**BEFORE THE CANADIAN RADIO-TELEVISION
AND TELECOMMUNICATIONS COMMISSION**

IN THE MATTER OF

AN APPLICATION BY COMPETITIVE NETWORK OPERATORS OF CANADA

TO

RECUSE THE CRTC CHAIR IAN SCOTT PENDING APPEAL CONCERNING BIAS

PURSUANT TO

PART 1 OF THE *CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RULES OF PRACTICE AND PROCEDURE*

3 FEBRUARY, 2022

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1.0 INTRODUCTION AND EXECUTIVE SUMMARY

1. On June 28, 2021, TekSavvy Solutions Inc.("**TekSavvy**") sought leave to appeal Telecom Decision 2021-181 to the Federal Court of Appeal, alleging (among other things) a reasonable apprehension of bias and breach of procedural fairness in Chairperson Scott's conduct and public statements leading up to the CRTC's decision.

2. Leave to appeal was granted on September 15, 2021, and the matter is expected to be heard within the coming months.

3. Indeed, this matter remains very much in the public eye, as evidenced by recent media coverage. The apprehension of bias and breach of procedural fairness persists, to the point where, as recently as February 2, 2022, Chairperson Scott felt the need to defend himself against these allegations in seeking an exclusive interview with The Toronto Star.

4. In the present application, brought pursuant to Part 1 of the Rules of Practice and Procedure, SOR/2010-277, and the principles of natural justice and procedural fairness, the Competitive Network Operators of Canada ("**CNOC**") seek an order that Chairperson Scott recuse himself, or be recused, from deciding all matters affecting service-based competition pending adjudication of TekSavvy's bias claims by the Federal Court of Appeal. Chairperson Scott's involvement in such proceedings would render any decision made by the Commission in which he is involved vulnerable to appellate review on the same grounds should TekSavvy be successful in its appeal.

5. The recusal of Chairman Scott from any process relating to the relationship between facilities-based incumbent telecom providers and small service-based competitive providers is crucial to restore public and stakeholder confidence in the CRTC, to protect it from further institutional damage, and to avoid the taint of bias. This is particularly important in view of the upcoming proceedings before it, the outcomes of which will determine the future of choice and competition in residential telecom services, and their affordability for Canadian households.

2.0 FACTS AND CONTEXT

6. The relevant material facts and context, which are to be taken by the Commission as proved, are as follows.

7. In Telecom Decision 2021-181 (currently under review by the Governor in Council), the CRTC significantly increased the wholesale access rates that facilities-based providers could charge their service-based competitors. The decision reversed the final rates that the CRTC had ordered two years earlier in Telecom Order 2019-288—which was unanimously upheld by the Federal Court of Appeal (2020 FCA 140). The 2019 final rates had the effect of altering the competitive landscape, enabling service-based providers to offer competitive, more affordable Internet connectivity to households across Canada in furtherance of Canadian telecommunications policy objectives as laid out in section 7 of the *Telecommunications Act* and in the Government of Canada's 2019 policy direction to the CRTC (*Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227).

8. TekSavvy's appeal raises serious questions about perceived bias on the part of Chairperson Scott. Its materials allege that Chairperson Scott's conduct gives rise to a reasonable apprehension of bias in the following ways:

    1) **Public Statement of Preference for Facilities-Based Competition**: Chairperson Scott made public comments, shortly before Telecom Decision 2021-181 was issued, regarding his "personal preference" for "facilities-based competition" at the Canadian Club Toronto (Canadian Club, Ian Scott, 20 May 2021).

    2) ***Ex parte* Meeting with Bell Executive**: Mr. Scott took an *ex parte* meeting with Bell's then-COO (now CEO) Mirko Bibic only one week after the facilities-based providers, including Bell, applied to have the Commission reverse its findings in Telecom Order 2019-288. A photograph of this meeting was widely circulated in the media. This meeting was not attended by any Commission staff and is alleged to contravene the Commission's internal protocols and guidelines, as well as those from the Office of the Conflict of Interest and Ethics Commissioner.

9. Indeed, on February 2, 2022, The Toronto Star published an exclusive interview with Chairperson Scott in which he defended himself from accusations of bias, which he called a "smear" campaign. In the interview, Chairperson Scott admitted he had "known (Mr. Bibic) for many years", and strenuously defended his one-on-one meeting with Mr. Bibic shortly after Bell filed an application asking the CRTC to review Order 2019-288. (Toronto Star, "'No rule was ever broken:' CRTC chair Ian Scott says meeting with Bell executive was a drink with a friend", 1 February 2022).

10. Despite the passage of time since the decision, and at least six months after the publicity surrounding claims of bias and impartiality, the matter remains controversial and in the public eye, further supporting the argument that it is difficult for the CRTC to carry out its deliberations so long as these allegations against the Chair remain unresolved.

11. At the date of this application, there are several major outstanding Commission matters that impact CNOC members specifically, service-based competition generally, and the outcome of these files will also ultimately impact the prices that Canadians pay for essential telecommunications services. These matters are:

    1) **Wholesale access**: A decision on the details and timing of the Commission's transition away from an aggregated wholesale high-speed access model to a disaggregated access model (Telecom Notice of Consultation CRTC 2020-187). This proceeding could fundamentally undermine service-based competition and the fulfilment of the Canadian telecommunications policy objectives in section 7 of the *Telecommunications Act*;

    2) **Wholesale rate-setting**: A decision on whether the Commission will retain its long-standing approach to wholesale rate-setting, or adopt the incumbents' pleas to move to commercial negotiations, with Commission arbitration as a backstop (Telecom Notice of Consultation CRTC 2020-131);

    3) **Speed matching**: Shaw Cablesystems G.P.'s application for relief from the Commission's speed-matching requirement, a requirement brought about by a series of applications and Commission findings that ultimately concluded that the requirement was necessary to protect retail consumer interests (Commission File 8661-S83-202003193); and

    4) **CNOC application about fibre in-building wire**: A decision on CNOC's application to review and vary certain aspects of Telecom Regulatory Policy CRTC 2021-239, in which CNOC argues that the CRTC made serious errors of fact and law when conducting its analysis of the impact mandated wholesale access to fibre in-building wire would have on competition (Commission file 8662-C182-202107185).

12. Furthermore, the Commission has indicated in planning documents a review of the entire wholesale services framework, and network interconnection. The framing of such consultations, and the

Commission's proposals, could be subject to significant influence from the Chairperson, and tainted by his allegedly biased view.

13. The principles of natural justice and procedural fairness demand that Chairperson Scott not be involved in decisions that, by virtue of his conduct which is being adjudicated by a higher court of competent jurisdiction, could also be tainted. Given this state of affairs for the CRTC—particularly in light of The Toronto Star article—and the potential for bias to taint other matters currently before the Commission, Chairperson Scott must step away.

3.0 ARGUMENT AND RELIEF SOUGHT

14. The allegations of bias and partiality before the Federal Court of Appeal are deeply troubling to CNOC's members, many of whom operate as service-based competitors who compete with the facilities-based incumbents. At a broader level, all Canadians depend on the Commission and Commissioner conducting themselves and their proceedings in an impartial, fair, and even-handed manner, in order to "enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications" (*Telecommunications Act*, s. 7(c)).

15. Equally important is that the Commission ensure that its proceedings are conducted without the *appearance* of bias. Courts have long recognized the "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*Energy Probe v. Atomic Energy Control Board*, [1985] 1 F.C. 563; *King v. Sussex Justices*, [1924] 1 K.B. 256). In *Wewaykum v. Canada*, 2003 SCC 45, the Supreme Court defined bias as:

> [58] . . . a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

16. Recent jurisprudence confirmed the application of this principle to the kinds of allegations made by TekSavvy against Chairperson Scott:

    1) In *Shoan v. Canada (Attorney General)*, 2017 FC 426, the Federal Court held that "ex parte contact with stakeholders must be carefully managed as it potentially exposes the CRTC to legal challenges

and may raise serious concerns about its integrity and reputation", giving rise to "concern[s] of a reasonable apprehension of bias".

2) In a similar regulatory comment, the Supreme Court of Canada found that a utility commissioner's public comments during an ongoing proceeding—during which time "a greater degree of discretion is required"—led "inexorably to the conclusion that a reasonable person appraised of the situation would have an apprehension of bias" (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623).

17. Recently, the Commission addressed a reasonable apprehension of bias complaint concerning a sitting Commissioner's lunch with a senior executive of a party to a Part I application. Affirming the above-noted principles, the CRTC held that the Commissioner in question would not be permitted to participate in the Part I application (Commission file 2015-0379-8, Commission staff letter, 23 September 2015 to the Public Interest Advocacy Centre).

18. Allegations of bias are serious because they challenge "the integrity of its member who participated in the impugned decision". They are not "done lightly", and "must be supported by material evidence demonstrating conduct that derogates from the standard" (*Arthur v. Canada (Attorney General)*, 2001 FCA 223, para. 8).

19. In its successful application for leave to appeal, TekSavvy has established an arguable case to challenge Telecom Decision 2021-181 for, among other things, perceived bias on the part of Chairperson Scott. Sufficient grounds have been provided for this allegation, and it will be determined by the Federal Court of Appeal in the coming months.

20. Moreover, the jurisprudence confirms "the need to maintain a perception of fairness in the face of prior professional or family relationships" (*Sweetgrass First Nation v. Gollan*, 2006 FC 778, para. 48). Likewise, the leading text on administrative law states:

> Adjudicating in cases involving close friends, personal enemies, business associates, and rivals, not to mention family members, provide clear, though nowadays infrequent examples. Indeed, the rules of many tribunals contain codes identifying relationships of this kind that are either disqualifying or at the very least have to be declared.
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> (David Mullan, *Administrative Law* (2001), p. 330)

21. In *Myskiw v. Commissioner of the Correctional Service of Canada*, 2019 FPSLREB 107, a labour board found bias in the appointment process where a hiring manager and appointee were "personal friends who regularly had lunch together" and "occasionally spent time socializing with one another while away from the workplace" (para. 3). Bias was also found where a commission chair treated one party "with a degree of familiarity not extended to the other"—by, among other things, inviting one party to a barbecue at the chairperson's house (*United Enterprises Ltd. v. Saskatchewan* (1997), 150 Sask. R. 119 (Q.B.)).

22. Like the above cases, Chairperson Scott's admission to the Toronto Star—that he "went for a beer with someone [he had] known for many years" to "address" matters within the CRTC's jurisdiction—falls on the wrong side of the law.

23. In these circumstances, it is necessary and appropriate for Chairperson Scott to recuse himself from all Commission proceedings involving the interests of service-based competitors who rely on the Commission to ensure a fair and balanced competitive landscape. Any such proceeding in which he is involved would be vulnerable should TekSavvy be successful in its bias allegations. Deference should be shown to the outstanding Federal Court of Appeal proceeding.

24. Nor would Mr. Scott's recusal from this subset of *Telecommunications Act* regulation prejudice the Commission's administrative functioning. The Chair is one of nine commissioners, each of whom can carry out their statutory mandate to regulate the telecommunications industry without the involvement of Mr. Scott. The paramount importance of public confidence in the Commission's process warrants his recusal, pending the disposition of TekSavvy's appeal.

4.0 CONCLUSION

25. In light of serious allegations of perceived bias on the part of Chairperson Scott, and in the context of the many outstanding decisions and planned consultations that could significantly impact service-based providers, and the prices Canadians pay for essential telecommunications services, it is appropriate that Chairperson Scott recuse himself, or be recused, from all decisions affecting service-based providers pending the adjudication of these allegations by the Federal Court of Appeal.

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