

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 15

File No.: CT-2022-02

Registry Document No.: 215

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)

and

**Attorney General of Alberta and
Videotron Ltd.**
(interveners)

Decided on the basis of the written record
Before: Mr. Justice Andrew D. Little (Chairperson)
Date of order: September 12, 2022



AMENDED 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 and the Intervener Videotron Ltd. on August 19, 2022; a Direction from the Tribunal on August 23, 2022; a letter dated September 8, 2022, from counsel for the Attorney General of Alberta with respect to access to confidential information; and discussions at a Case Management Conference on September 9, 2022;

AND CONSIDERING that the Tribunal considers this Order to be a relevant confidentiality order for the purposes of Rule 51(d) of the *Competition Tribunal Rules*, without prejudice to the ability of the Attorney General of Alberta and each of the Parties and Videotron Ltd. to seek additional amendments to it;

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 and the Intervener 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 or the Intervener with respect to the Proceedings who (i) is not a current employee of a Respondent or the Intervener; (ii) has not been an employee of a Respondent or the Intervener within two years prior to the date of this Order, (iii) is not a current employee of a competitor of a Respondent or the Intervener; (iv) has not been an employee of a competitor of a Respondent or the Intervener 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) “**Intervener**” means Videotron;
- (g) “**Parties**” means the Commissioner and Respondents collectively, and “**Party**” means any one of them;

- (h) “**Person**” means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;
- (i) “**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;
- (j) “**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 or Intervener producing the Record claims is confidential pursuant to Section 2 of this Order; or
 - ii. the Tribunal has determined is confidential;
- (k) “**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;
- (l) “**Record Review Vendor**” means a professional service provider retained by a Party or the Intervener 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;
- (m) “**Respondent**” means Rogers and Shaw collectively, and “**Respondent**” means either of them;
- (n) “**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;
- (o) “**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;

- (p) “**Third Party**” means any Person other than the Commissioner, Respondents, or the Intervener;
- (q) “**Tribunal**” means the Competition Tribunal established pursuant to subsection 3(1) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), as amended; and
- (r) “**Videotron**” means Videotron Ltd., 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.

[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, the Intervener, or a Third Party;
- (b) confidential contractual arrangements between a Respondent or the Intervener and their 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, the Intervener, or their customers, suppliers or a Third Party;
- (d) business plans, marketing plans, strategic plans, budgets, forecasts and other similar information of a Respondent, the Intervener, or a Third Party;
- (e) internal market studies and analyses of a Respondent, the Intervener, 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, the Intervener, or a Third Party.

[3] Without prejudice to any position or argument a Respondent or the Intervener 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) with respect to any Protected Record originating from the Intervener, if the Parties and the Intervener agree in writing that the Record shall cease to be a Protected Record and, with respect to all other records, 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 or the Intervener 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 or the name of the Intervener 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/or the Intervener and is designated by at least one Party or the Intervener 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 or the Intervener may challenge a claim of confidentiality or level of confidentiality made by another Party or the Intervener. 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 or the Intervener 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 or Intervener 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) outside counsel to the Intervener and outside counsel’s staff who are directly involved in the Proceedings;
- (d) Independent Experts and their staff who are directly involved in the Proceedings; and
- (e) Record Review Vendors.

[7] (a) Subject to a further order of the Tribunal, the consent of the Party or Parties or Intervener 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:

- (i) the individuals described in Section 6 above; and
 - (ii) Designated Representatives of the Respondents or the Intervener who have executed the Confidentiality Undertaking in the form attached as Schedule A.
- (b) Notwithstanding paragraph 7(a)(ii) and the definition of the term “Designated Representatives” found in paragraph 1, as it relates to a Protected Record produced by either Rogers or Shaw and designated at Level “B”, the said Protected Record may only be shared with in-house counsel at each of Rogers and Shaw who have executed the Confidentiality Undertaking in the form attached as Schedule A and shall not be disclosed to any other Designated Representative of the Respondents.
- (c) Notwithstanding paragraph 7(a)(ii) and the definition of the term “Designated Representatives” found in paragraph 1, Protected Records produced by Videotron and marked as Level “B” shall be treated by the Respondents as Level “A” and not shared with any Designated Representative of the Respondents, and Protected Records produced by the Respondents and marked as Level “B” shall be treated by Videotron as Level “A” and not shared with any Designated Representative of Videotron.
- (d) The terms of this Order, and in particular the terms of this paragraph 7, are without prejudice to and shall not limit: (i) any Party’s or the Intervener’s ability to challenge the designation of any Protected Record; (ii) the burden on any Party or the Intervener to support any confidentiality designations they have made; or (iii) any Party’s or the Intervener’s ability to seek to vary the terms of this Order, and in particular the terms of this paragraph 7.

[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 the Intervener or otherwise originated from a Respondent or the Intervener, 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 or the Intervener may at any time and with prior reasonable notice to the other Party or the Intervener 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 or the Intervener 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 or the Intervener agree otherwise or the Tribunal so orders. If a Party or the Intervener 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 or the Intervener is required by law to disclose a Protected Record, or if a Party or the Intervener 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 or the Intervener shall give prompt written notice to the Party or the Intervener 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, outside counsel to the Intervener 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 or the Intervener from having full access to or, in the case of a Respondent or the Intervener only, using or disclosing Protected Records that originated from that Respondent or the Intervener.

[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 or the Intervener, 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 or the Intervener 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 or the Intervener to assert confidentiality claims during the course of the hearing.

[15] The Parties and the Intervener 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 or the Intervener that produced them unless the Party or the Intervener 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, outside counsel to the Intervener, 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’ or the Intervener’s 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 and the Intervener 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 or the Intervener 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 or the Intervener.

[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.

[21] The amendments to the Tribunal's Order dated May 19, 2022, contained in this Order are made effective on August 19, 2022.

DATED at Toronto, this 12th day of September 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 or the Intervener 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 or the Intervener 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 and the Intervener with prompt written notice so that the Party or the Intervener 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 or the Intervener 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 or the Intervener 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
Kevin Hong

For the respondents:

Rogers Communications Inc.

Jonathan Lissus
Crawford Smith
Matthew Law
Bradley Vermeersch

Shaw Communications Inc.

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

For the Interveners:

Attorney General of Alberta

Kyle Dickson-Smith
Opeyemi Bello
Andrea Berrios

Videotron Ltd.

John F. Rook Q.C.
Emrys Davis
Alysha Pannu