

Federal Court



Cour fédérale

**Date: 20250509**

**Docket: T-309-25**

**Citation: 2025 FC 861**

**Montréal, Quebec, May 9, 2025**

**PRESENT: Mr. Justice Gascon**

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

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

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

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**and**

**RORY MCGEE AND DOMINIC ATKINSON**

**Respondents**

**and**

**ROGERS COMMUNICATIONS INC.**

**Proposed Intervener**

**ORDER AND REASONS**

I. Overview

[1] Rogers Communications Inc. [Rogers] seeks leave to intervene pursuant to section 109 of the *Federal Courts Rules*, SOR/98-106 [Rules] so that it may participate in the Rule 399 motion filed by the Respondents, Rory McGee and Dominic Atkinson [Rule 399 Motion], to set aside the *ex parte* order I issued against them on February 28, 2025 [Order]. On February 3, 2025, the Commissioner of Competition [Commissioner] had filed an application [Section 11 Application] under paragraph 11(1)(a) of the *Competition Act*, RSC 1985, c C-34, as amended [Act] seeking to examine the Respondents in connection with an inquiry into certain marketing practices of Rogers under section 10 of the Act [Inquiry]. The Inquiry relates to allegedly false or misleading representations promoting Rogers' infinite mobile data plans.

[2] Rogers submits that the Court will benefit from its perspective on the important issue of statutory interpretation raised in the Rule 399 Motion. The Commissioner opposes Rogers' intervention, because its participation in the Rule 399 Motion would not be useful, its general interest in the outcome of the motion is minimal, and it would not serve the interests of justice.

[3] For the following reasons, Rogers’ motion for leave to intervene will be dismissed, as it has not satisfied the requirement of usefulness. The essence of Rogers’ proposed arguments can already be found in the Respondents’ written submissions in support of their Rule 399 Motion. Considering the mandatory nature of the usefulness requirement, Rogers’ leave to intervene is refused.

## II. The Test for Intervention

[4] Rule 109(1) provides that the Court may, on motion, grant leave to any person to intervene in a proceeding. The Federal Court of Appeal’s [FCA] recent decision in *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 [*Le-Vel Brands*] is the leading case regarding the test applicable on a Rule 109 motion for leave to intervene.

[5] The test for intervention established by the FCA requires this Court to consider three elements: (i) the usefulness of the proposed intervener’s participation to what the Court must decide; (ii) a genuine interest on the part of the proposed intervener; and (iii) a consideration of the interests of justice. However, unlike the latter two elements, usefulness is expressly set out in Rule 109. Indeed, Rule 109(2)(b) requires a proposed intervener to demonstrate, “how [its] participation will assist the determination of a factual or legal issue related to the proceeding.” Therefore, if a proposed intervener fails to establish that its participation is useful to the debate before the Court, the Court is legally bound to dismiss the motion for leave to intervene, regardless of whether the proposed intervener satisfies the other two elements. This is why failure to show usefulness is the most frequent reason why intervention motions fail (*Le-Vel Brands* at paras 7, 13–15).

[6] The usefulness element of the test for intervention requires that four questions be asked: (i) what issues have the parties raised; (ii) what does the proposed intervener intend to submit concerning those issues; (iii) are the proposed intervener's submissions doomed to fail; and (iv) will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding (*Le-Vel Brands* at para 19, citing *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour)*, 2022 FCA 67 at para 10). That said, the first question tackling the identification of the real issues is key to the assessment of usefulness, and proposed interveners must pay special attention to it (*Le-Vel Brands* at para 16).

### III. Rogers' Intervention Is Not Useful

[7] The Commissioner submits that Rogers' proposed submissions do not provide useful submissions as to whether the Court should set aside the Order, as is requested by the Respondents in their Rule 399 Motion. More specifically, he says, the submissions Rogers proposes to make would merely duplicate grounds already advanced by the Respondents in support of their Rule 399 Motion. I agree with the Commissioner.

[8] At the outset, I must determine what are the real issues raised by the parties in the Rule 399 Motion. Here, there can be no doubt that the key legal issue for this Court to determine is whether the Respondents have established, as required by Rule 399(1), "a *prima facie* case why the [O]rder should not have been made." To this end, the Respondents make two arguments. First, they submit that the Commissioner's Section 11 Application is not in furtherance to an ongoing, *bona fide* inquiry within the meaning of section 10 of the Act. Second, they claim that

the Commissioner's request for examinations of the Respondents and the Order he obtained from the Court is excessive, disproportionate, or unnecessarily burdensome.

[9] In its motion for leave to intervene, Rogers proposes to make submissions on two points: (a) the prejudice it will suffer if the Commissioner is entitled to rely on his examination powers under paragraph 11(1)(a) of the Act, rather than the process for third-party discovery in the Rules; and (b) the inconsistency between the Commissioner's position in his Section 11 Application and the approach followed by the Ontario Securities Commission [OSC] in similar circumstances. In essence, if granted intervener status, Rogers would submit that the Order gives the Commissioner an unfair advantage over Rogers in the Part VII.1 application that the Commissioner has now filed against it before the Competition Tribunal [Tribunal]. Rogers claims that, by using his broad investigatory powers under section 11 of the Act after the commencement of proceedings before the Tribunal, the Commissioner would secure better procedural rights than those afforded to any other party under the *Competition Tribunal Rules*, SOR/2008-141 [CT Rules]. This, argues Rogers, is prejudicial to respondents like itself in Tribunal proceedings, and contrary to the approach taken under other provincial statutes.

[10] In my opinion, Rogers' proposed submissions do not genuinely provide further clarity on whether the Order should be set aside. There is substantial overlap between the submissions Rogers would be making and those already made by the Respondents. In other words, I am not convinced that Rogers' participation in the Rule 399 Motion would add to the Respondents' submissions.

[11] Rogers' first proposed argument is that it will suffer prejudice if the Commissioner is permitted to use paragraph 11(1)(a) of the Act as contemplated by the Order and to thereby — in Rogers' view — circumvent the test for non-party discovery under the Rules. The Respondents already plead the essence of Rogers' argument at paragraph 5 of their own written submissions:

5. The Commissioner should not be permitted to invoke the extraordinary investigative powers under section 11 of the *Act* indefinitely to build an evidentiary record against Rogers for use at trial. These powers should not be available to him when exercising his role as prosecutor, and nothing in the governing statutory framework allows him to circumvent the comprehensive procedural rules that govern [Tribunal] proceedings. If he wishes to examine non-parties to develop his evidence for trial, he must comply with Rules 34(1) and 64 of the *Competition Tribunal Rules*, and Rule 238 of the *Federal Court Rules*, designed to protect strangers to the litigation.

[12] Even Rogers acknowledges, in its proposed submissions for the Rule 399 Motion, that the Respondents already explain how the applicable Rules and CT Rules “set out a comprehensive regime for documentary production and examinations for discovery, including of non-parties like Mr. Atkinson and Mr. McGee” (Rogers' Proposed Written Representations at para 5).

[13] I acknowledge that, unlike Rogers' proposed submissions, the Respondents' representations do not exhaustively discuss the alleged prejudice that could be suffered by Rogers in the Tribunal proceedings, or the differences between the Commissioner's investigatory powers under paragraph 11(1)(a) of the Act and the general rules for non-party discovery under Rules 238 and 239. However, extensive consideration of these issues does not assist the Court in determining whether the Order should not have been granted. In conformity with the Respondents' position, the Court simply needs to determine whether the Commissioner was

entitled to request examinations under paragraph 11(1)(a). I must add that, in light of the materials submitted to the Court as part of the Commissioner's Section 11 Application, I was made aware of these issues and of the alleged tensions between paragraph 11(1)(a) of the Act and the Rules and CT Rules, prior to issuing the Order.

[14] Rogers' second proposed argument is that the Commissioner's approach to paragraph 11(1)(a) of the Act is inconsistent with regulatory case law, and more specifically the OSC's decision in *Re: Jowdat Waheed et al*, 2012 ONSEC 47 [*Waheed*]. Here again, I agree with the Commissioner that this argument is equivalent to the Respondents' submission that the Commissioner's use of his Section 11 Application is not pursuant to an ongoing, *bona fide* inquiry into Rogers. The equivalence of both arguments is evident when comparing paragraph 12 of Rogers' proposed written representations with paragraph 46 of the Respondents' written representations in their Rule 399 Motion:

12. The same reasoning in *Waheed* applies here. This is not a case like *Canadian Pacific*, where the Commissioner seeks "to determine if there are more grounds available" to support his case. There is no evidence to that effect in his materials and indeed, the Commissioner's counsel points only to the need for clarification of certain documents. Having "determined the facts" and pleaded them extensively, the Commissioner cannot now use section 11(1)(a) to build evidence on those pleaded facts by asserting an "ongoing inquiry" to circumvent the *Federal Court Rules*. Nothing in the case law permits him to do so, and it represents an improper exercise of his statutory powers of investigation.

46. Nowhere in his materials did the Commissioner suggest that the purpose of his intended examinations under section 11(1)(a) is to identify additional grounds to assert against Rogers. To the contrary, his counsel acknowledged at the hearing that what he really seeks is "context and clarification" of the documents already produced by Dig. These examinations do not serve any

investigation of facts separate from those pleaded in the Tribunal proceeding. *Canadian Pacific* is distinguishable on that basis.

[15] The only difference between Rogers' proposed submissions and the Respondents' existing submissions on this point is Rogers' reference to the *Waheed* decision. I do not find that this decision alone warrants granting Rogers leave to intervene. *Waheed* relates to a different provincial legal regime and does not squarely support the proposition that an inquiry under section 10 of the Act ceases once the Commissioner files an application before the Tribunal.

[16] I pause to underline that, prior to the hearing of the Commissioner's *ex parte* Section 11 Application, Rogers had sought consent from the Commissioner to make submissions in that proceeding, relying on the same grounds it now asserts in its motion for leave to intervene. Rogers was alleging that the Commissioner was improperly trying to circumvent the Tribunal's discovery rules, and that his request for examinations under paragraph 11(1)(a) of the Act was not related to the Inquiry because the Inquiry was ended once the Commissioner had filed his Part VII.1 application against Rogers before the Tribunal.

[17] On February 24, 2025, even though it was not a party to the Section 11 Application, Rogers filed a motion seeking to adjourn the hearing of the application scheduled for February 26, 2025, and to obtain permission to make written and oral submissions on the legal issues raised by the Section 11 Application.

[18] On the morning of February 26, 2025, prior to the hearing of Section 11 Application, I issued a detailed direction in which I denied Rogers' motion [Direction]. I found that, even if the

Court were to assume that Rogers was a respondent, Rogers had not convinced me, in its motion record, that an exceptional situation existed to allow for its participation in the *ex parte* Section 11 Application. In reaching my conclusions in the Direction, I considered and rejected the same grounds and arguments that Rogers is now contemplating to make in the Rule 399 Motion.

#### IV. Conclusion

[19] Having found that Rogers' proposed arguments will not assist the Court in its consideration of the Rule 399 Motion, I conclude that Rogers' intervention fails to satisfy the requirement of usefulness. As a result, I have no choice but to dismiss Rogers' motion for leave to intervene (*Le-Vel Brands* at para 15).

[20] In light of the foregoing, there is no purpose in discussing the other two elements of the Rule 109 test, namely, Rogers' general interest in the outcome of the Rule 399 Motion and the interests of justice.

[21] The Commissioner is entitled to his costs on this motion for leave to intervene.

**ORDER in T-309-25**

**THIS COURT ORDERS that:**

1. The motion for intervener status is dismissed, with costs.

“Denis Gascon”  
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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-309-25

**STYLE OF CAUSE:** THE COMMISSIONER OF COMPETITION v RORY  
MCGEE AND DOMINIC ATKINSON

**MOTION IN WRITING PURSUANT TO RULE 369 OF THE *FEDERAL COURTS*  
*RULES***

**ORDER AND REASONS:** GASCON J.

**DATED:** MAY 9, 2025

**WRITTEN SUBMISSIONS BY:**

Jonathan Hood  
Tanis Halpape  
Irene Cybulsky  
Kendra Wilson

FOR THE APPLICANT

Scott Lemke

FOR THE RESPONDENTS

Crawford Smith  
Jonathan Lisus  
Bradley Vermeersch  
John Carlo Mastrangelo

FOR THE PROPOSED INTERVENER

and

Anita Banicevic  
Teraleigh Stevenson

**SOLICITORS OF RECORD:**

ATTORNEY GENERAL OF  
CANADA  
Gatineau, Quebec

FOR THE APPLICANT

MASSEY L.L.P.  
Toronto, Ontario

FOR THE RESPONDENTS

LAX O'SULLIVAN LISUS  
GOTTLIEB L.L.P.  
Toronto, Ontario

FOR THE PROPOSED INTERVENER

and

DAVIES WARD PHILLIPS &  
VINEBERG L.L.P.  
Toronto (Ontario)