

Competition Tribunal



Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 21

File No.: CT-2022-002

Registry Document No.: 707

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 BCE Inc., Blaik Kirby and Stephen Howe)

UPON considering the materials filed by BCE Inc. (“**BCE**”, and together with its subsidiaries and affiliates, “**Bell**”), Blaik Kirby and Stephen Howe (together, the “**Bell 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 Bell and the Bell Witnesses in support of their Motion to Quash the above-mentioned 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 Bell, 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AND UPON considering that the subpoenas issued on October 3 and 5, 2022 (the “**Initial Subpoenas**”) were withdrawn and replaced by the subpoenas issued on October 14, 2022 (the “**Second Subpoenas**”);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 Bell that they required the documents described therein to be provided no later than October 14, 2022;

AND UPON considering that, in a letter dated October 7, 2022, Bell advised Rogers and Shaw that it intended to move to quash the Initial Subpoenas, for reasons that were set out in that letter;

AND UPON considering that Bell incurred considerable costs in connection with the Initial Subpoenas, prior to their withdrawal on October 14, 2022, the day following the filing of this Motion;

AND UPON considering that the Second Subpoenas require the Bell Witnesses and Mr. Mark Graham, Bell’s Vice President, Legal and Regulatory, to attend at the hearing of this proceeding, on November 7, 2022 (the “**Hearing**”), and to bring with them certain documents;

AND UPON considering Bell’s representation that it seeks to quash the Second Subpoenas only insofar as they require the production of documents or to compel the attendance of Mr. Graham;

AND UPON considering representations made by Rogers and Shaw that they do not require Mr. Graham 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 Bell Witnesses, on September 23, 2022;

AND UPON considering, in particular, the following information 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 two categories:
 - a. “All memoranda or presentations dated on or after May 7, 2022 to [Bell’s] board of directors or executive leadership team considering the proposed divestiture of Freedom Mobile Inc. to Videotron Inc.”; and
 - b. “All memoranda or presentations to Bell’s board of directors or executive leadership team on or after July 8, 2022 containing analysis of Rogers’ network outage that occurred on July 8, 2022”.
2. Mr. Graham provided evidence that:
 - a. BCE’s board of directors discussed Rogers’ proposed acquisition of Shaw, the sale of Freedom Mobile to Videotron, and the network outage experienced by Rogers;
 - b. He requested BCE’s Assistant Corporate Secretary to send him the materials that were sent to BCE’s Board in relation to those topics;
 - c. In response to that request, he received approximately 10 pages of materials relating to the network outage and approximately eight to 15 pages relating to the “Rogers/Shaw/Videotron” transaction;
 - d. He is not entitled to look at materials that are sent to the Board and he doubts that BCE’s Chief Legal Officer, Mr. Rob Malcolmson, is entitled to do so;
 - e. He discussed *other* matters with Mr. Malcolmson that “were more in [their] capacity as Counsel for Bell”;
 - f. He obtained and reviewed the agendas of meetings of BCE’s Executive Leadership Team (“**ELT**”);
 - g. The proposed transaction between Rogers and Shaw is an item on one of those agendas;
 - h. The documentation that was sent to the ELT in relation to that agenda item is approximately five to six pages in length; and
 - i. He does not believe that Rogers’ network outage is an item on any of those agendas.

3. In a letter dated October 30, 2022, Rogers confirmed that it is now seeking only the documents described in paragraphs 2 (c) and (h) above. It further stated that, if ordered to be produced, those documents would all be received on a “Confidential A” basis and governed by the Tribunal’s Order with respect to documents having that designation.
4. Those 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. This is particularly so in light of the issues raised in Mr. Kirby’s Witness Statement and summarized in paragraph 43(a) of Rogers’ submissions. 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.
5. Contrary to Bell’ 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 paragraphs 2(c) and (h) above have already been gathered, it would not impose any burden on the Bell Witnesses to bring those documents with them to the Hearing.

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

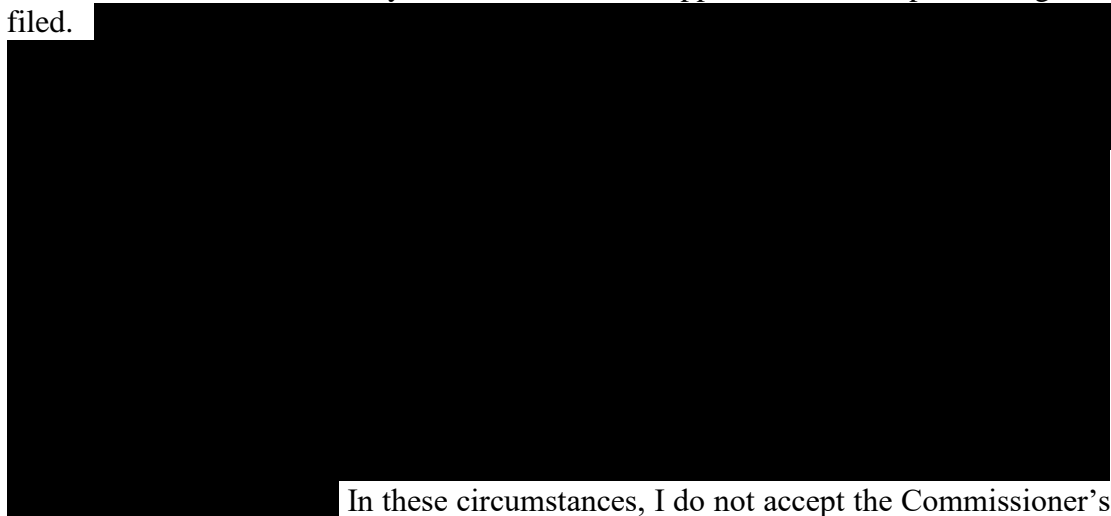
1. The documents required have been narrowed down to three categories. The first category concerns written submissions provided by or on behalf of Bell to representatives of the Competition Bureau (the “**Bureau**”): (i) after March 15, 2021, in respect of the proposed transaction between Rogers and Shaw; and (ii) after June 17, 2022, in respect of the proposed transaction involving Shaw, Rogers and Quebecor Inc.
2. The second category concerns written submissions provided by or on behalf of Bell to representatives of Industry, Science and Economic Development Canada, after the dates described immediately above, and in respect of those same proposed transactions.
3. The third category of documents described in the Shaw Second Subpoena is as follows:

“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, to the extent such agreements have not been produced by the Commissioner to the Respondents Shaw and Rogers.”

4. In a letter dated October 31, 2022, Shaw confirmed that it now seeks only two submissions that were provided by Bell to the Bureau, as well as six documents concerning network-sharing arrangements between Bell and Telus. The two submissions are dated [REDACTED] and [REDACTED], respectively. The documents concerning network-sharing arrangements are the [REDACTED] [REDACTED] as well as five amendments to that document, dated [REDACTED]

██████████ 2017, respectively, (collectively, the “**Network Sharing Arrangements**”).

5. In the same letter, Shaw stated that, if ordered to be produced, those documents would all be received on a “Confidential A” basis and governed by the Tribunal’s Order with respect to documents having that designation.
6. The two Bell submissions described immediately above were listed in Schedule B to the Commissioner’s Affidavit of Documents. According to an Affidavit of Ms. Jessica Fiset, affirmed on October 26, 2022, the Commissioner has asserted litigation privilege in respect of those submissions. However, the dates of those submissions raise a serious question as to whether litigation privilege attaches to those documents. In each case, the documents are dated many months before the Application in this proceeding was filed.



██████████ In these circumstances, I do not accept the Commissioner’s bare assertion of litigation privilege. He has not satisfied his onus to establish that litigation privilege attaches to those two submissions. My conclusion in this regard is reinforced by the following statement that appears at paragraph 9 of Mr. Graham’s affidavit: “In addition to complying with the Section 11 Order, Bell has supplied additional information to the Commissioner *to assist with his inquiry into the Proposed Transaction*” (emphasis added). On cross examination on his affidavit, Mr. Graham acknowledged that Bell’s submissions to the Bureau were made on a voluntary basis.

7. I also find that the two submissions discussed above would not benefit from the protection accorded by public interest privilege. I acknowledge that they 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 those submissions 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, Bell is a large, successful firm that does not have to fear potential reprisals from Rogers or Shaw. In addition, its opposition to the proposed transaction is a matter of public record. Furthermore, Bell would 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 he might commence before the Tribunal. These considerations, together with the public interest in getting at the truth, weigh in favour of concluding that public interest does not attach to the two submissions being sought by Shaw. The Commissioner has not demonstrated otherwise.

8. Given that the Commissioner is a party to this proceeding, I consider that it would be more appropriate for the Commissioner, rather than Bell (a third party), to provide copies of the two submissions to Shaw.
9. Insofar as the Network Sharing Arrangements are concerned, no privilege has been asserted and Ms. Fiset states in her affidavit that the Commissioner does not have those documents.
10. I find that the Network Sharing Arrangements are likely to be relevant and significant for the reasons set forth at paragraphs 95 – 99 of Shaw’s written submissions on this Motion. In this regard, I attach particular significance to the fact that Mr. Howe specifically refers to Bell’s “network reciprocity arrangement with Telus” in his Witness Statement. In the course of explaining that arrangement, he states that “there are significant advantages to deploying a wireless network within your wireline footprint.” Moreover, at the outset of his Witness Statement, he states that one of the purposes of that document is to “provide information regarding Bell’s experience with wireless network deployment and in particular (i) the benefits for wireless network deployment associated with owning an extensive wireline access network in the same footprint.” To the extent that this is a core issue in this proceeding, Shaw is entitled to test Mr. Howe’s statements with the benefit of having a better understanding of the Network Sharing Arrangements. This is especially so because the documentation disclosed to date consist of five amendments to the main agreement, [REDACTED]. I accept Shaw’s position that it is difficult to understand the nature of the arrangements without seeing the main agreement.
11. Contrary to Bell’s submissions, the Shaw Second Subpoena does not constitute an abuse of process, a fishing expedition or an attempt to circumvent the Rules. Moreover, given that the two disputed Bell submissions to the Bureau and the Network Sharing Agreements have already been gathered, it would not impose any burden on the Bell Witnesses to bring those documents with them to the Hearing.

THE TRIBUNAL ORDERS THAT:

1. Bell’s Motion to Quash the entirety of the document production demands set out in the Second Subpoenas is denied.
2. The Bell Witnesses shall attend the Hearing on November 7, 2022 and shall bring with them documents described in paragraphs 2(c) and 2(h) above, unless they are entirely protected by solicitor-client privilege. The Bell Witnesses shall also bring with them the Network Sharing Arrangements, as defined above. Mr. Graham is not required to attend the Hearing.

3. Shaw's Cross-Motion against the Commissioner is granted as it relates to the two submissions identified in the second paragraph 4 above. The Commissioner shall produce those two submissions to Shaw.
4. Rogers and Shaw, together, shall pay 75% of Bell's costs on this Motion, calculated in accordance with column IV of Tariff B of the *Federal Courts Rules*.
5. The Commissioner shall pay Shaw's costs on its Cross-Motion, calculated in accordance with column III of Tariff B of the *Federal Courts Rules*.

DATED at Ottawa, this 4th day of November, 2022

SIGNED on behalf of the Tribunal by the Presiding Member.

(s) Paul S. Crampton

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