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OTTAWA, ONT.

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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

MEMORANDUM OF FACT AND LAW
(Rogers' Refusals Motion)

October 27, 2025

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PART I - OVERVIEW

1. This is a refusals motion arising from the examination for discovery of the Commissioner's representative, Katheen Phillipowsky, on September 3, 4 and 5, 2025.
2. The Commissioner refused 94 questions. On this motion, Rogers seeks to compel answers to 59 questions, organized into three categories:
 - (a) questions related to the facts and conclusions reached regarding the Commissioner's assessments in 2020 and 2021 of unlimited data representations, his investigation commenced in March 2022, and his inquiry commenced in April 2023;
 - (b) questions related to the alleged breach of the deemed undertaking rule and a confidentiality order in the Rogers-Shaw litigation by the Commissioner; and
 - (c) questions related to other factual allegations pleaded by the Commissioner in his Notice of Application and Reply.
3. At the time of delivering this factum, the Tribunal's decision in respect of Rogers' amendment motion has not been released. Regardless of the outcome, Rogers' refusal motion should be granted because the three categories of questions are:
 - (a) relevant to the issues in dispute and the allegations pleaded by the parties;
 - (b) not precluded by this Tribunal's production order dated August 11, 2025; and
 - (c) not protected by any privilege.
4. The Commissioner is no ordinary litigant. As a public official, he has duties to safeguard the integrity of this process. He is not permitted to shield important information from view that would allow Rogers to respond to the Commissioner's

allegations and the remedies he seeks, test the evidence of his representative on discovery, and advance Rogers' affirmative defences.

5. Discovery is an essential tool in Tribunal proceedings to ensure a fair and efficient trial. Rogers is entitled to know the case it has to meet, to test the Commissioner's allegations and evidence, and to make full answer and defence. There is a reasonable likelihood that the questions refused by the Commissioner will elicit information that will enable Rogers to advance its defence to the Commissioner's allegations, including with respect to the issue of remedy and costs. Rogers respectfully requests the Tribunal to order the Commissioner to answer the refused questions and to make full disclosure of any relevant, non-privileged facts and documents arising from them.

PART II - STATEMENT OF FACTS

A. Procedural Background

6. On December 23, 2024, the Commissioner filed a Notice of Application alleging that Rogers had engaged and was engaging in reviewable conduct contrary to section 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*, R.S.C., 1985, c. C-34 (the "***Competition Act***") relating to the promotion of its "Infinite" plans.¹

7. Rogers filed its Response on February 6, 2025. It denied making any false and misleading representations relating to its Infinite plans.² The Commissioner filed a Reply to Rogers' Response on February 20, 2025.³

8. On July 7, 2025, Rogers brought a motion to compel further documentary production from the Commissioner.

¹ Notice of Application of the Commissioner of Competition [**Notice of Application**], Affidavit of Ashley McKnight, affirmed October 3, 2025 [**McKnight Affidavit**], Ex. A, Motion Record of the Respondent [**MR**], Tab 2, pp. 33 – 62.

² Rogers Response to the Notice of Application of the Commissioner of Competition [**Response**], McKnight Affidavit, Ex. B, MR, Tab 2, pp. 64 – 93.

³ Reply of the Commissioner of Competition, dated February 20, 2025 [**Reply**], McKnight Affidavit, Ex. C, MR, Tab 2, pp. 95 – 104.

9. On August 11, 2025, the Tribunal ordered the Commissioner to produce third-party records but declined to compel the Commissioner to produce certain records relating to his investigation of unlimited plan representations (the “**Production Order**”).⁴

10. Examinations for discovery took place August 27-29 and September 3-5, 2025. The Commissioner refused to answer 94 questions.

11. The parties exchanged answers to undertakings and further productions from September 19 to October 3, 2025.

12. Further examinations on the answers to undertakings and additional documents produced by the Commissioner are scheduled to take place on December 1, 2, 4 and 5, 2025.

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

14. On October 3, 2025, Rogers moved for leave to amend its Response. It also served a Notice of Constitutional Question. Rogers’ amendment motion was argued on October 17, 2025. The Tribunal’s decision on that motion is currently under reserve.

15. Rogers brings this motion to compel the Commissioner to answer 59 of the 94 questions he refused, as set out in Schedule A attached to this factum.⁵

B. Key Evidence Revealed in this Proceeding and from Commissioner’s Representative

16. Over the course of this proceeding and on examination for discovery of Ms. Phillipowsky, it has been revealed that:

⁴ [*Canada \(Commissioner of Competition\) v Rogers Communications Inc*, 2025 Comp Trib 11](#) at paras [9](#), [19](#), [33](#) (CACT) [*Production Order*].

⁵ The Schedule A to this Memorandum of Fact and Law differs slightly in structure to the Schedule A, attached to Rogers’ Notice of Motion. The Tribunal should refer to Schedule A, attached to this Memorandum of Fact and Law for the purpose of this motion.

- (a) The Commissioner had specific knowledge of Rogers' Infinite plans as early as June 2019. [REDACTED]
[REDACTED]
[REDACTED];⁶
- (b) On June 12, 2019, [REDACTED], by email, that Rogers was launching a new product that Rogers believed responded to concerns from customers. He attached a copy of Rogers' press release announcing the Infinite plans, and advised the Commissioner that he was available to discuss the press release and the plans with the Commissioner;⁷
- (c) The Commissioner does not believe he responded to [REDACTED] email, nor does he have a recollection of speaking to anyone at the Bureau about the email at or around the time it was received.⁸ The Commissioner also confirmed that he did not forward [REDACTED] email to anyone at the Bureau at the time it was received.⁹ Despite this lack of action, the Commissioner now alleges that the press release attached to [REDACTED] email is false and misleading in his Application;¹⁰
- (d) The Commissioner produced documents indicating that beginning in April 2020 he opened a preliminary assessment into "unlimited" representations that telecommunications providers were making in

⁶ [REDACTED], McKnight Affidavit, Ex. N, MR, Tab 2, pp. 873 – 874; Commissioner's Answers to Undertakings [**Answers to Undertakings**], UT 13, McKnight Affidavit, Ex. L, MR, Tab 2, p. 838.

⁷ [REDACTED], McKnight Affidavit, Ex. N, MR, Tab 2, pp. 873 – 874.

⁸ Answers to Undertakings, UT 14, McKnight Affidavit, Ex. L, MR, Tab 2, p. 839; Further Answers to Undertakings from the Examination of Kathleen Phillipowsky [**Further Answers to UTs and UAs**], UAs 4 – 5, McKnight Affidavit, Ex. M, MR, Tab 2, p. 870.

⁹ Further Answers to Undertakings from the Examination of Ms Phillipowsky, item 14, McKnight Affidavit, Ex. Z, MR, Tab 2, p. 1970.

¹⁰ Answers to Undertakings, UT 12, McKnight Affidavit, Ex. L, MR, Tab 2, p. 838.

April 2020, including Rogers' representations.¹¹ Ms. Phillipowsky testified at discovery that:

[REDACTED]

[REDACTED]

[REDACTED]

- (e) In September 2021, the Bureau opened another assessment into unlimited plan representations made by telecommunications providers.¹⁵ [REDACTED]

[REDACTED]¹⁶

- (f) In March 2022, the Commissioner opened an investigation into Rogers' representations that he had already reviewed and determined did not raise issues under the *Competition Act*.¹⁷ [REDACTED]

[REDACTED]¹⁸

- (g) In April 2023, the Commissioner commenced a formal inquiry into Rogers.¹⁹ The Commissioner subsequently took steps in furtherance of

¹¹ [REDACTED]

¹² Examination of Kathleen Phillipowsky, dated September 3, 2025 [**Phillipowsky September 3**], Q. 373 p. 90, McKnight Affidavit, Ex. G, MR, Tab 2, pp. 239.

¹³ Phillipowsky September 3, QQ. 374, p. 90, McKnight Affidavit, Ex. G, MR, Tab 2, p. 239.

¹⁴ Phillipowsky September 3, QQ. 380, p. 91, McKnight Affidavit, Ex. G, MR, Tab 2, p. 240.

¹⁵ Affidavit of Kathleen Phillipowsky, sworn November 14, 2023 [**Phillipowsky Affidavit**] at para 7, McKnight Affidavit, Ex. T, MR, Tab 2, pp. 902 – 903.

¹⁶ Examination of Kathleen Phillipowsky, dated September 5, 2025 [**Phillipowsky September 5**] QQ. 44 – 45, pp. 438 - 439, McKnight Affidavit, Ex. I, tab 2, pp. 696 – 697.

¹⁷ Phillipowsky Affidavit at para 7, McKnight Affidavit, Ex. T, tab 2, pp. 902 – 903.

¹⁸ Phillipowsky September 5, Q. 49, p. 440, McKnight Affidavit, Ex. I, MR, Tab 2, p. 698.

¹⁹ Phillipowsky Affidavit, at para 7, McKnight Affidavit, Ex. T, MR, Tab 2, pp. 902 – 903.

his investigation and inquiry to obtain information relevant to his inquiry into Rogers' Infinite plans, including obtaining section 11 orders against former directors and officers of Dig Insights Inc., who Rogers previously retained to conduct market research.²⁰

PART III - POINTS IN ISSUE

17. The issue on this motion is whether the Commissioner should be compelled to answer the questions in Schedule A. Those questions are broken down into three categories:

- (a) **Category #1:** questions related to the facts and conclusions regarding the Commissioner's assessments in 2020 and 2021, his investigation in 2022, and the conduct of his inquiry in 2023;
- (b) **Category #2:** questions related to the alleged breach of the deemed undertaking rule and confidentiality order in the Rogers-Shaw litigation by the Commissioner; and
- (c) **Category #3:** questions related to the Commissioner's allegation that Rogers' representations were or are false and misleading at paragraph 36 of his Notice of Application.

18. As described below, Rogers' position is that the questions in each of these categories are (a) relevant to the issues in dispute as pleaded by the parties, (b) not precluded by the Production Order, and (c) not protected by privilege. This is the case regardless of whether the Tribunal grants Rogers leave to amend its Response.

19. The Commissioner has made serious allegations about Rogers' conduct, including that its conduct should be considered an aggravating factor when considering the question of remedy. Rogers should have available to it the facts, information, and

²⁰ Affidavit of Valerie Prévost, dated January 31, 2025, at paras 1 and 18, McKnight Affidavit, Ex. U, MR, Tab 2, pp. 951 and 956.

documents in the Commissioner's possession that will allow it to make full answer and defence to his allegations, and to ensure a fair and efficient trial of the issues in dispute.

PART IV - STATEMENT OF SUBMISSIONS

A. Applicable Discovery Principles

20. Rule 240 of the *Federal Courts Rules* 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.²¹

21. Relevance is determined by the pleadings. In *Leigh Cement*, the Federal Court of Appeal articulated the test as follows:

... 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.²²

22. The principle in *Leigh Cement* is a flexible standard. Doubts as to relevance are to be resolved in favour of disclosure.²³

23. This Tribunal has previously confirmed the following discovery principles:

- (a) A liberal approach to the scope of questioning on discovery should be applied;²⁴

²¹ *Federal Courts Rules*, SOR/98-106, at r. 240(a).

²² *Canada v Lehigh Cement Limited*, 2011 FCA 120 at para 34 [*Leigh Cement*] recently reaffirmed in *Canada v Thompson*, 2022 FCA 119 at para 30.

²³ *The Commissioner of Competition v Live Nation Entertainment, Inc.*, 2019 CACT 3 at para 8 [*Live Nation*], and *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2022 Comp Trib 16 at para 13 (CACT).

²⁴ *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2022 Comp Trib 3 at para 6 (CACT) [*Secure*].

- (b) It is proper to ask for the factual basis of an allegation made by the Commissioner;²⁵
- (c) It is proper to seek facts or information known to the Commissioner and underlying his allegations with respect to the various elements of alleged conduct, even if those allegations contain a certain legal dimension;²⁶
- (d) Although the Commissioner is not a typical litigant, he is still required to comply with his discovery obligations;
- (e) Discovery is an important process used in Tribunal proceedings to protect and ensure a fair and efficient trial process;²⁷ and
- (f) Respondents are entitled to a fair hearing which includes the right to make full answer and defence.²⁸

24. Refusals motions are guided by the key objective of achieving a level of disclosure sufficient to allow each side to proceed fairly, efficiently, and effectively towards a hearing, with sufficient knowledge of the case each party has to meet.²⁹

B. Category #1: Questions related to the Commissioner’s Assessment, Investigation and Inquiry

25. Rogers seeks to compel the Commissioner to answer questions related to the facts underlying and conclusions reached in respect of (a) the assessments in 2020 and 2021 into telecommunications carriers’ “unlimited” plan representations, and (b) his investigation and inquiry into Rogers (collectively referred to as the “**Category 1 Questions**”).

26. Specifically, the Category 1 Questions concern:

²⁵ [The Commissioner of Competition v Vancouver Airport Authority](#), 2017 CACT 16 at para 27.

²⁶ [Live Nation](#) at para 26.

²⁷ [Live Nation](#) at para 6.

²⁸ [Commissioner of Competition v Sears Canada Inc](#), 2003 CACT 19 at paras 30-31.

²⁹ [Live Nation](#) at para 6; [Secure](#) at para 6 (CACT).

- (a) the facts underlying, and conclusions, of the Commissioner’s assessments of telecommunications carriers’ “unlimited” plan representations in 2020 and 2021 (qq. 383, 385 – 386, 390, 392, 398, 400, 401 from September 3, 2025, and qq. 194, 195, 196 – 197, 201 – 205, 222, 235 – 236, 237, 238, 239, 243, 319 from September 5, 2025);
- (b) the steps taken by the Commissioner after receiving an email from [REDACTED], in June 2019 (qq. 192, 193 from September 5, 2025);
- (c) the Commissioner’s 2021 assessment of telecommunications carriers’ “unlimited” plan representations (“**Project Cosmos**”) (qq. 141 – 144, 149 – 150 from September 5, 2025);³⁰ and
- (a) the facts and details of the Commissioner’s investigation and inquiry into Rogers (qq. 230, 231, 232, 248, 274 – 278, 322, 330 – 331, 332 – 333, 334, 335, 338, 340, 342 and 345 from September 3, 2025, and qq. 65 – 70 from September 5, 2025).³¹

27. At discovery, the Commissioner refused the Category 1 Questions on the basis of relevance. He also argues that they are precluded by the Production Order. With one exception (questions related to Project Cosmos), the Commissioner did not assert privilege in connection with the Category 1 Questions.

³¹ In addition, QQ. 69 – 70 from September 5, 2025 (to advise what documents, other than representations in the marketplace, Ms. Phillipowsky gathered as part of her investigation between March 2022 and April 2023) is also relevant to the alleged breach of the deemed undertaking rule and confidentiality order from the Rogers-Shaw Litigation by the Commissioner.

(i) The Category 1 Questions are Relevant

(a) Overview

28. The facts surrounding, and conclusions reached by, the Commissioner in an investigation are relevant when the respondent's pleading puts his conduct in issue by the defences raised, the responses made to the remedies sought by the Commissioner, and by asking the Tribunal to award costs.

29. First, if Rogers' pleading amendment motion is granted, there can be no debate that the Category 1 Questions are relevant, as they relate directly to the pleaded defenses of estoppel and waiver. As the Tribunal held in *Live Nation*:

- (a) "questions relating to the [...] 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"³²; and
- (b) "[i]n 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."³³

30. As in *Live Nation*, in its proposed Amended Response, Rogers pleaded estoppel and waiver defences. The Commissioner's conduct is relevant to those defences.

31. Second, even if the proposed amendments relating to waiver and estoppel are denied, the Category 1 Questions are still relevant to:

- (a) The Commissioner's allegations and discovery evidence regarding the general impression created by and impact of the representations at issue;

³² [Live Nation](#) at para 13.

³³ [Live Nation](#) at para 15.

(qq: 230, 231, 232, 330 – 331, 340, 342, 345, 400, 401 from September 3, 2025 and qq: 66 – 67, 68, 194, 195, 196 – 197, 201 – 204, 205, 222, 235 – 236, 237, 238, 239, 243, 319 from September 5, 2025)

- (b) The Tribunal’s exercise of its discretion on remedies and the aggravating factors alleged by the Commissioner; and

(qq. 230, 231, 232, 248, 275, 274 – 279, 322, 330 – 331, 332 – 333, 334, 335, 338, 340, 342, 345, 383, 385 – 386, 390, 392, 398, 400, 401 from September 3, 2025 and qq. 65, 66 – 67, 68, 69 – 70, 141, 142, 143, 144, 149 – 150, 192, 193, 194, 195, 196- 197, 201 – 204, 205, 222, 235 – 236, 237, 238, 239, 243 from September 5, 2025)

- (c) Whether costs should be awarded against the Commissioner, in the event Rogers is successful at trial.

(qq. 230, 231, 232, 248, 275, 274 – 279, 322, 330 – 331, 332 – 333, 334, 335, 338, 340, 342, 345, 383, 385 – 386, 390, 392, 398, 400, 401 from September 3, 2025 and qq. 65, 66 – 67, 68, 69 – 70, 141, 142, 143, 144, 149 – 150, 192, 193, 194, 195, 196 – 197, 201 – 204, 205, 222, 235 – 236, 237, 238, 239, 243 from September 5, 2025)

32. Each of these is addressed in turn.

(b) General Impression of the Representations

33. On discovery, the Commissioner’s representative gave extensive evidence about the general impression of the representations at issue. Ms. Phillipowsky testified that regardless of the context, the specific words used, or consumers’ experience with wireless services, every time Rogers used the word “unlimited” in relation to its Infinite plans, consumers would understand this to mean that it was offering unlimited high-

speed data. She said this meaning was plain on the words and, accordingly, those representations were false and misleading on their face.³⁴

34. Both the general impression of Rogers’ representations and whether they were material to consumers’ purchasing decisions must be tied to the relevant facts. While there is a “certain legal dimension” to the issue, the question is fundamentally what the relevant consumer understands the representations to mean.³⁵ Similarly, whether a representation is “material” depends on whether it could affect the relevant consumer’s purchasing decision.³⁶ These are the factual questions on which Ms. Phillipowsky gave evidence for the Commissioner, and Rogers is entitled to test and challenge that evidence.

35. As a result of Ms. Phillipowsky’s testimony, Rogers now knows that the Commissioner reached different conclusions on these factual issues in 2020. Over the course of five or six months beginning in April of 2020, he assessed the “unlimited” representations of different telecommunications carriers, including Rogers, and decided not to open an investigation. In reaching that decision, he must have considered and come to a conclusion as to the general impression and effect of the representations, in the context of the market as it was at the time, and in the context of the experience and understanding of relevant consumers at the time. In 2021, the Commissioner re-opened his assessment and considered the same representations as he had in 2020.

36. Rogers is entitled to challenge the Commissioner’s current evidence regarding general impression and effect by reference to his previous assessment and conclusions on those same issues. This is a matter of basic fairness. The Commissioner cannot be permitted to lead evidence today, in 2025, about the general impression and effect of

³⁴ Phillipowsky September 3, qq. 548 – 572, 592 – 603, 725 – 735, pp. 129 – 133, 137 – 140, 166 – 170, McKnight Affidavit, Ex. G, MR, Tab 2, pp. 278 – 282, 286 – 289, 315 – 319.

³⁵ [Live Nation](#) at para 26.

³⁶ [Canada \(Commissioner of Competition\) v Cineplex Inc](#) (2024), [2024 Comp Trib 5](#) at para 418.

Rogers' representations in 2019, while at the same time shielding evidence of his own contemporaneous conclusions.³⁷

37. Ms. Phillipowsky was not involved in the Commissioner's assessment in 2020 and is unable to provide direct evidence about it. The only evidence she can provide is her own retrospective assessment, in 2025, of what she believes the relevant facts to assess general impression of Rogers' representations were six years ago. The best evidence the Commissioner can provide Rogers and this Tribunal regarding the general impression of Rogers' representations in 2019 and 2020 is the assessment he conducted and conclusions he previously reached.

38. If the Commissioner's prior review of the representations and their impact on the market and consumer understanding led him to conclude that such representations were not misleading in a material respect, then the Tribunal should have the benefit of this evidence in deciding what the general impression of Rogers' representations were.

(c) Remedy Sought by the Commissioner

39. The Tribunal has broad discretion in the remedies it can order where it finds a contravention of the *Competition Act*. Section 74.1(1) places an upper bound on the remedies available but no lower bound; it states that where the Tribunal finds a person has engaged in reviewable conduct, it "may order" one or more of the enumerated remedies. It is open to the Tribunal to impose no remedy at all, or to order a corporation to pay up to 3% of its worldwide gross revenues.

40. In the event Rogers is found to have contravened the *Act*, it must be allowed broad scope to argue what factors are relevant to the appropriate remedy. These provisions are new and largely untested and there is little to no existing case law as to how the Tribunal should exercise its broad remedial discretion.

41. It should be open to Rogers to argue before the Tribunal that given the Commissioner himself concluded its representations were not objectionable, there

³⁷ Phillipowsky September 3, qq. 373 – 384, pp. 90 – 92, McKnight Affidavit, Ex. G, MR, Tab 2, pp. 239 – 241.

should be no penalty, or one at the low end of the range. Similarly, it should be open to Rogers to argue that the Commissioner's own analysis and conclusions are a relevant consideration in whether any prohibition order under s. 74.1(1)(a) is necessary, or should apply for a "shorter period" than 10 years, pursuant to s. 74.1(2).

42. The *Act* itself contemplates a broad range of factors that could be relevant to the Tribunal's remedial discretion, directing under s. 74.1(4) that any order is made "with a view to promoting ... conformity with the purposes of this Part and not with a view to punishment" and directing under s. 74.1(5)(l) that the Tribunal shall consider "any other relevant factor".

43. If the Commissioner did in fact conclude the representations at issue were unobjectionable, as appears to be the case from Ms. Phillipowsky's testimony, then this supports Rogers' argument that it was not engaged in flagrant misconduct, as the Commissioner now alleges. On the contrary, those facts support Rogers' position that it was acting in good faith and that its conduct was reasonable.

44. The Tribunal's broad remedial discretion must allow for such considerations. This is especially so in light of the *Competition Act's* requirement that administrative monetary penalties cannot be used for punishment and instead must be calibrated in favour of promoting compliance.

45. In support of the remedy, the Commissioner pleads that Rogers' conduct was an "aggravating factor" under section 74.1(5), relying on:³⁸

- (a) the reach of the alleged conduct;
- (b) the frequency and duration of the alleged conduct;
- (c) the vulnerability of persons likely to be adversely affected by the alleged conduct;

³⁸ Application, at para 46, McKnight Affidavit, Ex. A, MR, Tab 2, pp. 57 – 60.

- (d) the effect on competition; and
- (e) Rogers' history of compliance with the *Competition Act*.

46. These are among the same factors that must have informed the Commissioner's 2020 assessment of the representations and whether to take action in respect of them. In particular, the vulnerability of the persons likely to be adversely affected and the effect on competition would have been important matters going to his assessment. Any prior consideration of these factors by the Commissioner is directly relevant to Rogers' pleading and should be produced.

47. At this early stage of the proceeding and with an incomplete evidentiary record, it cannot be said that the Commissioner's analysis and conclusions concerning Rogers' representations are wholly and necessarily irrelevant to the question of remedy and aggravating factors. The Commissioner should be required to answer the Category 1 Questions and produce this information.

(d) Costs against the Commissioner

48. Rogers pleaded that if it is successful at trial, costs should be awarded against the Commissioner.³⁹

49. As a result of recent amendments to the *Competition Tribunal Act*, the Tribunal shall not award costs against the Commissioner unless it is satisfied that:

- (a) that an award is necessary to maintain confidence in the administration of justice; or
- (b) that the absence of an award would have a substantial adverse effect on the other party's ability to carry on business.⁴⁰

50. Rogers' position is that a costs award is necessary to maintain confidence in the administration of justice, for the following reasons:

³⁹ Response, at para 68, McKnight Affidavit, Ex. B, MR, Tab 2, p. 91.

⁴⁰ *Competition Tribunal Act*, [RSC 1985, c. 19 \(2nd Supp.\)](#), at s. 8.1(3)(a) & (b).

- (a) the Commissioner reviewed Rogers' representations as part of his 2020 assessment, concluded they were not false or misleading, and then proceeded nonetheless with this Application;
- (b) the Commissioner has improperly and unfairly singled Rogers out in his Application for long standing representations that have been industry-wide for years;⁴¹
- (c) the Commissioner materially prejudiced Rogers' ability to answer his case because of his significant delay in opening his inquiry;⁴²
- (d) the Commissioner has used his significant enforcement powers to selectively target Rogers and by not addressing his concerns on an industry-wide basis, created the unfair and harmful impression that it is only Rogers whose practices are at issue;⁴³ and
- (e) the Commissioner has caused Rogers reputational damages and unfairly tilted the competitive landscape to the material prejudice of Rogers and to the material advantage of its competitors.⁴⁴

51. In cases where the evidence raises serious issues about the Commissioner's conduct and thus whether a costs award is necessary to maintain confidence in the administration of justice, it must be open to a respondent to enquire into those facts given the new legislative provisions in respect of cost awards.

52. The Category 1 Questions are relevant to the question of whether the Tribunal should award costs against the Commissioner, regardless of the outcome of the Application. If there are any doubts as to relevance, they ought to be resolved in favour of disclosure, particularly in light of the serious nature of the allegations advanced, and penalties sought, by the Commissioner.

⁴¹ Response, at para 28, McKnight Affidavit, Ex. B, MR, Tab 2, p. 75.

⁴² Response, at para 27, McKnight Affidavit, Ex. B, MR, Tab 2, p. 74.

⁴³ Response, at para 29, McKnight Affidavit, Ex. B, MR, Tab 2, p. 74.

⁴⁴ Response, at para 29, McKnight Affidavit, Ex. B, MR, Tab 2, p. 74.

(ii) ***The Category 1 Questions are not Precluded by this Tribunal's Production Order***

53. At discovery, the Commissioner argued that the Category 1 Questions are precluded by the Tribunal's production order.⁴⁵ However, the Commissioner overstates the Tribunal's decision and its application to the Category 1 Questions:

- (a) the Tribunal's production order was based on a much narrower set of facts and was made without the benefit of the Commissioner's discovery evidence;
- (b) the Commissioner acknowledged, and the Tribunal accepted, that the legal significance of the four-year delay in the Commissioner bringing his Application was a live issue in dispute that could be debated at the hearing;⁴⁶ and
- (c) Rogers moved to amend its Response to plead estoppel and waiver defences.

54. On the production motion, Rogers sought production of (i) all records pertaining to the Commissioner's consideration or investigation of telecommunications providers' unlimited plan representations including prior to September 2021, and (ii) all relevant records from Bell, Telus, and any other third party received by the Bureau. The Commissioner opposed these requests.

55. The primary issue before the Tribunal was whether these records were relevant to the matters at issue in this proceeding.⁴⁷

56. On August 11, 2025, the Tribunal partially granted Rogers' production motion. The Tribunal:

⁴⁵ See for example questions 390, 398, 400, and 401 from Ms. Phillipowsky's examination on September 3, 2025, and questions 86, 195, 196 – 199, 201 – 204 from Ms. Phillipowsky's examination on September 5, 2025.

⁴⁶ [Production Order](#) at para 16 (CACT).

⁴⁷ [Production Order](#) at para 8 (CACT).

- (a) ordered the Commissioner to produce certain third-party records;⁴⁸ and
- (b) declined to order production of records related to the Commissioner's consideration or investigation of telecommunications providers' unlimited plan representations including prior to September 2021.⁴⁹

57. At the time, the Tribunal did not have the benefit of the parties' discovery evidence. However, the Tribunal accepted that the legal significance of the Commissioner's four-year delay in bringing his Application was a live issue in dispute that could be debated at the hearing.⁵⁰ Based on the discovery evidence, Rogers has learned additional facts that are not only relevant to this issue, but that show there is a reasonable basis to suggest that the Category 1 Questions may elicit additional relevant facts, information and documents. The discovery evidence revealed that:

- (a) the Commissioner concluded in 2020 and 2021 that the "unlimited" representations by telecommunications carriers were not false or misleading; and
- (b) the Commissioner's current position is that the representations were false and misleading on their face.⁵¹

58. These facts demonstrate the relevance of the Commissioner's prior assessments. His current position directly contradicts his previous conclusions. This speaks to the question of whether the duration, frequency and reach of the representations can be considered an "aggravating factor" as is alleged by the Commissioner. Rogers is entitled to know the facts and conclusions reached by the Commissioner so that it can fully respond to his allegations on the issue of remedy. The Commissioner's argument that the Tribunal's production precludes the Category 1 Questions should therefore be rejected.

⁴⁸ [Production Order](#) at para 33 (CACT).

⁴⁹ [Production Order](#) at paras 9, 19 (CACT).

⁵⁰ [Production Order](#) at para 16 (CACT).

⁵¹ Phillipowsky September 5, Q. 176, p. 480, McKnight Affidavit, Ex. I, MR, Tab 2, p. 738.

(iii) The Category 1 Questions are not Subject to Any Privilege

59. The only Category 1 Questions for which the Commissioner asserts solicitor-client privilege are those related to Project Cosmos, which is the name of the assessment conducted by the Commissioner in 2021.⁵²

60. Those questions are:

- (a) to review the document, “Cosmos”, at item 135 of the Commissioner’s Schedule B and confirm that the document contains legal advice;
- (b) 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;
- (c) to advise why Ms. Phillipowsky was seeking legal advice in the document referred to in the Commissioner’s Schedule B productions at item 135;
- (d) to produce a redacted copy of the document at item 135 of the Commissioner’s Schedule B, if the document contains information that is not privileged; and

[REDACTED]

61. Item 135, which the Commissioner claims solicitor-client privilege over in his revised schedule B, is an email dated April 7, 2022, with the subject line “Cosmos, Protected B, solicitor/client privileged”.⁵³ That email was sent almost immediately after the Commissioner opened his investigation into Rogers. The use of “Project Cosmos” in the subject line suggests it relates to the second assessment in 2021. There

⁵² Phillipowsky September 5, Q. 132, p. 466, McKnight Affidavit, Ex. I, MR, Tab 2, p. 724.

⁵³ Revised Schedule B, item 135, McKnight Affidavit, Ex. X, MR, Tab 2, p. 1728.

are no lawyers copied on the email.⁵⁴ Rogers has requested production of the email. The Commissioner refused on the basis of solicitor-client privilege.

62. The party asserting a privilege must prove that it applies:

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.⁵⁵

63. Under the *Solosky* test, a document protected by solicitor-client privilege (i) is a communication between solicitor and client; (ii) entails the seeking or giving of legal advice; and (iii) is intended to be confidential by the parties.⁵⁶

64. The Commissioner has not satisfied his burden. He cannot meet the test in respect of the Project Cosmos questions. With respect to the email, the Commissioner's counsel suggested that the email contained legal advice but that the Commissioner would confirm and/or produce a redacted version of the email. No such confirmation or redacted version of the email has been provided as at the date of this factum. Rogers is, in any event, entitled to any relevant, non-privileged information in the email. [REDACTED]

[REDACTED]

[REDACTED]

C. Category 2: Questions related to the Commissioner's Alleged Breach of the Deemed Undertaking Rule

65. Rogers seeks to compel the Commissioner to answer questions related to his alleged breach of the deemed undertaking rule and the confidentiality order issued in the Rogers-Shaw litigation (the "Category 2 Questions").

66. At discovery, the Commissioner refused to answer the Category 2 Questions on the basis of relevance. However, these questions are directly relevant to Rogers'

⁵⁴ Phillipowsky September 5, QQ. 133 – 136, p. 466, McKnight Affidavit, Ex. I, MR, Tab 2, p. 724.

⁵⁵ [Canada \(Office of the Information Commissioner\) v Canada \(Prime Minister\)](#), 2019 FCA 95 at para 50.

⁵⁶ [Solosky v The Queen](#), 1979 CanLII 9 (SCC), 1979 CanLII 9 at 837 (SCC) aff'd in [Blank v Canada \(Justice\)](#), 2016 FCA 189 at para 44.

proposed Amended Response. The material facts pleaded in the proposed Amended Response include that the Commissioner allowed Bureau officers conducting the investigation in this case to have unfettered access to documents produced pursuant to the discovery process in the Commissioner's application to block the Rogers-Shaw transaction. The Commissioner also allowed Bureau officers conducting the investigation to communicate freely with Bureau officers and counsel involved in the Rogers-Shaw application.⁵⁷

67. Rogers' position at trial will be that the Commissioner should not be entitled to rely on documents he obtained in breach of the deemed undertaking rule or the confidentiality order, and/or that the application should be stayed. As a result, if leave to amend is granted, there is no real debate as to whether the questions should be answered.

68. Even if leave to amend is not granted by the Tribunal, the questions are still relevant to Rogers' position that if the Commissioner is found to have misconducted himself in the manner of litigation (by breaching discovery rules and a confidentiality order), his conduct should be taken into consideration in any costs award.

69. In addition, during discovery, Rogers learned that Ms. Phillipowsky's investigative team:

- (f) had access to "all of the Rogers and Shaw documents";⁵⁸ and
- (g) communicated with Bureau counsel involved in the Rogers-Shaw application.⁵⁹

70. The Category 2 Questions are in follow-up to that testimony and relate to facts known only to the Commissioner. This Tribunal should compel disclosure.

⁵⁷ Amended Response of Rogers Communications Inc., at para. 32, McKnight Affidavit, Ex. E, MR, Tab 2, pp. 121 – 122.

⁵⁸ Phillipowsky September 5, Q. 85, pp. 448 – 449, McKnight Affidavit, Ex. I, MR, Tab 2, pp. 706 – 707. See also, Phillipowsky September 5 QQ. 7 – 21, 25 – 28, 31 – 33, 75, and 79 – 86 pp. 428 – 432, 433, 435 – 436, 446 – 450, McKnight Affidavit, Ex. I, MR, Tab 2, pp. 686 – 694 and 704 – 708.

⁵⁹ Revised Schedule B, item 1344, McKnight Affidavit, Ex. X, MR, Tab 2, p. 1767.

C. Category 3: Questions Related to other Factual Allegations made by the Commissioner

71. Rogers seeks to compel the Commissioner to answer questions related to specific factual allegations pleaded in his Notice of Application (the “**Category 3 Questions**”). These questions concern throttled speeds, identifying the representations challenged by the Commissioner, and representations made by Comwave Networks Inc. referred to in the Deceptive Marketing Digest Volume 3. Each of these categories of questions is addressed below.

(i) Throttled Speed Questions

72. In his Notice of Application, the Commissioner pleads:⁶⁰

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 (emphasis added).

73. Rogers disputes the Commissioner’s position in paragraph 36 of the Notice of Application, both relating to functionality and misleading impression. During Ms. Phillipowsky’s examination, Rogers therefore asked the throttled speed questions to ascertain the factual basis for paragraph 36 of his Notice of Application.⁶¹

74. The questions about throttled speed goes to a live issue between the parties and Rogers is entitled to the Commissioner’s information about what impact throttling has on device functionality and the basis for his allegation that throttled speeds make many

⁶⁰ Application, at para 36, McKnight Affidavit, Ex. A, MR, Tab 2, p. 55.

⁶¹ See questions 1096 – 1097, 1108, 1164, 1175, 1503, and 1505 from Examination of Kathleen Phillipowsky, dated September 4, 2025 [**Phillipowsky September 4**], McKnight Affidavit, Ex. H, MR, Tab 2, pp. 469, 471, 484, and 560 – 561.

operations difficult or impossible. The Commissioner refused to answer these questions.

75. The Commissioner's answers will reveal whether or not his position is substantiated. A core purpose of discovery is to allow Rogers to know the case it has to meet and to test the Commission's allegations. There is no reasonable basis for the Commissioner's refusal.

(i) *The representations at issue questions*

76. In his Notice of Application, the Commissioner pleads:⁶²

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.

[..]

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.

77. The Commissioner goes on to plead, that since 2019, Rogers has made and continues to make unlimited data representations on a daily basis.⁶³

78. Rogers asked the Commissioner to identify the specific representations at issue and the general impression they conveyed.⁶⁴ This question goes to the core of the case and what the Commissioner must prove to show that Rogers engaged in reviewable conduct.

79. Rogers' position at trial will be that it did not make false or misleading representations. However, Rogers cannot advance this defence in a vacuum. Rogers is

⁶² Application, at paras 8 and 18, McKnight Affidavit, Ex. A, MR, Tab 2, pp. 37 and 41.

⁶³ Application, at para 46(a), McKnight Affidavit, Ex. A, MR, Tab 2, pp. 57 – 58.

⁶⁴ Phillipowsky September 5, QQ 302 and 329, pp. 519 & 527, McKnight Affidavit, Ex. I, MR, Tab 2, pp. 777 – 785.

entitled to a straight answer from the Commissioner on which specific representations he relies on and what false or misleading impression he says they convey. Now is the time for the Commissioner to particularize those allegations. He cannot wait and spring them on Rogers as part of his affirmative evidence in January 2026.

80. This case is proceeding on a tight timetable and the parties are preparing their evidence. Rogers is entitled to know the precise scope of the impugned representations in order to understand the case it has to meet. The Commissioner should be required to answer these questions so that Rogers can properly conduct its defence.

(ii) Comwave's Representations

81. In his Notice of Application, the Commissioner pleads:⁶⁵

In May 2017, the Competition Bureau published the Deceptive Marketing Practices Digest Volume 3, which reminded telecommunications 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.

82. The guidance that the Commissioner alleges is found in the Deceptive Marketing Practices Digest Volume 3 (the “**Digest**”), which includes the example of representations made by Comwave Networks Inc. concerning its marketing of internet and home phone services.⁶⁶ The Commissioner alleges the Digest is a factor warranting an aggravated administrative monetary penalty against Rogers.⁶⁷ The Comwave “case study” is an integral part of the Digest.

⁶⁵ Application, at para 45, McKnight Affidavit, Ex. A, MR, Tab 2, p. 57.

⁶⁶ Phillipowsky September 4, Q. 1171, p. 281, McKnight Affidavit, Ex. H, MR, Tab 2, p. 486.

⁶⁷ Application, at para 45, McKnight Affidavit, Ex. A, MR, Tab 2, p. 57.

83. During Ms. Phillipowsky's examination for discovery, Rogers asked the Commissioner to produce the Comwave representations.⁶⁸ The Commissioner refused.

84. Rogers' position at trial will be that it complied with the Digest, the Comwave representations differ from its Infinite representations, and the Tribunal should consider those differences when exercising its discretion with respect to remedy, if any.

85. There is a reasonable likelihood that the production of the Comwave representations might elicit information which will assist the Tribunal in determining whether Rogers' representations were or were not consistent with the Commissioner's guidance. The comparison of Rogers' representations to Comwave's representations may also assist the Tribunal as to its consideration of remedy.

PART V - STATEMENT OF THE ORDER SOUGHT

86. Rogers submits that the Commissioner should be ordered to answer the questions identified in the attached Schedule "A".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2025.

⁶⁸ Phillipowsky September 4, Q. 1179, p. 282 McKnight Affidavit, Ex. H, MR, Tab 2, p. 487.



October 27, 2025

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SCHEDULE “B” LIST OF AUTHORITIES

- 1 [Blank v Canada \(Justice\), 2016 FCA 189](#)
- 2 [Canada \(Commissioner of Competition\) v Cineplex Inc, 2024 Comp Trib](#)
3 [5](#)
- 4 [Canada \(Commissioner of Competition\) v Rogers Communications Inc,](#)
5 [2025 Comp Trib 11](#)
- 6 [Canada \(Commissioner of Competition\) v Rogers Communications Inc](#)
7 [and Shaw Communications Inc, 2022 Comp Trib 16](#)
- 8 [Canada \(Commissioner of Competition\) v Secure Energy Services Inc,](#)
9 [2022 Comp Trib 3](#)
- 10 [Canada \(Office of the Information Commissioner\) v Canada \(Prime](#)
11 [Minister\), 2019 FCA 95](#)
- 12 [Canada v Lehigh Cement Limited, 2011 FCA 120](#)
- 13 [Canada v Thompson, 2022 FCA 119](#)
- 14 [Commissioner of Competition v Sears Canada Inc, 2003 CACT 19](#)
- 15 [Solosky v The Queen, 1979 CanLII 9 \(SCC\), 1979 CanLII 9](#)
- 16 [The Commissioner of Competition v Live Nation Entertainment, Inc, 2019](#)
17 [CACT 3](#)
- 18 [The Commissioner of Competition v Vancouver Airport Authority, 2017](#)
19 [CACT 16](#)

SCHEDULE “C” LEGISLATION/REGULATIONS

Federal Courts Rules, SOR/98-106

Règles des Cours fédérales, DORS/98-106

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

240 La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui :

(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;

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;

Competition Tribunal Act, RSC 1985, c. 19 (2nd Supp.)

Loi sur le Tribunal de la concurrence, SRC 1985, ch. 19 (2^e Suppl.)

No award against the Crown

Aucuns frais à la charge de la Couronne

8.1 (3) Despite any other Act of Parliament, the Tribunal shall not award costs against His Majesty in right of Canada unless it is satisfied

8.1 (3) Malgré toute autre loi fédérale, le Tribunal ne peut ordonner à Sa Majesté du chef du Canada de payer des frais, sauf s’il est convaincu :

(a) that an award is necessary to maintain confidence in the administration of justice; or

a) soit que l’ordonnance est nécessaire pour ne pas miner la confiance du public envers l’administration de la justice;

(b) that the absence of an award would have a substantial adverse effect on the other party’s ability to carry on business.

b) soit que l’absence d’ordonnance aurait un effet négatif important sur la capacité de l’autre partie d’exploiter son entreprise.

Competition Tribunal Rules,
SOR/2008-141

Application of deemed undertaking

62 (2) All parties and their counsel are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Règles du Tribunal de la concurrence,
DORS/2008-141

**Application de la présomption
d'engagement implicite**

62 (2) Toutes les parties et leurs avocats sont réputés s'engager à ne pas utiliser les éléments de preuve ou les renseignements auxquels la présente règle s'applique à des fins autres que celles de l'instance au cours de laquelle les éléments de preuve ont été obtenus.