COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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CT- 2024-012

Sarah Sharp-Smith for / pour
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OTTAWA, ONT. | # 98

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

<u>AMENDED</u> 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.~~

2. 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

3. 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.

4. 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

5. 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.

6. 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

7. 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~~quickly followed by 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.

8. 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~~were quickly followed by competitors launching similar plans with similar representations.

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

9. 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

10. 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.

11. 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.

12. 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.

13. 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.

14. 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”.

15. 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

16. 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.

17. 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

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

19. 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).

20. 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

21. 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.

22. 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.

23. 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".

24. 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.

25. 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.

26. 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.

X. The Administrative Monetary Remedy Sought is Constitutional

27. Rogers raises a constitutional challenge that is substantially similar to that raised by Google Canada Corporation and Google LLC in *Commissioner of Competition v Google Canada Corporation and Google LLC* (Tribunal file no.: CT-2024-010).

28. Contrary to Rogers' position, subparagraph 74.1(1)(c)(ii) of the Act is constitutional under the *Canadian Charter of Rights and Freedoms* ("Charter") and consistent with the *Canadian Bill of Rights*, SC 1960, c 44 ("Bill of Rights"). Rogers' challenge is contingent on speculation that the Tribunal might exercise its discretion in such a way that imposes a true penal consequence.

29. However, the Commissioner does not seek, nor does subparagraph 74.1(1)(c) of the Act permit the imposition of, a true penal consequence. In exercising its discretion to impose an administrative monetary penalty ("AMP"), the Tribunal is constrained by both the Act and established constitutional principles.

    a. Under subsection 74.1(4), the amount imposed by the Tribunal is limited to that necessary to promote practices that are in conformity with the Act, and not to punish.

b. In exercising its discretion, the Tribunal must account for the factors listed in subsection 74.1(5), including Rogers' financial position.

c. The Tribunal must consider the Charter, the Bill of Rights, and the associated jurisprudence in determining an appropriate amount for the AMP.

30. In light of these constraints, any AMP ordered by the Tribunal cannot be punitive in purpose or effect, nor can it constitute a true penal consequence. Since Rogers' claims under the Charter and Bill of Rights depend on subparagraph 74.1(1)(c)(ii) of the Act giving rise to a true penal consequence, its challenge must fail.

31. Nevertheless, if the Tribunal finds subsection 74.1(1)(c)(ii) of the Act to be unconstitutional, dismissal of the Commissioner's application is not the appropriate remedy. Instead, the Tribunal should read-down subparagraph 74.1(1)(c)(ii) to allow an amount that the Tribunal finds would not impose true penal consequences. This amount would be no less than that provided for by subparagraph 74.1(1)(c)(ii) as it read immediately prior to June 23, 2022.

32. Moreover, sections 74.01 and 74.011 of the Act, subsections 11(2) of the *Competition Tribunal Act*, and rules 60 and 64 of the *Competition Tribunal Rules* are also constitutional, even if the Tribunal finds subparagraph 74.1(1)(c)(ii) unconstitutional. In the event that the Tribunal finds subparagraph 74.1(1)(c)(ii) unconstitutional and does not grant an AMP that imposes true penal consequences, there will not have been a breach of Rogers' rights requiring a remedy in respect of these other provisions. As a result, these provisions cannot be said to be unconstitutional, nor would it be appropriate to exclude evidence obtained under these provisions.

33. With respect to Rogers' Charter challenge of section 11 of the Act, the Tribunal is respectfully not a "court of competent jurisdiction". While the Tribunal may determine the admissibility of evidence obtained pursuant to an order under section 11, it does not have the jurisdiction in the current proceeding to determine the constitutionality of that provision. Parliament granted the exclusive jurisdiction to hear and determine matters under section 11 to superior or county courts. To allow Rogers to challenge the constitutionality of section 11 would allow the Tribunal to invalidate orders of the superior or county courts that are entirely under the latter's jurisdiction. In the event the Tribunal finds that it is a court of competent jurisdiction, section 11 is nevertheless constitutional for the reasons in the foregoing paragraph.

34. Additionally, the processes applicable to orders under section 11 of the Act and applications before the Tribunal meet or exceed the requirements of s. 2(e) of the Bill of Rights.

DATED AT Gatineau, Quebec, this 26th day of November, 2025.

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