

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 5

File No.: CT-2022-02

Registry Document No.: 30

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended.

BETWEEN:

Commissioner of Competition
(applicant)

and

**Rogers Communications Inc. and
Shaw Communications Inc.**
(respondents)



Decided on the basis of the written record
Before: Mr. Justice Andrew D. Little (Chairperson)
Date of order: May 19, 2022

CONFIDENTIALITY ORDER

FURTHER TO an application filed by the Commissioner on May 9, 2022 against the Respondents pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34, as amended;

AND FURTHER TO the draft confidentiality order filed on consent by the Parties;

THE TRIBUNAL ORDERS THAT:

[1] For the purpose of this Order:

- (a) “**Act**” means the *Competition Act*, RSC 1985, c C-34, as amended;
- (b) “**Affiliate**” has the same meaning as in subsection 2(2) of the Act;
- (c) “**Commissioner**” means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;
- (d) “**Designated Representatives**” means up to two in house counsel and up to six additional individuals designated by each of the Respondents who will be permitted access to Records designated as Level B Protected Documents in accordance with the terms of this Order, which designations shall be made by written notice to the Tribunal with a copy sent concomitantly to the Commissioner. The Commissioner may make a motion to the Tribunal objecting to such designations;
- (e) “**Independent Expert**” means an expert retained by a Party with respect to the Proceedings who (i) is not a current employee of a Respondent; (ii) has not been an employee of a Respondent within two years prior to the date of this Order, (iii) is not a current employee of a competitor of a Respondent; (iv) has not been an employee of a competitor of a Respondent within two years prior to the date of this Order; and (v) has executed the Confidentiality Undertaking in the form attached as Schedule A hereto;
- (f) “**Parties**” means the Commissioner and Respondents collectively, and “**Party**” means any one of them;
- (g) “**Person**” means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;
- (h) “**Proceedings**” means the applications filed by the Commissioner against the Respondents (File Number CT-2022-002) for orders pursuant to sections 92 and 104 of the Act;

- (i) “**Protected Record**” means any Record (including the information such Record contains) that is produced in the Proceedings, including Records listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to undertakings, Records produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits and submissions that:
- i. the Party producing the Record claims is confidential pursuant to Section 2 of this Order; or
 - ii. the Tribunal has determined is confidential;
- (j) “**Record**” has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;
- (k) “**Record Review Vendor**” means a professional service provider retained by a Party with respect to the Proceedings to facilitate the review of Records, both digital and paper, by legal professionals and who has executed the Confidentiality Undertaking in the form attached as Schedule A hereto;
- (l) “**Respondent**” means Rogers and Shaw collectively, and “**Respondent**” means either of them;
- (m) “**Rogers**” means Rogers Communications Inc., its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the foregoing entities, and their respective directors, officers, employees, agents, representatives, successors and assigns of each;
- (n) “**Shaw**” means Shaw Communications Inc., the Shaw Family Living Trust, and, as applicable, their respective directors, officers, employees, agents, representatives, trustees, beneficiaries, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the foregoing entities, and their respective directors, officers, employees, agents, representatives, successors and assigns;
- (o) “**Third Party**” means any Person other than the Commissioner or Respondents; and
- (p) “**Tribunal**” means the Competition Tribunal established pursuant to subsection 3(1) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), as amended.

[2] Disclosure of Records containing any of the following types of information could cause specific and direct harm, to the extent they or the information therein are not already publicly

available or otherwise available to the recipient, and such Records may be designated as Protected Records:

- (a) information relating to prices, auctions, spectrum acquisition, network planning, capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives produced by a Respondent or a Third Party;
- (b) confidential contractual arrangements between a Respondent and its customers, agents, and/or suppliers or between a Third Party and its customers, agents, and/or suppliers;
- (c) financial data or reports, or financial information relating to a Respondent or its customers, suppliers or a Third Party;
- (d) business plans, marketing plans, strategic plans, budgets, forecasts and other similar information of a Respondent or a Third Party;
- (e) internal market studies and analyses of a Respondent or a Third Party;
- (f) internal investigative and related Records belonging to the Commissioner; and
- (g) other Records containing competitively sensitive and/or proprietary information of a Respondent or a Third Party.

[3] Without prejudice to any position or argument a Respondent may take or make in the Proceedings and in any related appeals, including (without limiting the generality of the foregoing) with respect to any claim of privilege by the Commissioner, the Commissioner may designate as Level A Protected (as defined below), any information that could identify a Third Party who is reasonably concerned about the public disclosure of its identity.

[4] If information from a Protected Record is incorporated into any other Record, that Record shall be a Protected Record. Any Protected Record shall cease to be a Protected Record if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); (b) if the Parties agree in writing that the Record shall cease to be a Protected Record; or (c) the Tribunal determines that the Record shall cease to be a Protected Record.

[5] Protected Records will be identified in the following manner for the purpose of the Proceedings:

- (a) a Party claiming that a Record is a Protected Record shall, at the time of production of a Protected Record, mark it with the name of the Party producing the Record and with “Confidential – Level A” or “Confidential – Level B” on the face of each Record and/or on each page that is claimed as confidential;

- (b) subject to Section 4 of this Order, all Records designated as Protected Records shall be treated as a Protected Record, save for determination otherwise by the Tribunal or re-designation pursuant to Section 9 below;
- (c) the inadvertent failure to designate a Record or portion thereof as a Protected Record at the time it is disclosed does not constitute waiver of the right to so designate after disclosure has been made;
- (d) if a Record originates with or from more than one Party and is designated by at least one Party as a Protected Record, the highest level of confidentiality shall universally attach to that Record, subject to the resolution of any challenge to that claim of confidentiality;
- (e) at any point in the Proceedings, a Party may challenge a claim of confidentiality or level of confidentiality made by another Party. The Parties shall use their best efforts to agree as to whether the Records (or portions thereof) are to be treated as Protected Records; and
- (f) if agreement cannot be reached, the Parties may apply to the Tribunal to determine whether the Record or a portion thereof is a Protected Record or what level of confidentiality should apply to a Protected Record.

[6] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked “Confidential – Level A” (“**Level A Protected**”) may be disclosed only to:

- (a) the Commissioner, counsel to the Commissioner, and the Commissioner’s staff;
- (b) outside counsel to the Respondents and outside counsel’s staff who are directly involved in the Proceedings;
- (c) Independent Experts and their staff who are directly involved in the Proceedings; and
- (d) Record Review Vendors.

[7] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked “Confidential – Level B” (“**Level B Protected**”) may be disclosed only to:

- (a) the individuals described in Section 6 above; and

(b) Designated Representatives of the Respondents who have executed the Confidentiality Undertaking in the form attached as Schedule A.

[8] Notwithstanding any provision of this Order, the Commissioner may disclose any Records designated as Level A Protected or Level B Protected that he has so designated, and that have not been produced in the Proceedings by a Respondent or otherwise originated from a Respondent, to any Person for the purpose of preparing for the hearing of the Proceedings, subject to the limits prescribed by section 29 of the Act.

[9] A Party may at any time and with prior reasonable notice to the other Party re-designate any of its own Records designated as Level A Protected as Level B Protected or public Records, and/or may re-designate any of its own Records designated as Level B Protected as public Records. Where another Party disputes the re-designation, the Tribunal shall determine the proper designation. Records re-designated as public shall cease to be Protected Records and shall form part of the public record if introduced into evidence at the hearing of the Proceedings, unless the Parties agree otherwise or the Tribunal so orders. If a Party changes the designation of a Record to confidential, a prior disclosure of it shall not constitute a breach of this Order.

[10] If a Party is required by law to disclose a Protected Record, or if a Party receives written notice from a Person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law to disclose a Protected Record, that Party shall give prompt written notice to the Party that claimed confidentiality over the Protected Record so that a protective order or other appropriate remedy may be sought.

[11] Outside counsel to the Respondents and their staff, counsel to the Commissioner, the Commissioner and his staff, and Independent Experts and their staff, may make copies of any Protected Record as they require in connection with the Proceedings.

[12] Nothing in this Order prevents a Party from having full access to or, in the case of a Respondent only, using or disclosing Protected Records that originated from that Respondent.

[13] For greater certainty, in accordance with section 62 of the *Competition Tribunal Rules*, all Persons who obtain access to Records and information through documentary, written and oral discovery through the Proceedings are subject to an implied undertaking to keep the Records and information confidential and to use the Records and information solely for the purposes of the Proceedings (including any application or proceedings to enforce any order made by the Tribunal in connection with the Proceedings) and any related appeals.

[14] At the hearing of the Proceedings:

- (a) Protected Records tendered as evidence at the hearing of the Proceedings shall be identified and clearly marked as such, in accordance with Paragraph 5(a), above;
- (b) Following submissions from the Parties, the Tribunal may determine whether the Record should be treated as a Protected Record;

- (c) Protected Records shall not form part of the public record unless the Party or Parties claiming confidentiality waive the claim, or the Tribunal determines that the Record is not a Protected Record;
- (d) Records over which no privilege or confidentiality claim has been asserted shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record in the Proceedings if introduced into evidence or otherwise placed on the record. Public Records shall be marked “Public” on the face of the Record; and
- (e) Nothing in this Order shall abrogate or derogate any legal onus, burden or requirement applicable to a sealing order or abrogate or derogate in any way from the rights of the Parties to assert confidentiality claims during the course of the hearing.

[15] The Parties shall provide the Tribunal with redacted versions of Protected Records at the time any such Records are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked “Public” on the face of the Record and shall form part of the public record in the Proceedings. Each Protected Record shall identify the portions of the Record which have been redacted from the “Public” version, by highlighting such portions in the Protected Record.

[16] The termination of the Proceedings shall not relieve any Person to whom Protected Records were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Records in accordance with the provisions of this Order and any Confidentiality Undertaking, subject to any further order of the Tribunal.

[17] Upon completion or final disposition of the Proceedings and any related appeals, all Protected Records and any copies of Protected Records, with the exception of Protected Records in the possession of the Commissioner and his staff, shall be destroyed or returned to the Party that produced them unless the Party that produced the Protected Records states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Respondents and counsel to the Commissioner may keep copies of Protected Records in their files and that any copies of Protected Records as may exist in the Parties’ automatic electronic backup and archival systems may be kept provided that deletion is not reasonably practical and the copies are retained in confidence and not used for any purpose other than backup and archival purposes.

[18] The Parties shall bear their own costs associated with the request for and issuance of this Order.

[19] Nothing in this Order prevents or affects the ability of a Party from applying to the Tribunal for further orders or directions with respect to the use or disclosure of Records or information produced by another Party.

[20] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including, without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Toronto, this 19th day of May 2022.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

SCHEDULE "A"

Confidentiality Undertaking

IN CONSIDERATION of being provided with Protected Records,

I _____, of the City of _____, in the Province/State of _____, hereby undertake and agree to maintain the confidentiality of any Protected Documents that I obtain and, in particular, that:

1. I will not copy, disseminate, transfer or otherwise share or disclose any Protected Record to any other person, except, as applicable, (a) my staff who are directly involved in this matter; (b) outside counsel for the Party on whose behalf I have been retained, outside counsel's staff who are directly involved in the Proceedings and, in the case of the Commissioner, the Commissioner's staff directly involved in the Proceedings; and (c) Persons permitted by order of the Competition Tribunal.
2. I will not use any Protected Record for any purpose other than in connection with the Proceedings and any related appeals.
3. Upon completion of the Proceedings and any related appeals, I agree that all Protected Records, and any copies of same, in my possession shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by the order of the Tribunal.
4. I have read the Confidentiality Order granted by the Tribunal on _____, a copy of which is attached to this Undertaking, and agree to be bound by same. I acknowledge that capitalized terms in this Undertaking have the same meaning as defined in the Confidentiality Order. I further acknowledge that any breach of this Undertaking by me will be considered to be a breach of the Confidentiality Order.
5. I acknowledge and agree that the completion of the Proceedings and any related appeals shall not relieve me of the obligation to maintain the confidentiality of Protected Records in accordance with the provisions of this Undertaking. I further acknowledge and agree that either Party shall be entitled to injunctive relief to prevent or enjoin breaches of this Undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.
6. In the event that I am required by law to disclose any Protected Record, I will provide counsel for the Parties to the Proceedings with prompt written notice so that the Party that claimed confidentiality over the Protected Record may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Records

that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to it.

7. I will promptly, upon the request of the Party who provided Protected Records to me, advise where they are kept. At the conclusion of my involvement in the Proceedings and any related appeals, I will, upon the request and direction of the Party who provided Protected Records to me, destroy, return or otherwise dispose of all Protected Records received or made by me having been duly authorized and directed to do so.
8. I hereby attorn to the jurisdiction of the Tribunal to resolve any disputes arising under this Undertaking.

DATED this ___ day of _____, 2022.

SIGNED, SEALED & DELIVERED in the presence of:

Name of witness

Name of signatory

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

John S. Tyhurst
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Katherine Rydel
Ryan Caron
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Rogers Communications Inc.

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