Federal Court  Cour fédérale

Date: 20240213

Docket: T-2416-23

Citation: 2024 FC 239

Ottawa, Ontario, February 13, 2024

PRESENT: Justice Andrew D. Little

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
ROGERS COMMUNICATIONS CANADA INC.

Respondent

ORDER AND REASONS

[1] These Reasons explain why I have granted a motion brought by the Commissioner of Competition under Rule 151 of the *Federal Courts Rules*, SOR/98-106, with the support of the respondents (together, "Rogers"), to seal certain information in the Court's file.

[2] On April 6, 2023, the Commissioner of Competition (the "Commissioner") commenced an inquiry under subparagraph 10(1)(*b*)(ii) of the *Competition Act*, RSC 1985, c C-34, on the

basis that he had reason to believe that grounds existed for the making of an order against Rogers under Part VII.1 of the *Competition Act*. The inquiry concerns certain marketing practices of Rogers, specifically, representations made to the public to promote the supply or use of, and their business interest in, mobile wireless telecommunication services that offer “unlimited” or “infinite” data.

[3] On November 15, 2023, the Commissioner filed an *ex parte* application under section 11 of the *Competition Act* for an order requiring Rogers to produce records under paragraph 11(1)(*b*) and to provide written returns of information under paragraph 11(1)(*c*), related to the inquiry under section 10.

[4] Following a hearing on November 30, 2023, I granted the Commissioner’s application under section 11 by order dated December 1, 2023. That order included a provision granting the Commissioner’s informal request at the hearing for an interim order under Rule 151 related to certain information in the supporting affidavit and the specifications attached to the order (the “Specifications”), on the understanding that the Commissioner would promptly file a formal motion under that Rule.

[5] By Notice of Motion filed on January 5, 2024, the Commissioner sought relief under Rule 151, supported by an affidavit from an investigating officer at the Competition Bureau and written representations.

[6] On January 19, 2024, Rogers filed a responding record that supported the Commissioner's motion, which included an affidavit from a senior Rogers employee and written representations.

I. Legal Principles

[7] The Supreme Court established the test under Rule 151 for a confidentiality order over sensitive commercial information in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41, [2002] 2 SCR 522 and recently affirmed it in *Sherman Estate v. Donovan,* 2021 SCC 25. The moving party must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[8] The relevant considerations, which encompass the "open court" principle, were also described and applied in *Desjardins v. Canada (Attorney General),* 2020 FCA 123 and, in a section 11 application, in *Canada (Commissioner of Competition) v. Google Canada Corporation,* 2023 FC 1038.

[9] The open court principle promotes certain objectives, including the protection of the constitutional freedom of expression, access to information in judicial proceedings, and promotion of truth-seeking and just outcomes in the courts and adjudicative tribunals: see *Sherman Estate,* at paras 1-2, 30, 39; *Sierra Club,* at paras 36, 49-52, 56, 72, 74-76, 81; *Google Canada,* at paras 41, 77.

[10] Under Rule 151, the moving party must provide a convincing evidentiary basis to justify issuing a sealing order, in particular to demonstrate a serious risk of harm. The risk in question must be substantiated and well grounded in the evidence: *Sherman Estate,* at paras 35, 62, 102; *Sierra Club,* at paras 46, 54; *Desjardins,* at paras 82, 87-88, 94.

[11] In *Desjardins,* the Federal Court of Appeal described the Court's approach:

> [85] I am of the opinion that the exercise of discretion under Rule 151 requires that a judge analyze all of the relevant facts and all of the circumstances that may show whether or not there is harm to the important interest sought to be protected and thus make the appropriate order. In particular, the exercise of discretion under Rule 151 requires that a court hearing a motion for an order of confidentiality weigh all of the relevant factors, including the objectives and particular provisions of the legislative or regulatory scheme, the public interest at stake in the case, the constitutional rights at issue (privacy, freedom of expression, the open court principle) as well as the information that is already public.

[12] In recent decisions, the Federal Court of Appeal has emphasized that courts be vigilant in applying the open court principle: *Canadian National Railway Company v. Canada (Transportation Agency),* 2023 FCA 245, at para 9; *Ontario Addiction Treatment Centres v. Canada (Attorney General),* 2023 FCA 236, at para 11. As the appeal court stated in *Ontario Addiction Treatment Centres,* any secrecy in court proceedings must be "necessary, justified and minimized": at para 11 (citing *Sierra Club* and *Sherman Estate*).

[13] The open court principle also applies to the Competition Tribunal: *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited,* 2021 Comp Trib 2. See also *Canadian Broadcasting Corporation v. Canada (Parole Board),* 2023 FCA 166, at paras 53-56; *Fraser v. Canada (Public Safety and Emergency Preparedness),* 2023 FCA 167, at paras 55-56.

II. Confidentiality in Competition Tribunal Proceedings

[14] Both parties relied on a confidentiality order granted by the Competition Tribunal in the recent merger proceedings involving Rogers, granted under the *Competition Tribunal Rules*, SOR/2008-141.

[15] The *Competition Tribunal Rules* expressly address the implementation of the open court principle. Rule 22 provides that subject to any confidentiality order under Rule 66, the public is entitled to access the documents filed or received in evidence on the public record. Under Rules 66 and 67, the Competition Tribunal may issue confidentiality orders in respect of documents, information and categories of documents and information. *The Competition Tribunal Rules* also contemplate that the Tribunal convene an early case management conference with the litigating parties and that the agenda may include confidentiality: see Rule 137(2)(c). See also Rules 23-24 (filing confidential and public versions of documents) and Rules 47(d), 51(d), 55(d), 60(2)(b). The Tribunal has issued Practice Directions regarding the *Filing of Confidential and Public Documents with the Tribunal* (March 2018) and the *Filing of Confidential Documents* (August 2008) (which attaches a draft confidentiality order).

[16] The Tribunal has long applied the test in *Sierra Club*: see *Commissioner of Competition v. Sears Canada, Inc*, 2003 Comp Trib 27. In *Parrish & Heimbecker*, the Tribunal ensured that the *Sierra Club* test reflected the contents of the *Competition Tribunal Rules*: see paras 69-86.

[17] In 2022, the Competition Tribunal issued confidentiality orders in the merger proceedings involving the Commissioner, Rogers Communications Inc. and Shaw Communications Inc.

under section 92 of the *Competition Act*: *Canada (Commissioner of Competition) v. Rogers Communications Inc. and Shaw Communications Inc.,* 2022 Comp Trib 15 (amending *Canada (Commissioner of Competition) v. Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 5) (the "Amended Confidentiality Order"). Paragraph 2 of the Amended Confidentiality Order provided:

> [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.

[18] In the Amended Confidentiality Order, a "Protected Record" meant any Record (including the information such Record contains) that was produced in the Proceedings, or was listed or contained in various documents typically prepared during the proceeding, that either (i) a party or intervener producing the Record claimed was confidential pursuant to section 2 of the order, or (ii) the Tribunal determined was confidential. "Record" had the same meaning as in subsection 2(1) of the *Competition Act*.

[19] In essence, the process contemplated by the Tribunal's confidentiality orders, granted near the outset of the Tribunal proceeding, was that the parties could designate certain documents or their contents as confidential if they fell into the categories identified in paragraphs 2(a) to (g) of the Amended Confidentiality Order, subject to challenge and determination by the Tribunal at the hearing or by interlocutory motion. The termination of the proceedings before the Tribunal did not terminate the obligations of persons to whom Protected Records were disclosed under the confidentiality orders. The orders contemplated destruction of confidential Records on completion or final disposition of the proceedings and that any information permitted to be retained be kept in confidence.

[20] During the expedited appeal from the Tribunal's decision in the Rogers/Shaw merger, the Federal Court of Appeal made its own confidentiality order for documents filed on the appeal in both confidential and public forms. The appeal court applied the open court principles in *Sierra Club* and *Sherman Estate* and adopted the terms of the Tribunal's Confidentiality Order and Amended Confidentiality Order, so that the terms of the Tribunal's orders applied in the appeal

court, *mutatis mutandis*: see FCA Court File No. A-286-22, Order of Stratas J.A. dated January 4, 2024, at page 5 and at para 2.

[21] The Tribunal has recently underlined the need to adduce evidence to support a party's confidentiality designations under its orders: see the Confidentiality Order in Canada *(Commissioner of Competition) v. Cineplex Inc.*, 2023 Comp Trib 6, and the Scheduling Order in *Canada (Commissioner of Competition) v. Cineplex Inc.*, 2023 Comp Trib 05.

III. The Present Motion under Rule 151

A. *Confidential Information identified by the Commissioner on this Motion*

[22] The Commissioner submitted that certain information in his application record was confidential under paragraph 2(f) of the Competition Tribunal's Amended Confidentiality Order. That information related to a Supplementary Information Request ("SIR") issued by the Commissioner to Rogers under subsection 114(2) of the *Competition Act* during his review of the Rogers/Shaw merger and prior to the section 92 proceedings commenced before the Tribunal. The affidavit filed by the Commissioner to support the section 11 application attached the SIR as an exhibit. In addition, specific phrases and sentences located on approximately 20 other pages of the application record referred to some content of the SIR.

[23] The SIR was included in the application record because, during communications in 2023 between representatives of the Commissioner and counsel for Rogers (known as "pre-application dialogue" or "pre-issuance dialogue"), the parties discussed the records already in the Commissioner's possession as a result of the SIR that may overlap with the scope of the

proposed Specifications for document production attached to the draft section 11 order: see *Canada (Commissioner of Competition) v. Pearson Canada Inc.*, 2014 FC 376, [2015] 3 FCR 3, at paras 45-46, 68; *Canada (Commissioner of Competition) v. Canada Tax Reviews Inc.*, 2021 FC 921, at paras 32-34, 36; Danielle Royale & David Feldman, "Investigatory Orders", in Nikiforos Iatrou, ed, *Litigating Competition Law in Canada*, 2nd ed (Toronto: LexisNexis Canada Inc, 2023) ch 5, at pp. 144-145; Antonio Di Domenico, *Competition Enforcement and Litigation in Canada*, (Toronto: Emond Montgomery Publications Limited, 2019), at pp. 47-48. That overlap arose due to the time scope, the custodians, and the nature of the records to which the SIR and the proposed section 11 order applied. Those topics were also discussed during the section 11 hearing, which was open to the public.

[24] The Commissioner's position on confidentiality relied on the continuing operation of the Tribunal's confidentiality orders, the evidence filed on this motion, and a letter from Rogers's counsel explaining the basis of its confidentiality claims (which was adopted and supplemented by the affidavit filed by Rogers on this motion).

[25] The Commissioner also observed that an order under Rule 151 would maintain the *status quo* for the contents of the SIR. The SIR was marked as a Protected Record in the Competition Tribunal proceeding: see Amended Confidentiality Order, paragraph 2(f).

[26] For the reasons that follow, I agree that the SIR, and the related information about it, should be treated as confidential under Rule 151 and were properly redacted from the application record available to the public in the Court's file.

[27] The confidentiality interest at stake has at least two public interest dimensions. One is the public interest in protecting confidential information covered by the terms of the Tribunal's confidentiality orders issued under the *Competition Tribunal Rules*, recognizing its established approach to confidentiality issues in litigated proceedings as outline above: see *Parrish & Heimbecker*, at paras 82-86.

[28] Another is the public interest in the confidentiality of the Commissioner's statutory merger review process. In that process, merging parties are obliged by law to provide notice and prescribed information to the Commissioner and to comply with a request from the Commissioner to provide additional information, both of which necessitate providing sensitive business information to the Competition Bureau and certifying that it is correct and complete in all material respects: see *Competition Act*, paragraph 29(1)(*b*), subsections 114(1), (2) and (2.1), and sections 118 and 123.1; *Notifiable Transactions Regulations*, SOR/87-348, esp at section 16; Merger Review Process Guidelines, section 3 (January 16, 2024), (https://ised-isde.canada.ca/site/competition-bureau-canada/en/merger-review-process-guidelines#s3_0); Information Bulletin on the Communication of Confidential Information Under the *Competition Act* (September 30, 2013) (https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/cb-bulletin-confidential-info-2013-e.pdf).

[29] Key elements of the merger review process, including the issuance of a SIR, occur before the Commissioner files an application under section 92. In addition, issuing a SIR also does not always lead to litigation or a settlement by consent agreement registered under section 105.

[30] The public interest in the confidentiality of the Commissioner's statutory merger review process is supported by other provisions in the *Competition Act*. Section 7 makes the Commissioner responsible for the administration and enforcement of the Act. Section 29 provides (in sum) that no person who performs or has performed duties or functions in the administration and enforcement of the *Competition Act* shall communicate certain information to any other person, with certain express exceptions. The information that may not be communicated includes "any information obtained pursuant to" sections 11 and section 114, and "any information provided voluntarily pursuant to this Act": see paragraphs 29(1)(*b*) and (*e*).

[31] One exception in the chapeau language of section 29 permits the communication of that information for "the purposes of the administration or enforcement" of the *Competition Act*, which must include an application under section 11 to seek an order during a formal inquiry under section 10. However, in my view, communication of information by inclusion in application materials filed under section 11 does not inevitably mean that paragraphs 29(1)(*b*) and (*e*) no longer apply to the information. The statute permits the use of such information in the administration and enforcement of the statute, and information that is truly confidential may be protected by a confidentiality order under Rule 151 or the *Competition Tribunal Rules*, or be discussed in an *in camera* hearing at the Tribunal.

[32] Both of these public interests may be acute when the information concerns a merger of companies whose shares are publically traded.

[33] I recognize that the SIR was the Commissioner's request for information, rather than a merging party's response to it. I do not believe that fact on its own negates the public interest in its confidentiality as described above. The information in a SIR is informed by the merging party's or parties' filings under section 114 and by any information they may have voluntarily provided (for example, in dialogue before the SIR is issued, or when seeking an advance ruling certificate under section 102).

[34] The risk of harm to the public interests arising in this case, and likely in general for SIRs, is apparent and serious. The proposed redactions cover the SIR itself and short passages elsewhere in the application record that reflect its contents. I agree with the parties that there is no alternative to the targeted redaction of the specified information in the application record.

[35] Does the harm to these public interests outweigh the public interest in open courts in the present circumstances? Yes, given the legal and practical context in which this Rule 151 motion arises: *Sierra Club*, at paras 74, 79, 86-87; *Sherman Estate*, at para 106; *Desjardins*, at para 85. See also: *A Lawyer v. The Law Society of British Columbia*, 2021 BCCA 284, at paras 41, 50, 80-81.

[36] The confidentiality issues here arise on a section 11 application during an inquiry under the *Competition Act*. The Commissioner is at the investigation stage and requires additional information. The statutory purpose of the inquiry under section 10 is to look into matters related to possible reviewable and other conduct, identified under paragraphs 10(1)(*a*) to (*c*), that the Commissioner considers necessary "with the view of determining the facts". Parliament has

instructed in subsection 10(3) that all inquiries under section 10 shall be conducted in private. The section 11 application occurred before the Commissioner's determination of whether to file an application under one of the substantive provisions of the *Competition Act*. The issues to be analyzed on the section 11 application are circumscribed by sections 10 and 11, and the merits of the conduct that is subject to the inquiry were not material in this (as in most) applications. See *Pearson*, at paras 24, 37, 39-47, 89-90, 99; *Canada Tax Reviews,* at paras 38-39. Royale & Feldman, at pp. 141, 145, 147-148; Di Domenico, at pp. 43-45, 47-48.

[37] Substantially all of the Commissioner's application record was publically available in the Court's files prior to the section 11 hearing and remains so. The hearing was conducted in public. The SIR from the prior merger review under Part VIII was relevant to this section 11 application, even though the current inquiry relates to conduct that may be reviewable under Part VII.1, because the Commissioner was already in possession of some records related to the current inquiry from Rogers's responses to the SIR during the merger review. On the section 11 application, the Commissioner had to disclose to the Court the extent of the records already in the Commissioner's possession and had to address whether producing the records sought was excessive, disproportionate or unduly burdensome, having regard in part to the overlap of the prior production during the merger with the proposed production under the Specifications in the draft section 11 order: see *Pearson*, at paras 45-46; *Canada Tax Reviews*, at paras 41-43, 46, 68; *Canada (Commissioner of Competition) v. Bell Mobility Inc.*, 2015 FC 990, at paras 46-56.

[38] In this context, treating the SIR and its contents as confidential under Rule 151, at the stage of a section 11 application (here, for an inquiry concerning conduct under a different

provision of the *Competition Act*), intrudes minimally into the open court principle and the objectives and values that support it: *Sierra Club,* at paras 49-51, 74, 79; *Google Canada,* at paras 52, 76-77. Through targeted redactions and the application of the Rule 151 test, the key objectives of section 11 are maintained and advanced, including judicial supervision and authorization of the Commissioner's requests for documents and information, the Commissioner's ability to use confidential and commercially sensitive information obtained from a respondent to satisfy the legal requirements for a section 11 order, and the public's ability to scrutinize both the Commissioner's request and the Court's process and decision to grant, modify, or deny the order requested.

[39] Lastly, treating the SIR and related information as confidential under Rule 151 does not simply continue the application of the Tribunal's Amended Confidentiality Order, although it does maintain the *status quo* in a practical sense. The Court must, and has, applied the relevant legal test under Rule 151 as set out in *Sierra Club* and *Sherman Estate*.

B. ***Confidential Information identified by Rogers on this Motion***

[40] Rogers identified information in the Commissioner's application record that it alleged was confidential due to competitive and commercial sensitivity. Its counsel sent a letter to the Commissioner prior to the section 11 application that identified information in Protected Records in the Tribunal proceeding and provided very detailed submissions to support its confidentiality claims. Rogers later withdrew its position on two small and related redactions (and properly so). Rogers also filed an affidavit on this motion that adopted the contents of its counsel's letter and

provided evidence to support its argument that the information was commercially and competitively sensitive.

[41] Rogers organized its sensitive information into several categories, as follows:

a) Information detailing the nature of the projects and product offerings of Rogers's wireless business that are under consideration and have not been publicly launched;

b) Information detailing Rogers's wireless marketing and business strategies, including the number of consumers to whom those strategies are directed;

c) Information relating to the information that Rogers tracks to analyze and assess the performance of its wireless business, including the non-public subscriber breakdowns and the data-usage of its consumers;

d) Information relating to Rogers's confidential contacts at third-party service providers; and

e) Information relating to Rogers's internal legal and regulatory processes.

[42] Rogers submitted that it had disclosed highly sensitive commercial information to the Commissioner during the merger review (information covered by the Amended Confidentiality Order) and during the pre-application dialogue prior to the section 11 Order. This disclosed information included detailed business plans that revealed the nature and performance of commercial strategies it employs in its wireless business. Rogers argued that disclosure of the information would fundamentally impair its ability to execute its strategies effectively, which would compromise its competitive position in offering wireless services to consumers.

[43] In addition to its own private interest in the information, Rogers contended that there was a "similarly important public interest that the competitive dynamics of a given market […] not be distorted or otherwise constrained by the disclosure of sensitive information that goes to the core of a company's commercial strategy and operations". Rogers further argued that the public has a significant interest in preserving the ability of parties like Rogers to engage fully and frankly with the Competition Bureau during an inquiry, and to ensure parties may have meaningful dialogue before a section 11 order is issued. On this approach, "[r]obust protection of commercially sensitive information will facilitate inquiries and advance important statutory objectives by permitting parties to freely advocate their position to the Competition Bureau, including through the provision of competitively sensitive information supportive of their position". Failure to protect commercially sensitive information during *Competition Act* inquiries, according to Rogers, would "eviscerate" the statutory protections put in place through subsection 10(3) and section 29 of the *Competition Act*. Rogers maintained that there is a "real risk that the resulting uncertainty would disincline parties from engaging fully with the Bureau" and that inhibiting the flow of salient information between the Bureau and affected market participants is not in the public interest.

[44] The Commissioner did not contest Rogers's position that the specified information should be protected by an order under Rule 151. The Commissioner stated that neither the public nor Rogers's competitive rivals have an absolute right to commercially sensitive information that meets the test in *Sierra Club* and *Sherman Estate* during a section 11 application.

[45] The Commissioner's submissions recognized a public interest in fair competition (citing *Resolve Business Outsourcing Income Fund v. Canadian Financial Wellness Group Inc.*, 2014 NSCA 98, at paras 26-31). The Commissioner also recognized the related public interest in parties being able to engage fully with the Commissioner in pre-application dialogue for section 11 proceedings. According to the Commissioner, in "the appropriate circumstances", the objectives underpinning the open court principle should yield to protect the public interest in fair competition which protects commercially sensitive information from wide disclosure.

[46] For the reasons below, I agree that the redacted information in the application record should be treated as confidential under Rule 151. I will discuss the information under several headings.

(a) *Rogers's internal consideration of a possible product or service offering*

[47] The affidavit filed by Rogers demonstrates the commercial sensitivity of redacted information concerning a possible product or service offering that Rogers was and is considering. The letter from Rogers's counsel, adopted in its witness's affidavit, identified some information as sourced from or referring to Protected Records under the Tribunal's Amended Confidentiality Order. The affidavit evidence characterized the details of planned wireless offerings as "incredibly sensitive" and indicated that disclosure of the details before the offerings are launched publically would seriously compromise their competitive viability, as rivals could respond to or even pre-empt the offerings with their own. The affidavit confirmed that this information is always kept highly confidential.

[48] Rogers's interest in this competitively sensitive information has a public interest related to competition, including the competitive process to retain or acquire customers of wireless services by offering new products or services.

[49] In *Resolve Business Outsourcing Income Fund*, the Nova Scotia Court of Appeal concluded that there was a public interest in fair competition relating to the integrity of a tendering process for a contract for a government-sponsored program. Fichaud JA observed, at paragraph 35:

> If D+H/Resolve's confidential material were made available to its competitors, the competitors could tailor their imminent tenders to that material, while D+H/Resolve would not have those competitors' equivalent confidential information. This would contravene the Government's Rules of Engagement and the judicially endorsed principles of fairness and equality that should govern the tender process. That the RFP had not yet issued, but was anticipated in the immediate future, has no bearing on the public's interest in the integrity of the upcoming tender process.

[50] In *Dow Chemical Canada ULC v. Nova Chemicals Corporation,* 2015 ABQB 81, the litigating parties were competitors and parties to a number of agreements related to the production of a product at a jointly-owned plant. Justice Romaine stated that the "promotion and protection of competition was a matter of public interest". She relied on the Competition Tribunal's insight with respect to confidentiality orders and its usual methods of categorizing confidential information (quoting the Reasons for Order dated June 9, 1999, in *Commissioner v. Superior Propane Inc., Petro-Canada, The Chancellor Holdings Corporation and ICG Propane Inc.*, (Tribunal File CT-1998-002), at pages 7-8). Romaine J. held at paragraphs 56-57:

> … the effect of denying a sealing and protective order in this case would be to allow one competitor in a two-competitor market to acquire confidential business information of the other. This would

> surely have an effect on competition, with Dow losing confidentiality of significant competitive variables for the benefit of Nova.
>
> I am thus satisfied that the evidence in this case raises the additional public interest concern that denying a sealing and confidentiality order may frustrate the promotion and protection of competition.

[51] Reasoning similar to those two decisions also applies in the present case, particularly given the small number of competitors and the nature of the competition in wireless services markets: see the Tribunal's consideration of the rivalrous behaviour towards new and renewing customers in the Rogers/Shaw merger in *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc ,* 2023 Comp Trib 1 (aff'd 2023 FCA 16), esp. at paras 1, 6, 199-226, 260, 408-409. Disclosure of Rogers's internal strategic information, analysis and plans for a possible new service or product offering would provide its rivals with insights into its future competitive behaviour, enabling them to respond more quickly and effectively to Rogers's possible offering, and depriving Rogers of a first mover advantage or its ability to respond promptly to a competitor's similar offering. The ability of a market participant to provide new product and service offerings to customers also reflects one of the statutory objectives in section 1.1 of the *Competition Act*, namely to provide consumers with competitive prices and product choices. See the discussion of this objective in section 1.1 in *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.*, 2009 FCA 295, [2010] 4 FCR 413, at paras 60-64.

[52] In addition, most of the redacted information falls into the categories identified in paragraphs 2(d) and (e) of the Amended Confidentiality Order and, in the case of the specific

internal information related to one possible service or product offering, was covered by the Amended Confidentiality Order.

[53] I note that neither *Resolve Business Outsourcing Income Fund* nor *Dow Chemical Canada* required the moving party to show a serious risk of harm to competition as contemplated by some substantive provisions of the *Competition Act* (*i.e.*, in a defined competition market, or to the standard of an adverse effect or a substantial lessening or prevention of competition in such a market). To do so would upend the *Sierra Club* analytical approach to sealing orders that protect commercially sensitive information.

[54] I therefore conclude that disclosure of this Rogers internal information poses a serious risk to an important public interest. As the parties agreed, there is no alternative practical alternative to protection under Rule 151; an order is necessary to prevent this serious risk to the identified interests.

[55] The third question is whether as a matter of proportionality, the benefits of the order outweigh its negative effects. That is the case here. In the legal and practical context of the section 11 application, protection of this information through the proposed redactions intrudes minimally into the open court principle: *Sierra Club*, at paras 79, 86-87, 91. In my view, it is commercially and competitively sensitive information that is of marginal utility to understand the section 11 application but could well be of real and practical benefit to others who are not directly affected by the Commissioner's inquiry – particularly competitors and other market participants. Protection of that information under Rule 151, at the section 11 stage, will not

materially offend the open courts principle, or inhibit the objectives and values that support it. However, disclosure of the information constitutes an avoidable alteration to the competitive landscape between the small number of competitors who are seeking to retain or acquire customers for wireless services.

[56] That said, the same information may or may not be suitable for Rule 151 protection in a later enforcement proceeding under a substantive provision of the *Competition Act*. For example, the analysis of proportionality and the weighing of benefits and effects may be different if the information were important to understand an aspect of a decision on the merits or the remedy to be imposed, given the objectives of the open court principle. See *A Lawyer v. The Law Society of British Columbia*, at para 81.

[57] For these reasons, I find that Rogers's information related to the possible product or service offering warrants protection under Rule 151 at this stage.

(b) *Internal customer analyses and data tracked by Rogers*

[58] Substantially the same analysis applies to the targeted redactions to the application record proposed by Rogers that refer to its internal customer analyses, including the nature of the analysis and customer data it tracks and some conclusions or observations about it. In this category of redactions, I include the titles of its internal dashboards for ongoing data tracking (recognizing that they are also covered by the reasoning below).

(c) *Rogers's internal information affecting the Specifications in the section 11 order*

(i) Organization charts and detailed role responsibilities

[59] Rogers provided organization charts ("org charts") of employees, and detailed descriptions of their roles and responsibilities, to the Commissioner during the Rogers/Shaw merger review. These documents were attached to the affidavit supporting the recent section 11 application. Rogers submitted that the org charts and detailed role descriptions were commercially sensitive and useful to its competitors. In addition, Rogers argued they contained proprietary information disclosed to the Commissioner in response to the SIR and were therefore covered by the category of information contemplated by paragraph 2(g) of the Amended Confidentiality Order. The evidence is not clear whether or not the documents were designated during the Tribunal merger proceedings and were therefore Protected Records under the Amended Confidentiality Order.

[60] This Rogers internal information was material to determining which kinds of employees would likely have information and records captured by the Specifications in the section 11 order. As may be expected, the information was discussed during pre-application dialogue between the representatives of the Commissioner and Rogers, as found in notes of those calls in the application record. Rogers provided some additional insights, and its position, during those pre-application calls, to attempt to resolve issues about custodians in the proposed section 11 order: see *Competition Act*, subsection 10(3) and paragraph 29(1)(*e*). As there was no agreement concerning the definitions of such custodians, the affidavit filed in Court to support the section 11 order attached the org charts and descriptions of individuals' roles.

[61] The org charts and, in particular, the detailed descriptions of internal employee roles and responsibilities, are not documents or information that Rogers shares outside the company. Rogers provided the records in response to the SIR and the Commissioner used it, appropriately, to prepare the draft Specifications in the section 11 order and for pre-application dialogue. In the present circumstances, I accept that the information has a private or confidential quality and can be characterized as having a public interest dimension related to both the statutory merger review process and as concerns the public interest in candid communications between the Commissioner and a respondent during pre-application dialogue before a section 11 application. As already noted, those communications are aimed principally at finding terms in the Specifications of a proposed order that satisfy the Commissioner's requirements for information related to his inquiry and are not excessive, disproportionate or unduly burdensome to the respondent who must comply with the order. The objectives of sections 10-11 are advanced by a respondent's ability to provide private information to the Commissioner about the records in its possession (here, related to custodians) on a voluntary basis and to address the issues with the Commissioner that are relevant and material to the section 11 application. Those issues (among others, including relevance to the inquiry) may then be explained to the Court during the *ex parte* application under section 11, as *Pearson* describes.

[62] In my view, disclosure of the Rogers org charts and employee responsibilities information would cause serious harm to these public interests, and the sole alternative is redaction from the application record. At this stage and in the context of the section 11 application, the third part of the legal test is also met. The balance at this stage is closer than for the information related to a possible product or service offering, as the information at issue is

directly connected to the section 11 application and there is no comparable impact on a market participant's competitive position. However, the Commissioner addressed the definition of custodians in his written representations on the application. The issue arose at the hearing but did not require specific reference to the contents of the proposed redacted information. The remaining public information in the application record, and discussions at the section 11 hearing, enable the public to understand the issues arising in relation to custodians. The org chart and employee responsibilities details to be redacted are somewhat intrusive into the open court principle but represent a proportional response to the competing public interests.

(ii) Rogers's internal records retention policies

[63] A similar but narrower analysis applies to Rogers's internal document and email retention policies. There are limited references in the application record to how long emails and documents are kept. For section 11 purposes, this information related to whether records will or will not be available for production to the Commissioner. The information was only disclosed during the section 11 pre-application dialogue, not during the prior merger review process.

[64] In addition, Rogers's commercial interest in not disclosing this information is different from the org chart and internal employee roles and responsibilities documents – the affidavit evidence from Rogers referred to the records retention information being "leveraged by an adversarial party in future legal or regulatory proceedings to undermine Rogers'[s] approach in those matters". I take that to mean that opposite parties will have information that will help them seek and obtain better discovery and document production in other proceedings, which is obviously important to Rogers's commercial interests but does not connect to most of the public

interests discussed in these Reasons. However, the information does attract the distinct public interest I have identified related to the pre-application dialogue process. At the stage of a section 11 application, which does not concern the merits or remedy in a substantive application under the *Competition Act* and does not concern a request for discovery by another party in legal proceedings, I conclude that the targeted redactions are appropriate under Rule 151 in this case, given the public information available in the record and at the hearing.

(iii) Third party service provider information

[65] There was one proposed redaction of the name of a third party service provider and the contact details of individuals who work for them. While these redactions were not the subject of specific evidence as to contractual confidentiality provisions, I find that for the reasons immediately above, these redactions are also appropriate under Rule 151 in this case.

IV. Additional Observations

[66] I will add the following observations to guide future section 11 applications that raise confidentiality issues.

[67] First, a notice of application for an order under section 11 can presumably also request relief under Rule 151 if the Commissioner identifies confidential information in his application record (whether independently or as a result of pre-application dialogue with the respondent). The *ex parte* nature of the section 11 application does not prevent either party from filing a motion under Rule 151, on notice to the other party, and returnable in Court immediately before the Commissioner's application: see *Google Canada*, at paras 9-10; *Pearson*, at paras 92-95. The

Court may grant a temporary order, as occurred in this case and in *Google Canada,* if the confidentiality issues cannot conveniently be addressed on the same day as the section 11 application.

[68] Second, the Court and its Registry are familiar with confidentiality issues and can rapidly deal with requests to file a confidential version of an application record under section 11, pending discussions between counsel for the Commissioner and the respondent or its counsel. Seeking relief under Rule 151 contemporaneously with filing the notice of application will avoid what occurred in this case – an early case management conference to discuss the Commissioner's initial filing of a "public" version of the application record that redacted the entire supporting affidavit and the proposed order under section 11. Before the hearing, the Commissioner filed amended confidential and public versions of his application record. Although the Commissioner acted with some understandable caution in his initial filing given the Competition Tribunal's Amended Confidentiality Order and the potential profile of the matter, I believe a more surgical approach to redacting possibly confidential information is achievable in future, one that will better ensure that the open court principle is maintained and yield a more efficient use of the Court and counsel's time.

[69] Lastly, the Commissioner's motion record filed on January 5, 2024, under Rules 151 and 369 appears to have been provided to, but not formally served on, the respondent's counsel. The respondent's counsel confirmed by letter that Rogers would be filing a record in response and did so. The process for motions served under the Rules, including timelines for response and reply, are different depending on whether the moving party seeks an oral hearing or asks that the

motion be determined in writing: see Rules 359, 360, 365 and 369. Service of motion materials on a respondent will alleviate the uncertainties for both the respondent and the Court. As counsel likely anticipated in this case, the absence of formal service made no substantive difference as the Commissioner's counsel provided the respondents' counsel with a copy of the motion record. The respondents' counsel communicated Rogers's intention to file materials and filed a responding record in a timely manner.

V. Conclusion

[70] For these reasons, the motion under Rule 151 is granted on the terms set out below. As the public and confidential versions of the application record filed on January 5, 2024, reflect the Court's decision, there is no practical reason to alter the status of any of other versions of the application record filed by the applicant prior to the section 11 hearing.

[71] The public and confidential versions of the letter from the Commissioner's counsel dated November 17, 2023, and of the motion record filed on January 5, 2024, for an order under Rule 151, also require no action as they are either consistent with these Reasons or the redactions in the public versions were reasonably necessary for the determination of this motion.

[72] Neither party requested costs of the motion.

ORDER IN T-2416-23

THIS COURT ORDERS that:

1. The motion under Rule 151 is granted. The information redacted from the application record filed on January 5, 2024, shall be treated as confidential under Rules 151 and 152 of the *Federal Courts Rules*.
2. Neither the parties nor the Registry is required to take action concerning the confidential and public versions of the application record filed on November 15, 2023 and on November 29, 2023, the letter from the Commissioner's counsel dated November 17, 2023, and the Commissioner's motion record filed on January 5, 2024.
3. The redacted information in the confidential versions of the documents in paragraphs 1 and 2 in the Court's files shall not be accessible to the public except as permitted by the *Federal Courts Rules* or as otherwise ordered by this Court.
4. There is no costs order.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2416-23
STYLE OF CAUSE:	THE COMMISSIONER OF COMPETITION v ROGERS COMMUNICATIONS INC. and ROGERS COMMUNICATIONS CANADA INC.

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	FEBRUARY 13, 2024

SOLICITORS OF RECORD:

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