

Competition Tribunal



Tribunal de la concurrence

**PUBLIC VERSION**

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 23

File No.: CT-2022-002

Registry Document No.: 683

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

BETWEEN:

**Commissioner of Competition**  
(applicant)

and

**Rogers Communications Inc.**  
**Shaw Communications Inc.**  
(respondents)

and

**Videotron Ltd.**  
(intervenor)



**ORDER CONCERNING CLAIM OF SOLICITOR-CLIENT PRIVILEGE**

**(Rendered Orally)**

[1] Thank you again for your written and verbal submissions yesterday morning. They were very helpful.

[2] I would obviously have liked to have much more time in which to reflect upon those submissions and consider the jurisprudence to which you referred. But we sat until after 6:00 pm. last evening, and I only had a chance to go back to those written and verbal submissions after that point in time. That said, I am now able to give you a verbal decision.

[3] In a nutshell, while I am willing to give Telus the benefit of the doubt with respect to three or four passages in the disputed document, I have concluded that the entirety of the document is not protected by solicitor-client privilege.

[4] On a balance of probabilities, I find that the remaining passages that are relevant for the purposes of this proceeding are not protected by solicitor client privilege. This is because they do not form part of the “protected continuum” of information protected by solicitor client privilege, as discussed by Justice Stratas in *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 (*Canada v Information Commissioner*). This finding holds even if I accept Telus’ position that the document is *prima facie* protected by solicitor-client privilege, based on both (i) the Supreme Court of Canada’s decision at *Canada v Thompson*, 2016 SCC 21, at paras 19 and 20; and (i) the evidence in Mr. Schmidt’s affidavit, to the effect that the document was “prepared by his legal staff under his supervision”.

[5] I use the term “relevant for the purposes of this proceeding”, because a lot of what is in the document is not relevant in that regard. So, as I mentioned to you on Monday evening, that material can be redacted, as reflected in the redacted version of the document that Mr. Naudie sent to the Tribunal on Monday evening. In fact, you can also redact the headings.

[6] I also use the term “document” because that is how Mr. Schmidt describes it in his affidavit and Mr. Smith hasn’t challenged him on that, notwithstanding that the first three pages look like power point slides, whereas the next five pages are what Mr. Schmidt characterized as being an “accompanying narration or memo”. And the footer at the bottom of the first three pages contains the words “TELUS confidential”, whereas the footer at the bottom of each page of the accompanying memo states “Privileged and confidential, prepared at Request of Counsel.” I will pause to state that the presence of those words in the footer is not determinative.

[7] In looking at this document, I consider it to be important to keep in mind that Mr. Schmidt has two roles within Telus, one legal and one business. In such circumstances, the jurisprudence is clear that the Court must make a determination regarding the capacity in which an individual was acting when they authored or oversaw the preparation of the communication: *NEP Canada ULC v MEC OP LLC*, 2013 ABQB 540. Mr. Schmidt is (i) VP, Telecom Policy, and (ii) Chief Regulatory Legal Counsel. And even if I were to accept that these roles can be difficult to tease out in the regulatory context, it is clear from the jurisprudence that not everything uttered by a lawyer to a client is privileged: *Canada v Information Commissioner*, above, at para 24.

[8] In order for a claim of solicitor-client privilege to be upheld in respect of a communication between solicitor and client, that communication must be of a legal nature. In my view, several passages in the two-part document either (i) have nothing to do with the seeking, formulating or

giving of legal advice, or (ii) they simply concern the provision of an update on the operational implementation of previously rendered advice, which the Federal Court of Appeal and other courts have stated is not protected by solicitor client privilege: *Canada v Information Commissioner*, above, at paras 31-33; *CNNOC Petroleum North America ULC v 801 Seventh Inc.*, 2021 ABQB 861, at para 38. Put differently, the passages in question are either business, rather than legal, in nature – provided in Mr. Schmidt’s business capacity, or with his “business hat” on – or are updates regarding the operational implementation of previously rendered advice.

[9] This is readily apparent from the words on the page, both in the relevant material within the document as well as in the non-relevant material that can be redacted.

[10] Further support for my finding about the nature of the content of the document is provided by the title at the top of page 2, which states “GRA Update: Q2 2022.” Mr. Casey testified yesterday that GR stands for Government Relations.

[11] Given that the relevant portions for the present purposes all concern [REDACTED], I note that my interpretation is broadly consistent with the evidence we heard yesterday regarding that initiative. That evidence made it clear that this project had both business and legal dimensions.

[12] So, in conclusion, I consider that the passages in question go beyond the continuum of solicitor client communications that are protected.

[13] In addition to the material that is not relevant for the purposes of this proceeding, the passages that may be redacted are:

- (a) The first sentence under the heading “[REDACTED]”, on page 2 of 9 of the PDF;
- (b) The first line under the heading “[REDACTED]”, on page 3 of 9 of the PDF;
- (c) The number in the first line on page 5 of 9 of the PDF, as well as the identification of the topics to be discussed, in the second line and the first half of the third line; and
- (d) The first line under the heading “[REDACTED]” on that same page.

[14] I will not comment any further regarding the issue of “approximately 30 pages” versus “8 or 9 pages” because Mr. Schmidt testified on cross-examination that there was in fact only this one document of 8 or 9 pages.

DATED at Ottawa, this 10th day of November, 2022

SIGNED on behalf of the Tribunal by the Presiding Member.

(s) Paul S. Crampton

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