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Date: November 3, 2025  
CT- 2024-012

Sara Pelletier for / pour  
REGISTRAR / REGISTRAIRE

**CT-2024-012**

OTTAWA, ONT.

# 76

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, RSC 1985, c C-34;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

**B E T W E E N:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

- and -

**ROGERS COMMUNICATIONS INC.**

**Respondent**

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**MOTION RECORD OF THE COMMISSIONER OF COMPETITION  
(REFUSALS MOTION OF ROGERS COMMUNICATIONS INC.)**

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**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Competition Bureau Legal Services  
Place du Portage, Phase I  
50 Victoria Street, 22<sup>nd</sup> Floor  
Gatineau, QC K1A 0C9

**Jonathan Hood**

[Jonathan.Hood@cb-bc.gc.ca](mailto:Jonathan.Hood@cb-bc.gc.ca)

**Kevin Hong**

[Kevin.Hong@cb-bc.gc.ca](mailto:Kevin.Hong@cb-bc.gc.ca)

**Irene Cybulsky**

[Irene.Cybulsky@cb-bc.gc.ca](mailto:Irene.Cybulsky@cb-bc.gc.ca)

**Kendra Wilson**

[Kendra.Wilson@cb-bc.gc.ca](mailto:Kendra.Wilson@cb-bc.gc.ca)

Counsel to the Commissioner of  
Competition/ Responding Party

**TO: THE REGISTRAR  
COMPETITION TRIBUNAL**  
Thomas D'Arcy McGee Building  
90 Sparks Street, Suite 600  
Ottawa, Ontario

**AND TO: LAX O'SULLIVAN LISUS GOTTLIEB LLP**  
Suite 2750, 145 King Street West  
Toronto, ON M5H 1J8

**Jonathan Lisus** LSO# 32952H  
jlisus@lolg.ca  
Tel: 416.598.7873

**Crawford Smith** LSO# 42131S  
csmith@lolg.ca  
Tel: 416 598 8648

**Alexander T. Mulligan** LSO# 87338H  
amulligan@lolg.ca  
Tel: 416 956 5084

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
40th Floor – 155 Wellington St. West  
Toronto, ON M5V 3J7

**Anita Banicevic** LSO# 42793G  
abanicevic@dwpv.com  
Tel: 416 863 5523

**Teraleigh Stevenson** LSO# 82540E  
tstevenson@dwpv.com  
Tel: 416 367 7627

Counsel for the Respondent, Rogers  
Communications Inc.

CT-2024-012

**THE COMPETITION TRIBUNAL****IN THE MATTER OF** the *Competition Act*, RSC 1985, c C-34;**AND IN THE MATTER OF** an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;**B E T W E E N:****THE COMMISSIONER OF COMPETITION****Applicant****- and -****ROGERS COMMUNICATIONS INC.****Respondent**

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# TAB 1

**CT-2024-012**

**THE COMPETITION TRIBUNAL**

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

**AND IN THE MATTER OF** an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

**BETWEEN:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**– and –**

**ROGERS COMMUNICATIONS INC.**

**Respondent**

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**RESPONSE OF THE COMMISSIONER OF COMPETITION  
(REFUSALS MOTION OF ROGERS COMMUNICATIONS INC.)**

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**THE GROUNDS ON WHICH THE COMMISSIONER OF COMPETITION  
OPPOSES THE RESPONDENT’S MOTION ARE:**

1. The Commissioner of Competition (“**Commissioner**”) opposes the motion of Rogers Communications Inc. (“**Rogers**”) to compel answers to questions refused during the examination for discovery of the Commissioner’s representative. These questions are listed in Schedule “**A**” to this notice.

2. The Commissioner has complied with his documentary discovery obligations. In accordance with the scheduling order in this proceeding, the Commissioner has already produced to Rogers all evidence relevant to issues in this proceeding that are in his possession, power, and control.
3. Subsequent to the Commissioner's document productions, Rogers examined the representative of the Commissioner, Kathleen Phillipowsky, on September 3, 4 & 5, 2025.
4. On September 19, 2025, the Commissioner provided Rogers with answers to undertakings from the examination of Kathleen Phillipowsky. The Commissioner provided additional answers to undertakings on September 29, 2025.
5. On October 3, 2025, Rogers filed a motion to amend its pleading. Rogers proposed to plead several new issues, including (i) estoppel and waiver; (ii) allegations the Commissioner breached the deemed undertaking rule; (iii) the Commissioner's knowledge and actions as they purported to relate to several mitigating factors; and (iv) a constitutional challenge against certain provisions of the *Competition Act*, *Competition Tribunal Act*, and *Competition Tribunal Rules*.
6. Rogers motion to amend was heard by the Competition Tribunal ("**Tribunal**") on October 17, 2025. The Tribunal reserved its decision.
7. In bringing this motion, Rogers relies on a mischaracterization of the evidence of Kathleen Phillipowsky from her examination. Contrary to Rogers' assertions, she did not testify that there was a recommendation to "close" the Commissioner's preliminary assessment of "unlimited" representation by telecommunication carriers, or that a recommendation

was made that resulted in any conclusions that Rogers' impugned representations did not raise issues under the *Competition Act*.

8. The Commissioner properly refused the 59 questions to which Rogers seeks to compel answers.

**A. Questions Relating to the Commissioner's Preliminary Assessment, Investigation, and Inquiry**

9. Rogers persists in its attempts to seek information regarding the Commissioner's thought process and internal analysis. It does not seek relevant facts, but conclusions the Commissioner may have drawn from those facts. To the extent Rogers is seeking facts, the Commissioner has already produced all relevant evidence which underlay the Commissioner's preliminary assessment, investigation, and inquiry in the present matter.
10. Rogers improperly justifies its questions on the basis of relevance to the issue of general impression, remedies, and costs. But this is not a train of inquiry that either advances Rogers' case or damages the case of the Commissioner.
  - a. The Commissioner already produced all relevant evidence to Rogers. Those are the facts to which Rogers is entitled. Rogers' attempt to defend its conduct on the basis of the Commissioner's thought process is improper. It would require the Tribunal to place weight on the Commissioner's opinions, beyond what may be proved through admissible evidence at trial.

- b. With respect to remedy, the Commissioner's thought process and internal analysis can have no bearing on the aggravating or mitigating factors pleaded. And how the Tribunal ultimately characterizes Rogers' conduct and the impugned representations cannot reasonably be swayed by private internal deliberations of the Bureau.
  - c. It is not enough for Rogers to justify its questions solely on the basis of costs. It must also be relevant to an issue in dispute.
11. Rogers also challenges the Commissioner claim of solicitor-client privilege over the document listed as Item 135 of Schedule "B" of the Commissioner's Affidavit of Documents. There is sufficient information about the document to support the Commissioner's claim: (i) the document is labelled on its face "solicitor/client privilege"; (ii) it is between senior members of the Bureau staff responsible for the file who reasonably would be discussing legal advice; and (iii) the Commissioner's representative confirmed that it relays legal advice from a lawyer. If the Tribunal needs to further verify the privilege claim, it should inspect the document under seal.

## **B. Questions Relating to the Deemed Undertaking Rule**

12. If Rogers' proposed amendments regarding the deemed undertaking rule are not permitted, then these questions are irrelevant. As mentioned above, the potential for costs cannot justify irrelevant questions.
13. Regardless, the deemed undertaking rule can have no bearing on costs until such time as the Commissioner attempts to rely on information in breach of the rule. Until then, Rogers questions are a fishing expedition. It already possesses sufficient knowledge to identify any breach of the

rule with respect to the information produced on discovery in the *Rogers-Shaw* proceeding (Tribunal File No CT-2022-002).

### **C. Questions Regarding the Commissioner's Allegations**

#### *a. Throttling Questions*

14. Rogers improperly seeks the Commissioner's opinion on the impact of throttling. Expert opinion is the domain of a qualified expert at trial and not a proper subject for discovery.
15. To the extent Rogers seeks facts, the Commissioner has already produced all evidence in his possession, power, and control that may be relevant to determining the impact of throttling.

#### *b. Questions about the Representations at Issue*

16. It is also improper for Rogers to ask the Commissioner for the facts on which the Commissioner relies on to support an allegation.
17. It is also unnecessary and unreasonable for Rogers to ask that the Commissioner identify all specific representations at issue and the general impression each of them conveyed.
18. The Commissioner's Notice of Application sets out sufficient particulars of both the historic and on-going representations alleged to be false and misleading, including reproductions of numerous representations with which the Commissioner takes issue. The Commissioner has provided the main facts, significant sources, or categories of documents described in sufficient detail to allow Rogers to identify which of its own representations are at issue.

19. Given the volume of representations at issue and the sufficient particulars already provided, Rogers' request is also disproportionate, unreasonable, and burdensome.

*c. Comwave Question*

20. The question Rogers asks regarding Comwave is unnecessary and irrelevant. In defending against the Commissioner's allegation that Rogers disregarded the Bureau's warning set out in its 2017 "Deceptive Marketing Practices Digest — Volume 3", Rogers does not need to access the Bureau's investigatory file in another matter. Extrinsic information to which Rogers did not previously have access cannot aid Rogers in its arguments regarding its interpretation of the digest. The digest already includes examples of the representations that were at issue in that matter; examples which Rogers would have relied on.
21. The Comwave file is not relevant in any other respect. The Bureau's approach in other cases, and the specific representations made there have no bearing on any issue in the current matter.

**D. Other Grounds**

22. The Commissioner relies on the following statutory provisions and rules:
- a. *Competition Act*, RSC 1985, c C-34, s [74.1](#).
  - b. *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s [8\(2\)](#) & [8.1](#).
  - c. *Competition Tribunal Rules*, SOR/2008-141, rr [2](#), [34](#), [61](#), [62](#) & [64](#).
  - d. *Federal Courts Rules*, SOR/98-106, r [240](#) & [242](#).

23. Such further or other grounds as counsel may raise and the Tribunal may permit.

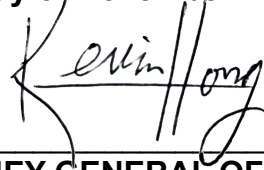
#### **E. Relief Sought**

24. The Commissioner seeks the following relief:
  - a. an order dismissing Rogers' motion;
  - b. costs of this motion; and
  - c. such further and other relief as the Commissioner may request and the Tribunal may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

25. Transcripts of the Examination for Discovery of Kathleen Phillipowsky (3, 4 & 5 September 2025);
26. Answers to Undertakings from the Examination of Kathleen Philippowsky Held September 3-5, 2025 dated September 19, 2025;
27. Additional Answers to Undertakings from the Examination of Kathleen Philippowsky Held September 3-5, 2025 dated September 29, 2025; and
28. Such further and other material as counsel may raise and the Tribunal may permit.

**DATED AT TORONTO, ONTARIO, this 3rd day of November 2025.**



**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
 Competition Bureau Legal Services  
 Place du Portage, Phase I  
 50 Victoria Street, 22<sup>nd</sup> Floor  
 Gatineau, QC K1A 0C9  
 Fax: 819-953-9267

**Jonathan Hood**

Tel: 613-325-1760

[Jonathan.Hood@cb-bc.gc.ca](mailto:Jonathan.Hood@cb-bc.gc.ca)

**Kevin Hong**

Tel: 819-665-6381

[Kevin.Hong@cb-bc.gc.ca](mailto:Kevin.Hong@cb-bc.gc.ca)

**Irene Cybulsky**

Tel: 613-316-5034

[Irene.Cybulsky@cb-bc.gc.ca](mailto:Irene.Cybulsky@cb-bc.gc.ca)

**Kendra Wilson**

Tel: 613-799-9454

[Kendra.Wilson@cb-bc.gc.ca](mailto:Kendra.Wilson@cb-bc.gc.ca)

Counsel for the Commissioner of  
 Competition

**TO: THE REGISTRAR  
 COMPETITION TRIBUNAL**  
 Thomas D'Arcy McGee Building  
 90 Sparks Street, Suite 600  
 Ottawa, Ontario

**AND TO: LAX O'SULLIVAN LISUS GOTTLIEB LLP**  
 Suite 2750, 145 King St W  
 Toronto, ON M5H 1J8

**Jonathan Lisus** LSO# 32952H  
[jlisus@lolg.ca](mailto:jlisus@lolg.ca)  
 Tel: 416.598.7873

**Crawford Smith** LSO# 42131S  
csmith@lolg.ca  
Tel: 416.598.8648

**Alexander T. Mulligan** LSO# 87338H  
amulligan@lolg.ca  
Tel: 416.956.5084

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
40<sup>th</sup> Floor – 155 Wellington St. West  
Toronto, ON M5V 3J7

**Anita Banicevic** LSO# 42793G  
abanicevic@dwpv.com  
Tel: 416.863.5523

**Teraleigh Stevenson** LSO# 82540E  
tstevenson@dwpv.com  
Tel: 416.367.7627

Counsel for the Respondent,  
Rogers Communications Inc.

**Schedule "A"**  
**List of Refusals**

**Category #1: Assessment, investigation, and inquiry questions**

*(a) Assessment Questions*

<b>REFUSALS</b>			
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>
<b>September 3, 2025</b>			
1.	91 – 92	383	To advise if the preliminary assessment resulted in a recommendation to start an investigation.
2.	92	385 – 386	To advise who the individuals conducting the preliminary assessment reported to.
3.	93	390	To advise who Ms. Phillipowsky believes was the person to whom the individuals conducting the preliminary assessment reported to.
4.	94	392	To advise if the person to whom the people conducting the preliminary assessment reported to was different than the person who instructed Ms. Phillipowsky to commence an investigation.
5.	96 – 97	398	To advise if whether somebody conducting a preliminary assessment writes a recommendation as to whether or not to open an investigation.
6.	96	400	To advise if the preliminary assessment is closed.
7.	99 – 97	401	To confirm that the preliminary assessment was not ongoing in that period of time between September 2020 and September 2021.
<b>September 5, 2025</b>			
8.	485	192	To advise whether the Competition Bureau took any steps at or around the time Mr. McPhail sent his email to Mr. Boswell or the introduction of Rogers Infinite wireless plans.

9.	485	193	To provide a copy of any communication initiating the steps the Bureau took, if it took any at or around the time of Mr. McPhail's email or the launch of Rogers Infinite wireless plans.
10.	485	194	To advise whether it is the case that when a preliminary assessment is closed, as it was in this case, that there is some communication closing it.
11.	486	195	To advise whether there is a formal or informal communication that brings an assessment to a close.
12.	486-487	196 – 197	To advise whether when this preliminary assessment ended or any preliminary assessment ends, whether there is a report by the individuals conducting the preliminary assessment to their superior advising them that they are closing the assessment or asking that they close the assessment.
13.	488 – 489	201-204	To confirm that there was a recommendation that was made in 2020, and the recommendation that was made was to wrap up the preliminary assessment.
14.	489	205	To provide a copy of the 2020 recommendation.
15.	494	222	To advise if the Commissioner agrees that had Rogers sought an advisory opinion, it would have been advised by the Commissioner at the time that the conduct was not reviewable.
16.	496	235 - 236	To advise how Ms. Sonley first raised this issue of the marketing of unlimited wireless data plans.
17.	497	237	To advise why Ms. Sonley was raising the issue of the marketing of unlimited wireless data plans.
18.	497	238	To advise to whom Ms. Sonley raised the issue of the marketing of unlimited wireless data plans.
19.	497	239	To advise what steps, if any, were taken in relation to Ms. Sonley raising the issue of the marketing of unlimited wireless data plans.
20.	497-498	243	To advise whether the notes taken by Ms. Assad of the conference call where Ms. Sonley raised the issue of the marketing of unlimited wireless data plans bear on the allegations pleaded by the Commissioner in the Notice of Application.

21.	524-525	319	To provide the recollection of each of the participants of the telephone call, provided those individuals are still at the Bureau (RFLB00041_000000014).
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*(b) Investigation and Inquiry Questions*

<b>REFUSALS</b>			
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>
<b>September 3, 2025</b>			
1.	50	230	To advise if Ms. Phillipowsky was satisfied that the Notice of Application reflected the facts upon which your recommendation was based.
2.	51	231	To advise if the Notice of Application is consistent with the facts that formed part of the recommendation to commence this litigation.
3.	51	232	To advise if there are facts set out in the Notice of Application that are different than those in the recommendation.
4.	56	248	To advise when the Commissioner says that litigation became a real possibility such that he is entitled to claim litigation privilege.
5.	63-64	275	To advise when the culmination was to recommend that an application be filed.
6.	65	274 – 279	To advise when the iterative process of recommendations (to pursue an application) began.
7.	77	322	To advise if there is a distinction between the Commissioner conducting an inquiry and conducting an investigation.
8.	79	330 – 331	To advise what steps the Commissioner has taken or what facts the Commissioner has learned since filling the Notice of Application in December 2024.
9.	80	332 – 333	To advise what non-privileged steps the Commissioner has taken in furtherance of an investigation into Rogers' promotion of unlimited wireless plans.
10.	80	334	To advise if the Commissioner's examination of a DIG representative, pursuant to Section 11, was part of the investigation.

11.	80	335	To advise if the Commissioner's examination of a DIG representative, pursuant to Section 11, was part of the litigation.
12.	81	338	To advise if the Commissioner's position is that the facts discovered as part of the investigation are privileged.
13.	81	340	To advise if there are any facts that the Commissioner has learned through its investigation subsequent to December 2024 that are relevant to the issues in this litigation.
14.	82	342	To advise if any of the facts supporting the allegations in the Notice of Application were gathered after the application was initiated and to identify which facts those are.
15.	83	345	To advise what the Commissioner learned from DIG that relates to the allegations in the Notice of Application.
<b>September 5, 2025</b>			
16.	444	65	To advise if Ms. Phillipowsky made a recommendation to commence an inquiry.
17.	444	66-67	If there was a recommendation to go on inquiry, to provide information as to whom the recommendation was made, the form of the recommendation, the basis of the recommendation, excluding any legal advice that may have been provided as part of the recommendation, and the documents that underpinned that recommendation.
18.	444-445	68	To produce a copy of the recommendation itself.
19.	445	69-70	To advise what documents, other than representations in the marketplace, Ms. Phillipowsky gathered as part of her investigation between March 2022 and April 2023.
20.	467	141	To review the document, "Cosmos", at Row 137 (item 135) of the Commissioner's Schedule B and confirm that the document contains legal advice.
21.	468	142	To advise whether it was Ms. Phillipowsky who was seeking the legal advice in the document referred to in the Commissioner's schedule B productions at item 135 (row 137).
22.	468	143	To advise why Ms. Phillipowsky was seeking legal advice in the document referred to in the Commissioner's schedule B productions at item 135 (row 137).
23.	468	144	To produce a redacted copy of the document at Row 137 (item 135) of the Commissioner's Schedule B, if the document contains information that is not privileged.

24.	470	149 – 150	To advise whether Ms. Cybulsky was on the Project Cosmos team at the time (October 13, 2022).
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**Category #2: Deemed Undertaking Questions**

<b>REFUSALS</b>			
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>
<b>September 5, 2025</b>			
1.	447	79	To advise who was on the Rogers-Shaw team.
2.	448	82 – 83	To advise who provided Ms. Phillipowsky with access to the documents produced by the parties in the Rogers-Shaw litigation.
3.	449-450	86	To confirm whether, as Ms. Phillipowsky was conducting her investigation, she looked at certain documents that came from the Rogers-Shaw productions.
4.	454	94	To advise what process, procedures, or safeguards the Bureau had in place to ensure that documents produced in the context of the Rogers-Shaw litigation were not shared with members of Ms. Phillipowsky's investigative team.
5.	454-455	95	To advise whether Ms. Phillipowsky reviewed documents or was provided with copies of documents that were produced by the parties as part of the Rogers-Shaw litigation.

**Category #3: Other Refusals**

<b>REFUSALS</b>			
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>
<b>September 4, 2025</b>			
1.	264	1096 – 1097	To advise if it is acceptable to market a plan as "unlimited data" if the speed of the data is fixed throughout.
2.	266	1108	To advise at what speed the Commissioner says there is not an impact on functionality.

3.	279	1164	To advise if it does not matter whether Rogers throttled at 256 kbps, 512 kbps, or 4G. And to advise if these speeds are a material restriction as explained in Deceptive Marketing Practices Digest, Volume III.
4.	282	1175	To advise what throttling speed has a significant influence on the unlimited plan.
5.	282	1179	To produce the representations made by Comwave (pg. 16 of the Deceptive Marketing Practices, Vol 3).
6.	355-356	1503	To advise what measurement of difficulty or virtual impossibility the Commissioner says applies to para. 36 of the Notice of Application.
7.	356	1505	To advise what the amount of time is at which it becomes difficult or virtually impossible for a social media site, website, range of websites, streaming, cloud gaming, and/or any other application which the Commissioner alleges there is a difference in time between the max speed and the throttle speed.
<b>September 5, 2025</b>			
8.	519-520	302	To identify each of the representations made by Rogers that the Commissioner alleges in this application were false and misleading and in what way (para. 46(f) of Notice of Application).
9.	527	329	To advise what the Commissioner says is the general impression created by the representation and the facts or sources of information relevant to the alleged general impression for each of the representations the Commissioner alleges in this proceeding are false or misleading.

# TAB 2

**CT-2024-012**

**THE COMPETITION TRIBUNAL**

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

**AND IN THE MATTER OF** an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

**BETWEEN:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**– and –**

**ROGERS COMMUNICATIONS INC.**

**Respondent**

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**MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF  
COMPETITION  
(REFUSALS MOTION OF ROGERS COMMUNICATIONS INC.)**

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## OVERVIEW

1. Rogers seeks answers to three categories of questions, each of which was properly refused by the Commissioner.
2. The first category is Rogers' third attempt to compel disclosure of records related to the Commissioner's thought process and internal analysis. Through document productions, Rogers received all non-privileged documents containing the facts, both favourable and adverse, relevant to issues properly in dispute. Through examinations for discovery, Rogers tested those facts. Rogers knows the case it has to meet.
3. What Rogers primarily seeks with its first category of questions is not additional facts. Rogers' questions imply it already has those facts. It rather seeks the Commissioner's conclusions on those facts, which the Tribunal has already determined is irrelevant. Attempting to make them relevant, Rogers brought a motion to amend its pleadings. That motion remains outstanding. Yet Rogers now asserts that these questions are relevant even if its amendments are not accepted.
4. In seeking the Commissioner's internal analysis, Rogers mischaracterizes the testimony of the Commissioner's representative. Contrary to Rogers' characterization, Ms. Phillipowsky never testified that the Commissioner ever reviewed and concluded that Rogers representations were not problematic. Rogers' attempt to read that into her evidence is inaccurate and does not make these questions relevant.
5. The second category of questions related to the deemed undertaking rule are an improper and irrelevant fishing expedition that cannot be

justified on the basis of costs. In any event, it is likely that these questions will be resolved through Rogers' motion to amend.

6. The third category of questions related to factual allegations by the Commissioner are improper, unreasonable, or unnecessary.
7. The Commissioner has complied with his discovery obligations by disclosing the facts necessary for Rogers to proceed fairly, effectively, and expeditiously to the hearing, knowing the case it must meet.

## PART I – STATEMENT OF FACTS

### A. Procedural History

8. The Commissioner of Competition ("**Commissioner**") filed this application against Rogers Communications Inc. ("**Rogers**") on December 23, 2024.<sup>1</sup> The application alleges that Rogers misled, and continues to mislead, consumers by offering mobile data plans that it represented as having unlimited data, but which actually have limits. The Commissioner relies on section 74.1 of the *Competition Act* ("**Act**") regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2).
9. The parties exchanged Affidavits of Documents and productions between June 13-18, 2025, with additional productions completed by July 30, 2025.

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<sup>1</sup> *Commissioner of Competition v Rogers Communications Inc.*, Ottawa CT-2024-012 (Comp Trib) ([Notice of Application](#), Commissioner of Competition).

10. After receiving the Commissioner's document productions, Rogers brought a motion on July 7, 2025 to compel additional production from the Commissioner. On August 11, 2025, the Competition Tribunal ("**Tribunal**") issued its Reasons for Order and Order on Rogers' motion for additional production.<sup>2</sup> The Tribunal dismissed Rogers' request for records relating to the Commissioner's consideration or investigation of unlimited plan representations. In doing so, the Tribunal agreed with the Commissioner that "the rationale or the motivation behind the timing of investigative steps, as well as Rogers' claim that it was "unfairly targeted", are irrelevant considerations."<sup>3</sup> However, the Tribunal granted the motion with respect to third party records, which were produced by the Commissioner by the Tribunal's deadline of October 3, 2025.
11. The parties conducted examinations for discovery between August 25, 2025 and September 5, 2025. The Commissioner's representative, Kathleen Phillipowsky, was examined by Rogers between September 3-5, 2025.
12. The Commissioner has confirmed, through both the examination of Ms. Phillipowsky and answers to undertakings, that all relevant evidence gathered in the course of the investigation has been produced.<sup>4</sup> Rogers has not pointed in the present motion to any particular evidence that the Commissioner has failed to properly disclose or produce.
13. On October 3, 2025, Rogers brought the present motion to compel answers to 59 questions that the Commissioner had refused.

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<sup>2</sup> [\*Canada \(Commissioner of Competition\) v Rogers Communications Inc.\*](#), 2025 Comp Trib 11.

<sup>3</sup> *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 11 at paras [12-13](#).

<sup>4</sup> See e.g. Transcript of Examination for Discovery of Kathleen Phillipowsky (5 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit I at 729; see also *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 11 at para [12](#).

14. On the same day, Rogers also brought a motion to amend its Response to the Commissioner's Notice of Application.<sup>5</sup> Rogers proposed to plead several new issues, including (i) estoppel and waiver; (ii) allegations the Commissioner breached the deemed undertaking rule; (iii) the Commissioner's knowledge and actions as they purported to relate to several mitigating factors; and (iv) a constitutional challenge against certain provisions of the Act, *Competition Tribunal Act*, and *Competition Tribunal Rules*.
15. Rogers' motion to amend its Response was heard by the Tribunal on October 17, 2025. The Tribunal reserved its decision.

**B. Rogers' speculation about the preliminary assessment is unsupported by evidence**

16. Rogers relies on the same unfounded allegations about the Commissioner's preliminary assessment that it made in its motion to amend. In considering that motion, the law required the Tribunal to take the facts pleaded as true. But, as the Commissioner raised then, those facts were not true. Now it is open to the Tribunal to consider the evidence of Ms. Phillipowsky to confirm why.
17. Contrary to Rogers' speculation, Ms. Phillipowsky never testified that the Commissioner has ever reviewed Rogers' representations and concluded they were not problematic.
18. Rather, Ms. Phillipowsky's answers on examination for discovery set out the following timeline:

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<sup>5</sup> *Commissioner of Competition v Rogers Communications Inc.*, Ottawa CT-2024-012 (Comp Trib) ([Motion Record Requesting Leave to Amend the Response](#), Rogers Communications Inc.).

- a. On June 7, 2019,<sup>6</sup> Rogers' then Chief Legal and Regulatory Officer at Rogers, Graeme McPhail, left a voicemail with the Commissioner. Mr. McPhail wanted to tell the Commissioner about something new that Rogers was launching, but the voicemail included no (or very limited) specifics.<sup>7</sup> Mr. McPhail subsequently e-mailed the Commissioner a copy of a press release – which itself was misleading – relating to Rogers' Infinite plans.<sup>8</sup> That's it. In e-mailing the Commissioner, Rogers does not allege that it was formally seeking a written opinion under section 124.1 of the Act.<sup>9</sup>
  
- b. In 2020, the Competition Bureau ("**Bureau**") conducted a preliminary assessment relating to representations being made by telecommunication companies about unlimited data.<sup>10</sup> Preliminary assessments are conducted to establish whether certain representations could raise issues under the

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<sup>6</sup> The Commissioner sent an e-mail to Graeme McPhail on June 11, 2019 referencing Mr. McPhail's "voicemail from Friday": Answers to Undertakings from the Examination of Kathleen Philippowsky Held September 3-5, 2025, Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit L at 838; Transcript of Examination for Discovery of Kathleen Phillipowsky (5 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit I at 739.

<sup>7</sup> Answers to Undertakings from the Examination of Kathleen Philippowsky Held September 3-5, 2025, Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit L at 838.

<sup>8</sup> Transcript of Examination for Discovery of Kathleen Phillipowsky (5 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit I at 740-741.

<sup>9</sup> Additional Answers to Undertakings from the Examination of Kathleen Philippowsky Held September 3-5, 2025, Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit L at 870.

<sup>10</sup> Transcript of Examination for Discovery of Kathleen Phillipowsky (3 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit G at 175.

Act and whether to recommend that an investigative team be assigned.<sup>11</sup>

- c. In the Fall of 2020, the preliminary assessment resulted in a recommendation.<sup>12</sup> Contrary to Rogers' assertions, Ms. Phillipowsky did not testify that there was a recommendation to "close" the preliminary assessment or that the recommendation resulted in any conclusions that the representations did not raise issues under the Act.
- d. In September 2021, following the completion of the preliminary assessment, an investigative team was assigned to review representations of various telecommunication companies.<sup>13</sup>
- e. Six months later in March 2022, an investigation into Rogers' unlimited wireless representations in particular was commenced as a result of the investigative team's review.<sup>14</sup>

19. We correct the record, as described above, because Rogers has made factual assertions about Ms. Phillipowsky's testimony that are

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<sup>11</sup> Transcript of Examination for Discovery of Kathleen Phillipowsky (3 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit G at 239.

<sup>12</sup> Transcript of Examination for Discovery of Kathleen Phillipowsky (3 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit G at 240; Transcript of Examination for Discovery of Kathleen Phillipowsky (5 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit I at 746.

<sup>13</sup> Transcript of Examination for Discovery of Kathleen Phillipowsky (3 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit G at 239.

<sup>14</sup> Transcript of Examination for Discovery of Kathleen Phillipowsky (5 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit I at 697-8.

unsupported and cannot be left unaddressed. Those assertions mischaracterize the record. In any event, even if Rogers' claims were true, this would still not make the Commissioner's thought process relevant for the reasons described below.

## **PART II – POINTS IN ISSUE**

20. The issue on this motion is whether the Commissioner properly refused to answer the questions listed in Schedule "A" to this memorandum of fact and law.

## **PART III – SUBMISSIONS**

### **C. The Test on a Refusals Motion**

21. The *Competition Tribunal Rules* do not provide for the practice or procedure to be followed for refusals during examination for discovery. The Tribunal can instead refer to the applicable rules under the *Federal Courts Rules*.<sup>15</sup>
22. Rule 240 of the *Federal Courts Rules* requires that a person being examined shall answer, to the best of their knowledge, information and belief, any question that is relevant to any unadmitted allegation of fact in a pleading.<sup>16</sup>

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<sup>15</sup> *Competition Tribunal Rules*, SOR/2008-141, s [34](#).

<sup>16</sup> *Federal Courts Rules*, SOR/980196, s [240](#).

23. Under the *Federal Courts Rules*, questions on discovery are restricted to questions of fact.<sup>17</sup>
24. Rule 242 of the *Federal Courts Rules* allows for objections to questions during examination for discovery on the following grounds:
- a. the answer is privileged;
  - b. the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;
  - c. the question is unreasonable or unnecessary; or
  - d. it would be unduly onerous to require the person to make the inquiries referred to in rule 241.<sup>18</sup>
25. A question will be relevant in the following circumstances:
- when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.<sup>19</sup>
26. Even where a question is relevant, the Tribunal may still exercise its discretion to disallow it. The Tribunal may exercise its discretion based on the risk that a party is abusing the discovery process, undue hardship on the answering party, where there are other means of obtaining the information sought, or where the question forms part of a fishing expedition of "vague and far-reaching scope".<sup>20</sup>

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<sup>17</sup> *Canada v CHR Investment Corporation*, 2021 FCA 68 at para [21-23](#).

<sup>18</sup> *Federal Courts Rules*, SOR/98-106, s [242](#).

<sup>19</sup> *Canada v Lehigh Cement Limited*, 2011 FCA 120 at para [34](#).

<sup>20</sup> *Canada v Lehigh Cement Limited*, 2011 FCA 120 at para [35](#).

27. The goal on examination for discovery is “a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each party has to meet”.<sup>21</sup>
28. A brief statement of the Commissioner’s particular position on each specific refusal is set out in Schedule “A”. In the following sections, we address the broad categorical arguments raised by Rogers.

**D. Category 1: The Questions Relating to the Commissioner’s Preliminary Assessment, Investigation, and Inquiry are Not Relevant to Any Issue**

29. Rogers attempts to ask questions relating to (i) the Commissioner’s preliminary assessment of “unlimited” plan representations by telecommunication companies; and (ii) the Commissioner’s investigation and subsequent inquiry into Rogers’ representations. These comprise questions 230, 231, 232, 248, 275, 274-279, 322, 330-331, 332-333, 334, 335, 338, 340, 342, 345, 383, 385-386, 390, 392, 398, 400, and 401 from September 3, 2025; and questions 65, 66-67, 68, 69-70, 141, 142, 143, 144, 149-150, 192, 193, 194, 195, 196-197, 201-204, 205, 222, 235-236, 237, 238, 239, 243, and 319 from September 5, 2025.
- i. The Questions Regarding the Commissioner’s Conduct and Thought Process Irrelevant to the Issue of General Impression*
30. The Commissioner’s preliminary assessment of “unlimited” representations by telecommunication companies in 2020 is irrelevant

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<sup>21</sup> *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 at para [46](#).

to determining the general impression of Rogers' representations. In asking about details of that assessment and the process surrounding it, Rogers does not seek relevant facts, but rather the conclusions the Commissioner drew from those facts. The Tribunal has consistently found that such questions do not need to be answered.<sup>22</sup>

31. The Commissioner has already produced to Rogers all relevant evidence which underlay the Commissioner's investigation and subsequent inquiry into Rogers' representations. To the extent Rogers wishes to "challenge the Commissioner's current evidence regarding general impression and effect",<sup>23</sup> it can do so with any facts favourable to its position that the Commissioner ascertained during his investigation and inquiry (which have already been produced). What Rogers cannot do under the Act is defend its conduct on the basis of the Commissioner's thought process in arriving at his current position.
32. This is not a train of inquiry that either advances Rogers' case or damages the case of the Commissioner. Rogers argues the following:

The best evidence the Commissioner can provide Rogers and this Tribunal regarding the general impression of Rogers' representations in 2019 and 2020 is the assessment he conducted and conclusions he previously reached.<sup>24</sup>

33. If Rogers is correct, then it necessarily follows that the Tribunal would also be required to also place weight on any conclusion by the Commissioner that Rogers' conduct was contrary to the Act. But this is not the Tribunal's task, which is to independently determine whether a person is engaging in or has engaged in reviewable conduct under

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<sup>22</sup> *The Commissioner of Competition v Vancouver Airport Authority*, 2017 CACT 16 at para 69.

<sup>23</sup> [Memorandum of Fact and Law of the Respondent](#) at para 36.

<sup>24</sup> [Memorandum of Fact and Law of the Respondent](#) at para 37.

Part VII.1 of the Act.<sup>25</sup> Just as the Commissioner must prove his case through facts and admissible opinion evidence, so too must Rogers.

*ii. The Commissioner Already Produced the Facts Relevant to Remedy*

34. Again, Rogers has already received all records relevant to the matters in issue that are in the possession, power, or control of the Commissioner. To the extent that the Commissioner considered any facts that could offer a defence to the aggravating factors pleaded by the Commissioner, those have already been disclosed. But, how the Commissioner assessed those facts and what the Commissioner may have concluded are improper questions.<sup>26</sup>
35. The Commissioner's previous opinions – as opposed to the facts that those opinions were based on – cannot reasonably have any bearing on the aggravating or mitigating factors pleaded. Rogers highlights the vulnerability of the persons likely to be adversely affected by its conduct.<sup>27</sup> As previously argued by the Commissioner, the characteristics of consumers are not affected in any way by what the Commissioner may think of them. Aside from the relevant facts considered by the Commissioner (which have already been disclosed), Rogers' questions do not fairly lead to a train of inquiry that would either advance its case or damage the case of the Commissioner.
36. Rogers also argues that the Commissioner's alleged previous conclusions may be relevant to whether Rogers was engaged in "flagrant misconduct", whether it was acting in good faith, and whether

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<sup>25</sup> See *Competition Act*, RSC 1985, c C-34, s [74.1](#).

<sup>26</sup> *The Commissioner of Competition v Vancouver Airport Authority*, 2017 CACT 16 at para [69](#).

<sup>27</sup> [Memorandum of Fact and Law of the Respondent](#) at para 46.

its conduct was reasonable.<sup>28</sup> Again, this is not a reasonable train of inquiry for Rogers that would either advance its case or damage the case of the Commissioner. How the Tribunal ultimately characterizes Rogers' conduct and the impugned representations cannot reasonably be swayed by private internal deliberations of the Bureau. To do so would incorrectly place weight on the opinions of the Commissioner beyond what the Commissioner is able to establish through admissible evidence at trial.

*iii. The Potential For Costs Cannot Justify Irrelevant Questions*

37. Rogers invokes the fact it is seeking costs as a justification for its questions about the Commissioner's conduct and thought process. The potential for costs cannot justify questions that are irrelevant to the determination of issues in this proceeding. If allowed, it would permit any aggrieved respondent before this Tribunal to open wide the Commissioner's investigatory process in the hopes of finding embarrassing information with a disregard for any benefit for the determination of issues in the proceeding. This constitutes an abuse of the discovery process.
38. It is generally recognized that costs are not an issue between the parties, but "are a separate matter to be decided after all of the issues have been decided."<sup>29</sup> As a result, courts (including the Federal Court) routinely do not permit allegations of fact in pleadings that are solely relevant to costs.<sup>30</sup> The Tax Court of Canada applied that jurisprudence to find under its analogous rule that a question on examination for

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<sup>28</sup> [Memorandum of Fact and Law of the Respondent](#) at para 43.

<sup>29</sup> [A.I. MacFarlane & Associates Ltd. v Delong](#), 1986 CanLII 2512 at 3, 55 OR (2d) 89 (ON SC).

<sup>30</sup> See e.g. [Eli Lilly and Co. v Apotex Inc.](#), 2003 FC 978 at paras [24-26](#).

discovery that is only relevant to costs does not have to be answered.<sup>31</sup>  
The Tribunal should find likewise.

39. In any case, Rogers does not articulate a reasonable justification for its inquiry into the Commissioner's conduct. Rogers continues to repeat the claim that the Commissioner "singled Rogers out" and used his powers to "selectively target Rogers". The Tribunal already rejected this position in finding that "The Act gives the Commissioner the power and discretion to investigate and enforce its provisions as it sees fit. It does not dictate how and when to do it, nor does it impose an industry wide approach to enforcement."<sup>32</sup> It would be inappropriate to permit a line of questioning based on an argument that "is not a defence that is available in law".<sup>33</sup>

*iv. The Project Cosmos Document (Item 135) is Solicitor-Client Privileged*

40. Rogers challenges the claim of solicitor-client privilege over the document listed as item 135 of Schedule "B" to the Commissioner's Affidavit of Documents.<sup>34</sup>
41. Rogers does not have a reasonable basis to continue opposing the Commissioner's claim of solicitor-client privilege over the document. The document is an e-mail with the clear subject line "Cosmos, Protected B, solicitor/client privileged". The e-mail is between senior members of the Bureau staff responsible for the file, Brendan Ross (Major Case Director) and Julie Tremblay (Associate Deputy Commissioner), copying Ms. Phillipowsky (case team lead). When asked on examination whether the e-mail "**relays legal advice** from somebody who is a lawyer"

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<sup>31</sup> *Leverman v The Queen*, 2011 TCC 479 at paras [12-16](#)

<sup>32</sup> *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 11 at para [18](#).

<sup>33</sup> *Ibid* at para [17](#).

<sup>34</sup> Document ID RBMK00103\_000000009.

(emphasis added), the Commissioner’s representative confirmed “That’s right”.<sup>35</sup>

42. Rogers points to the fact that no lawyer was a participant in the e-mail. But that is not a requirement for solicitor-client privilege to apply. In *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, the Federal Court of Appeal rejected an argument that a letter was not solicitor-client privileged because it was not a communication between a lawyer and his client.<sup>36</sup> The court upheld the privilege claim on the basis that:

the disclosure of the information would reveal privileged information about the solicitor-client relationship, and could lead **directly or indirectly** to the revelation of confidential solicitor client communications [redacted in original]. **It would permit inferences to be drawn about the instructions given, and reveal or permit accurate inferences to be drawn about the precise legal services provided.**<sup>37</sup> (emphasis added)

43. Based on (i) the e-mail’s subject line; (ii) senior nature of the participants who had responsibility over the file; and (iii) confirmation by the Commissioner’s representative that the e-mail relays legal advice, there is sufficient basis – short of revealing information about the advice given – for the privilege claim.
44. Alternatively, if the Tribunal agrees with Rogers that the validity of the claim is still reasonably unclear, an inspection should be made. Under rule 61 of the *Competition Tribunal Rules*, the Tribunal has the power to

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<sup>35</sup> Transcript of Examination for Discovery of Kathleen Phillipowsky (5 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit I at 725.

<sup>36</sup> *Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, 2019 FCA 95 at para [56](#).

<sup>37</sup> *Ibid* at para [61](#).

determine the validity of a privilege claim after inspecting the document over which the claim was made.<sup>38</sup>

45. The Commissioner is willing to provide the e-mail under seal to the Tribunal for a judicial member not involved in this matter to determine the validity of the Commissioner's solicitor-client privilege claim. Although lacking a reason to question the Commissioner's claim, Rogers has thus far been unsatisfied by the information provided. Given that the privileged nature of the e-mail is clear on its face, an inspection would be the most effective and expedient manner if the Tribunal believes it necessary to further confirm the validity of the claim.

**E. Category 2: The Questions Relating to the Deemed Undertaking Rule are a Fishing Expedition**

46. Rogers seeks to compel answers to questions relating to the deemed undertaking rule as it applies to information from the *Rogers-Shaw* proceeding previously before this Tribunal (Tribunal File No. CT-2022-002). These comprise questions 79, 82-83, 86, 94 & 95 from September 5, 2025.
47. Rogers embarks on a fishing expedition in the hopes that it may uncover some evidence of a breach of the deemed undertaking rule. Rogers has not alleged that any portion of the Commissioner's Notice of Application was based on a breach of the rule, nor has it alleged any record produced by the Commissioner in this proceeding is subject to the rule.

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<sup>38</sup> *Competition Tribunal Rules*, SOR/2008-141, rr [61](#); *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s [8\(2\)](#).

48. Rogers' attempt to justify these questions on the basis of costs is irrelevant. As discussed above, relevance to costs alone cannot be used to justify a question. Even if the Tribunal finds otherwise, the deemed undertaking rule only becomes relevant to costs if the Tribunal finds that the Commissioner has improperly relied on information obtained through a breach of the rule. That will only become fully apparent through the evidence led by the Commissioner at trial. And not least because it remains open to the Commissioner to seek relief from the application of the rule should the Commissioner wish to rely on any information subject to the rule.<sup>39</sup>
49. In any event, Rogers' counsel already has sufficient knowledge to identify and address any breaches of the deemed undertaking rule with respect to the information it produced in the *Rogers-Shaw* proceeding. Discovery on this point is unnecessary – even if Rogers is granted leave to plead a breach of the rule.
50. As a party to both proceedings, Rogers already knows what information was provided the Commissioner through the *Rogers-Shaw* discovery process that was not also produced in the present proceeding. In the event that the Commissioner attempts to rely on information in breach of the deemed undertaking rule, Rogers is already well-positioned to spot it. If Rogers subsequently seeks a remedy or costs as a result of such a breach, the mere fact of a breach is sufficient; the extraneous information Rogers seeks on this motion would be unnecessary.

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<sup>39</sup> *Competition Tribunal Rules*, SOR/2008-141 s [62\(4\)](#).

**F. Category 3: The Questions Regarding the Commissioner's Allegations are Improper, Unreasonable, or Unnecessary**

51. Rogers challenges refusals relating to three subcategories of questions relating to the Commissioner's allegations in this proceeding: (i) throttled speed (questions 1096-1097, 1108, 1164, 1175, 1503 & 1505 from September 4, 2025); (ii) representations at issue (questions 302 & 329 from September 5, 2025); and (iii) Comwave (question 1179 from September 4, 2025).

*i. The Questions About Throttled Speed are Improper*

52. Rogers improperly asks the Commissioner to speculate or opine on several matters relating to the throttling of mobile data plans. Contrary to Rogers' assertion that these questions seek "the Commissioner's information about what impact throttling has on device functionality",<sup>40</sup> these questions do not elicit relevant facts. Instead, they ask for the Commissioner's opinion on the impact of throttling.

53. Expert opinion is not a proper subject for discovery.<sup>41</sup> This is for good reason: the Commissioner (or specifically, his representative under examination) is not alleged to have the technical expertise to opine on these speculative questions. The answers to these questions are properly within the domain of an expert witness. For example, question 1108 calls for an opinion on the speed at which the functionality of an application is not impacted; question 1175 calls for an opinion on the speed at which a throttled unlimited plan would be significantly "influenced"; question 1503 calls for an opinion on how to measure

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<sup>40</sup> [Memorandum of Fact and Law of the Respondent](#) at para 74.

<sup>41</sup> *Bayer inc v. Apotex inc*, 2020 FC 325 at paras [18](#) & [21](#).

whether its “difficult or virtually impossible” to complete an operation in an application.

54. Questions 1096-1097 are hypothetical questions about whether certain types of representations may or may not contravene the Act. These are not relevant. The issue before the Tribunal is whether the actual representations made by Rogers are misleading. Hypothetical representations divorced from any factual context cannot be meaningfully assessed under the Act. Further, the Commissioner’s opinion does not assist in resolving whether the actual representations are misleading.
55. Regardless, questions 1096-1097 raise questions of law as to whether it would be “acceptable” for a plan to be marked as “unlimited data” if the speed of the data is fixed throughout. The Commissioner’s representative cannot appropriately opine as to the legal question of what would be “acceptable” under the Act.<sup>42</sup>
- ii. The Questions About Representations at Issue are Disproportionate, Unduly Burdensome, and Unnecessary*
56. Rogers seeks to have the Commissioner identify all specific representations at issue and the general impression each of them conveyed. Compelling the Commissioner to undertake an individualized review of the over 20,000 records containing representations produced by Rogers would be disproportionate, unduly burdensome, and unnecessary to determine the issues.<sup>43</sup>

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<sup>42</sup> *Bayer inc v Apotex inc*, 2020 FC 325 at paras [18](#) & [21](#).

<sup>43</sup> *The Commissioner of Competition v Rogers Communications Inc. et al*, Ottawa T-2416-23 (FC) (Order of Justice Andrew D. Little dated December 1, 2023), Schedule I, Specification I: “Provide one copy of each unique version of all Infinite Representations, with the exception of Electronic Messages,

57. The Notice of Application already sets out the facts necessary to assess whether a representation is false or misleading. The Commissioner’s case does not depend on the precise wording of each representation, but on the features that make a representation misleading: the use of the term “Infinite” or “unlimited”; the display of the Rogers infinite Loop; or anything else that conveys that the data provided is “unlimited”.
58. The Notice of Application reproduces examples of historic and on-going representations alleged to be false and misleading. These include images or reproductions of newspaper advertisements, billboards, public transit advertisements, mall banners, internet video advertisements, transit shelter advertisements, mobile application advertisements, television commercials, e-mails, and representations on Rogers’ website.<sup>44</sup> The Notice of Application sets out details of the general impression created by these representations.<sup>45</sup> If Rogers had any doubt as to which representations were at issue, it could have requested particulars. It did not and instead filed its Response, confirming it understood the Commissioner’s allegations.
59. Rogers argues that it is “entitled to a straight answer from the Commissioner on **which specific representations he relies on** and

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made to the public. The Respondents need not provide copies of identical Infinite Representations made in the same medium.

For each Electronic Message, provide the template used by or on behalf of the Respondents to send Electronic Messages to the public that promote Infinite Plans.”

<sup>44</sup> *Commissioner of Competition v Rogers Communications Inc.*, Ottawa CT-2024-012 (Comp Trib) ([Notice of Application](#), Commissioner of Competition), Figures 1-18 at paras 14-32.

<sup>45</sup> *Commissioner of Competition v Rogers Communications Inc.*, Ottawa CT-2024-012 (Comp Trib) ([Notice of Application](#), Commissioner of Competition) at paras 21 & 32-36.

what false or misleading impression he says they convey” (emphasis added).<sup>46</sup> It is well-recognized that Rogers is not entitled to ask for the facts on which the Commissioner relies on to support an allegation.<sup>47</sup> To do so would require the Commissioner’s representative to improperly “consider the applicable law, then use it to select facts and to announce a result.”<sup>48</sup>

60. Rogers is only entitled to all relevant facts known by the Commissioner; and that is what it has already received. The Commissioner produced to Rogers all non-privileged screen captures, and reproductions of its representations that the Bureau collected in the course of the Bureau’s investigation.
61. In response to questions of this type, it is sufficient for the Commissioner to only provide the “main facts, significant sources, or categories of documents described in sufficient detail” to allow the relevant facts to be located.<sup>49</sup> The sample of representations reproduced in the Notice of Application provide the significant sources underlying the Commissioner’s allegations. The Notice of Application also sufficiently describes the category of representations at issue. And as mentioned above, the Commissioner already produced to Rogers all reproductions of its representations that were collected by the Bureau.
62. It would also be improper and unreasonable to the Commissioner to essentially identify every document containing facts known to the

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<sup>46</sup> [Memorandum of Fact and Law of the Respondent](#) at para 79.

<sup>47</sup> *Apotex Inc. v Pharmascience Inc.*, 2004 FC 1198 at para [19\(2\)](#), aff’d [2005 FCA 144](#); *Bayer inc v Apotex inc*, 2020 FC 325 at paras [26](#) & [27](#).

<sup>48</sup> *Apotex Inc. v Pharmascience Inc.*, 2004 FC 1198 at para [19\(2\)](#), aff’d [2005 FCA 144](#);

<sup>49</sup> *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 at para [58](#).

Commissioner and which underlie a specific allegation.<sup>50</sup> This is especially the case here, where Rogers' questions would require the Commissioner to detail each and every instance of a national multi-channel marketing campaign, and an offering that has been on the market for six years.

*iii. The Question About Comwave is Unnecessary and Irrelevant*

63. Rogers attempts to compel the Commissioner to produce representations of Comwave Networks Inc. that were subject to a registered consent agreement. While these representations were described as an example in the Bureau's 2017 "Deceptive Marketing Practices Digest — Volume 3" ("**Digest**"),<sup>51</sup> Rogers' questions are both unnecessary and irrelevant.
64. It is unnecessary for Rogers to gain access to other investigatory files of the Bureau to properly respond to the aggravating factors pleaded by the Commissioner. The Digest on its face is sufficient for Rogers to fairly and effectively address the Commissioner's case. The Digest already describes and includes examples of the impugned representations by Comwave to the extent it's necessary to understand the Bureau's commentary.<sup>52</sup> It also hyperlinks to the consent agreement which again describes and gives an example of Comwave's "unlimited" representations.<sup>53</sup>

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<sup>50</sup> *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 at para [28](#).

<sup>51</sup> Competition Bureau Canada, [The Deceptive Marketing Practices Digest](#), vol 3 (Ottawa: Competition Bureau Canada, 2017).

<sup>52</sup> Competition Bureau Canada, [The Deceptive Marketing Practices Digest](#), vol 3 (Ottawa: Competition Bureau Canada, 2017) at 16.

<sup>53</sup> *The Commissioner of Competition v Comwave Networks Inc.* (13 September 2016), Ottawa CT-2016-014 (Comp Trib) ([Registered Consent Agreement](#)) at 2.

65. Extrinsic information to which Rogers did not previously have access could not have affected its interpretation of the Bureau's guidance at the time, nor should it affect the Tribunal's determination of whether Rogers disregarded the Bureau's warning. At trial, Rogers will be free to lead evidence of factors that influenced its interpretation of the Digest, but that does not require examining the Commissioner on his other investigations.
66. The Bureau's investigatory file with respect to Comwave is also irrelevant. The dispute between the parties on this point is whether Rogers engaged in false or misleading advertising in the face of the Bureau's warning about unlimited claims relating to products or services that are not unlimited.<sup>54</sup> It is not about comparing Rogers' representations to those by Comwave, nor the Bureau's approach in other cases.

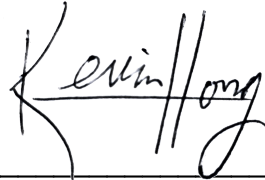
#### **PART IV – ORDER SOUGHT**

67. The Commissioner asks that Rogers' motion be dismissed with costs.

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<sup>54</sup> *Commissioner of Competition v Rogers Communications Inc.*, Ottawa CT-2024-012 (Comp Trib) ([Notice of Application](#), Commissioner of Competition) at paras 45 & 46(e); *Commissioner of Competition v Rogers Communications Inc.*, Ottawa CT-2024-012 (Comp Trib) ([Response](#), Rogers Communications Inc.) at para 58.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 3rd day of  
November 2025 at Toronto, Ontario.**



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**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Competition Bureau Legal Services  
Place du Portage, Phase I  
50 Victoria Street, 22<sup>nd</sup> Floor  
Gatineau, QC K1A 0C9  
Fax: 819-953-9267

**Jonathan Hood**

Tel: 613-325-1760

[Jonathan.Hood@cb-bc.gc.ca](mailto:Jonathan.Hood@cb-bc.gc.ca)

**Kevin Hong**

Tel: 819-665-6381

[Kevin.Hong@cb-bc.gc.ca](mailto:Kevin.Hong@cb-bc.gc.ca)

**Irene Cybulsky**

Tel: 613-316-5034

[Irene.Cybulsky@cb-bc.gc.ca](mailto:Irene.Cybulsky@cb-bc.gc.ca)

**Kendra Wilson**

Tel: 613-799-9454

[Kendra.Wilson@cb-bc.gc.ca](mailto:Kendra.Wilson@cb-bc.gc.ca)

**Counsel for the Commissioner of  
Competition**

## PART V – LIST OF AUTHORITIES

### A. Legislation/Regulations

1. *Competition Act*, RSC 1985, c C-34, s [74.1](#).
2. *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s [8\(2\)](#).
3. *Competition Tribunal Rules*, SOR/2008-141, ss [34](#), [61](#) & [62\(4\)](#).
4. *Federal Courts Rules*, SOR/980196, ss [240](#) & [242](#).

### B. Case Law

5. [\*A.I. MacFarlane & Associates Ltd. v Delong\*](#), 1986 CanLII 2512, 55 OR (2d) 89 (ON SC).
6. [\*Apotex Inc. v Pharmascience Inc.\*](#), 2004 FC 1198.
7. [\*Bayer inc v Apotex inc\*](#), 2020 FC 325.
8. [\*Canada v CHR Investment Corporation\*](#), 2021 FCA 68.
9. [\*Canada \(Commissioner of Competition\) v Rogers Communications Inc.\*](#), 2025 Comp Trib 11.
10. [\*Canada v Lehigh Cement Limited\*](#), 2011 FCA 120.
11. [\*Canada \(Office of the Information Commissioner\) v Canada \(Prime Minister\)\*](#), 2019 FCA 95.
12. [\*Eli Lilly and Co. v Apotex Inc.\*](#), 2003 FC 978.
13. [\*Leverman v The Queen\*](#), 2011 TCC 479.
14. *The Commissioner of Competition v Comwave Networks Inc.* (13 September 2016), Ottawa CT-2016-014 (Comp Trib) ([Registered Consent Agreement](#)).
15. [\*The Commissioner of Competition v Vancouver Airport Authority\*](#), 2017 Comp Trib 16.

### C. Secondary Sources

16. Competition Bureau Canada, [\*The Deceptive Marketing Practices Digest\*](#), vol 3 (Ottawa: Competition Bureau Canada, 2017).

**SCHEDULE “A”**

**Category #1: Assessment, investigation, and inquiry questions**

*(a) Assessment Questions*

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner’s Position on Refusal</b>
<b>September 3, 2025</b>				
1.	91 – 92	383	To advise if the preliminary assessment resulted in a recommendation to start an investigation.	<p>Improper. Requests that seek to reveal how the Commissioner assessed and interpreted facts need not be answered.</p> <p>Unnecessary. The Commissioner has already produced to Rogers all relevant facts which underlay the Commissioner’s preliminary assessment and investigation into “unlimited” representations.</p> <p>Irrelevant. The Commissioner’s thought process is not relevant to any unadmitted allegation of fact in a pleading.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
2.	92	385 – 386	To advise who the individuals conducting the preliminary assessment reported to.	<p>Irrelevant. The reporting structure of the staff conducting a preliminary assessment has no conceivable connection to any unadmitted allegation of fact in a pleading. This is a question about internal administration within the Bureau and not relevant facts.</p> <p>Even if Rogers' proposed amendments regarding estoppel and waiver are permitted, the reporting structure is not relevant to any of the elements of estoppel or waiver.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
3.	93	390	To advise who Ms. Phillipowsky believes was the person to whom the individuals conducting the preliminary assessment reported to.	<p>Irrelevant. Ms. Phillipowsky's belief as to the reporting structure of the staff conducting a preliminary assessment has no conceivable connection to any unadmitted allegation of fact in a pleading. This is a question about internal administration within the Bureau and not relevant facts.</p> <p>Even if Rogers' proposed amendments regarding estoppel and waiver are permitted, Ms. Phillipowsky's belief as to the reporting structure is not relevant to any of the elements of estoppel or waiver.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
4.	94	392	To advise if the person to whom the people conducting the preliminary assessment reported to was different than the person who instructed Ms. Phillipowsky to commence an investigation.	<p>Irrelevant. The reporting structure of the staff conducting a preliminary assessment has no conceivable connection to any unadmitted allegation of fact in a pleading. This is a question about internal administration within the Bureau and not relevant facts.</p> <p>Even if Rogers' proposed amendments regarding estoppel and waiver are permitted, the reporting structure is not relevant to any of the elements of estoppel or waiver.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
5.	96 – 97	398	To advise if whether somebody conducting a preliminary assessment writes a recommendation as to whether or not to open an investigation.	<p>Irrelevant. It is about the Bureau's internal administrative processes in general and has no bearing on any issue in dispute even if Rogers estoppel defence is permitted. The Commissioner's internal administrative processes are not material to any allegations; only the facts collected are. And those facts have been produced.</p> <p>It also appears the answer to this question may be found answers provided by Ms. Phillipowsky to other questions:</p> <ul style="list-style-type: none"> <li>• Questions 372-373, Transcript of Examination for Discovery of Kathleen Phillipowsky (3 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit G at 239.</li> <li>• Questions 199-200, Transcript of Examination for Discovery of Kathleen Phillipowsky (5 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit I at 746.</li> </ul>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
6.	96	400	To advise if the preliminary assessment is closed.	<p>It appears the answer to this question may be found in an answer provided by Ms. Phillipowsky in response to questions 380-381 on September 3, 2025:</p> <ul style="list-style-type: none"> <li>• Transcript of Examination for Discovery of Kathleen Phillipowsky (3 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit G at 240.</li> </ul>
7.	96 – 97	401	To confirm that the preliminary assessment was not ongoing in that period of time between September 2020 and September 2021.	<p>It appears the answer to this question may be found in an answer provided by Ms. Phillipowsky in response to questions 379-381 on September 3, 2025:</p> <ul style="list-style-type: none"> <li>• Transcript of Examination for Discovery of Kathleen Phillipowsky (3 September 2025), Motion Record of the Respondent, Affidavit of Ashley McKnight, Tab 2, Exhibit G at 240.</li> </ul>
<b>September 5, 2025</b>				

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
8.	485	192	To advise whether the Competition Bureau took any steps at or around the time Mr. McPhail sent his email to Mr. Boswell or the introduction of Rogers Infinite wireless plans.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
9.	485	193	To provide a copy of any communication initiating the steps the Bureau took, if it took any at or around the time of Mr. McPhail's email or the launch of Rogers Infinite wireless plans.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>
10.	485	194	To advise whether it is the case that when a preliminary assessment is closed, as it was in this case, that there is some communication closing it.	Irrelevant. The question is about the Bureau's internal administrative processes in general and is not relevant to any issue in dispute, even if Rogers estoppel defence is permitted.

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
11.	486	195	To advise whether there is a formal or informal communication that brings an assessment to a close.	Irrelevant. The question is about the Bureau's internal administrative processes in general and is not relevant to any issue in dispute, even if Rogers estoppel defence is permitted.

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
12.	486-487	196 – 197	To advise whether when this preliminary assessment ended or any preliminary assessment ends, whether there is a report by the individuals conducting the preliminary assessment to their superior advising them that they are closing the assessment or asking that they close the assessment.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question in so far as it relates to the particular preliminary assessment regarding “unlimited” representations by telecommunication companies.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner’s thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
13.	488 – 489	201- 204	To confirm that there was a recommendation that was made in 2020, and the recommendation that was made was to wrap up the preliminary assessment.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
14.	489	204	To provide a copy of the 2020 recommendation.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>
15.	494	222	To advise if the Commissioner agrees that had Rogers sought an advisory opinion, it would have been advised by the Commissioner at the time that the conduct was not reviewable.	<p>Improper. The question raises a hypothetical that can't be answered without context on the basis of a vague reference to a situation in which "Rogers sought an advisory opinion". It also calls for an opinion of law.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
16.	496	235 - 236	To advise how Ms. Sonley first raised this issue of the marketing of unlimited wireless data plans.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
17.	497	237	To advise why Ms. Sonley was raising the issue of the marketing of unlimited wireless data plans.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
18.	497	238	To advise to whom Ms. Sonley raised the issue of the marketing of unlimited wireless data plans.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
19.	497	239	To advise what steps, if any, were taken in relation to Ms. Sonley raising the issue of the marketing of unlimited wireless data plans.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
20.	497-498	243	To advise whether the notes taken by Ms. Assad of the conference call where Ms. Sonley raised the issue of the marketing of unlimited wireless data plans bear on the allegations pleaded by the Commissioner in the Notice of Application.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
21.	524-525	319	To provide the recollection of each of the participants of the telephone call, provided those individuals are still at the Bureau (RFLB00041_000000014).	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

*(b) Investigation and Inquiry Questions*

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
<b>September 3, 2025</b>				
1.	50	230	To advise if Ms. Phillipowsky was satisfied that the Notice of Application reflected the facts upon which your recommendation was based.	<p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. Ms. Phillipowsky's subjective opinion as to whether she "satisfied" that the Notice of Application reflected facts from a recommendation has no bearing on any fact or issue before the Tribunal.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
2.	51	231	To advise if the Notice of Application is consistent with the facts that formed part of the recommendation to commence this litigation.	<p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. Ms. Phillipowsky's subjective opinion as to whether the Notice of Application is "consistent" with the facts from a recommendation has no bearing on any fact or issue before the Tribunal.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
3.	51	232	To advise if there are facts set out in the Notice of Application that are different than those in the recommendation.	<p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. Ms. Phillipowsky's subjective opinion as to whether the Notice of Application is "different" from the facts from a recommendation has no bearing on any fact or issue before the Tribunal.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>
4.	56	248	To advise when the Commissioner says that litigation became a real possibility such that he is entitled to claim litigation privilege.	Improper. Asks for an opinion of law as to when litigation privilege may apply.

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
5.	63-64	275	To advise when the culmination was to recommend that an application be filed.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
6.	65	274 – 279	To advise when the iterative process of recommendations (to pursue an application) began.	<p>If Rogers proposed amendments to add the estoppel defence are permitted then the Commissioner will answer this question.</p> <p>Otherwise:</p> <p>Improper. Questions as to how the Commissioner or his representative assessed and interpreted facts need not be answered.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p> <p>Unnecessary. All relevant facts considered by the Commissioner, both favourable and adverse, have been disclosed to Rogers.</p>
7.	77	322	To advise if there is a distinction between the Commissioner conducting an inquiry and conducting an investigation.	<p>Improperly asks for an opinion of law as to the Commissioner's powers or authority under the Act.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis are not relevant to any issue in dispute.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
8.	79	330 – 331	To advise what steps the Commissioner has taken or what facts the Commissioner has learned since filling the Notice of Application in December 2024.	<p>Irrelevant. What investigative steps the Commissioner has taken since filing the Notice of Application is irrelevant to any issue in dispute.</p> <p>Unnecessary. The Commissioner has already produced to Rogers all relevant documents in his possession, power, or control and has complied with his continuing disclosure obligations.</p>
9.	80	332 – 333	To advise what non-privileged steps the Commissioner has taken in furtherance of an investigation into Rogers' promotion of unlimited wireless plans.	<p>Irrelevant. What investigative steps the Commissioner has taken since filing the Notice of Application is irrelevant to any issue in dispute.</p> <p>Unnecessary. The Commissioner has already produced to Rogers all relevant documents in his possession, power, or control and has complied with his continuing disclosure obligations.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
10.	80	334	To advise if the Commissioner's examination of a DIG representative, pursuant to Section 11, was part of the investigation.	Irrelevant. To the extent any relevant information was obtained from DIG pursuant to an order under section 11 of the Act, it has been produced to Rogers (including examination transcripts). More generally, the Commissioner's authority to bring this application and the evidence relied upon are not affected by this distinction as to whether the order sought under section was "part of the investigation".
11.	80	335	To advise if the Commissioner's examination of a DIG representative, pursuant to Section 11, was part of the litigation.	Irrelevant. What investigative steps the Commissioner has taken since filing the Notice of Application is irrelevant to any issue in dispute. To the extent any relevant information was obtained from DIG pursuant to an order under section 11 of the Act, it has been produced to Rogers (including examination transcripts).
12.	81	338	To advise if the Commissioner's position is that the facts discovered as part of the investigation are privileged.	Irrelevant and improper. However, facts discovered during an investigation are generally not subject to privilege, and any additional relevant facts discovered by the Commissioner after filing the Notice of Application have been disclosed.

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
13.	81	340	To advise if there are any facts that the Commissioner has learned through its investigation subsequent to December 2024 that are relevant to the issues in this litigation.	<p>Improper/Unreasonable. The Commissioner is not required to organize the facts by date for Rogers.</p> <p>Unnecessary. The Commissioner has already produced to Rogers all relevant documents in his possession, power, or control and has complied with his continuing disclosure obligations.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p>
14.	82	342	To advise if any of the facts supporting the allegations in the Notice of Application were gathered after the application was initiated and to identify which facts those are.	<p>Improper/Unreasonable. The Commissioner is not required to organize the facts by date for Rogers.</p> <p>Unnecessary. The Commissioner has already produced to Rogers all relevant documents in his possession, power, or control and has complied with his continuing disclosure obligations.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
15.	83	345	To advise what the Commissioner learned from DIG that relates to the allegations in the Notice of Application.	<p>Improper/Unreasonable. The Commissioner is not required to organize the facts by source for Rogers.</p> <p>Unnecessary. To the extent any relevant information was obtained from DIG pursuant to an order under section 11 of the Act, it has been produced to Rogers (including examination transcripts).</p>
<b>September 5, 2025</b>				
16.	444	65	To advise if Ms. Phillipowsky made a recommendation to commence an inquiry.	<p>Improper. Requests that seek to reveal how the Commissioner assessed and interpreted facts need not be answered.</p> <p>Unnecessary. The Commissioner has already produced to Rogers all relevant facts which underlay the Commissioner's investigation and subsequent inquiry into Rogers' representations.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
17.	444	66-67	If there was a recommendation to go on inquiry, to provide information as to whom the recommendation was made, the form of the recommendation, the basis of the recommendation, excluding any legal advice that may have been provided as part of the recommendation, and the documents that underpinned that recommendation.	<p>Improper. Requests that seek to reveal how the Commissioner assessed and interpreted facts need not be answered.</p> <p>Unnecessary. The Commissioner has already produced to Rogers all relevant facts which underlay the Commissioner's investigation and subsequent inquiry into Rogers' representations.</p> <p>Irrelevant. The Commissioner's thought process and internal analysis is not relevant to any unadmitted allegation of fact in a pleading.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
18.	444-445	68	To produce a copy of the recommendation itself.	<p>Improper. Requests that seek to reveal how the Commissioner assessed and interpreted facts need not be answered.</p> <p>Unnecessary. The Commissioner has already produced to Rogers all relevant facts which underlay the Commissioner's investigation and subsequent inquiry into Rogers' representations.</p> <p>Irrelevant. The Commissioner's thought process is not relevant to any unadmitted allegation of fact in a pleading.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
19.	445	69-70	To advise what documents, other than representations in the marketplace, Ms. Phillipowsky gathered as part of her investigation between March 2022 and April 2023.	<p>Improper/Unreasonable. The Commissioner is not required to organize the facts by date for Rogers.</p> <p>Unnecessary. The Commissioner has already produced to Rogers all relevant facts which underlay the Commissioner's investigation and subsequent inquiry into Rogers' representations.</p> <p>Irrelevant. To the extent Rogers is attempting to determine what the Commissioner knew when, the Commissioner's thought process is not relevant to any unadmitted allegation of fact in a pleading.</p>
20.	467	141	To review the document, "Cosmos", at Row 137 (item 135) of the Commissioner's Schedule B and confirm that the document contains legal advice.	Solicitor-client privileged. The document is an e-mail that consists of a discussion of legal advice provided by counsel.
21.	468	142	To advise whether it was Ms. Phillipowsky who was seeking the legal advice in the document referred to in the Commissioner's schedule B productions at item 135 (row 137).	Solicitor-client privileged. The document is an e-mail that consists of a discussion of legal advice provided by counsel. The answer to this question would tend to reveal the context of the legal advice given.
22.	468	143	To advise why Ms. Phillipowsky was seeking legal advice in the document referred to in the Commissioner's schedule B productions at item 135 (row 137).	Solicitor-client privileged. The reason why a client sought legal advice in a particular circumstance is central to the solicitor-client relationship.

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
23.	468	144	To produce a redacted copy of the document at Row 137 (item 135) of the Commissioner's Schedule B, if the document contains information that is not privileged.	Solicitor-client privileged. The document is privileged in its entirety.
24.	470	149 – 150	To advise whether Ms. Cybulsky was on the Project Cosmos team at the time (October 13, 2022).	Irrelevant. Whether Ms. Cybulsky was assigned to the Project Cosmos team at the time is irrelevant as to whether the e-mail would tend to reveal legal advice. Counsel can provide legal advice regardless of whether they are administratively assigned to a team.

**Category #2: Deemed Undertaking Questions**

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
<b>September 5, 2025</b>				
1.	447	79	To advise who was on the Rogers-Shaw team.	Irrelevant. Relevance solely to costs cannot justify a question. Regardless, the deemed undertaking rule only becomes relevant to costs if the Tribunal finds the Commissioner has improperly relied on information obtained through a breach of the rule (which has not occurred).
2.	448	82 – 83	To advise who provided Ms. Phillipowsky with access to the documents produced by the parties in the Rogers-Shaw litigation.	Irrelevant. Relevance solely to costs cannot justify a question. Regardless, the deemed undertaking rule only becomes relevant to costs if the Tribunal finds the Commissioner has improperly relied on information obtained through a breach of the rule (which has not occurred).
3.	449-450	86	To confirm whether, as Ms. Phillipowsky was conducting her investigation, she looked at certain documents that came from the Rogers-Shaw productions.	Irrelevant. Relevance solely to costs cannot justify a question. Regardless, the deemed undertaking rule only becomes relevant to costs if the Tribunal finds the Commissioner has improperly relied on information obtained through a breach of the rule (which has not occurred).

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
4.	454	94	To advise what process, procedures, or safeguards the Bureau had in place to ensure that documents produced in the context of the Rogers-Shaw litigation were not shared with members of Ms. Phillipowsky's investigative team.	Irrelevant. Relevance solely to costs cannot justify a question. Regardless, the deemed undertaking rule only becomes relevant to costs if the Tribunal finds the Commissioner has improperly relied on information obtained through a breach of the rule (which has not occurred).
5.	454-455	95	To advise whether Ms. Phillipowsky reviewed documents or was provided with copies of documents that were produced by the parties as part of the Rogers-Shaw litigation.	Irrelevant. Relevance solely to costs cannot justify a question. Regardless, the deemed undertaking rule only becomes relevant to costs if the Tribunal finds the Commissioner has improperly relied on information obtained through a breach of the rule (which has not occurred).

**Category #3: Other Refusals**

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
<b>September 4, 2025</b>				
1.	264	1096 – 1097	To advise if it is acceptable to market a plan as "unlimited data" if the speed of the data is fixed throughout.	Improperly asks for an opinion of law. The question also presents a hypothetical without the necessary factual context.
2.	266	1108	To advise at what speed the Commissioner says there is not an impact on functionality.	Improperly asks for expert opinion.
3.	279	1164	To advise if it does not matter whether Rogers throttled at 256 kbps, 512 kbps, or 4G. And to advise if these speeds are a material restriction as explained in Deceptive Marketing Practices Digest, Volume III.	Improperly asks for expert opinion.
4.	282	1175	To advise what throttling speed has a significant influence on the unlimited plan.	Improperly asks for expert opinion.
5.	282	1179	To produce the representations made by Comwave (pg. 16 of the Deceptive Marketing Practices, Vol 3).	Unnecessary. The Deceptive Marketing Practices Digest already contains examples of the representations that are referenced. Extrinsic evidence to which Rogers did not have access could not have affected Rogers interpretation of the Digest.  Irrelevant. The Commissioner's file in another matter is not relevant to any matter in dispute.

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
6.	355-356	1503	To advise what measurement of difficulty or virtual impossibility the Commissioner says applies to para. 36 of the Notice of Application.	Improperly asks for expert opinion.
7.	356	1505	To advise what the amount of time is at which it becomes difficult or virtually impossible for a social media site, website, range of websites, streaming, cloud gaming, and/or any other application which the Commissioner alleges there is a difference in time between the max speed and thew throttle speed.	Improperly asks for expert opinion.
<b>September 5, 2025</b>				

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
8.	519-520	302	To identify each of the representations made by Rogers that the Commissioner alleges in this application were false and misleading and in what way (para. 46(f) of Notice of Application).	<p>Improper. Parties are not entitled to ask for the facts on which another party relies on to support an allegation.</p> <p>Unnecessary. The Commissioner's Notice of Application already provides the main facts, significant sources, or categories of documents described in sufficient detail that are the basis for the Commissioner's position. These representations are Rogers' own and already in its possession.</p> <p>Unreasonable. The Commissioner is not in a position to assess and detail each and every instance of a national multi-channel marketing campaign, and an offering that has been on the market for six years.</p>

<b>REFUSALS</b>				
<b>No.</b>	<b>Page</b>	<b>Ques.</b>	<b>Question</b>	<b>Commissioner's Position on Refusal</b>
9.	527	329	To advise what the Commissioner says is the general impression created by the representation and the facts or sources of information relevant to the alleged general impression for each of the representations the Commissioner alleges in this proceeding are false or misleading.	<p>Improper. Parties are not entitled to ask for the facts on which another party relies on to support an allegation.</p> <p>Unnecessary. The Commissioner's Notice of Application already sets out the Commissioner's allegations regarding the general impression of Rogers representations with sufficient particularity.</p> <p>Unreasonable. The Commissioner is not in a position to assess and detail each and every instance of a national multi-channel marketing campaign, and an offering that has been on the market for six years.</p>

**Court File No. CT-2024-012**

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, RSC 1985, c C-34;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

**B E T W E E N:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**- and -**

**ROGERS COMMUNICATIONS INC.**

**Respondent**

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**MOTION RECORD OF THE COMMISSIONER OF  
COMPETITION  
(Refusals Motion of Rogers Communications Inc.)**

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**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Competition Bureau Legal Services  
Place du Portage, Phase I  
50 Victoria Street, 22<sup>nd</sup> Floor  
Gatineau, QC K1A 0C9

**Jonathan Hood**

[Jonathan.Hood@cb-bc.gc.ca](mailto:Jonathan.Hood@cb-bc.gc.ca)

**Kevin Hong**

[Kevin.Hong@cb-bc.gc.ca](mailto:Kevin.Hong@cb-bc.gc.ca)

**Irene Cybulsky**

[Irene.Cybulsky@cb-bc.gc.ca](mailto:Irene.Cybulsky@cb-bc.gc.ca)

**Kendra Wilson**

[Kendra.Wilson@cb-bc.gc.ca](mailto:Kendra.Wilson@cb-bc.gc.ca)

Counsel to the Commissioner of  
Competition/ Responding Party