Competition Tribunal Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 21
File No.: CT-2024-012
Registry Document No.: 80

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act* for 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)

Date of hearing by videoconference: October 17, 2025
Before: Madam Justice Jocelyne Gagné
Date of Reasons for Order and Order: November 7, 2025

AMENDED REASONS FOR ORDER AND ORDER PARTIALLY GRANTING ROGER'S MOTION TO AMEND ITS RESPONSE

I. OVERVIEW

[1] Rogers Communications Inc. brings this motion under rule 75(1) of the *Federal Court Rules*, SOR/98-106 [the FC Rules] for leave to amend its Response to the Notice of Application of the Commissioner of Competition. Rogers seeks to (i) bring a proposed constitutional challenge to section 74.1(1)(*c*)(ii) of the *Competition Act*, RSC 1985, c C-34 [the Act], along with proposed amendments relating to (ii) a defence of estoppel and waiver, (iii) an alleged breach of the deemed undertaking rule by the Commissioner, and (iv) some additional facts pertaining to the remedies sought in the Notice of Application. The Commissioner opposes these proposed amendments.

[2] Rogers is also seeking leave to make some minor corrections and revisions to its Response, which are not opposed by the Commissioner.

II. THE NOTICE OF APPLICATION

[3] On December 23, 2024, the Commissioner filed a Notice of Application pursuant to section 74.1 of the Act, alleging that Rogers has previously engaged in and continues to engage in reviewable conduct contrary to paragraph 74.01(1)(*a*) and subsections 74.011(1) and 74.011(2) of the Act.

[4] According to the Commissioner, Rogers misleads consumers by offering data plans that are said to be unlimited, but that, in fact, have limits [Infinite plans]. The Commissioner argues that by advertising limited data plans as if they were unlimited, Rogers has made and continues to make representations to the Canadian public that are false or misleading in a material respect for the purpose of promoting the supply or use of wireless telecommunication services and related products, and its business interests more generally.

[5] The Commissioner seeks various forms of relief, including "a declaration that [Rogers] has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(*a*) and subsections, 74.011(1) and 74.011(2) of the Act"; "an order prohibiting Rogers from engaging in the reviewable conduct or substantially similar reviewable conduct in Canada for a period of ten years from the date of such order"; "an order requiring Rogers to pay such an administrative monetary penalty as the Tribunal deems appropriate", and "an order requiring Rogers to pay an amount, not exceeding the total amounts paid to Rogers for the products in respect of which the reviewable conduct was engaged in, to be distributed among those persons to whom the products were sold, in an amount and manner to be assessed by the Tribunal."

III. PROCEDURAL BACKGROUND

[6] Rogers filed its Response on February 6, 2025, denying any false and misleading representations relating to its Infinite plans. The Commissioner filed a Reply to Rogers' Response on February 20, 2025.

[7] The hearing is scheduled to commence on March 30, 2026. The Commissioner's evidence is scheduled to be delivered January 9, 2026, and Rogers' responding evidence is scheduled to be delivered February 18, 2026.

[8] Examinations on discovery are ongoing and took place so far on August 27-29, 2025, and September 3-5, 2025. The parties have exchanged answers to undertakings and a Refusals Motion is scheduled to be heard on November 7, 2025. The parties are in the process of scheduling further examinations in respect of the answers to undertakings.

[9] Rogers delivered its proposed amendments to the Commissioner on its Response on September 26, 2025 and sought the Commissioner's consent. The Commissioner refused.

IV. ISSUES

[10] The present motion raises the issue as to whether Rogers should be granted leave to:

(a) challenge the constitutionality of the administrative monetary penalty regime contained in section 74.1(1)(*c*)(ii) of the Act at this stage of the proceedings;

(b) raise a defence of estoppel and waiver;

(c) allege a breach of the deemed undertaking rule by the Commissioner; and

(d) provide additional facts pertaining to the remedies sought in the application.

V. ANALYSIS

[11] Rule 34(1) of the *Competition Tribunal Rules*, SOR/2008-141 [the CT Rules] provides that, if a question arises as to the practice or procedure to be followed in proceedings before the Tribunal that is not provided therein, the FC Rules may be applied. Amendments to a document before the Tribunal fall under that category of procedures, and the Tribunal will therefore refer to the FC Rules.

[12] Rule 75 of the FC Rules states that "the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties." The threshold requirement on a motion to amend pleadings is that the proposed amendment must have a "reasonable prospect of success" (*Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 29-32). A proposed amendment will be refused if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action or defence (*McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at para 20).

[13] However, allowing an amendment should not result in an injustice to the other party not capable of being compensated by an award of costs, just as it should serve the interests of justice (*Canderel Ltd v Canada (CA)*, 1993 CanLII 2990 (FCA)).

A. Proposed Constitutional Challenge

[14] Rogers pleads the following with respect to its proposed constitutional challenge (paragraphs 74-77 of the Proposed Amended Response):

a) The potential imposition of a financial penalty under section 74.1(1)(*c*)(ii) of the Act constitutes a true penal consequence;

b) As a result, it is incumbent on the Bureau, the Commissioner, and this Tribunal to respect and safeguard protections guaranteed to Rogers, including without limitation, rights guaranteed by the *Charter* and *Bill of Rights*;

c) Rogers' rights under sections 7 and 8 and subsections 11(*c*), 11(*d*), 11(*g*) and 11(*i*) of the *Charter* as well as under subsection 2(*e*) of the *Bill of Rights* have been violated; and

d) Rogers has served its Notice of Constitutional Question on the Commissioner.

[15] According to Rogers, it is not plain and obvious that Rogers' constitutional challenge is bound to fail. The Commissioner did not suggest otherwise.

[16] The Commissioner, however, argues that this proposed amendment would cause significant prejudice that cannot be remedied by costs or by modest adjustments to the procedural schedule.

[17] First, the Commissioner states that Rogers offers no explanation for why it waited until discoveries to bring its motion. Yet, Rule 75 specifically provides that an amendment can be made, with leave from the Court, "at any time", whereas notice regarding constitutional questions must be served at least ten days before the day on which the constitutional question is to be argued.

[18] Second, the Commissioner takes issue with the fact that Rogers' constitutional challenge is, in substance, a duplicate to that currently pending before the Tribunal in *Commissioner of Competition v Google Canada Corporation and Google LLC* (CT-2024-010). In that separate matter, Google challenged the constitutionality of a subset of the administrative monetary penalty regime under the abuse of dominance provisions of the Act, whereas Rogers here challenges a similarly worded subset of the administrative monetary penalty regime pertaining to the false and misleading representations provisions of the Act. According to the Commissioner, allowing Rogers' challenge would duplicate proceedings, evidence, and argument on a question that is already pending before the Tribunal and likely to be settled there (subject to appeal). Yet, the Commissioner relies on no authority for the proposition that similar constitutional issues, regarding different provisions of a same legislation, between different parties — necessarily involving different factual backgrounds — cannot be brought before a Court or Tribunal. But there is more. An issue that was argued over 4 days before a decision maker, as was the case in the Google challenge, can hardly be said to be bereft of any reasonable change of success, or to be frivolous.

[19] The Commissioner finally asserts that Rogers' proposed challenge could not be accommodated within the existing schedule issued by the Tribunal on March 26, 2025, after consultation with the parties. On the one hand, Rogers replies that the amendment in respect of the constitutional challenge fundamentally concerns a question of law that can be accommodated within the existing schedule. The Tribunal will hold Rogers to that statement. On the other hand, this legal issue was recently argued by the Commissioner in the Google matter, so he could arguably be said to have a head start as it concerns his material. The Tribunal also considers that a few days could be added to the hearing without causing significant prejudice to any party.

[20] Being satisfied that Rogers seeking leave to amend its Response to include a constitutional challenge meets the test in the FC Rules and as articulated in the caselaw, Rogers will be granted leave to bring the proposed constitutional challenge to section 74.1(1)(*c*)(ii) of the Act.

B. Proposed Defence of Estoppel and Waiver

[21] Rogers asserts having sufficiently pleaded the necessary elements of a promissory estoppel and waiver defence (paragraphs 24-38 of the Proposed Amended Response).

[22] Promissory estoppel is an equitable defence that requires a legal relationship between two parties, a promise that is intended to affect that relationship, and the reliance of this promise. It is typically invoked in situations involving parties to a contract, including insurance (*Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47; *Maracle v Travellers Indemnity Co. of Canada*, 1991 2 SCR 50) and real property (*Dunn v Vicars*, 2009 BCCA 477).

[23] In *Immeubles Jacques Robitaille inc. v Québec (City)*, 2014 SCC 34, the Supreme Court of Canada notes that public law promissory estoppel is like the ordinary, or "private law," promissory estoppel, in requiring "[…] proof of a clear and unambiguous promise made to a citizen by a public authority in order to induce the citizen to perform certain acts. In addition, the citizen must have relied on the promise and acted on it by changing his or her conduct" (*Immeubles Jacques Robitaille* at para 19). However, the public law doctrine is distinguishable from "private law promissory estoppel" over-and-above the inclusion of a public authority, in that the doctrine has several important caveats. The doctrine: (i) can be set aside for an overriding public interest; (ii) cannot stop the application of an express legislative provision, and (iii) requires that the promises made by public authorities are not unlawful or otherwise inconsistent with statutory discretion (*Immeubles Jacques Robitaille* at paras 20-21).

[24] Rogers asserts that it reached out to the Commissioner both before and after launching its Infinite plans to notify the Commissioner of their features and marketing campaign. Rogers further offered to meet with the Commissioner to discuss the plans, but the Commissioner did not respond. The Commissioner does not challenge these facts. Mostly relying on the *Trial Lawyers* case, Rogers pleads that through the Commissioner's conduct – in that he raised no issue or concerns with Rogers's Infinite plans or proposed marketing campaign when he was made aware of them – the Commissioner effectively made representations to Rogers, and that Rogers acted in reliance on the Commissioner's conduct by continuing to promote its Infinite plans in the same form.

[25] The major difference between the two positions held by the parties lies in the way they articulate the relationship between them. Rogers' arguments suggest that the two parties' relationship is akin to "ordinary" or "private law" promissory estoppel, based on reliance on *Trial Lawyers*. The Commissioner's arguments fall more in line with a "public law" promissory estoppel, relying on *Immeubles Jacques Robitailles*.

[26] Promissory estoppel can be pled against a public authority but the test to be applied is narrower.

[27] In this case, there is no clear and unambiguous promise made to Rogers, and had there been one, it could not be invoked to prevent the application of the Act. The Commissioner's silence cannot ground the public law promissory estoppel claim. The Commissioner was under no obligation to answer Rogers' requests, nor to meet with Rogers in advance of the launching of its Infinite plans.

[28] The Commissioner rightfully notes that the Act permits a party to request a binding written opinion on proposed conduct under its section 124.1. Using the Commissioner's silence to ground a promissory estoppel claim against the Commissioner would obviate the need for section 124.1 of the Act and put the Commissioner in an unbearable position.

[29] Same can be said about the defence of waiver. In *Trial Lawyers*, the Supreme Court of Canada held that the test for waiver is strict and requires "full knowledge of rights" and "an unequivocal and conscious intention to abandon them" (*Trial Lawyers* at para 75). Rogers' argument that the Commissioner's inaction communicated a clear intention that he intended to waive his right to bring an application in this matter cannot stand. It would essentially impose a time limit on the Commissioner's ability to bring an application under the Act. Yet, the Act does not dictate how or when the Commissioner should investigate and enforce the Act's provisions.

[30] Even if the facts pled by Rogers were true, they would not support a defence of promissory estoppel or waiver; those claims in the context of the Commissioner's application have no prospect of success and the proposed amendment will be denied.

C. Alleged Breach of the Deemed Undertaking Rule

[31] Rogers' proposed amendments invoking the deemed undertaking rule are found at paragraph 32 of the Proposed Amended Response. They are grounded on rule 62(2) of the CT Rules, which codifies the common law and provides that parties and their counsel "are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained".

[32] According to Rogers, the Commissioner breached the deemed undertaking rule by allowing Bureau officers conducting the investigation in this case to have unfettered access to documents produced pursuant to the discovery process in the Commissioner's application to block the Rogers-Shaw merger transaction (CT-2022-002).

[33] Counsel for Rogers candidly admitted at the hearing of this motion that they did not consider what information might emerge from this other matter and how it could be used in the current one. All they assert is that no protection was put in place within the Bureau to ensure the information collected in the Rogers-Shaw case would not be used in other cases. They claim to know that the officers had access to the information, yet they do not know whether it was accessed or used. Rogers has not pointed to any particular portion of the Commissioner's application that it considers ought to have been founded or based on such a breach. Nor has it alleged that the Commissioner has produced or relied on any information that ought to have been obtained through the alleged breach.

[34] In my view, if there is no known reference or use of information from the Rogers-Shaw matter in the matter before me, there is no breach in the matter before me. If the information was not protected in the Roger-Shaw matter, the alleged breach of the deemed undertaking rule or the alleged breach of the confidentiality order would have occurred in that matter.

[35] Rogers' proposed amendment is not a proper pleading. Allowing it in the present context would amount to nothing more than a "fishing expedition". Leave to amend its Response to plead an alleged breach of the deemed undertaking rule will therefore be denied.

D. Remedies and Mitigating Factors

[36] At paragraph 81 of its Proposed Amended Response, Rogers seeks to reintroduce, through a different channel, its factual allegations in support of its estoppel and waiver defences. Rogers asserts that these facts are relevant for the assessment of the aggravating/mitigating factors enumerated in section 74.1(5) of the Act.

[37] Under some of the alleged mitigating factors, Rogers is proposing to add references to the Commissioner's alleged knowledge, understanding, analysis, or inaction in respect of Rogers' conduct. They are basically yet another attempt to put forward the Commissioner's thought process as it was investigating Rogers' Infinite plans and their compliance with the Act, and the Commissioner's previous analysis and conclusions.

[38] As was noted with respect to a previous motion brought by Rogers for an order to compel further documentary production, the motivation and thinking behind the Commissioner's timing in bringing the present application are not relevant. What may be relevant is solely the timing or the fact that it took the Commissioner five years to bring this application.

[39] The Commissioner's previous conclusions on whether Rogers' conduct was false or misleading is not relevant to the matter at hand, just as it has no bearing on whether the consumers in the relevant market were vulnerable, nor does it change the nature of the conduct.

[40] The fact that Rogers attempted to engage with the Commissioner prior to and after the launch of its Infinite plans, without more, cannot reasonably equate to a confirmation by the Commissioner of compliance with the Act.

[41] In sum, the proposed amendments are irrelevant, and leave will be denied.

E. Unopposed Amendments

[42] Finally, the Commissioner does not oppose the miscellaneous amendments proposed by Rogers at paragraphs 22 and 40 of the Proposed Amended Response and leave to amend those paragraphs will be granted to Rogers.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[43] Rogers' motion is granted in part.

[44] Rogers is granted leave for the proposed amendments found at paragraphs ~~20~~ 22, 40, and ~~72~~ 74 to 77 of the Proposed Amended Response.

[45] Rogers is denied leave for the proposed amendments found at paragraphs 25 to 38, and 81 of the Proposed Amended Response.

[46] As success on this motion is divided, costs shall be in the cause.

DATED at Ottawa, this 6 of November 2025.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) Jocelyne Gagné

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

Jonathan Hood
Irene Cybulsky
Kendra Wilson
Antoine Lippé

For the respondent:

Rogers Communications Inc.

Jonathan Lisus
Crawford Smith
John Carlo Mastrangelo
Joanna MacDonald
Brad Vermeersch
Anita Banicevic
Taraleigh Stevenson