoenas exist but have not yet been produced to Shaw.

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[59] Bell Factum at paras. 30-36.

[60] Graham Cross-Examination, QQ 368-371, pp. 91-92, lns 1-25, 1-2, QQ 475-476, p. 126, lns 18-23.

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90. Thus, far from the Bell Subpoena being a "fishing expedition",

91. it should be precluded from taking the position that such documents are overly burdensome to produce, and this Tribunal should draw an adverse inference.

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(d) Relevance of the Network Sharing Agreements

93. Finally, Shaw seeks through the Subpoenas the production of the fully complement Network Sharing Agreements. For obvious reasons, no privilege has been asserted with respect to such Agreements.

94. To be clear,

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95. The Network Sharing Agreements are relevant and material for several reasons.

96. *First*, Mr. Howe specifically refers to and describes, to a limited extent, the Network Sharing Agreements in his Witness Statement. As a matter of procedural fairness, Shaw must be given the opportunity to test his evidence.

97.

98. *Third*, the Commissioner has asserted that the proposed sale of Freedom Mobile to Videotron would result in Videotron being too reliant on Rogers. Shaw is entitled to test that assertion, including by reviewing the Network Sharing Arrangements and the interdependency of Bell and TELUS in the provision of wireless telecommunications services.

99. Finally, the Network Sharing Agreements demonstrate the extent of the business relationship between Bell and TELUS in the provision of wireless services. Bell and TELUS have a mutual interest in preventing Videotron from emerging as a stronger competitor in wireless. The credibility of Messrs. Kirby, Howe, Casey and Benhadid is squarely in issue.

100. As alluded to above, the Network Sharing Agreements are readily available to both of Mr. Howe and Mr. Kirby.[66] and readily able to be gathered by the two Bell witnesses who are admitted to have access.

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66 Graham Cross-Examination, QQ. 368-371, pp. 91-92,

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(ii) The Subpoenas Do Not Constitute an Abuse of Process

101. Each of Bell, TELUS and the Commissioner rely on the decision of this Tribunal in *Commissioner of Competition v. Canada Pipe Company*[68] for the proposition that seeking to obtain disclosure, outside the discovery process, from a non-party through a subpoena *duces tecum* constitutes an abuse of the Tribunal's process.

102. In taking this position, however they misunderstand both the context of *Canada Pipe No. 2* and the scope of the Tribunal's decision in that case.

103. In *Canada (Commissioner of Competition) v. Canada Pipe Co.*, which preceded *Canada Pipe No. 2* by several months, Canada Pipe Company Ltd. ("**Canada Pipe**"), the Respondent in a proceeding by the Commissioner alleging exclusive dealing and abuse of dominant position, brought a motion seeking, among other things:

(a) that the Commissioner produce to Canada Pipe "all documents in [her] possession, custody or control that relate to the matters at issue in this proceeding, including those documents that undermine, call into question or are detrimental to the various positions the Commissioner has taken in the Application";[69] and

(b) in the alternative, that all documents or records produced or obtained by the Commissioner from any third party in relation to her investigation – including documents obtained by the Commissioner in accordance with section 11 of the *Competition Act* – be produced to Canada Pipe by the Commissioner.[70]

104. Importantly, at the time the motion was brought the *Competition Tribunal Rules* did not require the Commissioner to produce to Canada Pipe all documents in her possession, power or control that were <u>relevant</u> to the matters in issue in the Application. Rather, it was sufficient for the Commissioner to produce to Canada Pipe

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68 2004 Comp. Trib. 5 [*Canada Pipe No. 2*].

69 *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2004 Comp. Trib. 2 at para. 1 (C.T.) [*Canada Pipe No. 1*].

70 *Ibid.* at para. 2.

only those documents on which she intended to rely in the Application.[71] As a result, notwithstanding that the Tribunal was "satisfied that Canada Pipe has established that the Commissioner is likely in possession of additional documents and that these documents are likely relevant to the matters at issue in the proceeding",[72] the fact that the Commissioner did not intend to *rely* on the materials sought was sufficient to satisfy the Tribunal that Canada Pipe was not entitled to them.[73]

105. Within weeks of *Canada Pipe No. 1*, having lost its motion to compel the Commissioner to produce relevant documents on which she did not intend to rely, Canada Pipe served subpoenas on a number of third-party witnesses directing the witnesses to produce

> any and all documents provided by you or your employer to the Commissioner of Competition prior to August 21, 2003, whether you did so voluntarily or pursuant to a Court Order, as well as any documents received by you or your employer from the Commission relating to this matter.[74]

106. In light of the Tribunal's recent ruling in *Canada Pipe No. 1* declining to order production of the same classes of documents that were the subject of the subpoenas, the Commissioner brought a motion to set aside the subpoenas on the basis that, among other things, the production of the documents at issue was now *res judicata*.[75]

107. In all of the circumstances – including, importantly, that Canada Pipe had sought the same documents by motion against the Commissioner and had its motion denied – the Tribunal quashed the subpoenas:

> The subpoenae at issue direct witnesses to produce any and all documents provided or received by the witnesses, or the witnesses' employers, to and from the Commissioner prior to August 21, 2003. **The subpoenae** fail to limit the documents that must be produced and, in my view, **are overly broad**. **In the circumstances of this case, where Canada Pipe**

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[71] *Canada Pipe No. 1*, *supra* 69 at paras. 40-41.
[72] *Canada Pipe No. 1*, *supra* 69 at para. 48.
[73] *Canada Pipe No. 1*, *supra* 69 at para. 49.
[74] *Canada Pipe No. 2*, *supra* 68 at para. 1.
[75] *Canada Pipe No. 2*, *supra* 68 at paras. 1-2.

> **attempted and failed to obtain further production of documents and persons by way of a pre-hearing motion brought pursuant to paragraph 21(2)(d.1) of the Rules** (see [*Canada Pipe No. 1*], **such broadly framed subpoenae are tantamount to an abuse of the Tribunal's process effectively circumventing an earlier ruling of the Tribunal**.[76] [emphasis added]

108. Importantly, however, before quashing the subpoenas at issue in *Canada Pipe No. 2*, the Tribunal first considered whether there was "new material before [it] to establish a change in circumstances or to show that further production is desirable or warranted".[77] To the extent that such a change of circumstance had occurred, it is apparent that no finding of abuse of process would have been made – *notwithstanding that the Commissioner had already produced documents to Canada Pipe through the discovery process*.[78]

109. In this case, there has been a clear change in circumstance: namely, the delivery of the Bell Witness Statements and the TELUS Witness Statements.

110. As noted above, in light of the nature of this proceeding, Shaw took a highly focused approach to the documentary production process, including by not bringing motions challenging each and every element of non-disclosure or improper claim of privilege. Shaw took seriously the Tribunal's request in the *Practice Direction Regarding an Expedited Proceeding Process before the Tribunal* that the parties should "reasonably cooperate and agree on expediting discovery and pre-hearing steps, as well as the hearing itself, including with respect to documentary discovery, examinations for discovery, and the presentation of evidence in a manner that could streamline the hearing".[79]

111. The request for production of the Submissions and the Network Sharing Agreements arose directly from the decision of Bell and TELUS to provide Witness

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76 *Canada Pipe No. 2*, *supra* 68 at para. 6.
77 *Canada Pipe No. 2*, *supra* 68 at para 9.
78 *Canada Pipe No. 1*, *supra* 68 at para. 22.
79 Competition Tribunal *Practice Direction Regarding an Expedited Proceeding Process before the Tribunal* dated January 2019.

Statements and testimony at trial – a decision which only became known to Shaw on September 23, after the completion of the discovery process.

D. The Documents Sought in the Bell and TELUS Submissions are Not Protected by Any Valid and Subsisting Claim of Privilege

112. While both TELUS and Bell have suggested that they have no ability to waive any form of privilege asserted by the Commissioner[80] and the Commissioner has asserted baldly in its Response that responsive documents in his possession "were provided to the Commissioner by third-parties, and in contemplation of litigation", [81] such assertions fall well short of is required in order to sustain a claim of privilege over the Submissions.[82]

113. In assessing the assertions of litigation privilege over the Submissions, it must be recalled that litigation privilege is intended to protect "communications and documents **whose dominant purpose is preparation for litigation**".[83] The rationale underlying this class privilege was aptly described by this Tribunal in *Commissioner of Competition v. Air Canada* as follows:

> The importance of litigation privilege has been recognized by the case law. In order to achieve its purpose of ensuring the efficacy of the adversarial process, parties to litigation must be left to prepare their positions […] 'without adversarial interference and without fear of premature disclosure'.[84]

114. The test for asserting litigation privilege in Canada has long been settled as requiring that: (i) litigation was "ongoing or reasonably contemplated at the time the document was created" and that (ii) "the dominant purpose of creating the document was for that litigation".[85]

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80 Bell Factum at para. 46; TELUS Factum at para. 69.

81 Commissioner Response to the Cross-Motion at para. 19.

82 Again, no claim of privilege has been asserted in respect of the Network Sharing Agreements.

83 *Lizotte v. Aviva Insurance Company of Canada*, [2016] 2 S.C.R. 521 at paras. 1, 19 [emphasis added].

84 *Grand Rapids First Nation v. Canada*, 2014 FCA 201 esp. at paras. 26-34; *Commissioner of Competition v. Air Canada*, 2012 Comp. Trib. 20 at para. 18.

85 *Hagedorn v. Helios I (The)*, [2014] F.C.J. No. 519 at para. 25 (C.A.), varying [2013] F.C.J. No. 229 (F.C.).

115. In the seminal 2006 case of *Blank v. Canada (Minister of Justice)*, the Supreme Court of Canada had the opportunity to consider whether litigation privilege could be claimed where litigation was merely the *substantial* purpose for a document's creation. A majority of the Court refused to expand the litigation privilege in this manner:

> I see no reason to depart from the dominant purpose test. **Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure** and not as an equal partner of the broadly interpreted solicitor-client privilege. **The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure**.[86] [emphasis added]

116. In its 2016 decision in *Lizotte v. Aviva Insurance Company of Canada*, the Supreme Court of Canada endorsed unanimously the "dominant purpose" test from *Blank*. In *Lizotte*, the Court held that litigation is a class privilege that "entails a presumption of non-disclosure **once the conditions for its application are met**".[87]

117. Notably in this case, neither of the criteria for the attachment of litigation privilege has been satisfied. Indeed, there is no evidence properly before this Tribunal to substantiate any claims of litigation privilege.

(i) The Dominant Purpose of the Submissions Was Not Litigation

118. Neither Bell nor TELUS has provided evidence that the Submissions sought by the Subpoenas were created or supplied for the "dominant purpose of litigation". Rather, the only assertions of privilege made in this motion or in the related cross-motion against the Commissioner are unsubstantiated, unsupportable claims of litigation privilege by the Commissioner, as well as an unsupported assertion by Bell that [redacted]

86 *Blank v. Canada (Minister of Justice)*, [2006] 2. S.C.R. 319 at paras. 59-60.
87 *Lizotte*, *supra* 83 at paras. 32-33 [emphasis added].
88 [redacted]

119. There can be no doubt that the onus is on the person claiming privilege to establish an evidentiary basis for that claim.[89] While the Supreme Court of Canada in *Lizotte* made clear that as a class privilege, no case-by-case balancing of interests was needed in order for litigation privilege properly to be invoked, the Court confirmed that the privilege would provide protection only "[o]nce the conditions for its application are met".[90]

120. Bell and TELUS have never been parties to this proceeding – and would not have intended to become parties even if either of them believed or understood that litigation was imminent. They do not assert litigation privilege in their own right. Rather, they purport to rely upon the Commissioner's assertion of litigation privilege.[91]

121. However, The Ontario Superior Court of Justice has held that materials relating to the lobbying of public officials to pursue a particular course of action – even when such lobbying efforts accompany and are contemporaneous to litigation (which is not the case here) – are not subject to valid claims of litigation privilege.[93]

122.

(a)

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89 *Hagedorn v. Helios I (The)*, 2014 FCA 135 at para. 27; see also *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24 at para. 93.

90 *Lizotte*, *supra* 83 at para. 33. See also paras. 1, 4, 19.

91 Bell Factum at para. 46; TELUS Factum at paras. 37, 69; Supplementary Affidavit of Daniel Stern affirmed October 17, 2022 at para. 11.

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93 *Kaymar Rehabilitation Inc. v. Champlain C.C.A.C.*, 2013 ONSC 1754 at paras. 65-66 & 77-88 (Master). *R. v. Toronto Star Newspapers Ltd.*, [2005] O.J. No. 5533 at paras. 28-30 (S.C.J.).

(b)

123. Having failed to show that any of the Submissions was authored for the dominant purpose of litigation, any claim of litigation privilege must fail.

(ii) Litigation Not Reasonably in Contemplation

124. Further, even if the Commissioner did have a subjective intention to commence litigation in respect of the Proposed Transaction at the time the Submissions in question were prepared and provided to him, the test imposed by *Blank* requires that litigation be reasonably in contemplation. In this regard, the internal Competition Bureau email from May 2021 that TELUS purported to file in evidence after its affiant was cross-examined[94] – even if properly admissible – is of no assistance. It is not sufficient for the Commissioner to have subjectively contemplated litigation. Such contemplation must be reasonable in the circumstances, as determined objectively by the Tribunal, not by other employees of the Competition Bureau.[95]

125. The reason for this is clear: in circumstances where claims of litigation privilege are an "exception to the principle of full disclosure" in litigation,[96] a party should not be

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94 Email of Melissa Fisher dated May 5, 2021, Exhibit A to the Second Supplementary Affidavit of Daniel Stern affirmed October 24, 2022.

95 *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia (c.o.b. Scotiabank)*, [2004] B.C.J. No. 1865 at para. 31 (S.C.) (QL).

96 *Blank*, *supra* 86 at para. 60.

permitted to hide otherwise relevant documents simply by more readily anticipating litigation.

126. As noted in *Canada Pipe No. 1* at paras. 62-64: "In these proceedings, the Commissioner is not a normal adversary, she is a public officer with a statutory obligation to act fairly… the Commissioner must be motivated by goals of fundamental fairness and not by achieving strategic advantage in the proceeding".[97]

127. Courts across Canada – including the Federal Courts – have found that when a party is in an investigative phase aimed at determining whether litigation should be commenced, claims of litigation privilege are not yet validly asserted, since during this period litigation is not yet reasonably in contemplation.[98] Where, as here, the investigation is undertaken by a regulatory body, the obligation on the investigator to maintain a fair and even-handed approach before making the decision to commence litigation is that much more acute.[99]

128. In this case, by May 2021 the Commissioner had not yet initiated an inquiry under section 10 of the *Competition Act* in respect of the proposed business combination between Shaw and Rogers. That inquiry was initiated in June 2021. The recommendation to commence litigation was only made in March 2022.

(iii) Confidentiality Does Not Provide a Basis for a Claim of Litigation Privilege

129. Both Bell and TELUS rely heavily in their materials on the commercially sensitive nature of the Submissions to resist their disclosure.[100]

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97 *Canada Pipe No. 1*, *supra* 69 at paras. 62-64.

98 *Rousseau v. Wyndowe*, 2006 FC 1312 at paras. 12-15, 24, 35, 36 & 38, *affirmed on other grounds*, 2008 FCA 39 at para. 12; *Hegedorn v. Helios I (The)*, 2014 FCA 135 at paras. 1-9, 25-42, varying in the result 2013 FC 101 at paras. 1-11, 15-19 & 35-42; *Alberta v. Suncor Energy Inc.*, 2017 ABCA 221 at paras.1, 4, 5 & 22-43, leave to appeal refused, [2017] S.C.C.A. No. 411; *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289 at paras. 74-78 & 81-89.

99 *College of Physicians of B.C. v. B.C.*, 2002 BCCA 665 at paras. 72-91, *leave to appeal refused,* [2003] S.C.C.A. No. 83. The Commissioner's oath of office under section 7(2) of the Competition Act requires him to execute the powers and trusts reposed in him "faithfully, truly and impartially". [emphasis added]

100 Bell Factum at paras. 2, 22, 24, 35; TELUS Factum at paras. 4, 20-23, 37, 57.

130. As noted above, the Tribunal has issued a Confidentiality Order. The Commissioner has produced a significant number of competitively sensitive documents and has designated them as Confidential – Level A under that Order. The Confidentiality Order addresses fully the concerns expressed by Bell and by TELUS.

131. In any event, the fact that a document is confidential has no bearing on whether it is subject to a valid claim of litigation privilege.[101] While assertions of confidentiality might have been relevant to a claim of public interest privilege, the Commissioner has made no such claim. This is for good reason: the Federal Court of Appeal laid to rest in 2018 the Commissioner's previous practice of asserting public interest privilege over all documents collected during the course of an investigation. Indeed, the Federal Court of Appeal went further and found that where submissions are made to the Commissioner of Competition, *there was no reasonable expectation of confidentiality*:

> Indeed, there is material suggesting that **those providing information to the Commissioner can never have any assurance or expectation of confidentiality**. In proceedings before the Competition Tribunal, the Commissioner has consistently taken the view that "**anyone providing information to the [Commissioner] either voluntarily or pursuant to an order under s. 11 [of the Act] must expect that such information may be used by the [Commissioner] in the administration of the Act including the bringing of an application before this Tribunal under the Act**": Canada (Director of Investigation & Research) v. Air Canada (1993), 46 C.P.R. (3d) 312 (Competition Trib.) at p. 316.
>
> Further, as the facts of this case demonstrate, the alleged public interest class privilege, if asserted by the Commissioner, is waivable by the Commissioner and only the Commissioner at any time. **Thus, there is no assurance of confidentiality**.[102] [emphasis added]

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[101] *Lizotte*, *supra* 83 at para. 22.

[102] *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24 at paras. 102-103. See also *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2011 ONSC 3387 at paras. 55, 66 in which the Ontario Superior Court of Justice noted that "there is a risk of disclosure every time the Commissioner concludes an investigation and decides to commence proceedings", and that

132. Section 29 of the *Competition Act* does not purport to protect submissions made to the Commissioner once steps have been taken to bring enforcement proceedings under the *Competition Act*.[103] Mr. Stern, TELUS's representative, conceded during cross-examination that the Commissioner could not have made assurances that documents provided to him by TELUS would be withheld from production to Shaw and Rogers.[104]

133. Indeed, where ██████ submissions of this nature[105] are made to regulators like the Commissioner, even valid claims of privilege have been found to have been waived.[106] Thus, in *Huang v. Silvercorp.*, the British Columbia Supreme Court found that any applicable claims of privilege had been waived where a party (Silvercorp) purported to assert litigation privilege over information provided to the British Columbia Securities Commission: (i) the Commission's information guide specifically adverted to such information being disclosed to the respondent in the event that proceedings were commenced; and (ii) the information at issue was provided to the Commission voluntarily, for the self-serving purpose of persuading the Commission to pursue proceedings. In such circumstances, the Court found that waiver necessarily followed.[107]

E. The Commissioner Has No Basis on Which to Assert a Claim of Privilege

134. In their effort to avoid disclosure of Submissions ████████████████████ ███████████, Bell and TELUS suggest that any disclosure of the Submissions must be sought through the Commissioner, who has asserted unsupportable claims of litigation privilege over the Submissions.

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industry participants "had no reasonable expectation of privacy when they made their complaints and provided information to the Competition Bureau".

[103] Competition Act, s. 29.

[104] Stern Cross-Examination, p. 98, lns 3-22. Similarly, Mr. Graham has not produced any contemporaneous evidence that Bell sought any such assurances from the Commissioner: Graham Cross-Examination, QQ 459-464, pp. 121-123, lns 7-25, 1-25, 1-5.

[105] Stern Cross-Examination, pp. 85-87, lns 9-25, 1-25, 1-6; Graham Cross-Examination, Q 477, p. 126-127, lns 24-25, 1-4.

[106] See *Commissioner of Competition v. Air Canada*, 2012 Comp. Trib. 20 at paras. 15, 20 (C.T.); *Canada (Director of Investigation & Research) v. Washington*, 1996 CarswellNat 336 at paras. 24-25 (C.T.), per Rothstein J.; *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at paras. 219, 222-225.

[107] *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at paras. 219, 222-225.

135. To be clear, Shaw does not accept that the Submissions or the Network Sharing Agreements must be obtained from the Commissioner rather than through the properly issued Subpoenas. It appears that the Commissioner does not even have all of the documents in question. In the interests of avoiding the suggestion that not all relevant parties are present in these Motions, Shaw brought its cross-motion. As noted above, however, the Submissions are not privileged in the hands of Bell and TELUS.

136. Whether copies of a non-privileged document that are "gathered or copied – but not *created* – for the purpose of litigation"[108] and placed in the barrister's brief may be subject to a proper claim of litigation privilege remains an open question in Canada, and one that the Supreme Court of Canada declined to decide in *Blank*. However, both the Federal Court and the Supreme Court of Canada have made clear that the act of placing a non-privileged document into a barrister's brief does not cloak the original with privilege. As Justice Fish wrote for the majority of the Supreme Court in *Blank*:

> I take care to mention that **assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect**.[109] [emphasis added]

137. To similar effect, in *Belgravia Investments Ltd. v. Canada*, the Federal Court stated:

> Furthermore, **no automatic privilege attaches to documents which are not otherwise privileged simply because they come into the hands of a party's lawyer**. In [*Chrusz*], the Court said "An original document that is clothed with no privilege does not acquire privilege simply because it gets into the hands of a solicitor".[110] [emphasis added]

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108 *Blank*, *supra* 86 at para. 62.
109 Blank, *supra* 86 at para. 64.
110 *Belgravia Investments Ltd. v. Canada*, [2002] F.C.J. No. 870 at para. 46

138. However, in circumstances where Bell and TELUS appear to accept that they have no claims of privilege in their own right that may be fairly asserted over the Submissions, their demand that the Submissions be sought directly from the Commissioner seeks to do precisely that: to impermissibly cloak with privilege documents and information for the mere reason that at some point they were put into the Commissioner's brief in the year before the commencement of this proceeding.

139. In this case, however, the Commissioner's claims of privilege do not avail Bell and TELUS, since: (i) those claims of privilege cannot properly be asserted by the Commissioner (and certainly have not been proven); and (ii) in the alternative, even if such claims had been properly asserted, the Commissioner has undoubtedly waived privilege through the disclosures that have been made in this proceeding.

(i) Privilege Not Properly Asserted or Proven

140. As noted above (and conceded by the Commissioner in his Response to the Cross-Motion),[111] the onus was on the Commissioner to substantiate his claims of privilege in the motion. He has not done so. Indeed, the Commissioner's (unsupported) statements are that:

(a) "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";[112] and

(b) "All of the documents were provided to the Commissioner by third-parties, and in contemplation of litigation".[113]

141. In the circumstances of these motions, however, not only are the Commissioner's assertions in this regard not supported by evidence, they are contradicted by the

111 Commissioner Response to the Cross-Motion at para. 16.
112 Commissioner Response to the Cross-Motion at para. 20.
113 Commissioner Response to the Cross-Motion at para. 19.

evidence before the Tribunal, including the evidence of Bell's and TELUS's representatives:

(a)

(b) *The Submissions were not made for the dominant purpose of reasonably contemplated litigation*: As noted above, the Submissions are not claimed by Bell and TELUS to have been made for the dominant purpose of litigation.

(c) *The disclosures made by the Commissioner reflect an unprincipled approach to claims of privilege*:

114

142.

143. To allow the Commissioner to cherry-pick disclosures and claim litigation privilege in this manner – asserting claims that are internally inconsistent not only temporally but with respect to subject matter – is to risk the Tribunal allowing the Commissioner to revert back to the days when he could pick and choose the documents over which he elected to claim "public interest privilege". A unanimous Federal Court of Appeal in *Vancouver Airport Authority v. Commissioner of Competition* explained cogently why this approach to privilege had the potential to work serious injustice by impeding the truth-seeking function of the Tribunal:

> If the class privilege urged by the Commissioner is recognized, something incongruous emerges: **Competition Tribunal proceedings are subject to procedural fairness obligations at the highest level, akin to court proceedings, yet the Commissioner can unilaterally assert a class privilege and withhold all documents obtained from third parties in his investigation — here, the entire case against the Airport Authority — unless the Commissioner unilaterally decides to waive the privilege over some of the documents**. Thus, as far as disclosure of the case against the party whose conduct is impugned is concerned, that party gets only what the Commissioner deigns to give it. And requests for more disclosure may well be dismissed by the Competition Tribunal because, on the authority of a decision by this Court upholding the class privilege, the interests in confidentiality supporting the class privilege will be seen to be very high. Perhaps summaries of withheld documents might be provided. **<u>But by definition, summaries leave information out. What may seem innocuous or irrelevant to the preparers of the summaries may be critical to the party whose conduct is impugned</u>. And the actual documents authored by participants in the matters under investigation are often**

> **more useful for cross-examination than summaries prepared by non-participants**. **<u>This entire scenario is fraught with the potential of interference with procedural fairness rights and the truth-finding function of the proceedings</u>**.[115] [emphasis added]

144.

(ii) In the Alternative, Any Privilege Over the Submissions Has Been Implicitly Waived by the Commissioner

145. Further and in the alternative, even if litigation privilege could properly be asserted in respect of the Submissions (and, for all of the reasons set out above, it cannot), such privilege has clearly been waived by the Commissioner's selective disclosure. As explained by The Honourable Madam Justice McLachlin, as she then was, in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, waiver of privilege "may occur in the absence of intention to waive, where fairness and consistency so require". [116] The Federal Court confirmed in *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)* that where, as here, the partial disclosure <u>without</u> the allegedly privileged information would be unfair to the parties or would tend to mislead, privilege over the undisclosed information may be waived as a matter of fairness.[117]

146. Notably, in declining to order production in *Canada Pipe No. 1* the Tribunal made specific reference to the fact that there was "no evidence to suggest that documents produced by the Commissioner are only partially disclosed".[118]

[115] *Vancouver Airport Authority v. Commissioner of Competition*, *supra* 89 at para. 113.
[116] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 at para. 6 (S.C.).
[117] *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2017 FC 382 at paras. 56-63.
[118] *Canada Pipe No. 1*, *supra* 69 at para. 55.

147. As a matter of fairness, the partial disclosure by the Commissioner should, to the extent necessary, be remedied through a finding of implied waiver.

F. The "Summaries" Proposed by the Commissioner Are Not Sufficient; In Camera Review is Appropriate

148. The Commissioner proposes in his Response to the Cross-Motion that, in the event that the allegedly privileged Submissions are ordered to be produced, that Shaw be limited to "summaries of fact". However, the Federal Court of Appeal in *Vancouver Airport Authority v. Commissioner of Competition* explained precisely why such summaries are insufficient:

> Perhaps summaries of withheld documents might be provided. **But by definition, summaries leave information out. What may seem innocuous or irrelevant to the preparers of the summaries may be critical to the party whose conduct is impugned**. **And the actual documents authored by participants in the matters under investigation are often more useful for cross-examination than summaries prepared by non-participants**. **This entire scenario is fraught with the potential of interference with procedural fairness rights and the truth-finding function of the proceedings**.[119] [emphasis added]

149. In Shaw's respectful submission, the Submissions (and the Network Sharing Agreements) should be produced to Shaw in their entirety. However, to the extent that the Tribunal is uncertain regarding the propriety of the Commissioner's expansive claims of litigation privilege, in Shaw's respectful submission an *in camera* review of the documents at issue (of which there are very few) would be the most appropriate way forward.

G. Documents Should Be Produced In Advance of the Hearing

150. While Bell asserts that the *Competition Tribunal Rules* do not permit the Tribunal to order that documents responsive to the Subpoenas be produced in advance of the

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[119] *Vancouver Airport Authority v. Commissioner of Competition*, *supra* 89 at para. 113.

hearing of the merits, Bell also submits that: “the purpose of the Rules […] is to allow for the expeditious hearing of time-sensitive matters”.[120]

151. As a matter of procedural efficiency, Shaw respectfully submits that Rule 2(1) permits this Tribunal to “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”, including by ordering the Submissions and the Network Sharing Agreements to be produced in advance of the hearing.

PART IV – ORDER REQUESTED

152. Shaw respectfully requests that that this Tribunal:

(a) Deny the Bell and TELUS Motions to Quash the Subpoenas and grant Shaw its costs, fees and expenses associated with responding to both Motions to Quash;

(b) In the alternative, Order the Commissioner to produce the documents sought by the Cross-Motion of Shaw and grant Shaw its costs, fees and expenses associated with bringing the Cross-Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of October, 2022.

Davies Ward Phillips & Vineberg LLP

120 Bell Factum at para. 33.

October 26, 2022

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SCHEDULE "A"

LIST OF AUTHORITIES

Tab	Case
1.	*Alberta v. Suncor Energy Inc.,* 2017 ABCA 221; leave to appeal refused, [2017] S.C.C.A. No. 411
2.	*B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (c.o.b. Scotiabank), [2004] B.C.J. No. 1865 at para. 31 (S.C.) (QL).
3.	*Belgravia Investments Ltd. v. Canada,* [2002] F.C.J. No. 870
4.	*Blank v. Canada (Minister of Justice),* [2006] 2. S.C.R. 319
5.	*Canada (Commissioner of Competition) v. Canada Pipe Co.,* 2004 Comp. Trib. 2
6.	*Canada (Commissioner of Competition) v. Canada Pipe Co.,* 2004 Comp. Trib. 5
7.	*Canada (Commissioner of Competition) v. Chatr Wireless Inc.,* 2011 ONSC 3387
8.	*Canada (Director of Investigation & Research) v. Washington,* 1996 CarswellNat 336
9.	*Chemawawin First Nation v R*, 2014 FCA 201
10.	*Canadian Natural Resources Ltd. v. ShawCor Ltd.,* 2014 ABCA 289
11.	*College of Physicians of B.C. v. B.C.,* 2002 BCCA 665; leave to appeal refused, [2003] S.C.C.A. No. 83.
12.	*Commissioner of Competition v. Air Canada,* 2012 Comp. Trib. 20
13.	*Goguen v. Gibson*, 1984 CarswellNat 21 (Fed. CA)
14.	*Hagedorn v. Helios I (The),* [2014] F.C.J. No. 519 (C.A.), varying [2013] F.C.J. No. 229 (F.C.).
15.	*Huang v. Silvercorp Metals Inc.,* 2017 BCSC 795
16.	*Immigration Consultants of Canada Regulatory Council v . CICC The College of Immigration and Citizenship Consultants Corp*. 2020 FC 1191, Federal Court

Tab	Case
17.	*Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre*, 2013 ONSC 1754
18.	*Lizotte v. Aviva Insurance Company of Canada*, [2016] 2 S.C.R
19.	*Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2017 FC 382
20.	*Rousseau v. Wyndowe*, 2006 FC 1312; affirmed on other grounds, 2008 FCA 39
21.	*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R
22.	*Suncor Energy Inc. v. Her Majesty the Queen in Right of Alberta*, 2017 CarswellAlta 2356
23.	*Toronto Star Newspapers Limited v. Canada*, 2005 CarswellOnt 7522
24.	*Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24
	Secondary Sources
25.	*Black's Law Dictionary*, 11th ed.
26.	Information Bulletin on the Communication of Confidential Information Under the Competition Act dated September 30, 2013
27.	Competition Tribunal Practice Direction Regarding an Expedited Proceeding Process before the Tribunal dated January 2019.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

COMPETITION ACT**,** RSC, 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.

Order

92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

Order for oral examination, production or written return

11 (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to

(a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in

this section and sections 12 to 14 referred to as a “presiding officer”, designated in the order;

(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

Records or information in possession of affiliate

(2) If the person against whom an order is sought under paragraph (1)(b) or (c) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has or is likely to have records or information relevant to the inquiry, the judge may order the corporation to

(a) produce the records; or

(b) make and deliver a written return of the information.

No person excused from complying with order

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*.

Effect of order

(4) An order made under this section has effect anywhere in Canada.

Person outside Canada

(5) An order may be made under subsection (1) against a person outside Canada who carries on business in Canada or sells products into Canada.

COMPETITION TRIBUNAL RULES**,** SOR/2008-141

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**.**

Urgent matters

(2) If a party considers that the circumstances require that an application be heard urgently or within a specified period, the party may request that the Tribunal give directions about how to proceed.

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.