COMPETITION TRIBUNAL
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PUBLIC

CT-2021-002

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*;

BETWEEN

THE COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and –

ATTORNEY GENERAL OF ALBERTA AND VIDEOTRON INC.

Interveners

WRITTEN SUBMISSIONS OF BCE INC.,
BLAIK KIRBY, STEPHEN HOWE and MARK GRAHAM
(Motion to Quash Subpoenas Issued on October 14, 2022)

October 25, 2022

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PART I - OVERVIEW

1. BCE Inc., Blaik Kirby, Stephen Howe, and Mark Graham (together, "**Bell**," unless otherwise specified) bring this motion to quash subpoenas issued by the Tribunal Registrar on October 14, 2022 at the request of the respondents Rogers Communications Inc. ("**Rogers**") and Shaw Communications Inc. ("**Shaw**" and together with Rogers the "**Respondents**") (the "**Second Rogers Subpoena**" and "**Second Shaw Subpoena**", and together the "**Second Subpoenas**"). Bell seeks to quash the Second Subpoenas only insofar as they purport to require production of documents or to compel the attendance of Mr. Graham, who is internal counsel for Bell and who has not provided a witness statement in this proceeding.

2. The Second Subpoenas are an abuse of the Tribunal's process. They seek to circumvent both the limits of discovery provided for under the *Competition Tribunal Rules* (the "**Rules**") and the discovery timetable set by the Tribunal in this proceeding. They seek highly confidential and competitively sensitive documents from Bell, none of which are relevant or significant to any of Bell's witness statements, indeed most of which are not relevant to the matter more broadly.

3. The Second Subpoenas on their face are an attempt to obtain third-party discovery that is not provided for by the Rules. This abusive tactic by Rogers and Shaw is a clear attempt to discourage Bell and other third parties from cooperating in the Tribunal's process by creating the competitive risk and financial burden associated with producing documents demanded in broad subpoenas *duces tecum*.

4. Permitting the Second Subpoenas to stand would undermine the integrity and efficiency of the Tribunal process and create a dangerous chilling effect on the participation of third parties in Bureau applications and in Tribunal proceedings hearing such applications, to the detriment of both the Bureau's and the Tribunal's mandates in this case and cases in the future. The Second Subpoenas must be quashed.

PART II - SUMMARY OF FACTS

5. The underlying application in this matter (the "**Section 92 Application**") is an application by the Commissioner of Competition to block the proposed acquisition of Shaw by Rogers (the "**Proposed Transaction**"), both major competitors of Bell. On March 30, 2021, following the announcement of the Proposed Transaction, Bell began providing information to the Competition Bureau regarding the Proposed Transaction as part of the Bureau's review of the transaction.[1]

6. Further to an order made on August 1, 2021 under section 11 of the *Competition Act* (the "**Section 11 Order**"), later varied in part, Bell produced documents to the Bureau on September 15, November 1, and November 29, 2021.[2] In total, Bell produced 863,211 responsive documents and 706 GB of data.[3] In addition to complying with the Section 11 Order, Bell has also supplied additional information to the Commissioner to assist with his inquiry into the Proposed Transaction.[4]

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[1] Affidavit of Mark Graham, affirmed October 13, 2022 at para 7 ["**Initial Graham Affidavit**"].
[2] Initial Graham Affidavit, at para 9.
[3] *Ibid.*
[4] *Ibid.*

7. On or about July 15, 2022, the Commissioner served his affidavit of documents on Rogers and Shaw in accordance with the scheduling order issued by the Tribunal on June 17, 2022 for the Section 92 Application (the "**Scheduling Order**").[5] Among other things, the Commissioner's affidavit of documents disclosed:

(a) all the documents and data produced by Bell in response to the Section 11 Order;

(b) a submission from Bell to the Commissioner dated December 29, 2021 regarding the Proposed Transaction;

(c) several other communications between Bell and the Commissioner dated on or after May 5, 2021 over which the Commissioner claimed litigation privilege and which were not produced to Rogers and Shaw;[6] and

(d) Submissions by Bell to the Canadian Radio-Television and Telecommunications Commission ("**CRTC**") and to Industry, Science and Economic Development Canada ("**ISED**") which had been provided by Bell to the Commissioner.[7]

8. Under the Scheduling Order, discovery motions were required to be heard by September 7, 2022.[8] Neither Rogers nor Shaw brought any motion seeking production of

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[5] Affidavit of Ashley McKnight, affirmed October 19, 2022 at para 14.

[6] Affidavit of Jessica Fiset, affirmed on October 17, 2022 at para 7 ["**Fiset Affidavit**"]

[7] Affidavit of Tanya Barbiero, affirmed October 19, 2022, Exhibit 27 at footnote 2.

[8] Response of the Commissioner of Competition (Bell Motion to Quash Subpoenas against Blaik Kirby and Stephen Howe) dated October 17, 2022, at para 29 ["**Commissioner Response**"].

additional documents that originated with Bell or challenging the Commissioner's claims of litigation privilege over his communications with Bell.[9]

9. On or about September 23, 2022, the Commissioner filed witness statements on discrete topics from two Bell employees, Blaik Kirby and Stephen Howe (the "**Bell Witnesses**"), as part of the Section 92 Application (the "**Kirby Affidavit**" and the "**Howe Affidavit**", together the "**Bell Witness Statements**").[10]

10. On October 3 and 5, 2022, the Registrar of the Competition Tribunal issued two subpoenas:

(a) a summons to Blaik Kirby and Stephen Howe, issued at the request of Rogers, requiring Blaik Kirby and Stephen Howe to attend at the hearing of the Section 92 Application on November 7, 2022 and to bring with them a large volume of documents set out in 12 specifications (the "**First Rogers Subpoena**");

(b) a summons to Blaik Kirby and Stephen Howe, issued at the request of Shaw, requiring Blaik Kirby and Stephen Howe to attend at the hearing of the Section 92 Application on November 7, 2022 and to bring with them a large volume of documents set out in 6 specifications (the "**First Shaw Subpoena**" and together with the Rogers Subpoena, the "**First Subpoenas**").

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[9] Commissioner Response, para 26.
[10] Initial Graham Affidavit, para 12.

11. The First Rogers Subpoena was served on Bell effective October 4, 2022.[11] The First Shaw Subpoena was served on Bell effective October 6, 2022.[12] In their covering correspondence, both Rogers and Shaw demanded that Bell produce the documents sought in the First Subpoenas to them by no later than October 14, 2022.[13]

12. On October 7, Bell advised that it would be moving to quash the First Subpoenas and set out its concerns in a detailed letter to Rogers' and Shaw's counsel. These included that the First Subpoenas were overly broad, sought production of highly confidential and commercially sensitive documents, sought documents that were irrelevant and amounted to a fishing expedition, and constituted an abuse of the Tribunal's process. Bell also highlighted that it would take several months for it to collect, review, and produce the documents sought even if the First Subpoenas were otherwise proper.[14]

13. Rogers and Shaw maintained their position that the First Subpoenas were proper, and went so far as to suggest that the First Subpoenas sought a small number of documents falling within "discrete" categories. Rogers and Shaw also insisted that Bell should begin the process of collecting the documents sought pending disposition of its motion to quash the First Subpoenas.[15]

14. Bell served its motion to quash the First Subpoenas on October 13, 2022. The motion was supported by an affidavit from Mark Graham, Vice President, Legal and

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[11] Initial Graham Affidavit, para 14.
[12] *Ibid.*
[13] *Ibid.*
[14] Affidavit of Jennifer Maringola affirmed October 18, 2022, Exhibit A ["**Maringola Affidavit**"].
[15] Maringola Affidavit, Exhibit B.

Regulatory of Bell.[16] The following day, Rogers and Shaw advised that they would be withdrawing the First Subpoenas in favour of a new set of subpoenas that would delete several of the specifications in the First Subpoenas and narrow others. Rogers and Shaw served the subpoenas (the "**Second Subpoenas**") later that day, addressed to the Bell Witnesses and to Mr. Graham (who has not provided a witness statement in the Section 92 Application).

15. The Second Subpoenas direct Messrs. Kirby, Howe, and Graham to attend at the hearing of the Section 92 Application on November 7, 2022, and to bring with them:

(a) In the case of the Second Rogers Subpoena, all memoranda or presentations to Bell's Board of Directors or executive leadership team:

(i) considering the proposed divestiture of Freedom Mobile Inc. to Videotron Inc., dated on or after May 7, 2022; and

(ii) containing analysis of Rogers' network outage that occurred on July 8, 2022 (the "**Rogers Outage**").

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

(b) In the case of the Shaw Subpoena:

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

(i) written submissions dated on or after March 15, 2021 provided by Bell or its subsidiaries or affiliates to the Bureau or Industry, Science and Economic Development Canada ("**ISED**") concerning the Proposed Transaction, including written submissions provided to the Bureau on September 13, 2021, September 24, 2021, September 29, 2021, October 27, 2021, November 17, 2021 and November 30, 2021;

(ii) written submissions dated on or after June 17, 2022 provided by Bell or its subsidiaries or affiliates to the Bureau or ISED concerning a proposed transaction involving Shaw, Rogers and Quebecor Inc.;

(iii) written submissions dated on or after July 1, 2020 provided by Bell to representatives of the Bureau or ISED concerning Bell's proposed plans to acquire Shaw; and

(iv) network reciprocity agreements between Bell and TELUS.

These revised specifications overlap with specifications 2, 3, 5, and 6 of the First Shaw Subpoena.

16. Rogers and Shaw have advised that they are not seeking to compel Mr. Graham to testify at trial but have addressed the subpoena to him only because they believe that he has the documents sought in the Second Subpoenas "readily available".[17] Bell's

[17] Maringola Affidavit, Exhibit E.

uncontradicted evidence is that Messrs. Kirby and Howe do not likely have most if not all of the documents sought in their power, possession, or control[18] and that Mr. Graham only has certain of the documents sought in the Shaw Second Subpoena in his power, possession, or control.[19]

PART III - ISSUES

17. The issues before the Tribunal on this motion are: first, whether the Second Subpoenas should be quashed; and second, whether Bell should be awarded its costs of this motion.

PART IV - LAW AND ARGUMENT

Test for quashing a subpoena

18. A subpoena may be quashed if it is an abuse of process.[20] A party is not permitted to use a subpoena to do indirectly what they cannot do directly. It is also impermissible to subpoena a witness to obtain documents that a party is already entitled to obtain through other means, such as through discovery of a party.[21] Parties are not permitted to use subpoenas as a fishing expedition.[22] A subpoena that is abusive may be quashed solely on this basis, even if the documents sought therein are relevant and significant to the proceeding.[23]

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[18] Initial Graham Affidavit, at paras 19-20, Affidavit of Mark Graham affirmed October 18, 2022 at para 9 ["**Supplementary Graham Affidavit**"].

[19] Cross-Examination Transcript of Mark Graham, October 24, 2022, page 24, Q95, 10-16, page 25, Q101, 14-19.

[20] *Laboratories Servier v. Apotex Inc*., 2008 FC 321 at para 21, [*Laboratories Servier*].

[21] *Canada (Citizenship and Immigration) v. Mahjoub*, 2010 FC 1193 at para 30, [*Mahjoub*].

[22] *Laboratories Servier*, at para 35, *Zundel (Re)*, 2004 FC 798 at para 7, [*Zundel*].

[23] *Laboratories Servier*, at para 37.

19. The Competition Tribunal has quashed subpoenas *duces tecum* against third parties on the basis that broad document requests to third parties, where parties to a hearing failed to obtain production of such documents through pre-hearing motions brought under the Rules, are "tantamount to an abuse of the Tribunal's process effectively circumventing an earlier ruling of the Tribunal".[24]

20. A subpoena (even one that is otherwise not abusive) may also be quashed it if seeks production of documents that are:

(a) not "relevant and significant" to the matters in issue;[25] or

(b) protected from production by legal privilege or another legal rule.[26]

21. The burden of proof on a motion to quash a subpoena lies with the party seeking to sustain the subpoena.[27] This onus is appropriate considering that subpoenas are issued by the Registrar upon request of a party, unlike an order under section 11 of the *Competition Act*, which must be issued by the Federal Court on the basis of affidavit evidence from the Commissioner.[28] The party seeking to uphold a subpoena must demonstrate with evidence that the witness likely has relevant and significant evidence (testimony or documents) to give at trial; a bare assertion of relevance is insufficient.[29]

The Second Subpoenas are an abuse of process

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[24] *Commissioner of Competition v. Canada Pipe Company*, 2004 Comp. Trib. 5 at para 6 [*Canada Pipe*].
[25] *Zundel*, at para 5.
[26] *Zundel,* at para 7, see also *Samson Indian National Band v. Canada*, 2003 FC 975.
[27] *Mahjoub*, at para 9.
[28] *Competition Tribunal Rules*, SOR/2008-141, s. 7, *Competition Act,* RSC 1985, c C-34, ss. 11(1)-(2).
[29] *Laboratories Servier*, at para 31, *Zundel*, at para 8.

22. Rogers and Shaw appear to be using the subpoena process to deter the Bell Witnesses from participating in the Tribunal proceeding by seeking to compel production of highly competitively sensitive information from Bell to two of its major competitors, or at least to their external counsel, who are presently advising them on current matters of high competitive significance. The Second Subpoenas are a clear fishing expedition which seek documents of no relevance and significance to the Bell Witness Statements, and indeed limited if any relevance to any matters at issue in the Section 92 Application. Ordering production of the highly confidential and competitively sensitive information sought in the Second Subpoenas would create a chilling effect on participation in Tribunal proceedings by third parties, including by Bell in this case,[30] which is undesirable from a public policy perspective for this and all future cases before the Tribunal, and for investigations by the Bureau in future matters.

23. The procedural history of the First and Second Subpoenas makes their abusive nature manifest. The First Subpoenas were, on their face, astonishingly broad both in terms of the volume and commercial sensitivity of the documents sought. Despite the disingenuous protestations from Rogers and Shaw that the First Subpoenas were directed at "discrete categories" of records,[31] they amounted to nothing short of a demand for broad third-party discovery of Bell and were a naked attempt to retaliate against Bell for permitting two of its employees to give evidence in the Section 92 Application.

[30] Supplementary Graham Affidavit, at para 8, Initial Graham Affidavit, at paras 31-32.
[31] Maringola Affidavit, Exhibit B.

24. The Respondents' later pivot to withdraw the First Subpoenas and narrow the scope of the documents being sought does not cure the abusive nature of the Second Subpoenas. Indeed, when considered in isolation rather than in comparison to the extremely broad First Subpoenas, the Second Subpoenas are clearly themselves a broad fishing expedition seeking access to highly confidential and competitively sensitive documents which have not been referenced or produced in the Section 92 Application.

25. Confronted with the strength of Bell's evidence on its motion to quash, Shaw have attempted to deflect their abusive intention in issuing subpoenas seeking production of documents by the Bell Witnesses by focusing their request on documents that they say are related to Bell's December 29, 2021 submission to the Commissioner. The Respondents had that document, and other similar Bell documents provided to the Bureau, ISED, and the CRTC, for months before issuing the First Subpoenas. They have also known since they received the Commissioner's affidavit of documents on July 15, 2022 that the Commissioner was claiming privilege over other communications between him and Bell.

26. The fact that the Respondents waited until the eleventh hour, serving the First Subpoenas only after receiving the Bell Witness Statements, lays bare their retaliatory nature. The vast majority of the documents sought in the Second Subpoenas, if relevant or potentially relevant to the Section 92 Application writ large, could have—and should have—been sought from the Commissioner using the discovery process provided for by the Rules *and* the Scheduling Order.

27. The Respondents' declared intention to (attempt to) use the documents sought to challenge the credibility of the Bell witnesses is, of course, a challenge to Bureau evidence and the Bureau's basis for bringing the Section 92 Application, an issue that did not arise with the filing of the Bell Witness Statements. Further, Bell's uncontested evidence is that Messrs. Kirby and Howe had no involvement in the preparation of any regulatory submissions to the Bureau or ISED.[32] As a result such documents cannot be used to challenge the credibility of the Bell Witnesses. The remaining specifications that seek more recent and highly sensitive documents (e.g., materials presented to Bell's board of directors and executive leadership team within over approximately six months) are simply a fishing expedition targeted at a somewhat more plausible date range than the First Subpoenas, and do not even have a foundation in communications between Bell and the Bureau. Regardless, the Respondents' arguments that they require these documents to impeach the credibility of the Bell Witnesses is unavailing, for the reasons discussed further below.

28. The tactical issuance of subpoenas *duces tecum* against witnesses on the eve of a Tribunal hearing is incompatible with the fair, timely, and cost-effective resolution of proceedings before the Tribunal. That is especially so in this case where Rogers and Shaw have demanded (and received) a highly expedited procedure. As the Tribunal's 2019 practice direction regarding an "Expedited Proceeding Process before the Tribunal" states, "the best way to expedite [the Tribunal's] proceedings is to apply certain

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[32] Supplementary Graham Affidavit, at para 9.

parameters and limitations on the discovery process".[33] One limit that exists in the Rules is the absence of third-party discovery, which the Respondents attempt to flout through the issuance of the Second Subpoenas.

29. If the Second Subpoenas are upheld, the issuance of subpoenas *duces tecum* in Tribunal proceedings will likely become routine. This will only serve to delay proceedings, greatly expand the Tribunal's workload hearing pre-trial motions, and discourage the participation of third parties in Bureau investigations and applications and in the Tribunal's adjudicative process. All of this is inimical to the interests of justice, which at the Tribunal are oriented at getting the right substantive result as expeditiously as possible while affording the parties reasonable due process.

Third party discovery is not permitted in merger review proceedings

30. Subpoena *duces tecum* are a vehicle to compel production of documents to prove facts relevant to the issues in a proceeding. They are not to be used to expand the discovery process by facilitating non-party discovery of documents. [34]

31. As in the *Canada Pipe* case, the Second Subpoenas attempt to do an end-run around the Rules, which do not provide for third party discovery as do the *Federal Courts Rules* governing actions and most provincial rules of civil procedure. The Rules set out a complete code for discovery in the context of a merger review proceeding[35] and the lack

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[33] *Practice Direction Regarding an Expedited Proceeding Process Before the Tribunal*, Ottawa, January 2019.

[34] *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1990 CanLII 5609, 112 A.R. 197 at para. 13 (AB QB).

[35] *Canada Pipe*, at para 7, citing *Commissioner of Competition v. Canada Pipe Company*, 2003 Comp. Trib. 15, at para 68. While the *Competition Tribunal Rules* have been amended since *Canada Pipe* to expand the scope of documents that the Commissioner is required to produce in a section 92 application, the

of third-party discovery was a deliberate choice. It is an abuse of process for a party to use a subpoena *duces tecum* to obtain discovery that is not available under the Rules.

32. In *Canada Pipe,* the Tribunal aptly noted that allowing broad subpoenas to compel production of documents from third parties, outside of the discovery process provided by the Rules, would unnecessarily lengthen the hearing. It would also unduly expand the scope of the Commissioner's production obligations, improperly extending the disclosure of documents beyond the standards established by the Rules and affirmed by the Tribunal.[36] The risk is the same in this case. Rogers and Shaw seek to expand not only the extent of the Commissioner's disclosure obligations but to create a new process for third party discovery.

33. Third party discovery is incompatible with the expedited nature of a standard, let alone an expedited, Tribunal process. If demands for discovery of witnesses are permitted, especially mere weeks before a hearing, they will prevent the orderly management of Tribunal proceedings, contrary to the purpose of the Rules, which is to allow for the expeditious hearing of time-sensitive matters.[37]

34. Even in Federal Court actions where third-party discovery is permitted, it is exceptional and allowed only where it is necessary because the documents <u>cannot</u> be

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principle that the *Rules* constitute a complete code for discovery in such proceedings remains the established law.

[36] *Canada Pipe* at para 7.

[37] *Competition Tribunal Rules*, SOR/2008-141, s. 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."

obtained from a party to the action and the interests of justice require production.[38] Confidentiality of information sought militates against ordering third party production.[39]

35. In this case, the documents sought by the Second Subpoenas are extremely commercially sensitive and highly confidential, and are being sought by two of Bell's most significant competitors. Bell's unchallenged evidence is that these documents contain key competitive concerns and strategies relating to Rogers, Shaw, and the Proposed Transaction, and disclosure of such documents would cause substantial and serious competitive, financial, and other harm to Bell.[40]

36. To date, the only explanation provided by Rogers or Shaw as to the potential relevance of the documents subject to the Second Subpoenas is that they may be used to challenge the credibility of the Bell witnesses on cross-examination. This is not a proper basis for a subpoena. Discovery is generally not permitted on issues going solely to credibility,[41] and subpoenas should also not be permitted for this tangential purpose. It is certainly not an adequate or proportionate justification for a subpoena *duces tecum* directed at lay witnesses in an expedited proceeding. Fishing expeditions going solely to the credibility of witnesses should not be permitted.

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[38] *Janssen Inc. v. Pfizer Canada Inc.*, 2019 FCA 188, aff'ing *Hospira Healthcare Corporation v. Kennedy Institute of Rheamatology*, 2018 FC 992.

[39] *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, at para 19, rev'd on other grounds *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38.

[40] Supplementary Graham Affidavit, at para 6.

[41] See *Trimay Wear Plate Ltd. v. Way*, 2009 ABQB 47 at para 12. Rules 240 and 242 of the *Federal Court Rules* restrict the permissible scope of examination for discovery in an action to questions related to "unadmitted allegations of fact".

The Second Subpoenas are neither necessary nor timely

37. Many of the documents in issue could have and should have been sought from the Commissioner in accordance with the discovery timetable in the Scheduling Order. The deadlines under that order for production of documents, motions arising from document production (including challenging privilege claims), and motions arising from examinations for discovery have all long passed. The Respondents had ample opportunity to seek the production the documents that are in the Commissioner's possession, power, or control, and chose not to. This is further highlighted by the cross-motion served on the Commissioner by the Respondents for production of many of the documents listed in the Second Subpoenas.

38. The only justification provided by the Respondents for the sudden need for third party discovery is the service of the Bell Witness Statements on September 23, 2021. The service of these witness statements is of no moment. The witness statements do not change the nature of the matters in issue and do not make documents that were once irrelevant or insignificant, relevant and significant. If Rogers or Shaw thought the documents were relevant or even potentially relevant to the Section 92 Application, they could have and should have sought them sooner.

39. Bell also adopts and relies on the Commissioner's submissions concerning the integrity of the discovery process in his response to Shaw's cross motion in respect of certain of the documents sought in the Second Subpoenas.

Addressing a subpoena *duces tecum* to internal counsel is itself abusive

40. The Respondents have improperly added Mr. Graham, one of Bell's internal counsel, to the Second Subpoenas. They acknowledge that the sole reason for doing so is that the Bell Witnesses likely do not have the documents that they seek, but that Mr. Graham may have them by virtue of his role as counsel. Mr. Graham is not a witness in this proceeding and the Respondents have confirmed that they do not seek to have him testify at the hearing—according to the Respondents, his role is strictly to arrive, deliver documents, and leave.

41. It is generally improper to issue a subpoena to counsel.[42] Here, Rogers and Shaw have targeted Mr. Graham only to circumvent the rule that subpoenas may only be used to obtain production of documents that are within the power, possession, or control of the individual to whom they are addressed.[43] They are not to be used as a vehicle to obtain discovery of corporate records belonging to a witness's employer.[44] It is improper for the Respondents to add Mr. Graham to the Second Subpoenas to act solely as a vehicle for the delivery of documents where he is not a witness in the Section 92 Application and the Respondents have no intention of making him one.

A subpoena cannot compel production of documents ahead of a hearing

42. Bell's position is that the Second Subpoenas should be quashed in their entirety. In any event, if any portion of the Second Subpoenas are upheld, they cannot be used to

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[42] *Laboratories Servier*, at para 26.

[43] *Simpson Strong-Tie Co. v. Peak Innovations Inc.*, 2008 CarlswellNat 6025 (FC), at paras 9-10, *aff'd*, 2009 FC 392 [*Simpson Strong-Tie Co*], see also *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 147.

[44] *Simpson Strong-Tie Co.* at paras 9-10.

compel the production of documents in advance of the Bell Witnesses' attendance at trial. A subpoena issued under Section 7 of the Rules only requires that the witness produce documents at the date of their attendance.[45]

Conclusion on abuse of process

43. As set out above, there are numerous bases upon which the Tribunal can and should conclude that the Second Subpoenas constitute an abuse of process and should be quashed, irrespective of their relevance or significance to the Section 92 Application. Aside from placing an unfair and unwarranted burden on Bell, for the documents sought by Rogers, that burden cannot be met by Bell by November 7, 2022, as the identification and production of responsive documents would take between 60-90 days.[46] Regardless, enforcing the Second Subpoenas would have deleterious effects on the orderly hearing of the Section 92 Application and would set a dangerous precedent for future Tribunal proceedings, particularly in expedited matters.

The documents sought are not "relevant and significant" to the matters in issue

44. The Second Subpoenas should also be quashed as they seek documents that are not relevant and significant to the matters in issue.

Second Subpoena Specification	Reason for non-relevance/significance
Rogers Specification 1 – All memoranda or presentations dated on or after May 7, 2022 to [Bell's] board of directors or executive leadership team considering	The Bell Witnesses Statements do not comment directly on the proposed divestiture of Freedom Mobile to Videotron, but only on competitive

[45] S.O.R. /2008-141, s. 7. See also, *Carol* at para. 10; *Law Society of Saskatchewan v Abrametz*, 2016 SKQB 134 at para. 46; and *Reflection Productions v. Ontario Media Dev. Corp.*, 2022 ONSC 64 at para. 72 (Div. Ct.) discussing the limits of subpoena *duces tecum* more generally.

[46] Supplemental Graham Affidavit, at para 7.

the proposed divestiture of Freedom Mobile Inc. to Videotron Inc.	dynamics more broadly, and production of these documents is not relevant and significant for any cross-examination of the Bell Witnesses. Bell's evidence is that neither Messrs. Kirby or Howe likely possess any such documents, and so they would be irrelevant to the witness's credibility. [47] More importantly, BCE's analysis of or opinions regarding the proposed divestiture are not relevant and significant to the Tribunal's determination of the effectiveness of the proposed divestiture, which may be the subject of lay and/or expert evidence at the hearing.
Rogers Specification 2 – All memoranda or presentations to Bell's board of directors or executive leadership team on or after July 8, 2022 containing analysis of the Rogers Outage.	The Bell Witnesses do not make any statements in their Witness Statements relating to the Rogers Outage and production of these documents is neither relevant to nor necessary for any cross-examination of the Bell Witnesses. In any event, BCE's analysis of the Rogers Outage is not relevant and significant to the Tribunal's consideration of the Proposed Transaction, which may be the subject of lay and or expert evidence at the hearing.
Shaw Specifications 1 and 2 – Written submissions from Bell to the Bureau or ISED regarding the Proposed Transaction dated on or after March 15, 2021.	Neither of the Bell Witnesses make any statements in their Witness Statements regarding Bell's submissions to the Bureau or ISED, nor were either involved in the preparation of such submissions.[48] These documents are not relevant and significant for cross-examination of the Bell Witnesses, indeed they cannot properly be used to cross-examine the Bell Witnesses on their credibility.
Shaw specifications 3 and 4 – Written submissions from Bell to the Competition	Neither of the Bell Witnesses make any statements in their Witness Statements

[47] Initial Graham Affidavit, at paras 19-20.
[48] Supplementary Graham Affidavit, at para 9.

Bureau or ISED regarding the proposed transaction involving Shaw, Rogers and Quebecor Inc. dated on or after June 17, 2022.	regarding Bell's submissions to the Competition Bureau or ISED, nor were either involved in the preparation of such submissions. [49] These documents are not relevant and significant for cross-examination of the Bell Witnesses, indeed they cannot properly be used to cross-examine the Bell Witnesses on their credibility.
Shaw specifications 5 and 6 – Written submissions from Bell to the Bureau or ISED regarding Bell's proposed plans to acquire Shaw dated on or after July 1, 2020	Neither of the Bell Witnesses make any statements in their Witness Statements regarding Bell's submissions to the Bureau or ISED, nor were either involved in the preparation of such submissions. [50] Further, any potential transaction between Bell and Shaw is manifestly different than that between Rogers and Shaw. Documents relating to a potential transaction between different parties are manifestly not relevant and significant to the Section 92 Application, certainly not to the Bell Witness Statements which do not contain any statements related to "Bell's proposed plans to acquire Shaw".
Shaw specification 7 – Network sharing agreements between Bell and Telus, to the extent such agreements have not been produced by the Commissioner to the Respondents.	The existence of the network sharing agreements is referenced only in a brief and general manner in the Bell Witness Statements; that does not and cannot render the entire detailed agreements relevant and significant. Moreover, the Commissioner has already produced several of the network sharing agreements to the Respondents in his affidavit of documents. The Respondents have not provided any evidentiary foundation showing why this disclosure is insufficient.

[49] *Ibid.*
[50] *Ibid.*

45. The only potential relevance of the documents cited by the Respondents to date (including at a case management conference before the Tribunal) is to potentially challenge the credibility of the Bell Witnesses. None of the documents covered by the Second Subpoenas are prior statements of the Bell Witnesses. The Respondents have not provided any other explanation as to how these documents could possibly be considered relevant (let alone significant) to the Bell Witness Statements, the credibility of the Bell Witnesses, or the Section 92 Application. In this regard, the Second Subpoenas are at best a fishing expedition in the hope of identifying information that Rogers and Shaw would attempt to use to discredit the Bell Witnesses. By definition, this is third-party discovery not contemplated by the Rules.

The Second Subpoenas seek documents that are protected by litigation privilege

46. A subpoena cannot be used to compel privileged documents.[51] Specifications 1 to 6 (inclusive) of the Shaw Subpoena seek production of communications between the Commissioner and Bell over which the Commissioner has claimed litigation privilege. Bell's understanding has always been that those communications were made for the dominant purpose of the Commissioner's preparation for the Section 92 Application and supports the Commissioner's privilege claim. The Second Subpoenas should be quashed to the extent they seek production of documents over which the Commissioner has claimed litigation privilege.[52] Bell adopts the Commissioner's submissions on this issue.

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[51] *Zundel,* at para 7, see also *Samson Indian National Band v. Canada*, 2003 FC 975.

[52] See *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5386, where the Ontario Superior Court upheld the Commissioner's claims of litigation privilege for all communications between third-parties and the Commissioner after the point at which litigation was contemplated by the Bureau.

The Second Subpoenas seek solicitor-client privileged information

47. The Second Rogers Subpoena seeks solicitor-client privileged documents. Specification 1 includes all memoranda or presentations to Bell's board of directors or executive leadership team about the proposed divestiture of Freedom Mobile Inc. to Videotron Inc., which may include documents Bell prepared for the purpose of obtaining legal advice and actual legal advice. Without prejudice to Bell's position that the Second Rogers Subpoena should be quashed entirely, at the very least, it cannot compel the production of documents that are subject to a claim of solicitor-client privilege by Bell.

Rogers and Shaw's conduct has been abusive and costs should be ordered

48. The Respondents' conduct in issuing the First and Second Subpoenas and in their response to Bell's motion to quash has been nothing short of abusive. Bell should therefore be awarded its costs of this motion on an enhanced scale.

49. In what has now become a pattern of conduct, Rogers and Shaw served the First Subpoenas on Bell in language that was deliberately and manifestly worded to potentially require the production of hundreds of thousands documents spanning an unbounded time period of at least 10 years, many of which would contain highly confidential and competitively sensitive information.[53] The uncontroverted evidence is that the sheer volume of documents captured by the First Subpoenas would have required months to collect and review, at considerable cost to Bell.[54] This should have been no surprise to

[53] Initial Graham Affidavit, at paras 21, 28.
[54] Initial Graham Affidavit, at paras 25-27.

Rogers and Shaw, who are both represented by experienced counsel with expertise in both merger review matters and the telecommunications industry.

50. Despite the broad language of the First Subpoenas, Respondents' counsel subsequently characterized the requests as "highly focused both in terms of their subject matter and time frame", and demanded that Bell produce these documents, or alternatively hear its motion to quash, within 8 to 10 days.[55] This characterization of the First Subpoenas was manifestly inaccurate and misleading, as is demonstrated both by the text of the First Subpoenas (which contained multiple broadly worded specifications with broad date ranges or none at all, including specifications 5 and 6 of the First Rogers Subpoena) and by their hasty withdrawal.

51. Rogers and Shaw, as with the earlier abandoned confidentiality designation motion in this case, narrowed the scope of their demands only after Bell had engaged in the burdensome and costly exercise of preparing their motion record and responding evidence on an expedited basis at considerable cost to Bell, all in connection with an underlying proceeding in respect of which Bell is not a party. The issuance of the Second Subpoenas also required Bell to prepare further supplementary evidence in response (again on an expedited basis). Further, Shaw, upon service of the Second Shaw Subpoena engaged in a self-serving and disingenuous attempt to deflect responsibility for this procedural morass by reframing the overbreadth of First Subpoenas as a "misunderstanding" on Bell's part. That characterization was completely inconsistent with the facts and scope of the First Subpoenas and belies any claim that the Respondents

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[55] Maringola Affidavit, Exhibits B and C.

ever intended to work constructively with Bell to address either the First or Second Subpoenas.[56]

52. Contrary to the Respondents' late attempt to spin their posture as "cooperative," they offered no concessions or compromises until Bell had already been put to considerable expense preparing its motion materials. Then and only then, they entirely withdrew the First Subpoenas and replaced them with substantially revised (but still improper) Second Subpoenas. This dramatic reversal only served to confirm the abuse of process wrought by the First Subpoenas, and granted Bell total success on its initial motion to quash. It is astonishing for Rogers and Shaw to now suggest that their swift capitulation following the issuance of the First Subpoenas leaves the equities of this motion with them.

53. Rogers' and Shaw's blatant tactical maneuvering and subsequent posturing, all at Bell's expense, renders all the more abusive the attempt by Rogers and Shaw to deter Bell from cooperating with the Commissioner with respect to the Proposed Transaction, and to dissuade, or hinder, third-party evidence. Such conduct should not be countenanced by the Tribunal and Bell should be awarded its costs on this motion on the highest possible scale.

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[56] Maringola Affidavit, Exhibit E.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of October, 2022.

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