

FILED / PRODUIT

Date: July 21, 2022

CT- 2022-002

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

CT-2002-002

THE COMPETITION TRIBUNAL

OTTAWA, ONT.

Doc. # 71

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATION INC. AND SHAW COMMUNICATIONS INC.

Respondents

MOTION RECORD
(Confidentiality & Privilege Motion)

July 21, 2022

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TAB A

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATION INC. AND SHAW COMMUNICATIONS INC.

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT Rogers Communications Inc. ("**Rogers**") and Shaw Communications Inc. ("**Shaw**", and together, the "**Moving Parties**") will make a motion to the Competition Tribunal ("**Tribunal**") on August 4, 2022, pursuant to the Tribunal's June 17, 2022 Scheduling Order.

THIS MOTION IS FOR:

- (a) An Order that the following documents and records the Commissioner has designated "Confidential – Level A" be redesignated as "Confidential –

Level B” under the Tribunal’s May 19, 2022 Confidentiality Order

(“**Confidentiality Order**”):

- (i) the expert reports, affidavits and associated exhibits in the Commissioner’s Application Record delivered in support of his Application under s. 104 of the *Competition Act* (“**Commissioner’s s. 104 Record**”); and
 - (ii) the productions the Commissioner served on July 15, 2022 in his Application under s. 92 of the *Competition Act*, as set out in Schedule “A” to his Affidavit of Documents (“**Commissioner’s Productions**”);
- (b) An Order that the following documents from the Commissioner’s Productions over which he asserts litigation privilege are not privileged and must be produced:
- (i) records to, from, or copying third parties outside the Commissioner and his staff, except for those communications specifically and solely concerning the preparation of affidavits sworn by such third parties in support of the Commissioner’s s. 104 Application;
 - (ii) records created by, produced by, or received from third parties, or recording information or communications with third parties, whether at the request of the Commissioner, pursuant to an order, or voluntarily; and

- (iii) all other records not specifically and solely concerning the preparation of affidavits sworn in support of the Commissioner's s. 104 Application.
- (c) the Moving Parties' costs of this motion; and
- (d) such further relief as the Moving Parties may request and the Tribunal may permit.

THE GROUNDS FOR THIS MOTION ARE:

Background

- (a) Rogers is a publicly traded company that provides wireline internet services to customers in Ontario, New Brunswick, and Newfoundland, and wireless cellular and data services to customers across Canada.
- (b) Shaw is a publicly traded company that provides wireline services to customers in Western Canada and Northern Ontario. It also provides wireless services in British Columbia, Alberta and Ontario.
- (c) On March 13, 2021, Rogers and Shaw entered into an Arrangement Agreement. Rogers agreed to purchase all the issued and outstanding shares of Shaw for approximately \$26 billion, including the assumption of debt (the "**Transaction**").
- (d) On May 8, 2022, the Commissioner commenced this application under s. 92 of the *Competition Act* (the "**s. 92 Application**") for an order blocking

the Transaction in its entirety, alleging that it would substantially prevent or lessen competition in the wireless services markets in Ontario, British Columbia and Alberta.

- (e) That same day, the Commissioner commenced an Application under s. 104 of the *Competition Act* seeking interim orders to prohibit Rogers and Shaw from closing the Transaction pending the Tribunal's disposition of the s. 92 Application, and to prohibit Rogers from enforcing any agreement that would limit Shaw's wireless business, including its proposed divestiture of Freedom.
- (f) The Commissioner's s. 104 Record is voluminous. It contains affidavits from 10 fact witnesses and two expert reports. Of particular note, an affidavit from a Senior Competition Law Officer at the Competition Bureau, Laura Sonley (the "**Sonley Affidavit**"), contains 331 exhibits, including various internal emails, communications and presentations from both Rogers and Shaw obtained by the Commissioner through the Competition Bureau's Requests for Information. Other exhibits to the Sonley Affidavit were produced to the Commissioner by third parties, such as Bell, Telus, [REDACTED], and Xplornet.
- (g) The Commissioner, Rogers and Shaw resolved the s. 104 Application on May 30, 2022 by a Consent Agreement. Rogers and Shaw agreed not to close the Transaction pending the Tribunal's disposition of the s. 92

Application, which would proceed (and has proceeded) on an expedited basis.

The Confidentiality Order and Designations in the s. 104 Record

- (h) Together with the his s. 104 Record, the Commissioner circulated his proposed form of Confidentiality Order to Rogers and Shaw. The Tribunal subsequently issued its Confidentiality Order on May 19, 2022 in substantially the same form. The Confidentiality Order applies to all documents produced in the Commissioner’s Applications under both s. 92 and s. 104.
- (i) The Confidentiality Order creates two designations for protected documents:
- (i) “**Level A**” documents may be reviewed only by the Commissioner and his staff/counsel, external counsel to Rogers and Shaw, independent experts and document review vendors (see para. 6). They may not be provided to or reviewed by representatives of Rogers and Shaw, including the designated representatives described below; and
- (ii) “**Level B**” documents can be accessed by all individuals who are entitled to access “Level A” documents, as well as a very limited number of designated representatives of Rogers and Shaw who execute a confidentiality undertaking. These “designated representatives” may include in-house counsel.

- (j) The Confidentiality Order in the first instance places responsibility for designating a document as either “Level A” or “Level B” on “the Party producing the record” “at the time of production” (para. 5(a)).
- (k) The Confidentiality Order provides that the Commissioner may designate a document as “Level A” if the document contains “any information that could identify a Third Party who is reasonably concerned about the public disclosure of its identity” (para. 3). The Confidentiality Order does not provide any other basis for the Commissioner to designate a document as “Level A”.
- (l) When Rogers and Shaw produced documents to the Commissioner in response to his Requests for Information, none of those documents was designated as either “Level A” or “Counsel’s Eyes Only”. At the time, this proceeding had yet to be commenced and there was no formal Confidentiality Order in place. Instead, Rogers and Shaw each requested that their documents be treated as confidential in cover letters accompanying the productions.
- (m) The Commissioner marked all confidential documents contained in his s. 104 Record as “Level A”, including over 200 documents exhibited to the Sonley Affidavit that the Commissioner received from Rogers, Shaw and third parties. The Commissioner did not designate any document in his s. 104 Record as “Level B”, such that they could be shared with Rogers’ and

Shaw's designated representatives who have given confidentiality undertakings.

- (n) The Commissioner did not provide any basis for this blanket use of the "Level A" designation. Nor did he raise any concern relating to the public disclosure of a third party's identity.

Requests that the Commissioner Re-Designate Confidential Documents

- (o) On May 24, 2022, counsel for Shaw sought the Commissioner's agreement that all confidential documents in the s. 104 Record marked as "Level A" be re-designated "Level B" pursuant to the Confidentiality Order. The basis for this request was that the Commissioner had not identified a reasonable concern about the public disclosure of a third party's identity in connection with any document marked as "Level A".
- (p) The Commissioner's counsel replied that the "Level A" designation was intentional because "the [Competition] Bureau is naturally concerned about competitors Rogers and Shaw sharing competitively sensitive information". The Commissioner's counsel did not provide any basis for the alleged concern regarding competitively sensitive information. Nor did the Commissioner's counsel identify any concern about the disclosure of a third party's identity in connection with the documents marked as "Level A". The identities of all individuals who swore or affirmed affidavits contained in the s. 104 Record were publicly disclosed, including representatives of Bell, Telus and other third parties.

- (q) On July 6 and 7, 2022, counsel for Rogers and Shaw advised the Commissioner's counsel that the "Level A" designations in the s. 104 Record were overbroad and contrary to the Confidentiality Order. Counsel for Rogers and Shaw requested confirmation by July 11, 2022 that these documents could be treated as "Level B"—such that they can be shared with the parties' designated representatives, including for the purpose of providing instructions to counsel—unless the Commissioner could identify a basis for the heightened "Level A" protections under section 3 of the Confidentiality Order.
- (r) By email dated July 11, 2022, the Commissioner declined to change his position, and instructed the Moving Parties to "continue to treat materials marked as Level A as Level A"—again without identifying any reasonable concern relating to the disclosure of a third party's identity, nor any grounds for his alleged concerns regarding competitively sensitive information.

Commissioner's Confidentiality Designations in s. 92 Application Productions

- (s) On July 15, 2022, the Commissioner delivered his Affidavit of Documents and associated Productions in his s. 92 Application.
- (t) The Commissioner's "Schedule A" Productions are extensive, totalling 2,630,798 documents—of which 2,621,401 (*i.e.* over 99.6%) have been designated as "Confidential – Level A". Only 8,332 (*i.e.* less than 0.32%) have been designated as "Confidential – Level B".

- (u) The Commissioner has not identified any basis for his broad “Level A” designations, whether under the Confidentiality Order or otherwise.

The Commissioner’s Confidentiality Designations are Unsupportable

- (v) Despite repeated requests from Rogers and Shaw, the Commissioner has failed or refused to identify any reasonable concern pertaining to the public disclosure of a third party’s identity in connection with the documents contained in his s. 104 Record or in his Productions. Nor has he provided any evidentiary basis to justify any such purported concern.
- (w) The Commissioner’s attempt to use the “Level A” designation to shield information he believes could be competitively sensitive—and prevent disclosure of such information to the designated representatives of Rogers and Shaw—is improper and contrary to the express terms of the Confidentiality Order.
- (x) Nor can the Commissioner show that designating every single document in the s. 104 Record and nearly 99.7% of the documents in his Productions as “Level A” is either necessary or warranted.
- (y) The Confidentiality Order, which was negotiated and agreed to by all parties to this proceeding, already provides robust protection for various forms of “competitively sensitive and/or proprietary information” under the “Level B” designation. Specifically:

- (i) section 7(b) of the Confidentiality Order provides that confidentiality undertakings may be given by designated representatives of Rogers and Shaw. The Chief Legal Officer for Rogers and Shaw's Executive Vice President & Chief Legal and Regulatory Officer executed their confidentiality undertakings on May 27, 2022 and July 7, 2022, respectively. A small number of additional executives of Rogers and Shaw have subsequently executed confidentiality undertakings as well; and
- (ii) the Confidentiality Order is supplemented by the deemed undertaking in s. 62 of the *Competition Tribunal Rules*, which provides that "[a]ll parties and their counsel are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained".
- (z) The Commissioner has not provided any basis as to why designating documents in the s. 104 Record or his Productions as "Level A" is necessary given the above protections.
- (aa) Designating documents as "Level A", which restricts their availability only to external counsel and experts, amounts to a "counsel's eyes only" protective order. The Commissioner has not identified any basis for such a protective order, nor provided any evidence to establish that disclosure of the impugned documents to a limited number of Rogers and Shaw

designated representatives would present a serious threat that is real, substantial and grounded in the evidence. Nor could the Commissioner plausibly do so.

- (bb) The burden rests on the Commissioner to justify his “Level A” designations, and to do so on a document-by-document basis. Rogers and Shaw are entitled to have their designated representatives review each and every document in respect of which the Commissioner cannot discharge that burden.
- (cc) The effect of the Commissioner’s approach to the issue of confidentiality is to limit unjustifiably the exchange of information among counsel and the designated representatives of Rogers and Shaw. It interferes unfairly with the solicitor-client relationship between Rogers and Shaw and their respective external counsel, and impedes external counsel’s ability to properly and fairly advise their client and obtain informed instructions in defending a proceeding that is of critical importance to them.

Commissioner’s Privilege Claims in s. 92 Application Productions

- (dd) Schedule B to the Affidavit of Documents delivered by the Commissioner on July 15, 2022 lists 748 over which privilege is claimed. Those documents have been withheld from Rogers and from Shaw.
- (ee) Of the documents over which the Commissioner asserts litigation privilege:

- (i) a significant majority are communications with third parties that could not, based on their date and other information provided in the Commissioner's Schedule B, concern the preparation of affidavits for the Commissioner's s. 104 Application. Litigation privilege cannot and does not attach to these communications;
 - (ii) a significant number have had all identifying information and metadata redacted, and are simply listed as "Document from a Third Party" or "Internal Bureau Document". Leaving aside the Commissioner's improper redaction of information, litigation privilege cannot attach to documents created by third parties; and
 - (iii) for most of the remaining documents, the Commissioner has provided no apparent basis for his claim to litigation privilege and it is clear that the documents do not concern the preparation of affidavits for the Commissioner's s. 104 Application.
- (ff) The Commissioner has adopted an overbroad and unjustifiable approach to withholding documents on the basis of privilege. There is no basis for the Commissioner's wide-ranging claims to litigation privilege. Aside from records specifically and solely concerning the preparation of affidavits sworn in support of the Commissioner's s. 104 Application, all records over which the Commissioner has claimed litigation privilege must be produced.

General

- (gg) section 2(1), 34, 61, 62, 66 and Part 3 of the *Competition Tribunal Rules*;

- (hh) section 8.1 of the *Competition Tribunal Act*; and
- (ii) such further and other grounds as the Moving Parties may advise and the Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the

Motion:

- (a) an affidavit, to be sworn; and
- (b) such further and other evidence as the Moving Parties may advise and the Tribunal may permit.

July 20, 2022

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TAB B

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATION INC. AND SHAW COMMUNICATIONS INC.

Respondents

AFFIDAVIT OF ASHLEY MCKNIGHT


I, Ashley McKnight, of the City of Oshawa, in the Regional Municipality of Durham, MAKE OATH AND SAY:

1. I am a law clerk with the law firm of Lax O'Sullivan Lisus Gottlieb LLP, lawyers for the Respondent, Rogers Communication Inc. I therefore have knowledge of the matters contained in this Affidavit. Where I rely on information from others, I have stated the source of that information and believe it to be true.

2. Attached as [Exhibit 1](#) is a letter from counsel to the Applicant Commissioner of Competition (the “**Commissioner**”), Derek Leschinsky, to the distribution list. Mr. Leschinsky’s letter encloses a draft confidentiality order, which I attach as [Exhibit 2](#).
3. Attached as [Exhibit 3](#) is a Confidentiality Order issued by the Competition Tribunal on May 19, 2022.
4. Attached as [Exhibit 4](#) is an email chain that began with an email from counsel to the Respondent Shaw Communications Inc. (“**Shaw**”), Derek Ricci, to counsel to the Commissioner, Derek Leschinsky, dated May 24, 2022. The last email in this chain is from Mr. Leschinsky to counsel to the Respondent Rogers Communications Inc. (“**Rogers**”), Crawford Smith, and is dated July 11, 2022.
5. Attached as [Exhibit 5](#) is the confidentiality undertaking from Rogers’s Chief Legal Officer, Marisa Wyse, dated and filed with the Tribunal on May 27, 2022.
6. Attached as [Exhibit 6](#) is the confidentiality undertaking from Shaw’s Executive Vice President and Chief Legal Officer, Peter Johnson, dated and filed with the Tribunal on July 7, 2022.
7. I am advised by John Carlo Mastrangelo, a lawyer at Lax O’Sullivan Lisus Gottlieb LLP, that the Commissioner delivered an Affidavit of Documents and productions in his application under s. 92 of the *Competition Act* on July 15, 2022. Attached as [Exhibit 7](#) is “Schedule B” to the Commissioner’s Affidavit of Documents, with a Level A confidentiality designation.

8. I am advised by Mr. Mastrangelo that "Schedule A" to the Commissioner's Affidavit of Documents is voluminous. It is not attached to this affidavit, but can be made available to this Tribunal on request.

SWORN by Ashley McKnight at the City of Toronto, in the Province of Ontario, before me on July 20, 2022.



Commissioner for Taking Affidavits
(or as may be)



ASHLEY MCKNIGHT

JOHN CARLO MASTRANGELO
LSO #: 76002P

This is Exhibit "1" referred to in the Affidavit of Ashley McKnight sworn July 20, 2022.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASFRANGELO

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May 6, 2022

BY EMAIL

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Dear Counsel:

Re: The proposed acquisition of Shaw Communications Inc. by Rogers Communications Inc.

Further to my letter dated May 2, 2022 and your correspondence and other submissions over the course of the last week, the Bureau has carefully reviewed these materials. As you know, these materials raise issues which have been before the Bureau for over a year; the Bureau does not consider that the limited new information recently received, in conjunction with the entirety of the other material provided by the parties and third parties, has changed the views which were set out in meetings and correspondence since October 6, 2021 and most recently in meetings on April 27 and 29, 2022. As stated in the referenced letter, the Commissioner is strongly of the view that protection of the public interest in competition, including clear evidence of the competitive decline of the Shaw wireless business since the announcement of the proposed transaction, requires that this matter be placed before the Competition Tribunal.

We have thus received instructions from the Commissioner to file applications under sections 92 and 104 of the Competition Act in this matter, *inter alia*, seeking to block the closing of the transaction pursuant to section 92 and interim orders pursuant to section 104. We are providing this information on a confidential basis today, after market close, as requested by counsel.

We would ask counsel to confirm that you will accept electronic service of the applications and supporting material using your firm's respective file transfer websites. That would facilitate sending and receipt for both applicant and respondents. We would

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ask for your separate responses on behalf of your respective clients within the next hour, so that we may make arrangements accordingly.

We will not be in a position to provide the applications until they are filed with the Tribunal, which we expect will occur as early as Monday. As soon as we have certified copies of the applications in hand, we will serve same electronically, assuming your consent as above.

We would also ask that you confirm that copies of the unredacted materials will not be disclosed to any client and will be held on an outside counsel basis for only counsel and independent experts until a confidentiality order can be registered and confidentiality claims are settled. (Attached is a copy of the order used in the Secure proceeding which is now before the Tribunal, which provides a precedent. We propose seeking an order on consent along the same lines from the Tribunal in due course.)

Finally, pursuant to the Tribunal's Practice Direction Regarding an Expedited Process Before the Tribunal, we have instructions to seek an expedited process for the hearing of this matter and the Practice Direction indicates that we are to signal whether there is consent to same at the time of filing the application. We have until 5 days after filing to signal to the Tribunal whether an order is being sought where there is no consent, so this issue is somewhat less urgent.

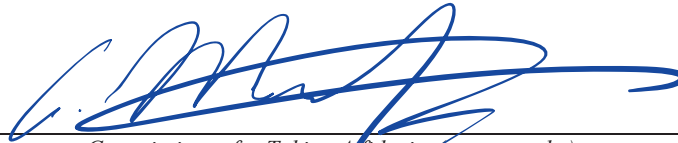
Thank you in advance for your cooperation,

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Derek", with a long horizontal flourish extending to the right.

Derek Leschinsky
Senior Counsel
Competition Bureau Legal Services

This is Exhibit "2" referred to in the Affidavit of Ashley McKnight sworn July 20, 2022.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2021 Comp Trib 6

File No.: CT-2021-002

Registry Document No.: 26

IN THE MATTER OF the applications filed by the Commissioner of Competition (the “Commissioner”) against the Respondent (“Secure”) pursuant to sections 92 and 104 of the Competition Act, RSC 1985, c C-34, as amended

BETWEEN:

Commissioner of Competition
(applicant)

and

Secure Energy Services Inc.
(respondent)



Decided on the basis of the written record

Before Judicial Member: J. Gagné

Date of order: July 13, 2021

CONFIDENTIALITY ORDER

FURTHER TO the acquisition of Tervita Corporation (previously named as a respondent in this file) by Secure;

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*, R.S.C. 1985, c. C-34, as amended;
- (b) **“Affiliate”** has the same meaning as in subsection 2(2) of the Act;
- (c) **“Designated Representatives”** means one in house counsel and up to six additional individuals designated by the Respondent 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 objection to such designations;
- (d) **“Independent Expert”** means an expert retained by a Party with respect to the Proceedings who (i) is not a current employee of the Respondent; (ii) has not been an employee of the Respondent within 2 years prior to the date of this Order, (iii) is not a current employee of a competitor of the Respondent; (iv) has not been an employee of a competitor of the 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;
- (e) **“Parties”** means the Commissioner and the Respondent collectively, and **“Party”** means any one of them;
- (f) **“Person”** means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;
- (g) **“Proceedings”** means the applications filed by the Commissioner against the Respondents (File Number CT-2021-002) for orders pursuant to sections 92 and 104 of the Act;
- (h) **“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;
- (i) **“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;
- (j) **“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;
- (k) **“Respondent”** means Secure (as defined below);
- (l) **“Secure”** means Secure Energy Services 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;
- (m) **“Third Party”** means any Person other than the Commissioner or the Respondent; and
- (n) **“Tribunal”** means the Competition Tribunal established pursuant to subsection 3(1) of the *Competition Tribunal Act*, R.S.C. 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 extent they or the information therein are not already publicly available, and such Records may be designated as Protected Records:

- (a) information relating to prices, capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives produced by the Respondent or a Third Party;
- (b) confidential contractual arrangements between the Respondent and their customers, agents, and/or suppliers or between a Third Party and their customers, agents, and/or suppliers;

- (c) financial data or reports, or financial information relating to the Respondent or its customers, suppliers or a Third Party;
- (d) business plans, marketing plans, strategic plans, budgets, forecasts and other similar information of the Respondent or a Third Party;
- (e) internal market studies and analyses of the 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 the 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 a 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 the Respondent or otherwise originated from the 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 a Protected Record, 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 Respondent 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 either Party from having full access to or, in the case of the Respondent only, using or disclosing Protected Records that originated from that Party.
- [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) the Tribunal may determine whether the Record should be treated as a Protected Record;

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- (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 Respondent 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 Ottawa, this 13th day of July 2021.

SIGNED on behalf of the Tribunal by Jocelyne Gagné.

(s) Jocelyne Gagné

COUNSEL OF RECORD:

For the applicant:

Attorney General of Canada

Jonathan Hood

Paul Klippenstein

Ellé Nekiar

For the respondent:

Blake Cassels & Graydon LLP

Robert E. Kwinter

Brian Facey

Nicole Henderson

This is Exhibit "3" referred to in the Affidavit of Ashley McKnight sworn July 20, 2022.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

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.

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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
Derek Leschinsky
Katherine Rydel
Ryan Caron
Suzanie Chua
Marie-Hélène Gay
Kevin Hong

For the respondents:

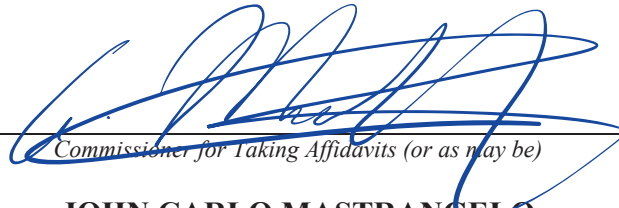
Rogers Communications Inc.

Jonathon Lisus
Crawford Smith

Shaw Communications Inc.

Kent E. Thomson
Derek D. Ricci
Steven G. Frankel

This is Exhibit "4" referred to in the Affidavit of Ashley McKnight sworn July 20, 2022.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANCELO

From: Leschinsky, Derek (CB/BC) <derek.leschinsky@cb-bc.gc.ca>
Sent: July-11-22 1:23 PM
To: Ricci, Derek <dricci@dwpv.com>; Crawford Smith <csmith@lolg.ca>; Tyhurst, John (CB/BC) <John.Tyhurst@cb-bc.gc.ca>
Cc: Jonathan Lisus <jlisus@lolg.ca>; Brad Vermeersch <bvermeersch@lolg.ca>; Banicevic, Anita <ABanicevic@dwpv.com>; Wall, Jonathan <JWall@goodmans.ca>; Thomson, Kent <KentThomson@dwpv.com>; Frankel, Steven <sfrankel@dwpv.com>; Cormack, Sarah <SCormack@dwpv.com>; Syed, Amani (CB/BC) <Amani.Syed@cb-bc.gc.ca>; Mohammad, Raha (CB/BC) <raha.mohammad@cb-bc.gc.ca>; Bakelaar, Darian (CB/BC) <darian.bakelaar@cb-bc.gc.ca>; Rydel, Katherine (CB/BC) <Katherine.Rydel@cb-bc.gc.ca>; Bodrug, John <JBodrug@dwpv.com>; Hong, Kevin (CB/BC) <Kevin.Hong@cb-bc.gc.ca>; Rosner, David <DRosner@goodmans.ca>; Caron, Ryan (CB/BC) <Ryan.Caron@cb-bc.gc.ca>; Kearney, Elisa <ekearney@dwpv.com>
Subject: RE: Rogers/Shaw - Confidentiality Order [LOLG-DMS.FID125335]

Counsel,

We are following up with the Bureau regarding your emails below. We will not be in a position to confirm any different position by 4 pm today than we have previously communicated to you. The parties should continue to treat materials marked as Level A as Level A. We do not agree that the parties are entitled to depart, unilaterally, from the designations so marked. In the meantime, could you please identify each person who a party might identify as a Designated Representative in addition to Ms. Wyse and Mr. Johnson?

Thank you,

Derek Leschinsky
Senior Counsel
Competition Bureau Legal Services
Department of Justice / Government of Canada
Derek.Leschinsky@cb-bc.gc.ca / 613-818-1611

Avocat principal
Services juridiques Bureau de la concurrence Canada
Ministère de la Justice / Gouvernement du Canada
Derek.Leschinsky@bc-cb.gc.ca / 613-818-1611

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From: Ricci, Derek <dricci@dwpv.com>

Sent: July 7, 2022 5:21 PM

To: Crawford Smith <csmith@lolg.ca>; Leschinsky, Derek (CB/BC) <derek.leschinsky@cb-bc.gc.ca>; Tyhurst, John (CB/BC) <John.Tyhurst@cb-bc.gc.ca>

Cc: Jonathan Lisus <jlisus@lolg.ca>; Brad Vermeersch <bvermeersch@lolg.ca>; Banicevic, Anita <ABanicevic@dwpv.com>; Wall, Jonathan <JWall@goodmans.ca>; Thomson, Kent <KentThomson@dwpv.com>; Frankel, Steven <sfrankel@dwpv.com>; Cormack, Sarah <SCormack@dwpv.com>; Syed, Amani (CB/BC) <Amani.Syed@cb-bc.gc.ca>; Mohammad, Raha (CB/BC) <raha.mohammad@cb-bc.gc.ca>; Bakelaar, Darian (CB/BC) <darian.bakelaar@cb-bc.gc.ca>; Rydel, Katherine (CB/BC) <Katherine.Rydel@cb-bc.gc.ca>; Bodrug, John <JBodrug@dwpv.com>; Hong, Kevin (CB/BC) <Kevin.Hong@cb-bc.gc.ca>; Rosner, David <DRosner@goodmans.ca>; Caron, Ryan (CB/BC) <Ryan.Caron@cb-bc.gc.ca>; Kearney, Elisa <ekearney@dwpv.com>

Subject: RE: Rogers/Shaw - Confidentiality Order [LOLG-DMS.FID125335]

John, Derek:

We agree with Crawford's email below.

Peter Johnson, Executive Vice President & Chief Legal and Regulatory Officer of Shaw, has filed a Confidentiality Undertaking with the Tribunal authorizing him to review confidential material. Our intention is to provide all section 104 materials to Mr. Johnson, unless you advise of the specific portions of the record that are Level A Protected by 4pm on July 11.

We also expect to designate additional representatives of Shaw in due course.

Regards,

Derek.

From: Crawford Smith <csmith@lolg.ca>

Sent: July 6, 2022 5:09 PM

To: Leschinsky, Derek (CB/BC) <derek.leschinsky@cb-bc.gc.ca>; Tyhurst, John (CB/BC) <John.Tyhurst@cb-bc.gc.ca>

Cc: Jonathan Lisus <jlisus@lolg.ca>; Brad Vermeersch <bvermeersch@lolg.ca>; Ricci, Derek <dricci@dwpv.com>; Banicevic, Anita <ABanicevic@dwpv.com>; Wall, Jonathan <JWall@goodmans.ca>; Thomson, Kent <KentThomson@dwpv.com>; Frankel, Steven <sfrankel@dwpv.com>; Cormack, Sarah <SCormack@dwpv.com>; Syed, Amani (CB/BC) <Amani.Syed@cb-bc.gc.ca>; Mohammad, Raha (CB/BC) <raha.mohammad@cb-bc.gc.ca>; Bakelaar, Darian (CB/BC) <darian.bakelaar@cb-bc.gc.ca>; Rydel, Katherine (CB/BC) <Katherine.Rydel@cb-bc.gc.ca>; Bodrug, John <JBodrug@dwpv.com>; Hong, Kevin (CB/BC) <Kevin.Hong@cb-bc.gc.ca>; Rosner, David <DRosner@goodmans.ca>; Caron, Ryan (CB/BC) <Ryan.Caron@cb-bc.gc.ca>; Kearney, Elisa <ekearney@dwpv.com>

Subject: RE: Rogers/Shaw - Confidentiality Order [LOLG-DMS.FID125335]

External Email / Courriel externe

John, Derek

We have reflected on Derek Ricci's note below and the parties' discussions last month. We have also reviewed the issued Confidentiality Order and the relevant cases both before the Competition Tribunal and the Federal Court concerning the use of the Level A designation and the test required for a protective order. It remains our view that the Commissioner's designation of all of the materials as "Level A" confidentiality is overinclusive and inconsistent with the Confidentiality Order. The Level A designation in the Order is reserved for information designated by the Commissioner that could identify a third party who is reasonably concerned about the public disclosure of its identity.

Your May 24 email and our last discussion on this topic suggest that the Commissioner is using the Level A designation to shield information he believes could be competitively sensitive. This is inconsistent with the express terms of the Order and an improper use of the Level A designation. Further, the concern you have articulated – assuming it is valid - is answered entirely by the undertaking attached to the Order which must be provided by designated representatives, not to mention the implied undertaking in section 62 of the *Competition Tribunal Rules*. In any event, it is the Commissioner who must demonstrate with evidence that there is a specific, direct harm that would result from disclosure of the information. The Commissioner's concern that Rogers and Shaw will receive competitively sensitive information is an insufficient basis to shield the small number of designated representatives at Shaw or Rogers from reviewing the vast majority of the s. 104 materials, even if this were permitted by the Order which it is not. There is no specific, direct harm flowing from sharing the s. 104 record with the limited number of designated representatives for Shaw and Rogers and the Commissioner has not adduced any evidence to suggest there would be.

Marisa Wyse for Rogers has filed the undertaking with the Tribunal to authorize her to review confidential material. Our intention is to provide all section 104 materials to Ms. Wyse unless you advise of the portions of the record that are Level A Protected by 4pm on July 11. We expect further designated representatives will be identified in due course.

If there is an issue with this approach, we intend to bring a motion. As you can appreciate, with production being made next Friday, it is important the parties reach a resolution of this issue promptly.

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From: Leschinsky, Derek (CB/BC) <derek.leschinsky@cb-bc.gc.ca>
Sent: May-24-22 9:48 AM
To: Ricci, Derek <dricci@dwpv.com>
Cc: Jonathan Lissus <jlissus@lolg.ca>; Crawford Smith <csmith@lolg.ca>; Brad Vermeersch <bvermeersch@lolg.ca>; Koch, Michael <mkoch@goodmans.ca>; Banicevic, Anita <ABanicevic@dwpv.com>; Wall, Jonathan <JWall@goodmans.ca>; Thomson, Kent <KentThomson@dwpv.com>; Frankel, Steven <sfrankel@dwpv.com>; Cormack, Sarah <SCormack@dwpv.com>; Rosenthal, Julie <jrosenthal@goodmans.ca>; Syed, Amani (CB/BC) <Amani.Syed@cb-bc.gc.ca>; Mohammad, Raha (CB/BC) <raha.mohammad@cb-bc.gc.ca>; Bakelaar, Darian (CB/BC) <darian.bakelaar@cb-bc.gc.ca>; Tyhurst, John (CB/BC) <John.Tyhurst@cb-bc.gc.ca>; Chua, Suzanie (CB/BC) <suzanie.chua@cb-bc.gc.ca>; Rydel, Katherine (CB/BC) <Katherine.Rydel@cb-bc.gc.ca>; Bodrug, John <JBodrug@dwpv.com>; Hong, Kevin (CB/BC) <Kevin.Hong@cb-bc.gc.ca>; Gay, Marie-Helene (CB/BC) <Marie-Helene.Gay@cb-bc.gc.ca>; Rosner, David <DRosner@goodmans.ca>; Caron, Ryan (CB/BC) <Ryan.Caron@cb-bc.gc.ca>; Kearney, Elisa <ekearney@dwpv.com>
Subject: RE: Rogers/Shaw - Confidentiality Order

Derek,

The designation of records as Level A confidential by the Bureau was intentional and subject to further consideration of particular designations you might bring to our attention, is something that the Bureau intends to maintain. Among other things, the Bureau is naturally concerned about competitors Rogers and Shaw sharing competitively sensitive information. We trust that you understand the competition basis for this approach and that the Respondents will maintain all Level A designations.

Thank you,

Derek Leschinsky
Senior Counsel
Competition Bureau Legal Services
Department of Justice / Government of Canada
Derek.Leschinsky@cb-bc.gc.ca / 613-818-1611

Avocat principal
Services juridiques Bureau de la concurrence Canada
Ministère de la Justice / Gouvernement du Canada
Derek.Leschinsky@bc-cb.gc.ca / 613-818-1611

From: Ricci, Derek <dricci@dwpv.com>
Sent: May 24, 2022 8:55 AM
To: Leschinsky, Derek (CB/BC) <derek.leschinsky@cb-bc.gc.ca>
Cc: Jonathan Lissus <jlissus@lolg.ca>; Crawford Smith <csmith@lolg.ca>; Brad Vermeersch

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<bvermeersch@lolg.ca>; Koch, Michael <mkoch@goodmans.ca>; Banicevic, Anita <ABanicevic@dwpv.com>; Wall, Jonathan <JWall@goodmans.ca>; Thomson, Kent <KentThomson@dwpv.com>; Frankel, Steven <sfrankel@dwpv.com>; Cormack, Sarah <SCormack@dwpv.com>; Rosenthal, Julie <jrosenthal@goodmans.ca>; Syed, Amani (CB/BC) <Amani.Syed@cb-bc.gc.ca>; Mohammad, Raha (CB/BC) <raha.mohammad@cb-bc.gc.ca>; Bakelaar, Darian (CB/BC) <darian.bakelaar@cb-bc.gc.ca>; Tyhurst, John (CB/BC) <John.Tyhurst@cb-bc.gc.ca>; Chua, Suzanie (CB/BC) <suzanie.chua@cb-bc.gc.ca>; Rydel, Katherine (CB/BC) <Katherine.Rydel@cb-bc.gc.ca>; Bodrug, John <JBodrug@dwpv.com>; Hong, Kevin (CB/BC) <Kevin.Hong@cb-bc.gc.ca>; Gay, Marie-Helene (CB/BC) <Marie-Helene.Gay@cb-bc.gc.ca>; Rosner, David <DRosner@goodmans.ca>; Caron, Ryan (CB/BC) <Ryan.Caron@cb-bc.gc.ca>; Kearney, Elisa <ekearney@dwpv.com>

Subject: Rogers/Shaw - Confidentiality Order

Derek:

I'm writing concerning the confidentiality designation of the materials filed to date by the Commissioner.

The Confidentiality Order issued by the Tribunal last week (attached) contemplates two types of "Protected Records" – Level A Protected and Level B Protected. Pursuant to paragraph 3 of the Confidentiality Order, the Level A Protected designation is restricted to information designated by the Commissioner that "could identify a Third Party who is reasonably concerned about the public disclosure of its identity". The Level B Protected designation applies to all other Protected Records.

To the extent that the materials filed to date by the Commissioner include a confidentiality designation, the Commissioner has used only the "Level A" designation, rather than the "Level B" designation. The Commissioner's use of the "Level A" designation – which, in fairness, pre-dates the issuance of the Confidentiality Order – appears to us to be in error. Instead, it is apparent based on our review of the materials that the Commissioner intended to apply the "Level B" designation to the materials in question. We have not to date identified any material that could properly fall within the "Level A" designation.

Accordingly, unless we hear from you by 2:00 pm today, we will proceed on the basis that all of the "Level A" designations in the Commissioner's materials are, in fact, "Level B" designations.

While we are eager to sort out this labelling issue as soon as possible in order to allow disclosure of information to Designated Representatives, we continue to reserve all of our rights with respect to the Commissioner's confidentiality designations.

Kind regards,

Derek.

Derek Ricci
T 416.367.7471
dricci@dwpv.com

[Bio](#) | [vCard](#)

DAVIES

155 Wellington Street West
Toronto, ON M5V 3J7
dwpv.com

DAVIES WARD PHILLIPS & VINEBERG LLP

This email may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone. Delete this email and destroy any copies.

This is Exhibit "5" referred to in the Affidavit of Ashley McKnight sworn July 20, 2022.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

SCHEDULE "A"

Confidentiality Undertaking

IN CONSIDERATION of being provided with Protected Records, I Marisa Wyse, of the City of Toronto, in the Province/State of Ontario, 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 May 19, 2022, 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.

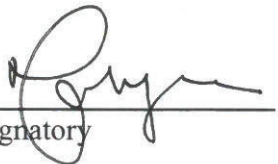
7. I will promptly, upon the request of the Party who provided Protected Records to me, advise where they are kept. At the conclusion of my involvement in the Proceedings and any related appeals, I will, upon the request and direction of the Party who provided Protected Records to me, destroy, return 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 27th day of May, 2022.

SIGNED, SEALED & DELIVERED in the presence of:



Name of witness
RON MCKENZIE

MARISA WYSE 

Name of signatory

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: May19, 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.

PUBLIC

DATED at Toronto, this XXth day of May 2022.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

John S. Tyhurst
Derek Leschinsky
Katherine Rydel
Ryan Caron
Suzanie Chua
Marie-Hélène Gay
Kevin Hong

For the respondents:

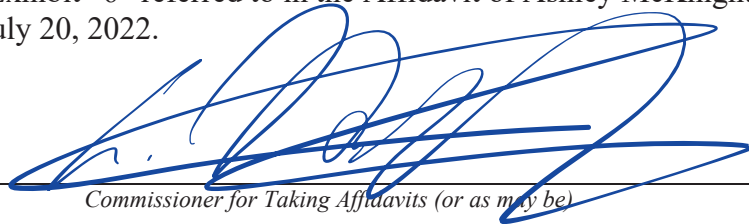
Rogers Communications Inc.

Jonathon Lisus
Crawford Smith

Shaw Communications Inc.

Kent E. Thomson
Derek D. Ricci
Steven G. Frankel

This is Exhibit "6" referred to in the Affidavit of Ashley McKnight sworn July 20, 2022.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

SCHEDULE "A"

Confidentiality Undertaking

IN CONSIDERATION of being provided with Protected Records, I Peter A. Johnson, of the City of Calgary, in the Province/State of Alberta, 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 May 19, 2022, 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 7th day of July, 2022.

SIGNED, SEALED & DELIVERED in the presence of:

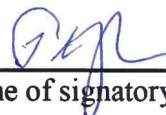
Alison Hughes

Name of witness



Peter A. Johnson

Name of signatory



COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

John S. Tyhurst
Derek Leschinsky
Katherine Rydel
Ryan Caron
Suzanie Chua
Marie-Hélène Gay
Kevin Hong

For the respondents:

Rogers Communications Inc.

Jonathon Liss
Crawford Smith

Shaw Communications Inc.

Kent E. Thomson
Derek D. Ricci
Steven G. Frankel

This is Exhibit "7" referred to in the Affidavit of Ashley McKnight sworn July 20, 2022.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

DOCID	DOCDATE	TITLE	PEOPLE/ORGANIZATIONS FROM	PEOPLE/ORGANIZATIONS TO	PEOPLE/ORGANIZATIONS CC	DOCTYPE	CONFIDENTIALITY	PRIVILEGE	
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RBCH0002_00001464							Level A	Litigation Privilege	
RBCH0002_000002035	6/17/2021	RE: Call with Xplornet/xplore Mobile re: Proposed Rogers/Shaw transaction	Carl MacQuarrie <carl.macquarrie@corp.xplornet.com>	"Giles, Karlyn (CB/BC)" <karlyn.giles@cb-bc.gc.ca> "Jakubowski, Ryan (CB/BC)" <ryan.jakubowski@cb-bc.gc.ca> "Kowalczyzyn, Andrew (CB/BC)" <andrew.kowalczyzyn@cb-bc.gc.ca> "Lang, Greg (IC)" <greg.lang@canada.ca> "Leschmsky, Derek (CB/BC)" <derek.leschmsky@cb-bc.gc.ca> "Ranchod, Viresh (CB/BC)" <viresh.ranchod@cb-bc.gc.ca> "Sam, Sorina (IC)" <sorina.sam@canada.ca> "Sansom, Steve (CB/BC)" <steve.sansom@cb-bc.gc.ca> "Sonley, Laura (CB/BC)" <laura.sonley@cb-bc.gc.ca> "Prudham" <cj.prudham@corp.xplornet.com>			Microsoft Outlook Note	Public	Litigation Privilege
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RBCH0009_00001427							Level A	Litigation Privilege
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RBCH0009_00001714	12/8/2021	Quick favour	"Sonley, Laura (CB/BC)" </o=exchange/ou=exchange administrative group (fyd0bf23apdt)/cn=recipients/cn=73b6289d46949f296e59bad6978f417-laura sonle">	"Lelievre, Cédric" <cledrick.lalievre@crtc.gc.ca> "Saicheua, Kay" <kay.saicheua@crtc.gc.ca>		Microsoft Outlook Note	Public	Litigation Privilege
RBCH0009_00001717	12/9/2021	RE: Quick favour	"Sonley, Laura (CB/BC)" </o=exchange/ou=exchange administrative group (fyd0bf23apdt)/cn=recipients/cn=73b6289d46949f296e59bad6978f417-laura sonle">	"Sonley, Laura (CB/BC)" <laura.sonley@cb-bc.gc.ca>	"Kent, Philippe" <philippe.kent@crtc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBCH0009_00001730	1/5/2022	RE: Quick favour	"Lendvay, Jeremy" <jeremy.lendvay@crtc.gc.ca>	"Sonley, Laura (CB/BC)" <laura.sonley@cb-bc.gc.ca>	"Kent, Philippe" <philippe.kent@crtc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
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RBCH0009_00004863	12/8/2021	RE: Quick favour	"Lendvay, Jeremy" <jeremy.lendvay@crtc.gc.ca>	"Sonley, Laura (CB/BC)" <laura.sonley@cb-bc.gc.ca>	"Kent, Philippe" <philippe.kent@crtc.gc.ca> "Lelievre, Cédric" <cledrick.lalievre@crtc.gc.ca> "Nadeau, Philippe" <philippe.nadeau@crtc.gc.ca> "Saicheua, Kay" <kay.saicheua@crtc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
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RBCH0010_00001759	1/18/2022	RE: Quick favour	"Sonley, Laura (CB/BC)" </o=exchange/ou=exchange administrative group (fyd0bf23apdt)/cn=recipients/cn=73b6289d46949f296e59bad6978f417-laura sonle">	"Lendvay, Jeremy" <jeremy.lendvay@crtc.gc.ca>	"Kent, Philippe" <philippe.kent@crtc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
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RBCH0010_00002792							Level A	Litigation Privilege
RBCH0010_00003224	1/18/2022	RE: Quick favour	"Lendvay, Jeremy" <jeremy.lendvay@crtc.gc.ca>	"Sonley, Laura (CB/BC)" <laura.sonley@cb-bc.gc.ca>	"Kent, Philippe" <philippe.kent@crtc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBCH0010_00003506	1/18/2022	RE: Quick favour	"Sonley, Laura (CB/BC)" </o=exchange/ou=exchange administrative group (fyd0bf23apdt)/cn=recipients/cn=73b6289d46949f296e59bad6978f417-laura sonle">	"Lendvay, Jeremy" <jeremy.lendvay@crtc.gc.ca>	"Kent, Philippe" <philippe.kent@crtc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBCH0010_00004079							Level A	Litigation Privilege
RBCH0010_00004348	1/19/2022	RE: Quick favour	"Lendvay, Jeremy" <jeremy.lendvay@crtc.gc.ca>	"Sonley, Laura (CB/BC)" <laura.sonley@cb-bc.gc.ca>	"Kent, Philippe" <philippe.kent@crtc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
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RBCH0011_00000612	2/28/2022	RE: Competition Bureau: Question re [REDACTED]	"Briere, Marie-Helene (CB/BC)" </o=exchange/ou=exchange administrative group (fyd0bf23apdt)/cn=recipients/cn=7ae61b1a9b6d47a89814eaa9b9774edd-marie-helen">	"ews / crbs (STATCAN)" <statcan.csws-crbs.statcan@statcan.gc.ca>	"Asherman, Andrea - CISWS/CSRS" <andrea.asherman@statcan.gc.ca> "Cloutier, Caroline - CISWS/CSRS" <caroline.cloutier@statcan.gc.ca> "Kowalczyzyn, Andrew (CB/BC)" <andrew.kowalczyzyn@cb-bc.gc.ca> "Leschinsky, Doree (CB/BC)"	Microsoft Outlook Note	Public	Litigation Privilege
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RBC00011_00002270	2/25/2022	RE: Competition Bureau: Question re [REDACTED]	'Couture, Caroline - CISWS/CSRSB' <caroline.couture@statcan.gc.ca>	'Brennan, Jim - CISWS/CSRSB' <jim.brennan@statcan.gc.ca>	'Asherman, Andrea - CISWS/CSRSB' <andrea.asherman@statcan.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
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RBC00011_00003909							Level A	Litigation Privilege
RBC00011_00004078							Level A	Litigation Privilege
RBC00011_00004089	3/1/2022	RE: Competition Bureau: Question re [REDACTED]	'Briere, Marie-Helene (CB/BC)' <'f/o=exchange/abs/ou=exchange administrative group (fydlboh23apdt)(cn=recipients/cn=7ae61b1a9b647a89814eaa9b9774edd-marie-helen'>	osws / carbs (STATCAN) <statcan.cisws-carbs.statcan@statcan.gc.ca>	'Asherman, Andrea - CISWS/CSRSB' <andrea.asherman@statcan.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
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RBC00011_00005566							Level A	Litigation Privilege
RBC00011_00005627	2/8/2022	RE: Follow-up questions	'Lendvay, Jeremy' <jeremy.lendvay@crtc.gc.ca>	'Kent, Philippe' <philippe.kent@crtc.gc.ca>	'Kachi, Nanao' <nanao.kachi@crtc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
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RBC00011_00006242	2/23/2022	Competition Bureau: Question re [REDACTED]	'Briere, Marie-Helene (CB/BC)' <'f/o=exchange/abs/ou=exchange administrative group (fydlboh23apdt)(cn=recipients/cn=7ae61b1a9b647a89814eaa9b9774edd-marie-helen'>	'Li, Jiang Beryl - EAD/DAE' <jiangberyl.li@statcan.gc.ca>	'Kowalczyzyn, Andrew (CB/BC)' <andrew.kowalczyzyn@cb-bc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBC00011_00006318							Level A	Litigation Privilege
RBC00011_00006549							Level A	Litigation Privilege
RBC00012_00000029	3/3/2022	RE: [REDACTED]: Correspondence with Third Party	'Sonley, Laura (CB/BC)' <laura.sonley@cb-bc.gc.ca>	'Kachi, Nanao' <nanao.kachi@crtc.gc.ca>	'Leschinsky, Derek (CB/BC)' <derek.leschinsky@cb-bc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBC00012_00000299	3/3/2022	RE: [REDACTED]: Correspondence with Third Party	'Kachi, Nanao' <nanao.kachi@crtc.gc.ca>	'Sonley, Laura (CB/BC)' <laura.sonley@cb-bc.gc.ca>	'Moon, Stephen (CB/BC)' <stephen.moon@cb-bc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBC00012_00000465	3/7/2022	RE: [REDACTED]: Correspondence with Third Party	'Kachi, Nanao' <nanao.kachi@crtc.gc.ca>	'Sonley, Laura (CB/BC)' <laura.sonley@cb-bc.gc.ca>	'Leschinsky, Derek (CB/BC)' <derek.leschinsky@cb-bc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBC00012_00000527							Level A	Litigation Privilege
RBC00012_00000550							Level A	Litigation Privilege
RBC00012_00000601							Level A	Litigation Privilege
RBC00012_00000602							Level A	Litigation Privilege
RBC00012_00000603							Level A	Litigation Privilege
RBC00012_00001063							Level A	Litigation Privilege
RBC00012_00001140							Level A	Litigation Privilege
RBC00012_00001267							Level A	Litigation Privilege
RBC00012_00001268							Level A	Litigation Privilege
RBC00012_00001269							Level A	Litigation Privilege
RBC00012_00001462							Level A	Litigation Privilege
RBC00012_00001626	3/7/2022	RE: [REDACTED]: Correspondence with Third Party	'Kachi, Nanao' <nanao.kachi@crtc.gc.ca>	'Sonley, Laura (CB/BC)' <laura.sonley@cb-bc.gc.ca>	'Leschinsky, Derek (CB/BC)' <derek.leschinsky@cb-bc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBC00012_00001737							Level A	Litigation Privilege
RBC00012_00001738							Level A	Litigation Privilege
RBC00012_00002033	3/8/2022	RE: [REDACTED]: Correspondence with Third Party	'Sonley, Laura (CB/BC)' <laura.sonley@cb-bc.gc.ca>	'Kachi, Nanao' <nanao.kachi@crtc.gc.ca>	'Moon, Stephen (CB/BC)' <stephen.moon@cb-bc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBC00012_00002272	3/7/2022	RE: [REDACTED]: Correspondence with Third Party	'Sonley, Laura (CB/BC)' <laura.sonley@cb-bc.gc.ca>	'Kachi, Nanao' <nanao.kachi@crtc.gc.ca>	'Moon, Stephen (CB/BC)' <stephen.moon@cb-bc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBC00012_00003319							Level A	Litigation Privilege
RBC00012_00003865	3/1/2022	[REDACTED]: Correspondence with Third Party	'Sonley, Laura (CB/BC)' <laura.sonley@cb-bc.gc.ca>	'Kachi, Nanao' <nanao.kachi@crtc.gc.ca>	'Moon, Stephen (CB/BC)' <stephen.moon@cb-bc.gc.ca>	Microsoft Outlook Note	Public	Litigation Privilege
RBC00012_00004087							Level A	Litigation Privilege
RBC00012_00004088							Level A	Litigation Privilege
RBC00014_00000052							Level A	Litigation Privilege
RBC00014_00000055							Level A	Litigation Privilege
RBC00014_00000057							Level A	Litigation Privilege
RBC00014_00000059							Level A	Litigation Privilege
RBC00014_00000061							Level A	Litigation Privilege
RBC00014_00000075							Level A	Litigation Privilege
RBC00014_00000079							Level B	Litigation Privilege
RBC00014_00000085							Level A	Litigation Privilege
RBC00014_00000090							Level A	Litigation Privilege
RBC00014_00000108							Level A	Litigation Privilege
RBC00014_00000109							Level A	Litigation Privilege
RBC00014_00000116							Level A	Litigation Privilege
RBC00014_00000124							Level A	Litigation Privilege
RBC00014_00000127							Level A	Litigation Privilege
RBC00014_00000128							Level A	Litigation Privilege
RBC00014_00000133							Level A	Litigation Privilege
RBC00014_00000145							Level A	Litigation Privilege
RBC00014_00000159							Level A	Litigation Privilege
RBC00014_00000167							Level A	Litigation Privilege
RBC00014_00000172							Level A	Litigation Privilege
RBC00014_00000183							Level A	Litigation Privilege
RBC00014_00000184							Level A	Litigation Privilege
RBC00014_00000185							Level A	Litigation Privilege
RBC00014_00000186							Level A	Litigation Privilege
RBC00014_00000187							Level A	Litigation Privilege
RBC00014_00000205							Level A	Litigation Privilege
RBC00014_00000206							Level A	Litigation Privilege
RBC00014_00000208							Level A	Litigation Privilege
RBC00014_00000209							Level A	Litigation Privilege

RBCH0002_000000403									Level A	Litigation Privilege
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RBCH0002_000000405									Level A	Litigation Privilege
RBCH0002_000000406									Level A	Litigation Privilege
RBCH0002_000000407									Level A	Litigation Privilege
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RBCH0002_000000434									Level A	Litigation Privilege
RBCH0002_000002157									Level A	Litigation Privilege
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RBCH0002_000002572									Level A	Litigation Privilege
RBCH0002_000002912									Level A	Litigation Privilege
RBCH0002_000003048									Level A	Litigation Privilege
RBCH0002_000005498									Level A	Litigation Privilege
RBCH0002_000005626									Level A	Litigation Privilege
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RBCH0002_000006989									Level A	Litigation Privilege
RBCH0002_000007567									Level A	Litigation Privilege
RBCH0002_000008204									Level A	Litigation Privilege
RBCH0002_000008286									Level A	Litigation Privilege
RBDC0003_000000001									Level A	Litigation Privilege
RBDC0003_000000002									Level A	Litigation Privilege
RBDC0003_000000003									Level A	Litigation Privilege
RBDC0003_000000004									Level A	Litigation Privilege
RBDC0004_000000001									Level A	Litigation Privilege
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RBDC0004_000000003									Level A	Litigation Privilege
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RBFE0005_000000003									Level A	Litigation Privilege
RBFE0005_000000004									Level A	Litigation Privilege
RBFC0008_000000003									Level A	Litigation Privilege
RBHC0013_000000001									Level A	Litigation Privilege
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RBHC0013_000000009									Level A	Litigation Privilege
RBHC0013_000000010									Level A	Litigation Privilege
RBHC0013_000000014									Level A	Litigation Privilege
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RBID0001_000000002									Level A	Litigation Privilege
RBIG0001_000000001									Level A	Litigation Privilege
RBKD0001_000000001									Level A	Litigation Privilege
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RBKD0001_000000003									Level A	Litigation Privilege
RBKE0001_000000002									Level A	Litigation Privilege
RBKF0001_000000001									Level A	Litigation Privilege
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RBKF0001_000000011									Level A	Litigation Privilege
RBKF0001_000000012									Level A	Litigation Privilege
RCJM0001_000000001									Level B	Litigation Privilege