

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2026 Comp Trib 15

File No.: CT-2024-012

Registry Document No.: 309

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: March 19, 2026

Before: Madam Justice Jocelyne Gagné

Date of Reasons for Order and Order: March 24, 2026

ORDER AND REASONS

(Motion to strike the witness statements of Dr. Matthew Strathearn and Motion to file a sur-reply expert report)

[1] **FURTHER TO** two motions by Rogers Communications Inc. for: (i) an order striking Dr. Matthew Strathearn's witness statement affirmed January 7, 2026, and reply witness statement affirmed March 10, 2026, on the ground that they contain inadmissible expert evidence (the "Motion to strike"), and (ii) leave to file a brief sur-reply expert report from Dr. Nick Feamster in response to the reply expert report of Mr. Simon Lee affirmed March 11, 2026 (the "Motion for leave to file a sur-reply expert report");

[2] **AND HAVING** read the parties' motion records and heard their oral submissions during a videoconference/telephone hearing held on March 19, 2026;

[3] **AND CONSIDERING** that the evidentiary portion in this case is scheduled for three weeks, to commence on March 30, 2026, and that arguments shall be heard over three days during the week of April 27, 2026;

[4] **AND UPON** being satisfied for the following reasons, that the Motion to strike should be granted in part, and the Motion for leave to file a sur-reply expert report granted;

Motion to strike

[5] Dr. Matthew Strathearn is a Senior Economist employed by the Competition Bureau. He was provided various data and information and asked whether it was possible for him to calculate the benefit Rogers received as a result of alleged false and misleading representations, using econometric methods and the information made available to him.

[6] In his initial witness statement affirmed January 7, 2026, he provided the following information:

- a) He calculated the total revenues Rogers obtained from "unlimited" wireless plans between June 2019 and September 2025, using Rogers' "Speedpass & Topup vs Price Plan.xlsx" spreadsheet;
- b) He calculated the revenues obtained by Rogers from the sale of Speed Passes purchased by Rogers' Infinite Plan customers from June 2019 to September 2025;
- c) However, using first a difference-in-differences (DiD) methodology, and second, a difference-in-differences in reverse (DiDR) methodology, Dr. Strathearn was unable to calculate the difference between the revenues made by Rogers from its "unlimited" wireless plans and what it would have made had the marketing representations not claimed that the plans offered "unlimited" data;
- d) He was unable to calculate the dollar value of Rogers' gain in wireless market share that are attributable to the marketing of "unlimited" data plans from June 2019 to present, notably for lack of access to revenue and unit sales for both Rogers and competitors;
- e) He was unable to calculate the dollar value of Rogers' gains in "likelihood to recommend" that are attributable to the marketing of "unlimited" data plans from June 2019 to present, notably for lack of access to "likelihood to recommend" survey data for both Rogers and other Comparable Companies (as defined in his witness statement) offering "unlimited" plans;

- f) He was unable to calculate the dollar value of Rogers' improvements in terms of brand equity from June 2019 to present, notably for lack of access to brand equity data for both Rogers and other Comparable Companies offering comparable "unlimited" plans;
- g) He was unable to calculate the dollar value of Rogers' existing customers staying with Rogers due to the representations (lower customer churn) from June 2019 to present, notably for lack of access to a measure of customer churn for both Rogers and other Comparable Companies offering comparable "unlimited" plans; and
- h) Finally, he had sufficient data to calculate 3% of Rogers' global annual sales using Rogers' public Quarterly Earnings and Reports for Q1 2019 to Q3 2025.

[7] Rogers filed the affidavit and expert report of Dr. Timothy Snail affirmed February 18, 2026, who found that (i) consumers benefitted from "unlimited" plans launched by Rogers (and by Bell and Telus); (ii) Roger's wireless service revenues, average revenue per user, and profit margins declined post launch; (iii) Rogers did not experience gains in market share or subscriber additions following the launch, and (iv) Rogers did not obtain an incremental, net economic benefit attributable to the challenged representations. Dr. Snail found that since any benefit obtained by Rogers from its Infinite plan representations would be measurable and minimal, reliance on the statutory fallback of administrative monetary penalties that are based on a percentage of annual worldwide gross revenues would grossly overstate any economic gain and would be disconnected from the alleged misrepresentations. Finally, Dr. Snail commented on Dr. Strathearn's factual allegations and found his approach to be ill-suited to a setting where the focus is on an industry-wide introduction of no-coverage plans, as well as unnecessary given the contemporaneous evidence indicating the lack of benefit for Rogers.

[8] In Dr. Strathearn's reply witness statement affirmed March 10, 2026, he provided the following testimony:

- a) DiD is one valid econometric framework for constructing the counterfactual, allowing the calculation of the difference between the actual and counterfactual that represents the incremental benefits to Rogers attributable to the impugned representations;
- b) After reading Dr. Snail's report, he remained unable to compare the actual with a reliably quantified counterfactual, thus unable to calculate the incremental benefit to Rogers attributable to the impugned representations;
- c) He criticized Dr. Snail's evidence regarding benefits to consumers from the market-wide adoption of "unlimited" plans, as it does not quantify the effect, if any, of the impugned representations at issue in this proceeding, nor does it provide a quantified counterfactual that would allow him to calculate any benefit incremental to those representations;
- d) He criticized Dr. Snail's finding that Rogers' revenues declined after the launch of its Infinite data plans, as he did not quantify the portion of the 2019-2020 revenue decline, if any, that is attributable to the impugned representations, nor did he account for the global COVID-19 pandemic or provide a quantitative analysis separating the effects of broader economic conditions during that period from other potential drivers of revenue variation;

- e) He opined that the path of monthly Infinite revenue needs to be presented separately from the legacy revenue in order to assess the benefit related to the incremental customers that purchased Infinite plans due to the impugned representations;
- f) He criticized the methodology used by Dr. Snail to calculate the increase in infrastructure spending attributable to the impugned representations, as well as the change in market share;
- g) He opined that Dr. Snail's report did not provide quantified counterfactual revenue estimates for the but for scenarios; and
- h) In calculating the benefit from the sale of Speed Passes, Dr. Snail only considered the first Speed Pass purchase for each customer, failing to consider that at that point, the terms of the contract between Rogers and the customer would be a barrier to changing supplier.

[9] Rogers asserts that Dr. Strathearn's witness statement and reply witness statement are inadmissible evidence as they are replete with opinion evidence that ought to have been the subject of an expert report.

[10] The Commissioner responds that Dr. Strathearn's evidence is admissible factual evidence grounded in his personal knowledge and the work he performs in the ordinary course of his role.

[11] I agree with the Commissioner that the initial witness statement is admissible as factual evidence, and that its probative value is better left to be assessed with the entire evidence that will be presented at trial. Dr. Strathearn can testify as to the fact that with the information at hand, **he** was unable to calculate Rogers' benefit using the DiD or DiDr methodologies. However, he cannot opine that with the same information, **one** could not calculate Rogers' benefit. The weight that will be given to this evidence is left for the trial.

[12] However, I agree with Rogers that Dr. Strathearn's reply witness statement falls outside the scope of factual evidence, and that the opinions it contains are inextricable from the overall contents of the document. As such, Dr. Strathearn's reply witness statement will be struck from the file.

Motion for leave to file a sur-reply expert report

[13] In her Application, the Commissioner alleges that Rogers' advertisements of its Infinite wireless data plans are false and misleading, notably because Rogers' throttled data is not functional or usable.

[14] During discovery, the Commissioner's representative was asked what measurement of difficulty or virtual impossibility applies to her allegation, and she answered that it would be the subject of expert evidence.

[15] On January 9, 2026, the Commissioner delivered her case-in-chief, including an expert report from Mr. Simon Lee. Mr. Lee was asked to opine on the required speeds for various wireless data activities on cellular devices, minimum speed requirements for such activities to function as intended, how they compare to throttled speeds, and the practical impact and user experience of

throttling. Mr. Lee conducted no empirical work or testing to answer these questions, but rather provided theoretical calculations of the time required to load content and carry out these cellular activities, and a comparison of download speeds to published requirements for certain types of applications.

[16] On February 18, 2026, Rogers responded with an expert report from Dr. Nick Feamster. Dr. Feamster was asked to evaluate the technical claims Mr. Lee made in his expert report, conduct empirical testing of mobile applications at throttled speeds on Rogers' network, and offer an expert opinion on whether throttled speeds of up to 512 kbps provide functional mobile data connectivity. Dr. Feamster concluded that Rogers' throttled speeds "maintain[s] core mobile functionality [...] in a manner that is practically usable for everyday mobile needs."

[17] To support his conclusions, Dr. Feamster tested 20 mobile use cases under throttled conditions on Rogers' network in Toronto over two days, using an Apple iPhone and a Google Pixel 10 Pro Fold Android device. Both devices were connected to the Rogers network, used Rogers SIM cards, and were on Rogers 5G+ data plans. Dr. Feamster exhausted the high-speed data buckets and then measured and recorded the experience of throttled data use.

[18] On March 11, 2026, the Commissioner delivered her reply evidence, including Mr. Lee's reply expert report in which he outlined the result of his own testing of the use cases. Mr. Lee used his own testing protocol, not conducted on the Rogers network or on a throttled network.

[19] Rogers asserts that Mr. Lee's testing evidence could and should have been led in chief, and I agree.

[20] The issue of testing and the usability and functionality of Rogers' throttled data is not new and does not emanate from Dr. Feamster's responding expert report. The parties have joined in their pleadings on whether Rogers reduced-speed data is functional and usable. Before the Commissioner even filed her Application, Bureau employees had carried out their own testing of throttled data.

[21] As such, I agree that Rogers should be granted leave to file a brief sur-reply expert report, limited to opining, not exceeding 5 pages, on Mr. Lee's testing protocol and test results. For greater certainty, Dr. Feamster is not to carry on additional testing or file additional video recording.

[22] For the above reasons, (i) Rogers' Motion to strike is granted in part, and Dr. Matthiew Strathearn reply witness statement is struck from the record, and (ii) Rogers is granted leave to file a sur-reply expert report from Dr. Feamster, not exceeding 5 pages, commenting on Mr. Lee's testing protocol and test results.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[23] Rogers' Motion to strike is granted in part, and Dr. Matthiew Strathearn's reply witness statement dated March 10, 2026, is struck from the record.

[24] Rogers is granted leave to file a sur-reply expert report from Dr. Nick Feamster, not exceeding 5 pages and limited to commenting on Mr. Lee's testing protocol and test results.

[25] Costs of these motions are granted to Rogers.

DATED at Ottawa, this 24th day of March 2026.

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
Kevin Hong
Irene Cybulsky
Kendra Wilson

For the respondent:

Rogers Communications Inc.

Jonathan Lisus
Crawford Smith
Alexander T. Mulligan
Anita Banicevic
Taraleigh Stevenson