Federal Court of Appeal | Cour d'appel fédérale

Date: 20260402

Docket: A-413-25

Citation: 2026 FCA 68

CORAM: **RENNIE J.A.**
LASKIN J.A.
ROCHESTER J.A.

BETWEEN:

ROGERS COMMUNICATIONS INC.

Appellant

and

COMMISSIONER OF COMPETITION

Respondent

Heard at Ottawa, Ontario, on March 4, 2026.

Judgment delivered at Ottawa, Ontario, on March 30, 2026.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: LASKIN J.A.
ROCHESTER J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal from a decision of the Competition Tribunal *per* Gagné J. denying, in part, the appellant's motion for leave to amend its Response to the Notice of Application of the Commissioner of Competition ("Response") (*Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2025 Comp Trib 21 [Tribunal Decision]).

[2] By way of context, it is sufficient to say at this point that the Commissioner of Competition previously investigated the appellant's marketing practices, the same practices which are now the subject of the underlying Competition Tribunal application. The conclusion of that internal investigation was that the appellant's conduct did not violate the *Competition Act*, R.S.C. 1985, c. C-34 (the Act). Gagné J. found that the internal investigation and the related opinions, considerations and conclusions were not relevant to the proceedings currently before the Competition Tribunal. Rogers now appeals.

[3] For the reasons that follow, I would dismiss the appeal.

I. The prior investigation into Rogers

[4] In 2019, Rogers offered customers mobile data plans, characterizing them as "Infinite" data plans. As part of these plans, once a customer used up all their high-speed data, they were relegated to access to data at lower speeds, a practice known as "throttling", and had to incur additional costs to restore their access to high-speed data. Other major Canadian carriers introduced similar plans around the same time as Rogers.

[5] Prior to and following the launch of the Infinite wireless plans, Rogers contacted the Commissioner to discuss the plans. Although Rogers reached out several times, the Commissioner never responded.

[6] In April 2023, the Commissioner initiated a formal inquiry into Rogers' marketing practices under section 10 of the Act. The inquiry lasted about 18 months. On December 23, 2024, the Commissioner commenced an application in the Competition Tribunal against the appellant, Rogers, alleging that Rogers' marketing of its Infinite wireless plans constituted deceptive marketing contrary to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the Act (the "application").

[7] The application centres around whether consumers were deceived into thinking that Rogers' Infinite wireless plans offered unlimited high-speed data. As previously mentioned, these plans offered only a limited amount of high-speed data each month. If the Tribunal finds that Rogers engaged in reviewable conduct contrary to paragraph 74.01(1)(a) it will then determine what remedies are appropriate under section 74.1. One remedy the Commissioner seeks is an administrative monetary penalty under paragraph 74.1(1)(c) of the Act (an "AMP").

[8] In its Response to the Notice of Application, Rogers denies that its marketing of the Infinite wireless plans was false or misleading. Rogers also pleads that the Commissioner brought the application four years after Rogers began marketing its Infinite wireless plans and that that delay casts doubt on whether Canadian consumers suffered harm as alleged by the Commissioner.

[9] In the ensuing examinations for discovery, Rogers learned that in April 2020, the Commissioner conducted an internal investigation into the practices of Rogers and other

Canadian telecommunications service providers relating to marketing of “unlimited data” mobile plans. That preliminary investigation was closed in the fall of 2020.

[10] Armed with this new information obtained on discovery, Rogers brought two motions.

[11] First, Rogers sought leave to amend its Response to add facts learned on discovery that might, in its view, constitute mitigating factors and therefore lower the amount of any AMP levied against it. Those proposed amendments are the subject of the present appeal.

[12] In order to better understand the issues in this appeal, it is helpful to refer to the second motion filed by Rogers—a motion to compel the Commissioner to answer certain questions refused in examinations for discovery. Gagné J., acting as the Case Management Judge, heard the refusals motion after the Reasons on the motion to amend that are the subject of this appeal were issued. On December 12, 2025, the Judge partially granted the refusals motion and required the Commissioner to produce several documents, including a copy of the recommendation that resulted from the 2020 assessment into unlimited data representations (*Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2025 Comp Trib 23).

II. The Competition Tribunal Decision

[13] In the Tribunal Decision at issue, Gagné J. concluded that the Commissioner’s previous conclusions on whether Rogers’ conduct was false or misleading, as well as Rogers’ previous attempts to contact the Commissioner prior to and following the launch of its Infinite Plans, were

not relevant to the question of remedy and the AMP, under subsection 74.1(5) of the Act, noting that “the motivation and thinking behind the Commissioner’s timing in bringing the present application are not relevant” (Tribunal Decision at para. 38). She further stated that the facts Rogers sought to introduce into its pleadings had “no bearing on whether the consumers in the relevant market were vulnerable, nor does it change the nature of the conduct” (Tribunal Decision at para. 39). Rogers also sought to amend its Response on the ground that the same factual allegations would support an estoppel and waiver defence. Gagné J. also denied those amendments, concluding that the facts alleged would not support a defence of promissory estoppel or waiver, and therefore that those claims had no prospect of success.

[14] In the end, however, the issue in this appeal is quite narrow. Rogers takes issue solely with Gagné J.’s conclusion as to the relevance of the prior investigation to the issue of any remedy that the Competition Tribunal might award.

A. *Standard of review*

[15] Rogers argues that it is not asking this Court to re-examine the judge’s exercise of discretion and that the *Housen v. Nikolaisen*, 2002 SCC 33 standard is inapplicable. Rather, Rogers contends that the Judge misdirected herself on the applicable legal test, a question of correctness. The Commissioner disagrees with this characterization of the issue, arguing that Rogers is attempting to transform the review of a discretionary pleading decision into a correctness appeal.

[16] I agree with Rogers that whether the judge adopted the right test to the amendment of a pleading is a question of law governed by the correctness standard. However, the substance of Rogers' submissions address whether Rogers' proposed amendments were, in fact, relevant. This is a question of mixed fact and law, subject to the deferential standard of palpable and overriding error.

B. *The test for leave to amend pleadings*

[17] Leave to amend a pleading should be granted where the proposed amendment has a "reasonable prospect of success" (*Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176 at paras. 29–31 [*Teva*]). In her reasons, Gagné J. sets out the "reasonable prospect of success" language at the beginning of the decision (Tribunal Decision at para. 12, citing *Teva*), but does not return to it. Rogers argues that the Judge therefore misdirected itself on the legal test because, instead of using the "reasonable prospect of success" test in the relevant part of the Decision, she simply stated that the facts that Rogers sought to introduce were "irrelevant" (Tribunal Decision at para. 41).

[18] In support, Roger cites *Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187 [*Pomeroy*], for the proposition that, when considering whether to grant leave to amend a pleading, "[t]he controlling principle is that an amendment should be allowed at any stage of an action if it assists in determining the real questions in controversy between the parties" (at para. 4). This is a low bar.

[19] I do not find *Pomeroy* of much assistance. I am not convinced that in *Pomeroy* this Court intended to depart from or vary the established test governing leave to amend pleadings. This view is reinforced by the circumstances of that case itself; *Pomeroy* was not an appeal from a decision on a motion under rule 75 of the *Federal Courts Rules*, SOR/98-106. Rather, it was an appeal of a decision on a motion for leave to file an amended reply under section 54 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a.

[20] Nor am I persuaded by Rogers' argument that the Judge applied the wrong test to the amendment of pleadings. I say this for two reasons.

[21] First, a court is not required to "describe the principles that bear upon their decisions in a perfectly precise or encyclopedic way" (*Teva* at para. 36). This is particularly so where a judge is sitting in case management, as was the judge here. It is clear from the reasons that the judge was fully aware of the test. The law does not require a slavish repetition of the test at each stage of its application. Moreover, courts are not bound by an insistence on using "magic words" to articulate the applicable legal test; what matters is whether reasons accord with the legal test, not whether they reproduce the legal test precisely as articulated in the jurisprudence (*Nova Chemicals Corporation v. The Dow Chemical Company, Dow Global Technologies Inc. and Dow Chemical Canada ULC*, 2020 FCA 141 at paras. 113–15; see also *R. v. R.E.M.*, 2008 SCC 51 at paras. 17–19).

[22] Second, if Rogers' argument is followed to its logical conclusion, then lack of relevance is not a basis upon which the Tribunal can deny leave to amend a pleading. This leads to the

conclusion that a pleading that is not relevant can nonetheless have a “reasonable prospect of success”. I do not agree.

[23] To encapsulate, although the threshold for amending a pleading is low, relevance is one aspect of that threshold. An irrelevant pleading cannot have a reasonable prospect of success.

[24] In determining whether an amendment to a defence should be allowed, it is helpful for the Court to ask whether the amendment, if it were already part of the proposed pleadings, would be a plea capable of being struck (*McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4 at para. 22). It is well-established that irrelevance is a proper basis for striking a pleading. For example, the Supreme Court of Canada has struck pleadings because of lack of relevance (*Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21 at para. 81; see also *Huachangda Canada Holdings Inc. v. Solcz Group Inc.*, 2019 ONCA 649). The judge therefore applied the correct test.

[25] This then brings us to the core issue on appeal, whether the prior internal investigation is relevant to the application before the Tribunal.

C. *The Tribunal did not err in denying the proposed amendments*

[26] The crux of Rogers’ argument is that the internal investigation and the failure of the Commissioner to respond to Rogers’ request to meet to discuss its Infinite Data plans bear on the question of the remedy that the Tribunal might order and the size of the AMP.

[27] The decision to grant or deny leave to amend a pleading is discretionary, as is the Tribunal's power to issue a remedy, including an AMP (*Canada v. Easter,* 2024 FCA 176 at para. 26; *Cineplex Inc. v. Commissioner of Competition*, 2026 FCA 10 at para. 243). Therefore, as previously stated, the relevance of the proposed amendments to the question of remedy raises a question of mixed fact and law reviewable on the deferential standard of palpable and overriding error.

[28] Subsection 74.1(5) of the Act lists numerous factors relevant to assessing AMPs, three of which Rogers specifically invokes to support its argument of relevancy: (b) the frequency and duration of the conduct, (c) the vulnerability of the class of persons likely to be adversely affected by the conduct, and (i) the history of compliance with the Act by the person against whom the order is made.

[29] Rogers set out in its written representations why its proposed amendments are relevant to each of these factors:

A. **Frequency and duration of conduct**: Rogers argues that the fact that the Bureau received notice of its representations on the day the plans launched undermines the Commissioner's pleading that the fact that the representations were in-market for over 5 years is an aggravating factor.

B. **History of Rogers' compliance with the Act**: Rogers argues that the advance notice it provided to the Commissioner demonstrates a good faith attempt at compliance and is therefore a mitigating factor.

C. **Vulnerability of persons likely to be adversely affected by the conduct**: Rogers argues that the delay in commencing proceedings undermines allegations of the vulnerability of customers because, if customers were vulnerable, the Commissioner would be expected to commence proceedings earlier against all major wireless carriers.

[30] The line between past conduct being relevant to the substantive question, or relevant to the question of remedy, is neither bright nor clear. As the Judge recognized, it was evident from the pleas of waiver and estoppel that Rogers sought to expand the proceedings before the Tribunal into an inquiry into the Commissioner's prior investigation and conclusions. For example, Rogers seeks to add to its pleadings the fact that "[b]y Fall 2020 the Commissioner concluded, in writing, that Rogers' and other carriers' representations were not false or misleading in a material respect and decided to take no action in respect of them".

[31] Rogers also argues that the conduct of an investigation is relevant and has been previously found relevant in *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2014 ONSC 1146 [*Chatr*]. In that case, also in the context of an allegation of deceptive marketing practices, the court found that the opportunistic conduct of the other commercial complainants in the matter was a mitigating factor in assessing an AMP (at paras. 72–76). The Court did not, however, find that the Bureau's conduct was relevant to remedy. Regardless of the reservations I have about the reasons in that case, it is not pertinent as it addresses the market behaviour of third parties in assessing the AMP. It does not advance Rogers' argument.

[32] At first blush, Rogers' argument is compelling. Reflection, however, teaches otherwise.

[33] The Competition Act itself frames the scope and focus of the proceedings before the Tribunal. The Act requires that the Tribunal determine whether there has been conduct injurious to the competitiveness of the Canadian economy, in this case, by distorting consumer choice away from price and quality. Relevancy is therefore framed by the Act and the factors set out at subsection 74.1(5) of the Act. Examples include the vulnerability of the class of persons likely to be adversely affected by the conduct, the materiality of any representation, the effect on competition in the relevant market, and the financial position of the person against whom the order is made. All focus on Rogers' conduct and its effect on the primary objective of the legislation—the competitiveness of the Canadian economy. What transpired within the Bureau does not change Rogers' conduct, nor does it change whether consumers were, in fact misled. What transpired within the Bureau is also irrelevant to the key statutory criteria in assessing penalties. The Bureau's internal deliberations have no bearing on the extent of consumer losses and the injury to competition.

[34] Proceedings before the Tax Court of Canada are a useful analogy. The Tax Court's mandate is to determine whether the taxpayer paid tax as required by the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [*ITA*]. What an auditor thought, whether a prior audit found that no tax was owing, whether an assessment had been raised in past years, or how other taxpayers in similar circumstances were assessed is irrelevant and not within the Tax Court's jurisdiction to consider (*Iris Technologies Inc. v. Canada*, 2024 SCC 24 at para. 41 [*Iris Technologies*], citing *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250 at

para. 83; see also *Iris Technologies* at para. 105). The Tax Court is judging whether the taxpayer is obligated to pay tax under the *ITA*, and nothing else. The process, motivation, or delay in issuing an assessment are irrelevant. The same principles apply here.

[35] Rogers casts its argument narrowly, focusing on the relevance of the internal investigation to the question of remedy and the AMP. It argues that the lengthy delay between the internal investigation and the resuscitation of the inquiry, and the fact that the Commissioner did not respond to its letters requesting a meeting on its Infinite Data plans are relevant as mitigating circumstances. Again, while beguiling, these arguments are irrelevant to the statutory criteria, just as they would be in a proceeding before the Tax Court.

[36] Several points may be made in respect of this argument.

[37] While Rogers did not appeal Gagné J.'s ruling on estoppel or waiver, the question of the delay in the context of remedy is the same argument in another guise. This is made clear by asking a simple question—assuming that the Tribunal has this information before it, what use can legitimately be made of it considering the obligation of the Tribunal to answer two questions—did Rogers engage in a deceptive marketing practice, and if so, was there injury to competition? Whether framed as a defence, or mitigating factor, the argument about the internal deliberations and prior investigation places the Commissioner's conduct in issue, and not Rogers'.

[38] Second, acceding to Rogers' argument raises broader legal policy concerns.

[39] First, it undermines the statutory scheme of the Act. Great mischief could ensue if the Commissioner's failure to respond to unsolicited notices of intended market practices gave rise to an obligation on the part of the Commissioner to respond, and that the failure to do so constituted a waiver of the right of enforcement, an estoppel of the same, or reduced the AMP. A second concern is that the Act itself provides a mechanism whereby parties can seek non-binding rulings from the Commissioner, similar to CRA practice with respect to the *ITA* (Act, s. 124.1; Canada, Canada Revenue Agency, Income Tax Rulings Directorate, *Advance Income Tax Rulings and Technical Interpretations*, Information Circular IC70-6R12 (1 April 2022), online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic70-6/ic70-6-advance-income-tax-rulings-and-technical-interpretations.html>). The third concern is that it is a diversion from the guidance provided by Parliament as to the purpose of the AMP, which is to promote competition, and is not a punishment (Act, s. 74.1). Rogers essentially asks that the public policy objective of the AMP be subordinated to the alleged deficiencies in the Commissioner's investigation.

[40] There is a further reason why I would reject this line of argument. There is a danger, which is not speculative, that opening this line of inquiry risks that the trial becomes a trial of the Commissioner's investigation, diverting the focus away from the singular issue that Parliament has mandated the Tribunal to decide—whether the conduct constitutes a deceptive marketing practice. Gagné J. was acutely aware of this, sitting as she was as the case management judge. This was one of a series of four previous procedural decisions made in that capacity. Courts routinely afford deference to the factually suffused decisions of case management judges who

"must be given latitude to manage cases" (*Sawridge Band v. Canada (C.A.)*, 2001 FCA 338 at para. 11).

[41] I say that this concern is not speculative because the only facts necessary for Rogers to make an argument in support of mitigation have been pled and are uncontested, and not at issue before us. It will be for the Tribunal itself what weight, if any, to give to them. To explore in detail what transpired during the time between the investigation and the inquiry brings us full circle back into an inquiry into the Commissioner's thought process, which is irrelevant territory.

[42] Rogers relies on *The Commissioner of Competition v. Live Nation Entertainment, Inc.*, 2019 Comp Trib 3 [*Live Nation*]. In *Live Nation*, the Tribunal partially granted a refusals motion seeking to compel answers about an investigation that the Commissioner had conducted eight years prior to commencing proceedings against the respondents. In so concluding, the Tribunal stated that "questions relating to the 2009-2010 investigation and to what the Commissioner previously reviewed are generally relevant in light of the Respondents' pleading on estoppel and waiver and on the issue of remedy" (*Live Nation* at para. 13). The Tribunal also more generally states that "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" (*Live Nation* at para. 12).

[43] As noted, the rulings on estoppel and waiver were not appealed. A distinction between this appeal and the decision in *Live Nation* is that, in that case, the Tribunal was dealing with

"relevance" in the context of examinations for discovery. That is a different process with different considerations as compared to pleadings.

[44] In discovery, 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 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" (*Canada v. Lehigh Cement Limited*, 2011 FCA 120 at para. 34). In discovery, the purpose is not only to learn the facts, but "often equally more important, the absence of facts" (*Live Nation* at para. 30). In contrast, when dealing with pleadings, facts are taken as true and there is no need to speculate about whether those facts "might elicit information" or "might lead to a train of inquiry".

[45] In *Live Nation*, Gascon J. expressly notes that the issue before him was "not whether the estoppel argument raised by the Respondents in their pleading will ultimately be successful on the merits" (at para. 16). *Live Nation* is not, therefore, addressing leave to amend. But more importantly, while Gascon J. agreed to compel answers to questions about the timeline of the Commissioner raising the complaint, he refused to compel answers to questions about "the reasons or explanations behind those decisions of the Commissioner" (*Live Nation* at para. 18). The case therefore does not assist Rogers.

[46] In any event, and a previously noted, the timeline of the Commissioner's investigation is already raised in the pleadings. In Rogers' unamended Response, it pleads that "[i]n 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". The key fact that Rogers points to in respect of mitigating conduct relevant to the AMP is already pled.

[47] In sum, I agree with Gagné J. that the purpose of pleading further facts was to inquire into the investigation itself and that the proposed amendments were irrelevant to the ultimate question before the Tribunal and, therefore, had no prospect of success. I see no reviewable error in the reasoning or this conclusion.

D. *Motion for leave to adduce fresh evidence*

[48] As a result of the refusals motion that Gagné J. granted in part, on December 15, 2025, the Commissioner disclosed several documents to the appellant. Rogers contends that these documents confirm facts pleaded in the Amended Response, and seeks to have them admitted as fresh evidence under rule 351 of the *Federal Courts Rules*:

New evidence on appeal	**Nouveaux éléments de preuve**
351 In special circumstances, the Court may grant leave to a party to present evidence on a question of fact.	**351** Dans des circonstances particulières, la Cour peut permettre à toute partie de présenter des éléments de preuve sur une question de fait.

[49] Rogers argues that if the Tribunal had access to these documents at the time it considered its motion to amend its pleading, it would have granted its motion to amend. I note, however, that Rogers also argues on this appeal that it raises a question of law and is not challenging the judge's exercise of discretion.

[50] The test to be applied on a motion to adduce fresh evidence is well known. *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759 requires that the evidence:

a. could not have been adduced at first instance with the exercise of due diligence;

b. is relevant in that it bears on a decisive or potentially decisive issue on appeal;

c. is credible in the sense that it is reasonably capable of belief; and

d. is such that, if believed, could reasonably be expected to have affected the result in the Tribunal below.

[51] For the reasons given above, I would dismiss the motion. Irrelevant evidence cannot be decisive or potentially decisive of the narrow question on appeal before us. Nor could the documents reasonably be expected to have affected the result in the motion for leave to amend now before us.

III. Conclusion

[52] I would therefore dismiss the appeal, with costs.

"Donald J. Rennie"
J.A.

“I agree.
J.B. Laskin J.A.”

“I agree.
Vanessa Rochester J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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