PUBLIC

CT-2024-012

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to s. 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

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: November 6, 2025
CT- 2024-012

Sara Pelletier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. | # 84

COMPENDIUM
(Rogers' Refusals Motion)

November 5, 2025

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TAB 1

SCHEDULE "A" CHART OF REFUSALS

Category #1: Assessment, investigation, and inquiry questions

(a) *Assessment Questions*

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
September 3, 2025				
1.	91 – 92	383	To advise if the preliminary assessment resulted in a recommendation to start an investigation.	Refused. Relevance.
2.	92	385 – 386	To advise who the individuals conducting the preliminary assessment reported to.	Refused. Relevance.
3.	93	390	To advise who Ms. Phillipowsky believes was the person to whom the individuals conducting the preliminary assessment reported to.	Refused. On the grounds of Justice Gagné's order.
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.	Refused.
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.	Refused. Conduct of the investigation is not in issue and on the grounds of Justice Gagné's order.
6.	96	400	To advise if the preliminary assessment is closed.	Refused. Conduct of the investigation is not in issue and on the grounds of Justice Gagné's order.

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
7.	96 – 97	401	To confirm that the preliminary assessment was not ongoing in that period of time between September 2020 and September 2021.	Refused. Conduct of the investigation is not in issue and on the grounds of Justice Gagné's order.
September 5, 2025				
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.	Refused.
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.	Refused.
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.	Refused.
11.	486	195	To advise whether there is a formal or informal communication that brings an assessment to a close.	Refused. The conduct of the investigation is not at issue.
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.	Refused. Relevance and on the grounds of Justice Gagné's order.
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.	Refused. On the grounds of Justice Gagné's order.

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
14.	489	205	To provide a copy of the 2020 recommendation.	Refused.
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.	Refused.
16.	496	235 - 236	To advise how Ms. Sonley first raised this issue of the marketing of unlimited wireless data plans.	Refused.
17.	497	237	To advise why Ms. Sonley was raising the issue of the marketing of unlimited wireless data plans.	Refused.
18.	497	238	To advise to whom Ms. Sonley raised the issue of the marketing of unlimited wireless data plans.	Refused.
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.	Refused.
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.	Refused.
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).	Unanswered.

(b) *Investigation and Inquiry Questions*

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
September 3, 2025				
1.	50	230	To advise if Ms. Phillipowsky was satisfied that the Notice of Application reflected the facts upon which your recommendation was based.	Refused.
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.	Refused.
3.	51	232	To advise if there are facts set out in the Notice of Application that are different than those in the recommendation.	Refused. All of evidence and facts that have been collected, provided they're not in the previous documents, have been disclosed.
4.	56	248	To advise when the Commissioner says that litigation became a real possibility such that he is entitled to claim litigation privilege.	Unanswered.
5.	63-64	275	To advise when the culmination was to recommend that an application be filed.	Unanswered.
6.	65	274 – 279	To advise when the iterative process of recommendations (to pursue an application) began.	Refused.
7.	77	322	To advise if there is a distinction between the Commissioner conducting an inquiry and conducting an investigation.	Refused. Relevance.

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
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.	Refused. Relevance.
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.	Refused.
10.	80	334	To advise if the Commissioner's examination of a DIG representative, pursuant to Section 11, was part of the investigation.	Refused.
11.	80	335	To advise if the Commissioner's examination of a DIG representative, pursuant to Section 11, was part of the litigation.	Refused. Relevance.
12.	81	338	To advise if the Commissioner's position is that the facts discovered as part of the investigation are privileged.	Refused. Relevance, the purpose of this discovery is for Rogers to know the case that it has to meet and to ask questions with respect to the facts that Ms. Phillipowsky might know with respect to our various pleading allegations.
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.	Refused. Relevance.
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.	Refused. Relevance.
15.	83	345	To advise what the Commissioner learned from DIG that relates to the allegations in the Notice of Application.	Refused.

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
September 5, 2025				
16.	444	65	To advise if Ms. Phillipowsky made a recommendation to commence an inquiry.	Refused.
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.	Refused. Any documents that are facts have already been provided to Rogers.
18.	444-445	68	To produce a copy of the recommendation itself.	Refused.
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.	Refused. If there were any facts they would have been disclosed to Rogers.
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.	Unanswered.
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).	Refused.
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).	Refused.

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
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.	Unanswered.
24.	470	149 – 150	To advise whether Ms. Cybulsky was on the Project Cosmos team at the time (October 13, 2022).	Refused.

Category #2: Deemed Undertaking Questions

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
September 5, 2025				
1.	447	79	To advise who was on the Rogers-Shaw team.	Refused. Relevance
2.	448	82 – 83	To advise who provided Ms. Phillipowsky with access to the documents produced by the parties in the Rogers-Shaw litigation.	Refused.
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.	Refused. The conduct of the investigation is not at issue.
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.	Refused.
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.	Refused.

Category #3: Other Refusals

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
September 4, 2025				
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.	Refused.
2.	266	1108	To advise at what speed the Commissioner says there is not an impact on functionality.	Refused. Relevance.
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.	Refused.
4.	282	1175	To advise what throttling speed has a significant influence on the unlimited plan.	Refused.
5.	282	1179	To produce the representations made by Comwave (pg. 16 of The Deceptive Marketing Practices, Vol 3).	Unanswered.
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.	Unanswered.
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.	Unanswered.

REFUSALS				
No.	**Page**	**Ques.**	**Question**	**Answer**
September 5, 2025				
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).	Unanswered.
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.	Unanswered.

TAB 2

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

RECEIVED / REÇU
Date: December 23, 2024
CT- 2024-012

Badih Abboud for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. | # 1

CT-2024-

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

NOTICE OF APPLICATION

TAKE NOTICE that the Commissioner of Competition (the "**Commissioner**") will make an application (the "**Application**") to the Competition Tribunal (the "**Tribunal**") for an order pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"), in respect of conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the Act.

AND TAKE NOTICE that the Commissioner relies on the following Statement of Grounds and Material Facts in support of this Application and on such further or other material as counsel may advice and the Tribunal may permit.

AND TAKE NOTICE that if you do not file a Response with the Registrar of the Tribunal within 45 days of the date upon which this Application is served upon you, the Tribunal may, upon application by the Commissioner and without further notice, make such order or orders as it may consider just, including the order sought in this Application.

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Attention: Jonathan Hood
Tanis Halpape
Irene Cybulsky
Kendra Wilson

APPLICATION

1. The Commissioner makes this Application pursuant to section 74.1 of the *Competition Act* (the "**Act**") for:

   a. A declaration that the Respondent, Rogers Communications Inc. ("**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;

   b. 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;

   c. an order requiring Rogers to publish or otherwise disseminate notices of determinations made herein pursuant to paragraph 74.1(1)(b) of the Act in such manner and at such times as the Commissioner may advise and this Tribunal may permit;

   d. an order requiring Rogers to pay such an administrative monetary penalty as the Tribunal deems appropriate;

   e. 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;

   f. costs; and

   g. such further and other relief as the Commissioner may advise and this Tribunal may permit.

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. OVERVIEW

1. Rogers has extensively promoted unlimited and infinite mobile data plans to millions of Canadians across Canada through advertising in a wide variety of marketing channels. In these representations, Rogers has made, and continues to make promises to consumers that their data will be unlimited, providing them with infinite possibilities.

2. Many of Rogers' representations promoting its infinite plans include representations that explain the benefits that consumers would enjoy by having data that is free from any limits. For example, from a Rogers video advertisement, internally titled "It's Big" we hear:

> "Because we don't want to stream just one movie… We need every movie"
> "And we're not just catching the game… We're sharing every goal, trade and stat"
> "Because we like our data, like our tacos… All you can eat!"
> "Rogers Infinite: it's data that goes on and on!"
> "Infinite data for unlimited possibilities".

3. Rogers is misleading consumers by offering data plans that appear to be unlimited but actually have limits. The data is limited by a data cap. If customers reach the data cap, their high-speed data disappears for the rest of the month, and what remains is data whose speed is reduced by over 99%. When this happens, downloading a high-definition movie, which used to take minutes, will take hours.

4. By advertising limited data plans as if they were actually unlimited, Rogers has made, and is continuing to make representations to the public that are false or misleading in a material respect.

II. THE PARTIES

5. The Commissioner is an officer appointed by the Governor in Council under section 7 of the Act and is responsible for the administration and enforcement of the Act.

6. Rogers is a publicly traded Canadian communications and media company headquartered in Toronto, Ontario, that provides, among other services, wireless services. Wireless services are those services provided over a radio network permitting both voice and data communication.

III. ROGERS' DECEPTIVE MARKETING PRACTICES

7. Rogers has made, and continues to make, materially false or misleading representations to the Canadian public for the purposes of promoting the supply or use of wireless telecommunication services that offer "unlimited" or "infinite" data ("**Rogers Infinite Unlimited Plans**") and related products, and its business interests more generally, contrary to paragraph 74.01(1)(a) as well as subsections 74.011(1) and 74.011(2) of the Act.

8. Specifically, Rogers has made, and continues to make, representations to the public that convey the materially false or misleading general impression that Rogers Infinite Unlimited Plans offer unlimited and infinite data, allowing consumers to use as much data as they want, free from data limits ("**Unlimited Data Representations**"). In fact, Rogers is providing plans whose high-speed data is limited to a defined amount ("**Data Cap**") and thereafter data speeds reduced by over 99% ("**throttled**").

The lead-up to the launch of Rogers Infinite Unlimited Plans

9. Prior to the introduction of Rogers Infinite Unlimited Plans, Rogers offered wireless plans with a Data Cap. After a consumer hit their Data Cap their data speed was not limited, however Rogers would charge them an

additional fee for any data used beyond their Data Cap (an "**Overage**"). Consumers who wanted to avoid being charged an Overage could, as they approached their Data Cap, purchase a data top up, which would allow them to continue to use a defined amount of data.

10. However, Rogers found that many consumers were restricting their wireless data usage. For instance, consumers were seeking and switching to wi-fi when possible to avoid "punitive" additional charges on top of their monthly plan costs. This affected Roger's ability to earn more revenue from the sale of additional data or from the sale of upgraded wireless plans.

11. In or about 2019, Rogers started to look at the possibility of replacing its data plans with a different model. It considered various options, before ultimately settling on the approach of offering set amounts of data each month (which Rogers refers to internally as data buckets), and then throttling that data after the data bucket is empty.

12. However, rather than marketing the plans as involving data buckets and throttling, Rogers marketed these plans to Canadians as being "unlimited" plans offering "infinite data". Rogers named the plans "Rogers Infinite", and adopted an infinity loop as the logo of the plans.

13. At this time Canadians were familiar with other telecom offerings that were indeed unlimited, including those from Rogers, such as unlimited home internet and unlimited wireless talk and text.

Rogers Infinite Unlimited Plans

Representations to the public

14. Starting in June of 2019, Rogers launched an aggressive "high impact, high reach" multi-phase advertising campaign to promote its Rogers Infinite Unlimited Plans across Canada.

15. The campaign sought to establish at the outset the concept of “infinite data”, with a main message of “unlimited data is here”. The ads leaned heavily into the terms “unlimited” and “infinite”, as well as the infinity loop.

Figure 1: Star Metro Toronto Newspaper

16. Rogers went on to “blanket the country” with advertisements promising “unlimited data for infinite possibilities”. Representations were made using an array of different channels. Impressions, which indicate how many times consumers are exposed to a representation, were in the hundreds of millions. Rogers’ objective of the ads was to “sear it into people’s brains” and to “own” the concept of unlimited data.

Figure 2: Yonge and Dundas Square in Toronto

17. After the initial launch, representations were added to the advertisements that spoke about the benefits that consumers would get from having unlimited data. These representations reinforced the unlimited nature of the offering, and often encouraged greater data use. Representations include:

    a. "ENTER A WORLD OF INFINITE DATA", "WHERE MUSIC GOES ON AND ON", "CONNECTIONS GO ON AND ON", "MOVIES GO ON AND ON", "SPORTS GO ON AND ON", "ANYWHERE YOU GO", "INTRODUCING UNLIMITED DATA FOR INFINITE POSSIBILITIES" "ROGERS Infinite";

    b. "Shop Rogers Infinite plans with infinite data", "Data without limits", "Enjoy infinite data on any 5G device. No limits, no restrictions, and no overages";

c. “Enjoy lightning fast streaming, gaming and sharing with a connection that keeps up with you, so you’ll never miss a beat while you’re on the go”; and

d. “Unlimited data that goes on and on and on and on and on and on and on”.

18. Rogers made the impugned representations through various channels, including television, radio, social media, online banner advertisements, in billboards, in malls, in live events, and even on public transit wraps. A few examples of the myriad representations include:

Figure 3: Edmonton LRT Transit Wrap

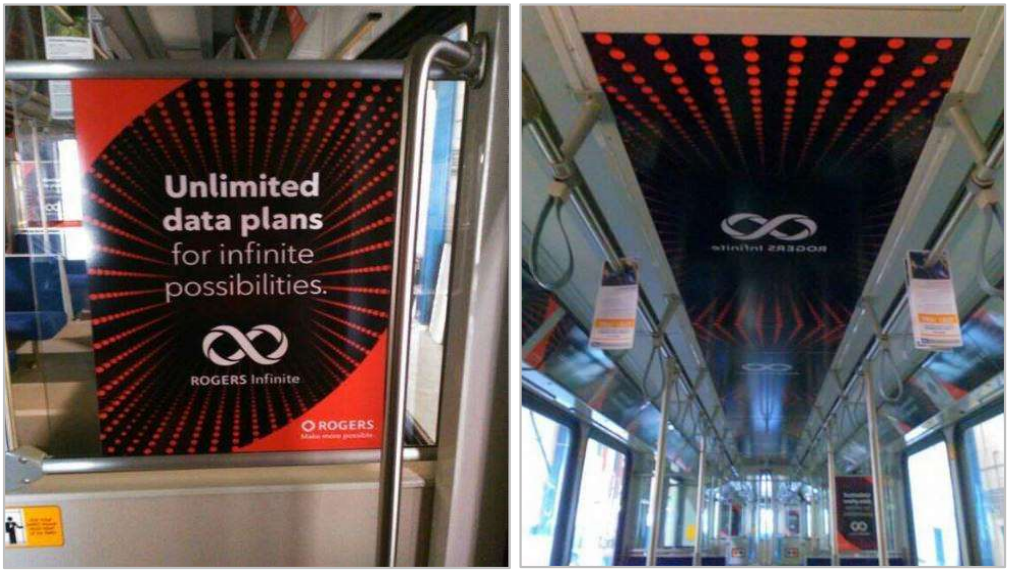
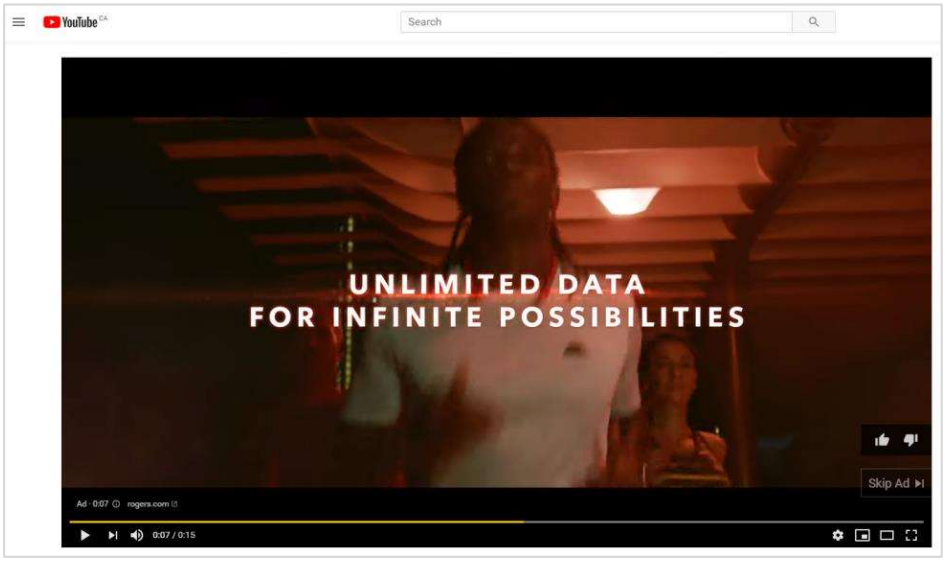


Figure 4: Edmonton LRT Transit

Figure 5: Mall Banners



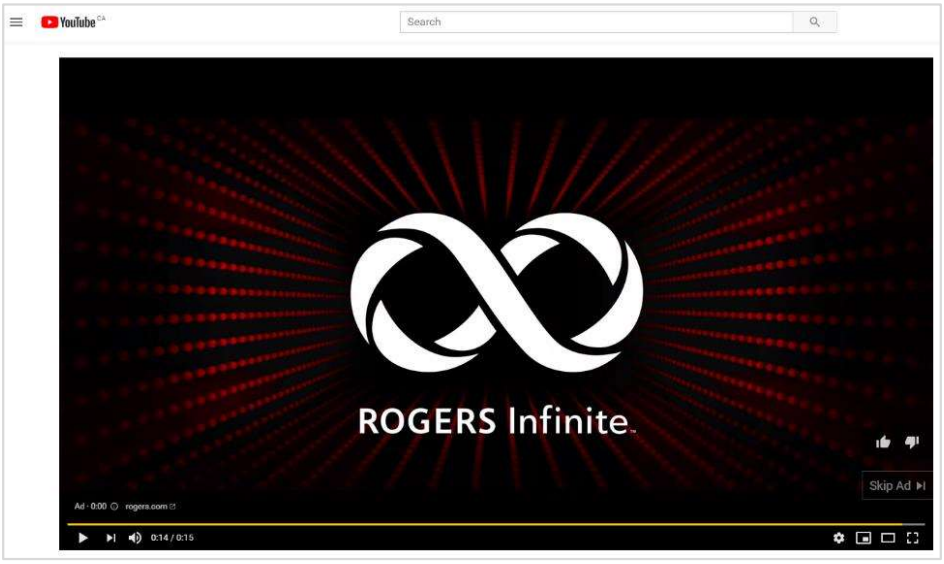


Figure 6: Two still images of a YouTube video advertisement

Figure 7: Transit Shelter Advertising in Toronto

Figure 8: Instagram Advertisement

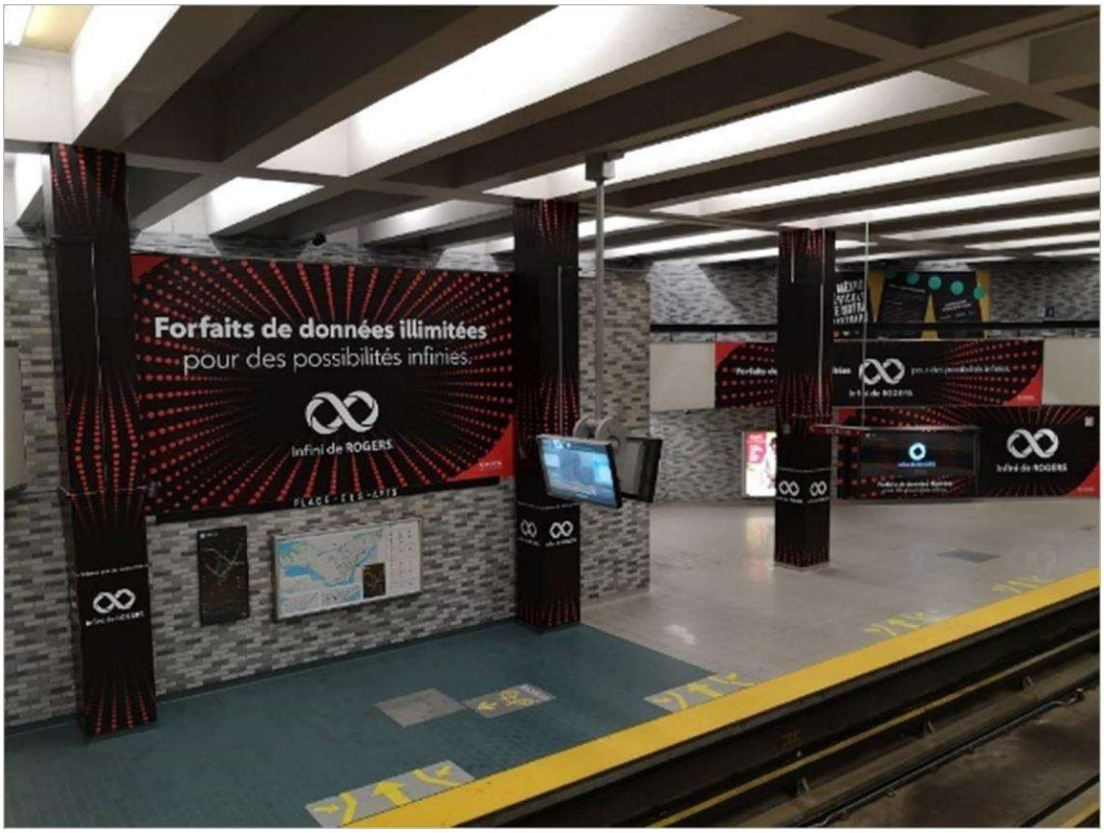


Figure 9: Place-des-Arts, Montreal

Figure 10: Screen Capture from Rogers Infinite advertisement during hockey game with audio "Say goodbye to data overages. Introducing Rogers Infinite. Unlimited data plans for infinite possibilities".

19. Rogers made similar representations in both the subject line and body of promotional emails sent to consumers. For example, one email subject line read: "[Redacted Name], get Rogers Infinite and say bye to data Top Ups". In another example, shown in Figure 11 below, the email states "Introducing ROGERS Infinite. Unlimited data plans for infinite possibilities. [Redacted Name] you've told us you want more data and less worrying about overage fees, and we've listened. With unlimited plans starting at $75/mo, get ready to stream more, share more, and stay connected without ever worrying about overages again". Rogers has sent many other emails that contain similar representations.

Figure 11: Email representation

Advertisements on Rogers' website

20. Rogers has also made numerous similar representations in advertisements on its website, rogers.com (the "**Website**"). For example, the following representations appeared on the Website:

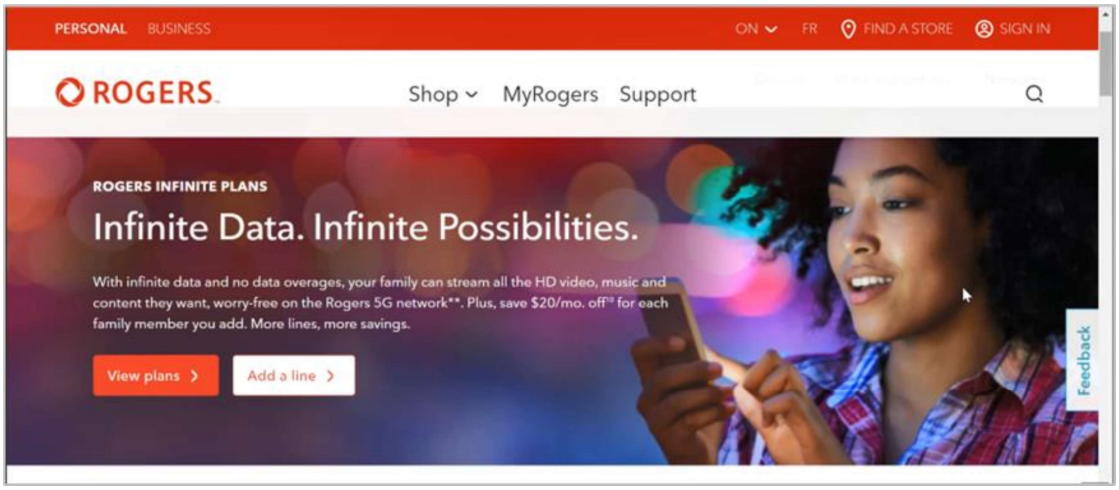


Figure 12: Still image of video capture of Rogers webpage (October 26, 2022)

21. Below the heading "ROGERS INFINITE PLANS", the advertisement says in large text: "Infinite Data. Infinite Possibilities." This is followed by further content including the sentence "With infinite data and no data overages, your family can stream all the HD video, music and content they want, worry-free on the Rogers 5G network**" (the asterisks are explained in paragraph 23 below). These representations reinforce the general impression that there are no limits and consumers can use as much data as they want.

22. If, rather than clicking on the "View plans" or "Add a line" links, a consumer chooses to scroll down on the page, they would encounter additional related representations as pictured in Figure 13. Under a graphic and a heading "Unlimited data", the consumer sees "Rogers Infinite$_{TM}$ plans come with unlimited data and no data overages so you can stream worry-free…". It is notable that the term "unlimited" appears side-by-side here in

two contexts - “Unlimited Data” and “Unlimited Calls & Texts”. On one hand, in the context of calls and texts users could make as many calls or texts as they like without limit, while on the other hand, in respect of data, the “unlimited data” is subject to a data limit.

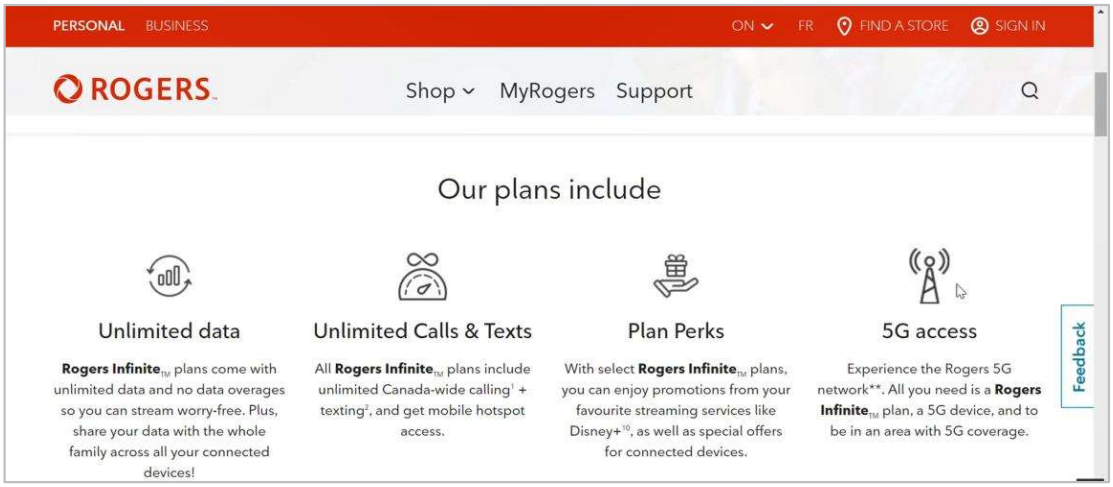
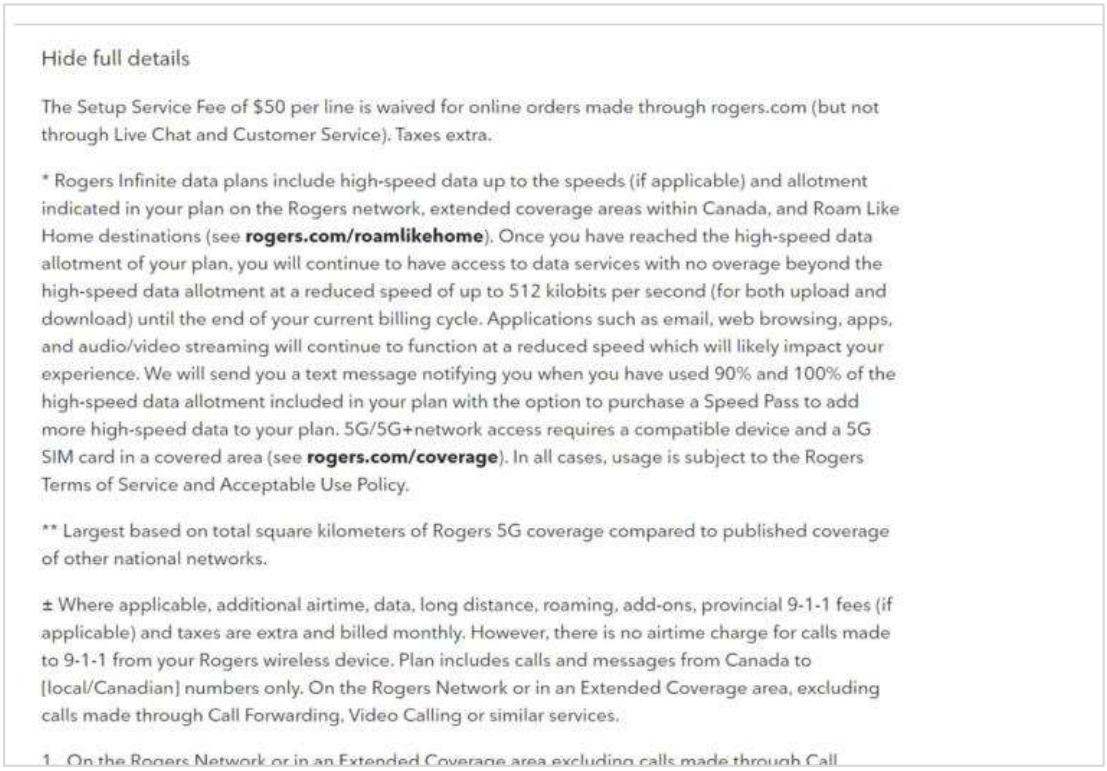


Figure 13: Still image of video capture of Rogers webpage, continued with scroll (October 26, 2022)

23. The asterisks in Figure 12 and paragraph 21 above do not go to anywhere that is immediately visible on the page. If a consumer scrolls past Figure 13 down to the bottom of this webpage on the Website and clicks a collapsed ribbon that reads “*See full details”* (Figure 14), the Website reveals a section of terms and conditions (the “**Terms and Conditions**”). The Terms and Conditions on the Website varied over time. The ones that were in effect at the time of the representations reproduced in Figure 12 and 13 are in Figure 15 below:

Figure 14: Still image of video capture of bottom of Rogers webpage, before “See full details” clicked and expanded (October 26, 2022)



Hide full details

The Setup Service Fee of $50 per line is waived for online orders made through rogers.com (but not through Live Chat and Customer Service). Taxes extra.

* Rogers Infinite data plans include high-speed data up to the speeds (if applicable) and allotment indicated in your plan on the Rogers network, extended coverage areas within Canada, and Roam Like Home destinations (see **rogers.com/roamlikehome**). Once you have reached the high-speed data allotment of your plan, you will continue to have access to data services with no overage beyond the high-speed data allotment at a reduced speed of up to 512 kilobits per second (for both upload and download) until the end of your current billing cycle. Applications such as email, web browsing, apps, and audio/video streaming will continue to function at a reduced speed which will likely impact your experience. We will send you a text message notifying you when you have used 90% and 100% of the high-speed data allotment included in your plan with the option to purchase a Speed Pass to add more high-speed data to your plan. 5G/5G+network access requires a compatible device and a 5G SIM card in a covered area (see **rogers.com/coverage**). In all cases, usage is subject to the Rogers Terms of Service and Acceptable Use Policy.

** Largest based on total square kilometers of Rogers 5G coverage compared to published coverage of other national networks.

± Where applicable, additional airtime, data, long distance, roaming, add-ons, provincial 9-1-1 fees (if applicable) and taxes are extra and billed monthly. However, there is no airtime charge for calls made to 9-1-1 from your Rogers wireless device. Plan includes calls and messages from Canada to [local/Canadian] numbers only. On the Rogers Network or in an Extended Coverage area, excluding calls made through Call Forwarding, Video Calling or similar services.

1. On the Rogers Network or in an Extended Coverage area excluding calls made through Call

Figure 15: *Excerpt of video capture of bottom of Rogers webpage, after "See full details" clicked and expanded (October 26, 2022)*

Rogers Infinite Unlimited Plan Offerings on the Website

24. On the Website, Rogers makes a series of Unlimited Data Representations in relation to Rogers Infinite Unlimited Plans. These are in summarized tiles ("**Plan Tiles**"). An example is shown below this paragraph. The name of each plan ("**Plan Name(s)**") is prominent at the top of the Plan Tile, and associated details of what is included are below the title in smaller font. Although the Plan Names have changed over time, they have always been anchored with the word "infinite" or "unlimited". The Plan Names have included over time: "Unlimited data", "Rogers Infinite", "Infinite 25 GB", "Infinite Extra" and "5G Infinite Essential".

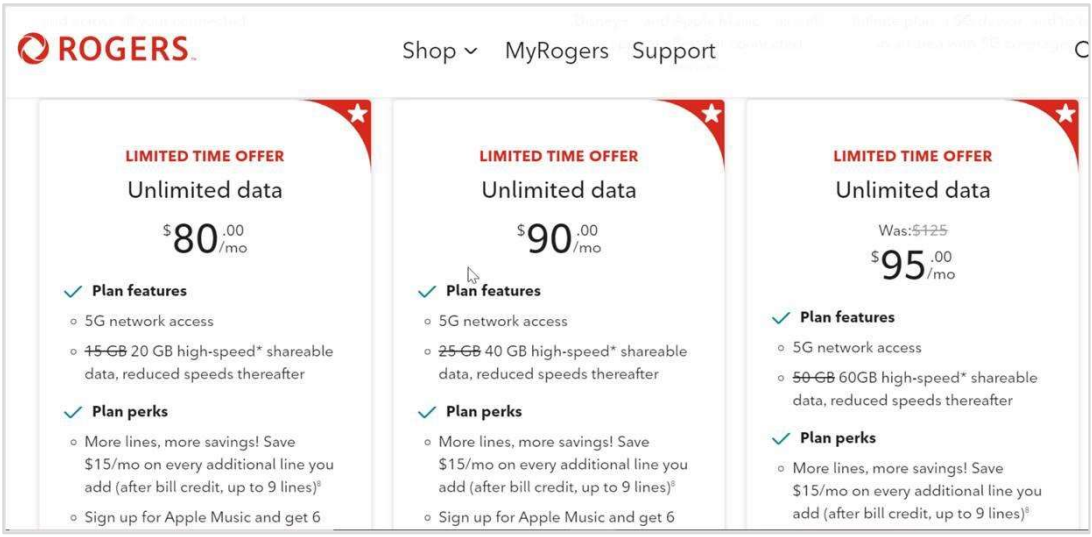


Figure 16: Still images of video capture of Rogers webpage (November 2, 2021)

25. The figure above shows an example of Plan Tiles on the Website. In the example above, the Plan Name is "Unlimited data", below which is the plan price. In smaller font, under the bold heading "Plan features" are bullet points. The first bullet point refers to 5G network access, the second includes language regarding the "unlimited data" of the plan. Together, they indicate that the plan features 5G network access, with 20GB high-speed shareable data, reduced speed thereafter. The asterisk again does not go to anywhere that is immediately visible on the page, but is referencing the Terms and Conditions, visible only as described above, through scrolling to the bottom of the page and expanding the "*See full details*" ribbon.

26. Since at least the fall of 2022, Rogers has chosen to de-emphasize the Data Cap limitation by moving away from including a number of GBs in the title of the plans (e.g. Infinite 15 GB), to Plan Names such as "Infinite Essential", "Infinite Extra" and "Infinite Lite", as can be seen in the example below. In the small font bullets in each Plan Tile, the representation in this example has changed to say "**75 GB** at speeds up to 1 Gbps. Unlimited data at reduced speeds thereafter*".

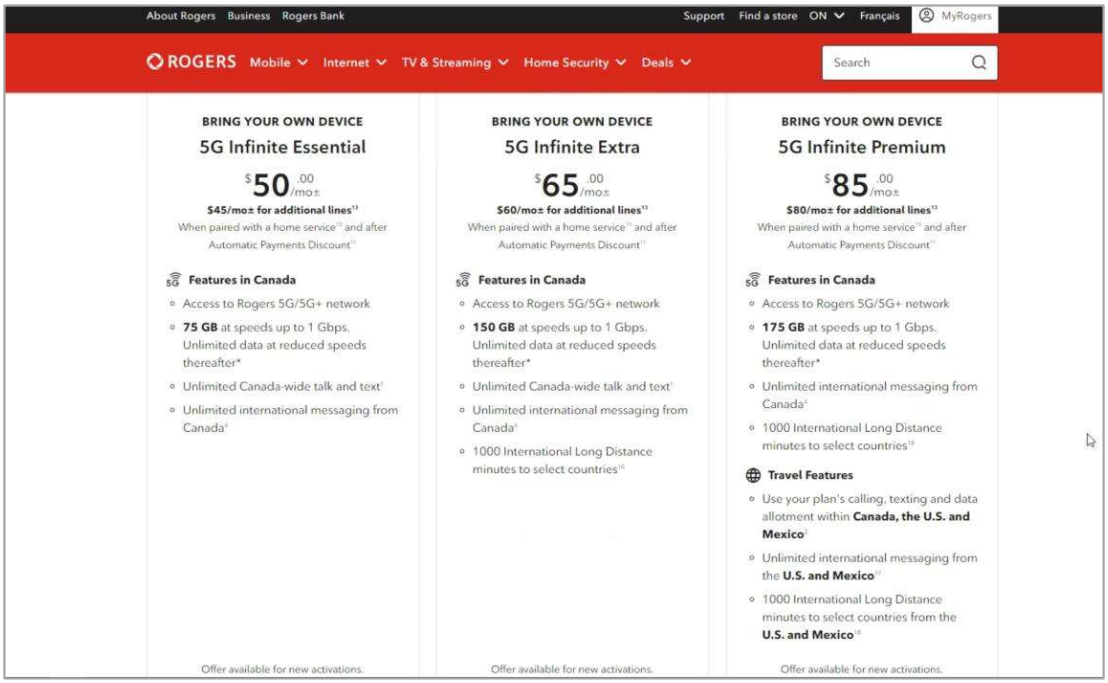


Figure 17: Still images of video capture of a more recent Rogers webpage, rogers.com/plans (September 27, 2024)

27. While Rogers is fully aware of the extent to which the plans are throttled, nowhere in the Plan Tiles does it disclose the magnitude of the throttling. For example, the Plan Tiles do not disclose that the 5G/5G+ speeds will be reduced to speeds between roughly 500 to 2,000 times slower for plans with speeds of 250 Megabit per second ("**Mbps**") and 1 Gigabit per second ("**Gbps**") respectively, or that 1 Gbps would be throttled down to 0.000512 Gbps (512 Kilobits per second ("**Kbps**")).

28. Similarly, should consumers note the language indicating that speeds will be reduced, they will not find an explanation in the Plan Tiles of the effect of the "reduced speeds" on the consumers' experience, only that it will be impacted.

29. Rogers' own internal records consider various speeds and associated functions. They show that speeds up to nearly six times higher than the throttled speed of 512 Kbps are considered useful only for "essential connectivity" and that significantly faster speeds are needed for activities

such as high-definition ("**HD**") video streaming, video calling, cloud gaming or downloading large files, such as movies.

30. While there are asterisks on the Plan Tiles, they do not go to anywhere that is immediately visible on the page. As was the case for Figure 12, the consumer must scroll to the bottom of the webpage and click a collapsed ribbon that reads "*See full details",* which then reveals a section of Terms and Conditions in fine print, within which the asterisks are eventually explained.

31. Consumers who read through the dense text can discover that, upon using up their plan's Data Cap, their data speed will be reduced to a maximum of 512 Kbps (the "**Throttle Speed**") until the end of the billing cycle, and that "*Applications such as email, web browsing, apps, and audio/video streaming will continue to function at a reduced speed which will likely impact your experience*".

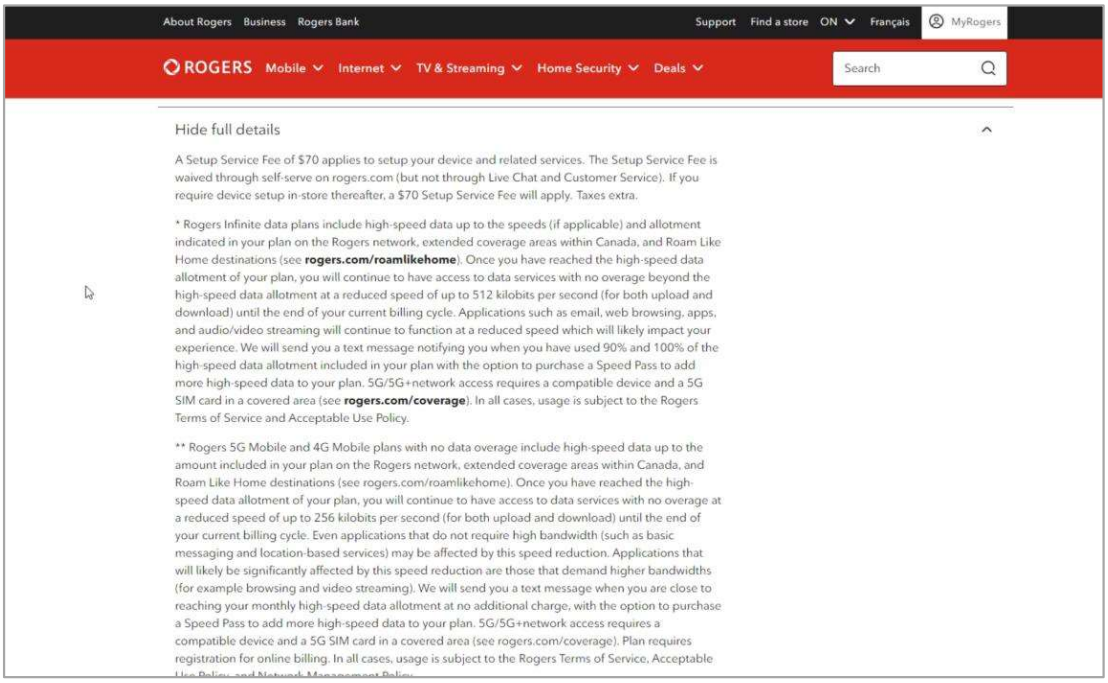


Figure 18: Still image of video capture of Rogers webpage, continued with scroll: bottom of webpage following clicking the ribbon called "See full details" (September 27, 2024)

32. These disclaimers are inadequate to alter the general impression conveyed by the representations promising unlimited and infinite data. To the extent that they are even noticed and read, they do not convey the extent or magnitude of the effect that this reduction has on a consumer's experience.

Rogers Unlimited Data Representations are false or misleading

33. The literal meaning and the general impression conveyed by the word "unlimited" is very straightforward and aligns with the dictionary meaning: something that is not limited in any way or restricted in terms of number, quantity, or extent; infinite. The literal meaning and general impression of the word "infinite" is equally straightforward: limitless, endless in space, extent or size; impossible to measure. The fact that consumers understand these terms in much the same way when it comes to data was made known to Rogers in consumer research that it commissioned.

34. Rogers Infinite Unlimited Plans are not, and never have been unlimited or infinite. Instead, the data included with the plans is limited and finite in terms of quantity and quality by Roger's Data Caps and throttling.

35. Initially, Rogers restricted the trickle of throttled data to speeds of no more than 256 Kbps (or 0.000256 Gbps). It was later increased by Rogers to 512 Kbps (or 0.000512 Gbps) in response to competitive pressures. These speeds can be upwards of 2,000 times slower than the speeds available before being throttled.

36. Many operations that could be done quickly before the throttling, become difficult or virtually impossible after data is throttled. This fundamentally impacts the functionality of any application that requires high-speed data, such as streaming, video calling or cloud gaming. For example, Rogers indicates that downloading an HD movie takes 1 to 4 minutes at 1 Gbps to 250 Mbps respectively, but this will take over a day to download at 512 kbps. Contrary to the general impression conveyed by Rogers' representations, once throttled, consumers can no longer do all that they want to do with their data.

Promoting Rogers' business interests by stimulating use of data to drive upsells

37. Rogers made false or misleading representations to the public in order to promote the supply and use of its Rogers Infinite Unlimited Plans.

38. Roger's objectives for the creation of Rogers Infinite Unlimited Plans also included the goal of increasing the monetization of data by selling more of it to its customers. Rogers' representations often encouraged consumers to use more data, while at the same time telling customers not to worry about data Overage charges or data top-ups. In moving to the Rogers Infinite Unlimited Plans, Rogers capitalized on this sentiment, for example, it told consumers to "[…] stop eyeing your data usage and start

streaming more, surfing more, and sharing more, without any overages on an exclusive Rogers Infinite unlimited data plan. […]".This can result in consumers using up their data buckets and then receiving throttled data.

39. Rogers decided on the Throttle Speed for its Rogers Infinite Unlimited Plans to ensure that it would create a "painful" experience for consumers. Rogers expected this to encourage consumers to either buy more high-speed data for the rest of the month by purchasing what Rogers markets as a "**Speed Pass**", or upgrade to a plan with a bigger data bucket.

40. To this end, Rogers sends notifications to Infinite customers who are approaching their Data Cap encouraging them to purchase a Speed Pass and/or suggesting that they upgrade to a Rogers Infinite Unlimited Plan with a larger data bucket. Consumers unable or unwilling to pay for more data have to wait until the beginning of their next billing cycle to get full functionality back in a way that allows them to do all that they want to do with their data.

41. Since the introduction of the Rogers Infinite Unlimited Plans, Rogers has sold millions of dollars worth of Speed Passes to Canadian consumers, and generated billions in revenues.

Disclaimers or other disclosures are insufficient to cure the false or misleading general impression

42. Rogers has made countless materially false or misleading representations to Canadians regarding Rogers Infinite Unlimited Plans that contained no disclaimers or disclosures of any kind.

43. As described above, there are limited disclosures about data amounts and reduced speeds in certain representations, such as Plan Tiles, as well as in disclaimers in the Terms and Conditions available at the bottom of the webpage containing the Plan Tiles on the Website. Rogers' own

internal records indicate that most website visitors do not scroll to, and therefore read, the Terms and Conditions. Even if consumers do read the fine print, either on Rogers' Website, or in any other representation, it is inadequate to alter the general impression conveyed by the various representations promising infinite data.

The Unlimited Data Representations are Material

44. The Unlimited Data Representations had and continue to have a material influence on consumers' decisions to purchase Rogers Infinite Unlimited Plans. The representations provide consumers with comfort that they will have continual access to all the data they want so that they never have to worry about running out of data or having to pay for more.

IV. AGGRAVATING FACTORS

45. In May 2017, the Competition Bureau published the Deceptive Marketing Practices Digest Volume 3, which reminded telecommunication companies to avoid using the term "unlimited" if their products are restricted, limited or qualified in some way, and warned that disclaimers are often ineffective at altering or limiting the plain meaning of the representations, especially when used in a digital medium. Two years later, Rogers forged ahead with the exact strategy that the industry was warned not to use: marketing data as unlimited, even though it is limited, and relying on disclaimers on its Website to cure the deception.

46. The deceptive conduct described herein is aggravated by the factors referred to in subsection 74.1(5) of the Act, including (but not limited to) the following:

    a. the **reach of the conduct within the relevant geographic market:** The Unlimited Data Representations were made across Canada on several platforms, accessible by all Canadians.

Rogers data shows that the representations made hundreds of millions of impressions.

b. the **frequency and duration of the conduct:** Rogers has made, and continues to make, the Unlimited Data Representations on a daily basis from June 2019 to present, for a total of 5 years and 6 months.

c. the **vulnerability of the class of persons likely to be adversely affected by the conduct:** Rogers was aware that most website visitors do not scroll to, and therefore few consumers would read the fine print containing pertinent details of the plan. In addition, Rogers targeted newcomers to Canada with advertising on a website geared to this cohort. Finally, at the time of launch, consumers had an understanding of unlimited services being unlimited, and were vulnerable to services masquerading as unlimited.

d. the **materiality of any representation:** unlimited data is ranked as the feature with the highest stated interest and value amongst customers, therefore misrepresentation of a highly relevant aspect of a plan would have a meaningful impact on consumer behaviour.

e. the **likelihood of self-correction in the relevant geographic market:** after the Competition Bureau's 2017 warning to the telecommunications industry about unlimited claims that are not unlimited, and despite testing that Rogers had commissioned that indicated consumer understanding did not match the reality of the plans, as well as executives' concerns about the public's perception that they are engaging in false advertising, Rogers nevertheless went ahead and began making the Unlimited Data Representations. After becoming aware of the Commissioner's

inquiry, Rogers made modest adjustments to its representations, but has not addressed the issue at the core of this matter – referring to data inappropriately as “unlimited” or “infinite” when in fact it is subject to limitations.

f. **the effect on competition in the relevant market:** Rogers’ launch of the Rogers Infinite Unlimited Plans and Unlimited Data Representations was quickly followed by their competitors launching similar plans with representations about ‘unlimited’ data.

g. **the gross revenue from sales affected by the conduct:** the gross revenue generated from the sales affected by the conduct is high. Not only was revenue derived from the sales of plans but also from Speed Pass sales, and plan upsell. As of the end of 2023, there were over 2.5 million consumers subscribed to Rogers Infinite Unlimited Plans, and Rogers has generated billions in revenue from those plans.

h. **the financial position of the person against whom the order is made:** Rogers has a strong financial position, with consolidated total revenues of $19.3 billion in 2023, $15.4 billion in 2022, and $14.7 billion in 2021.

i. **the history of compliance with this Act by the person against whom the order is made:** Rogers has been the subject of two different inquiries under the Deceptive Marketing Practices provisions of the Act, one with a finding that Rogers (Chatr) made unsubstantiated performance claims contrary to paragraph 74.01(1)(b) of the Act and another inquiry that resulted in a registered consent agreement relating to premium text messaging conduct the Commissioner concluded was contrary to paragraph 74.01(1)(a) of the Act.

j. **any other relevant factor:** Rogers was aware that the Unlimited Data Representations were misleading but nevertheless made and continued to make the representations.

V. RELIEF SOUGHT

47. The Commissioner claims the relief set out in paragraph 1, above.

VI. PROCEDURAL MATTERS

48. The Commissioner requests that this proceeding be conducted in English.

49. The Commissioner requests that this Application be heard in the City of Ottawa.

DATED AT Ottawa, this 22nd day of December 2024.

Boswell, Matthew

Digitally signed by Boswell, Matthew
Date: 2024.12.22 21:42:45 -05'00'

Matthew Boswell
Commissioner of Competition

For the purposes of the Application, service of all documents on the Commissioner may be served on:

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Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

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AND TO : **The Registrar**
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 584

TAB 3

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

RECEIVED / REÇU
Date: February 6, 2025
CT- 2024-012

Badih Abboud for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. | # 3

CT-2024-012

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to s. 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

RESPONSE OF ROGERS COMMUNICATIONS INC.

A. Overview

1. The Commissioner's Application singles out Rogers for allegedly misleading advertising related to its approach to advertising unlimited wireless data plans, an approach that has been commonplace throughout the industry since 2019. In the more than five years before the Bureau brought this proceeding, Bell, Telus, SaskTel, and other Canadian carriers have marketed their wireless plans as having "unlimited data" in the same way Rogers has, and many of them still do so today.

2. The Commissioner's Application ignores Rogers' ubiquitous disclosure of key plan features, ignores widespread consumer understanding of unlimited wireless data plans, presents a highly selective and misleading collection of advertisements, and unreasonably targets Rogers for an industry-wide practice. The Bureau attacks not only Rogers' advertising but the industry's entire approach to unlimited wireless data plans. Its position is out of step with the market reality, with the Canadian Radio and Television Commission's (CRTC) Wireless Code, and with a common-sense approach to what the ordinary consumer of Infinite plans understood about the service they were buying.

3. Rogers introduced its Infinite wireless plans in June 2019, spurring a significant pro-competitive shift in the Canadian market for high-data users. These plans were intended to address consumer frustration at being forced either to automatically pay overage fees or be cut off from data access. Rogers addressed these concerns by increasing the size of data buckets, eliminating overage fees, and allowing customers to decide for themselves whether to purchase additional high-speed data or continue using unlimited data at a reduced speed.

4. These new Infinite plans significantly reduced Rogers' revenues from overage fees, but were unequivocally beneficial to consumers, as the Competition Bureau has recognized. In submissions to the CRTC in July 2020, the Bureau concluded that the launch of unlimited data plans resulted in an effective 25% decrease in plan prices from the major carriers and released "pent up demand for higher data usage" that consumers were avoiding because of "high penalties if they used more than their plan limit".

5. Rogers' advertising of its Infinite plans has never been false or misleading, much less in a material respect. The Bureau selectively focuses on isolated ads from brand campaigns, while

ignoring the repeated, clear, and conspicuous disclosures that accompanied Rogers' promotion of its plans.

6. These disclosures unambiguously told consumers that they would have high-speed data up to a certain amount based on the plan they chose, with unlimited data at reduced speeds thereafter. This was made clear in Rogers' advertising, on its website, in the description of its wireless plans, and in the plan summaries provided to customers at the time of purchase.

7. Rogers at all times complied with the legal and regulatory requirements to market wireless plans as having unlimited data. In 2013, six years before Rogers launched its Infinite Plans, the CRTC—which regulates the wireless industry in the public interest—specifically addressed the marketing of unlimited wireless plans. The CRTC's mandatory Wireless Code allows carriers to describe wireless plans as offering unlimited data, so long as they disclose any restrictions on the speed or quality of that data. This is precisely what Rogers does.

8. Rogers fully complied with these requirements in designing, launching, and marketing its Infinite plans. In the more than five years since their launch, the CRTC has never taken action against Infinite plans, nor, as far as Rogers is aware, against any other carrier's unlimited plans.

9. With the larger data buckets that Rogers introduced as part of its Infinite plans, only a small percentage of customers exceeded their high-speed data buckets and experienced reduced speeds, and that percentage has steadily declined over the last five years as data buckets have grown larger and larger. As a result, the vast majority of Infinite customers experience unlimited high-speed data.

10. Rogers opposes the Commissioner's Application, denies all of the allegations set out in his Notice of Application, and asks that the relief he seeks be denied in its entirety, with costs payable to Rogers.

B. Rogers Launches "Infinite" Plans in 2019

11. Rogers launched its new Infinite plans in June of 2019. Prior to this, carriers sold plans with a set monthly allocation of data, known as a "data bucket". If customers exceeded their bucket before the end of the month, they were either automatically charged overage fees or cut off from access to data entirely.

12. This had been a significant source of consumer complaints. Consumers wanted certainty over the amount they would pay each month, and to be able to use their phones without fear of going over their data allocation or being cut off.

13. Rogers' Infinite plans addressed these concerns. They offered customers significantly larger "max speed" data buckets and eliminated overage fees entirely. Even after customers exceeded their data bucket for the month, they could continue to use unlimited data at a reduced speed with no additional cost. If customers chose, they could purchase additional high-speed data with a "Speed Pass", for which customers were never automatically charged.

14. Infinite plans were developed for and marketed to sophisticated, high-use wireless data consumers. These were the customers who most often exceeded their monthly data allowance and most often incurred overage charges as a result. They wanted larger data buckets, control over their spending, and to use their data without having to worry about exceeding their monthly allowance and paying data overages. Rogers' Infinite plans delivered these benefits.

15. Promotional materials at and following the launch of Infinite plans emphasize the elimination of overage fees and clearly disclose the amount of high-speed data provided for the advertised price (see, *e.g.*, Figure 1, Figure 2, and Figure 3 below).

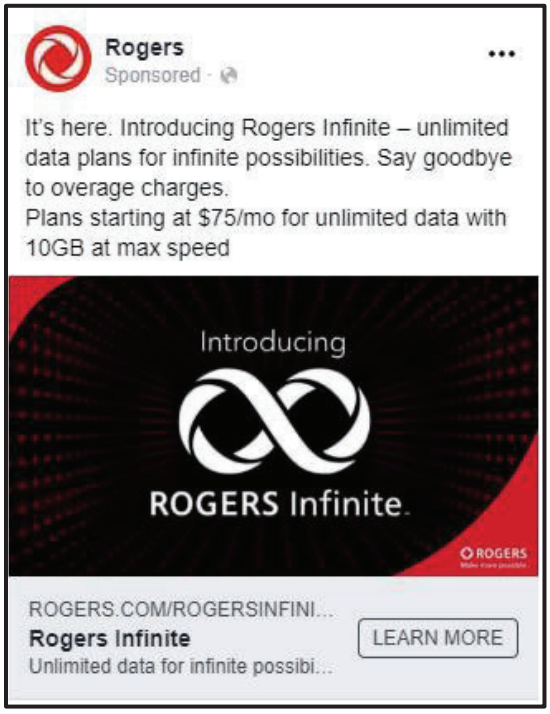


Figure 1: Facebook Advertisement from July 2019

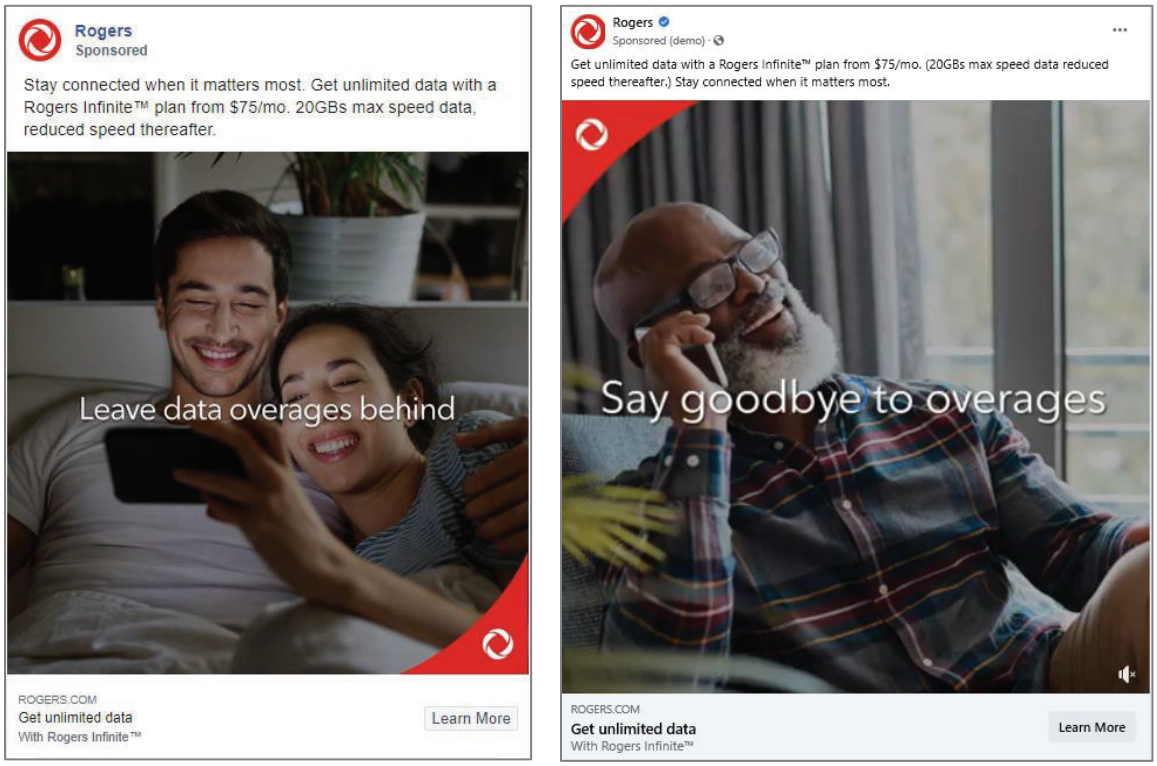


Figure 2: Social Media Advertisements from May 2020

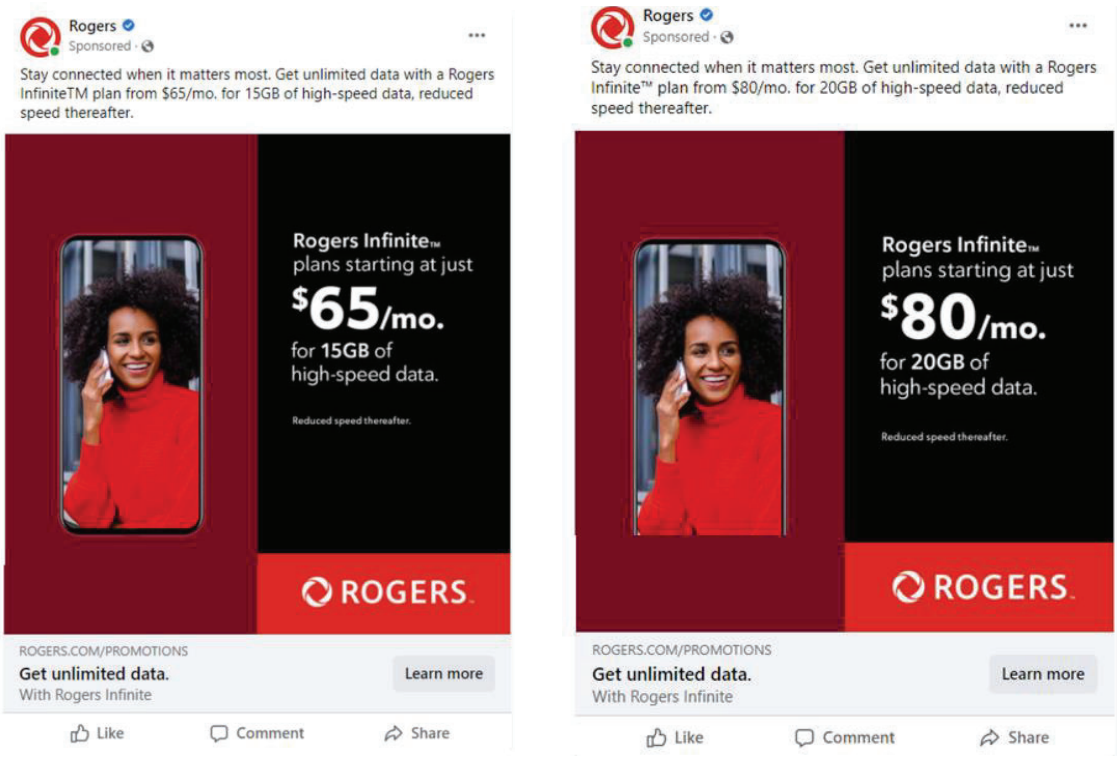


Figure 3: Examples of Infinite Advertisements (January-April 2022)

16. Customers are offered different amounts of high-speed data at different prices and choose the plan that best fits their needs. Plans with smaller high-speed data buckets cost less, and plans with larger high-speed data buckets cost more. The bucket sizes and plan prices are prominently displayed both on Rogers' website and in store (see Figure 4 for the online plan tiles).

Figure 4: Screenshot from Rogers Mobility Website at Launch

17. Rogers clearly and conspicuously disclosed to every customer who was considering purchasing an Infinite plan that they would receive a certain amount of high-speed data—as chosen by them—and would have "unlimited data at reduced speeds thereafter". This same disclosure is repeated multiple times during the purchasing process.

18. At the time of launch in 2019, the smallest Infinite high-speed data bucket was 10GB—more than three times the monthly usage of an average wireless data subscriber at the time. Rogers also offered 20GB and 50GB plans for customers seeking even larger high-speed data buckets. Since then, data buckets have steadily grown in size while the cost of plans has come down dramatically. The smallest Infinite plan now offers 100GB of data and the cost per gigabyte has decreased significantly.

19. The Bureau asserts that Infinite plans were designed to increase revenues from the sale of additional data. In fact, the opposite is true and Rogers knew from the outset that these revenues would drop significantly. Rogers nevertheless introduced Infinite plans to address consumer frustrations with overage fees. In the third quarter of 2019—the first full quarter following the introduction of Infinite plans—revenues from overage fees fell by over $50 million compared to the same quarter in 2018 and have significantly decreased since.

20. The Bureau's repeated allegations that Rogers introduced Infinite plans as a way to drive increased consumer spending on data is false. It was not Rogers' intention and it was not the result, as is plainly evident. Rogers introduced these plans to address significant consumer concerns, not because they would increase Rogers' data revenues.

21. Shortly after launch, the Competition Bureau acknowledged the positive impact that unlimited data plans had on wireless data plan prices and consumer choice more generally. In submissions to the CRTC, the Bureau noted that "the launch of 'unlimited plans' arguably amounted to a decrease of approximately 25% in the Big 3's plan prices in most markets … as compared with previous equivalent plans".

22. Rogers' introduction of its no-overage-fee Infinite plans spurred other major carriers to do the same, leading to a significant pro-consumer shift in the wireless industry. Over the past five years, Bell, Telus, SaskTel, and other carriers have offered plans with no overage fees, large high-speed data buckets, and unlimited usage at reduced speeds thereafter. They have also marketed these unlimited data plans in substantially the same way as Rogers on their websites and in promotional materials (see, for example, Figure 5 and Figure 6).

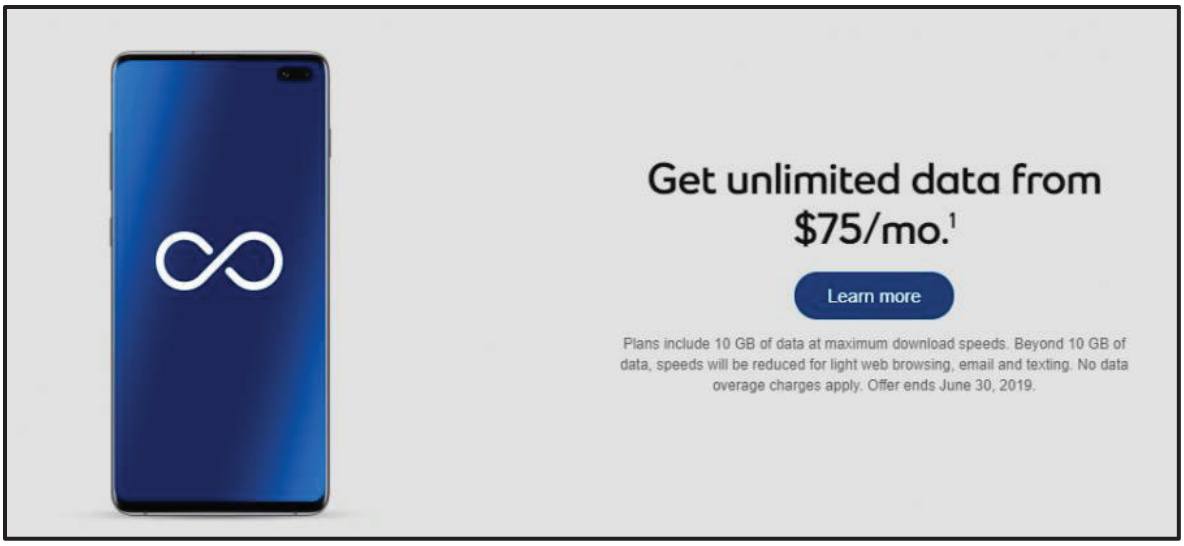


Figure 5: Bell Facebook Ad, 2019

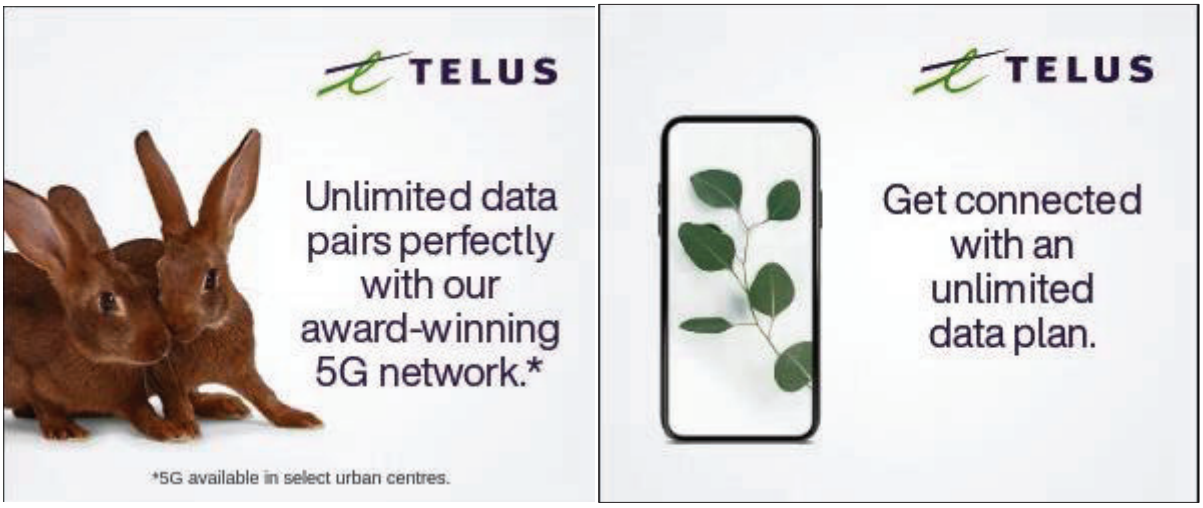


Figure 6: Screenshots from Telus Digital Ad, December 3, 2022

23. The ubiquitous presence of these plans in the market over the last five years, together with carriers' consistent marketing of them, are important context for the Bureau's allegations. The messaging from other carriers reinforces Rogers' own messaging and thus informs how the ordinary consumer would understand these plans, the features they offer, and their limits on high-speed data usage.

C. Competition Bureau Pursues Rogers Years After Infinite Launch

24. In the four years following Rogers' launch of its Infinite plans and the industry's widespread adoption of "unlimited" data offerings, the Bureau never took enforcement action related to the promotion of these plans. It issued no guidance, sent no warning letters, and commenced no enforcement proceedings against Rogers or against any other carrier. Similarly, the CRTC has not taken any action against any carrier, under the Wireless Code or otherwise.

25. According to materials the Commissioner filed in the Federal Court in connection with its investigation of Rogers, the Competition Bureau began reviewing representations from Canadian wireless providers in September 2021, "to assess whether wireless products were being marketed as 'unlimited' when usage was restricted, limited, or qualified in some way". The Bureau did not advise Rogers of its investigation at that time.

26. In March 2022, the Competition Bureau opened an investigation into Rogers regarding the promotion of its Infinite plans. Again, the Bureau did not notify Rogers of this investigation. On April 6, 2023, three days after Rogers closed its acquisition of Shaw Communications, the Commissioner opened an inquiry, only into Rogers, under s. 10(1)(b)(ii) of the *Competition Act*. The Bureau first notified Rogers of the inquiry by letter dated June 2, 2023, two months after opening the inquiry, more than a year after it commenced its investigation, and four years after the launch of Rogers' Infinite plans.

27. The Bureau's significant delay in opening its inquiry—four years following Rogers' introduction of Infinite plans—has materially prejudiced Rogers' ability to answer the Bureau's case. Since Rogers only became aware of the Bureau's investigation in June 2023, Rogers had no reason to preserve documents relevant to its defence going back to 2019. Rogers' marketing of

its Infinite plans, and the key features of those plans, have been clear and conspicuous since their launch in 2019. This unexplained delay also casts doubt on the harm the Bureau is alleging and the merits of the Commissioner's Application.

28. The Bureau has improperly and unfairly singled out Rogers in this Application for longstanding representations that have been industry-wide for years. No other carrier has been subject to enforcement action for its promotion of "unlimited" data plans over the past five years, despite having made substantially identical representations to those at issue in this Application.

29. The Bureau's use of its significant enforcement powers to selectively target Rogers and not to address its concerns on an industry-wide basis creates the unfair and harmful impression that it is only Rogers whose practices are at issue. It subjects Rogers to reputational damage, and unfairly tilts the competitive landscape to the material prejudice of Rogers and material advantage of its competitors.

D. Rogers' Infinite Representations are Neither False nor Misleading

30. The Bureau's allegations rest on an incomplete, highly curated, and materially misleading selection of materials. They present a distorted view of the representations Rogers made to consumers and misstate the general impression such representations are likely to create.

31. Viewed from the perspective of the ordinary consumer of unlimited wireless data services, Rogers' representations convey the general impression that Infinite plans give customers (i) a monthly *high-speed* data bucket of their choosing, and (ii) access to unlimited amounts of data *at reduced speeds* if they exceed that bucket, with no overage fees. This is the general impression based on Rogers' promotional materials and multiple disclosures throughout the purchasing process.

32. The Bureau relies on selective marketing materials, taken in isolation and divorced from the broader context in which they were made and understood in the market. The Bureau focuses on "brand" marketing and ignores ads promoting specific plans and prices, such as those in Figures 1, 2, and 3, above. The Bureau also ignores the repeated, clear, and conspicuous disclosures made during the purchasing process, discussed in more detail below.

33. None of the representations excerpted at paragraphs 14-19 of the Commissioner's Notice of Application fairly provide a sense of the general impression conveyed by Rogers' Infinite representations, either as a whole or individually. The ordinary consumer does not experience individual billboards, excerpts from social media posts, and still-frames from YouTube advertisements in a vacuum, without the benefit of the additional information provided as part of the full context of the Infinite representations and during the purchasing process, or without regard to the broader market context in which Rogers' Infinite plans were launched.

34. Nor is the general impression conveyed by Rogers' representations materially impacted by the brand name "Infinite" or the "infinity loop". Ordinary consumers do not view this branding as exhaustively describing plan features, which are identified and explained clearly in promotional materials and during the purchasing process. Other businesses have used similar branding, both in the telecommunications and other markets. For example, Bell has used the "infinity loop" to promote its version of unlimited plans (see Figure 5 above), and Visa has used the "Infinite" brand for its premium credit card—all without any apparent issue from the Bureau.

35. Ordinary consumers of Infinite plans are highly knowledgeable about wireless services. They know that plans always come with different features and a variety of terms and conditions, beyond those disclosed on billboards or space constrained advertisements. They would not view

isolated representations as intending to reflect or describe all the features of any specific plan. That information is prominently and repeatedly disclosed to consumers during the purchasing process, as discussed below.

36. Taking, as it must do, the perspective of the ordinary consumer of unlimited data plans, the Bureau cannot meet its burden to establish that Rogers' representations were false or misleading. Nor can the Bureau meet its burden to show that the isolated, incomplete examples it has chosen were material to the ordinary consumer's purchasing decision.

E. Rogers Clearly and Conspicuously Disclosed Plan Features

37. The general impression conveyed by Rogers' promotional representations is reinforced by clear, conspicuous, and repeated disclosures throughout the purchasing process. It is impossible for any consumer to purchase an Infinite plan without:

(a) Learning that different plans offer different amounts of *high-speed* data at different prices;

(b) Learning that they will have access to unlimited data *at reduced speeds* thereafter, with no overage fees; and

(c) Choosing the amount of high-speed data that suits their needs.

38. Each of these points is reinforced multiple times throughout the purchasing process. And even after a purchase is made, customers are given the opportunity to cancel their service if they change their mind.

39. For customers subscribing online, Rogers' website prominently identifies, in bold font, the amount of high-speed data available with each plan. This is followed by clear disclosure that there is "Unlimited data at reduced speeds thereafter" (see, *e.g.*, Figure 7).

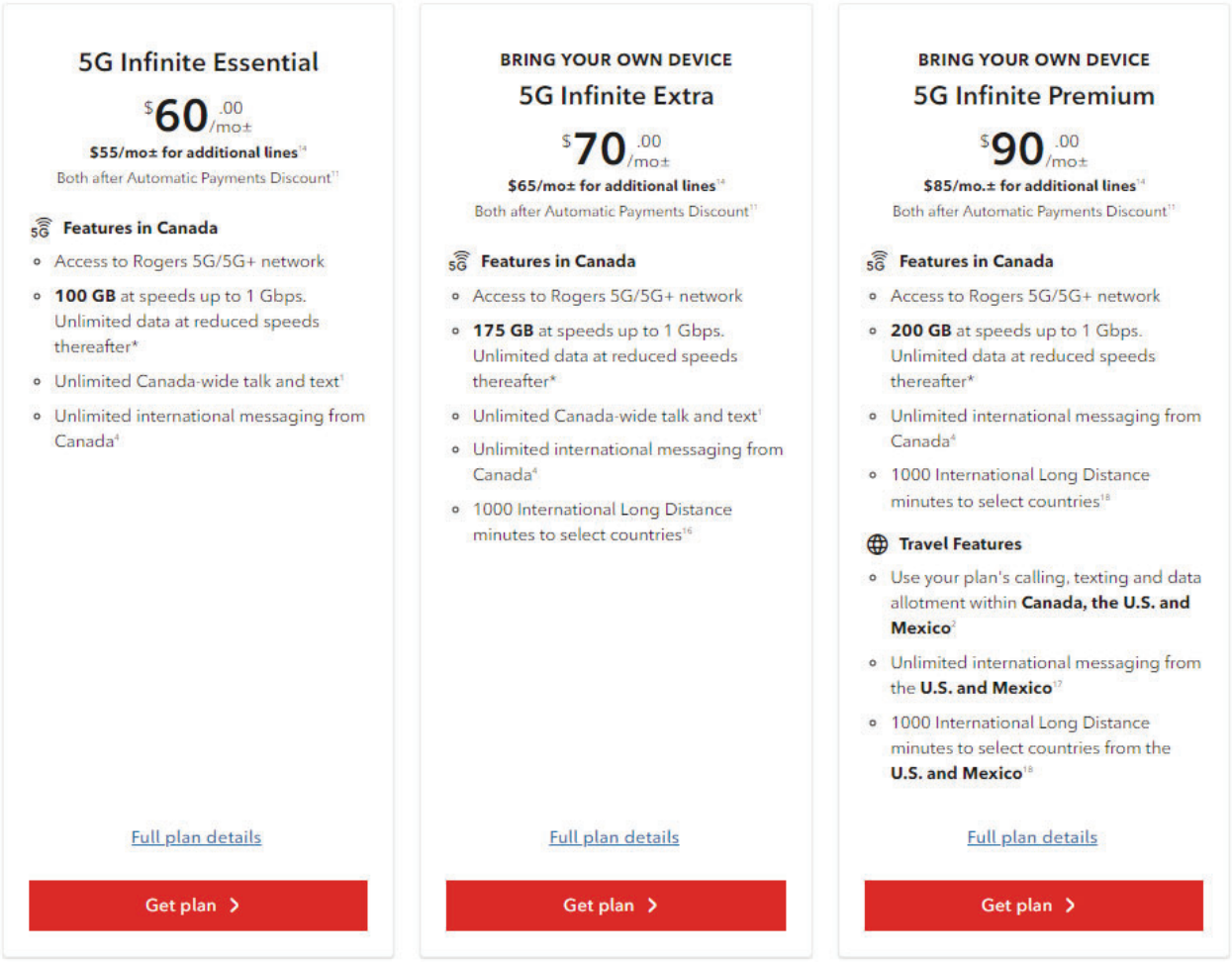


Figure 7: Screenshot from Rogers Website, taken February 5, 2025

40. Once customers select the red "Get plan" button at the bottom of the plan tiles, they are brought to a web page titled "Build Your Plan". They are presented with the different plans available and choose the one that best suits their needs. Each option discloses the amount of high-speed data available per month, and again states "Unlimited data usage at reduced speeds beyond [the bucket size selected]" (see Figure 8).

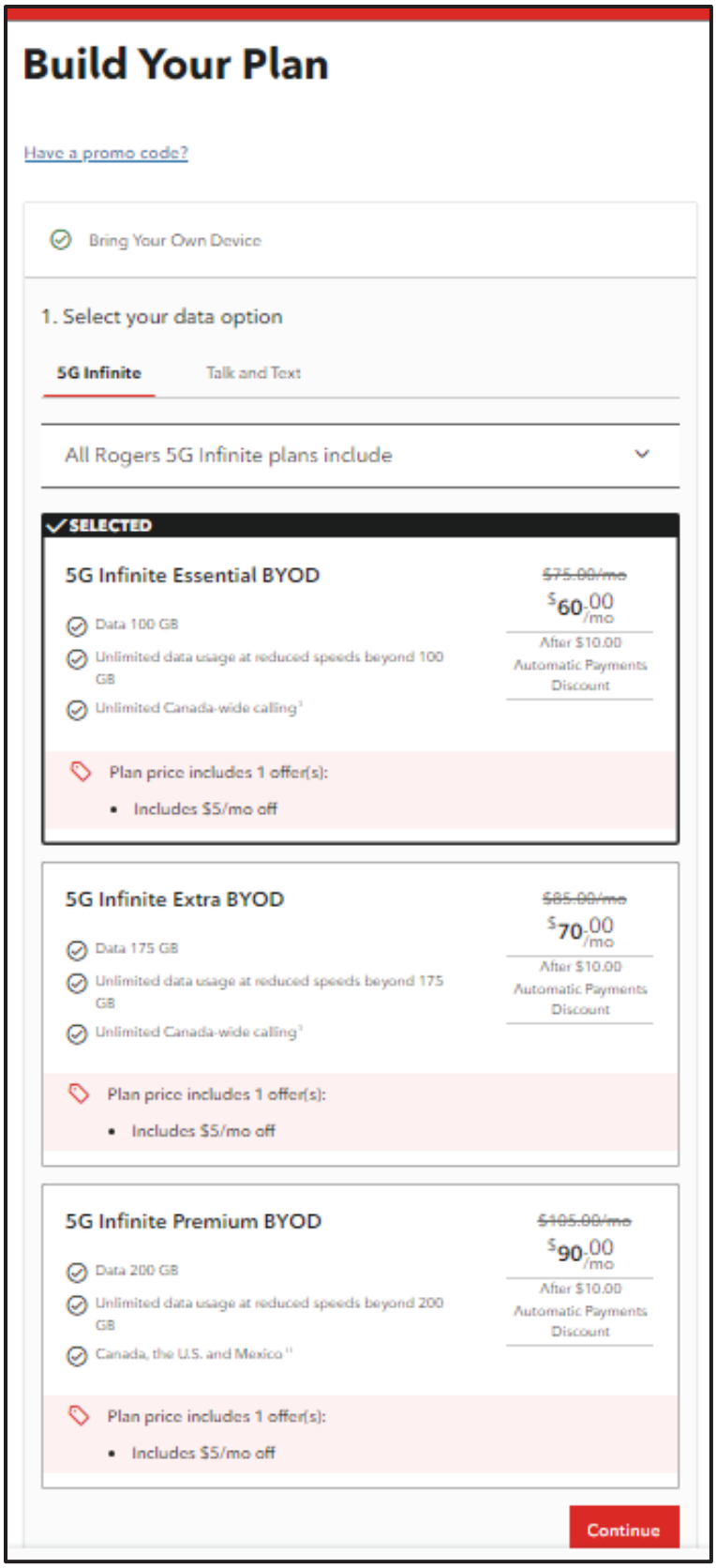


Figure 8: Screenshot from Rogers' "Build Your Plan" Page, taken February 5, 2025

41. If a customer wishes to know more about the reduced speed after they exceed their monthly bucket, both the asterisk on the initial plan page (Figure 7) and the "See Full Details" drop-down on the second page (Figure 8), lead to a more detailed description that explains: (i) that they have a bucket of data at high-speed; (ii) that they will have access to unlimited data at a reduced speed of 512kbps thereafter with no overage fees; and (iii) that applications such as email and web browsing will continue to function, but the reduced speed "will likely impact your experience" (see Figure 9).

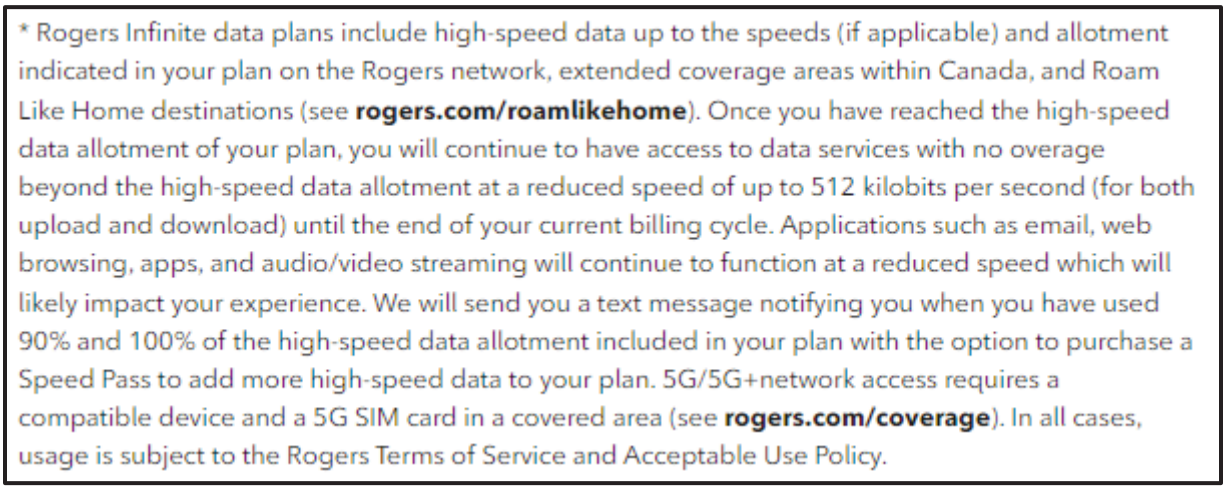

* Rogers Infinite data plans include high-speed data up to the speeds (if applicable) and allotment indicated in your plan on the Rogers network, extended coverage areas within Canada, and Roam Like Home destinations (see **rogers.com/roamlikehome**). Once you have reached the high-speed data allotment of your plan, you will continue to have access to data services with no overage beyond the high-speed data allotment at a reduced speed of up to 512 kilobits per second (for both upload and download) until the end of your current billing cycle. Applications such as email, web browsing, apps, and audio/video streaming will continue to function at a reduced speed which will likely impact your experience. We will send you a text message notifying you when you have used 90% and 100% of the high-speed data allotment included in your plan with the option to purchase a Speed Pass to add more high-speed data to your plan. 5G/5G+network access requires a compatible device and a 5G SIM card in a covered area (see **rogers.com/coverage**). In all cases, usage is subject to the Rogers Terms of Service and Acceptable Use Policy.

Figure 9: Screenshot from "Full Details" page on Rogers Website, taken February 5, 2025

42. Once a customer selects their high-speed data bucket size, they are prompted to review their order and given a copy of their Wireless Service Agreement, which again sets out how much high-speed data their plan offers each month, with "unlimited data at reduced speeds thereafter" (Figure 10).

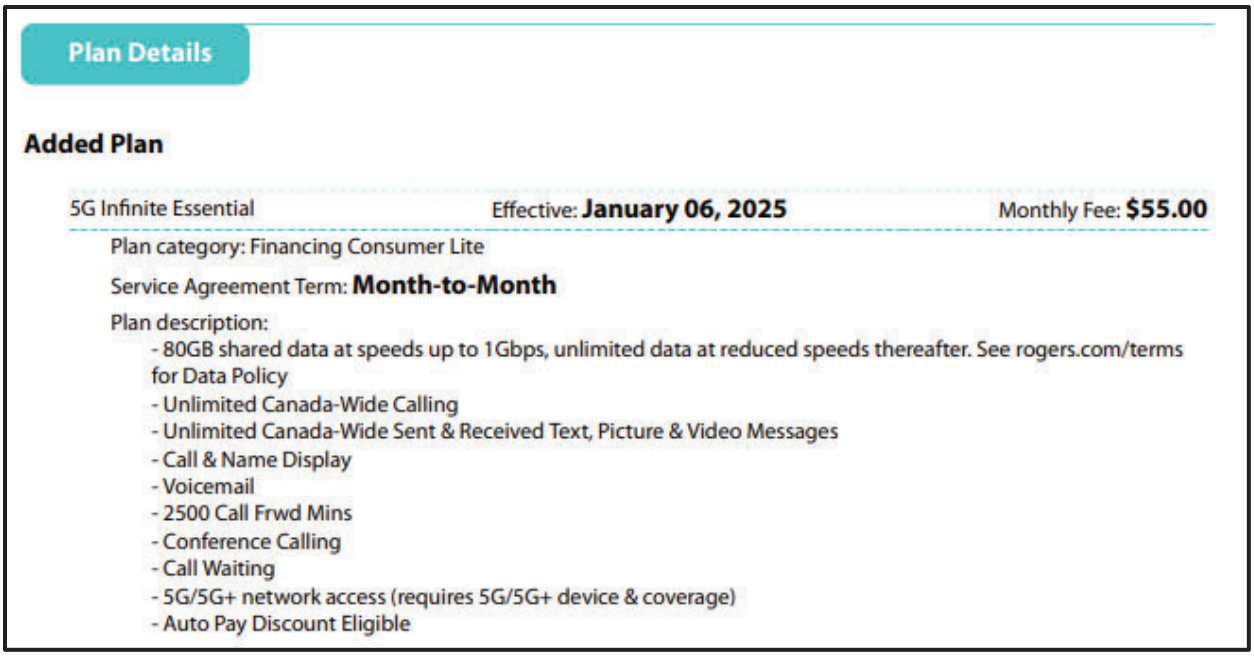
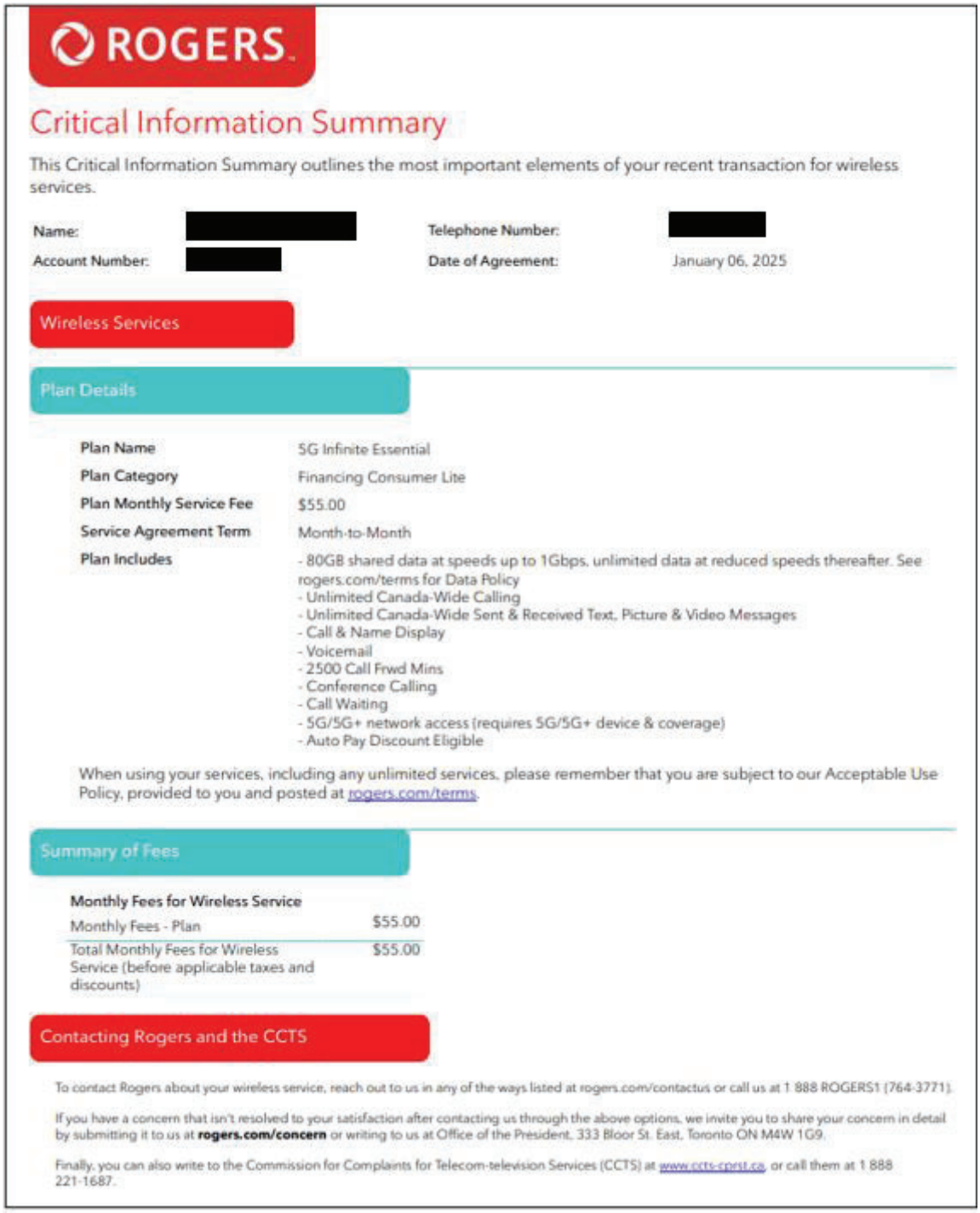


Figure 10: Excerpt from an Infinite customer's Wireless Services Agreement

43. Customers are required to confirm acceptance of their Wireless Service Agreement by clicking a checkbox at the time of purchase. Once the transaction is complete, Rogers sends them a copy of their Wireless Service Agreement, along with a "Critical Information Summary". The Critical Information Summary describes key plan features in plain terms, highlighting the size of the data bucket the customer has chosen and reiterating the disclosure that data speed will be reduced beyond that bucket (Figure 11).



ROGERS

Critical Information Summary

This Critical Information Summary outlines the most important elements of your recent transaction for wireless services.

Name: [redacted]
Account Number: [redacted]
Telephone Number: [redacted]
Date of Agreement: January 06, 2025

Wireless Services

Plan Details

Plan Name	5G Infinite Essential
Plan Category	Financing Consumer Lite
Plan Monthly Service Fee	$55.00
Service Agreement Term	Month-to-Month
Plan Includes	- 80GB shared data at speeds up to 1Gbps, unlimited data at reduced speeds thereafter. See rogers.com/terms for Data Policy - Unlimited Canada-Wide Calling - Unlimited Canada-Wide Sent & Received Text, Picture & Video Messages - Call & Name Display - Voicemail - 2500 Call Frwd Mins - Conference Calling - Call Waiting - 5G/5G+ network access (requires 5G/5G+ device & coverage) - Auto Pay Discount Eligible

When using your services, including any unlimited services, please remember that you are subject to our Acceptable Use Policy, provided to you and posted at rogers.com/terms.

Summary of Fees

Monthly Fees for Wireless Service	
Monthly Fees - Plan	$55.00
Total Monthly Fees for Wireless Service (before applicable taxes and discounts)	$55.00

Contacting Rogers and the CCTS

To contact Rogers about your wireless service, reach out to us in any of the ways listed at rogers.com/contactus or call us at 1 888 ROGERS1 (764-3771).

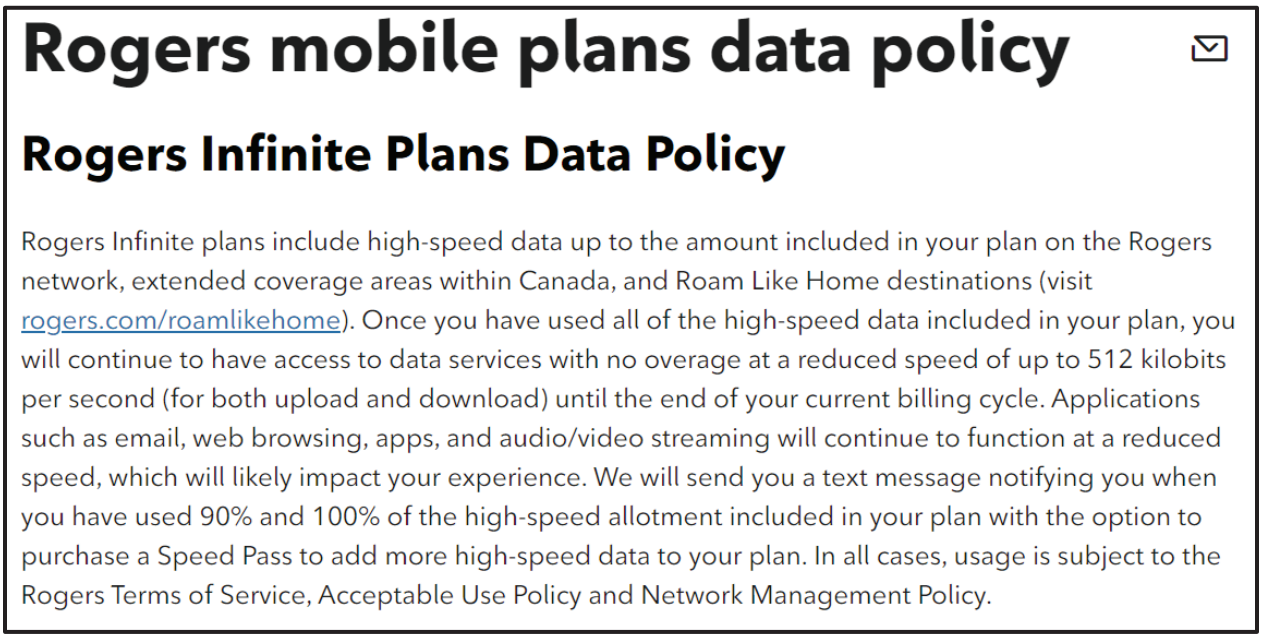
If you have a concern that isn't resolved to your satisfaction after contacting us through the above options, we invite you to share your concern in detail by submitting it to us at **rogers.com/concern** or writing to us at Office of the President, 333 Bloor St. East, Toronto ON M4W 1G9.

Finally, you can also write to the Commission for Complaints for Telecom-television Services (CCTS) at www.ccts-cprst.ca, or call them at 1 888 221-1687.

Figure 11: Excerpt from an Infinite customer's Critical Information Summary

44. Both the Wireless Service Agreement and the Critical Information Summary direct customers to Rogers' "Data Policy" (available at rogers.com/terms and excerpted in Figure 12)

for additional details on high-speed data allocations and speed reductions. This Policy again provides the information available to consumers during the purchase process under "See full details".



Rogers mobile plans data policy

Rogers Infinite Plans Data Policy

Rogers Infinite plans include high-speed data up to the amount included in your plan on the Rogers network, extended coverage areas within Canada, and Roam Like Home destinations (visit rogers.com/roamlikehome). Once you have used all of the high-speed data included in your plan, you will continue to have access to data services with no overage at a reduced speed of up to 512 kilobits per second (for both upload and download) until the end of your current billing cycle. Applications such as email, web browsing, apps, and audio/video streaming will continue to function at a reduced speed, which will likely impact your experience. We will send you a text message notifying you when you have used 90% and 100% of the high-speed allotment included in your plan with the option to purchase a Speed Pass to add more high-speed data to your plan. In all cases, usage is subject to the Rogers Terms of Service, Acceptable Use Policy and Network Management Policy.

Figure 12: Excerpt from Rogers' Mobile Plans Data Policy, available at rogers.com/terms, taken January 12, 2025

45. While the appearance and layout of Rogers' website has evolved since Infinite plans were launched in June 2019, the online purchase process has always clearly disclosed to prospective customers: (i) the amount of high-speed data available with each plan; and (ii) that unlimited data is available "*at reduced speeds thereafter*".

46. Rogers makes the same disclosure to prospective Infinite customers subscribing in-store or by phone. Training materials provided to customer service representatives and partner retailers at the time of launch identified the key features of Infinite plans, which were to be communicated to consumers. These materials explain that Infinite plans include unlimited data with no overage charges, with a bucket of data at "max speeds" and access above that data allotment at reduced speeds.

47. Customers purchasing their Infinite plan in-store or by telephone are also provided their Wireless Service Agreements and Critical Information Summaries (referenced above). And if customers are dissatisfied with the terms of their plan after reviewing these documents, they can cancel their services without penalty. Those who purchased an Infinite plan without a device can cancel their services at any time. Those who purchased an Infinite plan with a device can cancel their services within fifteen days provided they return their device.

48. Whether online, in store, or over the phone, Rogers clearly, conspicuously, and repeatedly discloses the key features of its Infinite plans. Every subscriber to an Infinite plan necessarily understands that different plans have different amounts of high-speed data. They are told repeatedly and in plain language that they will have access to unlimited data *at reduced speeds* if they go over their high-speed bucket. And they are presented with different plans at different price points so they can choose the amount of high-speed data that best suits their needs.

49. The ordinary consumer of Infinite plans understands these choices are not meaningless. They understand that they can choose to pay a lower amount for a smaller bucket or a higher amount for a larger bucket. They understand they will enjoy unlimited usage at reduced speeds thereafter, without paying overage fees. The Bureau's suggestion that consumers have the general impression that every plan entitles them to unlimited high-speed data is impossible to reconcile with the purchasing process and the clear and repeated disclosures made throughout.

F. <u>Large Buckets Mean Customers Effectively Have Unlimited High-Speed Data</u>

50. Even if the Bureau's position regarding general impression is correct, which Rogers denies, the overwhelming majority of Infinite customers have access to high-speed data in such

significant quantities that it is *effectively* unlimited for their purposes. That is, the vast majority of Infinite customers never exceed their monthly high-speed data buckets, and therefore never experience speed reductions at all.

51. Consistent with the relative increase in the size of Infinite high-speed data buckets, the average utilization of high-speed data was never close to the average bucket size, and consistently declined since Infinite plans were launched in 2019. Since launch, only a small percentage of Infinite plan customers exceed their high-speed mobile data bucket each month. Of the limited number of Infinite customers each month who exceed their high-speed data bucket, the vast majority continue to use mobile data at reduced speeds without purchasing a Speed Pass.

52. The average percentage of Infinite customers each month that purchase Speed Pass top-up data at any point in their billing cycle is low and has consistently declined. Usage trends demonstrate that, for the vast majority of Infinite plan customers, the high-speed mobile data bucket is effectively unlimited. For the small minority of customers that exceed their high-speed data bucket in a given billing cycle, all continue to enjoy unlimited data at reduced speeds for the remainder of the billing cycle, with no overage fees. Indeed, most of the small number of customers that exceed their high-speed data bucket do not purchase a Speed Pass.

G. Regulated Conduct Defence; Presumption of Consistency with CRTC Wireless Code

53. The promotion of "unlimited data" plans is explicitly addressed by the CRTC in the Wireless Code, as part of its statutory mandate under the *Telecommunications Act*.

54. In 2013, the CRTC implemented the Wireless Code following extensive public consultation with various stakeholders, including submissions from the Competition Bureau. It amended the Wireless Code in 2017, again following an extensive public consultation process.

55. The Wireless Code expressly permits carriers to market "unlimited" data plans, provided (a) those plans do not carry any automatic overage fees, and (b) the carrier clearly explains any plan limits in a "Fair Use Policy" and "Critical Information Summary".

56. A Fair Use Policy is a publicly accessible document that explains what the carrier considers unacceptable use of its wireless services. A Critical Information Summary is a one- or two-page document provided to customers at the time of purchase, summarizing their key contract terms in plain and easy-to-understand language. It is required to include "a description of any limits imposed on services purchased on an unlimited basis", including data speed reductions. Rogers has always complied with these requirements.

57. The Tribunal should reject the Bureau's attempt to undermine the approach established by the CRTC respecting the representations at issue in this Application. The *Competition Act* should be applied in a manner that is consistent with and respects the policy choices of the CRTC, as reflected in the Wireless Code, given the CRTC's function as a federal agency with the expertise and statutory mandate to regulate the telecommunications industry.

58. In addition, and contrary to paragraph 45 of the Commissioner's Notice of Application, Rogers' representations were never inconsistent with the Bureau's 2017 *Deceptive Marketing Practices Digest*, Volume 3. There, the Bureau stated that "marketing a telecommunication service as 'unlimited' *may* raise concerns under the misleading prohibitions in the *Competition Act* if, in fact, the service *is materially limited in a manner that is inconsistent with its general impression*". It did not say that wireless carriers should never use "unlimited" for plans with high-speed data buckets and reduced speeds thereafter, even if such speed reductions are clearly disclosed.

59. The Bureau also explained that its position is similar to that of the U.S. Federal Trade Commission, which has only required that any restrictions on unlimited wireless plans be clearly and conspicuously disclosed. As set out above, Rogers and other carriers have followed that approach since the launch of Infinite plans and the Bureau did not take any enforcement action with respect to that approach over a five-year period.

60. Rogers pleads and relies upon the regulated conduct defence.

H. Request for Relief Is Inappropriate and Unwarranted

61. Even if the Tribunal were to find that Rogers engaged in reviewable conduct, which is expressly denied, the Tribunal should exercise its discretion not to order any relief beyond the declaration pleaded at paragraph 1(a) of the Notice of Application. The other pleaded relief — namely, a prohibition order, an administrative monetary penalty, and a restitutionary award—are inappropriate and unnecessary.

62. Furthermore, to impose such relief particularly after the Bureau chose not to take any enforcement action for more than five years would be contrary to the requirement in section 74.1(4) that any order should be made with a view to promoting conformity and not with a view to punishment.

i. Rogers Exercised Due Diligence in Marketing and Promoting Infinite Plans

63. At all times material to this Application, Rogers took reasonable and diligent steps to ensure that prospective customers would not be likely to be misled by its Infinite representations. As a result, in accordance with section 74.1(3) of the *Competition Act,* no order under section 74.1(1)(b), (c), or (d) can be ordered against Rogers.

64. In particular, since launch in June 2019, Rogers' Infinite representations have complied with all the requirements of the CRTC in the Wireless Code and with the position of the Competition Bureau described in the 2017 *Deceptive Marketing Practices Digest*—neither of which say that carriers cannot use "unlimited" to promote plans with reduced data speeds where such limitations are clearly disclosed.

65. In light of the regulatory environment and the position consistently taken by the Competition Bureau and the CRTC, it was reasonable for Rogers to believe that it was at all times in compliance with its obligations under the *Competition Act*, and that its approach to promoting its Infinite plans—like those of its competitors for their equivalent plans—were neither false nor misleading. No order under section 74.1(1)(b), (c), or (d) should be imposed because Rogers acted with diligence and reasonable care to ensure that the ordinary consumer interested in its Infinite wireless plans was not likely to be misled by its representations.

ii. Section 74.1(5) Factors Weigh Against an Administrative Monetary Penalty

66. The Bureau's request for an administrative monetary penalty against Rogers should be rejected. Rogers denies each of the alleged aggravating factors at paragraph 46 of the Notice of Application, and in addition to the facts pleaded above, relies on the following as relevant factors under s. 74.1(5) of the *Competition Act*:

(a) Reach, frequency, and duration of the impugned conduct: The Bureau did not take any enforcement action against Rogers for more than five years in respect of what it now claims are deceptive marketing practices. And the Bureau still has not taken any enforcement action against any other carrier. The continued reach,

frequency, and duration of "unlimited" data representations was a direct consequence of this regulatory inaction and cannot be held against Rogers.

(b) Vulnerability of the consumers: Infinite plans are directed at sophisticated, high-use data customers, who are interested in accessing large data buckets and having bill certainty. Customers in other segments of the wireless market can purchase other kinds of plans that best serve their needs, including occasional use or low-cost plans. Contrary to paragraph 46(c) of the Commissioner's Notice of Application, the ordinary consumers in the market for unlimited wireless services are not vulnerable, are capable of understanding clear and repeated disclosures of speed reduction, and are clearly familiar with the option to purchase high-speed data buckets of different sizes and at different prices.

(c) Materiality of any representations: Customers were repeatedly told, both in promotions and during the purchasing process, that Infinite plans include a high-speed data bucket and unlimited data at reduced speeds thereafter. The Bureau's selection of isolated and incomplete promotional statements are insufficiently material to alter customers' purchasing decisions in respect of unlimited wireless plans. This is particularly the case in light of the repeated disclosure made to relevant consumers throughout the purchasing process.

(d) The effect on competition in the wireless market: Rogers' introduction of Infinite plans was manifestly pro-competitive, which was widely recognized in the media and acknowledged by the Competition Bureau in its CRTC submissions referenced above. Customers are unquestionably better off with bigger data

buckets, lower prices, and no overage fees. If anything, the fact that Rogers' competitors soon launched their own similar unlimited plans should be a mitigating factor, since Rogers stood to gain no benefit from its approach to marketing its plans.

(e) Likelihood of self-correction: No administrative remedy under s. 74.1 is necessary to ensure compliance with any finding of the Tribunal regarding the impugned representations.

(f) Financial position of the person against whom the order is made: As noted above, the overriding principle under s. 74.1(4) of the *Competition Act* is that any relief must be determined with a view to promoting compliance, not punishment. Compliance with the Tribunal's determinations can be achieved in this case without a monetary penalty.

(g) Rogers' history of compliance with the *Competition Act*: Contrary to the Bureau's characterization of the two inquiries referenced in paragraph 46(i):

- With respect to Rogers' performance claims concerning Chatr (Rogers' pre-paid wireless brand), these claims were found by the Ontario Superior Court to be unquestionably true and fully substantiated after the claims were made. In that case, the Ontario Superior Court specifically determined that Rogers had suffered reputational harm as a result of the Commissioner's application in that case; and

- The consent agreement reached between the Commissioner and Rogers concerning industry-wide "premium text messaging" is a negotiated settlement that states expressly that nothing in that agreement "shall be taken as an admission or acceptance by [Rogers] of any facts, wrongdoing, submissions, legal argument or conclusions for any other purpose". In that case, the Commissioner took enforcement action against Rogers, Bell, and Telus at the same time and ultimately reached negotiated resolutions with all three carriers. In this instance, the Commissioner has targeted Rogers and remained silent with respect to its competitors.

67. For all of the reasons outlined above, should the Tribunal find any violation of the *Competition Act*, it should exercise its discretion not to order any relief under s. 74.1(1).

I. Other Procedural Matters

68. For the reasons set out above, Rogers asks that the Application be dismissed in its entirety, with costs.

69. Rogers agrees with the Commissioner that this proceeding be conducted in English in the City of Ottawa.

DATED at the City of Toronto, this 6th day of February, 2025.

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The Commissioner of Competition

TAB 4

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
PUBLIC
RECEIVED / REÇU
Date: February 20, 2025
CT- 2024-012
Sarah Sharp-Smith for / pour
REGISTRAR / REGISTRAIRE
OTTAWA, ONT. 5

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

REPLY OF THE COMMISSIONER OF COMPETITION

I. OVERVIEW

1. Rogers' advertisements that make unqualified promises of unlimited or infinite data have been viewed innumerable times by millions of Canadians. These ads are false or misleading in a material respect and are not negated by other advertisements, which Rogers alleges make "ubiquitous disclosure of key plan features", that are also false or misleading in a material respect.

2. Rogers points to the fact that its misleading advertising campaign spurred other wireless carriers to follow suit, and claims that this is pro-competitive. The fact that other wireless carriers may have copied Rogers' reviewable conduct is an aggravating factor, not a mitigating one.

3. The Commissioner repeats and relies upon the allegations in his Notice of Application and, except as hereinafter expressly admitted, denies the allegations in the Response. Unless otherwise indicated, defined terms in the Reply have the meaning ascribed to them in the Notice of Application.

II. Rogers' advertisements were viewed by millions of Canadians innumerable times

4. Contrary to Rogers' Response, the representations provided in the Notice of Application that make unqualified promises of unlimited and infinite data have been viewed innumerable times by all types of Canadians. In 2019, Rogers blanketed the country with these advertisements with the intention of owning the idea of unlimited data and searing it into Canadians' brains. These advertisements impact consumers' understanding of the Rogers Infinite Unlimited Plans and their benefits, the main message being "Unlimited data for infinite possibilities". Rogers' goal was not only to promote the sale of the plans; it was also to improve consumers' impression of the Rogers brand.

5. These false or misleading advertisements are not cured because Rogers made additional representations that allegedly disclosed the "key plan" features. First, the implication of Rogers' defence is that a company can blatantly engage in an extensive campaign of advertising that is false or misleading, provided at a latter stage it makes advertisements which are less misleading. Second, the Commissioner expressly denies that the minimal disclosures offered by Rogers in other representations were in any way adequate to overcome the claims that the product offered unlimited data. Furthermore, the ads are insufficient to provide consumers with an appreciation for the impact of throttled data on their mobile usage experience. As stated in the Notice of Application, subsequent disclosure of "key plan features" does not cure the false or misleading general impression created by the advertisements.

III. Rogers was aware of the Bureau's position that telecom services should not be marketed as unlimited if they are in fact limited

6. Rogers argues in paragraph 24 of its Response that the Bureau issued no guidance with respect to its position that telecom services should not be marketed as unlimited if they are in fact limited. Rogers' assertion is inaccurate. The Bureau published an article in Volume 3 of the Deceptive Marketing Practices Digest (the "Digest") in 2017, advising the telecom sector not to engage in precisely the kind of conduct that Rogers went on to engage in, and warning that the Bureau will take action if required.

7. Likewise in the same paragraph of its Response, Rogers also incorrectly claims that the Bureau has never taken any enforcement actions against any carrier for these kinds of claims. In the very same Digest article that Rogers claims to have abided by, the Bureau describes a consent agreement with another telecom operator for offering unlimited internet services, where disclaimers showed that speeds were significantly slowed after a data cap was reached. The reviewable conduct in the Consent Agreement is similar to the conduct in this case.

IV. Giving consumers less than what they were promised is not a pro-consumer development

8. In its Response, Rogers extolls the benefits to consumers brought about by the introduction of the Rogers Infinite Unlimited Plans. It admits that other wireless carriers immediately began engaging in similar conduct as Rogers. The Bureau expressly denies that giving consumers less than what they were promised is a pro-consumer development, or that Rogers winning the race to the bottom should be celebrated.

9. Rogers decided long ago to charge its wireless customers expensive overage fees for exceeding their monthly allotment, a practice that Rogers admits in paragraph 12 was a significant source of consumer complaints. The Commissioner has no quarrel with Rogers' decision to increase data buckets, get rid of overages, and throttle speeds after consumers hit their data cap. However, Roger's misrepresentation of these data plans to millions of Canadian consumers cannot be characterized as a pro-consumer development; no benefit has accrued to consumers from the deceptive marketing. Similarly, there is nothing pro-competitive about the fact that Roger's misleading claims have been emulated by competitors.

V. Rogers introduced the Infinite Plans because it was profit maximizing to do so

10. Rogers claims in paragraphs 19 and 20 that it had no intention of trying to increase revenues from the sale of data. In support of this assertion, Rogers relies on the fact that revenues from overages fell by over $50 million immediately after introduction of the plans, and have decreased since. This is misleading: revenues from overages decreased because overage charges had been eliminated from Rogers' Infinite Plans. However, instead of decreasing, Rogers' own records show that Rogers anticipated that its wireless revenues would significantly increase over the

next five years after launch of the Rogers Infinite Unlimited Plans, notwithstanding the elimination of overage fees.

VI. Rogers incorrectly argues that consumers will understand the word "unlimited" to actually mean limited

11. Rogers argues that its representations promising unlimited data do not convey the general impression to the ordinary consumer that they will receive unlimited data. Rogers argues that instead, consumers will understand the claims of unlimited data to mean that consumers will get a set amount of high-speed data, after which the data is capped and throttled thereafter. Put another way, Rogers argues that consumers will understand the word "unlimited" to actually mean "limited", such that the general impression is the opposite of its plain meaning. The Commissioner denies that this is the general impression that is conveyed by the impugned representations. Rogers' own research shows that many consumers interpret claims of "unlimited data" in a manner consistent with its ordinary meaning.

12. Rogers claims in paragraph 35 that ordinary consumers of Rogers Infinite Unlimited Plans are highly knowledgeable about wireless services. However, their own research showed many consumers' beliefs were often not aligned with the reality of the plan features, such as throttling and truly unlimited data.

13. Rogers ignores that its advertisements promising infinite data for unlimited possibilities were shown repeatedly to millions of consumers across Canada regardless of their knowledge of wireless plans. Indeed, Rogers' own records make it clear that the representations were intended to reach a wide swath of consumers.

14. Further, Rogers has argued that the benefit of its Rogers Infinite Unlimited Plans was that consumers would never have to pay overage charges

again. Rogers has admitted that many consumers had negative reactions to these overages, not just consumers who were highly knowledgeable about wireless services. That being the case, the appeal of unlimited data cuts across all Canadian wireless consumers.

15. Even if somehow only select consumers were influenced by the representations, which is denied, this alone would not be enough to make such consumers understand that “unlimited” does not in fact mean “unlimited”.

16. Rogers also ignores the fact that it has marketed other products as unlimited to consumers for other services such as home internet, where the word “unlimited” actually means unlimited. Indeed, even many of Rogers Infinite Unlimited Plans are marketed as having unlimited data as well as unlimited talk and text. However, while the talk and text is truly unlimited, the data is not. The Commissioner denies that consumers, even sophisticated ones, would understand that “unlimited” actually means ‘limited by a data cap, followed by speeds that only allow for limited functionality’.

VII. The fact that some consumers may not reach their caps does not cure Rogers’ misrepresentations

17. Rogers’ argument that its advertising is not misleading because the data caps are set high such that consumers were not hitting their caps ignores what consumers were promised by Rogers when they purchased the Rogers Infinite Unlimited Plans: data without limits. Rogers’ assertion that the cap is such that it might as well be unlimited does not cure the misrepresentation. Rogers could have chosen to market the plans as involving big buckets of data. It chose instead to market them as offering “unlimited” data.

18. Even if Rogers is correct that few subscribers reach the threshold, many clearly do, and these consumers have paid millions of dollars in fees to access what should be unlimited data, or have paid to upgrade to more expensive plans to get more data. This also ignores, for example, the customers who may have curtailed their data usage upon being notified they were approaching their data cap.

VIII. The regulated conduct defence is not available

19. Contrary to the response, the regulated conduct defence is not available as a matter of law under section 74.1 of the Act.

20. In addition, the CRTC Wireless Code (the "Wireless Code") does not shield Rogers from engaging in misleading advertising. Rogers, in its Response, has mischaracterized what the Wireless Code provides, claiming that it allows unlimited claims, subject only to the requirement that speed or quality restrictions are disclosed. The 2013 CRTC decision establishing the Wireless Code provides that consumers of unlimited plans should not be subject to any usage limitations beyond those necessary for network management purposes, and that there should be no restrictions outside of the service provider's fair use policy. A fair use policy is defined as a policy that explains what is considered to be unacceptable use of the service provider's wireless services and the consequences of unacceptable use (e.g. using the service to engage in an activity that constitutes a criminal offence).

21. In any event, the *Competition Act* (the "Act") regulates misleading advertising while the Wireless Code has a different purpose. Specifically, the Wireless Code ensures that consumers of wireless services are informed of their rights and obligations in their contracts. Consistent with this, the 2013 CRTC decision establishing the Wireless Code reminds readers that advertising laws must still be followed.

IX. Rogers did not exercise due diligence in marketing its plans

22. Contrary to the allegations contained in the Response, including paragraphs 63 – 65, the due diligence defence is unavailable to Rogers, as its application would interfere with the positive obligations set out in section 74.01.

23. Rogers argues in paragraph 64 that it exercised due diligence because it complied with the Digest article regarding the making of unlimited claims in telecom. As set out in paragraph 6, the Digest was a warning to the telecom sector not to engage in exactly the kind of conduct that Rogers chose to engage in. Rogers was aware of the Bureau's position on these claims. It was also aware that the Bureau had already taken enforcement action against another telecom provider for engaging in practices that were similar to the conduct that Rogers engaged in. This is the opposite of due diligence, and in fact should be considered an aggravating factor.

24. Rogers ignores the fact that it could have offered the exact same product to consumers and simply informed them about what they would receive: high-speed data that is capped, followed by throttled data that allows a minimal level of connectivity. Rogers instead chose to blanket the country with claims that the data was "unlimited".

25. Rogers makes much of the amount of time that has passed since it started the conduct. Yet, even in 2023 when the Bureau notified Rogers about its problematic conduct, Rogers did not change its conduct. Instead, Rogers continues to engage in the reviewable conduct based on its own independent business assessment and the benefits (financial and otherwise) this conduct provides Rogers.

26. Further, Rogers did not seek or obtain any advisory opinion when they commenced the conduct as was open to them under section 124.1 of the Act.

27. Finally, Rogers' due diligence defence founders on the fact that prior to launching the plans in 2019, Rogers commissioned market research which showed Rogers that using the terms "infinite" and "unlimited" data would mislead consumers. After the plans had been in the market for two years, Rogers commissioned further research which demonstrated that nearly all consumers tested, including Rogers Infinite customers, understood "unlimited data" claims to mean that the plans do not have a data cap.

DATED AT Toronto, Ontario, this 20th day of February, 2025.

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TAB 5

File No. 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;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.

Respondent

90

A. The purpose of a preliminary assessment would be to take a look at representations and see whether they could raise issues under the Act.

373 Q. Okay. So in this context, the purpose of the preliminary assessment was to look at representations that were being made in the marketplace by Rogers and other telecommunications providers to see whether they may raise a concern with respect to the deceptive marketing provisions of the Competition Act, correct?

A. Yes, and to see whether a -- it warrants further -- an investigative team to be assigned.

374 Q. And there was no investigative team that was assigned—in 2020, correct?

A. Not at that time.

375 Q. And, in fact, an investigative team was not assigned until you initiated a team in September 2021?

A. That's correct.

376 Q. Was that done on an instruction from somebody to start a team?

A. I was assigned the file by my manager, yes.

377 Q. And not just assigned the file.
A. Mm-hm.
378 Q. You were told to begin an investigation?
A. That's correct.
379 Q. So did this preliminary assessment continue all the way through 2020 right to 2021?
A. No.
380 Q. When did the preliminary assessment stop?
A. In the fall of 2020, I believe.
381 Q. So in 2020 -- and I take it the preliminary assessment was stopped because somebody told these individuals to stop?
A. No, they'd done the preliminary assessment.
382 Q. Okay. And the preliminary assessment did not result in a recommendation to start an investigation?
MR. HOOD: You just assumed the facts again.
BY MR. SMITH:
383 Q. Did the preliminary assessment result in a recommendation to start an investigation?

R/F MR. HOOD: I'm going to refuse it because it's not relevant.

BY MR. SMITH:

384 Q. Okay. There was no investigation that was taking place between the fall of 2020 and September of 2021, fair?

A. No, there was no investigative team assigned.

385 Q. And who is it -- or perhaps I asked this question, in which case, I apologize.

Who was it that the individuals conducting the preliminary assessment reported to?

A. I'm not certain.

386 Q. Can you find out?

R/F MR. HOOD: I'm going to refuse it because it's not relevant.

BY MR. SMITH:

387 Q. You don't remember who it was?

A. I have an idea, but --

388 Q. Well, if you have an idea --

MR. HOOD: We don't want you to guess.

BY MR. SMITH:

389 Q. No, but if you have a belief based on the fact that you work at the Competition Bureau and are familiar with this file, I'm entitled to

BY MR. SMITH:

548 Q. Is the ad falsely misleading?

A. Yes.

549 Q. Okay. In what respect?

A. In the ad, Rogers is advertising unlimited data plans, and in reality, the plans are capped and throttled.

550 Q. So they are capped in what way?

A. There is a limit on the amount of data, so the 10GB in this case. That's the cap.

551 Q. And so that's a limit on the amount of high-speed data? That's what you're referring to?

A. Yes. So the --

552 Q. Right.

A. -- data that's promised is capped at 10GB.

553 Q. And so what you're saying is that this ad is false and misleading because the amount of data available at high speed is 10GB, correct?

A. Yes, because the unlimited data is limited through the 10GB limit, and then subsequent to that --

554 Q. Sorry.

A. Yeah.

555 Q. I just want to make sure that I understand that --

A. Mm-hm.

556 Q. -- and to be fair to you.

Well, complete your answer, and then we'll understand it.

A. Sure.

557 Q. Okay. Go ahead.

A. So the unlimited data --

558 Q. Yes.

A. -- that is being advertised has a cap on it. So it's actually 10GB of data. And then subsequent to that, the speed is limited by over 99 percent. So limit with a cap; limit with a throttle.

559 Q. Sorry, let me just make sure that I understand that. What is it that -- so that I understand your evidence, you're saying this ad is false and misleading because the consumer is limited to 10 gigabits of high-speed data? Have I understood that correctly?

A. The consumer is promised data without limits.

560 Q. Uh-huh.

A. And then there's two limits

associated with the data. To start, there is a limit of gigabytes at -- and then following that, the data is limited to 512 kilobits per second. So it's throttled by over 99 percent.

561 Q. Right. So you've referred to that as two limits, but I take it we can agree that the amount of data itself is not limited. What is limited is the amount of data at max speed?

A. I disagree. The data that is promised is limited.

562 Q. Where does it say that the data promised is limited? I don't understand that statement.

A. So Rogers makes claims about unlimited data plans.

563 Q. Yes.

A. The word "unlimited" means what it means in the dictionary.

564 Q. Which is what?

A. So in this context, it'd be "no limits."

565 Q. And no limits on what?

A. The data.

566 Q. So no limit on the amount of data.

A. So --

567 Q. So, for example, if I'm using my phone to send emails back and -- sorry, before I go to that, is it the Commissioner's position that there is, in fact, a limit on the amount of data a consumer has under an Infinite plan?

A. The data that is advertised, which is "unlimited" or no limits, is limited through the data cap and then the throttling of --

568 Q. Sorry.

A. Yeah.

569 Q. I think we have a fundamental misunderstanding.

MR. HOOD: I think we have a fundamental disagreement, but regardless...

BY MR. SMITH:

570 Q. No, I don't think so.

Do you agree with me that under Rogers' Infinite plan that a consumer is entitled to use as much data as they want without limit?

Set aside, set aside at any -- sorry, set aside at any particular speed.

I'm asking you, do you agree with me that there is no limit on the amount of data a consumer is entitled to use?

A. I can't agree to that, especially

when speed is a component of the data.

571 Q. So that's why I'm saying to you that there is -- you're saying there's two limits, but what I'm saying to you is that there is an amount of high-speed data, and then there is data available thereafter at reduced speed. Can we agree with that?

A. Was your question -- sorry, was your question about the construct of the plan, or are you talking about the represent- --

572 Q. Well, let's just talk about the -- let's just make sure we agree on the construct of the plan.

Do you agree with me that under Rogers' Infinite plan, a consumer has allotment of high-speed data and data available thereafter at reduced speed?

A. I would say that these plans, the Infinite plans, have a limit on the amount of data, high-speed data, and then after the limit is surpassed, the speeds are reduced or limited by 99 percent.

573 Q. Okay. So you agree with me: If a consumer buys a 10GB plan, you agree with me that they have an allotment of data available at maximum

588 Q. What is it about the ad that is false and misleading?

A. So, again, we can see the text at the top. We can see the image here, and we can see the link down below.

589 Q. Yes, I can see it.

A. I --

590 Q. What is it about it that's misleading?

MR. HOOD: She's explain- -- let her finish.

BY MR. SMITH:

591 Q. Okay, okay. Go ahead.

MR. HOOD: She's explaining why that's misleading. Let her finish.

BY MR. SMITH:

592 Q. Okay. Go ahead.

A. So part of the caption here at the top, under "Rogers sponsored," we see [as read]:

"Introduction: Rogers Infinite unlimited data plans for infinite possibilities."

So there is a claim here that the data plans are unlimited, and it's reinforced by this "infinite possibilities." We also see the infinity

symbol right here. So introducing, then the Rogers logo, infinity, Rogers Infinite, and then you can also see below rogers.com, "Rogers Infinite" is bolded. "Unlimited data for infinite possibilities."

593 Q. Okay. I'm still not sure I understand, other than the description of what you've said, what's actually false or misleading about the ad. Is it false or misleading that there are 10 gigabits of data available at max speed?

A. If that was the only representation as part of this advertisement, then, no. But when you read everything in context, all of the various other representations creates a certain general impression that the data is unlimited; however, we know that it's not, so --

594 Q. And the restriction on --

MR. HOOD: Just let her -- she was about to say "so."

BY MR. SMITH:

595 Q. Okay. No, no, I just want to make sure I'm clear: And the restriction on the data that you're referring to is the speed at which you receive the data?

A. It's the data cap and the speed

throttling.

596 Q. And the cap is the amount of the high-speed allotment, correct?

A. That's the data cap.

597 Q. We're agreed on that, correct?

A. Yes.

598 Q. Okay. And then after that, a consumer has access to no restriction on data other than the data is at a reduced speed of 512 kilobits per second, correct?

A. That is the limit, yes.

599 Q. Okay.

A. So the limit is the throttled data.

600 Q. What is it that you say a consumer would understand by the statement "10GB at max speed"?

A. Well, it would be framed with what else they read on the page, so as --

601 Q. Read the whole thing, then. What does a consumer understand --

MR. HOOD: You keep cutting her off. Let her finish her answer.

MR. SMITH: Okay. Well, but --

MR. HOOD: She was about to say the

rest of the answer, so.

BY MR. SMITH:

602 Q. Okay. Go ahead.

A. So we can see here, as I read out earlier:

"Rogers Infinite unlimited data plans for infinite possibilities. Say goodbye to overage charges."

So if the consumer does end up reading that following -- the following lines in the advertisement, we see the plan starting at $75 a month for unlimited data with 10GB at max speed.

603 Q. Okay.

A. In terms of what they understand, I can't tell you with certainty of exactly what consumers would understand from that; however, based on the other representations that would inform their understanding, they would have some sort of expectation of the data being without limits.

604 Q. So let's just -- okay. So based on other representations, you say they would have an impression of data without limits? That's your evidence?

A. Yes.

723 Q. Sorry, can I ask --
A. Mm-hm.
724 Q. -- can you please stick with my question. How are these tiles false and misleading? Not something else. These tiles.
MR. HOOD: She's giving you the answer.
MR. SMITH: No, no, she's not -- no --
MR. HOOD: She can't divorce it from what comes before --
MR. SMITH: Mr. Hood, she's not --
MR. HOOD: -- but she'll tell you --
MR. SMITH: She's --
MR. HOOD: -- what's also misleading about these plan tiles.
MR. SMITH: No, no --
MR. HOOD: But you're trying to get her to --
MR. SMITH: No, I'm --
MR. HOOD: -- divorce everything. You can't do it.
BY MR. SMITH:
725 Q. I want an answer to my question, which is what on the page there is false and misleading?
MR. HOOD: And she's going to answer

that, but she's saying, you can't say -- you can't answer that question without first understanding what comes before. But, yes, there are things on that page also that are misleading. So --

BY MR. SMITH:

726 Q. Tell me what --

MR. HOOD: -- Ms. Phillipowsky, go ahead.

BY MR. SMITH:

727 Q. -- on that page is false and misleading.

A. So taking this page in isolation, ignoring everything else and ignoring what's above, what's misleading about this web page and what the representations are, it says "unlimited data usage" on the page, and below, there is subsequently a limit on the data. And then further below, it also -- there, in smaller print, it says "reduced speeds beyond 10GB."

So there's representation about unlimited data usage; then, there's contradictory disclaimers below that as well as unclear disclaimers with the reduced speeds beyond 10GB. It's not -- it doesn't tell me what the reduced speeds are right here. We also see on the

right-hand side "no more data overages," so that would reinforce that it is unlimited data.

728 Q. Sorry, you just told me a minute ago there are no data overage charges under an Infinite plan.

A. I'm not disagreeing that there are no data over- -- no data overages --

729 Q. So that --

A. -- but --

730 Q. -- statement is correct?

A. It's correct, but it reinforces the fact that the general impression conveyed is that these unlimited data plans provide unlimited data.

731 Q. Ms. Phillipowsky, what is a consumer to understand about the difference between the plans?

A. So I don't necessarily agree that a consumer would go through a whole process of trying to spot the differences between all the plans, but if they do --

732 Q. Sorry, are you telling me that a consumer looking at the website to choose a plan would perceive all of these plans to be identical?

A. I think that consumers would

believe that they'll offer unlimited data usage.

733 Q. Uh-huh. And what about the amount of max speed data?

A. So I don't necessarily agree that consumers would necessarily go and notice that, and as I was explaining before, even if you do notice it, it's not entirely clear of what it -- what it's saying and what it means because there is "unlimited data usage" being advertised. And higher up on the page, which I know you would like me to not take into account, but it also says "unlimited data plans."

734 Q. Ms. Phillipowsky, let's just look at it. I take it you accept that there is a difference between having 10 gigabits of data at max speed and 20 gigabits of data at max speed?

A. I agree that there's a difference between 10 gigabytes and 20 gigabytes.

735 Q. And would you agree with me that a consumer who actually looked at this page would understand that the Infinite 10 plan offered fewer gigabits at max speed than the Infinite 20 plan?

A. Again, I can only rely on -- or I can reference materials that I've seen. And according to Rogers' own testing, consumers and

Rogers' Infinite consumers are not aware of these limits. So you're asking me about what they would see and what they would understand, but from what I've seen, it does not seem to be the case that they understand.

Moreover, I know that many of Rogers' Infinite customers were subscribed to the lowest tier of the plan, so it could -- I don't -- it would suggest to me that consumers --

736 Q. Well, how many customers went over their data allotment?

MR. HOOD: That's a different question entirely.

MR. SMITH: No, no, no. We'll take --

MR. HOOD: Can a consumer --

MR. SMITH: We'll take it in --

MR. HOOD: -- look at this --

MR. SMITH: We'll take it in two --

MR. HOOD: -- and not appreciate the difference?

MR. SMITH: How many --

MR. HOOD: She's just said, yes --

MR. SMITH: How many customers --

MR. HOOD: -- that can happen.

BY MR. SMITH:

TAB 6

File No. 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;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.

Respondent

MR. HOOD: Just give me a second here.
BY MR. SMITH:
1096 Q. And before we go to that, let me ask you a different question: Is it acceptable to market a plan as "unlimited data" if the speed of the data is fixed throughout?
MR. HOOD: Again, that's a hypothetical. We can only --
BY MR. SMITH:
1097 Q. You're not going to tell me the answer to that, either?
R/F MR. HOOD: No.
BY MR. SMITH:
1098 Q. Okay. Let's go to paragraph 36. And as I understand the Commissioner's position, Ms. Phillipowsky, the Commissioner's position is that data beyond the data bucket is unusable. Is that the Commissioner's position?
A. I believe what the pleadings say is that it's difficult or virtually impossible.
1099 Q. So at paragraph 36 --
MR. HOOD: It's qualified by many operations, not all of them.
BY MR. SMITH:
1100 Q. Okay. So some operations, the

BY MR. SMITH:

1107 Q. And at what speed does the Commissioner say there is not an impact on functionality?

MR. HOOD: We don't need to say that. We say that, at 512, there is an impact on functionality.

BY MR. SMITH:

1108 Q. I know. And I'm asking you a different question.

At what speed does the Commissioner say there is not an impact?

R/F MR. HOOD: It's not relevant.

BY MR. SMITH:

1109 Q. Can I ask you to turn to paragraph 45 of your pleading, please.

MR. HOOD: Yes, we have it.

BY MR. SMITH:

1110 Q. At paragraph 44, the Commissioner says [as read]:

"The unlimited data representations had and continue to have a material influence on consumers' decisions to purchase Rogers Infinite unlimited plans."

of -- it is relevant to the product itself.

1164 Q. So it does not matter whether Rogers throttled at 256, 512, or 4G; that is a material restriction as explained in this guidance?

R/F MR. HOOD: That's refused on the same grounds as before. We can't answer that question in the abstract. We have to understand what's -- and how the advertisement is being [inaudible].

BY MR. SMITH:

1165 Q. Okay. So just so that we're clear, if you're unable to answer the question, then industry, reading this, would not know what speed amounts to a material restriction?

MR. HOOD: No, I refused to answer the question, and if industry had any question about this, industry had a mechanism under the Act to come and ask for our opinion.

BY MR. SMITH:

1166 Q. So if industry doesn't ask the Bureau for its position as to the speed, would you agree with me that, looking at this document, industry would not know at what speed a restriction is material?

R/F MR. HOOD: That's refused.

BY MR. SMITH:

BY MR. SMITH:

1171 Q. So just give me the answer. I don't need the preamble.

A. All right. On page 17, well, you can see the diagram of -- I'm assuming that's a cheetah and a snail. Below that, it does talk about, in the context of the Comwave case, that:

"The Bureau concluded that the representations created the general impression that there were no caps on downloads when, in fact, the terms and conditions contained in disclaimers effectively limited Internet usage by significantly slowing downloaded speeds when consumers reached a certain amount of data per month."

So that would be the reference to "speed" here.

1172 Q. Okay. In the context of a -- is Comwave a wireless data case?

A. Comwave is a home Internet --

1173 Q. It's a home telephone, home Internet product, right?

A. Internet, yeah.

1174 Q. It's not a wireless data plan, is it?

A. It's a, I suppose, wireline.

1175 Q. And when the term "significantly" is used there, at what speed does throttling have a significant influence on the unlimited plan?

R/F MR. HOOD: It's refused.

BY MR. SMITH:

1176 Q. Okay. You referred to the Comwave case. Which representations made by Comwave are you referring to?

A. The one that I read here?

1177 Q. No, the ones actually made by Comwave.

A. There were some examples of representations earlier written in the Digest.

1178 Q. Does the Bureau have the representations that were made by Comwave?

A. I would assume so, but I --

1179 Q. I would like them.

U/A MR. HOOD: We'll take it under advisement.

BY MR. SMITH:

1180 Q. Let's see whether we need to pull up the document or not.

And so what it looks like for the benefit of the record is that there are two screens, one on the left, one on the right, both reflecting something that's called "Gem" at the top on both sides. So just...

A. I see those, yes.

1284 Q. Are you familiar with this document?

A. I am.

1285 Q. Okay. What is it?

A. So this is a screen-recording of two screen-recordings. So there was a screen-recording of this application, CBC Gem, through a browser mobile simulator. So it's a video recording comparing two recordings.

1286 Q. Right. When this was recorded, is it splicing together two separate recordings?

A. That's right.

1287 Q. I see, okay. So the recording on the left was taken separately from the recording on the right?

A. That's correct.

1288 Q. And we'll start with who spliced these two together?

A. I recorded this side by side.

1289 Q. Okay. So you record -- I get that. You recorded --

A. Mm-hm.

1290 Q. -- each side of this particular recording, correct?

A. No, from what I can recall, this is a livestream on CBC Gem. So I had -- unfortunately, I didn't take notes of this, but if I can recall correctly, I had another officer record on their end, I think, just so we could have a simultaneous recording of the same show being aired through the CBC Gem website.

1291 Q. Okay. So the two -- so the screen-recording --

A. Mm-hm.

1292 Q. -- that is reflected in this video is taken by you?

A. The overall screen-recording with the -- yes.

1293 Q. But there are two separate operators with respect to each video on the screen, on the two sides of the screen?

A. I think that -- that's right.

1294 Q. That's your best recollection?

A. Yes. I forget when this was

recorded, but it's been some time.

1295 Q. Okay. So, then, if we're looking at this screen, I just want to orient myself to what it is that's occurring here. So on the left-hand side of the screen is a rectangular image. This isn't a screen-recording on the left-hand side of a cell phone, is it?

A. No. This is a screen-recording of -- from a laptop or a computer on what I believe is the Google Chrome browser with the mobile simulation that is -- has been selected through Chrome.

1296 Q. When you say "mobile simulation," what do you mean?

A. So through the browser, you can access the DevTools or the inspection tools, and there's a toggle that you can click that will change the screen from what you're viewing on your browser, and then it changes to the aspect ratio of a phone.

1297 Q. So it changes the size of what you're viewing in the Chrome browser to reflect what it would look like on a phone?

A. That's right.

1298 Q. And so if we look at the very top

left-hand side of the screen, for example, it says "Dimensions, iPhone 12 Pro," then "390x844." That reflects the mobile simulator you're referring to, which makes it appear as though it looks like a -- it looks like it would appear on an iPhone 12 Pro, correct?

A. That's my understanding.

1299 Q. Same for the right-hand side: The mobile simulator has been used to simulate how this would appear on an iPhone XR, correct?

A. That's correct.

1300 Q. Does the mobile simulator affect the performance of the web page in Chrome?

A. I guess I'm wondering what you mean by "performance in Chrome." Are you talking about the throttling?

1301 Q. I'm not getting -- we'll get to the throttling in a minute, but just --

A. Okay.

1302 Q. -- looking at it, the mobile simulator you were referring to just changes the aspect ratio of the screen, correct?

A. Mm-hm. Right.

1303 Q. Are you aware of any other effect that it has?

A. I understand that the aspect on the web page will conform to what would be seen -- would likely be seen on that version of the phone.

So, for instance, if you go to Google and you look on your laptop, it'll be zoomed out because your screen is bigger, and from what I understand, it will adjust based on the aspect ratio that we just discussed. So it's a bit more zoomed in and mobile friendly.

1304 Q. Right. The intention being that from the Google Chrome developer tool that you referred to, it's simulating what the same screen would look like on a phone as opposed to on a web page, correct?

A. Yes, that's my understanding.

1305 Q. But it doesn't necessarily simulate how the website performs on the phone, fair?

A. I think it simulates it, but it is not a phone.

1306 Q. And why do you say you think it simulates it?

A. It's my understanding that this is a tool that developers can use to see and estimate what it would look like on a phone.

1307 Q. Sure. How it would look, correct?
A. Mm-hm.
1308 Q. Yes?
A. Yes.
1309 Q. Did you compare or did you separately access the CBC Gem player that we see on the screen here using a mobile phone?
A. I can't recall.
1310 Q. We don't see any documents reflecting any screen-recordings taken from a mobile phone. You don't recall there being any such screen-recordings taken from a mobile phone, do you?
A. I don't believe the team had made any recordings on a mobile phone.
1311 Q. Nothing to compare how CBC Gem performed in Google Chrome against how CBC Gem performed on an actual mobile phone, correct?
A. Subject to the qualification that we had given earlier about potential litigation-privileged information, there's nothing -- no recordings.
MR. HOOD: I'm sorry, just to be clear, you're talking about, when they did this, did an officer have a cell phone where an officer was

recording the video? Is that what you're getting at?

BY MR. VERMEERSCH:

1312 Q. Well, that's a separate question, but I am curious to know just -- you did these tests over a period of time in 2022, correct?

A. That sounds like the right date. I would need to verify the document just to be sure.

1313 Q. The documents that we have, the 14 that we'll talk about, I think they're dated between February 28th, 2022, and March 2nd, 2022. Does that sound familiar?

A. Sounds familiar.

1314 Q. And in that period of time or around that period of time, did you do any confirmation testing or testing using a mobile phone for which there was screen-recording?

A. I don't believe we did.

1315 Q. And do you recall doing any testing at all using a mobile phone?

A. I don't believe so.

1316 Q. And do you recall any testing at any point up to today using a mobile phone?

MR. HOOD: So aside from the

qualification with respect to something that might be covered by privilege with respect to --

MR. VERMEERSCH: Yeah, no, I --

MR. HOOD: -- anything an officer did, go ahead. You can answer.

MR. VERMEERSCH: We don't want anything that's privileged, but...

MR. HOOD: Go ahead.

THE WITNESS: No.

BY MR. VERMEERSCH:

1317 Q. Okay. So this is running on Google Chrome on a laptop, you said.

A. Mm-hm.

1318 Q. These are Windows devices?

A. Yes.

1319 Q. And they're connected to the Internet, correct?

A. Yes.

1320 Q. How are they connected to the Internet?

A. So the particular laptops that we use at work, it's connected through a VPN.

1321 Q. Okay. So it connects to the Internet through a VPN, and then is the machine, is the laptop itself connected to the physical

318

Internet? Or to the Internet, I suppose, not the "physical" Internet.

A. Are you talking about, like, an ethernet cable versus...?

1322 Q. Yeah, a cable or a wireless device.

A. So given this was in 2022, I believe we were working from home at that point, so this would be through WiFi. Not necessarily, like, a wire connection.

1323 Q. Do you know it was wireless?

A. Yes.

1324 Q. Okay. Your colleague who took the screen-recording on the left -- or, sorry, that was operating the device on the left-hand side, was that also connected wirelessly?

A. I can't recall who took which recording, so I can't necessarily confirm which side. I can only talk about what I know my --

1325 Q. No, I understand.

A. -- setup was.

1326 Q. Do you recall who [was] the colleague that assisted you here?

A. Yes, it would have been Valérie Prévost-Tanguay.

1327 Q. And is she still at the Bureau?
A. She is.
1328 Q. Okay. I'd like you to ask her whether her device was connected to the Internet wirelessly or through a wired connection.
U/T MR. HOOD: Yes, we'll give that undertaking.
BY MR. VERMEERSCH:
1329 Q. Okay. And who's your wire -- who's your Internet provider?
A. I think it's FibreStream.
1330 Q. Okay. And I'd also like you to ask your colleague who her wireline or Internet provider is.
U/T MR. HOOD: Yeah, we'll give that undertaking.
MR. VERMEERSCH: Okay.
THE REPORTER: Can both counsel please keep your voices up?
MR. HOOD: Sorry, yes, we'll give that undertaking. It's a small room, if I raise my voice, people...
THE REPORTER: I'm next to a horrible fan.
MR. HOOD: I'm sorry.

MR. VERMEERSCH: Understood.

Ms. MacDonald, we're going to roll the video back, and I want to start playing it and stop at the 2-second mark.

MR. HOOD: Looks like we're on the screen. I can't -- okay, yeah. It looks like we're on the 2-second mark, sorry.

Can you see it? It says "2 seconds."

THE WITNESS: I see -- okay, yeah.

MR. VERMEERSCH: Hold on.

THE WITNESS: Oh, no. It's black again.

MR. HOOD: If you restart it, it'll work.

BY MR. VERMEERSCH:

1331 Q. We're going to change devices here.

A. Okay.

1332 Q. So this is still on 004.

MR. HOOD: Wow, that looks a lot better. Sorry. Because it didn't even look like there was -- anyways, I apologize.

BY MR. VERMEERSCH:

1333 Q. No, no. That's why we do this. So, sorry, just to orient it again,

left-hand side, right-hand side, both reflecting the same starting image at "00." Do you see that?

A. I see that.

1334 Q. Okay, great. So I'm going to start the recording. I'm at 2 seconds, and a dialogue box has opened on the right-hand side.

A. Mm-hm.

1335 Q. Can you tell me what that is?

A. Yes, so that is part of the inspection tool that I was mentioning earlier through Chrome.

1336 Q. And what's the inspection tool?

A. So it's the inspection/DevTool where you can access various options with respect to the Chrome application. So you can inspect various places on a web page, including having this toggle that converts it to a mobile simulation.

1337 Q. When you say "mobile simulation," it changes the aspect ratio?

A. Yes.

1338 Q. And so you opened this dialogue box, not your colleague; is that correct?

A. So hopefully I was clearer earlier, but these are two recordings, so I was simply just trying to overlay the videos just to

show it side by side. So the way that the video shows that -- that dialogue box is actually always present underneath the overlap.

1339 Q. I see. So the dialogue box is always open underneath the two recordings there, correct?

A. Exactly, yeah.

1340 Q. Okay. All right. So then we'll restart the -- or we'll continue with the recording. So we're about at 11 seconds, and you see how the images on both the right-hand and left-hand side are now black; the images that were previously apparent have now disappeared. What happened here?

A. Do you mind going back just two seconds just so I can...?

So my understanding is that we would have clicked on the "Play" button.

1341 Q. Okay. And you say your understanding. Do you have a recollection of it, or...?

A. I generally have an idea of what we did. We went onto the website, and we would have clicked "Play."

1342 Q. You didn't reload the pages at

this point?

A. I don't believe we did.

1343 Q. All right. And we've now hit "Play" again. And so an image starts -- I'm stopping at 20 seconds now, and there are images in the top box on the left-hand and right-hand [sides]. They're different images.

A. Mm-hm.

1344 Q. But it appears that they're trying to -- or they're accessing the same video. Is that the idea behind the test?

A. That's right. It was just seeing the video simultaneously on the different devices.

1345 Q. Do you know what resolution the video is at in the test?

A. When you're talking about the video, are you talking about the episode of "Murdoch Mysteries" or...?

1346 Q. Yeah, if that's what it is.

A. It is.

1347 Q. Are they -- let's back up a second. Are the resolutions on the left-hand and right-hand side the same?

A. It was whatever was automatically preset.

1348 Q. Preset by what?

A. The website...? I don't know entirely. It's just whatever -- we arrived -- whatever was present when -- on the website, we just left it as-is in that scenario.

1349 Q. Why?

A. I'm not sure. Just...

1350 Q. But just the idea being, however you access it, using your mobile device was what you wanted to test here, right?

A. We wanted to test what it would look like on a mobile device.

1351 Q. Right. But there's another element to the test, right? On the left-hand side, there's a little --

A. Mm-hm.

1352 Q. -- dialogue box up here or a little set of words and a down arrow that says "No Throttling." Do you see that?

A. I do.

1353 Q. Right. And then on the right-hand side, it says "Custom" with a down arrow, correct?

A. That's right.

1354 Q. So the idea here is, on the right-hand side, the speed is restricted to

512 kilobytes; is that correct?

A. Kilobits --

1355 Q. Kilobits.

A. -- per second.

1356 Q. Sure.

MR. HOOD: It matters.

BY MR. VERMEERSCH:

1357 Q. And on the left-hand side, this is "No Throttling," so this is just whatever the Internet connection can provide, correct?

A. Whatever Internet connection we were able to access through the VPN through the wireless network on that particular day and time.

1358 Q. Right, okay. You'll have to help me with the "Murdoch" point. Is it a video that you access, or is it livestream?

A. This was a livestream.

1359 Q. So you were both accessing the CBC Gem livestream at the same time?

A. Yes.

1360 Q. Okay. All right. Okay. So we will continue, then.

MR. HOOD: It's too bad we don't have the audio.

THE WITNESS: I think there is audio.

It's not good because it's overlapping, but...

Yeah. Bad timing to record. Sorry, guys.

BY MR. VERMEERSCH:

1361 Q. Okay. So we're now at 2:35, 2 minutes and 35 seconds, on the 3-minute-and-27-second video. And there's now address bars that have opened up. So what's happening here?

A. So, now, we are going to the speedtest.net website.

1362 Q. And why did you choose to stop it at this point?

A. The program was over. Um...

1363 Q. It may have been at a commercial break on the left-hand side --

A. Right.

1364 Q. -- is what you're seeing?

A. Yeah, that's it. What does it say?

"Stay with us. We'll be back after the commercial break."

1365 Q. Okay. So you hit a commercial break on the left-hand side.

A. Mm-hm.

1366 Q. And then I just want to roll through to 2:35 again.

A. Sure.

1367 Q. Okay. So you've opened up the address bars. Okay. And you said to input the Speedtest address?

A. That's it.

1368 Q. Okay.

A. Speedtest.net.

1369 Q. And what is that?

A. It's a website where you can test speed on your device.

1370 Q. Okay. And so, then, if we go forward. So just pausing here at 2:55. So at 2:55, we see, on the left-hand side, the Speedtest logo at the top. I'm interested in the bottom quarter or less of the screen. It says "Bell Mobility" and a little globe sign to the left of it.

A. I see that.

1371 Q. What is that?

A. I can't say for certain, but my understanding would be that it would be the provider that -- the Internet provider that was accessing -- that -- I'm assuming it was Valérie

who's accessing that website.

1372 Q. Okay. And then below that, there's a little -- it kind of looks like a person icon. Do you see that?

A. I see that.

1373 Q. And it says "SSC299Z," and then it gives a ten-digit number with three periods in it. Do you see that?

A. I see that.

1374 Q. And the ten-digit number is 192.197.178.2. Is that an IP address?

A. The formation of it seems to be consistent with an IP address, but I'm not sure. Oh, you know what? "SCC" [sic].

1375 Q. It might be Shared Services Canada.

A. I think that that was my guess as well.

1376 Q. And that's probably the location of where the VPN is, correct?

A. I think that that's correct.

MR. VERMEERSCH: Okay. All right. Let's just scroll forward a little bit here.

MR. HOOD: Just go off.

(OFF THE RECORD)

BY MR. VERMEERSCH:

1377 Q. Okay. So we're now looking on the left-hand side. It says Speedtest, and the bar is filled at 131.89. And so what is that number telling you?

A. So it's running through the speed test now. I don't -- I think that once it's loaded for a while, there'll be, like, a final number that appears.

1378 Q. Okay. I'll just scroll forward, then. All right. So we're at 3:13, and it says at the top under "DOWNLOAD Mbps 145.22." Do you see that?

A. I see that.

1379 Q. And "Ping 34 ms"?

A. Yeah.

1380 Q. So what does that tell me?

A. So my understanding is that the speed test is indicating that the download speed is 145.22 mbps, and the Ping is 34 ms.

1381 Q. So that tells me -- well, what does that tell me in terms of the video that we just looked at?

A. That the video would be operating on 145, approximately -- obviously, speed

fluctuates, but mbps at that time.

1382 Q. The speed test is taken after the video, correct?

A. Right.

1383 Q. And so the speed test isn't occurring while the video is occurring?

A. No.

1384 Q. And the speed test is through Ookla, correct?

A. That's correct.

1385 Q. This is a free service on the Internet?

A. That's right.

1386 Q. The Commissioner didn't have some other speed-test parameter or tool to evaluate the speed at which the video was operating, correct?

A. We only used this.

1387 Q. "This" being --

A. The Speedtest.

1388 Q. -- Speedtest? Okay.

And then on the right-hand side. So the right-hand side, the Speedtest is run, and now it says "DOWNLOAD Mbps 0.51," "Ping 138 ms." Do you see that?

A. Yes. I see that.

1389 Q. Okay. And this is to reflect that the speed that the browser is operating at after the video ends is 0.51 mbps, correct?

A. Yes. Or 510, 12, whatever, kilobits per second.

1390 Q. And so what does the Commissioner say the result of this test is?

A. This was simply to illustrate what the CBC Gem episode would look like having the throttle added at 512 kilobits per second versus unconstrained on the corporate VPN.

1391 Q. Okay. All right. We'll go to another video. All right. I'm showing you another video, another file, RBMK00107000000052.

A. Mm-hm.

1392 Q. Do you see this?

A. I do see it, yes.

1393 Q. And I think what we'll get into is this is another comparison video.

A. Okay.

1394 Q. It looks familiar to you?

A. It does.

1395 Q. We can run it for a minute just to show you.

A. Sure.

is the basis of the first sentence of paragraph 36. Sorry --

MR. HOOD: All right. Certainly --

MR. VERMEERSCH: -- known to --

MR. HOOD: -- are facts that are known. Thank you. Yes.

BY MR. VERMEERSCH:

1487 Q. And you agree with that, that it's part of -- the testing we looked at and that is contained in the Commissioner's productions are facts known to the Commissioner in relation to paragraph 36, correct?

A. That's correct.

1488 Q. Right. We watched the video, the 1-minute video together, correct?

A. We did.

1489 Q. It was not "virtually impossible" to see it, correct?

A. It was difficult.

1490 Q. Why do you say it was difficult?

A. It was lagging. It took a lot of time. It was painful. It was -- well, I could use all the other words that we've seen before, but it took time. It took three times the amount of time, approximately, to watch a 1-minute video.

1491 Q. Okay. The first part of the answer you gave, Ms. Phillipowsky, were qualitative assessments, correct? "Painful" -- sorry.

"It was lagging. It was painful. It took a lot of time."

There's not a point at which you have determined something is difficult to watch. It takes a certain amount of time to load; you haven't concluded it is therefore difficult to watch, correct?

A. Sorry, one more time?

1492 Q. Yeah. We looked at a 1-minute video on YouTube, correct?

A. Yes.

1493 Q. It took 3 minutes and 28 seconds, probably a little less, given the way the video was recorded, to download and play --

A. Yes.

1494 Q. -- correct?

And that's assuming you start the video and watch it stream without letting it load at all, correct?

A. Yes, that's when you play the video, right away.

1495 Q. Right. Immediate streaming of the

video, correct?

A. Yes.

1496 Q. You have not determined a particular amount of time for a 1-minute video to load or stream or play constitutes that video being difficult to watch, have you?

A. I think that any type of buffering is difficult to watch.

1497 Q. Any buffering at all?

A. In my personal experience, I find that to be difficult.

1498 Q. That's what I'm trying to understand. Are you saying that, based on your personal experience, the video is difficult to load?

A. Yes, if it's buffering.

1499 Q. And does the Commissioner have any facts about consumers' perception of what is difficult to...

Does the Commissioner have any facts about what the ordinary consumer believes is -- believes an application becomes difficult based on an amount of time it takes to buffer that application?

MR. HOOD: So I don't think that's an

ordinary-consumer question. Ms. Phillipowsky has already told you that we have, obviously, the videos, which they are what they are; we can -- but then there's also the reference in the Rogers documents to how consumers experience throttling.

BY MR. VERMEERSCH:

1500 Q. Right. But what I'm trying to understand is, does the Commissioner have any facts about how the ordinary consumer perceives difficult usage of an application?

MR. HOOD: So the ordinary-consumer test is applied to looking at the representation.

What you're talking about is a different issue as to how consumers experience the actual throttled speeds.

MR. VERMEERSCH: No, what I'm talking about is a qualitative assessment in paragraph 36 --

MR. HOOD: I understand.

MR. VERMEERSCH: -- pleaded by the Commissioner that it becomes "difficult or virtually impossible," and Ms. Phillipowsky has told me that she has a view of what is difficult.

MR. HOOD: Yes.

BY MR. VERMEERSCH:

1501 Q. Any amount of buffering.

What I'm trying to understand is that based on -- is the pleading at all rooted in any understanding of what the ordinary consumer believes is difficult or virtually impossible --

MR. HOOD: And that's the --

BY MR. VERMEERSCH:

1502 Q. -- with respect to usage?

MR. HOOD: That's the issue. You're now converting what is a question with respect to what a consumer is experiencing versus the ordinary-consumer test, which is used to assess the representations at issue. The throttling is not -- like, what the consumer experience is [is] not the representation at issue.

MR. VERMEERSCH: Okay. Let's try any consumer. So --

MR. HOOD: So -- but you can absolutely ask for facts.

BY MR. SMITH:

1503 Q. Let's just take it out of the consumer.

What is the measurement of difficulty or virtual impossibility the Commissioner says applies in paragraph 36?

U/A MR. HOOD: We're going to take that under advisement.

BY MR. SMITH:

1504 Q. Okay. And what are the --

MR. HOOD: We can certainly -- sorry, go ahead.

BY MR. SMITH:

1505 Q. And what are the facts that underpin that assessment? And what is the amount of time for each application that is -- each different type of application at which it becomes difficult or virtually impossible?

So I would like to know, for a social media site, what is the amount of time? For a website, what is the amount of time? For a range of different websites, what is the amount of time? For streaming? For Cloud gaming? And any other application which the Commissioner alleges there is a difference in time between the max speed and the throttled speed.

U/A MR. HOOD: Okay. I've got it. We'll take it under advisement.

MR. VERMEERSCH: Okay. Do you have a binder over there?

MR. HOOD: Oh, sorry, I put it away

because the laptop was...

MR. VERMEERSCH: Okay. Let's go to -- we'll go to --

MR. HOOD: Sorry, we've been at it for about an hour, 15 minutes. If we're going on to another topic, maybe we could take, like, a ten-minute break and then come back after --

MR. VERMEERSCH: Sure, that's fine. Yeah.

(RECESSED AT 2:47 P.M.)

(RESUMING AT 3:05 P.M.)

BY MR. VERMEERSCH:

1506 Q. Ms. Phillipowsky, we're going to pull up RBMK00107_16, and my colleague will show this to you. This is a comparison.

MR. HOOD: So I'll just put it -- is this an important piece of equipment?

MR. VERMEERSCH: Not -- for the reporter, so.

MR. HOOD: Okay.

BY MR. SMITH:

1507 Q. So my colleague is showing you this video, and this is a comparison on the left and the right-hand side, one without throttling, one with 512-kilobits-per-second speed; is that

TAB 7

File No. 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;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.

Respondent

documents that formed part of the package of material that the Bureau sent over to us on behalf of Rogers in advance of the examination?

A. I looked at the list of documents, yes.

4 Q. Right. And I take it those are documents that you were certainly familiar with as the team lead on the investigation?

A. Yes.

5 Q. And you attended Mr. Hartling's examination?

A. I did.

6 Q. I'm going to show you a document you will be familiar with. This is a document that was included as Tab 100 in Exhibit 1 to Mr. Hartling's examination.

MR. HOOD: And so just to interject, as we said, we're not sure where this came from, and we actually sent -- at your request, we sent over a revised binder that has this removed and also substituted in the document you identified had privileged information into the binder.

BY MR. SMITH:

7 Q. That's fine, Mr. Hood.

My question for you, Ms. Phillipowsky,

this appears to be a document from Shaw. Do you see that?

A. I see that.

Q. And in the upper right-hand corner, it bears the identification SJRB-CCB00095158. Do you see that?

A. I see that.

Q. And it appears to be an email exchange with individuals at Shaw relating to Freedom Mobile and unlimited data plans. Do you see that?

A. I see that.

Q. The document appears to be dated March 1st, 2017. Do you see the date of the email?

A. I see that at the top.

Q. And that date is some six years before the Rogers-Shaw transaction closed?

MR. HOOD: Sorry, did...

BY MR. SMITH:

Q. Well, you know the Rogers-Shaw transaction closed in 2023, correct?

A. Yes.

Q. It closed on April 3rd, 2023, or thereabouts?

A. Sounds right.

Q. And so this document is some six years before that?
A. Yes.
Q. It's not a Rogers production, is it?
A. No.
Q. And it's not a Rogers response to any supplementary information request or Section 11 order obtained by the Bureau, is it?
A. I don't believe it is.
Q. So, Ms. Phillipowsky, how did you get this document as part of your investigation?
MR. HOOD: Sorry, why is this relevant?
MR. SMITH: Well, this is a document that has been produced in this litigation as part of Mr. Hartling's examination to us, and I would like to know where the Commissioner got this document from.
MR. HOOD: Sorry, so...
MR. SMITH: Mr. Hood, you sent us this document as --
MR. HOOD: I understand that.
MR. SMITH: -- part of your examination of Mr. Hartling. I am entitled to examine on where the document came. Ms. --

MR. HOOD: And then we removed it.

MR. SMITH: It doesn't matter whether you removed it. Ms. Phillipowsky has already given me the evidence that these documents formed part of her investigation. She was involved in the -- yeah, she was involved in the preparation of the material for Mr. Hartling's examination. I am entitled to know the providence of this document.

MR. HOOD: So your question is --

BY MR. SMITH:

18 Q. My question is --

MR. HOOD: -- did we answer, like, the SIR productions of --

MR. SMITH: I want to --

MR. HOOD: -- Shaw?

BY MR. SMITH:

19 Q. Yes. How did the Commissioner get this document?

MR. HOOD: Go ahead.

THE WITNESS: Okay. So this document appears to be from the Shaw SIR production.

BY MR. SMITH:

20 Q. And how do you know that?

A. From the code.

MR. SMITH: Okay. I'd like to mark the

document as -- I guess we're at the first exhibit to this examination.

MR. HOOD: Sure. Sorry, the only reason why I'm hesitating, I -- it's up to you. I want to mark your exhibits. We've had a binder of documents that we're flipping through. Some don't have page numbers on them, like, identifying page numbers on them, so I thought we might want to mark that as an exhibit.

MR. SMITH: I don't think we need to. I try to give the production number for every one.

MR. HOOD: So there are production numbers that Mr. Vermeersch referenced yesterday that, like, we have pages with the same production number with no page numbers on them. And that email chain we -- we can have this off the record. We don't need to have this on the record.

MR. SMITH: So let's have a discussion about it off the record.

(OFF THE RECORD)

BY MR. SMITH:

Q. Which part of the document ID code in the upper right-hand corner indicates to you that it was part of the Shaw SIR productions?

A. I recognize the "SJRB" code to be

consistent with the Shaw SIR production code.

Q. Is that the only thing that indicates to you that it's a Shaw SIR production?

A. From the code?

Q. From anything.

A. Well, I see the email exchange. There's -- at freedommobile.ca.

Q. Yes.

A. So...

Q. My question -- and maybe I'll help you a bit more directly: You're aware that Shaw produced documents in response to the SIR request?

A. Mm-hm.

Q. And you're aware that Shaw produced documents in the litigation?

MR. HOOD: I understand. I'm sorry.

BY MR. SMITH:

Q. You're aware of that, correct?

A. Oh. Yes.

Q. And my question is, how do you know that this document came from the SIR request as opposed to Shaw's productions?

A. I see what you're saying. Now that you've raised that, I'm not entirely sure --

MR. HOOD: So we could take it away --

THE WITNESS: I would need to verify.

MR. HOOD: -- and confirm that this came from that, that that doc ID code equals a Rogers SUR production code.

BY MR. SMITH:

29 Q. Well, what I would like to know, just so that it's all on the record, is where the document came from, how it was produced by Shaw, and how you know how it was produced.

MR. HOOD: We'll take that under advisement -- or, sorry --

MR. SMITH: I --

U/T MR. HOOD: I'll give that undertaking.

BY MR. SMITH:

30 Q. I take it, Ms. Phillipowsky, that --

MR. HOOD: I don't think it was marked as an exhibit.

MR. SMITH: I'd like to mark it as Exhibit 1, then. So just for the record, this is an email chain between Karen Harbin and Mathew Flanigan and others at Freedom Mobile, dated March 1, 2017.

EXHIBIT NO. 1: Email Chain Between Karen Harbin and Mathew Flanigan and

Others at Freedom Mobile
Dated March 1, 2017.
BY MR. SMITH:

31 Q. Did you review, for the purposes of your investigation, documents from Shaw?

A. We reviewed the documents following the motion that we had recently.

32 Q. No. I mean, in advance of the motion that was heard in the context of this proceeding. As part of your investigation, at any time between September 2021 and the date the litigation was commenced on about December 22 or 23, 2024, did you review Shaw documents?

A. We had access to the records as part of the merger file. In terms of a review, we did not do a formal review of the records, but we did have access to them.

33 Q. Right. But whether there was a formal review or not, I take it somebody on your team did look at the documents as part of this investigation?

A. Again, we did have access to them. I can't confirm whether these documents in particular were reviewed with a view to inform this investigation.

436

MR. HOOD: And I want to be -- you guys are throwing the term "investigation" back and forth. I think you asked Ms. Phillipowsky questions about the terminology. Are we talking about the matter as it was talked about yesterday?

MR. SMITH: Well, let's -- let me just --

MR. HOOD: Because there was the preliminary assessment.

BY MR. SMITH:

34 Q. I'll just put this on the record. As I understand it, to use your terminology, there was a preliminary assessment that took place in or about 2020, correct?

A. That's correct.

35 Q. You began looking into Rogers' "unlimited" representations and formed a team in about September 2021?

A. Yes.

36 Q. And you were directed to do so at that time?

A. To look at all the various telecommunication companies making those representations.

37 Q. And in March of 2022, you opened a

the second page of the tab, which is at paragraph 7 of the affidavit at the bottom, you say [as read]:

"In September 2021, the team began reviewing representations from telecommunication providers in the wireless market in order to assess whether wireless products were being marketed in Canada as 'unlimited' when, in fact, usage was being restricted, limited, or qualified in some way."

Do you see that?

A. I see that.

42 Q. And that is the word you say you were directed to undertake in September?

A. Yes, I was asked to begin reviewing these representations.

43 Q. And just remind me, who was it who asked you to do that?

A. I was assigned by my manager, Julie Tremblay.

44 Q. And what is described there, the team began reviewing representations from telecommunications providers in the wireless market, that work that you were asked to do is the

same work that the Bureau did as part of its preliminary assessment, correct?

A. The same work? I mean, it's -- it was a different team and --

45 Q. But the subject is the same?

A. Yeah, the topic of unlimited data claims.

46 Q. Right. And reviewing the representations made by various telecommunications providers?

A. Yes.

47 Q. Okay. And then you go on to say [as read]:

"In March 2022, an investigation into Rogers' unlimited" --

MR. HOOD: Sorry, which paragraph are we in?

MR. SMITH: No, it's the very next sentence.

MR. HOOD: Sorry.

BY MR. SMITH:

48 Q. [As read]:

"March 2022, an investigation into Rogers' 'unlimited wireless'

representations was commenced as a result of this review."

Do you see that?

A. I see that.

49 Q. Okay. What is the difference between the work you say you were doing in September 2021 and an investigation in March of 2022?

A. So in September of 2021, it was an overview of the telecommunications market, and it was more of, like, a project reviewing all of the various representations.

In March of 2022, that is when we had identified Rogers' unlimited wireless representations as being the subject of an investigation, so...

50 Q. Okay. Would you agree with me that at or about this time, through the period September 2021 to March 2022, all of the major telecommunication providers were making representations about offering an unlimited data wireless plan?

A. There were similar representations about unlimited endless data.

51 Q. And just like Rogers, those

"If you want to have relevant sources of information and documents that we may have collected relevant to this application between those dates..."

You can answer that question.

BY MR. SMITH:

72 Q. So what is it that you had or did that's responsive to that question?

A. Okay.

MR. HOOD: So just for example, like, the capture of this --

THE WITNESS: Yeah.

BY MR. SMITH:

73 Q. So I'll just start.

You obviously captured certain representations that were in the marketplace?

A. Correct.

74 Q. And you did the testing work that you discussed with Mr. Vermeersch yesterday?

A. Yes.

75 Q. Anything else?

A. The collection of...? I mean, we had access to the Rogers SIR documents.

76 Q. Okay. And what documents -- did

you review the Rogers SIR documents?

A. Yes.

77 Q. And which documents did you review?

R/F MR. HOOD: It's refused. If you have a question about documents that may have sources of information that we're aware of relevant to specific allegations, we can answer that pursuant to VAA. We're not going to give you everything we looked at pursuant to the investigation.

BY MR. SMITH:

78 Q. Well, what I would like to know is -- okay, let's ask the question this way: You were not on the Rogers-Shaw team, were you?

A. I was not.

79 Q. Who was on the Rogers-Shaw team?

R/F MR. HOOD: It's refused, but I'm pretty sure you know that from conducting your discovery of Rogers and Shaw, Mr. Smith. It's not relevant here.

MR. SMITH: I couldn't possibly look at that. That's covered by the deemed undertaking rule.

MR. HOOD: It's Rogers' own evidence --

BY MR. SMITH:

80 Q. Who --
MR. HOOD: -- but, anyways.
BY MR. SMITH:
81 Q. Who --
MR. HOOD: I'm pretty sure it was introduced at the Tribunal, which [would have been] (ph) the deemed undertaking --
BY MR. SMITH:
82 Q. Who provided you --
MR. HOOD: --- rule does apply.
BY MR. SMITH:
83 Q. -- with access to the documents produced by the parties in the Rogers-Shaw litigation?
R/F MR. HOOD: It's refused.
BY MR. SMITH:
84 Q. Okay. What were the significant sources of information in the Rogers-Shaw productions that you were given access to?
MR. HOOD: Sorry, it still sounds like -- let's see...
BY MR. SMITH:
85 Q. I'm not asking, Mr. Hood -- just to be clear, I'm not trying to get an itemized list of every single document.

So you can take it from my question, Ms. Phillipowsky, that my questions are directed at the allegations in this proceeding.

So what I want to know is the significant sources of information from the Rogers-Shaw case that you had that bear on the allegations in this proceeding.

MR. HOOD: So I think that that's still too broad a question because she had access to all of the Rogers and Shaw documents.

MR. SMITH: I --

MR. HOOD: Clearly, she's aware of certain documents, and you might have questions, perfectly relevant questions with respect to specific allegations. Like, you can ask about that; for example, the testing. And then we can say, here are the Rogers documents that are sources of information we know are relevant to this allegation.

BY MR. SMITH:

86 Q. Okay. Let's see if we can go at it a different way.

As you were conducting your investigation, you looked at -- not just had access to. You looked at certain documents that came from

the Rogers-Shaw productions, correct?

R/F MR. HOOD: It's refused.

BY MR. SMITH:

87 Q. Okay. You --

MR. HOOD: The conduct of the investigation is not at issue.

MR. SMITH: That's -- I am --

MR. HOOD: If you want to understand --

MR. SMITH: I am just --

MR. HOOD: -- what we have in the Rogers and Shaw documents that we think is potentially relevant sources of information in the context of specific questions, we'll give you that information.

BY MR. SMITH:

88 Q. Okay. In relation to each of the allegations set out in the notice of allegation -- Mr. --

MR. HOOD: Notice of Application.

MR. SMITH: Notice of Application.

Mr. Hood, you know what I'm trying to get at. You're --

MR. HOOD: Yeah, and I'm not going to give you a blanket, like, here is a -- like, here are the -- like, you've --

listed there as an email dated April 7th, 2022. Do you see that? It's highlighted on the screen.

A. I see that.

132 Q. And in Column C, it says:

"Cosmos: Protected B solicitor-client privilege."

What is "Cosmos"?

A. That is the project name that -- for the September 2021 project.

133 Q. And the parties to the email are Ms. Tremblay, Mr. Ross, and yourself. Do you see that?

A. I see that.

134 Q. Is Ms. Trembley a lawyer?

A. No.

135 Q. Is Mr. Ross a lawyer?

A. Non-practicing. No.

136 Q. Okay. So he's not practicing. And you are not a lawyer?

A. I'm not.

137 Q. The document is marked "solicitor-client privilege." Do you see that?

A. I see that.

138 Q. What is the subject or what is the basis of the privilege claim if none --

MR. HOOD: So --

BY MR. SMITH:

139 Q. -- of the parties are lawyers?

MR. HOOD: I know that document. I've read that document. It contains solicitor-client legal advice. If you want us -- like, I can't give you any more information other than that.

But, like, Rogers claims documents where legal counsel is not on it [as] (ph) it contains legal advice. That document contains legal advice from counsel.

BY MR. SMITH:

140 Q. So if I understand what your counsel is saying, Ms. Phillipowsky, although the document is not being exchanged between any party who is a practicing lawyer, it relays legal advice from somebody who is a lawyer?

A. That's right.

141 Q. Okay. And who --

U/A MR. HOOD: And I apologize. I gave evidence. I want to be careful. Can I take it under advisement? Because I think I know what document that is, but if -- I understand why you're asking the question. I'm prepared to go and take a look at the document and confirm that that document

contains legal advice because I might be mistaken with respect to that document.

BY MR. SMITH:

142 Q. Sure. That is appreciated. Thank you.

And was it you, Ms. Phillipowsky, who was seeking legal advice?

R/F MR. HOOD: It's refused.

BY MR. SMITH:

143 Q. And why were you seeking legal advice at this time?

R/F MR. HOOD: It's refused.

BY MR. SMITH:

144 Q. Okay. Can we go -- and, sorry, I should say, to the extent the document contains information that is not privileged, I would like a redacted copy of the document.

U/A MR. HOOD: We'll take that under advisement.

BY MR. SMITH:

145 Q. Ms. MacDonald, can I go to the next -- Ms. MacDonald, can I go to the next document in the Schedule B that we discussed, which I think is Item 1344.

So this is an email dated October 13,

speed. That's not included here.

Also, it seem -- the description seems to oversell what can be done at 256 kilobits per second. It says [as read]:

"Beyond this, customers can use unlimited data at reduced speeds, which still allows simple browsing, engaging in social media, streaming video, and sending email and text messages."

So from reading that, the consumer wouldn't necessarily know or the reader wouldn't necessarily know that it -- it certainly impacts the experience to do most of those actions.

176 Q. And so if Rogers were to have made representations or advertised in a manner consistent with this document, based on what you just told me, you would say that those representations are false and misleading?

A. Yes, because it's promising unlimited data and then contradicting that statement by adding additional limitations through a data cap followed by throttling.

177 Q. Can I ask you to turn to Tab 7 of the book. So this is document RFLB00050, many

File No. 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;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.

Respondent

how the process works, go ahead.

BY MR. SMITH:

199 Q. I take it I'm right: There are preliminary assessments that take place from time to time, and the Bureau and the officers are tasked with looking into matters which may amount to reviewable conduct?

A. Yes, we have preliminary assessments to establish whether there's a recommendation to form an investigative team.

200 Q. Right. And there's either a recommendation to form an investigative team, or there is, alternatively, a recommendation that the preliminary assessment be wrapped up and no team be initiated, correct?

A. Yes.

201 Q. And in this case, the preliminary assessment wrapped up in 2020, correct?

A. The preliminary assessment, yes, there was -- the assessment was made in 2020.

202 Q. And it wrapped up in 2020?

A. There was a recommendation in 2020. I don't know if...

203 Q. And that recommendation was to close the preliminary assessment?

consumer or class of consumers who were harmed by the representations at issue in this proceeding?

MR. HOOD: So the question started off with, 'Is there a benefit to Rogers'? And so now you're asking: Is there a corresponding allegation of harm to consumers?

BY MR. SMITH:

300 Q. I'm asking, is the Commissioner aware of any consumer or class of consumers who were actually harmed by the representations at issue in this proceeding?

U/A MR. HOOD: Let me take that under advisement. I'll take it under advisement.

BY MR. SMITH:

301 Q. And if you answer the question and the Commissioner alleges that there is, I would like to know which customers or class of customers, how they were harmed, and the magnitude of that harm.

U/A MR. HOOD: Yes, we'll take that under advisement.

BY MR. SMITH:

302 Q. Thank you.

Can I ask you to turn to Tab 3 of our book.

520

Actually, before we do that, I would like an undertaking for the Commissioner to identify each of the representations made by Rogers that he alleges in this application were false and misleading and in what way.

U/A MR. HOOD: So I'm going to take that under advisement, and maybe we can have an off-the-record conversation about a way to sensibly come to a landing on this issue because there literally have been thousands of representations produced by Rogers.

MR. SMITH: Okay. So you understand my position.

MR. HOOD: Sorry, and -- yeah, apologies. Go ahead.

BY MR. SMITH:

303 Q. So you understand my position. If the Commissioner is going to say, as I believe he is, that Rogers made representations to the public and the Commissioner is entitled to relief, I am similarly entitled to know the representations, with specificity, that the Commissioner says were false and misleading and in what way those representations are false and misleading.

MR. HOOD: So I understand the request.

The extent to which we're involving Mr. Leschinsky, I'll take that under advisement.

THE REPORTER: Sorry, Mr. Hood, can you keep your voice up, please.

MR. HOOD: Sorry, the extent to which those questions get repeated for Mr. Leschinsky, I've taken that under advisement.

BY MR. SMITH:

329 Q. Final question for today: For each of the representations the Commissioner alleges in this proceeding are false or misleading, can you please advise me 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?

U/A MR. HOOD: Take it under advisement.

MR. SMITH: Thank you very much.

Subject to advisements, refusals, and undertakings and --

MR. HOOD: And the TELUS documents.

MR. SMITH: -- and the TELUS, Bell documents, those are my questions.

Ms. Phillipowsky, thank you very much for your patience.

TAB 8

CT-2024-012

THE COMPETITION TRIBUNAL

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

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B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC.

Respondent

ANSWERS TO UNDERTAKINGS FROM THE EXAMINATION OF KATHLEEN PHILLIPOWSKY HELD SEPTEMBER 3-5, 2025

			So like I said, we're prepared to undertake and go back through and let you know which ones you can take to be as answers with respect to the ordinary consumer. MR. SMITH: Thank you, Mr. Hood. That's helpful. Presumably in your answer, you will identify those that you can and those that you cannot, and the reason why you cannot. MR. HOOD: That's correct. MR. SMITH: Okay. We'll take the undertaking, and we'll see where we go.	
9.	Page 16, lines 15-21	UT	What I would like to know, just so it's on the record, is where the document came from, how it was produced by Shaw, and how you know how it was produced.	This document came from the Shaw SIR productions. This source information associated with this document confirms that it was provided by Shaw in response to the SIR.
10.	Page 39, lines 17-25 and page 40, lines 7-20	UT	I just asked my question. The witness said there were documents that referenced DIG work that were produced as part of the supplementary information request. To the best of your recollection, which documents do you have in mind? [...] I don't have it. So your recollection is that your affidavit specifies the documents or	Following a review of her affidavit, Ms. Phillipowsky's recollection is that there were certain records produced as part of the supplementary information request that involved Dig Insight's Data Stim research and related records. For example, see ROG00473610, ROG00473611, ROG00474141, ROG00474142, ROG00474633, ROG00483131.

CT-2024-012

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ANSWERS TO UNDERTAKINGS FROM THE EXAMINATION OF KATHLEEN PHILLIPOWSKY HELD SEPTEMBER 3-5, 2025

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			summarizes the documents you had as a result of the review of the SIR? Can you, by way of undertaking, take a look at your affidavit to review your recollection, and if that assists, answer the question?	
11.	Page 42, lines 24-25, and page 43, lines 1-4	UT	And when you reviewed the affidavit and it refreshes your recollection, you'll let me know when you obtained that? You're nodding your head "yes."	There is no reference to the Tier Renaming research in the affidavit. We first obtained information related to Dig Insight's work on the Tier Renaming study with the Rogers section 11 productions in March 2024.
12.	Page 58, lines 21-25, and page 59, lines 1-8	UT	Sorry, just so that I'm clear, you said the press release is not at issue. What did you mean?	A press release is a type of representation made to the public. It is an unlimited data representation at issue.
13.	Page 61, lines 23-24 Page 62, lines 1-8	UT	I would like you -- just sticking with that email, I would like you to ask the Commissioner for his recollection of the voicemail, if he has a recording of the voicemail, we'd like a production of it, although I take it that's probably unlikely, but if he has a recollection of it, I'd like that. And if he has a recording obviously.	The Commissioner has a vague recollection that the voice message was principally about Mr. McPhail wanting to tell him about something new that Rogers was launching, but no or very limited specifics. He does not have a copy of the voice message left by Graeme McPhail referenced in the reply email dated June 11, 2019.

CT-2024-012

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Respondent

ANSWERS TO UNDERTAKINGS FROM THE EXAMINATION OF KATHLEEN PHILLIPOWSKY HELD SEPTEMBER 3-5, 2025

14.	Page 63, lines 24-25, and page 64, lines 1-3	UT	And did Mr. Boswell respond to the email?	The Commissioner doesn't believe that he responded by email or otherwise to Graeme McPhail's email of June 12, 2019.
15.	Page 72, lines 21-25	UT	Okay. Why don't, by way of undertaking, you go back and take a look at -- refresh your recollection by reference to whatever it is that you are referring to in that email.	The footnote Ms. Phillipowsky referred to in her testimony is contained on page 8 of the document "Telecom Notice of Consultation CRTC 2019-57 Review of Mobile Wireless Services Final Comments of the Competition Bureau July 15, 2020" (RFLB00054_000000016).
16.	Page 93, lines 19-21	UT	If you think of anything else, you'll let me know? [related to executives' concerns referred to in 46(e) in Notice of Application]	Ms. Phillipowsky does not recall anything else.
17.	Page 98, lines 7-12	UT	I'm asking, is the Commissioner aware of any consumer or class of consumers who were actually harmed by the representations at issue in this proceeding?	Yes. Consumers are harmed when they are misled and not provide with what they were promised. As noted in *Cineplex* in para 227 where the FCA is cited saying "it is presumed that whenever the elements of paragraph 74.01(1)(a) are made out, there is *per se* harm to competition".
18.	Page 100, lines 3-11	UT	I would also like to know in relation to each of those representations, and you can similarly take this under advisement, I would like to know in relation to each of those representations which provision of the	All the representations referred to engage 74.01 and the electronic message representations engage 74.01 and 74.011(1) and 74.011(2).

TAB 9

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*;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC.

Respondent

ADDITIONAL ANSWERS TO UNDERTAKINGS FROM THE EXAMINATION OF KATHLEEN PHILLIPOWSKY HELD SEPTEMBER 3-5, 2025

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				still be used, stating that it “still allows simple browsing, engaging in social media, streaming video, and sending email and text messages”.
4.	Page 69, Lines 15-17	UA	Did he speak to anybody in the Bureau about this email, including Rogers' introduction of its Infinite wireless plan?	The Commissioner does not have a recollection of speaking to anyone at the Bureau about the email from Graeme McPhail around the time it was received on June 12, 2019.
5.	Page 69, Lines 21-25	UA	If he did, I would like to know to whom he spoke and his full recollection of that conversation and the counterparty to that communication, his full recollection of the discussion?	See above
6.	Page 84, Line 25 and Page 85, Lines 1-12	UA	What I want to understand from you, and you can do it by way of undertaking, is I want to know the benefit the Commissioner says Rogers received; the facts, significant sources of information on which the Commissioner alleges Rogers received a benefit. I would like an undertaking -- well, all of this is an undertaking -- to provide me with the Commissioner's position as to the quantum of that benefit; or if the quantum is not determinable, why it's not determinable; and if it can be quantified, how it has been quantified by the Commissioner.	The benefit that Rogers received from the conduct includes the difference in wireless revenue for wireless plans (including speed passes) that Rogers obtained because of the misleading advertising, as well as other benefits, referenced in Roger’s productions, such as increased market shares, reduced churn, and improved brand perception. The facts and significant sources of information related to the assessment of benefit will come from Rogers’ productions, including potentially, information provided in response to undertakings from the examination of Mr. Hartling and in addition there may be relevant

TAB 10

From: Graeme McPhail <graeme.mcphail@rci.rogers.com>
To: "Boswell, Matthew (IC)" <matthew.boswell@canada.ca>
Bcc: "Boswell, Matthew (he, him, his | il, le, lui) (CB/BC)" <matthew.boswell@cb-bc.gc.ca>
Date: Wed, 12 Jun 2019 09:35:04 -0400
Attachments: Rogers Infinte Plan - EN.pdf (605.57 kB)

Hi Matt, thanks for getting back to me. Timing has overtaken us. I have attached a press release that we sent out today, announcing a significant development in the wireless marketplace. We think this is very responsive to what we have heard from our customers, both in terms of pricing and bill certainty, with the elimination of overage charges. I would be pleased to connect with you to walk you through this. I am available today until 10:30 and any time after 2 pm. I can move any other commitment for the balance of the week if required. Let me know what works for you thanks.

From: Boswell, Matthew (IC) <matthew.boswell@canada.ca>
Sent: June 11, 2019 1:57 PM
To: Graeme McPhail <Graeme.McPhail@rci.rogers.com>
Subject: Voice Mail

Hi Graeme,

Apologies for the delay in getting back to you, but I was out of the office on Friday and yesterday and didn't notice your voice mail until this morning. Please let me know when might be a good time to have a call further to your voice mail from Friday.

Cheers,

Matthew Boswell

Commissaire de la concurrence
Bureau de la concurrence
Gouvernement du Canada
Matthew.Boswell@canada.ca
Commissioner of Competition
Competition Bureau
Government of Canada
Matthew.Boswell@canada.ca

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Ce message est confidentiel. Notre transmission et réception de courriels se fait strictement suivant les modalités énoncées dans l'avis publié à www.rogers.com/aviscourriel

TAB 11

Case: Unlimited Data Cell Plans

Date/Time	Notes
2020-04-02 3:20 PM	https://www.theverge.com/2019/11/5/20949850/att-fine-unlimited-data-plan-fake-throttling https://www.whistleout.ca/CellPhones/Guides/truth-about-unlimited-data https://www.whistleout.ca/CellPhones/Guides/comparing-rogers-infinite-unlimited-data ☐ Google Search for articles re unlimited wireless plans ☐ "*AT&T fined $60 million for throttling 'unlimited' data plans*" –The Verge, Nov. 5 2019 ☐ " *The Truth About Unlimited Data*" – WhistleOut – Aug 21, 2019 ☐ "*How Does Rogers, Bell and Telus Compare to Other Unlimited Data Plan?*" WhistleOut – Aug 21, 2019
2020-04-02 4:44 PM	https://www.bell.ca/Mobility/Cell_phone_plans/Unlimited-plans ☐ Online Capture – **Bell advertisement** re Unlimited cell Plan ☐ **Bell** - Our unlimited data plans start at $75 for 10 GB of data at unbeatable speeds across Canada. This allows you to upload, download and stream a ton of content at maximum speed. Beyond 10 GB of maximum speed data, you can use unlimited data at speeds of **up to 512 Kbps** – suitable for light web browsing, email and messaging – without ever having to worry about data overage fees. ☐ Captures re Bell Unlimited Plans saved to case file
2020-04-03 9:20 AM	https://www.rogers.com/wireless/rogers-infinite https://www.telus.com/en/bc/mobility/plans https://www.freedommobile.ca/en-CA/plans ☐ Online Captures re "unlimited cell plan" **Rogers, Telus** and **Freedom** advertisements re unlimited cell plans ☐ **Rogers** - Your data never stops **-** You have unlimited data. Beyond your max speed data, it continues at a reduced speed for basic email, browsing, texting and apps. **Roger – See Full Details -** Once you have reached the max speed data allotment of your plan, you will continue to have access to data services with no overage beyond the max speed data allotment at a reduced speed of **up to 512 kilobits** per second (for both upload and download) until the end of your current billing cycle. Applications such as email, web browsing, apps, and audio/video streaming will continue to function at a reduced speed which will likely impact your experience. ☐ **Telus** - Surf and stream endless data on your phone with no data overages Read legal footnote[2]. **Endless data -** Continue to surf and stream on your device after 20GB at reduced speeds. ☐ **Terms and Conditions** - Data speeds **reduced to a maximum of 512Kbps** after your included high-speed data bucket is exhausted. Speed may vary

Case: Unlimited Data Cell Plans

Date/Time	Notes
	with your device, internet traffic, environmental conditions, and other factors. Please refer to TELUS' Fair Use Policy at telus.com/fairusepolicy for further information. ☐ **FAQ** - This should not affect any applications that require less than 512Kbps of download bandwidth or 512Kbps of upload bandwidth (such as browsing and email), but could affect the performance of applications that normally require greater bandwidth. ☐ **Freedom** – Unlimited Plans – Canada's most affordable unlimited data plans – Data Unlimited 10 GB Speeds reduced beyond 10 GB. ☐ **Freedom Fair Usage Policy –** Even after you've used your monthly data amount, you can still use data at reduced speeds without additional charges. This is subject, at all times, to reasonable usage limits for personal use by an individual. For plans that have a data allotment that includes access to Freedom Network data, if your applicable data allotment is depleted within the current billing cycle, we will slow your Freedom Network data speeds down to 256 kilobits per second for downloads and 128 kilobits per second for uploads. This should not affect any applications that require less than 256 kilobits per second of download bandwidth or 128 kilobits per second of upload bandwidth (such as: web browsing, email, voice over IP services or low-quality audio streaming), but could affect the performance of applications that normally require greater bandwidth (e.g., video streaming or peer-topeer file sharing). Thereafter, if your Freedom Network data usage levels within the current billing cycle continue to be high, we reserve the right to slow your speeds down to a maximum of 64 kilobits per second for downloads and 32 kilobits per second for uploads. At this rate, Internet applications that do not require significant bandwidth nor real time streaming performance (such as: web browsing, email, instant messaging) will continue to work, but at a slower speed. ☐ Captures saved to case file
2020-04-03 3:50 PM	https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04205.html#section5 https://www.canada.ca/en/competition-bureau/news/2016/09/comwave-pay-over-300-000-settle-telecom-services-advertising-case.html Search on **Competition Bureau** website for re Bureau position on "Unlimited Claims" ☐ ***'Unlimited' claims - Marketing 'all-you-can-eat' telecom services -*** **The Deceptive Marketing Practices Digest, Volume 3, Bulletin, May 2, 2017** ☐ "*Comwave to pay over $300,000 to settle telecom services advertising case*" – **New Release** – September 13, 2016

Case: Unlimited Data Cell Plans

Date/Time	Notes
2020-04-03 3:56 PM	https://www.consumer.ftc.gov/blog/2015/01/fast-talk-straight-talk-and-others-about-unlimited-data https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc ☐ Search about **FTC position** on Unlimited Data ☐ *Fast-talk from Straight Talk and others about unlimited data*– Jan 28, 2015 ☐ *Prepaid Mobile Provider TracFone to Pay $40 Million to Settle FTC Charges It Deceived Consumers About 'Unlimited' Data Plans* – Press Release, Jan 28, 2015
2020-04-14 11:00 AM	https://www.sasktel.com/store/product-detail-compare/Personal/Wireless/Rate-plans/Unlimited-plans/_/N-1k5bltr ☐ **SaskTel** - Online Captures re "unlimited cell plan" ☐ **Unlimited Plans** – SaskTel has always offered great unlimited plans! Get unlimited data and unlimited calling in Canada. On VIP 20, Total 15, and Total 30, your speed is only ever reduced to 2 Mbps (4X faster than any other plan in SK), so you can still use your apps, stream music and podcasts, stream SD video, and make video calls. ☐ **VIP 20** – Unlimited Canada-wide data (speed reduced after 20 GB)
2020-04-14 1:53 PM	**Conference call** (JP, NA, Laura Sonley and Kristen McLean – all Bureau officers) ☐ Call with **Lara Sonley** and **Kristen McLean** to discuss the issue as Laura is the one who first raised the issue regarding wireless companies promoting "unlimited" plans that throttle access after certain data usage. ☐ **Nermine Assaad official note taker** – see her notes
2020-04-20 9:00 AM	https://globalnews.ca/news/5385643/unlimited-data-plans-canada/ ☐ Google Search for articles re unlimited wireless plans ☐ **Global News** ☐ *Rogers, Bell, Telus launch beefed up wireless data plans – but there's a catch* – Article posted June 13, 2019 ☐ Video "Major wireless carrier offering new unlimited plans: https://globalnews.ca/video/rd/1536459331656/?jwsource=cl
2020-04-29 12:31 PM	http://sgib.cb.ic.gc.ca/login/form_login.cfm ☐ **BIMS Research** for consumer complaints re unlimited cell plans ☐ Searched for issues :2.8.3 – Unlimited Services Representations ☐ From 2019-01-01 to today (as the unlimited cell plans have only been offered in Canada since spring 2019)

Case: Unlimited Data Cell Plans

Date/Time	Notes
	☐ Results = 7 Requests ☐ 4 Requests were found to be pertinent to the case matter – saved in case folder.
2020-04-29 3:35 PM	https://www.whistleout.ca/CellPhones/Guides/best-unlimited-data-plans ☐ Google Search for articles re unlimited wireless plans in Canada ☐ "*Unlimited Data Plans In Canada*" – WhistleOut article – Jan 6 2020
2020-04-30 2:50 PM	☐ SCREEN CAPTURES - **Bell** Advertisement re unlimited data posted on my personal **Facebook** and **Instagram** account ☐ Transferred the Screen Captures that I had sent on April 29, 2020 to my email account: josee.pilotte@canada.ca to the case file. ☐ Get unlimited data + calling $65/mo. – Plans include 15 GB of data at maximum download speed. Beyond 15 GB of data, speeds are up to 512 Kbps, suitable for light web browsing, email and messaging.
2020-05-01 8:30 AM	https://www.chatrwireless.com/web/chatr.portal?_nfpb=true&_pageLabel=PlanBrowse https://www.luckymobile.ca/shop/plans/prepaid ☐ Online Captures re "unlimited cell plan" CHATR and LUCKYMOBILE advertisements re unlimited cell plans ☐ **CHATR** - 8 GB at 3G speed. Continue using data at a reduced speed until your next Anniversary Date. ☐ **CHATR** Data Management Policy - (2) If your data usage in a month exceeds your 3G speed data allotment, you can continue to use data with no overage charge, but managed data speeds will be reduced from up to 3 Mbps to up to 64 kilobits per second (for both download and upload) until your Anniversary Date. Many applications that do not require high bandwidth (such as email and web browsing) should not be significantly affected by this speed reduction. Applications that will likely be affected by this speed reduction are those that demand higher bandwidths (for example video streaming). ☐ **LUCKYMOBILE** - Unlimited Canada-Wide & US Calling Plan - 8GB - $50/mo - **Plan Includes** : 8GB Data at 3G speeds - Unlimited additional data at reduced speeds of up to 128 Kbps for email, light browsing and messaging once you have exceeded your allotted 3G data.
2020-05-01 3:07 PM	https://www.telus.com/en/bc/support/article/fair-use-policy?INTCMP=VAN_fairusepolicy https://www.rogers.com/consumer/wireless/smartphone-plans?icid=tl-hpmbccon-hrcwrls#financingTabPlan ☐ **Telus** Fair Use Policy re unlimited data plans ☐ **Rogers** – Full Details re unlimited data plans

Case: Unlimited Data Cell Plans

Date/Time	Notes
2020-05-06 10:11 AM	https://www.sasktel.com/store/product-detail-compare/Personal/Wireless/Rate-plans/Unlimited-plans/_/N-1k5bltr https://support.sasktel.com/app/answers/detail/a_id/17071/ ☐ SaskTel Terms and Conditions - Canada Wide usage subject to the Wireless Data Fair Use Policy. Current Fair Use Policy thresholds are: Total 5 - 512 Kbps at 5 GB, Total 15 - 2 Mbps at 15 GB,VIP 20 - 2 Mbps at 20 GB, and Total 30 - 2 Mbps at 30 GB. For more information, see Understanding unlimited data, data caps, and usage limits. - we reserve the right to limit a customer's data speeds if they exceed the limits outlined in our Fair Use Policy. ☐ SaskTel Understanding Unlimited Data When your plan includes "unlimited data," it means you won't pay extra no matter how much data you use in Canada…A "**usage limit**" is the amount of data you can use in a one-month period (your billing period or bill cycle) before your data speed will be slowed down (or "throttled"). All unlimited wireless rate plans have a usage limit, but the specific limit depends on your rate plan.
2020-05-06 1:05 PM	https://www.sasktel.com/about-us/legal-and-regulatory/wireless-fair-use ☐ SaskTel Fair Use Policy If you exceed the Wireless Fair Use Policy usage limits, your wireless data service will be slowed down to 512 Kbps download speed and 512 Kbps upload speed for Total 5, Total 10 and Total 75 and 2 Mbps download speed and 2 Mbps upload speed for all other wireless data plans that include unlimited data, for the remainder of your billing period….Please be assured that this slowdown will still allow you to access web browsing, email and instant messaging. While you probably won't notice the difference if you are browsing webpages, you may notice difficulty in doing activities that consume high bandwidth, such as when you try to stream radio or videos.
2020-05-06 2:15 PM	https://forums.redflagdeals.com/rogers-infinite-plans-unlimited-data-plans-starting-75-10gb-2290987/ https://forums.redflagdeals.com/need-your-suggestion-rogers-bell-telus-unlimited-data-plan-2321701/ https://forums.redflagdeals.com/bell-telus-rogers-offering-unlimited-data-phone-plan-w-throttling-after-allotted-data-startin-10gb-75-byod-2291329/ ☐ **RedFlagDeals** forum ☐ Customer comment re unlimited plans in Canada
2020-05-11 1:54 PM	https://www.reddit.com/r/ontario/comments/cl9fnu/warning_bells_and_maybe_others_unlimited_plan_is/ https://www.reddit.com/r/PersonalFinanceCanada/comments/c085bf/bell_offers_unlimited_mobile_data_plans_after/

Case: Unlimited Data Cell Plans

Date/Time	Notes
	https://mobilesyrup.com/2019/08/22/bell-unlimited-plan-throttling-reddit/ https://mobilesyrup.com/2019/07/24/rogers-telus-throttle-speeds-unlimited-data-plans/ ☐ **Reddit** ☐ It's worth noting that comments in all of the Reddit posts are coming from customers of all carriers indicating their satisfaction with the service and do not feel that their speeds are throttled heavily (https://mobilesyrup.com/2019/08/22/bell-unlimited-plan-throttling-reddit/) ☐ **Speed test results** will differ from region to region, and the server you connect to can also increase or decrease the speed. What is certain though is that you are limited to apps that consume very minimal data on your smartphone after you exceed the data limit.
2020-05-19 9:06 AM	☐ SCREEN CAPTURE - Rogers Advertisement re unlimited data posted on my personal **Facebook account.** ☐ Transferred the Screen Capture (taken on May 13, 2020) to my email account: josee.pilotte@canada.ca and then to the case file. ☐ Obtenez des données illimitées avec un forfait Infini de Rogers à partir de 65$ par mois. 15 Go de données à vitesse maximale. Vitesse réduite ensuite.

TAB 12

Court File No.

FEDERAL COURT

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

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* relating to marketing practices of Rogers Communications Inc. and Rogers Communications Canada Inc.;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring Rogers Communications Inc. and Rogers Communications Canada Inc. to produce records pursuant to paragraph 11(1)(b) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.
ROGERS COMMUNICATIONS CANADA INC.

Respondents

AFFIDAVIT OF KATHLEEN PHILLIPOWSKY

solemnly affirmed on November 14, 2023

I, Kathleen Phillipowsky, a Senior Competition Law Officer with the Competition Bureau (the "**Bureau**"), of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I make this affidavit in support of an *ex parte* application brought by the Commissioner of Competition (the "**Commissioner**") for an Order pursuant to section 11 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "**Act**") to produce records pursuant to paragraph 11(1)(b) of the Act, and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the Act.

2. I am an authorized representative of the Commissioner for the purpose of this application.

3. I have been employed by the Bureau in the Deceptive Marketing Practices Directorate since February 2017. During this time, I have investigated whether companies and individuals are complying with the deceptive marketing practices provisions under Part VII.1 of the Act. Throughout the course of these investigations, I have reviewed representations made to promote various products and reviewed records and information pertaining to investigations and inquiries under Part VII.1 of the Act.

4. I am currently leading an inquiry under Part VII.1 of the Act into certain marketing practices of the Respondents and am leading the investigative team comprised of officers from the Bureau (the "**Team**"). I therefore have personal knowledge of the

matters to which I depose. Where I do not have personal knowledge of the matters to which I depose, I have set out the grounds for my belief.

I. THE COMMISSIONER HAS COMMENCED AN INQUIRY

5. The Commissioner is an officer appointed by the Governor in Council under section 7 of the Act and is responsible for the administration and enforcement of the Act.

6. On May 2, 2017, the Bureau published the Deceptive Marketing Practices Digest Volume 3 which included an article titled "'*Unlimited' claims - Marketing 'all you can eat' telecom services"*. The article indicated that sometimes consumers who enter into transactions or complete purchases for 'unlimited' telecommunication services are disappointed later to discover that the service is in fact restricted, limited or qualified in some way. It indicated that this happens because advertisers will use a word that seems clear, such as the word unlimited, but then try to alter or limit its plain meaning by adding qualifying language or other details. The article provided a reminder to telecommunication companies to avoid using the term "unlimited" if the products are restricted, limited or qualified in some way, and warned that disclaimers are often ineffective at altering or limiting the plain meaning of the representation, especially when used in a digital medium. Attached hereto as **Exhibit A** is a copy of the Digest.

7. In September 2021, the Team began reviewing representations from telecommunication providers in the wireless market in Canada, in order to assess whether wireless products were being marketed in Canada as unlimited when in fact usage was being restricted, limited or qualified in some way. In March 2022,

an investigation into Rogers' unlimited wireless representations was commenced as a result of this review.

8. On April 6, 2023, the Commissioner commenced an inquiry pursuant to subparagraph 10(1)(b)(ii) of the Act on the basis that he has reason to believe that grounds exist for the making of an order under Part VII.1 of the Act (the "**Inquiry**"), specifically in respect of paragraph 74.01(1)(a) of the Act, and subsections 74.011(1) and 74.011(2) of the Act. The Inquiry concerns certain marketing practices of Rogers Communications Inc. ("**RCI**") and Rogers Communications Canada Inc ("**RCCI**") (together the "**Respondents**") .

9. While the Inquiry was originally into RCCI and Rogers Wireless Inc., on May 11, 2023, the Inquiry was amended to add RCI and remove Rogers Wireless Inc.

II CIRCUMSTANCES OF THE INQUIRY

10. The Inquiry concerns representations made to the public by the Respondents to promote the supply or use of, and their business interest in, wireless telecommunication services. Specifically, mobile wireless telecommunication services that offer "unlimited" or "infinite" data ("**Rogers Infinite Plans**"). The Respondents make these representations on their website rogers.com (the "**Website**"), in-store, on online advertisements and in electronic messages. The Respondent RCI has its registered office address in Vancouver, British Columbia and the Respondent RCCI in Toronto, Ontario.

TAB 13

Court File No.

FEDERAL COURT

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

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* into conduct by Rogers Communications Inc. and Rogers Communications Canada Inc. reviewable under Part VII.1 of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring former and current employees of Dig Insights Inc., to attend before a Presiding Officer to be examined on matters relevant to the inquiry pursuant to paragraph 11(1)(a) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

RORY MCGEE AND DOMINIC ATKINSON

Respondents

AFFIDAVIT OF VALÉRIE PRÉVOST TANGUAY

Affirmed on January 31, 2025

I, Valérie Prévost Tanguay, a Competition Law Officer with the Competition Bureau (the "**Bureau**"), of the City of Gatineau, in the Province of Québec, AFFIRM THAT:

1. I make this affidavit in support of an *ex parte* application brought by the Commissioner of Competition (the "**Commissioner**") for an Order pursuant to section 11 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "**Act**") requiring the Respondents to attend and be examined on oath or solemn affirmation by the Commissioner or an authorized representative of the Commissioner on any matter that is relevant to the Inquiry (as defined below in paragraph 6) before a Presiding Officer within the meaning of subsection 13(1) of the Act.

2. I am an authorized representative of the Commissioner for the purpose of this application.

3. I have been employed by the Bureau, in the Deceptive Marketing Practices Directorate, since April 2019. During this time, I have investigated whether companies and individuals are complying with the deceptive marketing practices provisions under Part VII.1 of the Act. Throughout the course of these investigations, I have reviewed representations made to promote various products and reviewed records and information pertaining to investigations and inquiries under Part VII.1 of the Act.

II. CIRCUMSTANCES OF THE INQUIRY

11. The circumstances of the Inquiry and the conduct upon which it was based have previously been described in the affidavit of Kathleen Phillipowsky affirmed on November 14, 2023, which was previously filed with this Court in support of the December Order. The affidavit is attached as **Exhibit 5**. The circumstances of the Inquiry were further updated in my affidavit affirmed June 12, 2024 which was previously filed with this Court in support of the June Order. The affidavit is attached as **Exhibit 6**. This information is summarized below.

12. The Inquiry concerns representations made to the public by Rogers to promote the supply or use of, and their business interest in, mobile wireless telecommunication services that offer “unlimited” or “infinite” data (“**Rogers Infinite Plans**”). The Commissioner has reason to believe that these representations convey the false or misleading general impression that Rogers Infinite Plans offer consumers unlimited data. Since 2019, Rogers has made and continues to make these representations using an array of different channels over time such as their website rogers.com (the “**Website**”), electronic messages, television, radio, social media, online banner advertisements, in billboards, in malls, in live events, and even on public transit wraps.

13. To date, the Team has gathered and assessed records and information from a variety of sources. This includes records and information obtained from public sources, including the Website, a Rogers store,

17. The Commissioner is of the view that the information and records gathered to date require additional clarification and context and seeks to examine the Respondents for that purpose.

III. THE RESPONDENTS HAVE, OR ARE LIKELY TO HAVE, INFORMATION RELEVANT TO THE INQUIRY

18. In reviewing the records in the Commissioner's possession and in particular the Records, the Team has identified the Respondents as individuals who are likely to have information that is highly relevant to the Inquiry.

19. The Respondents were involved with the research projects requested by Rogers. I believe that Mr. McGee would be able to further the Inquiry by providing information about the research and the manner in which the projects were realised. I believe Mr. Atkinson would be able to further the Inquiry by providing information about Dig Insights' research, how it operates and manages its projects, how it interacts with Rogers and a more high-level understanding of the relevant research, as further discussed below.

20. The Commissioner is seeking to examine:

    (a) Rory McGee in his capacity as former Vice President of Insights. Mr. McGee was employed in this capacity from January 2018 to December 2024. Mr. McGee is no longer employed by Dig Insights.

TAB 14

Court File No.

FEDERAL COURT

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

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* into conduct by Rogers Communications Inc. and Rogers Communications Canada Inc. reviewable under Part VII.1 of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring Dig Insights Inc. to produce records pursuant to paragraph 11(1)(b) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

DIG INSIGHTS INC.

Respondent

AFFIDAVIT OF VALÉRIE PRÉVOST TANGUAY

Affirmed on June 12, 2024

"**December Order**") in which he stated that he was satisfied that an inquiry is being made under section 10 of the Act relating to the marketing practices of Rogers. The December Order is attached as **Exhibit 1**. He again acknowledged the Inquiry on February 13, 2024 in paragraph 2 of his order and reasons for a confidentiality motion (the "**February Reasons**") relating to the December Order. The February Reasons are attached as **Exhibit 2**.

II. CIRCUMSTANCES OF THE INQUIRY

8. The Inquiry concerns representations made to the public by Rogers to promote the supply or use of, and their business interest in, mobile wireless telecommunication services that offer "unlimited" or "infinite" data ("**Rogers Infinite Plans**"). The Commissioner has reason to believe that these representations convey the false or misleading general impression that Rogers Infinite Plans offer consumers unlimited data. Rogers makes these representations on their website rogers.com (the "**Website**"), in-store, in online advertisements and in electronic messages. The circumstances of the Inquiry are detailed in the affidavit of Kathleen Phillipowsky affirmed on November 14, 2023, which was previously filed with this Court in support of the December Order. The affidavit is attached as **Exhibit 3**.

9. To date, the Team has gathered and assessed records and information from a variety of sources. This includes records and information obtained from public sources, including the Website, a Rogers store,

TAB 15

Commissioner's List of Documents - Schedule B

Count	Document Date	AOD Title	Author/From	Recipient	CC	Privilege Type	Document ID
122	12/30/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000733
123	12/30/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000738
124	12/30/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000760
125	12/30/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000771
126	12/30/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000775
127	12/30/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000777
128	12/30/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000787
129	12/30/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000806
130	12/31/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000812
131	12/30/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00085_000000829
132	6/19/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00095_000000644
133	5/11/2023	[REDACTED: Internal correspondence regarding Expert]	"Carr, Paula (CB/BC)" <paula.carr@cb-bc.gc.ca> / cb-bc.gc.ca "Craig, Hugh (he, him | il, le) (CB/BC)" <hugh.craig@cb-bc.gc.ca> / cb-bc.gc.ca "Cybulsky, Irene (CB/BC)" <irene.cybulsky@cb-bc.gc.ca> / cb-bc.gc.ca "Prévost-Tanguay, Valérie (CB/BC)" <valerie.prevost-tanguay@cb-bc.gc.ca> / cb-bc.gc.ca	"Phillipowsky, Kathleen (CB/BC)" <"/o=exchangelabs/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=41278852ac4947d29f97bdb82f79e407-kathleen ph"> / ExchangeLabs		Litigation Privilege Solicitor Client Privilege	RBMK00095_000001036
134	6/19/2024	[REDACTED: Document created by Expert for purpose of Litigation]				Litigation Privilege	RBMK00095_000001945
135	4/7/2022	Cosmos, Protected B, solicitor/client privileged	"Tremblay2, Julie (CB/BC)" <julie.tremblay2@cb-bc.gc.ca> / cb-bc.gc.ca	"Ross, Brendan (CB/BC)" <brendan.ross@cb-bc.gc.ca> / cb-bc.gc.ca	"Phillipowsky, Kathleen (CB/BC)" <kathleen.phillipowsky@cb-bc.gc.ca> / cb-bc.gc.ca	Solicitor Client Privilege	RBMK00103_000000009
136	3/16/2023	Cosmos: Facts of the Case Draft | solicitor-client privileged	"Craig, Hugh (he, him | il, le) (CB/BC)" <hugh.craig@cb-bc.gc.ca> / cb-bc.gc.ca "Cybulsky, Irene (CB/BC)" <irene.cybulsky@cb-bc.gc.ca> / cb-bc.gc.ca	"Phillipowsky, Kathleen (CB/BC)" <"/o=exchangelabs/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=41278852ac4947d29f97bdb82f79e407-kathleen ph"> / ExchangeLabs	"Fletcher, Kevin (CB/BC)" <kevin.fletcher@cb-bc.gc.ca> / cb-bc.gc.ca "Vighio, Naushin (CB/BC)" <naushin.vighio@cb-bc.gc.ca> / cb-bc.gc.ca	Solicitor Client Privilege	RBMK00103_000000112
137	6/21/2024	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000001
138	11/28/2024	Capture created by Sophie Laflamme, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000004
139	3/28/2024	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000007
140	6/1/2023	Capture notes created by Paula Carr, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000011
141	7/31/2023	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000013
142	11/1/2024	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000014
143	6/30/2023	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000016
144	12/1/2023	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000017
145	10/9/2024	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000019
146	5/30/2024	Capture notes created by Paula Carr, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000022
147	5/31/2024	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000023
148	12/19/2024	Capture notes created by Valerie Prevost Tanguay, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000027
149	8/25/2023	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000036
150	3/11/2024	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000037
151	6/30/2023	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000042
152	3/1/2024	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000043
153	3/28/2024	Capture notes created by Donovan Sabga, Bureau Officer, for the purposes of litigation				Litigation Privilege	RBMK00106_000000044

Commissioner's List of Documents - Schedule B

Count	Document Date	AOD Title	Author/From	Recipient	CC	Privilege Type	Document ID
1342	12/20/2024	RE: Infinite - WITHOUT PREJUDICE	"Banicevic, Anita" <abanicevic@dwpv.com> / dwpv.com	"Hood, Jonathan (CB/BC)" <jonathan.hood@cb-bc.gc.ca> / cb-bc.gc.ca	"Cybulsky, Irene (CB/BC)" <irene.cybulsky@cb-bc.gc.ca> / cb-bc.gc.ca "Halpape, Tanis (CB/BC)" <tanis.halpape@cb-bc.gc.ca> / cb-bc.gc.ca "Stevenson, Teraleigh" <tstevenson@dwpv.com> / dwpv.com "Wilson, Kendra (CB/BC)" <kendra.wilson@cb-bc.gc.ca> / cb-bc.gc.ca	Settlement Privilege	RFLB00028_000001482
1343	12/17/2024	RE: Infinite - WITHOUT PREJUDICE	"Hood, Jonathan (CB/BC)" <jonathan.hood@cb-bc.gc.ca> / cb-bc.gc.ca	"Banicevic, Anita" <abanicevic@dwpv.com> / dwpv.com	"Cybulsky, Irene (CB/BC)" <irene.cybulsky@cb-bc.gc.ca> / cb-bc.gc.ca "Halpape, Tanis (CB/BC)" <tanis.halpape@cb-bc.gc.ca> / cb-bc.gc.ca "Stevenson, Teraleigh" <tstevenson@dwpv.com> / dwpv.com "Wilson, Kendra (CB/BC)" <kendra.wilson@cb-bc.gc.ca> / cb-bc.gc.ca	Settlement Privilege	RFLB00028_000001698
1344	10/13/2022	RE: Cosmos: Infinite Awareness and Comprehension - Truly Unlimited	"Phillipowsky, Kathleen (CB/BC)" <kathleen.phillipowsky@cb-bc.gc.ca> / cb-bc.gc.ca	"Cybulsky, Irene (CB/BC)" <irene.cybulsky@cb-bc.gc.ca> / cb-bc.gc.ca		Solicitor Client Privilege	RFLB00028_000001719
1345	12/20/2024	RE: Infinite - WITHOUT PREJUDICE	"Hood, Jonathan (CB/BC)" <jonathan.hood@cb-bc.gc.ca> / cb-bc.gc.ca	"Banicevic, Anita" <abanicevic@dwpv.com> / dwpv.com		Settlement Privilege	RFLB00028_000001758
1346	12/19/2024	RE: Infinite - WITHOUT PREJUDICE	"Banicevic, Anita" <abanicevic@dwpv.com> / dwpv.com	"Hood, Jonathan (CB/BC)" <jonathan.hood@cb-bc.gc.ca> / cb-bc.gc.ca	"Cybulsky, Irene (CB/BC)" <irene.cybulsky@cb-bc.gc.ca> / cb-bc.gc.ca "Halpape, Tanis (CB/BC)" <tanis.halpape@cb-bc.gc.ca> / cb-bc.gc.ca "Stevenson, Teraleigh" <tstevenson@dwpv.com> / dwpv.com "Wilson, Kendra (CB/BC)" <kendra.wilson@cb-bc.gc.ca> / cb-bc.gc.ca	Settlement Privilege	RFLB00028_000001798
1347	6/14/2023	2023.06.14 - Marketing Practices of Rogers.pdf				Settlement Privilege	RFLB00028_000002054
1348	12/16/2024	FW: Voice Mail	"Cybulsky, Irene (CB/BC)" <irene.cybulsky@cb-bc.gc.ca> / cb-bc.gc.ca "Hood, Jonathan (CB/BC)" <jonathan.hood@cb-bc.gc.ca> / cb-bc.gc.ca	"Boswell, Matthew (he, him, his | il, le, lui) (CB/BC)" <matthew.boswell@cb-bc.gc.ca> / cb-bc.gc.ca	"Burnett, Sharon (CB/BC)" <sharon.burnett@cb-bc.gc.ca> / cb-bc.gc.ca "Fletcher, Kevin (CB/BC)" <kevin.fletcher@cb-bc.gc.ca> / cb-bc.gc.ca "Hollingworth, Mike (CB/BC)" <mike.hollingworth@cb-bc.gc.ca> / cb-bc.gc.ca "Lamoureux, Stephane (CB/BC)" <stephane.lamoureux@cb-bc.gc.ca> / cb-bc.gc.ca "Palumbo, Josephine (CB/BC)" <josephine.palumbo@cb-bc.gc.ca> / cb-bc.gc.ca "Phillipowsky, Kathleen (CB/BC)" <kathleen.phillipowsky@cb-bc.gc.ca> / cb-bc.gc.ca "Tremblay2, Julie (CB/BC)" <julie.tremblay2@cb-bc.gc.ca> / cb-bc.gc.ca	Litigation Privilege Solicitor Client Privilege	RFLB00028_000002072
1349	12/17/2024	RE: Infinite - WITHOUT PREJUDICE	"Hood, Jonathan (CB/BC)" <jonathan.hood@cb-bc.gc.ca> / cb-bc.gc.ca	"Banicevic, Anita" <abanicevic@dwpv.com> / dwpv.com	"Cybulsky, Irene (CB/BC)" <irene.cybulsky@cb-bc.gc.ca> / cb-bc.gc.ca "Halpape, Tanis (CB/BC)" <tanis.halpape@cb-bc.gc.ca> / cb-bc.gc.ca "Stevenson, Teraleigh" <tstevenson@dwpv.com> / dwpv.com "Wilson, Kendra (CB/BC)" <kendra.wilson@cb-bc.gc.ca> / cb-bc.gc.ca	Settlement Privilege	RFLB00028_000002083
1350	12/6/2024	WITHOUT PREJUDICE - Rogers Infinite wireless plans representations	"Banicevic, Anita" <abanicevic@dwpv.com> / dwpv.com "Stevenson, Teraleigh" <tstevenson@dwpv.com> / dwpv.com	"Hood, Jonathan (CB/BC)" <jonathan.hood@cb-bc.gc.ca> / cb-bc.gc.ca	"Cybulsky, Irene (CB/BC)" <irene.cybulsky@cb-bc.gc.ca> / cb-bc.gc.ca "Fletcher, Kevin (CB/BC)" <kevin.fletcher@cb-bc.gc.ca> / cb-bc.gc.ca "Imperadeiro, Adriano (he, him | il, le) (CB/BC)" <adriano.imperadeiro@cb-bc.gc.ca> / cb-bc.gc.ca "Phillipowsky, Kathleen (CB/BC)" <kathleen.phillipowsky@cb-bc.gc.ca> / cb-bc.gc.ca	Settlement Privilege	RFLB00028_000002112

TAB 16

CT-2024-012

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to s. 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

ANSWERS TO UNDERTAKINGS, UNDER ADVISEMENTS AND REFUSALS GIVEN AT THE EXAMINATION FOR DISCOVERY OF KATHLEEN PHILIPOWSKY, HELD SEPTEMBER 3-5, 2025

Compendium #211

UNDER ADVISEMENTS				
No.	**Page**	**Ques.**	**Question**	**Answer**
12.	467	141	To review the document, “Cosmos”, at Row 137 of the Commissioner’s Schedule B and confirm that the document contains legal advice.	We answered this in our answers to undertakings that were sent on September 29, 2025. See pg. 2, request 2.
13.	468	144	To produce a redacted copy of the document at Row 137 of the Commissioner’s Schedule B, if the document contains information that is not privileged.	See answer above.
14.	484	189	To ask Mr. Boswell whether he forwarded the email at RFLB00050_000000001 to anybody in the Competition Bureau and if so, to whom and to produce same.	Mr. Boswell did not forward this email to anyone at the Bureau until after the litigation was contemplated.
15.	495	233	To provide the last known contact information for Nermine Assaad (RFLB00048_000000106).	Nermine Assaad is still employed by the Government of Canada.
16.	498	246	To advise if the notes for the conference call on April 14, 2020 at 1:53 PM contain facts that bear on the allegations in the application (RFLB00048_000000106)	Any facts that may be in this document have already been disclosed to Rogers.
19.	523-524	318	To ask other representatives of the Bureau, to the extent they are still with the Bureau, for their recollection of the telephone call (RFLB00041_000000014).	The other Bureau officer on the call still at the Bureau, Kelan Ton, has no independent recollection of the call beyond her notes.

TAB 17

Rogers - Reasons for Order and Order on a motion for additional production, 2025 CanLII 79245 (CT)

Date: 2025-08-11

Other citation: 2025 Comp Trib 11

Citation:
Rogers - Reasons for Order and Order on a motion for additional production, 2025 CanLII 79245 (CT), <https://canlii.ca/t/kdrrj>, retrieved on 2025-10-16

Most recent
unfavourable mention

Competition Tribunal / Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 11

File No.: CT-2024-012

Registry Document No.: 33

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 : July 14, 2025

Before: Madam Justice Jocelyne Gagné

Date of Reasons for Order and Order: August 11, 2025

REASONS FOR ORDER AND ORDER PARTIALLY GRANTING A MOTION FOR ADDITIONAL PRODUCTION

I. OVERVIEW

[1] On March 26, 2025, the Tribunal issued a Scheduling Order directing the applicant, the Commissioner of Competition ("Commissioner") and the respondent, Rogers Communications Inc. ("Rogers"), to provide the other party, by June 13, 2025, their affidavit of documents. On June 30, 2025, the parties requested, and the Tribunal granted, an extension to the deadline to file any motion arising from the affidavits of documents and/or productions, from June 30 to July 7, 2025.

[2] On July 7, 2025, Rogers filed an informal motion for an order to compel further documentary production from the Commissioner, that Rogers deems relevant. On July 10, 2025, the Commissioner opposed Rogers' motion, and on July 11, 2025, Rogers filed a reply. The Tribunal heard the motion by videoconference on July 14, 2025.

II. THE NOTICE OF APPLICATION

[3] On December 23, 2024, the Commissioner filed a Notice of Application pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 ("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. 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 service and related products, and its business interests more generally (the "Impugned Representations").

PUBLIC

[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. DOCUMENT PRODUCTION

[6] Prior to the start of this proceeding and following an application by the Commissioner, the Federal Court issued an order on December 1, 2023, requiring Rogers to produce records and to provide written returns of information under paragraphs 11(1)(*b*) and (*c*) of the Act.

[7] Rogers now seeks an order to compel the Commissioner to produce the following two categories of records: (i) "All records related to the Commissioner's consideration or investigation of telecommunications providers' unlimited plan representations including prior to September 2021" ("Unlimited Plan Records"); and (ii) "All relevant records from Bell, Telus and any other third party received by the Bureau pursuant to any supplementary or voluntary information request or section 11 order related to their equivalent unlimited plans […]" – including those obtained in the context of the Commissioner's review and challenge of the Rogers/Shaw transaction (CT-2022-002) ("Third-Party Records").

IV. issues

[8] The present motion raises the following issues:

(a) Are the two categories of records sought by Rogers relevant to the matters at issue in this proceeding?

(b) If any such records are relevant, is Rogers' request consistent with the principle of proportionality?

V. ANALYSIS

(1) Unlimited Plan Records

[9] Rogers seeks production of the Commissioner's Unlimited Plan Records, including (i) the Commissioner's analysis of other telecommunication providers' unlimited plan representations; (ii) notes related to an internal conference call held on April 14, 2020 concerning unlimited plan representations; (iii) documents related to an alleged "pause" in the Commissioner's review of unlimited plan representations across the industry between June 2020 and August 2021; and (iv) documents related to the Commissioner's decision not to pursue other telecommunication providers with respect to their unlimited plan representations.

[10] Rogers argues that the documents it seeks are relevant to two parts of its defence as found in paragraphs 24 to 29 of its response to the Notice of Application. First, the Commissioner waited almost 4 years after Rogers started making the Impugned Representations before making Rogers aware of his concerns; and second, the Commissioner has unfairly targeted Rogers for conduct that is industry wide.

[11] According to Rogers, competing telecommunication providers advertise their unlimited plans in substantially the same way as Rogers does, and these similar representations are relevant to assessing consumer understanding in the wireless industry. Moreover, and in addition to competitors' records being relevant to the Tribunal's assessment of the Impugned Representations, not only has the Commissioner "improperly and unfairly singled out Rogers", but Rogers argues that its offering in fact "spurred other major carriers to do the same, leading to a significant pro-consumer shift in the wireless industry."

[12] In short, the Commissioner responds 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. The Commissioner confirmed that he has produced "all the non-privileged evidence he has collected of unlimited representations made by other telecommunications companies" related to the present matter.

[13] The Tribunal agrees with the Commissioner.

[14] As to the timelines of the Commissioner's investigation into Rogers' conduct and subsequent enforcement action, these issues are not part of the debate. There is no dispute that Rogers started making the Impugned Representations in 2019 and that it was not until 2023 that the Commissioner contacted Rogers with his concerns.

[15] In *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3, the respondents contended that an eight-year gap between a 2009 investigation and a 2017 application created an estoppel and should limit remedy. On discovery, Live Nation asked the Commissioner (i) why it took eight years to take enforcement action; and (ii) why the Commissioner did nothing with earlier complaints about Live Nation's conduct. The Tribunal refused to require the Commissioner to answer both questions for the following reason:

> [18] What is relevant are the facts that the Commissioner apparently took eight years to raise the complaint with the Respondents and allegedly did not follow-up on complaints received in 2008, not the reasons or explanations behind those decisions of the Commissioner.

[16] The same can be said about the four year it took the Commissioner to advise Rogers of his concerns, after the launch of its unlimited plans. I agree with the Commissioner that while the legal significance of the timing can be debated at the hearing, the relevant dates that followed the launch of Rogers' unlimited plans, up until the filing of the Commissioner's application, are not in dispute.

[17] With respect to Rogers' allegation that it was improperly singled out, it is not a defence that is available in law. In *R v Miles of Music Ltd*, 74 OR (2d) 518, 1989 CanLII 255, a case that considered unfairness in abuse of process, the Ontario Court of Appeal found that:

> It cannot be a defence to a speeding driver that the police did not prosecute all drivers who were speeding on the same highway at the same time. In any event, the absence of any evidence that, however prevalent the offensive practice may be, the police had reasonable grounds for prosecuting some other alleged offender, makes it impossible to say that the respondents were selected for prosecution on the basis of grounds relating to personal characteristics.

[18] 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.

[19] Therefore, Rogers' requests for the Unlimited Plan Records, as defined in paragraph 9, is denied. The Unlimited Plan Records will not be produced.

[20] Given this conclusion, there is no need for the Tribunal to assess whether the request is consistent with the principle of proportionality.

(2) Third-Party Records

[21] Rogers also seeks production of Third-Party Records received by the Commissioner "pursuant to any supplementary or voluntary information request or section 11 order" since 2019, including in the context of the Rogers-Shaw matter (CT-2022-002). These include (i) marketing plans, reports, research and competitive assessment of unlimited wireless plans; (ii) assessment of the competitive impact of unlimited plans, and (iii) communications related to complaints regarding unlimited wireless plans.

[22] According to Rogers, given the nature of some specifications found in previous section 11 orders and in supplementary or voluntary information requests issued to various telecommunication providers, it is reasonable to expect that the Commissioner received records that are relevant to the present matter – especially since the Commissioner considers as an aggravating factor the fact that other providers such as Bell and Telus launched similar plans to Rogers.

[23] In response, the Commissioner's position is essentially that such a request amounts to a disproportionate, "exorbitant" ask, while the odds that such an exercise yields any critical information are trivial.

[24] The Commissioner pleads at paragraph 46(f) of his Notice of Application that the launch by Bell and Telus of similar plans to Rogers' is an aggravating factor. He also submits on this motion that other telecommunication providers "copied Rogers". Through the material filed by the Commissioner in the present matter, Rogers was made aware that in the context of the review of the Rogers-Shaw transaction, the Commissioner gathered marketing documents from competing telecommunication providers, including about unlimited plans. Those documents informed the Commissioner's inquiry, and the material that concerned Rogers has been produced in the present litigation as part of the Commissioner's Notice of Application.

[25] Similar documents obtained from Bell and Telus through section 11 orders, also in the context of the review of the Roger-Shaw transaction, are similarly relevant for the following reasons:

1. They are likely to inform the Tribunal about consumer's understanding and effect of the representations in the marketplace, and what Bell and Telus understood about the marketplace, including any market research they did about the plans;

2. They go to the Commissioner's pleading of aggravating factors as pleaded in paragraph 46(f) of his Notice of Application.

[26] The Tribunal agrees with Rogers that records that may reveal whether competing telecommunication providers merely followed suit, or rather already planned to launch their own unlimited plan, are relevant to this issue.

[27] However, I do not find relevant the documents that may reveal whether other telecommunication providers unlimited plans were successful in attracting customers and reducing or eliminating any alleged "benefit" Rogers received from introducing its unlimited plans.

[28] Turning to the question as to whether the production by the Commissioner of these records is consistent with the principle of proportionality (the main, if not only, basis for the Commissioner's position on this issue), the Tribunal considers that it is. Importantly, the Commissioner provided no evidence to sustain the allegation that to proceed with the production was overly burdensome. The Commissioner alleges that reviewing the Bell and Telus records for relevance to this Application would require reviewing over a million documents. In support of that allegation, the Commissioner refers the Tribunal to a 2023 affidavit sworn in a context of the section 11 application against Rogers whereby the affiant states that it took several months to review 22,000 records from the Rogers/Shaw Supplemental Information Request (RS SIR) for information that might overlap with the section 11 request. This evidence does not support the Commissioner's allegation in the present matter.

[29] In *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16, the Tribunal stated the following:

> [35] I do not dispute that the proportionality rule applies to Tribunal proceedings. More specifically, on questions such as those raised in this Refusals Motion, the Tribunal must always take into account issues of proportionality (*The Commissioner of Competition v Reliance Comfort Limited Partnership*, 2014 Comp Trib 9 ("Reliance") at paras 25-27). However, the case law is clear: claims invoking the principle of proportionality must be supported by evidence (*Wesley First Nation (Stoney Nakoda First Nation) v Alberta*, 2013 ABQB 344 at paras 93-94; *Montana Band* at para 33). It is not sufficient to merely raise the argument that it would be too onerous to comply with a request to provide answers to questions on discovery. Some evidence must be offered to support the claim and to establish how a request could be disproportionate to its value.

[30**]** The Commissioner also alleges that the parties agreed that neither would be required to review or list the records produced in response to the RS SIR for relevance to this application. In support of that allegation, the Commissioner refers the Tribunal to his June 2025 affidavit of documents, where it is rather stated that this agreement covers the records produced by Rogers, not those produced by third parties such as Bell and Telus.

[31**]** I am therefore of the view that the Commissioner's argument on proportionality – or lack thereof – must fail.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[32**]** Rogers' motion for additional production is granted in part.

[33**]** The Commissioner is to file, and deliver to Rogers on or before August 18, 2025, a further affidavit of document inclusive of the following Third-Party Records:

- (a)Marketing plans, reports, research and competitive assessment of unlimitedwireless plans;
- (b)Assessment of the competitive impact of unlimited plans (including Rogers); and
- (c)Communications related to complaints regarding unlimited wireless data plans.

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

DATED at Ottawa, this 11 day of August, 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

TAB 18

PUBLIC

Canada v. Lehigh Cement Limited, 2011 FCA 120 (CanLII)

Date: 2011-03-31
File number: A-263-10
Other citations: 417 NR 342 — [2011] 4 CTC 112 — [2011] FCJ No 515 (QL) — [2011] DTC 5069

Citation:
Canada v. Lehigh Cement Limited, 2011 FCA 120 (CanLII), <https://canlii.ca/t/fl230>, retrieved on 2025-10-06

Most recent
unfavourable mention

Date: 20110331

Docket: A-263-10

Citation: 2011 FCA 120

CORAM: EVANS J.A.

DAWSON J.A.

LAYDEN-STEVENSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEHIGH CEMENT LIMITED

Respondent

Heard at Vancouver, British Columbia, on March 3, 2011.

Judgment delivered at Ottawa, Ontario, on March 31, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: EVANS J.A.

LAYDEN-STEVENSON J.A.

Date: 20110331

Docket: A-263-10

Citation: 2011 FCA 120

CORAM: EVANS J.A.

DAWSON J.A.

LAYDEN-STEVENSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEHIGH CEMENT LIMITED

Respondent

PUBLIC

A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that (*a*) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or (*b*) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action. [emphasis added]	La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui : *a*) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge; *b*) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action. [Non souligné dans l'original.]

> [34] The jurisprudence establishes that a question is relevant 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. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.,* 2008 FCA 287, 381 N.R. 93 at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.

[35] Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place 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": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3.

[36] This Court's comment at paragraph 64 of the *Eli Lilly* decision is of particular relevance to the Crown's submission that the 2008 amendment effected a material change. There, the Court wrote:

64. Furthermore, the Prothonotary's reference to a fishing expedition in paragraph 19 of her Reasons was one where a party was required to disclose a document that might lead to another document that might then lead to useful information which would tend to adversely affect the party's case or to support the other party's case. In my view, limiting the "train of inquiry" test in this manner is consistent with the test described in *Peruvian Guano, supra*, and applied by this Court in *SmithKline Beecham Animal Health Inc. v. Canada*, 2002 FCA 229 (CanLII), [2002] 4 C.T.C. 93 (F.C.A.), where, at para. 24 of her Reasons for the Court, Madam Justice Sharlow wrote:

[24] The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):

TAB 19

The Commissioner of Competition v Live Nation Entertainment, Inc, 2019 CACT 3 (CanLII)

Date: 2019-04-05

File number: CT-2018-005; 84

Citation:
The Commissioner of Competition v Live Nation Entertainment, Inc, 2019 CACT 3 (CanLII), <https://canlii.ca/t/hzlhm>, retrieved on 2025-10-16

Most recent
unfavourable mention

Competition Tribunal / Tribunal de la concurrence

Reference: *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3

File No: CT-2018-005

Registry Document No: 84

IN THE MATTER OF an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 regarding conduct allegedly reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act;

AND IN THE MATTER OF a motion by the Respondents to compel answers to questions refused on discovery.

BETWEEN:

The Commissioner of Competition

(applicant)

and

Live Nation Entertainment, Inc, Live Nation Worldwide, Inc, Ticketmaster Canada Holdings ULC, Ticketmaster Canada LP, Ticketmaster L.L.C., The V.I.P. Tour Company, Ticketsnow.com, Inc, and TNOW Entertainment Group, Inc

(respondents)

Date of hearing: April 2, 2019

Before Judicial Member: D. Gascon J. (Chairperson)

Date of Order and Reasons for Order: April 5, 2019

ORDER AND REASONS FOR ORDER GRANTING IN PART THE RESPONDENTS' MOTION TO COMPEL ANSWERS TO QUESTIONS REFUSED ON DISCOVERY

I. INTRODUCTION

[1] On March 21, 2019, the Respondents filed a motion to compel the Commissioner of Competition ("**Commissioner**") to answer several questions that were refused during the examination for discovery of the Commissioner's representative, Ms. Lina Nikolova ("**Refusals Motion**"). Ms. Nikolova was examined for one day and a half on January 31 and February 1, 2019.

[2] In their Refusals Motion, the Respondents seek the following conclusions:

• An order compelling Ms. Nikolova to answer a list of questions that remained unanswered further to her examination for discovery and the expiry of the deadline provided for fulfilling answers to discovery undertakings ("**Refused Questions**");

• An order compelling Ms. Nikolova to attend for continued examination on discovery on behalf of the Commissioner or to provide follow-up answers in the form agreed upon by the parties, all in accordance with the scheduling order most recently amended on February 11, 2019;

• An order for the Respondents' costs of this motion; and

• Such further and other relief as the Tribunal deems just.

[3] At the hearing, the Respondents informed the Tribunal that they were no longer seeking an order compelling Ms. Nikolova to be further examined should the Tribunal order her to answer the Refused Questions, and that responses in writing would be satisfactory.

[4] In their Notice of Motion, the Respondents had initially identified a total of 34 Refused Questions grouped into four categories. However, in his response materials and in the days leading up to the hearing of this motion, the Commissioner provided answers to some of the questions that had been previously refused. In addition, the Respondents withdrew one of the Refused Questions for which they were seeking answers. The initial list of Refused Questions was thus narrowed down to 14 questions to be decided by the Tribunal, divided in two categories: (1) "Historical Conduct – Estoppel, Waiver and Remedy", which contained six outstanding questions relating to the Commissioner's review of the Respondents' conduct in 2009 ("**Category 1 Questions**"); and (2) "Individual Respondent Allegations – Liability", which referred to eight outstanding questions seeking details on which individual Respondents were specifically concerned by certain facts and allegations in the Commissioner's pleadings ("**Category 2 Questions**").

[5] The Respondents brought this Refusals Motion in the context of an application made against them by the Commissioner ("**Application**") under the deceptive marketing practices provisions of the *Competition Act*, RSC 1985, c C-34 ("**Act**"). In his Application, the Commissioner is seeking orders pursuant to section 74.1 of the Act regarding conduct allegedly reviewable under paragraph 74.01(1)(a) and section 74.05 of the Act. More specifically, the Commissioner alleges that one or more of the Respondents engaged in deceptive marketing practices by promoting the sale of tickets to the public on certain internet websites and mobile applications ("**Ticketing Platforms**") at prices that are not in fact attainable, and then supplied tickets at prices above the advertised price on these platforms. The Commissioner's Notice of Application alleges that the reviewable conduct dates back to 2009, and continues until today. The relief sought by the Commissioner includes a prohibition order and administrative monetary penalties.

II. LEGAL PRINCIPLES

> **[6]** I agree with the Respondents that, when dealing with refusals in the context of examinations for discovery, the Tribunal should not lose sight of the overarching objective of the discovery process, whether oral or by production of documents. The purpose of discovery is to render the trial process fairer and more efficient by allowing each side to gain an appreciation of the other side's case, and for the respondents to know the details of the case against them before trial (*Canada v Lehigh Cement Limited*, 2011 FCA 120 ("***Lehigh***") at para 30; *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17 at para 16). It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations 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 (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("***VAA***") at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.

[7] The *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**") do not deal specifically with refusals in examinations for discovery. However, subsection 34(1) of the CT Rules provides that, when a question arises as to the practice or procedure to be followed in cases not provided for by the rules, the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**") may be followed. FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person's knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings. In addition, FC Rule 242 states that a party may object to questions asked in an examination for discovery on the ground that the answer is privileged, the question is not relevant, the question is unreasonable or unnecessary, or it would be unduly onerous to require the person to make the inquiries referred to in FC Rule 241.

> **[8]** Relevance is the key element to determine whether a question is proper and should be answered. At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper. In *Lehigh* at paragraph 34, the Federal Court of Appeal noted the broad scope of relevance on examinations for discovery:
>
> The jurisprudence establishes that a question is relevant 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.

[9] And to determine the relevance of a question, one must look at the pleadings.

[10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts *known* by such party, but it cannot ask for the facts or evidence *relied on* by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (FCTD) ("***Montana Band***") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("***Apotex***"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).

[11] It remains, however, that answers to questions on examination for discovery will always depend on the particular facts of the case and involve a considerable exercise of discretion by the judicial member seized of a refusals motion. There is no magic formula applicable to all situations, and a case-by-case approach must prevail to determine the appropriate level of disclosure required in examinations for discovery. The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles" (*Lehigh* at paras 24-25; see also *VAA* at paras 41-46).

III. CATEGORY 1 QUESTIONS

[12] The six Category 1 Questions deal with the Commissioner's knowledge of a prior investigation into the Respondents' price displays in 2009 and 2010. The Respondents submit that these Refused Questions are relevant as they relate to the Respondents' pleading of estoppel and waiver, and to the issue of remedy, since the duration of the alleged reviewable conduct and the manner and length of the investigation are factors to be taken into account when determining any administrative monetary penalties. The Respondents claim that the Commissioner reviewed the Respondents' Ticketing Platforms for deceptive marketing practices in 2009, but raised no issues about the displays of prices that he now alleges were deceptive. In fact, say the Respondents, the Commissioner did not raise his current complaints with the Respondents until 2017. They therefore contend that the Commissioner's 2009-2010 review, and his eight-year delay in proceeding, are relevant both to the Respondents' pleading of estoppel and waiver and to the determination of any remedy by the Tribunal. In this context, they argue that they should be permitted to ask the Category 1 Questions about the Commissioner's 2009-2010 investigation. The Commissioner replies that the Category 1 Questions are improper and not relevant, and that they are unreasonable, unnecessary and unduly onerous.

> **[13]** I agree with the Respondents that, in the context of this Application, questions relating to the 2009-2010 investigation and to what the Commissioner had previously reviewed are generally relevant in light of the Respondents' pleading on estoppel and waiver and on the issue of remedy. It cannot be said that these questions are totally unrelated to the issues in dispute. Moreover, I observe that facts surrounding the Competition Bureau's prior investigation of the Respondents' conduct have been referred to by the Commissioner in his own materials. The Commissioner has produced, as relevant documents in the Commissioner's documentary production in this Application, some customer complaints from the 2009 period, as well as records relating to the Competition Bureau's investigation of certain Ticketing Platforms in 2009 and 2010. Indeed, the questions in dispute in this first category relate to particular factual issues emanating from specific documents produced by the Commissioner, such as Exhibit 114.

[14] I further note that, in her examination for discovery, Ms. Nikolova has already provided answers to many questions asked about the 2009-2010 investigation. I am not persuaded – subject to the caveat explained below with respect to the two "why" questions – that the remaining outstanding questions have gone too far and should be treated any differently. The facts surrounding the 2009-2010 investigation are relevant to the Respondents' pleading, and the Commissioner cannot select what he wants to answer and what he prefers not to disclose. The Commissioner should instead provide all relevant facts relating to this prior investigation. In the same vein, I do not share the Commissioner's views that the Category 1 Questions constitute a fishing expedition into the Commissioner's previous investigation. Nor do I find that question 679 is overly broad as it focuses on the 2009 or 2010 fee display.

> **[15]** The Commissioner further argues that, since the Category 1 Questions relate to the "conduct" of the 2009-2010 investigation, they need not be answered. I disagree. In light of the estoppel defence raised by the Respondents, the Commissioner's conduct in the investigation is clearly at play in this Application, as well as the timing and dates of the Competition Bureau's actions in that respect. Contrary to the situation in *Canada (Director of Investigation and Research) v Southam Inc*, 1991 CanLII 2396 (CT), [1991] CCTD No 16, 38 CPR (3d) 68, at paragraphs 10-11, the conduct of the Commissioner is one of the issues before the Tribunal, and it is directly relevant to the present proceedings on the basis of the pleadings.

[16] I pause to underline that the issue at this stage is not whether the estoppel argument raised by the Respondents in their pleading will ultimately be successful on the merits. It is whether the Category 1 Questions ask for relevant information. I am satisfied that the Respondents have established that they are relevant to their estoppel defence and to the issue of remedy.

[17] In light of the foregoing, questions 461, 462, 677 and 679 therefore need to be answered.

[18] However, with respect to questions 685 and 1199 respectively asking why it took eight years for the Commissioner to raise the complaint with the Respondents and why the Commissioner did not do anything about investigations that he might have carried on, I am not satisfied that they are proper questions on this examination for discovery. True, they relate to the Competition Bureau's 2009-2010 investigation, but they ask about the thought process of the Commissioner and essentially seek to obtain the opinion from the Commissioner on those two issues. What is relevant are the facts that the Commissioner apparently took eight years to raise the complaint with the Respondents and allegedly did not follow-up on complaints received in 2008, not the reasons or explanations behind those decisions of the Commissioner. Questions 685 and 1199 therefore need not be answered.

IV. CATEGORY 2 QUESTIONS

[19] Turning to the Category 2 Questions, they seek to obtain answers clarifying to which of the individual Respondents certain allegations made by the Commissioner relate. The Respondents argue that the Commissioner has named eight different Respondents, but that most of his allegations simply assert conduct by the "Respondents", without distinguishing among them. In his Notice of Application, at paragraphs 10 to 18, the Commissioner states generally that the Respondents "have acted separately, jointly and/or in concert with each other" or that they "work together and/or individually" in making the impugned representations or in permitting them to be made. The Respondents submit that which Respondent is actually alleged to have taken what steps, and with whom, is relevant information that should be provided. The Respondents have pleaded that some of the Respondents are not proper parties and do not have any responsibility for the representations that the Commissioner says are misleading or deceptive. The Commissioner does not object to the Category 2 Questions on the basis of relevance but on the ground that, as formulated, they ask for a legal interpretation and are improper.

[20] There is no doubt, in my view, that questions relating to individual Respondents and how the facts known by the Commissioner can be linked with each of them are relevant to this Application. The Commissioner's pleadings do not specify with great detail how each of the Respondents are specifically linked to the allegations. In light of the Respondents' pleading to the effect that several of the Respondents were not involved in the Ticketing Platforms and should not be targeted by this Application, I accept the general proposition that the Respondents are entitled to ask questions as to which of the Respondents the facts and allegations made by the Commissioner relate.

[21] Indeed, in the order issued by the Tribunal on October 17, 2018 with respect to the affidavits of documents to be produced in this Application, Justice Phelan addressed the problem of attribution of documents to each Respondent and noted that the Respondents insisted on being treated separately, on defending separately, and on pleading that some Respondents were not proper parties to the Application. Accordingly, Justice Phelan ordered that separate affidavits of documents were required for each Respondent, as requested by the Commissioner, thus recognizing the relevance and importance of information tailored to each individual Respondent.

[22] The problem raised by the Category 2 Questions lies in the way the questions have been formulated by the Respondents. It is useful to reproduce the eight questions in dispute. They read as follows:

• Q 285-286 -- [When you said that you are not aware of any facts linking VIP Tour Company to ticketmaster.ca at this time], does that include directly or indirectly by acting in concert or jointly with somebody else?

• Q 844-848 -- What facts are associated with Live Nation Entertainment Inc. [or any of the other seven respondents] acting jointly with another respondent in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

• Q 845-848 -- What facts does the Commissioner have in association with whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted in concert in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

• Q 846-848 -- What facts or information is the Commissioner aware of with respect to whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted separately, in any way, with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

• Q 847-848 -- What information does the Commissioner have, or is the Commissioner aware of, with respect to, or in connection with, whether Live Nation Entertainment Inc. [or any of the other seven respondents] permitted some other respondent to act in any particular way with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

• Q 1119 -- Which respondents are said to make the price representations in question and which respondents are said to permit others to make the price representations in question?

• Q 1120 -- I would like to have the Commissioner's information with respect to the manner in which each of the respondents permits another respondent to make price representations

• Q 1121 -- I would like to have the Commissioner's information as to the manner in which each respondent makes the price representations that are the subject of this application

[23] As stated above, it is not disputed that the Respondents can rightfully ask for the factual basis behind the allegations made by the Commissioner and for the facts *known* by Ms. Nikolova, but they cannot ask for the facts or evidence *relied on* by the Commissioner to support an allegation. Moreover, a witness cannot be asked pure questions of law, as opposed to facts. Indeed, the Commissioner acknowledged that it would have been fine to ask questions on the facts linking each Respondent to the representations at stake, as long as the questions did not seek the facts *relied on* for the Commissioner's legal arguments. For example, questions would have been proper and acceptable if they had asked about facts known to the Commissioner that relate to the involvement of the individual Respondents with respect to the representations in dispute.

[24] However, the Commissioner argues that, as formulated, the Category 2 Questions go one step too far and in fact ask for a "legal interpretation" to be made by the witness, as they would require Ms. Nikolova to assess whether the facts sought by the Respondents effectively qualify as "acting in concert", "acting jointly" or "acting separately", or as "making" or "permitting" to make the impugned representations. The Commissioner submits that questions asking a witness to testify on questions of law or to provide argument as to what is relevant in order to prove a given plea are improper as examinations for discovery may only seek facts, not law (*Apotex* at para 19). The Commissioner pleads that the questions asked by the Respondents would in fact force Ms. Nikolova to think of the law applicable or relied upon for the Commissioner's allegations, and to select facts in accordance with her understanding of the law.

[25] I am ready to accept that this effectively happens when a party asks a discovery witness questions relating to the facts *relied on* in support of an allegation. However, I am not persuaded that this always happens when a witness is asked about facts in relation or in connection with allegations incorporating a legal test to be met, or simply because the questions contain language referencing provisions of the applicable legislation at stake or certain terms capable of having a legal connotation. Stated differently, I am not convinced that questions asking for facts or information known to the Commissioner's representative being discovered in connection with a particular allegation in the pleadings can be deemed to be automatically improper (and not subject to answer) because they import or refer to a legal concept or to a specific element of the conduct being challenged in the application.

> **[26]** Depending on how they are actually formulated, questions seeking facts or information known to the Commissioner and underlying his allegations with respect to the various elements of an alleged conduct can be considered as appropriate questions on discovery, even if they contain a certain legal dimension. If I were to accept the Commissioner's position, it would mean that, as soon as a question would include wording repeating the language of the Act or the elements of an alleged conduct that is the subject of an application, it would run the risk of being refused on the ground that it is considered as requiring a legal interpretation. This would significantly restrain the scope of any discovery of the Commissioner's witness by the respondents, or risk transforming examinations for discovery into an exercise too focused on semantics, where counsel for the respondents would be expected to look for creative wording in order to avoid any reference to a term used in the Act or in the specific provisions at the source of the application.

[27] There is, of course, no question that examinations on discovery are designed to deal with matters of fact. However, the line of demarcation between seeking a disclosure of facts and asking for evidence relied upon for an allegation is often hazy. Likewise, there is always a fine line between questions asking for facts *relied on* by a party in support of an allegation (which are always improper) and

TAB 20

Rogers-Shaw - Reasons for Order and Order on Motions to Compel Answers to Questions Refused on Examinations for Discovery, 2022 CanLII 135601 (CT)

Date: 2022-09-15

File number: CT-2022-002

Citation:
Rogers-Shaw - Reasons for Order and Order on Motions to Compel Answers to Questions Refused on Examinations for Discovery, 2022 CanLII 135601 (CT), <https://canlii.ca/t/jspvb>, retrieved on 2025-10-06

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Tribunal de
Competition Tribunal la
concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.* , 20 22 Comp Trib 16

File No.: CT- 2022-002

Registry Document No.: 589

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

BETWEEN:

Commissioner of Competition

(applicant)

and

Rogers Communications Inc.
Shaw Communications Inc.

(respondents)

and

Attorney General of Alberta

Videotron Ltd.

(intervenors)

Date of hearing: September 13, 2022

Before: Justice Andrew D. Little (Chairperson)

Date of oral reasons for order and order: September 15, 2022

REASONS FOR ORDER AND ORDER ON MOTIONS TO COMPEL ANSWERS TO QUESTIONS REFUSED ON EXAMINATIONS FOR DISCOVERY

(Public Version of Reasons rendered orally on September 15, 2022)

I. iNTRODUCTION

[1] This proceeding concerns the proposed acquisition by Rogers Communications Inc. ("**Rogers**") of Shaw Communications Inc. ("**Shaw**") (the "**Proposed Transaction**"). In general terms, the application by the Commissioner of Competition (the "**Commissioner**") claims that the Proposed Transaction has and will likely lessen or prevent competition substantially under section 92 of the *Competition Act*, RSC 1985, c C-34 as amended (the "**Act**"), by removing Shaw as a competitor in certain markets for the provision of certain services described by the Commissioner.

"**Scope of examination** "	"**Étendue de l'interrogatoire** "
"**240** "A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that " "(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or " "(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action "	"**240** "La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui : " "a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge; " "b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action "
Objections permitted **242** (1) A person may object to a question asked in an examination for discovery on the ground that (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.	"**Objection permise** " "**242** "(1) Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas : " "a) la réponse est protégée par un privilège de non-divulgation; " "b) la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge; " "c) la question est déraisonnable ou inutile; " "d) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241. "
Objections not permitted (2) A person other than a person examined under rule 238 may not object to a question asked in an examination for discovery on the ground that (a) the answer would be evidence or hearsay; (b) the question constitutes cross-examination" "	" ""**Objection interdite** " "(2) À l'exception d'une personne interrogée aux termes de la règle 238, nul ne peut s'opposer à une question posée lors d'un interrogatoire préalable au motif que, selon le cas : " "a) la réponse constituerait un élément de preuve ou du ouï-dire; " "b) la question constitue un contre-interrogatoire."" "

[11] All parties agreed that the Federal Court of Appeal established the applicable legal test for relevance in *Canada v Lehigh Cement Limited*, 2011 FCA 120, at para 34. It was recently confirmed in *Canada v Thompson*, 2022 FCA 119, at para 30.

[12] The Tribunal has adopted this approach and other principles from *Lehigh* in several cases: *Commissioner of Competition v Secure Energy Services Inc*, 2022 Comp Trib 3, at para 6; *Commissioner of Competition v Live Nation Entertainment, Inc,* 2019 Comp Trib 3, at para 8; *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("***VAA***"), at paras 41-46.

[13] The *Lehigh* principle is a general and flexible standard. Doubts as to relevance will be resolved in favour of disclosure: *Live Nation*, at para 8.

[14] Earlier this year in *Secure*, Justice Phelan set out the following quotations from *Live Nation*, at para 6:

TAB 21

Secure Energy Services Inc. - Reasons for Order and Order regarding the Respondent's Motion to compel answers to refusal on discovery, 2022 CanLII 9498 (CT)

Date: 2022-02-15

File number: CT-2021-002

Citation:
Secure Energy Services Inc. - Reasons for Order and Order regarding the Respondent's Motion to compel answers to refusal on discovery, 2022 CanLII 9498 (CT), <https://canlii.ca/t/jmfl5>, retrieved on 2025-10-06

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Competition Tribunal / Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2022 Comp Trib 3

File No.: CT-2021-002

Registry Document No.: 100

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

BETWEEN:

The Commissioner of Competition

(applicant)

and

Secure Energy Services Inc.

(respondent)

Date of hearing by video-conference: January 28, 2022

Before Judicial Member: Phelan, J.

Date of order: February 15, 2022

REASONS FOR ORDER AND ORDER REGARDING THE RESPONDENT'S MOTION TO COMPEL THE COMMISSIONER TO PROVIDE PROPER AND COMPLETE ANSWERS TO REFUSALS ON DISCOVERY

I. NATURE OF MATTER

[1] This is Secure Energy Services Inc.'s [Secure/Respondent] motion [Secure's Motion] following the discovery of the Commissioner's representative. It was heard along with the Commissioner's motion to compel Secure to answer certain questions. The Tribunal has ruled on the Commissioner's motion. Ultimately Secure's Motion comes down to whether some or all of the questions identified in Schedule A to Secure's Motion should be answered. This Order will address the specific questions to be answered as well as the applicable principles regarding the types of questions. Many of the disputed questions related to information arising from the Commissioner's investigation of the Tervita/Newalta merger previously described in the Tribunal's decision related to the Commissioner's discovery motion.

[2] The Commissioner has taken the position that it is only required to answer questions about facts learned related to the Tervita-Newalta merger whereas Secure takes the position that the Commissioner has a broader obligation to answer questions based on the Commissioner's ""information, knowledge and belief"" – the usual discovery standard.

[3] Secure recognizes, properly I add, that certain types of questions are improper to ask of the Commissioner including those seeking expert opinion and analysis – sometimes a difficult distinction. Secure does not ask for new analyses to be performed but says that the Commissioner's refusals relate to the Commissioner's existing knowledge, information and belief about a completed transaction involving one of the merging parties in (arguably) the same product and geographic market.

[4] The Tervita/Newalta merger's relevance or potential relevance to the Secure/Tervita Merger [Merger] is obvious from the facts in issue and from the pleadings in the litigation. The Commissioner does not seriously dispute the relevance of the Tervita/Newalta merger to the issues in this case. It just seeks to shield itself from disclosing some of what it learned from its review of that merger.

II. considerations

[5] Generally Secure's position better reflects the discovery obligations of a party in a Tribunal matter – including the Commissioner's. The Tribunal has taken a broad approach to the discovery obligation and has provided guidance, which I adopt, in *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3 [*Live Nation*], and *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 [*VAA*].

[6] The following quotes from *Live Nation* reflect the Tribunal's approach to the discovery obligation:

> [6] … It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations 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 (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("VAA") at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.
>
> [7] … FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person's knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings.
>
> [8] … At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper.
>
> …
>
> [10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts known by such party, but it cannot ask for the facts or evidence relied on by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (FCTD) ("*Montana Band*") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("*Apotex*"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).
>
> [11] … The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles" (*Lehigh* at paras 24-25; see also *VAA* at paras 41 46).

[7] In outlining the broad scope of discovery applicable to parties, it is important to recognize the somewhat unique status of the Commissioner. This was touched upon at *VAA*, paras 43-44:

> [43] **Other factors colour the examination for discovery process in Tribunal matters. First, the Commissioner is a unique litigant in proceedings before the Tribunal. The Commissioner is a non-market participant and his representatives have no independent knowledge of facts regarding the market and behaviour at issue. Rather, all of the facts or information in the Commissioner's possession, power or control arise from what he has gathered from market participants in the course of his investigation of the matter at stake. The Commissioner and his representatives do not have the direct and primary knowledge of the facts supporting the Application. This means that it may typically be more difficult and challenging for a representative of the Commissioner to exhaustively describe "all facts known" to the Commissioner.**
>
> [44] **Second, expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings.** Subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) directs the Tribunal to conduct its proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit". Ensuring both expeditious litigation and adequate protection of procedural fairness is thus a statutory exigency central to the Tribunal's functions. The Tribunal endeavours to make its processes quick and efficient and, at the same time, never takes lightly concerns raised with respect to the procedural fairness of its proceedings. Furthermore, as I have indicated in the *VAA Privilege Decision*, since proceedings before the Tribunal are highly "judicialized", they attract a high level of procedural fairness (*VAA Privilege Decision* at para 159). It is well-established that the nature and extent of the duty of procedural fairness will vary with the specific context and the different factual situations dealt with by the Tribunal, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 25-26; *VAA Privilege Decision* at paras 165-170).
>
> [Tribunal's emphasis]

[8] The guiding principles for this discovery obligation are relevance and fairness as reflected in para 46 of *VAA*.

TAB 22

The Commissioner of Competition v Vancouver Airport Authority, 2017 CACT 16 (CanLII)

Date: 2017-10-26

File number: CT-2016-015; 135

Citation:
The Commissioner of Competition v Vancouver Airport Authority, 2017 CACT 16 (CanLII), <https://canlii.ca/t/hmros>, retrieved on 2025-10-06

Most recent
unfavourable mention

Competition Tribunal / Tribunal de la concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16

File No.: CT-2016-015

Registry Document No.: 135

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF a motion by Vancouver Airport Authority to compel answers to questions refused on discovery.

BETWEEN:

The Commissioner of Competition

(applicant)

and

Vancouver Airport Authority

(respondent)

Date of hearing: October 13, 2017

Before Judicial Member: D. Gascon J. (Chairperson)

Date of Order and Reasons for Order: October 26, 2017

ORDER AND REASONS FOR ORDER GRANTING IN PART RESPONDENT'S MOTION TO COMPEL ANSWERS TO QUESTIONS REFUSED ON DISCOVERY

I. OVERVIEW

[1] On September 29, 2017, the Vancouver Airport Authority ("**VAA**") filed a motion before the Tribunal to compel the Commissioner of Competition ("**Commissioner**") to answer several questions that were refused during the examination for discovery of the Commissioner's representative, Mr. Kevin Rushton ("**Refusals Motion**"). VAA brought this Refusals Motion in the context of an application made against VAA by the Commissioner ("**Application**") under the abuse of dominance provisions of the *Competition Act*, RSC 1985, c C-34 ("**Act**").

[2] In this Refusals Motion, VAA seeks the following conclusions:

(a) An order requiring the Commissioner to answer, within fifteen days, the refusals set out in Schedule "A" to VAA's Notice of Motion (specifically those refusals set out in VAA's Memorandum of Fact and Law under the following categories: Category A – Facts known to the Commissioner ("**Category A**"), Category B – Questions regarding the third-party summaries ("**Category B**") and Category C – Miscellaneous ("**Category C**"));

(b) An order for VAA's costs of this motion; and

(c) Such further and other relief as the Tribunal deems just.

[23**]** In other words, counsel for VAA clarified that, in its Category A Requests, VAA's intention was to ask the Commissioner to answer the question regarding facts underlying an allegation or an issue in dispute, and that it was not necessarily seeking references to every specific bullet in the Summaries and to every specific document in the Documentary Productions.

[24**]** I admit that there was some confusion at the hearing before the Tribunal regarding the exact scope of what VAA was seeking in its Category A Requests. However, I understand that, in the end, counsel for VAA essentially retracted from the actual wording of the Category A Requests used in VAA's Memorandum of Fact and Law and now asks the Tribunal to read down its Requests and to ignore the language "including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions" contained in the Requests.

[25**]** The problem with VAA's modified position is that, on a motion to compel answers to questions refused on discovery, the Tribunal has to rule on the specific questions asked at the examination and which, according to the moving party, have been refused or improperly answered by the deponent. The questions asked are those formulated during the examination itself and which the deponent refused, was unable to answer or decided to answer in the way he or she did, at the examination itself or after having taken the questions under advisement. As rightly pointed out by counsel for the Commissioner, these are questions and answers arising from sworn testimony.

[26**]** Further to my review of the transcripts of the examination for discovery of Mr. Rushton, and of the actual questions asked under the various Category A Requests, I find that what was effectively asked by VAA at the examination was not only all the facts underlying an allegation or an issue in dispute, but also in the same breath all references to specific bullets in the Summaries and to specific documents in the Documentary Productions. These were the questions posed to Mr. Rushton, and these were the questions to which the Commissioner's representative responded. I understand that VAA's original question or intention might not have been to ask such broad and wide-ranging questions, but this is what was done for the Category A Requests. I note that the so-called "original question" is not before the Tribunal, and indeed does not form part of the 39 Category A Requests identified by VAA.

> **[**27**]** I agree with VAA that questions asking for the factual basis of the allegations made by a party have been considered by the jurisprudence to be proper questions to ask on examinations for discovery. VAA was therefore entitled to ask for "all facts known to the party being discovered which underlie a particular allegation in the pleadings" (*Montana Band* at para 27). I am also ready to accept that, contrary to the Commissioner's contention, the vast majority of VAA's Category A Requests relate to specific and discrete topics and issues, as opposed to being generic, general or "catch-all" questions.

[28**]** However, the problem is the level of specificity asked by VAA in its Category A Requests, in terms of specific references to the Summaries and Documentary Productions. Pursuant to Rule 242 of the FCR, a person can object to questions asking for too much particularity on the ground that they are unreasonable or unnecessary. The Tribunal has previously established that the Commissioner does not generally have to identify every particular document upon which he relies to support an allegation (*Canada (Director of Investigation and Research) v Southam Inc*, [1991] CCTD No 16 ("***Southam***") at paras 17-18; *Canada (Director of Investigation and Research) v NutraSweet Co*, [1989] CCTD No 54 ("***NutraSweet***") at para 29). If it is unreasonable to expect a party to identify every document or part thereof which might be *relied upon* to support an allegation, I conclude that it is likewise unreasonable and improper, on an examination for discovery, to ask a party to identify every document *containing facts known* to that party and which underlie a specific allegation (*Southam* at para 18).

[29**]** I acknowledge that there could be situations where the volume and complexity of the documentation produced reach such a level that the specific identification of every document may become necessary (*NutraSweet* at para 29). Some courts have indeed held that, where documentary production is voluminous, a party may be required to identify which documents contained in its productions are related to or support particular allegations (*Rule-Bilt Ltd v Shenkman Corporation Ltd et al* (1977), 1977 CanLII 1167 (ON SC), 18 OR (2d) 276 (ONSC) ("***Rule-Bilt***") at paras 27-28; *International Minerals & Chemical Corp (Canada) Ltd v Commonwealth Insurance Co*, 1991 CanLII 7792 (SKSB) ("***International Minerals***") at paras 6-10). However, I am not persuaded that, in this case, VAA has established or demonstrated the existence of such a voluminous or complex document production so as to require the Commissioner to identify every specific reference to documents or portions of summaries. I note that, when VAA's own productions and the catering pricing records are removed, the Commissioner's Documentary Productions amount to 1,158 records and that the Summaries add up to some 200 pages. In my opinion, and in the absence of any evidence demonstrating the contrary, this cannot be qualified as onerously voluminous or inherently complex, having particular regard to VAA's access to an electronic index and electronic data search function for these materials.

[30**]** I thus find that, as drafted in VAA's Memorandum of Fact and Law and as they were asked during the examination for discovery of Mr. Rushton, VAA's initial Category A Requests are overbroad and inappropriate and, for that reason, they need not be answered by the Commissioner. I agree with the Commissioner that answering them as they were expressed would in effect require the Commissioner to "issue code" its Summaries and Documentary Productions. This, in my opinion, cannot be imposed on the Commissioner.

[31**]** That being said, in the circumstances of this case, it would not be helpful nor efficient to end my analysis here. At the hearing, counsel for VAA indeed asked the Tribunal to also consider VAA's "reformulated" questions, namely a severed version of the Category A Requests asking for "all the facts known to the Commissioner" without necessarily referencing specific documents or specific bullets in the Summaries. He suggested that the Tribunal could read down and truncate the final portion of the Requests if it found VAA's initial Category A Requests too broad, and then assess whether those reformulated Requests were properly and sufficiently answered by the Commissioner.

[32**]** It is true that, in this Order, I could only consider VAA's Category A Requests as they were initially formulated, simply determine that they need not be answered because they are overbroad and unreasonable, and state that I decide so without prejudice to VAA returning in a further examination with read-down and reformulated questions addressing the same issues. However, in the context of this case and as the final steps for the preparation of the trial loom ahead, I am of the view that this option would not be a practical, expeditious and fair way to deal with the issues raised by VAA's Refusals Motion. The questions as framed in VAA's initial Category A Requests may be too broad but the subject matters of the questions are relevant. It is therefore much more preferable for me to deal with the "reformulated" Requests immediately, and this is what I will proceed to do.

b. The issue of proportionality

[33**]** I pause a moment to briefly address the subsidiary argument of the Commissioner based on the principle of proportionality, as it essentially applies in relation to the Commissioner's concern about VAA's request to "issue code" his productions and summaries. I know that, since I have just concluded that VAA's Category A Requests are overly broad and need not be answered, it is not necessary to consider this issue of proportionality for the purpose of this Order. However, in light of the representations made by counsel for the Commissioner at the hearing, I make the following remarks.

[34**]** The Commissioner claims that, in any event, the Tribunal should not order him to answer VAA's Category A Requests because it would be unduly burdensome and onerous for the Commissioner to issue code the Summaries and Documentary Productions to the level of specificity sought by VAA. The Commissioner has not filed an affidavit to support his claim regarding the disproportionate burden he would face to answer VAA's requests, but counsel for the Commissioner argues that, in this case, the Tribunal could determine this issue of proportionality in the Commissioner's favour despite the absence of affidavit evidence. I disagree with the Commissioner's position on this front.

> **[**35**]** I do not dispute that the proportionality rule applies to Tribunal proceedings. More specifically, on questions such as those raised in this Refusals Motion, the Tribunal must always take into account issues of proportionality (*The Commissioner of Competition v Reliance Comfort Limited Partnership*, 2014 Comp Trib 9 ("***Reliance***") at paras 25-27). However, the case law is clear: claims invoking the principle of proportionality must be supported by evidence (*Wesley First Nation (Stoney Nakoda First Nation) v Alberta*, 2013 ABQB 344 at paras 93-94; *Montana Band* at para 33). It is not sufficient to merely raise the argument that it would be too onerous to comply with a request to provide answers to questions on discovery. Some evidence must be offered to support the claim and to establish how a request could be disproportionate to its value.

[36**]** Indeed, in the Tribunal's decision relied on by the Commissioner, Mr. Justice Rennie's finding that the request to compel answers would be too burdensome and disproportionate was predicated upon actual evidence coming from two affidavits detailing the costs, human resources and time needed to comply with the request made (*Reliance* at paras 32, 39 and 42). Similarly, in *The Commissioner of Competition v Air Canada*, 2012 Comp Trib 20 ("***Air Canada***"), affidavit evidence was filed to demonstrate how the questions asked would impose a massive and disproportionate burden (*Air Canada* at para 24).

> **[**37**]** In the current case, the Commissioner has offered no evidence to support his plea of burdensomeness and disproportionality, and this alone would have been sufficient to reject his claim in this respect. I am not excluding the possibility that, in some circumstances, proportionality could dictate that disclosure requirements imposed on the Commissioner or a private litigant in an examination for discovery be more limited. These questions are highly fact-specific and will depend on the circumstances of each case. But, in each case, a claim of disproportionate burden will always require clear and convincing evidence meeting the balance of probability threshold (*FH v McDougall*, 2008 SCC 53 at para 46).

c. The "reformulated" questions asked by VAA

[38**]** I now consider VAA's "reformulated" Category A Requests, namely the questions asking for "all the facts that the Commissioner knows" with respect to a particular issue or allegation without necessarily referencing specific bullets in the Summaries or specific documents in the Documentary Productions. Of course, I understand that, as restated, these Requests were not actually put to Mr. Rushton during his examination for discovery and that neither Mr. Rushton nor the Commissioner has yet had an opportunity to consider them and to respond to them. In this regard, I accept that the responses already given by the Commissioner to VAA's initial Category A Requests, including his "stock answer", cannot simply be assumed to reflect what Mr. Rushton and the Commissioner would effectively respond to the "reformulated" version of these Requests. In fact, I do not exclude the possibility that the overly broad nature of the Category A Requests formulated by VAA and of the "stock undertaking" used at Mr. Rushton's examination for discovery may have contributed to polarize the Commissioner's responses and to prompt him to reply with the "stock answer" he resorted to. In that context, Mr. Rushton and the Commissioner certainly deserve to be afforded the opportunity to effectively respond to the "reformulated" Category A Requests before the Tribunal can determine whether or not such questions have been properly and sufficiently answered.

[39**]** However, I believe that, in the circumstances of this case, it is also useful and practical for me to discuss what, in my view, would constitute a proper and sufficient answer by the Commissioner to such "reformulated" Category A Requests from VAA. As stated above, I am ready to accept that VAA was entitled to *ask* the Commissioner for "all facts known" with respect to a particular issue or allegation (*Montana Band* at para 27). What remains to be determined are the parameters that can assist the parties in defining what would constitute an acceptable *answer* by the Commissioner to questions seeking "all facts known" by him.

[40**]** In this regard, VAA's Refusals Motion raises some fundamental questions on the extent of the disclosure obligations of the Commissioner in the context of examinations for discovery, and it is worth taking a moment to look at this issue from the more global perspective of oral discovery in Tribunal proceedings.

i. Examinations for discovery

[41**]** It is well-accepted that the purpose of discovery, whether oral or by production of documents, is to obtain admissions to facilitate proof of all the matters which are at issue between the parties, and to allow the parties to inform themselves prior to trial of the nature of the other party's position, so as to define the issues in dispute (*Canada v Lehigh Cement Limited*, 2011 FCA 120 ("***Lehigh***") at para 30; *Southam* at para 3). The overall objective of examinations for discovery is to promote both fairness and the efficiency of the trial by allowing each party to know the case against it (*Bell Helicopter Textron Canada Limitée v Eurocopter*, 2010 FCA 142 at para 14; *Montana* at para 5).

[42**]** It is also generally recognized that courts have taken a liberal approach to questions seeking "all facts known" by a party and that, in examinations for discovery, the relevant facts should be provided with sufficient particularity so that the information is not being buried in a mass of documentation or information. A sufficient level of specificity contributes to render the trial process fairer and more efficient. As such, a party will typically be entitled to know not only which facts are referred to in the pleadings but also where such description of facts is to be found (*Dek-Block Ontario Ltd v Béton Bolduc (1982) Inc* (1998), 1998 CanLII 7918 (FC), 81 CPR (3d) 232

TAB 23

Commissioner of Competition v. Sears Canada Inc., 2003 CACT 19 (CanLII)

Date: 2003-10-06
File number: CT2002004
Other citations: 2003 Comp Trib 19 — 28 CPR (4th) 385

Citation:
Commissioner of Competition v. Sears Canada Inc., 2003 CACT 19 (CanLII), <https://canlii.ca/t/1hv>, retrieved on 2025-10-24

Most recent
unfavourable mention

Reference: *Commissioner of Competition v. Sears Canada Inc.*, 2003 Comp. Trib. 19

File no.: CT2002004

Registry document no.: 0085

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

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(*b*)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition

(applicant)

and

Sears Canada Inc.

(respondent)

Date of hearing: 20030926 and 20031003

Member: Dawson J. (presiding)

Date of Order: 20031006

Date of Reasons: 20031017

Order signed by: Dawson J.

REASONS FOR ORDER REGARDING RESPONDENT'S MOTION FOR LEAVE TO AMEND RESPONSE AND DIRECTING THE COMMISSIONER TO PRODUCE DOCUMENTS

[1] The respondent Sears Canada Inc. ("Sears") filed a notice of motion, dated September 8, 2003, seeking an order granting leave to amend the responding statement of grounds and material facts filed on its behalf, as well as an order directing the Commissioner of Competition ("Commissioner") to produce the following documents which Sears deems necessary to respond to the Commissioner's application: Exhibit C to the affidavit of Mr. Jim King, Director, National Consumer Sales, Bridgestone/Firestone Canada Inc. ("Bridgestone"), sworn April 24, 2001, and Schedule B-4 to the affidavit of production of records and responses by Michelin North America (Canada) Inc. ("Michelin") dated November 30, 2000, and also any records completing Schedule B-4 which may have been attached to the letter dated April 20, 2001, from Michelin. The motion was heard on September 26 and October 3, 2003. These are my reasons for issuing an order on October 6, 2003 dismissing the request to amend Sears' responding statement of grounds and material fact and allowing, on a condition of confidentiality, the request for production of the two documents.

[2] This motion arises in the context of an application brought by the Commissioner under the ordinary selling price provisions of subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act") against Sears. The Commissioner alleges that Sears employed deceptive marketing practices which constituted reviewable conduct in connection with the promotion and sales of five lines of tires during three sales events in 1999.

[25] The production which Sears now seeks is limited to two documents which, as noted above, are each exhibited to affidavits sworn on behalf of Bridgestone and Michelin. Those entities manufacture four of the five relevant tire lines and each was required to provide certain records and information relevant to the Commissioner's inquiry pursuant to section 11 of the Act. Counsel advise that Mr. King of Bridgestone and a representative of Michelin are expected to testify at the upcoming hearing as part of the Commissioner's case.

[26] In his disclosure statement the Commissioner, as he was required to do, specified the documents he was relying upon. With respect to the King affidavit, the Commissioner listed the affidavit as a document relied upon and then, after describing the affidavit by deponent and date, wrote "including the following Exhibits". There followed a list consisting of Exhibits A, B, D and G. With respect to the Michelin affidavit, the disclosure statement again described the affidavit by deponent and date and then specified that it included Schedules A1, A2, A3, A4 and also documents subsequently submitted completing Schedules A1, A2, A3 and B4.

[27] Sears now asserts that, having disclosed the existence of the affidavits, the Commissioner is obliged to disclose each in its entirety. Alternatively, Sears argues that the two omitted exhibits should be available to Sears on the basis that discovery of the documents is warranted within the contemplation of paragraph 21(2)(*d.1*) of the Rules.

[28] In resisting disclosure or discovery of the documents counsel for the Commissioner observed that Sears' motion was "on the cutting line or the intersection between the disclosure tract and fairness". Counsel argued that the Commissioner has not disclosed the exhibits in the disclosure statement because a fair reading of the disclosure statement shows the intent to exclude the exhibits from disclosure. The exhibits in question were said to be severable from the portions of the affidavits relied upon because the affidavits provided pursuant to section 11 of the Act are "a matrix within which information provided by the parties is set out and attached" as opposed to being a narrative affidavit. Discovery of the exhibits was said not to be warranted under the Rules because the primary consideration should be whether the disclosure provided enables a respondent to know the case to be met so as to have a meaningful opportunity to present its case. It was also said that the evidence before the Tribunal on this motion fails to establish that Sears does not know the case it has to meet.

[29] Notwithstanding the submission of counsel for the Commissioner, I am satisfied on the record now before me that discovery of the exhibits in question is warranted. I reach that conclusion on the basis that, in my view, it is not sufficient simply to ask whether the disclosure provided falls short of disclosing to Sears the case it has to meet.

> **[30]** In *Commissioner of Competition v. Canada Pipe Company*, 2003 CanLII 90068 (CT), 2003 Comp. Trib. 15 Mr. Justice Blanchard was required to consider whether the Rules as they relate to disclosure by the Commissioner violate a respondent's right to a fair hearing. After analysing the content of the duty of fairness in light of the five factors set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, Mr. Justice Blanchard wrote , at paragraph 53, that a respondent's "right to a fair hearing [before the Tribunal] would be fulfilled by a process that provides a respondent the right to know the case against it and the right to have a meaningful opportunity to present evidence supporting its own case". [underlining added]

> **[31]** In my view, this is consistent with the previous order in this case which refused the discovery sought at that time on the ground that Sears failed to show that the disclosure provided fell short of disclosing the case to be met by Sears and failed to show that specific information or documents were "necessary for the defence of the application" or that there would be "any actual unfairness if Sears has to proceed to hearing without specific evidence".

[32] These decisions are in my further view consistent with the decision of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522 where the Court observed that the right to a fair hearing includes the right to make full answer and defence.

[33] Applying those principles to the present motion, I am satisfied that the right to make full answer and defence carries with it the right to know all of the information provided to the Commissioner in the affidavits upon which the Commissioner has chosen to rely, particularly where the withheld information is relevant to issues such as the definition of the geographic market.

[34] The Commissioner also resists production of these documents on the ground that they are the subject of public interest privilege.

[35] Public interest privilege is supported by the policy considerations that the Commissioner must be able to obtain information from the relevant industry in performing his function under the Act. To gain co-operation from people in the industry the Commissioner must be able to gather information in confidence.

[36] In *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.,* [1991] F.C.J. No. 1021 (F.C.A.) the Federal Court of Appeal quoted with approval the following application of the principles of public interest privilege as originally stated by Reed, J. in *Canada (Director of Investigation and Research) v. Southam Inc.* (1991), 1991 CanLII 2396 (CT), 38 C.P.R. (3d) 68:

> The Director refuses to provide the specific interview notes, to identify the individuals interviewed, when they were interviewed and who they were interviewed by. At the same time, he has agreed to give the respondents a summary of what was said. In the competition law area, at least in merger and abuse of dominant position cases, the individuals who are interviewed may be potential or actual customers of the respondents, they may be potential or actual employees. They may fear reprisals if they provide the Director with information which is unfavourable to the respondents. Many of them are likely to be in a vulnerable position vis-a-vis the respondents. It is in the public interest to keep the interview notes confidential except when the interviewees are called as witnesses in a case or otherwise identified by the party claiming privilege. In addition, the Director is not required to prepare the respondents' case by identifying potential witnesses for them. ...The public interest in keeping the details of the interviews confidential outweighs any benefit that the respondents might obtain from them. This is particularly so given the fact that the Director has agreed to provide summaries of the relevant information. [underlining added]

TAB 24

Cineplex - Reasons for Order and Order, 2024 CanLII 93716 (CT)

Date: 2024-09-23
File number: CT-2023-003
Other citation: 2024 Comp Trib 5

Citation:
Cineplex - Reasons for Order and Order, 2024 CanLII 93716 (CT), <https://canlii.ca/t/k748j>, retrieved on 2025-10-27

Most recent
unfavourable mention

Competition Tribunal / Tribunal de la concurrence

REVISED PUBLIC VERSION[3]

Reference: *Canada (Commissioner of Competition) v Cineplex Inc* , 20 24 Comp Trib 5

File No.: CT-20 23-003

Registry Document No.: 84

IN THE MATTER OF an Application by the Commissioner of Competition for an order under sections 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34.

BETWEEN:

Commissioner of Competition

(applicant)

and

Cineplex Inc

(respondent)

Dates of hearing: February 14-16, 20-21 and 28-29, 2024

Before: Mr Justice Andrew D. Little (Chairperson)

Date of Reasons for Order and Order: September 23, 2024

REASONS FOR ORDER AND ORDER

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3. Revised as of February 14, 2025, pursuant to the Errata Note published on same day.

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closer to Vallance v DHL Express (Canada), Ltd, 2024 BCSC 140, at paras 55-56, 58-61, but stronger on its facts than Vallance. It is not necessary to consider the circumstances in which a partial statement of facts or similar omission can, on its own, constitute a representation under paragraph 74.01(1)(*a*).

[406**]** Beyond this analysis of the factual evidence, Dr Morwitz's expert opinion provides support for the finding of representations that are false or misleading under paragraph 74.01(1)(*a*). She testified that the Online Booking Fee is a "shrouded attribute" according to the academic literature. It is a fee separated from the price of the ticket and presented sequentially (i.e., the ticket price is presented first, and the fee is added later). She identified the shrouding or obfuscation of the fee owing to the number of steps that a consumer has to take to find or learn information about the per-ticket Online Booking Fee. She referred to: (i) the need to click on the ADD button for fee information to be displayed, (ii) the absence of any reference to a fee next to the displayed ticket price, (iii) the placement of Online Booking Fee information at the bottom of the Tickets Page (below the fold) and that consumers have to scroll down to find it, (iv) having to do mental math about the subtotal to otherwise become aware of the fee, (v) the font used to display it, (vi) the need to click the blue encircled "i" to get information about the added fee, and (vii) the use of the countdown clock to create a sense of urgency.

[407**]** Dr Morwitz described the effect on consumers of separating different elements of the overall price to be paid. In particular, her opinion was that the way in which the ticket prices and the Online Booking Fee are presented on the website and the App lowers consumers' perceptions of the total price of the tickets and affects their buying behaviour by leading them to underestimate the total price of purchasing the tickets.

[408**]** Dr Morwitz provided a summary of the academic literature and provided her own analysis of the situation on the Cineplex website and App. As discussed when analyzing Cineplex's objections to the admissibility of her evidence, I find that her opinions on these issues were not materially altered or compromised at the hearing. I also recognize that Dr Morwitz did not conduct a study to determine whether actual consumers were misled by the Cineplex website or App, or whether the partitioned pricing in fact led to altered perceptions of the ticket price or changed buying behaviour. As the Commissioner noted, she was not asked to do so (nor was the Commissioner required to demonstrate so under the *Competition Act*).

[409**]** Cineplex relied on Dr Amir's evidence that virtually no consumer was misled by the Online Booking Fee. I agree that evidence of this nature, if properly supported, could be relevant to the Tribunal's assessment, acknowledging again that the Commissioner is not required to adduce evidence to show that anyone was actually deceived: see paragraph 74.03(4)(*a*).

[410**]** In his report, Dr Amir testified that there were 97 million consumer visits to the Cineplex website in 2022. By contrast, only seven complaints were submitted to the Competition Bureau, all of which were after the Commissioner filed the Notice of Application in this matter, about a year after the Online Booking Fee was introduced. This represented 0.0000072 percent of visits to the "Cineplex Consumer Flow" (as Dr Amir described it). This suggested to Dr Amir that, "from a scientific perspective, virtually all consumers of the Cineplex Website did not find the Online Booking Fee misleading". Dr Amir did not find this surprising, given his analysis that "Cineplex's website design, the Consumer Flow of a ticket, and presentation of the Online Booking Fee are consistent with marketing and user design best practices as well as industry standards and norms".

[411**]** At the hearing, Dr Amir testified that it was his "scientific conclusion" that virtually all consumers of the Cineplex website did not find the Online Booking Fee misleading.

[412**]** I do not accept this position. It is neither scientific nor reliable. Cross-examination demonstrated that the numerator used by Dr Amir (i.e., the number of complaints to the Competition Bureau) was inaccurate and unreliable as a measure of actual persons who were deceived or misled. In addition, the denominator used by Dr Amir was significantly overstated. Cross-examination revealed that the premise (97 million visits to the website) did not reflect actual visitors. The number of website visitors is necessarily some unknown lower number, which Dr Amir agreed was significantly less than 97 million. In addition, the time period for the number of visits used by Dr Amir was calendar 2022, but the Online Booking Fee was not implemented until June 15, 2022, meaning that the number of "visits" is overstated by using the first 5.5 months in the calendar year.

[413**]** Further, it is apparent that to obtain a reasonable understanding of consumers who were or were not misled by Cineplex's display of pricing information, one would have to consider only those who were exposed to the ticket prices on the Tickets Page. A user cannot see pricing information without logging in, and, as Dr Amir recognized in his report, about 85.7 million of the "visits" did not reach the Tickets Page. Only 11.8% got to the Tickets Page, and an even smaller number got past the Tickets Page to the next page.

[414**]** Lastly, Dr Amir's analysis considered visits to the Tickets Page through the website but did not consider visits through the App, although about 37.5% of purchasers visit the Tickets Page on the App.

[415**]** I give no weight to Dr Amir's analysis on website visits and consumer complaints, including the inference drawn from it that virtually no one was misled. That the conclusion is consistent with other aspects of Dr Amir's report is of no consequence given the limited extent of his expertise to testify about website user design and best practices.

[416**]** The factual evidence before the Tribunal leads to the conclusion that the ticket price representations on the Cineplex website and the App were false or misleading. That conclusion is also supplemented and supported by the expert opinion from Dr Morwitz.

[417**]** The Commissioner has established the "false or misleading" element under paragraph 74.01(1)(*a*).

F. Were the Representations False or Misleading "in a material respect" under paragraph 74.01(1)(*a*)?

[418**]** A representation is material under paragraph 74.01(1)(*a*) if it is "so pertinent, germane or essential that it could affect the decision to purchase": Apotex Inc v Hoffman La-Roche Ltd (2000), 195 DLR (4th) 244 (Ont CA), 2000 CanLII 16984, at para 16. See also Premier Career Management Group FCA, at paras 20 (quoting Apotex), 65, 80; Sears, at paras 333-336 (a "material influence on the mind of a consumer"); Gestion Lebski inc, at paras 154, 163, 288; Yellow Page Marketing, at para 34.

TAB 25

Canada (Office of the Information Commissioner) v. Canada (Prime Minister), 2019 FCA 95 (CanLII)

Date: 2019-04-24
File number: A-311-17; A-313-17
Other citation: [2019] CarswellNat 1623

Citation:
Canada (Office of the Information Commissioner) v. Canada (Prime Minister), 2019 FCA 95 (CanLII), <https://canlii.ca/t/j077j>, retrieved on 2025-10-24

Most recent
unfavourable mention

Date: 20190424

Dockets: A-311-17

A-313-17

Citation: 2019 FCA 95

CORAM: **NEAR J.A.**

DE MONTIGNY J.A.

WOODS J.A.

Docket: A-311-17

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Appellant

and

THE PRIME MINISTER OF CANADA

Respondent

Docket: A-313-17

BETWEEN:

THE PRIME MINISTER OF CANADA

Appellant

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 17, 2018.

Judgment delivered at Ottawa, Ontario, on April 24, 2019.

PUBLIC REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: NEAR J.A.

WOODS J.A.

Date: 20190424

PUBLIC

[redacted]. While the Clerk slightly reformulated [redacted] in his Memorandum, he clearly conveys the same objective information and is not offering advice or recommendation; moreover, it is not intertwined in the analysis for consideration by the Prime Minister, and as such it can reasonably be severed from the record.

[43] The same is true of the information found in the second and third bullets in the Memorandum to the Clerk, dated August 6, 2013, pertaining to the fate of [redacted] (Appeal Book, vol. 2, tab 6(11), at p. 208). This is clearly factual and objective information that is devoid of any normative element.

[44] I am of the same view with respect to the information contained in the second bullet of the Memorandum to the Clerk dated July 2, 2013 (Appeal Book, vol. 2, tab 6(11), at p. 222). Here, the information at issue is an enumeration, in the Clerk's own words, of [redacted] considered at the time of the making of the Memorandum. Once again, no recommendation or advice is offered here; it is merely a summary of the arguments made by [redacted], without any gloss. This is to be contrasted with the third bullet in the same Memorandum, where the author expressed the views of the Deputy Secretary to the Cabinet and Counsel to the Clerk with respect to [redacted]. The information in the second bullet of the July 2 Memorandum is quite different from that information, and from the one considered by the Court in the following excerpt of *Telezone*:

> [63] … a memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or presenting a range of policy options on an issue, implicitly contains the writer's view of what the Minister should do, how the Minister should view a matter, or what are the parameters within which a decision should be made. All are normative in nature and are an integral part of an institutional decision-making process. They cannot be characterized as merely informing the Minister of matters that are largely factual in nature. Nor do I think that the use in the French text of paragraph 21(1)(a) of the word "*avis*", which is generally translated into English as "opinion", conveys a narrower meaning in this context than the word "advice" in the English version.

[45] When reading the second bullet of the above-mentioned Memorandum, there is not the slightest hint as to the writer's opinion regarding what the Clerk should do or how [redacted] should be treated. The advice or recommendation is fully set out in the third bullet, where the writer addresses in turn each of [redacted]. The second bullet is completely neutral and reads as a faithful and objective description of [redacted] submissions, without even drawing attention to what could be considered the most salient or persuasive of his arguments.

[46] The only information that cannot be considered purely factual and that should have been exempted by the Judge is that found in the third bullet of the summary that is part of the Memorandum to the Prime Minister dated July 10, 2013 (Appeal Book, vol. 2, tab 6(11), at p. 212). That piece of information clearly ""relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised"" (*John Doe* at para. 23). Indeed, almost identical wording found in the body of the Memorandum has been redacted by the Judge (see Appeal Book, vol. 2, tab 6(11), p. 214, second to last bullet). I note as well that the Commissioner agrees with the Prime Minister that this information constitutes a recommendation under paragraph 21(1)(a) of the Act; although not binding on this Court, this agreement is further support for the view that it ought to have been redacted by the Judge.

C. Was PCO authori□ed to refuse the disclosure of the records based on section 23 of the Act?

(1) General Principles

[47] Section 23 of the Act recognizes another discretionary exemption to the broad section 4 right to access, stating that a government institution ""may refuse"" the disclosure of any record containing ""information that is subject to solicitor-client privilege"".

[48] The common law recognizes two types of solicitor-client privilege: legal advice privilege and litigation privilege. In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, the Supreme Court confirmed that the phrase ""solicitor-client privilege"" in section 23 of the Act refers to both legs of the privilege (at para. 4). In the case at bar, the Prime Minister relied only upon the legal advice privilege to exempt some of the information in the 27 pages of records at issue. The Judge accepted that some of the information that the Prime Minister sought to shield from disclosure was privileged, but for the most part found that the documents did not involve solicitor-client communications (Reasons at para. 34).

[49] The legal advice privilege attaches to all communications between a solicitor and his or her client for the purpose of obtaining or giving legal advice. The test for determining whether a document or communication is subject to that privilege was enunciated by the Supreme Court in *Solosky*. Three conditions must be met for a document to be considered as legal advice giving rise to the privilege: 1) there must be a communication made in confidence between a lawyer and his or her client; 2) that communication must be for the purpose of seeking or giving legal advice; and 3) the parties must have intended the communication to be confidential (*Solosky* at p. 837; *Blank 2016* at para. 44).

[50] The Supreme Court has often reiterated the critical importance of the solicitor-client privilege to the proper functioning of our legal system, and has gone as far as stating that it should only be set aside in the ""most unusual circumstances"" (*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 at para. 17; see also *Alberta (Information and Privacy Commissioner) v. University of Calgary)*, 2016 SCC 53, [2016] 2 S.C.R. 555 at para. 34). That being said, a party asserting that a document is privileged bears the onus of establishing the privilege; this onus requires more than a bald assertion of privilege and will only be met if there is sufficient evidence to show that each of the three criteria of the *Solosky* test are met (see *Canada (Attorney General) v. Williamson*, 2003 FCA 361 at paras. 11-13).

[51] Solicitor-client privilege applies to communications that take place within what the case law refers to as a ""continuum of communication"". This notion was considered as follows by this Court in *Canada (Information Commissioner)*:

TAB 26

Canada (Commissioner of Competition) v. Canada Tax Reviews Inc., 2021 FC 921 (CanLII)

Date: 2021-09-07

File number: T-999-21

Citation:
Canada (Commissioner of Competition) v. Canada Tax Reviews Inc., 2021 FC 921 (CanLII), <https://canlii.ca/t/jjftr>, retrieved on 2025-11-05

Acknowledgements:
The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

Most recent
unfavourable mention

T-999-21

2021 FC 921

The Commissioner of Competition (*Applicant*) (*Responding Party on Motion*)

v.

Canada Tax Reviews Inc. (*Respondent*) (*Moving Party on Motion*)

Indexed as: Canada (Commissioner of Competition) v. Canada Tax Reviews Inc.

Federal Court, Crampton C.J.—By videoconference, August 18; Ottawa, September 7, 2021.

Competition — Motion to set aside, vary order issued ex parte under Competition Act, s. 11 for information from respondent, Canada Tax Reviews Inc. (CTR), relating to specific matters under inquiry — Motion brought by respondent under Federal Courts Rules, r. 399(1)(a) — Applicant (Commissioner of Competition) appointed under Act, s. 7; is responsible for enforcement, administration of Act — CTR described as tax recovery specialist firm that advocates on behalf of its clients to Canada Revenue Agency — Commissioner filed application pursuant to Act, ss. 11(1)(b),(c) for order requiring CTR to produce records, provide written returns of information — In that application, Commissioner explained that inquiry had been commenced under Act, s. 10 concerning certain of CTR's marketing practices — Commissioner had reason to believe that grounds existed for making of order under Part VII.1 of Act, specifically ss. 74.01(1)(a), 74.011(1) — CTR informed that Commissioner would be seeking order under Act, s. 11, was invited to participate in "pre-issuance dialogue" — Hearing of Commissioner's application taking place — Court then issuing disputed order — Whether disputed order should be varied — In ex parte applications under Act, s. 11, Commissioner subject to heavy burden to make full, frank disclosure of all relevant facts, circumstances surrounding application — Commissioner must ensure that Court not misled as to potential relevance of information for inquiry in question — Commissioner not failing to meet elevated duty of full, frank disclosure applying in ex parte proceedings under Act, s. 11 — Alleged shortcomings, defects in Commissioner's disclosure having to be such that they may have led Court to refuse to grant order in question or certain of specifications therein — None of defects that CTR identified rising to that level — Court had very good appreciation of CTR's position from materials submitted — Contrary to CTR's position, Court not misled by any aspect of Commissioner's disclosure — CTR objected to several specifications in disputed order that required specific information, maintained that information at issue not relevant to issues in this matter — Such specifications were relevant to Commissioner's inquiry into whether CTR made false or misleading representations, as contemplated by Act, ss. 74.01(1)(a), 74.011(1) — Would not impose excessive, disproportionate or unnecessary burden on CTR — Regarding scope of information sought, while change made to specification in disputed order to limit specific records sought, remaining provisions not excessive, disproportionate or unnecessarily burdensome — Commissioner not failing to meet elevated duty of full and frank disclosure — Commissioner under no legal obligation to discuss with CTR relevance of one or more aspects of draft order during process of pre-application dialogue — Motion dismissed with some limited exceptions.

Practice — Judgments and Orders — Respondent, Canada Tax Reviews Inc. (CTR), seeking to set aside, vary portions of order issued ex parte under Competition Act, s. 11 — Motion brought by CTR under Federal Courts Rules, r. 399(1)(a) — Applicant (Commissioner) had previously filed application pursuant to Act, ss. 11(1)(b),(c) for order requiring CTR to produce records, provide written returns of information — Inquiry commenced concerning certain of CTR's marketing practices — Court issuing disputed order following hearing of Commissioner's application — Whether disputed order should be varied — General test for having order set aside or varied on motion under Rules, r. 399(1)(a) is whether CTR disclosing prima facie case why order should not have been made — Even where respondent demonstrating specific conclusions to justify motion, Court affording Commissioner opportunity to be heard, retaining discretion to dismiss respondent's motion — After having considered any additional information provided by Commissioner, Court may remain satisfied that information described in Order still relevant, is not excessive, disproportionate or unnecessarily burdensome — In such circumstances, Court may exercise its discretion to deny relief respondent seeking.

This was a motion to set aside and vary an order issued *ex parte* under section 11 of the *Competition Act* for information from the respondent, Canada Tax Reviews Inc. (CTR) relating to specific matters under inquiry. The motion was brought by the respondent under paragraph 399(1)(a) of the *Federal Courts Rules*. It raised important issues pertaining to Orders issued *ex parte* pursuant to section 11 of the Act.

V. Issue

[28] Given that CTR is not requesting that the disputed order be set aside in its entirety, the sole issue on this motion is whether the disputed order should be varied.

[29] This will require assessing the basis for the various amendments sought by CTR.

VI. Assessment

A. *Applicable legal principles*

(1) The test under paragraph 399(1)(a) [of the Rules] in proceedings under section 11 of the Act

[30] The general test for having an order set aside or varied on a motion under paragraph 399(1)(a) is whether the respondent has disclosed a *prima facie* case why the order should not have been made. This requires the respondent to provide sufficient facts and law to justify a conclusion in its favour, in the absence of a response from the applicant: *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, at page 558, (1985), 52 O.R. (2d) 799. For orders issued under section 11 of the Act, this can be achieved by providing sufficient facts and law to justify one of the following conclusions: (i) that the Commissioner did not satisfy the elevated duty of disclosure that applies in such proceedings, (ii) that the Commissioner has not initiated a *bona fide* inquiry under section 10 of the Act, (iii) that some or all of the information that was ordered to be produced is irrelevant to the Commissioner's inquiry, or (iv) that some or all of that information would be excessive, disproportionate or unnecessarily burdensome.

[31] Even where a respondent demonstrates one or more of these things, the Court will afford the Commissioner an opportunity to be heard and will retain the discretion to dismiss the respondent's motion. For example, the respondent may disclose a *prima facie* case that the Commissioner did not meet the elevated duty of disclosure. However, after having considered any additional information provided by the Commissioner, the Court may remain satisfied that the information described in the order is still relevant and is not excessive, disproportionate or unnecessarily burdensome. In such circumstances, the Court may exercise its discretion to deny the relief sought by the respondent.

(2) The Commissioner's duty of disclosure

> [32] In *ex parte* applications under section 11 of the Act, the Commissioner is subject to a heavy burden to make full and frank disclosure of all of the relevant facts and circumstances surrounding the application: *Commissioner of Competition v. Labatt Brewing Company Limited*, 2008 FC 59, 337 F.T.R. 59 (*Labatt*), at paragraphs 22–23; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 18 C.C.L.I. (5th) 263 (*RBC*), at paragraph 26. This burden is intended to achieve two fundamental things:
>
> .... The first is ensuring that the Court is informed of "any points of fact or law known to it which favour the other side" (*United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.) (QL), at paragraph 27; *Labatt*, above, at paragraphs 25–26; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at paragraph 27). The second is ensuring that the Court is able to detect and redress abuses of its own processes (*RBC*, above, at paragraphs 31–36).
>
> *Canada (Commissioner of Competition) v. Pearson Canada Inc.*, 2014 FC 376, [2015] 3 F.C.R. 3 (*Pearson*), at paragraph 44.

[33] In essence, this elevated duty of candour assists the Court to properly balance the competing interests at play in *ex parte* applications. To this end, it requires the Commissioner to ensure that the Court is not misled, whether through non-disclosure or misinformation, as to the potential relevance of the information for the inquiry in question. In addition:

.... the Commissioner is obliged to disclose the general nature and extent of any information already obtained from the respondent in the course of the inquiry and in the investigation leading up to the inquiry. If the respondent has provided significant information to the Commissioner in other contexts, such as a recent merger review, the Commissioner should also provide a general description of that information, together with an explanation of how that information differs from the information being sought in the section 11 application.

Pearson, above, at paragraph 45.

[34] However, the Court ordinarily will not conclude that the Commissioner has failed to meet the duty of full and frank disclosure on the basis of a failure to disclose relatively inconsequential facts or due to other imperfections in the application record: *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.) (QL) [*Friedland*], at paragraph 31. Instead, "the defects complained of must be relevant and material to the discretion to be exercised by the Court": *Labatt*, above, at paragraph 27. Stated differently, those defects must be such that they may well have led the issuing judge, had he or she known of them, to refuse to grant the order or certain of the specifications therein: *Labatt*, above, at paragraph 35; *Canada (Commissioner of Competition) v. Air Canada*, 2000 CanLII 17157 (FC), [2001] 1 F.C. 219, (2000), 8 C.P.R. (4th) 372 (T.D.) (*Air Canada*), at paragraph 13.

[35] CTR maintains that the Commissioner's duty of full and frank disclosure is not discharged merely by including information in one of many exhibits to an affidavit. In support of this position, it relies on *Friedland*, above, which involved a motion for an *ex parte* Mareva injunction brought by the United States of America. However, the facts in that case are distinguishable from those in the present proceeding. There, the court observed that the inclusion of a proxy circular in one of a large number of exhibits to an affidavit could not be considered to have discharged the plaintiff's duty to disclose an important term in a share acquisition agreement: *Friedland*, above, at paragraphs 166 and 167.

[36] By contrast, in applications under section 11 of the Act, the Commissioner's affiant generally provides a description of the principal concerns raised by the respondent, and then refers the Court to the correspondence in which those and other concerns have been raised. In this case, the Commissioner's affiant also provided an overview of the points discussed during each of the four "pre-issuance dialogue"

TAB 27

PUBLIC

Basque v 1210520 B.C. Ltd., 2025 BCSC 437 (CanLII)

Date: 2025-03-13
File number: M39891

Citation:
Basque v 1210520 B.C. Ltd., 2025 BCSC 437 (CanLII), <https://canlii.ca/t/kb1f1>, retrieved on 2025-10-31

Most recent
unfavourable mention

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Basque v. 1210520 B.C. Ltd.,* 2025 BCSC 437

Date: 20250313

Docket: M39891

Registry: Chilliwack

Between:

Jacqueline Marie Basque

Plaintiff

And

1210520 B.C. Ltd. and

Sobeys Capital Incorporated/Sobeys Capital Incorporée

Defendants

Before: Associate Judge Hughes

Reasons for Judgment

Counsel for Plaintiff: V. Namdarian

Counsel for Defendants: C. VanDuzer

Place and Date of Hearing: Chilliwack, B.C. March 3, 2025

Place and Date of Judgment: Chilliwack, B.C. March 13, 2025

[1] The plaintiff seeks an order requiring the defendants to produce eleven adjuster's reports which have been listed under Part 4 of the defendants' list of documents as being subject to litigation privilege.

[2] This action arises from the plaintiff's claim for injuries she sustained from a slip and fall incident which occurred on August 16, 2021 (the "Incident"). The plaintiff claims that she was in a FreshCo grocery store in Aldergrove, BC when she slipped and fell on water that was leaking from a freezer. Store employees assisted the plaintiff and an ambulance was called.

[3] On September 22, 2021, plaintiff's counsel wrote a letter to FreshCo (the "Letter") advising that he had been retained by the plaintiff with respect to the Incident. The Letter reads, in part:

We request that you provide your insurer with notice of this claim and have them contact us at their earliest convenience ...

PUBLIC

...

We are hopeful that this matter may resolve without resorting to litigation.

[4] The defendants' insurer retained John Parsons ("Mr. Parsons") from Coast Claims Insurance Services to assist them. Mr. Parsons corresponded with plaintiff's counsel and produced eleven reports dated from October 7, 2021 to October 4, 2022 (the "Reports").

[5] The notice of civil claim was filed on June 6, 2023. The first communication from defendants' counsel was on August 11, 2023, requesting an extension of time to file their response to civil claim. There was no prior indication from the defendants that they had retained counsel in relation to the Incident.

[6] The parties largely agree on the legal principles relevant to a claim for litigation privilege, but disagree on their application to the case at bar. The important principles are as follows:

a) Litigation privilege is a narrow exception to the principle of full disclosure;

b) The onus generally lies with the party asserting litigation privilege to establish that privilege;

c) Litigation privilege is established on a document-by-document basis;

d) Each document must be assessed at the time it was created; and

e) If a document is created for a dual purpose, one of which is not for use in litigation, it must be produced.

Oates v. Burton, 2016 BCSC 1428 at paras. 16-21.

[7] The test for establishing litigation privilege is two-fold:

a) Was litigation in reasonable prospect at the time the document in dispute was created?

b) If so, was the dominant purpose for the document's creation for use in litigation?

Hamalainen (Committee of) v. Sippola, (1991) 1991 CanLII 440 (BC CA), 62 B.C.L.R. (2d) 254 at paras. 18-20, 27 (B.C.C.A.)

[8] The determination of whether litigation is contemplated as a reasonable prospect is an objective test based upon reasonableness: *Spenst v. Reemeyer*, 2013 BCSC 1394; *Raj v. Khosravi*, 2015 BCCA 49. It is a low threshold that is not particularly difficult to meet, but a bare assertion of "in reasonable prospect" will not be sufficient: *Raj*, para. 12. Litigation can be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it: *Hamalainen*, para. 21. Merely having notice of counsel involvement would not be sufficient to establish that litigation was in reasonable prospect: *Spenst*, para. 15.

> [9] A party claiming litigation privilege is required to establish that the dominant purpose for production of the document at issue was to obtain legal advice or to conduct or aid in the conduct of litigation. This is a higher threshold than the first part of the test and involves a fact-sensitive inquiry of all the circumstances and the context in which the document was produced: *Hamalainen*, para. 22; *Raj*, para. 12.

[10] This is the point at which counsel disagree. The plaintiff relies on cases such as *Hamalainen* and *Raj* which held that even in cases where litigation is in reasonable prospect from the time a claim arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the incident on which it is based. Thus, a finding of dominant purpose involves an individualized inquiry as to whether, and if so when, the focus of the investigation shifted to litigation: *Hamalainen*, para. 24; and *Raj*, para. 17.

[11] The defendants rely on *Plenert v. Melnik Estate*, 2016 BCSC 403, which considered *Panetta v. Retrocom Mid-Market Real Estate Investment Trust*, 2013 ONSC 2386. In *Panetta*, the Ontario court found that in third-party or tort claims (as opposed to claims by an insured against his own insurer) there is no preliminary investigative stage where privilege does not attach to documents prepared by an adjuster, and that the sole reason for any adjuster's investigation is to defend against potential litigation, which inherently includes the prospect of settlement.

[12] Notwithstanding the approach in *Panetta*, BC authorities require a fact-specific analysis in order to determine the dominant purpose for which a disputed document was produced. This approach is confirmed in *Plenert*, para. 42, where the court said "I do not go so far as to say that in all circumstances the investigations of liability insurers will be privileged" before referring to the evidence in that case.

[13] Likewise, in the recent case of *Kapoor v. Starbucks Coffee Canada, Inc.*, 2024 BCSC 1458, the court reviewed the evidence tendered. After considering *Plenert*, the court confirmed that the evidence supported the conclusion that the documents were created for the dominant purpose of obtaining legal advice or to conduct or aid in the conduct of anticipated litigation.

[14] Turning to the case at bar, the first issue to be determined is whether litigation was in reasonable prospect at the time that the Reports were created. As referenced at the outset, the Incident occurred on August 16, 2021. The plaintiff retained counsel thereafter, who wrote the Letter to the defendants on September 22, 2021.

[15] Mr. Parsons was also retained in or around September 2021, although there is no evidence as to whether that was before or after the Letter was received by the defendants. Mr. Parsons' first report was dated October 7, 2021 and includes five enclosures. The enclosures have been produced, but not the report itself. Subsequent reports were dated October 7 and December 29, 2021, and January 24, February 17, April 14, May 12, July 5, August 29, September 27 and October 17, 2022. There is no description of any of the eleven reports other than those set out in the defendants' list of documents.

TAB 28

Canada (National Revenue) v. Nerland, 2011 FC 714 (CanLII)

Date: 2011-06-16

File number: T-537-11

Citation:
Canada (National Revenue) v. Nerland, 2011 FC 714 (CanLII), <https://canlii.ca/t/fmf6h>, retrieved on 2025-10-31

Most recent
unfavourable mention

Federal Court | Cour fédérale

Date: 20110616

Docket: T-537-11

Citation: 2011 FC 714

Ottawa, Ontario, June 16, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

DENNIS L. NERLAND

Respondent

REASONS FOR ORDER AND ORDER

[1] On March 31, 2011, the Minister of National Revenue commenced three separate but related applications for Compliance Orders under s. 231.7(1) of the *Income Tax Act*, RSC 1985, c 1 (5 Supp) regarding Requests for Information issued by the Minister pursuant to s. 231.1(1) of the Act. The Requests for Information, and the subsequent applications, were directed to Moodys LLP (Court File T-536-11), Dennis L. Nerland (Court File T-537-11), and Dennis L. Nerland (Court File T-538-11).

[2] These Reasons relate to all three applications. Separate, but identical, Reasons for Order and Order will issue with respect to each file.

[3] The applications in these three Court files involve Requests for Information regarding the Holmes Family Trust and the Sheila Holmes Spousal Trust. Dennis L. Nerland is the Trustee of both Trusts. He is also a barrister and solicitor licensed to practise law in the Province of Alberta. He is a partner of the firm Shea Nerland Calnan LLP ("SNC").

[4] The applications first came before Justice Mosley of this Court at Calgary, Alberta, on

April 11, 2011. A barrister and solicitor with SNC appeared for the respondents in each of the three applications. Orders on consent issued directing the respondents to release any non-privileged documents to the Canada Revenue Agency (CRA) and to provide copies of those documents with respect to which privilege was claimed to the Court in a sealed container.

[5] By subsequent Order dated April 13, 2011, the respondents were ordered to file no later than May 6, 2011, any *ex parte* written representations that they wished the Court to consider in determining the claims of solicitor-client privilege. A hearing was scheduled for May 18, 2011, in Calgary, Alberta, for the purpose of determining whether any of the sealed documents requested by the Minister were not subject to solicitor-client privilege and could be released to the Minister.

PUBLIC

"solicitor-client privilege" means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.	« privilège des communications entre client et avocat » Droit qu'une personne peut posséder, devant une cour supérieure de la province où la question a pris naissance, de refuser de divulguer une communication orale ou documentaire pour le motif que celle-ci est une communication entre elle et son avocat en confidence professionnelle sauf que, pour l'application du présent article, un relevé comptable d'un avocat, y compris toute pièces justificative out tout chèque, ne peut être considéré comme une communication de cette nature.

[13] The jurisprudence on solicitor-client privilege and its basic tenets were recently canvassed by Justice Mandamin in *Taxpro Professional Corp v Canada (Minister of National Revenue*), 2011 FC 224. From that and other decisions, the following basic principles are gleaned:

a. The burden of proof rests on the party asserting privilege: *General Accident Assurance Co v Chrusz* (1999), 1999 CanLII 7320 (ON CA), 45 OR (3d) 321 (CA), at para. 95 and *Camp Development Corp v South Coast Greater Vancouver*, 2011 BCSC 88, at para. 10.

b. One must distinguish between the concepts of confidentiality and privilege. "It is not every item of correspondence passing between a solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity, or in which counsel gives advice, are protected: *Canada v Solosky*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821.

c. Communications between the client and employees of the law firm (articling students, law clerks and secretaries) are also privileged if the communication is made "for the purpose of facilitating the obtaining of legal advice": A.W. Bryant, S.N. Lederman and M.K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009), at 14.101, cited in *Copthorne Holdings Ltd v Canada*, 2005 TCC 491.

d. Communications between agents of the client to the solicitor are also protected if they are for the purpose of seeking legal advice: *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, at para 14.101, cited in *Copthorne Holdings, supra*.

e. The privilege attaches to communications made for the purpose of enabling the client to seek and obtain the necessary information or advice in relation to his "conduct, decisions or representation in the courts" it does not extend to the facts contained therein or the documents from which those facts are drawn: *Belgravia Investments Ltd v Canada*, 2002 FCT 649.

[14] When privilege is claimed in circumstances such as those before the Court it would be appropriate, and expected, that the party asserting the privilege would set out the basis of the claim with respect to each document. In the applications before the Court the respondents have filed an affidavit that sets out what can only be described as a most general description of the basis of the privilege, as follows:

15. That in relation to those documents for which solicitor-client privilege is sought, that I am advised arise out of instructions given by clients to consider and advise on a structure that could implement a plan that allow [*sic*] a Canadian resident to best plan for the results of a then prospective plan to agree to the sale of a private corporation.

TAB 29

R. v Haevischer, 2014 BCSC 534 (CanLII)

Date: 2014-03-28
File number: X072945-B

Citation:
R. v Haevischer, 2014 BCSC 534 (CanLII), <https://canlii.ca/t/htpdp>, retrieved on 2025-10-31

Most recent
unfavourable mention

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Haevischer,* 2014 BCSC 534

Date: 20140328

Docket: X072945-B

Registry: New Westminster

Regina

v.

Cody Rae Haevischer and Matthew James Johnston

This ruling has been edited to comply with applicable publication bans.

Before: The Honourable Madam Justice Wedge

Ruling re: Application No. 117
Exclusion of the Evidence of Michael Le

Counsel for the Crown: M.K. Levitz, Q.C.
C.G. Baragar
K.M. McIntosh

Counsel for the Accused Haevischer: S.R.A. Buck
D. Dlab

Counsel for the Accused Johnston: B.A. Martland

Place and Date of Hearing: Vancouver, B.C.
February 25-28, 2014

Place and Date of Judgment: Vancouver, B.C.
March 28, 2014

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[134] Second, the Applicants have not placed before the Court any documents or evidence concerning specific communications over which they claim privilege. In the authorities upon which they rely, the Court was provided with the documents or specifics of the communications such that the Court could properly adjudicate the privilege claims. In *Dunbar*, as I have noted, evidence was lead with respect to the circumstances in which the disputed documents were made, the timing of the documents' creation, and the contents of the documents that were the subject of the privilege claim.

[135] The absence of any evidence of the specific communications is particularly problematic in the context of litigation privilege, because the presumption of inadmissibility that arises in cases of solicitor-client privilege does not arise where the claim is litigation privilege. The Applicants must establish that in the context of the particular circumstances, the specified communication is privileged.

> [136] As noted by Doherty J.A. in *Chrusz* at para. 95, the adjudication of privilege claims is "fact sensitive" in the sense that the existence of the asserted privilege depends on the evidence adduced to support the claim and the context in which the claim is made. Justice Doherty went on to say:
>
> It is incumbent on the party asserting the privilege to establish an evidentiary basis for it. Broad privilege claims which blanket many documents, some of which are described in the vaguest way, will often fail, not because the privilege has been strictly construed, but because the party asserting the privilege has failed to meet its burden: see *Shaughnessy Golf & Country Club v. Drake International Inc. et al.* (1986), 1986 CanLII 163 (BC CA), 26 D.L.R. (4th) 298 at 302-4 and 307-8, per Esson J.A. (B.C.C.A.)

[137] The party asserting the privilege claim always has the option of providing the court with the disputed documents or particulars of the disputed communications, for purposes of advancing their argument in support of the privilege and permitting the court to adjudicate their claims, without breaching or waiving the privilege. In this case, the Applicants have provided the Court with no documents or particulars to support their assertion that information over which they claim privilege could otherwise undermine the reliability of Mr. Le's evidence; nor do they propose to do so in the event that a *voir dire* is held. The Applicants will only say that certain categories of information were exchanged in group meetings (e.g., information about Crown and defence witnesses, strategic thinking, defence theories, analyses of the evidence and so on) which has tainted Mr. Le's evidence but which they cannot raise in cross-examination of Mr. Le or specify for the Court because they are asserting privilege over it.

[138] The Applicants propose that I assume from the fact of the group meetings and the general categories of information discussed during them, that privileged information passed to Mr. Le. In essence, they are asking me to adjudicate their claims in a vacuum. The case authorities do not support such an approach, and I do not accept it in this case.

[139] Even if I were I to assume that litigation privilege attached to some of the communications in question, the Applicants would surely waive any privilege if a particular line of questioning about the impugned information assisted them in challenging evidence of Mr. Le which incriminated them. I can think of no scenario in which the Applicants would seek to maintain privilege over information that would undermine Mr. Le's evidence concerning their roles in the murders, or his credibility generally. If the privileged information could assist the Applicants to undermine the reliability of Mr. Le's evidence, surely they would waive the privilege. The Applicants have not assisted me by providing any examples of prejudice that could arise from privileged information held by Mr. Le which they are not willing to disclose.

[140] Finally, as noted by the Court in *Ivall,* in a trial involving multiple accused, a plea by a co-accused is always a prospect. In the present case, although Mr. Le expressed the desire shortly before the trial commenced to "work cooperatively" with the Applicants, it must have been apparent to each of the legal teams that any one of the accused might decide to enter a plea at any time during the trial as the Crown's evidence against the accused unfolded. There is no suggestion that the agreement to work cooperatively came with a promise that none of the accused would elect to enter a plea and give evidence against his co-accused.

[141] In the circumstances of this case, in particular, the spectre that one of the accused might break ranks must have been continuously present. Mr. Haevischer and Mr. Johnston are each charged with six counts of first degree murder in the deaths of the six victims. Mr. Le was charged with conspiracy to commit the murder of Corey Lal, and Mr. Lal's murder. The Crown's theory is that Mr. Haevischer and Mr. Johnston were present at the Balmoral and participated in the murders, while Mr. Le's involvement was limited to the planning of Mr. Lal's murder in the days leading up to the events at the Balmoral. On the Crown's theory of the case, the three accused and their legal counsel had to be alive to the prospect of antagonistic defences. Indeed, the record bears this out.

[142] On August 13, 2013, only a month before the trial was scheduled to commence, the three defence teams appeared before the Associate Chief Justice to argue for a change in the venue of the trial from New Westminster to Vancouver. At one point in the pre-trial conference, Cullen A.C.J. asked whether there were "some aspects of the trial where the three defence counsel don't have a common interest" (Transcript of Pre-Trial Conference at p. 6). Counsel for Mr. Johnston, Michael Tammen Q.C., replied as follows:

Yes. That's absolutely so, My Lord. We're not at the stage … of course, where we've even gone very far down that road, but it is clear that there's a very different case against each accused. And in particular, the Crown's case against the Accused Le is very different than the case against Haevischer and Johnston, and even as between Johnston and Haevischer, there's nuances in terms of the Crown theory of participation. But the Crown case against Le is very different. We can't rule out the prospect of antagonistic defences. Defence will try to work together on as many common issues as they can, but that only goes so far. ….

[143] Counsel for Mr. Le supported Mr. Tammen's submissions. He also stated the following (at p. 12 of the transcript):

… And quite frankly, Mr. Le is charged primarily as a conspirator on one allegation of murder, unlike the co-accused, and that makes his defence quite different. And much as I like Mr. Buck and Mr. Tammen, we wouldn't be comfortable sharing an office with them for large parts of this trial for those reasons.

[144] As I noted earlier, the Crown will not seek to elicit any evidence from Mr. Le concerning information shared by the accused and Mr. Le in joint meetings among the accused and their counsel or imparted to the Le legal team by the accused's legal teams.

[145] In conclusion, a *voir dire* in these circumstances will not assist in the proper adjudication of the issues raised by the Applicants.

TAB 30

Sakab Saudi Holding Company v. Saad Khalid S Al Jabri, 2025 ONSC 1262 (CanLII)

Date: 2025-02-26

File number: CV-21-00655418-00CL

Citation:
Sakab Saudi Holding Company v. Saad Khalid S Al Jabri, 2025 ONSC 1262 (CanLII), <https://canlii.ca/t/k9qrv>, retrieved on 2025-10-31

Most recent
unfavourable mention

CITATION**:** Sakab Saudi Holding Company v. Saad Khalid S Al Jabri, 2025 ONSC 1262

COURT FILE NO.: CV-21-00655418-00CL

DATE: 20250226

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SAKAB SAUDI HOLDING COMPANY, ALPHA STAR AVIATION SERVICES COMPANY, ENMA AL ARED REAL ESTATE INVESTMENT AND DEVELOPMENT COMPANY, KAFA'AT BUSINESS SOLUTIONS COMPANY, SECURITY CONTROL COMPANY, ARMOUR SECURITY INDUSTRIAL MANUFACTURING COMPANY, SAUDI TECHNOLOGY & SECURITY COMPREHENSIVE CONTROL COMPANY, TECHNOLOGY CONTROL COMPANY~~,~~ and NEW DAWN CONTRACTING COMPANY ~~and SKY PRIME INVESTMENT COMPANY~~, Plaintiffs

AND:

SAAD KHALID S AL JABRI, DREAMS INTERNATIONAL ADVISORY SERVICES LTD., 1147848 B.C. LTD., NEW EAST (US) INC., NEW EAST 804 805 LLC, NEW EAST BACK BAY LLC, NEW EAST DC LLC, JAALIK CONTRACTING LTD., NADYAH SULAIMAN A AL JABBARI, personally and as litigation guardian for SULAIMAN SAAD KHALID AL JABRI, KHALID SAAD KHALID AL JABRI, MOHAMMED SAAD KH AL JABRI, NAIF SAAD KH AL JABRI, HISSAH SAAD KH AL JABRI, SALEH SAAD KHALID AL JABRI, ~~CANADIAN GROWTH INVESTMENTS LIMITED~~, ~~GRYPHON SECURE INC., INFOSEC GLOBAL INC.~~, QFIVE GLOBAL INVESTMENT INC., GOLDEN VALLEY MANAGEMENT LTD, ~~NEW SOUTH EAST PTE LTD.~~, TEN LEAVES MANAGEMENT LTD., ~~2767143 ONTARIO INC.~~, NAGY MOUSTAFA, HSBC TRUSTEE (C.I.) LIMITED, in its capacity as Trustee of the Black Stallion Trust, HSBC PRIVATE BANKING NOMINEE 3 (JERSEY) LIMITED, in its capacity as a Nominee Shareholder of Black Stallion Investments Limited, BLACK STALLION INVESTMENTS LIMITED, NEW EAST FAMILY FOUNDATION, NEW EAST INTERNATIONAL LIMITED, ~~NEW SOUTH EAST ESTABLISHMENT, NCOM INC.~~ and 2701644 ONTARIO INC. Defendants

BEFORE: Cavanagh J.

COUNSEL: *Munaf Mohammed K.C., Jonathan Bell and Ian Thompson*, for the Plaintiffs

Sean Pierce, for Saad Aljabri, 1147848 B.C. Ltd., Nadyah Sulaiman A Al Jabbari, personally and as litigation guardian for Sulaiman Saad Khalid Al Jabri, Khalid Saad Khalid Al Jabri, Naif Saad KH Al Jabri, Sulaiman Saad Khalid Al Jabri, Hissah Saad KH Al Jabri, Saleh Saad Khalid Al Jabri and 2701644 Ontario Inc.

Hailey Bruckner and Greta Hoaken for Mohammed Saad KB Al Jabri, New East (US) Inc., New East 804 805 LLC, New East Back Bay LLC, New East DC LLC, Golden Valley Management Ltd., Ten Leaves Management Ltd., New East International Limited, and New East Family Foundation

Erin Chesney for Dreams International Advisory Services

HEARD: December 6, 2024

ENDORSEMENT

Introduction

[1] On this motion, the plaintiffs seek:

(a) an order directing the defendants to provide a detailed Schedule “B” to their affidavits of documents listing the documents over which they claim privilege.

(b) production of approximately 4,000 documents listed on Schedule “B” to a list of documents from the files of Cadwalader, Wickersham & Taft LLP (“Cadwalader”) over which the defendants claim privilege (a total of 17,497 documents are so listed).

(c) answers to approximately 165 questions that were refused on the examinations for discovery of the defendants or their representatives on the ground of privilege (that are listed in Appendix “E” to the notice of motion). In Schedule “C” of their factum, the plaintiffs list the questions in respect of which they seek directions.

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(d) determination of whether certain documents which were produced by the defendants in error and over which they claim privilege should be returned to the defendants because privilege was properly asserted.

(e) production of unredacted documents from Dreams, acting through its corporate director, HSBC PB Corporate Services 1 Limited ("HSBC").

[2] In their notice of motion, the plaintiffs seek an order compelling the defendants to produce certain categories of non-privileged documents listed in Schedule "B" to the "Cadwalader" list of documents, or, in the alternative, an order requiring the defendants to produce to the Court for inspection exemplar documents to be agreed upon from certain categories of non-privileged documents listed in the Cadwalader Schedule B for the purpose of determining the validity of the claims of privilege.

[3] The motion was not argued with submissions with respect to each document or question in dispute.

[4] At the hearing, counsel for the plaintiffs asked for directions with respect to six questions that, it was submitted, would resolve the bulk of the refusals given during examinations for discovery. The six questions were addressed at the hearing and provided in writing by counsel for the plaintiffs in a letter dated December 9, 2024. The defendants do not accept that directions with respect to these six questions will be sufficient to address the issues that arise on this motion.

[5] I have addressed these questions in this endorsement.

Analysis

Legal principles

> [6] In *General Accident Assurance Company et al. v. Chrusz et al.* (1999), 1999 CanLII 7320 (ON CA), 45 O.R. (3d) 321, Carthy J.A., writing for the majority of the Court of Appeal, addressed the general principles that apply to litigation privilege. Carthy J.A. confirmed that the purpose underlying litigation privilege is related to the needs of the adversarial trial process and for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. Carthy J.A. confirmed, at para. 33, that the document over which litigation privilege is claimed must have been created for the dominant purpose of litigation, actual or contemplated.
>
> In his dissenting reasons in *Chrusz*, Doherty J.A. addressed the principles that apply to solicitor–client privilege. In his reasons, at para. 95, Doherty J.A. explained how the adjudication of claims to solicitor-client privilege should be made:
>
> The adjudication of claims to client-solicitor privilege must be fact sensitive in the sense that the determination must depend on the evidence adduced to support the claim and on the context in which the claim is made. The claim to client-solicitor privilege in the context of litigation is in fact a claim that an exception be made to the most basic rule of evidence which dictates that all relevant evidence is admissible. It is incumbent on the party asserting the privilege to establish an evidentiary basis for it. Broad privilege claims which blanket many documents, some of which are described in the vaguest way, will often fail, not because the privilege has been strictly construed, but because the party asserting the privilege has failed to meet its burden: [citation omitted].

[7] Doherty J.A. confirmed, at para. 98, that the assessment of a claim to solicitor-client privilege must be contextual. Doherty J.A. held that the applicability of solicitor-client privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. Doherty J.A., at para. 120, held that if the third party's retainer extends to a function which is essential to the existence or operation of the solicitor-client relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for solicitor-client privilege.

[8] In *Prosser v. Industrial Alliance Insurance*, 2024 ABKB 87 (CanLII), 2024 ABQB 87, at para. 60, the Court held that information concerning the existence and nature of a solicitor-client relationship, including the fact and nature of a lawyer's retainer; the identity of the lawyer; the client's legal concerns, objectives or strategies; and the thought processes, strategies, or objectives of the lawyers are matters that are protected from disclosure by solicitor-client privilege.

[9] The following principles also apply with respect to solicitor-client privilege: (i) solicitor-client privilege must "remain as close to absolute as possible" (*R. v. Fink*, 2002 SCC 61, at para. 36); (ii) solicitor-client privilege protects confidential communications between a client and a lawyer in which legal advice is sought or offered (*R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 S.C.R. 445, at paras. 36-37); (iii) solicitor-client privilege extends to communications that disclose whether lawyers were retained and, if so, for what purpose (*Prosser v. Industrial Alliance Insurance*, 2024 ABKB 87 (CanLII), 2024 ABQB 87, at para. 60); (iv) solicitor-client privilege also protects not only the legal advice provided, but communications passing between lawyers and clients in support of the provision of legal advice (*Wintercorn v. Global Learning Group Inc.*, 2022 ONSC 4576, at para. 45(viii)); (v) the identity of who is paying the defendants' legal fees is privileged (*Kaiser (Re)*, 2012 ONCA 838, at para. 30); and (vi) solicitor-client privilege extends to documents, information, and communications shared or created in a continuum of communications for the purpose of obtaining legal advice and includes documents that are a "necessary step" in the process of receiving legal advice and documents that are incidental to obtaining and giving legal advice and/or that, if produced, would tend to reveal that advice (*Wintercorn*, at para. 45(viii); *Landry et al. v. HMQ*, 2021 ONSC 1297, at para. 14).

[10] The relevant legal principles with respect to common interest privilege were summarized by Gluestein J. in *Wintercorn*, at para. 160.

I summarize the relevant legal principles as follows:

(i) Common interest privilege is established where a lawyer's communication or advice is shared, on a confidential basis, with a non-client or other "with a sufficient common interest in the same transactions": *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51, 420 D.L.R. (4th) 477, at para. 41;

TAB 31

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General Accident Assurance Company v. Chrusz, 1999 CanLII 7320 (ON CA)

Date: 1999-09-14

File number: C29463

Other citations:
45 OR (3d) 321 — 180 DLR (4th) 241 — 92 ACWS (3d) 26 — 124 OAC 356 — 38 CPC (4th) 203 — [1999] CarswellOnt 2898 — [1999] OJ No 3291 (QL)

Citation:
General Accident Assurance Company v. Chrusz, 1999 CanLII 7320 (ON CA), <https://canlii.ca/t/1f9pq>, retrieved on 2025-10-31

Most recent unfavourable mention **18-004555 v Wawanesa Insurance, 2019 CanLII 22203 (ON LAT)**
[...] The facts in Chrusz are distinguishable . [...]

General Accident Assurance Company et al. v. Chrusz et al.
Chrusz et al. v. General Accident Assurance Company et al.
[Indexed as: General Accident Assurance Co. v. Chrusz]

45 O.R. (3d) 321

[1999] O.J. No. 3291

Docket No. C29463

Court of Appeal for Ontario

Carthy, Doherty and Rosenberg JJ.A.

September 14, 1999

Civil procedure -- Discovery -- Privilege -- Solicitor-client privilege -- Litigation privilege -- Common interest privilege -- Hotel destroyed by fire -- Insurance adjuster investigating fire -- Suspicion of arson -- Adjuster directed to provide reports directly to lawyer retained by insurer -- Insurer later making partial payments of insurance -- Subsequently, dismissed employee alleging that insured's claim fraudulent -- Insured's lawyer providing dismissed employee with copy of transcript of his statement -- Insurer suing insured -- Insured making counterclaim and joining employee -- Adjuster's reports before allegation of fraud not privileged -- Adjuster's reports after allegation of fraud privileged -- Insurer but not employee having right to assert privilege with respect to employee's statement.

On November 15, 1994, a fire damaged a hotel owned by C and others. The lead fire insurer, G Co., hired B, a claims adjuster, to investigate and, on November 16, he reported that he suspected arson. G Co. retained a lawyer, E, and on December 1, G Co. directed B to report directly to E. In January 1995, C delivered a proof of loss. Subsequently, G Co. made partial payments of the claim, but on May 23, 1995, P, a dismissed former employee at the hotel who stated that his conscience was bothering him, gave E a videotape and the "float sheet and additional time sheets" from the hotel, and he made a statement under oath alleging that C had fraudulently increased the insurance claim. E made a copy of the videotape, which was later returned to P, and E had a transcript prepared of C's statement.

On June 2, 1995, P was provided with a copy of the transcript on condition that he keep it confidential and that day, G Co. commenced an action for fraud against C and others. A statement of defence was filed, and it included a counterclaim against G Co., B, P and P's spouse. In those proceedings, the defendants sought production of various documents for which privilege had been claimed in the plaintiffs' affidavit of documents.

On a motion for production of the documents, Kurisko J. ruled that: (1) all communications between G Co. and E were privileged; (2) communications between B and G Co. or E before May 23, 1995 were not privileged; (3) communications between B or G Co. and third parties before May 23, 1995 were not privileged; (4) communications between B and G Co. or E after May 23, 1995 were privileged; (5) privilege in P's statement had been waived; and (6) the videotape was not privileged.

The Divisional Court set aside the order of Kurisko J. and ordered that privilege applied to everything except the videotape. C appealed.

Held, the appeal should be allowed.

Per Carthy J.A.: Doherty J.A.'s judgment analyzes the principles underlying solicitor-client privilege. However, the solicitor-client privilege, which derives from the interest of all citizens to access to confidential legal advice, is distinct from the litigation privilege, which derives from the needs of the adversary process. There is a tension between the litigation privilege, which is needed to facilitate adversarial preparation, and the disclosure of all of the relevant facts, which is needed to assure the fair resolution of a dispute. The trend of the modern rules is to truncate what would previously have been protected from disclosure. Historically, however, different jurisdictions have applied different tests. Some Canadian courts extend litigation privilege only if the dominant purpose of the document was connected to anticipated or pending litigation. In Ontario, relying on the authority of the Court of Appeal's decision in Blackstone v.

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Mutual Life Insurance Co. of New York, generally, a substantial purpose test has been applied. This test, however, runs against the grain of contemporary trends in discovery and the judgments in Blackstone do not stand in the way of now adopting the dominant purpose test. In employing the dominant purpose test, some authorities have included as privileged those documents collected or copied through a lawyer's investigative efforts, for example, copies of public documents, even though the original documents enjoy no privilege. Those authorities should be turned aside as inconsistent with modern perceptions of discoverability and, therefore, such documents should be produced.

In the immediate case, all communications between G Co. and E were protected by solicitor-client privilege, there being no indication of waiver. As for litigation privilege, it initially attached to communications between B and E or from B through G Co. to E because of the suspicion of arson. These communications, however, were not privileged as solicitor- client communications and the litigation privilege lasted so long as litigation was contemplated. When G Co. made payments to C, this indicated that litigation was no longer contemplated and the litigation privilege came to an end. On May 23, 1995, the situation changed with P's revelations and this brought litigation into contemplation. After May 23, 1995, any communications from B, whose dominant purpose was directed to the litigation, were privileged. However, the videotape, float book and additional time sheets were not prepared for the purposes of litigation and were not privileged. The P statement was privileged in the hands of E and, as for the copy delivered to P, he was closely enough aligned with G Co. that the delivery of a copy to him was not a waiver of the privilege by the insurer. The result here, however, was not an example of common interest privilege, which, in some instances, preserves the litigation privilege even though information is shared with a third party. This may occur where the disclosure is made to a person or party with a common interest in sharing the trial preparation effort. At the time when P made his statement, litigation against him was not contemplated and he was merely a potential witness. Therefore, the statement was not privileged in the hands of P. In the result, the judgment of the Divisional Court should be set aside and production should take place in accordance with these reasons.

Per Doherty J.A. (dissenting in part): Client-solicitor privilege serves the utilitarian purpose of allowing clients and lawyers to engage in the frank and full disclosure essential to giving and receiving effective legal advice and is also an expression of our society's commitment to both personal autonomy and access to justice. It also serves to promote the adversarial process as an effective means for resolving disputes. These purposes inform the perimeters of the privilege. The adjudication of a claim to client-solicitor privilege must be fact sensitive in the sense that the determination must depend on the evidence adduced to support the claim and on the context in which the claim is made. The confidentiality of the communications is of central importance and an insurer is not, by the mere possibility of a claim from its insured, in a position where it can automatically claim confidentiality about its communications. If an insurer asserts a privilege over the product of its investigations, it must demonstrate that it intended to keep that information confidential from its client. In this case, the initial suspicion of arson provided a basis for concluding that the initial communications were intended to be kept confidential from C. Then it was up to G Co. to establish on a proper evidentiary basis that the intention to keep information confidential continued. They did not do so for the period before May 23, 1995. However, after that time, the fraud allegations provided a firm basis to infer an intention to keep communications between G Co. and E confidential.

Assuming that the communications between G Co. and E were protected by client-solicitor privilege, the next question was whether this privilege extended to communications between B and E. The authorities established that: (1) not every communication by a third party to a lawyer that facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and (2) where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege. The second principle extends client-solicitor privileges to communications by or to a third party acting as a messenger, translator and amanuensis, and includes a third party employing an expert to assemble information provided by the client and to explain it to the lawyer. These two principles, however, were not determinative here because B was not merely a channel of communication and he could not be characterized as translating or interpreting information provided by G Co.; rather, he was gathering information from extraneous sources. Whether he was an agent under the general law of agency was also not determinative.

The determination of the solicitor client privilege and the role of third parties should depend on the third party's function. If the third party's retainer extends to a function essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications that are in furtherance of that function and that meet the criteria for client-solicitor privilege. For privilege to attach, the third party must be empowered to obtain legal services or to act on legal advice on behalf of the client. If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor, then the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected; therefore, it is not the case that client-solicitor privilege extends to all material dee med useful by the lawyer to properly advise the client. Further, such an extension of solicitor and client privilege would make litigation privilege redundant. In the circumstances of this case, B's function did not reach inside the client-solicitor relationship between G Co. and E; communications between B and E were not protected by client- solicitor privilege.

As for litigation privilege, for the conclusions stated by Carthy J.A., the communications between B and E before May 23, 1995 were not privileged but the situation changed after that date and privilege was engaged. However, his comments about copying non-privileged documents go too far, and the issue did not arise directly on this appeal.

Contrary to the conclusions of Carthy and Rosenberg JJ.A., the insurer did not have a claim for privilege with respect to the P statement. The operation of the litigation privilege should be recognized as a qualified one that can be overridden where the harm to other societal interests outweighs any benefit from the privilege. A competing interests approach should be applied. The harm done by non-disclosure must be considered and factored into the decision whether to give effect to the privilege claim. This permits the law of privilege to adapt to the evolving interests and priorities of the community. In the immediate case, the goals of adjudicative fairness and reliability could suffer significant harm if P's statement were not produced. Further, the policies underlying G Co.'s privacy interests in non-disclosure would not be adversely affected by disclosure of the statement. Further, there was no basis upon which P could claim privilege with respect to the copy of the statement.

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Eryou against a waiver of his client's litigation privilege: see, in this respect, United States v. American Telephone, supra. There was nothing inconsistent in giving a copy of a statement to this witness and maintaining privilege against the adversary. This was especially so when a promise of confidentiality was requested.

As closely as he was aligned in interest to General Accident, I do not consider that Pilotte acquired a common interest privilege. In all of the examples cited by Lord Denning in Buttes, there is an actual contemplation of litigation shared by individuals against a common adversary. Pilotte was merely a witness who was under no apparent threat of litigation. If events had proceeded in the normal course without a counterclaim and he was called as a witness at trial he would have no more reason to refuse production of the statement than any witness to a motor vehicle accident who has been provided with a written statement to refresh his or her memory before giving evidence. The cross-examiner would be entitled to its production and claims of litigation privilege would be hollow.

The fact that Pilotte became a party to the counterclaim did not change the status of this statement in his hands. It was not created for this litigation and is simply a relevant piece of factual information that came to counsel with the original brief.

CONCLUSION

I would set aside the orders below and in their place direct production as indicated in these reasons. The parties are better able than I to be specific as to particular communications and if there are disagreements these can be resolved on settlement of the order.

Costs throughout should be to the appellants on the basis of a single counsel fee against the respondent General Accident.

DOHERTY J.A. (dissenting in part): --

The Issues

This already prolonged litigation is stalled at the discovery stage while the parties argue over the appellants' right to production of documents in the possession of the respondents. Most of these documents were generated in the course of an investigation conducted on behalf of the respondent insurers into the origins of a fire at the appellants' hotel. The respondents resist production claiming both client-solicitor privilege and litigation privilege.

The appellants raise three issues:

-- Are communications between an appraiser and the insurers' solicitor protected from disclosure to the appellants by either client-solicitor privilege or litigation privilege?

-- Is a transcript of a statement made under oath by Deny Pilotte on May 23, 1995 to the lawyer for the insurers (the "May 23 statement") protected against production by the insurers' litigation privilege?

-- Is a copy of the May 23 statement that was given to Mr. Pilotte's lawyer by the lawyer for the insurers protected against production by Mr. Pilotte by either the insurers' litigation privilege or Mr. Pilotte's litigation privilege?

I have had the opportunity of reading the reasons of my colleagues, Carthy and Rosenberg JJ.A. I agree with their conclusions on the first and third issues. I respectfully dissent from their conclusion on the second. I would hold that the insurers are obliged to produce the statement.

These issues bring to the forefront two antithetical principles, both of which are accepted as fundamental to the civil litigation process. One principle, the right to full and timely discovery of the opposing party's case, rests on the premise that full access to all the facts on both sides of a lawsuit facilitates the early and just resolution of that suit. The other principle, the right of a party to maintain the confidentiality of client-solicitor communications, and sometimes communications involving third parties, rests on the equally fundamental tenet that the confidentiality of those communications is essential to the maintenance of a just and effective justice system. The tension between the two principles is described by Lamer C.J.C. in R. v. Gruenke, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263 at p. 289, 67 C.C.C. (3d) 289 at p. 305:

The prima facie protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication . . . .

In attempting to reconcile these principles, I do not start from the premise that one principle, access to all the facts, is a good thing in that it promotes the search for truth and that the other principle, confidentiality, is a necessary evil to be tolerated only in the clearest of situations. Both principles have a positive value to the community and individuals, and when viewed from a broad perspective, both serve the goal of ascertaining truth by means which are consistent with the important societal values of fairness, personal autonomy and access to justice.

The Facts

The appellants ("Chrusz") are the owners of a hotel property in Thunder Bay. The respondent insurers insured that property against fire loss. The respondent, General Accident Assurance Company ("General Accident"), is the lead insurer and has carriage of this litigation. For ease of reference, I will refer only to General Accident when speaking of the respondent insurers. The respondent, Deny Pilotte, was employed by Chrusz between July 1994 and January 1995 as the manager of the hotel property. The respondent, John Bourret, is a claims adjuster in the employ of the respondent, C.K. Alexander Insurance Adjusters Ltd.

PUBLIC

The privilege also serves to promote the adversarial process as an effective and just means for resolving disputes within our society. In that process, the client looks to the skilled lawyer to champion her cause against that of her adversaries. The client justifiably demands the undivided loyalty of her lawyer. Without client-solicitor privilege, the lawyer could not serve that role and provide that undivided loyalty. As the authors of McCormick, supra, write at pp. 316-17:

At the present time it seems most realistic to portray the attorney-client privilege as supported in part by its traditional utilitarian justification, and in part by the integral role it is perceived to play in the adversary system itself. Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business. To the extent that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, it is futile to envision drastic curtailment of the privilege without substantial modification of the underlying ethical system to which the privilege is merely ancillary.

(Emphasis added)

In summary, I see the privilege as serving the following purposes: promoting frank communications between client and solicitor where legal advice is being sought or given, facilitating access to justice, recognizing the inherent value of personal autonomy and affirming the efficacy of the adversarial process. Each of these purposes should guide the application of the established criteria when determining the existence of client-solicitor privilege in specific fact situations.

The adjudication of claims to client-solicitor privilege must be fact sensitive in the sense that the determination must depend on the evidence adduced to support the claim and on the context in which the claim is made. A claim to client-solicitor privilege in the context of litigation is in fact a claim that an exception should be made to the most basic rule of evidence which dictates that all relevant evidence is admissible. It is incumbent on the party asserting the privilege to establish an evidentiary basis for it. Broad privilege claims which blanket many documents, some of which are described in the vaguest way, will often fail, not because the privilege has been strictly construed, but because the party asserting the privilege has failed to meet its burden: see Shaughnessy Golf & Country Club v. Drake International Inc. (1986), 1986 CanLII 163 (BC CA), 26 D.L.R. (4th) 298 at pp. 302-04 and 307-08, 1 B.C.L.R. (2d) 309 (C.A.), per Esson J.A..

It is also necessary to consider the context of the claim, by which I mean the circumstances in which the privilege is claimed. For example, in this case, the insurer claims client- solicitor privilege against its insured in part in respect of the product of its investigation of a possible claim by the insured under its policy. The pre-existing relationship of the insured and insurer and the mutual obligations of good faith owed by each to the other must be considered in determining the validity of the insurer's assertion that it intended to keep information about the investigation confidential vis-à-vis its insured. The confidentiality claim cannot be approached as if the parties were strangers to each other.

The confidentiality of the communications is an underlying component of each of the purposes which justify client- solicitor privilege. In McCormick, supra, at p. 333, it is said:

It is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.

The centrality of confidentiality to the existence of the privilege helps make my point that the assessment of a claim to client-solicitor privilege must be contextual. Sometimes the relationship between the party claiming the privilege and the party seeking disclosure will be relevant to determining whether the communication was confidential. For example, the reciprocal obligations of an insured and an insurer to act in good faith towards each other are well-established: Canadian Indemnity Co. v. Canadian Johns-Manville Co., 1990 CanLII 78 (SCC), [1990] 2 S.C.R. 549 at pp. 620-21, 72 D.L.R. (4th) 478; Coronation Insurance Co. v. Taku Air Transport Ltd., 1991 CanLII 16 (SCC), [1991] 3 S.C.R. 622 at p. 636, 85 D.L.R. (4th) 609. I have difficulty reconciling these mutual obligations with the contention that an insurer automatically intends to maintain confidentiality as against the insured over the fruits of its investigation of an incident giving rise to a possible claim under a policy of insurance. I stress that I refe r only to the fruits of the insurer's investigation and not to other topics which may be the subject matter of communications between the insurer and its counsel.

Unlike some courts, (e.g., Somerville Belkin Industries Ltd. v. Brocklesby Transport, 1985 CanLII 563 (BC SC), [1985] 6 W.W.R. 85 at pp. 88, 5 C.P.C. (2d) 239 (B.C.S.C.)), I do not accept that the mere possibility of a claim under an insurance policy entitles an insurer to treat its client as a potential adversary from whom it intends to keep confidential information concerning its investigation of the claim. I prefer the view which assumes that the insurer "fairly and open mindedly" investigates potential claims: see Blackstone v. Mutual Life Insurance Co. of New York, 1944 CanLII 92 (ON CA), [1944] O.R. 328 at p. 334, [1944] 3 D.L.R. 147 (C.A.), per Robertson C.J.O.; Walters v. Toronto Transit Commission (1985), 1985 CanLII 2002 (ON SC), 50 O.R. (2d) 635 at pp. 637-38, 4 C.P.C. (2d) 66 (H.C.J.). If an insurer asserts a privilege over the product of its investigation, it must demonstrate that it intended to keep that information confidential from its client. The mere possibility of a claim will not establish that intention.

Chrusz accepts that all communications directly between Mr. Eryou and General Accident are protected by client-solicitor privilege. While I accept that concession for the purposes of this appeal, I would not want to be taken as endorsing it.

General Accident relies on Mr. Bourret's suspicion of arson as providing the necessary basis for the inference that the communications between Mr. Eryou and General Accident prior to May 23, 1995 were intended to be kept confidential from Chrusz. I can accept that the suspicion described in the affidavits provided a basis, as of November 16, 1994, for concluding that the initial communications were intended to be kept confidential from Chrusz. General Accident takes the position that once such suspicion was established, it continued as long as the investigation continued. I cannot agree. It is up to General Accident to establish a proper evidentiary basis for a finding that all of the communications referred to in the affidavits were intended to be confidential as against Chrusz. The record tells me only that General Accident had reason to suspect arson as of November 16, 1994. It would certainly seem that any suspicion had disappeared by the time the insurers advanced $100,000 on the policy shortly after J anuary 9, 1995. To the extent that the inference of intended

TAB 32

Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner), 2013 FCA 104 (CanLII)

Date: 2013-04-17
File number: A-375-12
Other citations: 360 DLR (4th) 176 — 444 NR 268 — [2013] FCJ No 439 (QL)

Citation:
Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner), 2013 FCA 104 (CanLII), <https://canlii.ca/t/fx5m2>, retrieved on 2025-10-31

Most recent
unfavourable mention

Date: 20130417

Docket: A-375-12

Citation: 2013 FCA 104

CORAM: EVANS J.A.

STRATAS J.A.

NEAR J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY

PREPAREDNESS and THE MINISTER OF JUSTICE OF CANADA

Appellants

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 9, 2013.

Judgment delivered at Toronto, Ontario, on April 17, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: EVANS AND NEAR JJ.A.

Date: 20130417

Docket: A-375-12

Citation: 2013 FCA 104

CORAM: EVANS J.A.

STRATAS J.A.

NEAR J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY

PREPAREDNESS and THE MINISTER OF JUSTICE CANADA

[15] The Federal Court concluded that the Protocol was no different from other memoranda of understanding or agreements that the Department of Justice has entered into with other departments.

[16] Next, on the issue of the exemption for advice, the Federal Court found that the Protocol was not, in itself, advice but rather an agreement setting out respective roles and responsibilities. Further, the Federal Court noted that it could not tell from the text of the Protocol whether it reflected earlier legal advice obtained by the DOJ. Accordingly, in the Court's view, disclosing the Protocol would "in no way harm the interests that the exemption…is designed to protect" (at paragraph 32).

[17] The Ministers appeal to this Court. They submit that the solicitor-client exemption applies. Further, they submit that the access to information coordinators properly exercised their discretion not to disclose the Protocol.

D. Analysis

(1) The standard of review

[18] The parties agree on the standard of review. The question whether the exemptions apply is reviewed on the basis of correctness. The question whether the discretion was properly exercised is reviewed on the basis of reasonableness. See, for example, *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2001 FCA 254 at paragraph 47.

[19] In this Court, the parties agreed that the Federal Court's characterizations of the Protocol, to the extent they are suffused by matters of fact, can only be set aside on the basis of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

(2) The solicitor-client privilege exemption (section 23)

(a) A preliminary consideration

[20] In their memorandum of fact and law, the Ministers addressed the issue of solicitor-client privilege as an all-or-nothing matter: either the whole Protocol is privileged or none of it is privileged.

[21] This overlooks the fact that sometimes only part of a document is privileged. Further, the Act does not regard disclosure as an all-or nothing matter. Indeed, under section 25 of the Act, a head of a government institution must sever any part of a record that does not contain exempt material if it can be reasonably severed. If only part of the Protocol is privileged, the issue of severance must be addressed.

(b) General principles

[22] The parties broadly agree on the general principles to be applied. Indeed, the Ministers conceded that at paragraphs 15-22 of its reasons the Federal Court correctly stated the general principles.

[23] Throughout their submissions in this Court, the Ministers stressed the importance of solicitor-client privilege, relying upon broad statements in cases such as *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574.

[24] However "fundamental," "all-encompassing" and "nearly absolute" the privilege may be, these cases confirm that not everything uttered by a lawyer to a client is privileged: see, *e.g.*, *Pritchard*, *supra*, at paragraph 20; *Blood Tribe*, *supra*, at paragraph 10. Before us, counsel for the Ministers quite properly conceded that comments by lawyers to clients about matters wholly unrelated to their solicitor-client relationship are not privileged.

[25] Rather, communications must be viewed in light of the context surrounding the solicitor-client relationship and the relationship itself: *Pritchard*, *supra* at paragraph 20; *Miranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193 at paragraph 32. In particular, heed must be paid to the nature of the relationship, the subject-matter of what is said to be advice, and the circumstances of the document in issue: *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565 at paragraph 50.

[26] All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See *Samson Indian Nation and Band v. Canada*, 1995 CanLII 3602 (FCA), [1995] 2 F.C. 762 at paragraph 8.

[27] Part of the continuum protected by privilege includes "matters great and small at various stages…includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client." See *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at page 1046 *per* Taylor L.J.; *Three Rivers District Council v. Governor and Company of the Bank of England*, [2004] UKHL 48 at paragraph 111.

> [28] In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice": *Balabel*, *supra* at page 1048. If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?

[29] For example, where a Director of a government department receives legal advice on how certain proceedings should be conducted and the director so instructs those conducting proceedings, the instructions, essentially cribbed from the legal advice, form part of the continuum and are protected: *Minister of Community and Social Services v. Cropley* (2004), 2004 CanLII 11694 (ON SCDC), 70 O.R. (3d) 680 (Div. Ct.). Disclosing such a communication would undercut the ability of the director to freely and candidly seek legal advice.

TAB 33

PUBLIC

Quadrangle v. AG Canada, 2023 ONSC 7125 (CanLII)

Date: 2023-12-16
File number: CV-15-00010824-00CL
Other citation: 170 OR (3d) 700

Citation:
Quadrangle v. AG Canada, 2023 ONSC 7125 (CanLII), <https://canlii.ca/t/k1vdz>, retrieved on 2025-10-31

Most recent
unfavourable mention

CITATION: *Quadrangle v. AG Canada*, 2023 ONSC 7125

COURT FILE NO.: CV-15-00010824-00CL

DATE: 20231216

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:	)
	)
QUADRANGLE GROUP LLC, QCP CW S.A.R.L. and OBELYSK MEDIA INC.	)*Jonathan Lisus and Matthew Law*, for Quadrangle Group LLC, QCP CW S.A.R.L., Plaintiffs Plaintiffs)
	)*Kris Borg-Olivier*, for Obelysk Media Inc., Plaintiff
– and –	)
	)
ATTORNEY GENERAL OF CANADA	)*Sanderson Graham and Sanam Goudarzi*, for the Defendant Defendant)
	)**HEARD:** December 15, 2023
	)

RULING - SOLICITOR CLIENT PRIVILEGE

63. The AGC further submitted that I should look to the whole purpose of each Document (and particularly those Documents that constitute presentation or slide "decks"), rather than just the specific heading under which the redacted portion is located. I also accept this proposition and I have done that.

64. Counsel for the Plaintiffs observed that the evidence of Mr. Hill was to the effect that he was not involved in the redactions at issue in these Documents, nor in fact in the redactions of any documents. The overarching position of the Plaintiffs is that all nine Documents relate to policy decisions and not the seeking or provision of legal advice, and matters of policy (and in particular statements of fact about current policy) cannot be the subject of solicitor client advice.

65. With respect to these nine Documents, I observe a number of things.

66. First, each is clearly related to matters that are squarely issues of policy. This is clear both from the face of the documents themselves and from the context within which they were created as demonstrated clearly by the evidence of Mr. Hill and as agreed by both parties. In short, they are policy documents, almost all of which were created by individuals within the Telecom Policy Group at Industry Canada, expressly for the purpose of either explaining as a matter of fact the then current policy (which is clearly not privileged) or for the purpose of describing various policy options which may or may not be available to, or of interest to, the Minister in the exercise of policy functions relating to spectrum licences.

67. In my view, and based on the authorities set out above, the mere fact that a policy document (or a business or operations document) refers, in the context of a discussion about available policy (or business) choices or options, to various benefits and risks and references one possible risk as a legal challenge or an option that may have a legal risk, does not make the document (or the excerpt) privileged. On the contrary, a reference to a legal risk may very well be one of the considerations being discussed by individuals involved in the consideration and implementation of policy or business decisions, but it does not automatically attract privilege.

68. This is particularly so where there is no evidence as to the involvement of a solicitor in the preparation or communication of the document, although to be clear a document could properly attract privilege if it records the seeking or provision of legal advice, even if the solicitor is not involved in the authorship or communication of the document itself. This is precisely the "continuum" referred to above.

> 69. Second, none of the Documents here is authored by a solicitor. To be clear, I am satisfied that none is "part of a continuum of communication" within which legal advice was sought or received except to the extent specifically described below. Simply put, there is a complete absence of evidence, again except as described below, that the Documents are related to the seeking or providing of legal advice at all or that they were part of any solicitor client relationship, let alone one within which legal advice was sought or obtained as part of the continuum within which the Document was created.

70. Third, the Documents, with noted exceptions, constitute slide or presentation decks or memoranda that do not on their face refer to any author or recipient at all, let alone any that are solicitors. For those, and subject to specific observations set out below, the evidence is as set out above: they were authored by the Telecom Policy Group within Industry Canada.

71. The exceptions are Documents 5 and 9, which reference Mr. Sheskay (General Counsel at Industry Canada) as one of four recipients in an email chain comprising (in the case of Document 5 several different email messages, and in the case of Document 9, two different email messages). As noted below, the (first and only) reference to Mr. Sheskay in either case, is when he is added to the email chain in the message subsequent to the one that is the subject of the redactions at issue.

72. The AGC emphasizes that he was General Counsel who routinely gave legal advice. The Plaintiffs submit that it is clear from the email chain, considered as a whole, that he was copied in a normal and ordinary course exchange of views on policy or business issues, that legal advice was neither requested of him nor given by him, and that the context of the communication is clearly non-privileged and policy related.

73. I am satisfied that the Documents are those as described by the Court in *Campbell* and *L'Abbé*. Subject to my specific findings set out below, the Documents are policy documents and not documents or communications prepared for the seeking or giving of legal advice, or indeed as part of a solicitor client relationship at all.

74. The AGC submits that Rule 30.06 contemplates a two-step process in that I must first be satisfied that a claim of privilege may have been improperly made, before I should inspect the Documents themselves for the purpose of determining the validity of the claim of privilege. As stated above, there are many cases that support the proposition that the court should inspect the documents themselves to make such a determination, without specifically considering whether or not an initial threshold has to be reached first.

75. If it is a requirement of the Rule, I am satisfied in respect of each of the nine Documents, based on the analysis above, that a claim of privilege may have been improperly made.

76. In any event, the AGC produced to the Court for the purposes of determining the validity of the claims of privilege, unredacted copies of each of the Documents. I have reviewed those and specifically considered them in reaching my conclusions, and I find the following in respect of each of the Documents, in addition to my general conclusions set out above. Given the nature of my findings, it is necessary to make reference to the specific redactions in each Document, as each must be considered separately:

a. **Document 1**: the evidence of Mr. Hill is that the document is dated September 27, 2012, and authored within the Telecom Policy Branch, likely specifically by Messrs. Johnstone and/or Chow, neither of whom is a solicitor.

The redacted text on page 3 relates in part to current policies. Those are statements of fact and cannot sustain a claim of privilege. The last point on page 3 references a legal risk but I am satisfied it is squarely within a discussion about policy options and **is not solicitor client privileged**.

TAB 34

Decor Grates Incorporated v. Imperial Manufacturing Group Inc., 2015 FCA 100 (CanLII), [2016] 1 FCR 246

Date: 2015-04-20

File number: A-415-13

Other citations: 472 NR 109 — [2015] FCJ No 503 (QL)

Citation:
Decor Grates Incorporated v. Imperial Manufacturing Group Inc., 2015 FCA 100 (CanLII), [2016] 1 FCR 246, <https://canlii.ca/t/ghc70>, retrieved on 2025-10-31

Acknowledgements:
The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

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Please note that in the first caption, "*Administrative Law — Judicial Review*" has been changed to "*Judges and Courts*" following an erratum published in [2017] Volume 1, Part 1.

[2016] 1 F.C.R. 246

A-415-13

2015 FCA 100

Imperial Manufacturing Group Inc. and **Home Depot of Canada Inc.** (*Appellants*)

v.

Decor Grates Incorporated (*Respondent*)

Indexed as: Decor Grates Incorporated v. Imperial Manufacturing Group Inc.

Federal Court of Appeal, Stratas, Webb and Scott JJ.A.—Toronto, September 11, 2014; Ottawa, April 20, 2015.

Judges and Courts — Standard of review — Discretionary interlocutory orders — Appeal from Federal Court order dismissing appellants' motion for particulars in action by respondent against appellants for infringement of certain industrial designs — Respondent granted registrations for two designs for floor heating grates under Industrial Design Act — Appellants seeking particulars of certain allegations in respondent's statement of claim — Claiming particulars relevant to certain defences to respondent's claim of infringement — On appeal, appellants submitting that Federal Court erring in law, improperly weighing relevant factors in matter — Asking Federal Court of Appeal to reweigh factors at issue, substitute discretion for that of Federal Court — Which line of authority on standard of review of discretionary interlocutory orders applying in present case — Line of authority on standard of review of discretionary interlocutory orders of Federal Court beginning with 1995 decision in David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. — In 2002, Supreme Court of Canada decision in Housen v. Nikolaisen providing definitive word on standard of review in civil cases — Given Housen, continued existence of David Bull line of authority considered redundant — However, unlike Housen, David Bull line of authority not capturing "palpable and overriding error" concept — Thus, offering false hope that appellate courts interfering on basis of reweighings but Federal Court of Appeal never doing this — For reasons of simplicity, coherency, only standard of review articulated in Housen should be used when Federal Court of Appeal reviewing discretionary, interlocutory orders — Thus, in accordance with Housen, absent error on question of law or extricable legal principle, intervention warranted only in cases of palpable, overriding error — No such error herein — Appeal dismissed.

Industrial Design — In action brought by respondent against appellants for infringement of certain industrial designs, appellants moving for particulars but Federal Court dismissing appellant's motion — Federal Court denying request for particulars since finding appellants embarking on "fishing expedition" — Appellants appealing Federal Court's order — Whether Federal Court erring herein — Applicable standard of review that set out by Supreme Court of Canada in Housen v. Nikolaisen — Absent error on question of law or extricable legal principle, intervention warranted only in cases of palpable, overriding error — Regarding appellants' request for particulars, information appellants seeking relating to matters relevant to propriety of information sought on discovery; request suggesting appellants misapprehending purpose of particulars — Industrial Design Act, s. 7(3), dealing with registration certificates, creating rebuttable presumption not conclusive one — Provided party having some evidence conflicting with certificate of registration (i.e. "proof to the contrary" in s. 7(3)), party can rely on evidence in support of allegation in statement of defence that presumption rebutted to extent of conflict — If appellants not having any conflicting evidence, cannot plead having "proof to the contrary" — Doing so would be abuse of process — As to appellants' argument that Federal Court erring in finding that request for particulars constituting "fishing expedition", Federal Court not erring on any legal point, including on law relating to Act, s. 7(3) — Appellants not persuading Federal Court of Appeal that threshold of palpable, overriding error met — In present case, all of Federal Court's findings of mixed fact and law, of fact based on evidence — Federal Court not making any obvious error or error going to very core of outcome reached.

PUBLIC

(2) The Merits of the Appeal

[30] The appellants submit that the Federal Court erred in legal principle when it stated [at paragraph 10] that "the fact of registration is all that the plaintiff must establish to prove its entitlement to the exclusive right to use the registered designs."

[31] In my view, this sentence cannot be viewed in isolation. First, the purpose of particulars must be kept front of mind.

[32] Courts grant motions for particulars of allegations in a statement of claim when defendants need them in order to plead. In short, the purpose of particulars is to facilitate the ability to plead. Put another way, without the particulars on an important point, the party cannot plead in response.

[33] This is to be distinguished from discoveries and, in particular, what courts must consider before ordering a discovery witness to answer a question. There, the Court considers whether the information sought is relevant and material to the legal and factual issues in the proceeding and consistent with the objectives set out in rule 3 of the *Federal Courts Rules*, SOR/98-106.

[34] The appellants seem to have a discovery purpose in mind. They seem to be supporting their request for particulars on the basis that the information they seek is relevant and material to the legal and factual issues in the case. In paragraph 32 of their memorandum of fact and law, they submit that the provision of particulars will enable them "to appreciate the facts on which the case is founded and better understand [Decor Grates'] position". But these matters are relevant to the propriety of information sought on discovery, not whether particulars in a statement of claim should be granted because a party needs them in order to plead.

[35] In paragraphs 31 and 32 of their memorandum of fact and law, the appellants suggest that the provision of the particulars would have a "significant impact" on their statement of defence by affecting its "submission, structure and tone". Here again, the appellants misapprehend the purpose of particulars. They are not supplied because they will make a pleading better or more forceful. They are supplied because without them they cannot plead in response to an important point.

[36] Had this been a request for information during a discovery, the appellants might be on firmer ground. Subsection 7(3) of the *Industrial Design Act* creates a rebuttable presumption, not a conclusive presumption. Subsection 7(3) provides as follows:

> **7.** …
>
> Certificate to be evidence of contents (3) The certificate, in the absence of proof to the contrary, is sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registration, and of compliance with this Act. [My emphasis]

[37] If subsection 7(3) set up a conclusive presumption, then all questions concerning facts inconsistent with the presumption would be out of bounds. But subsection 7(3) sets up only a rebuttable presumption. Provided a party has some evidence that conflicts with the certificate (i.e., "proof to the contrary"), it can rely upon that evidence in support of an allegation in its statement of defence that the presumption is rebutted to the extent of the conflict. For example, if the appellants have information suggesting that Decor Grates is not a "proprietor" because it is not or cannot be an author of the design in issue, it can plead an allegation based on that conflicting fact as "proof to the contrary". Depending on the circumstances, a party may be able to draw wider inferences from the conflicting evidence and make a wider allegation that other aspects of the presumption are also rebutted. But if the appellants do not have any conflicting evidence at all, they cannot plead they have "proof to the contrary". To do so would be an abuse of process: *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301, at paragraph 34; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at paragraph 45.

[38] The appellants also submit that the Judge erred in finding that their request for particulars was a "fishing expedition". Here, the Federal Court set out the law relating to the *Industrial Design Act* and subsection 7(3) of that Act in particular, and did not err on any legal point. As a result, the Federal Court's finding that the appellants are engaged in a "fishing expedition"—a search by an empty-handed party looking for something to grasp onto—is a question of mixed fact and law heavily suffused by facts. Therefore, in order to succeed on this, the appellants must persuade us that the Federal Court committed a palpable and overriding error.

[39] Further, the Federal Court made other supplementary findings in support of its decision, namely that some of the particulars sought were known to the appellant, Home Depot, those particulars could be shared with the appellant, Imperial [Manufacturing], the particulars sought went far beyond what was necessary to trigger the defences, and many of the particulars sought include "many extraneous elements that would be time consuming to locate." To some extent, some of these concerns seem more appropriate to the issue whether a question should be answered on discovery rather than whether a party needs the information in order to plead. But they are largely factual in nature. Here again, to set these findings aside, the appellants must persuade us that the Federal Court committed a palpable and overriding error.

[40] Palpable and overriding error is a high standard: see, e.g., *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31; *Waxman v. Waxman* (2004), 2004 CanLII 39040 (ON CA), 186 O.A.C. 201, at paragraphs 278–284. In *South Yukon*, this Court expressed the standard as follows (at paragraph 46):

> Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006), 2006 CanLII 37566 (ON CA), 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman*, *supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[41] In this case, the appellants have not persuaded me that the threshold of palpable and overriding error has been met. All of the Federal Court's findings of mixed fact and law (including matters of discretion) and findings of fact have a basis in the evidence. Put another way, there is no error that is obvious and goes to the very core of the outcome reached.

TAB 35

PUBLIC

Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada, 2009 BCSC 1474 (CanLII)

Date: 2009-10-29

File number: M075604

Citation:
Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada, 2009 BCSC 1474 (CanLII), <https://canlii.ca/t/26dop>, retrieved on 2025-11-04

Most recent unfavourable mention

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada,* 2009 BCSC 1474

Date: 20091029

Docket: M075604

Registry: Vancouver

Between:

Eilah Chonn

Plaintiff

And:

DCFS Canada Corp dba Mercedez-Benz

Credit Canada, Ulrich Peter Metz and Rolf Kloss

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff: John M. Cameron

Counsel for the Defendants: Scott Stewart
Michael Wilhelmson

Place and Date of Hearing: Vancouver, B.C.
July 8 and 10, 2009

Place and Date of Judgment: Vancouver, B.C.
October 29, 2009

Overview

[1] The parties have filed cross applications relating to their respective document disclosure obligations. The applications arise out of an action where the plaintiff seeks damages for personal injuries suffered in a motor vehicle accident that occurred on January 3, 2006 (the "Current Action").

PUBLIC

a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production. See *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 1986 CanLII 167 (BC CA), 5 B.C.LR. (2d) 1 (C.A.), per Esson J.A. dissenting, at pp. 10-11.

[27] For good reason, therefore, the law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature). See *Home Office v. Harman*, [1983] 1 A.C. 280 (H.L.) Lac D'Amiante; *Hunt v. T & N plc*; *Shaw Estate v. Oldroyd*, 2007 BCSC 866, at para. 21...

[18] Furthermore, the ongoing nature of the implied undertaking was addressed by the Court at para. 51:

[51] As mentioned earlier, the lawsuit against the appellant and others was settled in 2006. As a result the appellant was not required to give evidence at a civil trial; nor were her examination for discovery transcripts ever read into evidence. The transcripts remain in the hands of the parties and their lawyer. Nevertheless, the implied undertaking continues. The fact that the settlement has rendered the discovery moot does not mean the appellant's privacy interest is also moot. The undertaking continues to bind. When an adverse party incorporates the answers or documents obtained on discovery as part of the court record at trial the undertaking is spent, but not otherwise, except by consent or court order. See Lac d'Amiante, at paras. 70 and 76; *Shaw Estate v. Oldroyd*, at paras. 20-22.

Analysis

[19] The defendants raised three distinct grounds in arguing that the implied undertaking of confidentiality was not engaged with respect to the documents that were obtained in the Earlier Actions:

a) that it was ICBC rather than the named defendants that was the "party" to the Current Action for the purpose of Rule 26 and otherwise;

b) that Rule 26 overrides the common law implied undertaking of confidentiality; and

c) that merely generating and issuing a list of documents under Rule 26 do not constitute a "use" of the documents obtained in the Earlier Actions and does not engage the implied undertaking rule.

I will address these three grounds in turn.

Part 1 It is ICBC that is the "Party" under Rule 26 to the Current Action

[20] The position advanced by the defendants is that it is ICBC rather than the named defendants that is the "party" to the Current Action for the purposes of Rule 26 and indeed more broadly. Thus, ICBC says it had an obligation to list all documents in its control or possession including the records and material it had amassed in the Earlier Actions.

[21] Before turning to the merits of the defendants' assertion, I believe that the issue it raises fundamentally misses the central question. The question is not how ICBC came to be in possession of the documents from the Earlier Actions or whether it is a "party" for the purposes of Rule 26. Rather, the point is that no defendant can make use of evidence, oral or documentary, that was compelled and produced by reason of pre-trial discovery in earlier litigation. Had the named defendants in the Current Action been, by some remarkable circumstance, the named defendants in the Earlier Actions, the evidence would not have been available to them (subject to the other arguments advanced by the defendants to make use of such information) without either the accedance of the plaintiff or an order of the court. Thus, for example, if a party makes disclosure in litigation against the Provincial or Federal Crown, it is not open to either of those parties to look to or make use of such disclosure in subsequent litigation involving those same parties. The implied undertaking rule extends to subsequent or consecutive litigation between the same parties.

[22] Thus, even if ICBC were a "party" to the Current Action for the purposes of Rule 26, which I do not believe it is, its position would not be advanced. It is subject to the same restrictions as pertain to other litigants in that it is constrained by the implied undertaking rule in its use of all materials that it obtained in the course of earlier litigation.

[23] A portion of the plaintiff's concern appeared to relate not only to the fact that ICBC used documents from the Earlier Actions when it generated a List of the Insurance Corporation Documents under Rule 26, but also that ICBC considered it to be open to it to assemble the documents from the Earlier Actions, send those documents to counsel in the Current Action and begin its internal review of these materials.

[24] Again, the question of whether ICBC was a "party" to the Earlier Actions or what authority it enjoys in motor vehicle litigation to conduct the defence of such actions is of no moment in considering the obligations it has as a result of the implied undertaking that is attached to all material in its possession obtained from prior litigation.

> [25] A party who has documents from earlier litigation that are impressed with the implied undertaking simply cannot make use of those documents without the concurrence of the party from whom they were obtained or leave of the court. The implied undertaking protects documents or oral discovery obtained in earlier litigation from being used for any purpose "collateral" to that litigation. Thus, the documents cannot be used for internal strategic review in subsequent litigation. They cannot be used for the purposes of drafting pleadings. They cannot be sent to counsel for the purposes of obtaining an opinion in new litigation. All of these obligations bound the named defendants in the Current Action as well as ICBC in its conduct of that litigation.

[26] The practical consequences of these restrictions, it will be seen, are in most cases minimal. In most cases where ICBC or its counsel is aware, through the pleadings or their direct involvement in earlier litigation, of relevant documents or other pretrial discovery from that litigation, they need only contact plaintiff's counsel to obtain his or her concurrence to the use of the materials in question. Overwhelmingly, having regard to the authorities to which I will refer, that concurrence should be forthcoming.