Supplement to

Petition of

TekSavvy Solutions Inc.

to the Governor in Council

to vary

Telecom Decision CRTC 2021-181, Requests to review and vary Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services

24 June 2021

1. Further to our petition to Governor in Council to vary Telecom Decision CRTC 2021-181, *Requests to review and vary Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services*, ("the Petition"), TekSavvy Solutions Inc. ("TekSavvy") provides this supplemental submission in order to provide additional evidence and argument concerning the reasonable apprehension of the CRTC Chair's bias.

A. ADDITIONAL FACTUAL EVIDENCE OF MR. SCOTT'S BIAS

2. As set out in *Arthur v Canada (Attorney General)*, in supporting a case of reasonable apprehension of bias, it is often useful, and even necessary, to resort to evidence extrinsic to the case.[1] For this reason, TekSavvy wishes to draw the Governor in Council's attention to further evidence substantiating the reasonable apprehension of CRTC Chair's bias.

3. Based on the public record, including the federal Registry of Lobbyists and public reporting, CRTC Chair Ian Scott held at least 11 reported *ex parte* meetings with Bell, Rogers or Shaw during the course of the Commission's consideration of the Incumbents' Review & Vary applications resulting in Telecom Decision CRTC 2021-181 (the "Review and Vary Applications") which he, according to the lobbying registry, appeared to attend alone.[2] A summary of the records for these meetings for the time period during which the CRTC reviewed the Review and Vary Applications, as well as copies of the relevant lobbying records obtained from the federal Registry of Lobbyists, is appended as Appendix "A".[3]

4. Notably, Mr. Scott did not hold any meetings (on his own or accompanied by other CRTC or government officials) during this time with wholesale-based internet service providers ("ISPs"), including TekSavvy.

5. Apart from those *ex parte* meetings that occurred in the time period during which the Review and Vary Applications were under review with the Commission, Mr. Scott also

---

1 *Arthur v Canada (Attorney General)*, 2001 FCA 223 at paras 7 to 9.

2 The term "Incumbents" is used herein, and in the Petition, to refer to providers of wholesale HSA services, as the term is used in Telecom Decision CRTC 2021-181.

3 The period of review used is that commencing from the date of the first Review and Vary Application filed, which was filed by TELUS Communications Inc. ("TELUS") on November 13, 2019. Bell Canada and Bell MTS (together, "Bell"), as well as Rogers Communications Canada Inc. ("Rogers") jointly with other cable carriers Eastlink, Cogeco Communications inc., Shaw Cablesystems G.P. ("Shaw") and Videotron Ltd., filed their Review and Vary Applications on December 13, 2019. See for example the description of this timing set out in Telecom Decision CRTC 2020-342, *Requests to stay the implementation of Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services*, available online at: <https://crtc.gc.ca/eng/archive/2020/2020-342.htm>.

apparently held various other *ex parte* solo meetings with Bell, Rogers, TELUS and Shaw while other important files relating to wholesale rates were open before the Commission.[4]

6. At least one of Mr. Scott's *ex parte* meetings took place in a social setting, alone, with the CEO of one of the primary litigants in the open file. Mr. Scott met with Mirko Bibic, then chief operating officer of Bell (and now CEO) in a one-on-one meeting at D'Arcy McGee's, an Ottawa bar. This meeting took place on December 19, 2019 – one week after Bell filed its Review and Vary Application with the CRTC on December 13, 2019– namely, an application that led to the decision that is the subject of our Petition.

7. This meeting is described in public reporting, including three media articles appended hereto as Appendices "B", "C" and "D".[5] These articles feature statements by former CRTC Commissioners indicating that Mr. Scott's private *ex parte* beers with the CEO of Bell, one week after Bell filed an appeal to the CRTC in a contentious proceeding with hundreds of millions of dollars at issue, is offside the CRTC's internal norms, policies and practices. One former Chair of the CRTC noted that when he was chair, "he would include a third party, typically the CRTC's general counsel, in lobbying meetings with industry." Another former CRTC Commissioner and vice-chair of telecom said the CRTC's recommended practice was to meet with lobbyists in the office and have a third person present, such that an *ex-parte* meeting at a bar "would fall into the category of high-risk behaviour."

8. As discussed further below, Mr. Scott's *ex parte* meeting with Mr. Bibic is also clearly offside the standards of conduct required by the Governor in Council for its appointees to the CRTC, as confirmed by the termination of one Commissioner's appointment for far less egregious conduct:

> Whereas the Governor in Council has concluded that Raj Shoan's actions with respect to inappropriate contact with CRTC stakeholders and his lack of recognition of and disregard for the impact of that contact on the reputation and integrity of the CRTC (the inappropriate contact ground) are fundamentally incompatible with his position and that he no longer enjoys the confidence of the Governor in Council to be a Commissioner of the CRTC […][6]

---

4 For example, the Canadian Network Operators Consortium Inc.'s ("CNOC") *Part 1 Application to Review and Vary Telecom Regulatory Policy CRTC 2015-326 and Telecom Decision CRTC 2016-379*, Telecom Notice of Consultation CRTC 2019-57, *Review of Wireless Services,* and TNC 2020-131, *Review of the approach to rate setting for wholesale telecommunications services*.

5 Christine Dobby, "*Is the CRTC getting too cosy with big telecom? Star analysis finds major telecoms met with government and CRTC officials hundreds of times prior to reversal on wholesale internet rates*", June 12, 2021, Toronto Star is attached as Appendix "B"; Alain McKenna, "Le lien privilégié de Bell avec le CRTC fait grincer des dents", June 19, 2021, Le Devoir is attached as Appendix "C"; Maxime Johnson, "*Des airs de crise au CRTC*", June 19, 2021, L'Actualité is attached as Appendix "D".

6 Order in Council PC Number, May 5, 2017, available online at: <https://orders-in-council.canada.ca/attachment.php?attach=34358&lang=en>.

9. We reiterate that Mr. Scott's *ex parte* meeting occurred just one week after the CRTC opened its active file to hear Bell's Review and Vary Application: *i.e.*, the then-open proceeding that ultimately resulted in the CRTC's arbitrary determinations in Telecom Decision CRTC 2021-18, which completely reversed the CRTC's own evidence-based, years-in-the-making 2019 Rates Order and directly undermined Cabinet's mandate and direction to the CRTC to promote affordable pricing and competition.

10. As media reports indicate, and as seen in Appendix A, this meeting was disclosed Bell in the lobbyist registry, listing broadcasting as the subject discussed. In addition, a witness took a photograph of the meeting, appended hereto as Appendix "E".

B. APPLICABLE TEST FOR A REASONABLE APPREHENSION OF BIAS

11. The test for finding a reasonable apprehension of bias was iterated by the Supreme Court of Canada in *Committee for Justice and Liberty v Canada (National Energy Board)* in 1978: "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude".[7] As the Federal Court of Appeal has explained, the person raising the concern does not have to prove actual bias, and the Court does not have to seek it out; rather, the court must be satisfied that a reasonable apprehension of bias existed in the circumstances of the case.[8]

12. *Ex parte* communications with a party with an active file before the decision-maker have been found by courts to have the potential to give rise to a reasonable apprehension of bias.[9] Not only do *ex parte* communications potentially give rise to procedural unfairness, but as the Federal Court has explained, "[q]uite understandably, the party excluded from the conversation may also have serious concerns about the judge's impartiality, thus giving rise to a reasonable apprehension of bias."[10]

13. In fact, both the Federal Court and Cabinet have explicitly recognized the concern of perceived bias raised by *ex parte* meetings between Commissioners and stakeholders with open files before the CRTC. In particular, Balraj Shoan was a CRTC Commissioner whose appointment was terminated by the Governor-in-Council on June 23, 2016.[11] The termination was based on concerns set out by the Minister of Canadian Heritage and Official Languages regarding his actions.[12] One of the Minister's four stated concerns related to *ex parte* contact with CRTC stakeholders; the Federal Court described such conduct as "very troubling," noting:

---

7 [1978] 1 SCR 369 at 394. This case has been applied repeatedly by the Federal Court, including recently in for example *Gulia v. Canada (Attorney General),* 2021 FCA 106 and *Gardaworld Cash Services Canada Corporation v. Smith*, 2020 FC 1108.

8 *Setlur v. Canada (Attorney General)*, 193 FTR 104 (FCA) at para 27.

9 *Ibid*, for example.

10 *Gardaworld Cash Services Canada Corporation v. Smith*, 2020 FC 1108.

11 *Shoan v. Canada (Attorney General)*, 2017 FC 426 at para 1 ["*Shoan I*"].

12 *Ibid*, para 6.

> "the Applicant's conduct pertaining to inappropriate contact with CRTC stakeholders is very troubling. The Minister's Letter states that, as known to the Applicant, the CRTC has practices to carefully manage *ex parte* contacts to protect the perception of fairness and neutrality and to ensure that such contacts do not jeopardise the reputation and integrity of the CRTC. Further, that in July and August 2015 the Applicant met alone with stakeholders whose applications were before the CRTC and without following CRTC practices."[13] [*emphasis added*]

14. The Federal Court summarized the Minister's concern 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. In fact, the Federal Court specifically found that Mr. Shoan's one-on-one *ex parte* meetings "invited the concern of a reasonable apprehension of bias."[14] The Court found that a mere statement prior to the meeting that no open files would be discussed did not adequately discharge this potential for perception of bias.[15]

C. MR. IAN SCOTT'S ACTIONS GIVE RISE TO A REASONABLE APPREHENSION OF BIAS

15. Just as did Mr. Shoan in the actions that led to his termination, Mr. Scott similarly met alone with stakeholders with active applications before the CRTC, as described above, and as evidenced in Appendices A - E. In these records, Mr. Scott is the only public office holder listed in the federal Lobbying Registry– namely, he appears to have attended these meetings alone.

16. In one notable meeting, Mr. Scott met with Mirko Bibic, then chief operating officer of Bell (and now CEO), in a one-on-one meeting in an Ottawa bar. This meeting took place on December 19, 2019– one week after Bell filed its Review and Vary Application to the CRTC– namely, the application that led to the decision that is the subject of this Petition.

17. The mere occurrence of *ex parte* meetings with stakeholders invites a reasonable apprehension of bias, regardless of what was discussed (if the topic of discussion can even be confirmed at all). In Mr. Shoan's case, for example, Mr. Shoan noted that in one of the two *ex parte* meetings, it was confirmed in writing that an open file would not be discussed, and stated that the meeting was on an unrelated topic.[16] In the other *ex parte* meeting he held, he noted that there was no open application before the CRTC involving that entity. The Federal Court found that this did not discharge the risk of perceived bias, noting that the applicant "fails to recognize or acknowledge that the concern is the real or perceived

---

13 *Ibid*, para 144.

14 *Ibid*, para 155.

15 *Shoan v. Canada (Attorney General)*, 2018 FC 476 at para 38 ["*Shoan II*"], (together with *Shoan I*, "Shoan"). See also page 14 of Appendix F, discussed below, in which the CRTC's then general counsel expresses that "a confirmation letter is not foolproof."

16 *Ibid.*

apprehension of bias that his *ex parte* meetings give rise to"[17] and that "whether only a market assessment was in play at that stage, rather than the actual […] application, was not the issue. It was the perception of fairness and neutrality."[18] [*emphasis added*]

18. Attending these *ex parte* meetings alone, as well as in any social settings, increases the concern of real or perceived bias. While CRTC internal guidelines on stakeholder meetings are not published publicly, the Federal Court summarizes the guidance as it existed at the time of the Governor in Council's decision in 2016 regarding Mr. Shoan as follows:

> "if a meeting was held there should be a clear record generated of what was discussed and meetings should be held in a business setting, meaning boardrooms not restaurants, and to the extent possible should not be held alone."[19]

19. The Court also made a finding that a further internal CRTC guidance presentation prepared by the CRTC's then general counsel specifically asks Commissioners to "invite a CRTC employee to be present at the meeting."[20] The presentation to which the Court refers is attached as Appendix "F".

20. Mr. Scott's actions directly defy at least two of the three requirements listed above. At least one of the meetings, with Mr. Bibic, took place in a social setting with alcohol present. Mr. Scott attended alone. TekSavvy is not aware of any contemporaneous records of what was discussed at the meeting; it has made a formal request for any such records under the *Access to Information Act*.

21. In addition to the meeting in a bar, Mr. Scott met with facilities-based competitors (where he was formerly employed as a lobbyist, and for whose business model he has publicly expressed his "personal preference"[21]) a total of 11 reported times during the duration of the CRTC's review of the Review and Vary Applications reportedly without another CRTC representative present. Mr. Scott did not meet with a single wholesale-based competitor during this period – alone or not.

22. By guiding Commissioners to attend meetings in business meetings and with at least one other staff member, the internal CRTC guidelines described above implicitly acknowledge the negative perception of solo meetings in social settings. The CRTC presentation concerning stakeholder meetings also directly acknowledges the concerns that private meetings raise, including notably the perception that a Commissioner may be predisposed

17 *Shoan I, supra* note 11 at para 157.

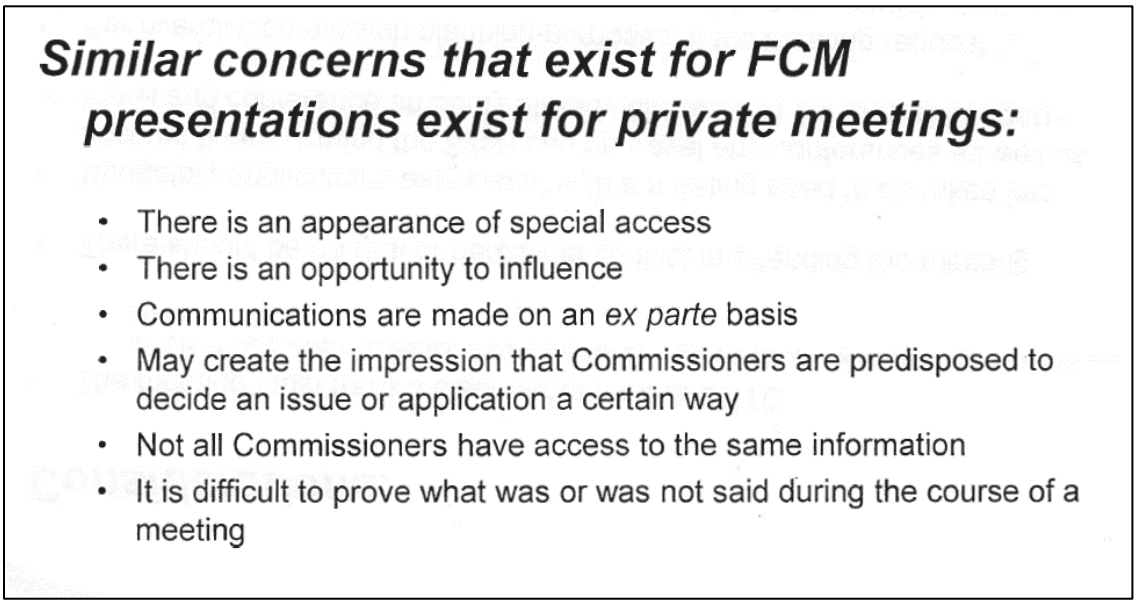
18 *Ibid*.

19 *Ibid*, at para 145.

20 *Ibid*.

21 See further information regarding this expressed preference in our Petition.

to deciding an application in one way as a result of the meeting, and that it is difficult to prove what was said:[22]



23. Public reporting also highlights the concerns they invite. For example, one article underscores the impossibility of other parties having any reliable confirmation of what was discussed at the *ex parte* meeting, noting with respect to Mr. Scott and Mr. Bibic, "De quoi ont-ils discuté ? Impossible de le savoir."[23] It is these very concerns that underlie courts' findings in *Shoan* that a simple letter confirming open files will not be discussed was not sufficient to discharge any possible perception of bias.[24] Other media reporting highlights the discrepancy between the opportunities to meet with Mr. Scott given to the Incumbents versus the wholesale-based competitors responding to the Review and Vary Applications,[25] and one article suggests that this has caused the public to have a lack of confidence in the CRTC, suggesting it is "[U]n manque de confiance qui pourrait faire mal."[26]

24. The *Shoan* decision shows that the test for reasonable apprehension is met. Multiple parties, including the courts, the then Minister of Heritage and Official Languages, the CRTC's own internal documents and the Attorney General acknowledged the concern of real or perceived bias, or the undermining of public confidence, presented by *ex parte* meetings with stakeholders with open files before the Commission. These bodies and persons are surely right-minded and reasonable observers within the meaning of the test for reasonable apprehension of bias.

---

22 Exhibit F, page 11.

23 Appendix C.

24 *Shoan I, supra* note 11 at para 157.

25 See for example Appendix B.

26 See Appendix D.

25. The Federal Court explicitly found that a CRTC Commissioner's *ex parte* meetings with stakeholders gave rise "to a real or perceived apprehension of bias," describing this concern as "abundantly demonstrated" by the response of stakeholders in that case.[27] The CRTC's own internal guidance acknowledged too that in terms of meetings with stakeholders, "appearance is just as important as reality during public hearings."[28] In responding to Mr. Shoan's application for judicial review, the Attorney General also argued that it was reasonable to conclude that a "failure to abide by practices and procedures concerning *ex parte* meetings with stakeholders with pending applications before the CRTC risked undermining public confidence in the CRTC."[29] As mentioned above, two former CRTC Commissioners have also acknowledged that the recommended practice for meetings with stakeholders was to have a third person present; former CRTC Commissioner Peter Menzies described a meeting at a bar as falling "into the category of high risk behaviour."[30]

26. As Chair of the CRTC, the same (or in fact worse) actions from Mr. Scott raise an even more serious concern of perceived bias than when taken by a regional Commissioner (as was Mr. Shoan). As Chair, Mr. Scott sets the agenda for and presides over the Commission meetings.[31] He also "directs the work of Commission staff."[32] A former CRTC Commissioner for example notes the important influence wielded by the Chair, stating in reporting that "he believes the CRTC chair has outsized influence over decisions because he works with staff on advice that is then presented to other commissioners."[33]

27. As a result, with a greater volume of *ex parte* meetings during open hearings than in the *Shoan* case (including at least one taking place alone over beers) and involving a CRTC Chair with more influence over decisions, it is difficult to argue that Mr. Scott's conduct would not also give rise to a reasonable apprehension of bias. That is, it would appear that the reasonable person, viewing the matter realistically and practically, and having thought the matter through, would be more likely to conclude that Mr. Scott may decide unfairly, whether consciously or unconsciously.

---

27 *Shoan I, supra* note 11 at para 157.

28 *Ibid* at para 145. See also Appendix F at page 15.

29 *Shoan II, supra* note 15 at para 60.

30 Appendix B. See discussion of comments of former CRTC Chair Konrad von Finckenstein and former Commissioner Peter Menzies.

31 See for example the description of the Chairperson's role: Canadian Radio-television and Telecommunications Commission, "Our Leadership", available online at: <https://crtc.gc.ca/eng/acrtc/organ.htm>.

32 *Ibid*.

33 Appendix B.

D. CONCLUSION

28. In light of the additional details and evidence noted above, together with the Petition, we respectfully request that the Governor in Council quickly take the steps outlined in the Petition, including notably, to overturn Telecom Decision 2021-181 and reinstate the evidence-based, pro-consumer 2019 Rates order, and to remove Chairman Mr. Ian Scott as chair of the CRTC, or, at the very least, amend Mr. Scott's appointment by the Governor of Council to prevent Mr. Scott from participating in any Telecom proceedings involving wholesale services.

***** END OF DOCUMENT *****