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OTTAWA, ONT.

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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

– and –

**ATTORNEY GENERAL OF ALBERTA
and VIDEOTRON LTD.**

Intervenors

**MOTION RECORD OF
SHAW COMMUNICATIONS INC.
(Motion re Confidentiality)**

October 5, 2022

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**NOTICE OF MOTION
(Motion re Confidentiality)**

TAKE NOTICE THAT the Respondent Shaw will make a motion to the Competition Tribunal on October 12, 2022 or such other date as fixed by the Tribunal.

THE MOTION IS FOR:

- (a) an Order directing the Commissioner to re-designate as Level B or public information in his witness statements and expert reports submitted on September 23, 2022 that has been inappropriately designated Level A because (1) such information is derived from documents, data or

information originating from Shaw that has previously been designated by Shaw as Level B or public or (2) such information is not properly subject to a Level A designation because it does not pose a serious threat to any cognizable interest, including, without limitation, the following information:

- (i) in the Expert Report of Michael Davies dated September 23, 2022, paragraphs 50, 68, 72, 78, 81-82, 83-88, 92, 100-102, 105, 107, 112, 114-116, 118, 181, 184-200, and headings II.A and VII;
 - (ii) in the Expert Report of Dr. Nathan H. Miller dated September 21, 2022, paragraphs 233-235 and 244;
 - (iii) in the witness Statement of Charlie Casey dated September 20, 2022, all references to market data from Comniscient Technologies Inc. (“**Comlink**”); and
 - (iv) all other references to aggregated data in the Commissioner’s evidence materials;
- (b) the costs of this motion; and
 - (c) such further and other relief as the Tribunal may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. Background

- (a) As the Tribunal is well aware, this case concerns an application by the Commissioner under s. 92 of the Competition Act for an order blocking the proposed merger of Rogers and Shaw. The proceedings are governed by a Confidentiality Order, which has most recently been amended on September 12, 2022.
- (b) The Confidentiality Order creates two categories of information that the parties may designate as confidential: “Level A” and “Level B”.

- (i) Level A documents may be reviewed only by the Commissioner and his staff and counsel; external counsel to Rogers, Shaw and Videotron; independent experts; and document review vendors. This is essentially a counsel's eyes only designation; and
- (ii) Subject to certain exceptions not relevant for purposes of this motion, Level B documents may be accessed by all individuals who are entitled to access Level A documents, as well as a limited number of "designated representatives" of Rogers, Shaw and Videotron who execute a confidentiality undertaking. These designated representatives include in-house counsel.

B. The Commissioner's Level A Designations Are Improper

- (c) Pursuant to the Tribunal's Scheduling Order dated June 17, 2022, the parties exchanged evidence on September 23, 2022.
- (d) On October 5, 2022, counsel for Shaw wrote to the Competition Bureau objecting to the Commissioner's confidentiality designations in his evidence on two grounds:
 - (i) *first*, the Commissioner has in multiple instances designated as Level A information drawn from or otherwise derived from Shaw documents, data and information that Shaw itself has designated as Level B. The Commissioner's designations are therefore improper on their face, because the information does not originate from the Commissioner, but rather from Shaw. As section 12 of the Confidentiality Order notes, "[n]othing 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". The Commissioner's designations of Shaw information as Level A

thus seeks to improperly limit Shaw's ability to "us[e] or disclos[e]" its own information; and

- (ii) *second*, with respect to certain remaining information, the Commissioner has improperly designated as Level A significant information that, if disclosed, would *not* pose a serious threat to commercial interests and is thus not properly designated as Level A. The Federal Court has repeatedly admonished parties that a counsel's eyes only designation (like the Level A designation here) is appropriate only in unusual circumstances because such a designation prevents counsel from showing relevant information to their clients. Thus, in order to justify a Level A designation, the Commissioner must satisfy a heavy burden of showing a serious threat that is real, substantial, and grounded in the evidence. He cannot do so with respect to the challenged information.
- (e) Shaw's letter to the Commissioner sets forth a non-exhaustive list of examples of improperly designated information from the expert reports of Michael Davies and Dr. Nathan H. Miller and the witness statement of Charlie Casey that fall into one or both of the above categories.
- (f) The Commissioner's Level A designations impairs Shaw's ability to defend itself in these proceedings. Documents and information marked as Level A prevent counsel for Shaw from reviewing and sharing such documents and information with Shaw's designated representatives, including Shaw's in-house counsel.
- (g) That impairment is particularly severe at this point in the proceeding given the parties' impending deadline on October 20, 2022 to submit responding evidence to materials that the Commissioner has improperly designated as Level A and cannot be shared with Shaw.

C. General Grounds

- (h) Section 2(1), 34, 66 and Part 3 of the *Competition Tribunal Rules*;
- (i) Section 8.1 of the *Competition Tribunal Act*; and
- (j) such further and other grounds as the Moving Party may advise and the Tribunal may permit.

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

- (a) the Affidavit of Tanya Barbiero sworn October 5, 2022; and
- (b) such further and other evidence as the solicitors may advise and the Tribunal may permit.

October 5, 2022

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Intervenors

**AFFIDAVIT OF TANYA BARBIERO
SWORN OCTOBER 5, 2022**

I, Tanya Barbiero, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a senior law clerk at Davies Ward Phillips & Vineberg LLP, lawyers for the Respondent Shaw and as such have knowledge of the matters contained in this Affidavit. Where I have relied on information from others, I state the source of that information and verily believe it to be true.

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2. I have attached as **Exhibit A** to my Affidavit a copy of a letter from Chanakya Sethi (counsel for the Respondent Shaw) to John Tyhurst (counsel for the Applicant Commissioner) dated October 5, 2022.

SWORN by **Tanya Barbiero** at the City of Toronto, in the Province of Ontario, before me on the 5th day of October, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
Connia Chen



TANYA BARBIERO

PUBLIC

THIS IS EXHIBIT "A" REFERRED TO IN THE
AFFIDAVIT OF TANYA BARBIERO, SWORN BEFORE
ME THIS 5th DAY OF OCTOBER, 2022.

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal stroke and a small upward tick.

A Commissioner for Taking Affidavits

Chanakya Sethi
T 416.863.5516
csethi@dwpv.com

File 281820

October 5, 2022

BY EMAIL

John Tyhurst
Competition Bureau of Canada
Industry Canada, Place du Portage
50 Victoria Street
Gatineau, QC K1A 0C9

Dear Mr. Tyhurst:

Commissioner of Competition v. Rogers Communications Inc. and Shaw Communications Inc.
(Case No. CT-2022-002)

Confidentiality Designations in the Commissioner's Evidence

Pursuant to the Court's Scheduling Order, we write to raise our concerns with the Commissioner's confidentiality designations in his evidence submitted on September 23, 2022. Our concerns fall into two categories.

First, the Commissioner has in multiple instances designated as Level A information drawn or otherwise derived from Shaw documents and data that Shaw itself has designated as Level B. The Commissioner should have consequently designated such information as Level B. In any event, we note that section 12 of the Confidentiality Order provides that "[n]othing 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." Thus, regardless of whatever characterization the Commissioner may have provided to documents, data or information that originated from Shaw, we want to make clear that Shaw will, without further notice to the Commissioner, "us[e] or disclos[e]" documents, data and information that "originated from" Shaw or was derived from Shaw documents, data or information consistent with Shaw's own designations of such materials, as it is entitled to under the Confidentiality Order.

Second, with respect to certain remaining information, the Commissioner has improperly designated as Level A significant information that, if disclosed, would *not* pose a "serious threat" to commercial interests and is thus not properly designated as Level A.¹ As the Commissioner is no doubt aware, because a counsel's eyes only designation (like the Level A designation here) "prevent[s] counsel from

¹ *Bard Peripheral Vascular Inc. v. WL Gore & Associates, Inc.*, 2017 FC 585 at para. 16.

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showing relevant information to their clients,” the Federal Court has repeatedly admonished that such designations “should only be granted in unusual circumstances”.² Thus, if the Commissioner believes information is properly designated as Level A, he must satisfy a “heavy” burden of showing a serious threat that is “real, substantial, and grounded in the evidence” to justify the Level A treatment. As explained below, with respect to certain information we have identified, we believe no such showing is possible. We therefore request that the Commissioner promptly re-designate the relevant information as Level B or public, as appropriate.

The practical effect of the Commissioner’s Level A designations is to impair Shaw’s ability to defend itself in these proceedings. As the Commissioner well knows, a Level A designation (of documents, data or information that does not originate from Shaw) prevents Shaw’s Designated Representatives, including Shaw’s in-house counsel, from reviewing such materials and thus from assisting Shaw’s outside counsel in defending Shaw against the Commissioner’s allegations. That impairment is particularly severe at this point in the case given the parties’ impending deadline on October 20, 2022 to submit evidence responding to the materials that the Commissioner has designated as Level A.

Because the Scheduling Order has set today as the deadline to submit any motions challenging confidentiality designations, Shaw intends to file a protective motion to preserve its rights. That said, we very much hope that the Commissioner and Shaw will be able to work in good faith to resolve these concerns promptly, thereby obviating the need for Shaw’s motion.

Expert Report of Michael Davies

In much of Mr. Davies’ report, the Commissioner has improperly designated as Level A information that is based on Shaw documents that Shaw itself has designated as Level B. For example:

- In paragraph 78 and Figure 5, the Commissioner has designated subscriber growth data relating to Shaw Mobile and Freedom as Level A. But those sections of the report cite SJRB-CCB00880579 as the basis for the underlying data. That document has been designated by Shaw as Level B.
- Similarly, paragraphs 81 to 82 and Figure 6 cite information related to customer lifetime value and churn derived from SJRB-CCB00824667 and SJRB-CCB00817625. Both documents have been designated by Shaw as Level B.³

Paragraphs 68, 72, 83 to 88, 92, 100 to 102, 105, 107, 112, 114 to 116, 118, 181, 184 to 200 all raise the same or similar issues.

² *Angelcare Development Inc. v. Munchkin, Inc.*, 2018 FC 447 at para 21.

³ Mr. Davies’ report cites REAB00003_000000490 in paragraphs 81 and 82 for certain information. However, that document is not on Mr. Davies’ reliance list and has not been produced to Shaw. In any event, as noted, the information cited in these paragraphs is found in SJRB-CCB00817625, which is on Mr. Davies’ reliance list and otherwise cited by him.

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In addition, the Commissioner has also improperly designated as Level A the information in paragraph 50 of Mr. Davies' report:

[REDACTED]

The information designated as Level A in the above sentence is not cited to any particular party, so it is unclear whose proprietary information the Commissioner is purporting to protect. In any event, no such protection is warranted because each of Shaw, Rogers and Videotron are parties to or otherwise aware of the divestiture-related agreements that govern Freedom's post-divestiture TPIA pricing. Moreover, even if the Commissioner is making a general point about TPIA margins compared to the margins for owned infrastructure, that point has been made without any confidentiality designation in the witness statement of Christopher Hickey provided by the Commissioner. Thus, no Level A designation is appropriate for this statement.

Finally, the Commissioner has also improperly applied Level A designations to information that is not subject to any confidentiality designation at all. For example, the Commissioner has marked as Level A the highlighted portion of this sentence explaining Mr. Davies' expert mandate: "I was asked by counsel for the Commissioner of Competition to ... describe the extent to which Shaw Communications Inc. was [REDACTED]. Similarly, the Commissioner has also marked heading II.A of the table of contents of Mr. Davies' report (concerning "[REDACTED]") and heading VII (concerning "[REDACTED]") as Level A in their entirety. It is unclear what confidential information these statements reveal; all of them should be public.

Expert Report of Dr. Nathan H. Miller

The Commissioner has improperly applied Level A designations to portions of Dr. Miller's report that disclose his own opinions and arguments about Shaw, not any confidential information of a party. For example, in paragraph 233 Dr. Miller makes a series of speculative assertions about what a post-merger Rogers *might* do in its dealings with a post-divestiture Freedom—without citing any document—and the Commissioner has labeled these claims as Level A:

Based on the terms of the divestiture proposal, New Freedom will need to depend on New Rogers for a number of services that were previously provided by Shaw as a within-firm service. Although New Freedom would be receiving those services from New Rogers [REDACTED] a competitor. With a competitor controlling how these services will be provided, New Freedom faces higher risks that the terms of these services will be abused—or at least not complied with as amicably as in the current state of affairs in which, instead, they are provided within the same integrated enterprise under Shaw's

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ownership. [REDACTED]

[REDACTED]. New Freedom would likely have limited recourse based on the terms of the proposed divestiture.

It is not at all clear how Dr. Miller's opinions and arguments could warrant Level A treatment. Nor is it clear, even assuming these claims can be reframed as factual, how the disclosure of the asserted potential for underhanded conduct by post-merger Rogers against post-divestiture Freedom's business would constitute a "serious threat" to its or any other party's commercial interests. (Quite the contrary, disclosure of the Bureau's concern would, if anything, seem to discourage such a threat, even if Dr. Miller's claims are to be credited.) In any event, Dr. Miller is making serious allegations that must be discussed with our client if Shaw is to be able to make full answer and defence. Beyond paragraph 233, we are also concerned about similar designations in paragraphs 234 to 235 and 244.

On top of designating Dr. Miller's own opinions and arguments as Level A, the Commissioner has also improperly designated information that is based on Shaw documents that Shaw has designated as Level B. For example, in paragraph 243, the Commissioner has designated as Level A information about concerns about wireless churn driving the launch of Shaw Mobile and cites SJRB-CCB00420532. But that document has been designated as Level B by Shaw. Similarly, footnote 309 quotes from SJRB-CCB00219615 and designates the quotation as Level A. Yet again, however, that document has been designated by Shaw as Level B.

Dr. Miller's expert report even improperly designates the confidentiality of the Commissioner's own materials. For example, footnote 318 quotes the following language from paragraph 15 of the affidavit of Mr. Hickey: [REDACTED]

[REDACTED]. But while that language is designated as Level A in Dr. Miller's report, it is *public* in Mr. Hickey's witness statement.

Witness Statement of Charlie Casey

The Commissioner has improperly applied Level A designations to all portions of Mr. Casey's affidavit that discuss market data that purport to show "that Shaw's net ports have been declining since the Proposed Transaction was announced, and most recently [Shaw] has been losing more subscribers than it has been acquiring" (para. 8(a)). For example, the Commissioner proposes to designate as Level A the fact that "Shaw gained [REDACTED] net ports in April 2021 and lost [REDACTED] net ports in December 2021" (para. 8(a)(i)).

These data points—and almost all the remaining data in Mr. Casey's witness statement—are commercially available for sale to "the Canadian wireless industry" by Comniscient Technologies Inc. ("Comlink"), as Mr. Casey notes in paragraph 4 of his statement. Accordingly, such data is not properly characterized as Level A given that it is "publicly available or otherwise available" under paragraph 2 of the Confidentiality Order.

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Even assuming, however, that some level of confidentiality is warranted for this data, Level A treatment is inappropriate. As discussed, a counsel's eyes only designation is warranted only in "unusual circumstances" involving a "serious threat" of harm in the event of disclosure of the relevant information. There is no conceivable harm by sharing with Shaw what Telus (or a commercial data aggregator) believes Shaw's own net ports were over a given period. To the contrary, it will allow Shaw to assist its outside counsel in the verification of such claims.

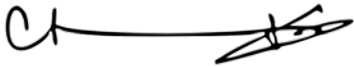
Inconsistent Designation of Aggregated Data

Finally, the Commissioner has inconsistently designated aggregated data as either Level A or public, including in Dr. Miller's expert report. For example, Dr. Miller's findings concerning deadweight loss in his report dated September 21, 2022 are both designated Level A (see, e.g., Exhibit 23) and public (see, e.g., paragraph 231). Indeed, *the same data* is designated both Level A and public, as is true in the case of Dr. Miller's calculation of a deadweight loss of at least \$42 million per year, a consumer surplus loss of at least \$78 million and a transfer from consumers to producers of at least \$63 million.

In all these cases, there is no basis for Level A treatment. Aggregated data—and information derived from that aggregated data, such as Dr. Miller's conclusions concerning the alleged deadweight loss—cannot reasonably be attributed to individual carriers and thus cannot plausibly pose a "serious threat" to any commercial interests.

As stated at the outset, we remain hopeful that we will be able to resolve Shaw's concerns expeditiously, without the need for motion practice. Finally, our review of the Commissioner's evidence materials is ongoing and we reserve all rights, including to raise additional challenges.

Yours very truly,



Chanakya Sethi

cc Jonathan Lisus, Crawford Smith, Matthew Law & Bradley Vermeersch, *Lax O'Sullivan Lisus Gottlieb LLP*
John Rook & Emrys Davis, *Bennett Jones LLP*