

**FILED / PRODUIT**

Date: August 3, 2022

CT- 2022-002

Annie Ruhlmann for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

Doc. # 148

CT-2022-002

**THE COMPETITION TRIBUNAL**

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

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

**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 COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

**AFFIDAVIT OF ANDY KAPLAN-MYRTH**

I, Andy Kaplan-Myrth, of the City of Ottawa, in the Province of Ontario,  
SOLEMNLY AFFIRM:

1. I am the Vice-President, Regulatory and Carrier Affairs (Legal, Regulatory and Public Policy Department) at TekSavvy Solutions Inc. ("**TekSavvy**"). As such, I have knowledge of the matters contained in this affidavit, except where stated to be on information and belief, and where so stated, I believe them to be true.

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2. TekSavvy is an independent internet and voice services provider based in Chatham, Ontario, and Gatineau, Quebec. TekSavvy provides internet and voice services to residential and business customers in every Canadian province. TekSavvy offers these services over its own network facilities in southwestern Ontario, and through last-mile wholesale broadband services provided by incumbent carriers across Canada, including Rogers Communications Inc. (“**Rogers**”) and Shaw Communications Inc. (“**Shaw**”), in their wireline operating territories. As a result, TekSavvy is both a customer of Rogers and Shaw, as well as a direct competitor of Rogers and Shaw in retail broadband services.

3. TekSavvy has provided the Competition Bureau with documents and information that are competitively sensitive in nature (the “**TekSavvy Documents and Information**”). The TekSavvy Documents and Information, which include detailed costing and operational details of TekSavvy’s business, are critical to TekSavvy’s viability and its ability to compete, including as against Rogers and Shaw. As such, the disclosure of the TekSavvy Documents and Information to any competitor’s employees (*e.g.*, Rogers and Shaw), would result in serious harm to TekSavvy’s business and its ability to fairly compete.

4. The TekSavvy Documents and Information were only provided to the Competition Bureau on the firm and mutual understanding that they would be kept at the highest possible level of confidentiality. The highly competitively sensitive nature of the documents was specified by me at the time of disclosing some TekSavvy Documents and Information to the Bureau on March 1, 2022. In my e-mail to the Bureau of that date, I noted the basis of our disclosure:

the attached information, and any subsequent information we may provide in relation thereto, is provided on a confidential basis pursuant to section 29 of the Competition Act. The attached information contains information of a highly competitively-sensitive nature which TekSavvy maintains consistently in a confidential manner; it constitutes (i) confidential financial and

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commercial information treated consistently in a confidential manner by TekSavvy; (ii) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of TekSavvy; and (iii) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party within the meanings of sections 20(1)(b),(c) and (d) of the Access to Information Act. TekSavvy requests that the Competition Bureau make all efforts to maintain the confidentiality of this information, including by seeking sealing orders, confidentiality orders, and in camera proceedings should this information be used by the Competition Bureau or other government bodies in any proceedings, and advising TekSavvy of any third party requests for access to this information at the earliest opportunity.

5. Without the understanding that Rogers' and Shaw's employees would not have access to the TekSavvy Documents and Information, TekSavvy would not have voluntarily disclosed them.

6. I understand that Rogers and Shaw have brought a motion in this proceeding that seeks to reclassify documents from Confidential Level A to Confidential Level B, as defined in the Competition Tribunal's May 19, 2022 Confidentiality Order (the "**Reclassification Motion**"). For the reasons I explain above regarding their competitively sensitive nature, TekSavvy has serious concerns about disclosing any TekSavvy Documents and Information to any employees of Rogers and Shaw.

7. TekSavvy learned of the Reclassification Motion on July 21, 2022. Attached as **Exhibit "1"** to this affidavit is the e-mail that I received from Mr. Derek Leschinsky that informed TekSavvy of the Reclassification Motion and the likelihood it implicated TekSavvy Documents and Information. This e-mail appears to suggest that at least some of the TekSavvy Documents and Information are implicated in the Reclassification Motion. On July 25, 2022, I wrote a letter to Mr. Alexander Gay, who is lead Counsel for the Commissioner of Competition (the "**Commissioner**") in opposing the Reclassification Motion. This letter expressed TekSavvy's serious concerns about any potential classification of the TekSavvy Documents and

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Information in a way that does not accord with Confidential Level A classification. Attached as **Exhibit "2"** to this affidavit is the letter that I sent to Mr. Gay.

8. I am informed by Abdalla Barqawi, counsel for TekSavvy, that since last week several requests have been made to the Commissioner (through counsel) to advise whether any of the TekSavvy Documents and Information could be implicated in the Reclassification Motion, the scope of which I understand from my counsel and the letter from Rogers' and Shaw's counsel that is attached as **Exhibit "3"** has since been narrowed, and, if so: (1) what level of classification the Commissioner has attributed to the TekSavvy Documents and Information; and (2) whether the Commissioner is advancing any claim of privilege over any of the TekSavvy Documents and Information. The Commissioner has not provided a response that provides the requested information.

9. Given that TekSavvy only has access to the public version of the filed materials, which do not reveal whether any of the TekSavvy Documents and Information are implicated by the Reclassification Motion, TekSavvy is currently unable to make particularized submissions on the proper classification over any references to its documents and information. Accordingly, TekSavvy will request that, until the Commissioner provides a full and substantive response to its request, and it is given adequate time to respond to the Reclassification Motion, that all of the TekSavvy Documents and Information, however incorporated, be treated as Confidential Level A.

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**AFFIRMED** by Andy Kaplan-Myrth at the City of Ottawa, in the Province of Ontario, before me on August 3, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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Commissioner for Taking Affidavits  
(or as may be)

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**Andy Kaplan-Myrth**

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This is **Exhibit "1"**  
to the affidavit of  
Andy Kaplan-Myrth  
affirmed before me this  
3<sup>rd</sup> day of August, 2022

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A Commissioner for Taking Affidavits

**Subject:** Rogers/Shaw - Motion for redesignation of Level A materials as Level B  
**Date:** Thursday, July 21, 2022 at 3:12:19 PM Eastern Daylight Saving Time  
**From:** Leschinsky, Derek (CB/BC)  
**To:** Jessica Rutledge, Andy Kaplan-Myrth  
**CC:** Alexander Gay, Caron, Ryan (CB/BC), Puri, Jasveen (he, him | il, lui) (CB/BC), Bakelaar, Darian (CB/BC), Imperadeiro, Adriano (CB/BC), Mohammad, Raha (CB/BC), Varelalizardi, Miriam (CB/BC)  
**Attachments:** 2022 07 21 - Motion Record (Confidentiality Privilege) (REDACTED - PUBLIC).pdf

Dear counsel,

We are in receipt of a motion from Rogers and Shaw that seeks to designate as Confidential Level B information the Commissioner has designated as Confidential Level A, including information pertaining to TekSavvy. Under the [Confidentiality Order](#) for this proceeding, Confidential Level B information may be disclosed to Designated Representatives of Rogers and Shaw. The Respondents' motion includes seeking to redesignate documents the Commissioner produced with his Affidavit of Documents. I understand that documents produced with the Commissioner's Affidavit of Documents include information about TekSavvy's costs and documents setting out information to TekSavvy voluntarily provided to the Bureau in connection with the Bureau's preparations relating to the Rogers/Shaw merger. My colleague Alexander Gay will be leading the Bureau's response to the motion respecting confidentiality and ask that you communicate with Alex on the topic of confidentiality as this matter advances.

Kind regards,

**Derek Leschinsky**  
Senior Counsel  
Competition Bureau Legal Services  
Department of Justice / Government of Canada  
[Derek.Leschinsky@cb-bc.gc.ca](mailto: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](mailto:Derek.Leschinsky@bc-cb.gc.ca) / 613-818-1611

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This is **Exhibit "2"**  
to the affidavit of  
Andy Kaplan-Myrth  
affirmed before me this  
3<sup>rd</sup> day of August, 2022

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A Commissioner for Taking Affidavits



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**WE'RE DIFFERENT.  
IN A GOOD WAY.**

**TekSavvy Solutions Inc**

800 Richmond Street  
Chatham ON N2M 5J5

**TELEPHONE** +1 519 360-1575 **FAX** 519.360.1716  
**TOLL FREE** 877-779-1575 **teksavvy.com**

Alexander Gay  
General Counsel, Department of Justice Canada  
50 O'Connor Street, 5th Floor  
Ottawa, ON K1A 0H8

25 July 2022

**RE: Rogers Communications Inc. (Rogers) and Shaw Communications Inc. (Shaw)  
motion concerning privilege and confidentiality in CT-2022-002**

Dear Mr. Alexander Gay:

1. I am writing to express TekSavvy's serious concerns with Rogers and Shaw's motion filed July 21, 2022 in the above-noted file (the "Motion"). We understand that the Motion seeks to reduce the level of confidentiality of, among other materials, detailed costing information provided by TekSavvy to the Bureau on a voluntary basis ("TekSavvy CSI").
2. TekSavvy Solutions Inc. (TekSavvy) is an independent internet and voice service provider based in Chatham, Ontario, and Gatineau, Quebec. TekSavvy provides internet and voice services to residential and business customers in every Canadian province. TekSavvy offers these services over its own network facilities and through last-mile wholesale broadband services provided by incumbent carriers across Canada, including Rogers and Shaw in their wireline operating territories.
3. The TekSavvy CSI is some of, if not the most, competitively sensitive information to TekSavvy. If disclosed to a competitor, it would provide that competitor—among other things—with the ability to understand the precise retail prices at which TekSavvy would not be able to compete across its service offerings. Moreover, it would reveal technical details of TekSavvy's business, including internal costs, network investments, and oversubscription ratios used by TekSavvy to purchase capacity from carriers and manage its network.
4. TekSavvy has serious concerns about its ability to compete fairly if this information were disclosed to any degree to two already dominant competitors. Limiting the disclosure of the TekSavvy CSI to a limited number of recipients within the Rogers and Shaw organizations does not reduce TekSavvy's concerns. Even a brief internal mention of, for example, an internal cost or an oversubscription ratio, could be sufficient information to harm TekSavvy's competitive position, and TekSavvy would have no way to know if such information were inadvertently revealed or acted upon.
5. Without the understanding that the TekSavvy CSI would remain protected from any disclosure to our competitors, TekSavvy would not have provided any competitively sensitive information to the Bureau on a voluntary basis. This will continue to hold true for any voluntary cooperation in the future.

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6. TekSavvy understands that the Competition Bureau is preparing a response in opposition to the Motion, and seeking to continue to protect, among other material, the TekSavvy CSI. TekSavvy looks forward to reviewing that response at the earliest opportunity. If, after reviewing that response, TekSavvy thinks its intervention is required to protect its interests in the confidentiality of the TekSavvy CSI, TekSavvy may seek to intervene to oppose the motion directly.

Yours truly,

*[transmitted electronically]*

Andy Kaplan-Myrth  
VP, Regulatory & Carrier Affairs

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This is **Exhibit “3”**  
to the affidavit of  
Andy Kaplan-Myrth  
affirmed before me this  
3<sup>rd</sup> day of August, 2022

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A Commissioner for Taking Affidavits

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**Matthew R. Law**

Direct 416 849 9050  
mlaw@lolg.ca

**Lax O'Sullivan Lisus Gottlieb LLP**

Suite 2750, 145 King St W  
Toronto ON M5H 1J8 Canada  
T 416 598 1744 F 416 598 3730  
www.lolg.ca

The logo for Lax O'Sullivan Lisus Gottlieb LLP is a dark blue square containing the firm's name in white, stacked vertically: "Lax", "O'Sullivan", "Lisus", and "Gottlieb".

Lax  
O'Sullivan  
Lisus  
Gottlieb

July 26, 2022

**BY EMAIL**

John Tyhurst  
Competition Bureau Legal Services

Nicole Henderson  
Blake, Cassels & Graydon LLP

Adam Hirsh  
Osler, Hoskin & Harcourt LLP

Stephen Zolf  
Aird & Berlis LLP

Dear Mr. Tyhurst, Ms. Henderson, Mr. Hirsh, and Mr. Zolf:

**Commissioner of Competition v. Rogers Communications Inc. and Shaw Communications Inc. (CT-2022-002) – Confidentiality Motion**

We write to set out the Respondents' position regarding the pending confidentiality and privilege motion, as communicated to Justice Little at the Case Management Conference yesterday morning. The Respondents are not withdrawing or amending their motion as currently framed, but are prepared to limit the relief they are seeking at the upcoming hearing to the following (only the first of which concerns Bell, Telus, and Distributel):

1. Challenging the Commissioner's designation as Level "A" confidential the affidavits, expert reports, and documents the Commissioner relied on in support of his s. 104 Application (including the documents and data relied on by the Commissioner's experts), except for the affidavits of Mr. Dhamani and Mr. Verma and the documents attached thereto.
2. Challenging the Commissioner's claim of litigation privilege over the documents set out in Schedule B to his Affidavit of Documents.
3. To the extent necessary, challenging the Commissioner's designation as Level "A" confidential the documents set out in Schedule B to his Affidavit of Documents and over which the Commissioner currently claims litigation privilege.

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In addition, the Respondents have redesignated their own documents produced in response to the Commissioner's SIR from Level "A" to Level "B", pursuant to paragraph 9 of the Confidentiality Order. Please advise whether the Commissioner intends to challenge those re-designations. If so, this issue will proceed in accordance with the timetable set out below.

To the extent that Bell, Telus, and Distributel do not already know which of their documents the Commissioner and his experts relied on in the s. 104 materials, we expect the Commissioner will advise them. We are also copying counsel for Stonepeak and Xplornet. Although they did not substantively respond to our letters providing a courtesy copy of the motion record, nor appear at the Case Management Conference yesterday, the Respondents do not object to those parties participating in the hearing in the same manner as Bell and Telus, so long as it does not affect the scheduling of the motion. We ask that those parties please advise whether they intend to participate or not by end of day tomorrow (Wednesday July 27).

In advance of Friday's Case Management Conference, Justice Little will expect the parties to have discussed a timetable for the motion. The Commissioner has committed to delivering his responding record on July 28. Bell and Telus advised that they would prefer to see the Commissioner's record before submitting any evidence of their own. Given the significantly narrowed scope of the motion and their commitment at the Case Management Conference to work within the existing schedule in the proceeding, Bell and Telus should be able to serve any evidence the following day, July 29. The Respondents therefore propose the following timetable:

July 28 – Commissioner delivers Responding Record on all issues

July 29 – Bell and Telus serve additional affidavits, if any

August 2 – Cross-examinations (note August 1 is a holiday)

August 3 – Rogers/Shaw serve written submissions

August 4 – Commissioner and Bell/Telus serve written submission

August 5 – Rogers/Shaw serve reply submissions, if necessary

August 8 – Hearing (subject to Tribunal's confirmation)

To the extent Distributel wishes to put in evidence and make submissions, the Respondents expect it to do so in accordance with the same schedule.

Please advise if your clients will agree to this schedule, so that we can advise Justice Little accordingly.

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Yours truly,



Matthew R. Law

cc: Derek Leschinsky, Alexander Gay, Katherine Rydel, Ryan Caron, Suzanie Chua, Marie-Hélène Gay, Kevin Hong, *Competition Bureau Legal Services*  
Jonathan Lisus, Crawford Smith, Bradley Vermeersch, *Lax O'Sullivan Lisus Gottlieb LLP*  
Kent Thomson, Derek Ricci, Steven Frankel, Chanakya Sethi, *Davies Ward Phillips & Vineberg LLP*  
Randal Hoffley, *Blake, Cassels & Graydon LLP*  
Michelle Lally, *Osler, Hoskin & Harcourt LLP*  
Omar Wakil, *Torys LLP*  
Kate McNeece, *McCarthy Tétrault LLP*