

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2025 CHRT 12
Date: February 7, 2025
File No.: HR-DP-2975-23

[ENGLISH TRANSLATION]

Between:

Jan Zawilski

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Cogeco Connexion Inc.

Respondent

Ruling

Member: Sarah Churchill-Joly

Table of Contents

I.	OVERVIEW.....	1
II.	DECISION.....	2
III.	BACKGROUND	2
IV.	LEGAL FRAMEWORK AND ISSUES	4
V.	ANALYSIS	6
A.	Documents Concerned	6
(i)	Document entitled <i>Statement of Work Between Cogeco and MediaKind - CMS Upgrade</i>	6
(ii)	Document entitled <i>HOR-10588 - DV Functional Analysis</i>	7
(iii)	Document entitled <i>En liasse, documents liés à l'incident INC0000521</i>	8
(iv)	The contract or contracts between the Respondent and its content providers, should the Respondent disclose them to the parties and file them in the Tribunal's record	8
B.	Issue No. 1: Is there a real and substantial risk that publicly disclosing the documents will cause Cogeco Connexion Inc. undue hardship, which poses a serious risk to an important public interest?	9
C.	Issue No. 2: Is the confidentiality order necessary in the sense that no alternative measures would prevent the real and substantial risk of undue hardship to Cogeco Connexion Inc. while preserving the values underlying the open court principle?.....	12
D.	Issue No. 3: Does the real and substantial risk of hardship outweigh the societal interest in knowing the information contained in the assessment documents, that is, do the benefits of the order outweigh its negative effects?	14
VI.	ORDER	15

I. OVERVIEW

[1] This is a ruling on a request for a confidentiality order under section 52(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[2] The Complainant, Jan Zawilski, filed a complaint against the Respondent, Cogeco Connexion Inc. (Cogeco), a communications company that provides customers in Quebec and Ontario with Internet, video and telephony services through its coaxial cable and fibre optic broadband networks.

[3] Mr. Zawilski is visually impaired. He claims that Cogeco has not adapted the video service offered on the Cogeco On Demand platform to his disability. This video platform allows customers, like Mr. Zawilski, to enjoy instant access to a vast selection of films and programs on demand. However, described video, i.e. an oral description of a program's main visual elements enabling Mr. Zawilski to follow what is happening in the program, is still unavailable. Mr. Zawilski argues that the lack of described video deprives him and other visually impaired Cogeco Connexion Inc. customers of full access to videos on the platform.

[4] The case thus raises issues relating to the duty to accommodate in the context of telecommunications and broadcasting services. In August 2021, Mr. Zawilski filed a complaint of discrimination against the Respondent with the Canadian Human Rights Commission (the "Commission"). On November 14, 2023, the Commission referred the complaint to the Canadian Human Rights Tribunal (the "Tribunal") for inquiry.

[5] The hearing was scheduled for February 10 to 14, 2025. The Respondent filed a request for a confidentiality order on January 20, 2025, in which it asked the Tribunal to ensure the confidentiality of four documents or groups of documents that the parties intended to submit as evidence at the hearing. It argues that the documents concerned must remain confidential since their disclosure would result in a breach of a non-disclosure agreement with a third party and would reveal sensitive technical and financial information that could give its competitors a significant competitive advantage. It therefore proposes that the Tribunal maintain this confidentiality by giving directions on confidentiality which would limit the use and retention of this information and provide for its eventual destruction.

[6] The Commission has stated that it does not object to this request. The Complainant relies on the opinion of the Commission.

II. DECISION

[7] The request is granted. For the reasons that follow, the Tribunal orders that the confidentiality of the documents in question be preserved, in accordance with the conditions set out in the order below.

III. BACKGROUND

[8] In a direction sent to the parties on August 1, 2024, I reminded them that, at the disclosure stage, they have an obligation to maintain the confidentiality of all documents disclosed to them. Thus, Mr. Zawilski and the Commission must maintain the confidentiality of all documents disclosed to them by the Respondent, and the Respondent has the same obligation with respect to documents sent to it by the Complainant or the Commission (see *Constantinescu v. Correctional Service Canada*, 2020 CHRT 3 at paras 152 to 155, regarding this implicit undertaking of confidentiality).

[9] On August 30, 2024, the Respondent filed a formal request for a confidentiality order at the disclosure stage. The request concerns four documents on its document list. It asks the Tribunal to seal them if they become part of the official record, as they contain sensitive technical and financial information and are subject to confidentiality clauses with third parties. If the Tribunal does not make such an order, the Respondent asks it to set guidelines similar to those adopted by the Tribunal in *Eadie v. MTS Inc.*, 2013 CHRT 5, to protect them at the disclosure stage.

[10] The Commission has stated that it has no objection to this request and considers that the Respondent has correctly identified and applied the relevant case law and legal principles. The Complainant, however, who was unrepresented at the time the request was filed, considers that Cogeco's request was well defined and does not represent a major issue for him in the context of the hearing. He left it to the Commission to analyze and comment on the request.

[11] I concluded that, at that stage, the request was premature. During the teleconference on November 27, 2024, I asked the Respondent to confirm to the Tribunal, no later than January 20, 2025, that the documents covered by its confidentiality request would indeed form part of the evidence that the parties planned to file at the hearing. I also asked the Respondent to provide a more detailed explanation of the nature and extent of the harm it believes it would suffer if the document entitled *HOR-10588 - DV Functional Analysis*, which contains financial and technical details and confidential trade secrets, were disclosed.

[12] In accordance with these directions from the Tribunal, the Respondent filed an amended request for a confidentiality order on January 20, 2025, in which it asks the Tribunal to ensure the confidentiality of four documents or categories of documents that the parties intend to file as evidence at the hearing. It thus withdrew a document from its initial request and added a new category of documents under point “d.”. The documents or categories of documents concerned are as follows:

- a. Document entitled *HOR-10588 - DV Functional Analysis* (described video functional analysis), designated under heading I-3 of the Respondent’s *AMENDED List of Documents*
- b. Document entitled *Statement of Work Between Cogeco and MediaKind-CMS Upgrade*, designated under heading I-4 of the Respondent’s *AMENDED List of Documents*
- c. Document entitled *En liasse, documents liés à l’incident INC0000521* ([translation] In a bundle, documents related to incident INC0000521), designated under heading I-36 of the Respondent’s *AMENDED List of Documents*
- d. The contract or contracts between the Respondent and its content providers, should the Respondent disclose them to the parties and file them in the Tribunal’s record.

[13] This ruling deals with the Respondent’s amended request for a confidentiality order.

[14] The parties were provided with redacted versions of these documents. The Tribunal, for its part, received a redacted version of the *Media First Master Agreement* (the “Master Agreement”) between the Respondent and MediaKind; the Master Agreement does not form part of these documents but does contain a confidentiality clause that applies to the first three documents that are the subject of this order.

[15] The Complainant and the Commission have chosen not to make any additional submissions and are relying on their initial submissions. They therefore do not object to the request with respect to the first three documents and have not taken a position on the last category of documents added by the Respondent.

IV. LEGAL FRAMEWORK AND ISSUES

[16] The open court principle is presumed to apply (*Attorney General of Nova Scotia v. MacIntyre*, 1982 CanLII 14 (SCC) at para 34). This principle is essential to the proper functioning of Canadian democracy and is inextricably tied to freedom of expression (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at para 11) and to the public's right to obtain information about the courts in the first place, which is guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms* (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC) at para 23). It applies to the Tribunal's legal proceedings. In the context of Quebec, section 23 of the *Charter of Human Rights and Freedoms*, RLRQ, c. C-12 (the "Quebec Charter") also recognizes the right of every person to a public hearing of their case.

[17] Canadian law recognizes that the open court principle must be applied with some flexibility, as there are circumstances where it must be balanced against other rights and interests whose protection may require imposing discretionary limits. Section 23 of the Quebec Charter provides that a court may order *in camera* proceedings "in the interests of morality or public order".

[18] Such an exception is found in section 52 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). This section gives the Tribunal broad powers to take any measures and make any order it considers necessary to ensure the confidentiality of an inquiry in certain circumstances (s. 52(2) of the CHRA). The Tribunal may, in particular, use these powers when there is a real and substantial risk that the disclosure will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public (s. 52(1)(c) of the CHRA).

[19] Section 52(1) is worded as follows:

52 (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that (...)

52 (1) L'instruction est publique, mais le membre instructeur peut, sur demande en ce sens, prendre toute mesure ou rendre toute ordonnance pour assurer la confidentialité de l'instruction s'il est convaincu que, selon le cas : (...)

(c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; (...)

c) il y a un risque sérieux de divulgation de questions personnelles ou autres de sorte que la nécessité d'empêcher leur divulgation dans l'intérêt des personnes concernées ou dans l'intérêt public l'emporte sur l'intérêt qu'a la société à ce que l'instruction soit publique; (...)

[20] These legislative criteria are, on the whole, consistent with those established by the Supreme Court of Canada in *Sherman (Estate) v. Donovan*, 2021 SCC 25 [*Sherman (Estate)*]. That decision, at paragraph 38, recasts the test that applies when a person asks a court to exercise its discretion in a way that limits the open court presumption. This test, once described by the Court in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*] as an analysis with two branches—necessity and the proportionality of the proposed order—is recast in *Sherman (Estate)* around three cumulative prerequisites. It must be demonstrated 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.

[21] Only where all three of these prerequisites have been met can a limit on openness properly be ordered. The Supreme Court has clarified that this test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Sherman (Estate)* at para 38, citing *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at paras 7 and 22).

[22] The Tribunal therefore applies section 52(1)(c) in light of this three-part test formulated by the Supreme Court (*SM, SV and JR v. Royal Canadian Mounted Police*, 2021 CHRT 35 at para 10). In my analysis of the Respondent's confidentiality request in this case, this three-part test guides how the issues I must decide in this ruling are stated:

Issue No. 1: Is there a real and substantial risk that publicly disclosing the documents will cause Cogeco Connexion Inc. undue hardship, which poses a serious risk to an important public interest?

Issue No. 2: Is the confidentiality order necessary in the sense that no alternative measures would prevent the real and substantial risk of undue hardship to Cogeco Connexion Inc. while preserving the values underlying the open court principle?

Issue No. 3: Does the real and substantial risk of hardship outweigh the societal interest in knowing the information contained in the assessment documents, that is, do the benefits of the order outweigh its negative effects?

[23] The burden is on the Respondent to demonstrate that it meets these conditions, which would allow the Tribunal to answer these questions in the affirmative and grant the confidentiality request.

V. ANALYSIS

[24] The Respondent asks the Tribunal to order that the following documents or categories of documents remain confidential:

A. Documents Concerned

(i) Document entitled *Statement of Work Between Cogeco and MediaKind - CMS Upgrade*

[25] On June 18, 2018, the Respondent and Ericsson Inc. signed the Master Agreement, which governs the relationship between the Respondent and this service provider. On February 1, 2019, Ericsson Inc. assigned its interest in the Master Agreement to MediaKind, as appears from clause 1 of the *Statement of Work Between Cogeco and MediaKind - CMS Upgrade*, which is binding on the Respondent and its service provider.

[26] The Master Agreement includes the following general confidentiality clause:

8.8 Confidentiality

8.8.1 This Agreement, including the terms and conditions herein, the Statement of Works, the Services, Purchase Orders, the Software and Documentation and any and all parts thereof, shall be deemed to be confidential information. Further, any and all other information received under this Agreement (including documents, reports, plans, designs, processes, know-how, lists, accounts, computer data, business, technical and other information of a Party, communicated or made available to the other Party, in writing, orally, through visual observation or in any other tangible or intangible form, whether or not marked "confidential", and all notes, analysis, compilations, studies, summaries and other material prepared by a Party containing or based, in whole or in part, on Customer's or Ericsson's Information, all techniques and ideas embodied and expressed in such information), irrespective of the way of disclosure shall be deemed confidential information; All of the above are hereinafter referred to as "Confidential Information".

[27] I agree with the Respondent that, under the terms of this clause, disclosing this agreement and the information in it would place the Respondent in breach of its confidentiality undertakings to its co-contractor.

[28] It also appears that this document falls within the scope of this clause in the Master Agreement and is therefore confidential.

(ii) Document entitled *HOR-10588 - DV Functional Analysis*

[29] The Respondent argues that this document contains notes on exchanges between the Respondent and its service provider concerning various issues and technical specifications relating to the testing required to make described video content available on the Respondent's video-on-demand platform.

[30] I agree that these notes, which concern technical information shared between the parties, are covered by clause 8.8.1 of the Master Agreement; therefore, this document is also confidential.

(iii) Document entitled *En liasse, documents liés à l'incident INC0000521*

[31] For the same reasons, the Respondent argues that the document entitled *En liasse, documents liés à l'incident INC0000521* is also confidential. These are exchanges between the Respondent and its service provider relating to various technical issues that arose in the course of testing carried out with a view to making content with descriptive video available on the Respondent's video-on-demand platform. The exchanges are covered by clause 8.8.1 of the Master Agreement and are therefore also confidential.

[32] In short, the first three documents covered by the request for a confidentiality order are protected by the contractual agreement between the Respondent and a third party, which provides for their confidentiality. They contain details of their contractual relationship as well as technical aspects and exchanges of information undertaken under the Master Agreement.

[33] I therefore conclude that they are confidential.

(iv) The contract or contracts between the Respondent and its content providers, should the Respondent disclose them to the parties and file them in the Tribunal's record

[34] This category of documents includes contracts between the Respondent and its content providers, which the Complainant and the Commission, in a separate motion for disclosure, requested be disclosed given their likely relevance to the case. These contracts contain confidentiality clauses that protect their content and the data communicated between the parties, in accordance with their terms. Some clauses also require the Respondent to notify the other party of a court-ordered obligation to disclose, to enable the latter to seek an injunction or other appropriate remedy. They also require the Respondent to take steps to ensure that information disclosed to the court is treated confidentially.

[35] These contracts with third parties are not yet part of the anticipated evidence of the parties to this case, and this request for a confidentiality order would apply, with respect to these specific documents, at the disclosure stage. However, given the imminent start of the

hearing, which is to begin on February 10, 2025, this request is no longer premature, and the Tribunal must rule on it as a matter of urgency.

[36] I must therefore determine whether the Respondent has proved the three issues I stated above, which stem from the test in *Sherman (Estate)*.

B. Issue No. 1: Is there a real and substantial risk that publicly disclosing the documents will cause Cogeco Connexion Inc. undue hardship, which poses a serious risk to an important public interest?

[37] For the reasons that follow, I answer this question in the affirmative.

[38] Firstly, an important public interest can be a commercial interest. In *Sherman (Estate)*, the Supreme Court examined the scope of this first condition in relation to the exercise of its discretion to limit the open court presumption in that case. It concerned a motion to seal the probate files of a prominent couple whose suspicious deaths had been widely publicized. At paras 41 and 42, the Court repeated its comments in *Sierra Club*, according to which the term “important interest” covers a wide range of public interest objectives that transcend the interests of the parties to the dispute, and of which there is no exhaustive list. Courts must also be “cautious” and “alive to the fundamental importance of the open court rule”. The Court emphasized that an important interest can be a commercial interest. To qualify as an “important commercial interest”, “the interest in question cannot merely be specific to the party requesting the order; it must be one which can be expressed in terms of a public interest in confidentiality”. In support, the Court cited paragraph 55 of *Sierra Club*. It also stated that the test set out in *Sierra Club* “continues to be an appropriate guide for judicial discretion in cases like this one” (*Sherman (Estate)* at para 43).

[39] I am of the opinion that the Court’s reasoning in *Sierra Club* serves, moreover, as the best guide in my analysis of the present case. In *Sherman (Estate)*, the Supreme Court applied its reformulation of the *Sierra Club* test in the context of interests affecting privacy and dignity, while *Sierra Club* involved an application for a confidentiality order concerning documents containing technical details of commercial interest. In sum, although the test, as set out in *Sierra Club*, is no longer current, its reformulation in *Sherman (Estate)* does not change its essence. Moreover, since the facts underlying the Court’s analysis in *Sierra Club*

are closer to those now before us, this reformulation is in several respects a more suitable guide for the purposes of our analysis.

[40] My remarks in this regard are consistent with the comments of the Quebec Superior Court in *Raymond Chabot Grant Thornton v. Bourgeois*, 2021 QCCS 2933, cited by the Respondent, where the Court wrote that *Sherman (Estate)* [translation] “is not perfectly transposable to a commercial dispute such as the one at hand where commercial information, rather than individuals’ privacy, is at issue”. I would qualify this statement to clarify that, in my view, the test in *Sherman (Estate)* is transposable to commercial litigation, but that other decisions, such as *Sierra Club*, better elaborate on how to implement it in this particular context.

[41] In *Sierra Club*, the Supreme Court stated that if exposure of information would cause a breach of a confidentiality agreement, that interest, rooted first in an agreement of personal concern to the contracting parties involved, indicates a “public interest in confidentiality”. This is a general commercial interest in preserving confidential information (*Sierra Club* at para 55).

[42] In this case, this supports the argument that the commercial interest Cogeco is seeking to protect is public in nature, even though it is rooted in specific agreements between the Respondent and its co-contractors. The non-disclosure clauses they contain are linked to a general interest in protecting confidential information and maintaining the trust essential to good contractual relations between co-contractors, which goes beyond the interests of the parties to the agreements in question.

[43] In addition, the Supreme Court has stated that the preservation of confidential information is a sufficiently important commercial interest to satisfy this first branch of the analysis, provided certain conditions relating to the information itself are met. In this regard, an applicant must demonstrate that the information in question “has been treated at all relevant times as confidential”, that it is of “a confidential nature” and that it was “accumulated with a reasonable expectation of it being kept confidential”. Its disclosure must also, on a balance of probabilities, be likely to harm the applicant’s exclusive, commercial and scientific rights. (*Sierra Club* at paras 59 to 61).

[44] In this case, the Respondent argues that irreparable harm will be done to its business interests if the confidential documents are disclosed. I am of the opinion that the information they contain has been collected and treated confidentially, since it is clearly covered by express confidentiality clauses. The parties to these agreements determined, prior to entering into their business relationship, that they intend to treat certain information as confidential between them and to maintain that confidentiality.

[45] Disclosing this information would not only cause a breach of a non-disclosure agreement with a third party, but also reveal sensitive technical and financial information. Although I have not received a copy of these documents or any formal evidence in this regard, the Respondent's submissions, to which the other parties (having received redacted versions) do not object, state that these documents contain such information.

[46] The Respondent states that *HOR-10588-DV Functional Analysis* contains technical details concerning the internal processes of the Respondent and its service provider and that disclosing it could give its competitors an unfair advantage. It also claims that the document *En liasse, documents liés à l'incident INC0000521* contains exchanges between the Respondent and its service provider regarding various technical issues that arose in the course of testing to make content with described video available on the Respondent's video-on-demand platform. I also accept the Respondent's assertion that the document entitled *Statement of Work Between Cogeco and MediaKind - CMS Upgrade* and the contracts between the Respondent and its content providers contain sensitive technical and financial information which would likely give the Respondent's competitors a significant competitive advantage.

[47] I agree with the Respondent and the Commission that the Respondent operates in the telecommunications industry, which has a limited number of players in Canada, and that this may increase the hardship it could suffer. These documents, which contain technical and financial information about the company's internal architecture, could give competitors a competitive advantage if made public. I understand that the Respondent has expended considerable resources to develop the components covered by this information, and that allowing a competitor to have access to it free of charge and without effort, simply by consulting the Tribunal's record, would give it an unfair commercial advantage. Maintaining

healthy competition in the market in which the Respondent operates is another important interest at stake in this case.

[48] I conclude that public disclosure of these documents would pose a real and substantial risk to two important public interests: the general interest in protecting confidential information and maintaining the trust essential to good contractual relations between co-contractors, and the general interest in maintaining healthy competition in the marketplace. Disclosure of these agreements and this information would cause the Respondent to breach its confidentiality undertakings with its co-contractor and lead to a deterioration in its competitive position. I am of the opinion that the resulting hardship for the Respondent is unjustified in this case, and that the Respondent meets the conditions of the first branch of the analysis.

C. Issue No. 2: Is the confidentiality order necessary in the sense that no alternative measures would prevent the real and substantial risk of undue hardship to Cogeco Connexion Inc. while preserving the values underlying the open court principle?

[49] At this stage of the analysis, I need to determine whether there are reasonable alternatives to the confidentiality order and its scope in order to protect the Respondent's important commercial interests while ensuring that it is not overly broad.

[50] I infer from the Respondent's Statement of Particulars that it intends to file, as a defence at the hearing, evidence as to its technical and legal ability to implement some of the remedies proposed by the Complainant and the Commission, and that the first three documents that are the subject of this confidentiality request could be among that evidence.

[51] The Complainant and the Commission are also of the view that the last category of documents, the contracts between the Respondent and its content providers, allows them to test the undue hardship defence put forward by the Respondent as well as its argument that content providers determine whether content is made available with descriptive video. The Commission argues that the contracts could facilitate a better understanding of the systemic remedies that the Tribunal could order, in particular to ensure a sustainable supply

of content with descriptive video as well as a gradual increase in its availability on the Respondent's video-on-demand service.

[52] In short, these documents contain evidence that allows the Respondent, as was the case in *Sierra Club*, to make full answer and defence and, more broadly, upholds the parties' rights to a fair trial, a fundamental principle of justice (*M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 at para 84). These documents will provide the Tribunal with a complete record on which to base its decision. Given their importance as a defence for the Respondent and their relevance to the case, the Respondent has no choice but to disclose them.

[53] I also believe that there are no other reasonable alternatives that would allow these documents to be disclosed without revealing their confidential aspects and that, as a result, the order is necessary. These documents are either technical in nature, which would make redacting them ineffective, or contain confidentiality clauses, some of which require third parties to permit their disclosure. In the context of a few dozen contracts, the need to review each of them to redact all commercial, technical and financial content and to obtain consent from each of the co-contractors is not a reasonable solution, especially when I take into account that some of the elements relevant to the present case will also be of a technical and confidential nature.

[54] As the Supreme Court reminded us in *Sierra Club* at paragraph 66, at this stage of the analysis, "[t]he test asks whether there are reasonably alternative measures; it does not require the adoption of the absolutely least restrictive option". I find that, in the circumstances of this case, there are no other reasonable or effective means of restricting public access to these documents. The confidentiality order is therefore necessary because disclosing these confidential documents would represent a serious risk to the Respondent's important commercial interests, and because there are no other reasonable alternatives.

D. Issue No. 3: Does the real and substantial risk of hardship outweigh the societal interest in knowing the information contained in the assessment documents, that is, do the benefits of the order outweigh its negative effects?

[55] At this stage, I have to weigh the salutary effects of the confidentiality order, including its effects on the parties' right to a fair trial, against its deleterious effects, including its effects on the right to free expression, which in turn is connected to the principle of open and accessible proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted (*Sierra Club* at para 69).

[56] The confidential documents were considered to be relevant to the defences that the Respondent could raise, as well as to the other parties' ability to test them and make their case. I conclude that the confidentiality order would have significant salutary effects with regard to the parties' right to a fair trial. By ensuring that the parties and the Tribunal have access to relevant evidence and can test it at the hearing, the order allows the Tribunal to make an informed decision on the issues in dispute, based on a complete record. It thus assists in the search for truth, a core value underlying freedom of expression (*Sierra Club* at para 72). The order also maintains trust between co-contractors and protects healthy competition in an industry with few players.

[57] These salutary effects of the order must be weighed against the undeniably deleterious effect of undermining the open court principle since an order would deprive the public of access to the content of the documents in question. In paragraphs 74 and 75 of *Sierra Club*, the Supreme Court explained that discussion of the deleterious effects of the confidentiality order on freedom of expression must include an assessment of the effects such an order would have on the three core values underlying freedom of expression, namely, (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976).

[58] In this case, the Respondent argues that the technical and financial evidence in question is incidental to the main issue between the parties and therefore of little interest to

the public. The order applies to a limited number of documents and does not outright exclude the public from the hearing room. Thus, the confidential nature of these documents will not prevent the public from following the proceedings and seeking the truth and the common good. I have already determined that the Tribunal's ability to undertake its search for the truth in this case is enhanced by the confidentiality order.

[59] Since the value of "individual self-fulfilment by allowing open development of thoughts and ideas" is not very relevant with regard to the open court principle in the context of protecting institutions' commercial interests (see *Sierra Club* at para 80), I conclude that any effect would be minimal.

[60] As for ensuring that participation in the political process is open to all persons, this fundamental value is always at stake when the open court principle is at issue, given the importance of judicial transparency in a democratic society. However, where the political process is engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase (*Sierra Club* at para 82).

[61] It is undeniable that the substance of the proceeding in this case, which involves the human rights of a group of individuals and which could, if the Tribunal determines it to be well founded, lead to systemic remedies, has a greater public significance than when it involves a dispute between individuals over purely private interests. That said, when I weigh this interest against the incidental nature of the content concerned, its technical nature, the limited scope of the order and the benefits it confers on the parties and the Tribunal in terms of procedural fairness, I conclude that the interference with the open court principle is justified and that the Respondent meets the necessary conditions for granting its request.

VI. ORDER

[62] For these reasons, the Tribunal:

1. GRANTS the request for a confidentiality order;
2. ORDERS the sealing of the following documents, should they be filed in the Tribunal record:

- a. Document entitled *HOR-10588 - DV Functional Analysis*, designated under heading I-3 of the Respondent's *AMENDED* List of Documents
 - b. Document entitled *Statement of Work Between Cogeco and MediaKind - CMS Upgrade*, designated under heading I-4 of the Respondent's *AMENDED* List of Documents
 - c. Document entitled *En liasse, documents liés à l'incident INC0000521*, designated under heading I-36 of the Respondent's *AMENDED* List of Documents
 - d. Contracts between the Respondent and its content providers that the Respondent discloses to the parties
3. ORDERS a ban on the disclosure, publication and distribution of these documents;
 4. ORDERS that at no time during the proceeding will these documents be disclosed, directly or indirectly, without the prior consent of the Tribunal, to any person or entity other than the Tribunal, the Commission, the Complainant and the Interested Person;
 5. ORDERS the Complainant, the Commission, the Interested Person and the Tribunal to protect the confidentiality of these documents, including for the duration of any judicial review or appeal of the decision and after the final decision has been rendered;
 6. ORDERS the Complainant, the Commission, the Interested Person and the Tribunal to retain any electronic version of these documents using a secure storage method;
 7. ORDERS the Complainant and the Interested Person to destroy these documents, including any notes, tables and memoranda prepared from them, after the final decision has been rendered and once all legal remedies have been exhausted.

[63] The Respondent asks me, should I not grant its request, to adopt confidentiality guidelines similar to those in *Eadie v. MTS Inc.*, 2013 CHRT 5. I am of the opinion that the guidelines established in that case remain applicable to the present case, despite my decision to grant the Respondent's request, as they clearly and usefully describe how the Tribunal and the parties should conduct themselves in light of the confidential nature of these documents. Now therefore, the Court:

8. ORDERS that the confidential documents be filed separately and that they be clearly marked as confidential;

9. ORDERS that any party wishing to make use of documents or information designated as confidential during the hearing must inform the Tribunal of its intentions in advance. The Tribunal will then decide whether to exercise its discretion under section 52 of the CHRA to hear the proceedings *in camera*;
10. ORDERS that the confidential documents not be used for any purpose other than this proceeding;
11. ORDERS the Commission, in its capacity as a government agency, to guarantee the confidentiality of the documents in accordance with applicable government policies and directives on the retention and protection of confidential proprietary information.

Signed by

Sarah Churchill-Joly
Tribunal Member

Ottawa, Ontario
February 7, 2025

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: HR-DP-2975-23

Style of Cause: Jan Zawilski v. Cogeco Connexion Inc.

Ruling of the Tribunal Dated: February 7, 2025

Motion dealt with in writing without appearance of parties

Written representations by:

Josée Gervais and Carla Chirila, for the Respondent

Sarah Chênevert-Beaudoin, for the Canadian Human Rights Commission

Jan Zawilski, for the Complainant