

Competition Tribunal



Tribunal de la concurrence

**PUBLIC VERSION**

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 20

File No.: CT-2022-002

Registry Document No.: 706

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

BETWEEN:

**Commissioner of Competition**  
(applicant)

and

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

and

**Attorney General of Alberta**  
**Videotron Ltd.**  
(intervenor)



**ORDER**

**(Motion to Quash, by Telus Communications Inc., Nazim Benhadid and Charlie Casey)**

**UPON** considering the materials filed by Telus Communications Inc. (“**Telus**”), Nazim Benhadid and Charlie Casey (together, the “**Telus Witnesses**”) in support of their Motion to Quash subpoenas issued by the Tribunal pursuant to section 7(1) of the *Competition Tribunal Rules*, SOR/2008- 141 (the “**Rules**”) on:

(a) October 3 and 14, 2022, at the request of the Respondent Rogers Communications Inc. (“**Rogers**”); and

(b) October 5 and 14, 2022, at the request of Shaw Communications Inc. (“**Shaw**”);

**AND UPON** considering the materials filed by Telus and the Telus Witnesses in support of their Motion to Quash the abovementioned subpoenas (the “**Motion**”);

**AND UPON** considering the materials filed by Rogers, Shaw and the Commissioner of Competition (the “**Commissioner**”) in connection with the Motion;

**AND UPON** considering the oral submissions made during the hearing of the Motion on October 28, 2022, as well as subsequent correspondence sent to the Tribunal by Telus, Rogers and Shaw;

**AND UPON** considering that the subpoenas issued on October 3 and 5, 2022 (the “**Initial Subpoenas**”) were withdrawn and replaced by the subpoenas issued on October 14, 2022 (the “**Second Subpoenas**”);

**AND UPON** considering that the Second Subpoenas are substantially narrower in scope than the Initial Subpoenas;

**AND UPON** considering that, at the time the Initial Subpoenas were served, Rogers and Shaw informed Telus that they required the documents described therein to be provided no later than October 14, 2022;

**AND UPON** considering that Telus incurred considerable costs in connection with the Initial Subpoenas, prior to their withdrawal;

**AND UPON** considering that the Second Subpoenas require the Telus Witnesses and Mr. Daniel Stern, Director, Regulatory Law and Policy at Telus, to attend at the hearing of this proceeding, on November 7, 2022 (the “**Hearing**”), and to bring with them certain documents;

**AND UPON** considering representations made by Rogers and Shaw that they do not require Mr. Stern to attend at the hearing;

**AND UPON** considering that the relevance of the information described below only became apparent after the filing of the Witness Statements of the Telus Witnesses, on September 23, 2022;

**AND UPON** considering, in particular, the following in respect of the Second Subpoena issued at the request of Rogers (the “**Rogers Second Subpoena**”):

1. The documents required have been narrowed down to “All memoranda or presentations dated on or after May 7, 2022 to [Telus’] board of directors or *executive leadership team* considering the proposed divestiture of Freedom Mobile Inc. to Videotron Inc.” (emphasis added).
2. Mr. Stern provided evidence that:
  - a. Telus does not seek to quash the requirement that the Telus Witnesses attend the hearing;
  - b. Telus’ counsel advised Rogers’ external counsel on October 7, 2022 that Telus would be objecting to the Initial Subpoena;
  - c. Mr. Stern requested Telus’ General Counsel, who is also Telus’ Chief Governance Officer and the Corporate Secretary, to inform him if there were any documents prepared for Telus’ board of directors that were potentially responsive to the Second Subpoena, and she provided him with a package of documents of approximately 30 pages in length, as well as an e-mail from Telus’ Chief Executive Officer to the board of directors;
  - d. The above-mentioned package “related to the Rogers-Shaw transaction”;
  - e. “It would make sense that the divestiture [to Videotron] was discussed” by Telus’ board;
  - f. He had not yet had an opportunity to consider whether the above-mentioned package may be “subject to the claim of privilege” or whether the above-mentioned e-mail “contains legal advice”;
  - g. He asked several members of Telus’ executive legal team (“ELT”) whether they had any documents that were responsive to the Initial Subpoena dated October 3, 2022;
  - h. One of those ELT members provided him with “something in [the] range of” three to five documents, collectively amounting to approximately “forty to fifty pages” in total;
  - i. A second ELT member provided him with “maybe six or seven” documents amounting to approximately “sixty pages” in total; and
  - j. He does not believe that any of the above-mentioned documents were shared with the entire ELT.
3. In a letter dated October 30, 2022, Rogers confirmed that it is now seeking only the documents described in paragraphs 2 (c), (h) and (i) above.

4. The plain meaning of the words “to [Telus’] ... executive leadership team”, as they appear in the Rogers Second Subpoena (as set forth in paragraph 1 above) is the ELT as a whole, rather than the individual members thereof.
5. Accordingly, if the documents described in paragraphs 2(h) and 2(i) above were not sent to the entire ELT, they would not be responsive to the Rogers Second Subpoena.
6. The remaining documents being sought by Rogers, namely those described in paragraph 2(c) above, are likely to be relevant and significant. Consequently, they must be brought to the hearing, unless they entirely consist of communications covered by solicitor-client privilege. If they only partially consist of such communications, the part(s) in question may be redacted.
7. The documents are reasonably likely to be relevant and significant for the reasons set forth at paragraphs 41 – 48 of Rogers’ written submissions on this Motion, particularly in relation to the issue of whether “wireline network ownership is critical to wireless network performance and reliability”, as set forth in Mr. Benhadid’s Witness Statement.
8. Contrary to Telus’ submissions, the Rogers Second Subpoena does not constitute an abuse of process, a fishing expedition or an attempt to circumvent the Rules. Moreover, given that the documents described in paragraph 2(c) above have already been gathered, it would not impose any burden on the Telus Witnesses to bring those documents with them to the Hearing.
9. To the extent that those documents meet the definition of either Confidential A or Confidential B documentation in this proceeding, they may be so designated, to ensure the protection of any competitively or commercially sensitive information.

**AND UPON** considering, in particular, the following in respect of the Second Subpoena issued at the request of Shaw (the “**Shaw Second Subpoena**”):

1. The documents required have been narrowed down to two categories. They concern written submissions dated on or after March 15, 2021, and provided by or on behalf of Telus and/or its various subsidiaries and affiliates to (a) representatives of the Competition Bureau (the “**Bureau**”) or (b) representatives of Industry, Science and Economic Development Canada (“**ISED**”). The two categories pertain to (i) the proposed transaction between Rogers and Shaw; and (ii) the proposed transaction involving Shaw, Rogers and Quebecor Inc.
2. Mr. Stern provided evidence that:
  - a. Telus does not seek to quash the requirement that the Telus Witnesses attend the hearing.
  - b. Telus’ counsel advised Shaw’s external counsel on October 7, 2022 that Telus would be objecting to the Initial Subpoena;

- c. Telus provided a submission, [REDACTED] to the Bureau and at least one additional submission [REDACTED];
  - d. No one from the Bureau wrote to him or to anyone else he knows at Telus to request that Telus make a submission;
  - e. One of the submissions made to the Bureau relates to [REDACTED] “[REDACTED]”;
3. It appears that any submissions made by Telus to the Bureau were made on a voluntary basis.
4. In a letter dated October 31, 2022, Shaw confirmed that it now only seeks six submissions provided by Telus to the Bureau or to ISED, the existence of which has been confirmed, namely,
  - a. A submission to the Bureau dated [REDACTED];
  - b. Two submissions to the Bureau dated [REDACTED];
  - c. A submission to the Bureau dated [REDACTED];
  - d. A submission to the Bureau dated [REDACTED]; and
  - e. A submission to ISED dated [REDACTED].
5. Based on the redacted version of the submission dated [REDACTED] that has been provided to the Tribunal, I am satisfied that this submission constituted advocacy, in the sense that it advocated that the Bureau or the Commissioner accept various propositions and that they seek to block the proposed transaction in its entirety. This submission was made prior to the point in time at which any decisions on those matters had been made or were even imminent. Although litigation between the Commissioner and the Respondents *may* have been reasonably apprehended or contemplated within the Bureau as of May 5, 2021, the dominant purpose of the submission was not to *prepare for* litigation. The Commissioner has not demonstrated otherwise. Accordingly, I find that this submission, and any other voluntary, advocacy, submissions that Telus made to the Bureau or to ISED, on the dates identified above, and that were not prepared for the dominant purpose of preparing for litigation, are not covered by litigation privilege.
6. I also find that submission dated [REDACTED] is not covered by public interest privilege. I acknowledge that it likely originated in confidence and that confidence between the Commissioner and third parties who may have relevant information to share is essential to the relationship in which communications such as that submission arise. I further recognize that such relationships must be “sedulously fostered” in the public good. However, in contrast to other third parties who may provide confidential information to the Commissioner, such as customers and suppliers of a dominant firm or merging parties, Telus is a large, successful firm that does not have to fear potential

reprisals from Rogers, Shaw or Videotron. Its opposition to the proposed transaction is a matter of public record. Also, in contrast to stakeholders who may provide information that might support a finding that the proposed transaction is anti-competitive, Telus [REDACTED]

[REDACTED]. Telus would also have been well aware that any information it provided to the Commissioner might well be disclosed, including by the Commissioner himself, in any proceedings that might be commenced before the Tribunal. These considerations, together with the public interest in getting at the truth, weighs in favour of concluding that public interest does not attach to the [REDACTED] submission. The Commissioner has not demonstrated otherwise. To the extent that the foregoing analysis may apply to any of the other submissions being sought by Shaw, the same conclusion would apply.

7. The [REDACTED] submission contains information that is relevant and significant, particularly given that it directly addresses issues related to network performance. This includes the issue of whether infrastructure needs to be owned. This is a matter that is directly addressed in Mr. Benhadid's Witness Statement: see the first paragraph 7 above. If the Commissioner has concluded that redacted information in that submission is not relevant, I am prepared to take him at his word on this. He is well aware of the serious adverse implications that would flow, well beyond the instant proceeding, if it ever came to light that any of the redacted information was in fact relevant to the issues in this proceeding. That said, it bears underscoring that the issue of the link between Shaw's wireless and wireline businesses is a relevant and significant issue in this proceeding.
8. Regarding the other four submissions to the Bureau being sought by Shaw, I consider that it would be more appropriate for the Commissioner, rather than Telus, to provide copies of them to Shaw, as he is a party to this proceeding. The Commissioner should be guided by the immediately preceding three paragraphs in determining whether those documents are relevant, significant and/or covered by privilege.
9. With respect to Telus' submission to ISED, dated [REDACTED] the evidence is that it is not in the Bureau's possession. This explains why it was not listed in the Commissioner's Affidavit of Documents. Given Mr. Stern's confirmation that this submission was focused on the proposed transfer of Shaw's spectrum licences to Rogers, I consider that it is reasonably likely to be relevant and significant to the issues in dispute in this proceeding and to Shaw's cross examination of the Telus Witnesses. This includes issues directly addressed in Mr. Benhadid's Witness Statement, as discussed above.
10. Contrary to Telus' submissions, the Shaw Second Subpoena does not constitute an abuse of process, a fishing expedition or an attempt to circumvent the Rules.
11. To the extent that any of the submissions identified above contain information that falls within the definition of either Confidential A or Confidential B documentation in this proceeding, they may be so designated, to ensure the protection of any competitively or commercially sensitive information.

**THE TRIBUNAL ORDERS THAT:**

1. Telus' Motion to Quash the entirety of the document production demands set out in the Second Subpoenas is denied.
2. The Telus Witnesses shall attend the Hearing on November 7, 2022 and shall bring with them documents described in paragraphs 2(c) and 9 above, unless they are entirely protected by solicitor-client privilege. Mr. Stern is not required to attend the Hearing.
3. Shaw's Cross-Motion as it relates to Telus is granted in part. The Commissioner shall produce to Shaw any of the four submissions identified in the second paragraph 4 above that are relevant and not entirely protected by litigation or public interest privilege. Any non-relevant or privileged information in such submissions may be redacted.
4. Rogers and Shaw, together, shall pay 75% of Telus' costs on this motion, calculated in accordance with column IV of Tariff B of the *Federal Courts Rules*.

DATED at Ottawa, this 3rd day of November, 2022

SIGNED on behalf of the Tribunal by the Presiding Member.

(s) Paul S. Crampton

**COUNSEL OF RECORD:**

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**Commissioner of Competition**

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