



Broadcasting Decision CRTC 2008-13

Ottawa, 21 January 2008

Complaint by Avis de recherche inc. alleging undue preference by Videotron Ltd.

*The Commission concludes that Videotron Ltd. has not contravened section 9 of the Broadcasting Distribution Regulations, which prohibits a licensee from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage. The Commission therefore **dismisses** the complaint by Avis de recherche inc.*

The parties

1. Avis de recherche inc. (ADR) is the licensee of the French-language Category 2 specialty programming service known as Avis de Recherche. The programming broadcast by the service is intended to serve as a media tool for the provision of information to law enforcement agencies across Canada.
2. Videotron Ltd. (Videotron), the largest broadcasting distribution undertaking (BDU) in Quebec, is a wholly-owned subsidiary of Quebecor Media Inc.

The complaint

3. On 11 April 2007, ADR filed a complaint alleging that Videotron was threatening to remove Avis de Recherche from its digital basic service if the amounts owed to Videotron for distributing the service were not paid. In its complaint, ADR stated that, to its knowledge, Videotron does not charge distribution fees to the other Canadian Category 2 specialty services it distributes, including its related Category 2 service Prise 2. ADR stated that Avis de Recherche has been distributed in Quebec on Videotron's digital basic service since 21 October 2004.
4. ADR indicated that Videotron distributes only three digital Canadian French-language Category 2 specialty services: cinépop, a service owned by Astral Media Inc.; Prise 2, a related service owned by TVA Group Inc. (TVA Group); and Avis de Recherche. ADR submitted that Videotron's distribution of these three services contravenes the spirit of the Commission's regulations, specifically, section 18(14) of the *Broadcasting Distribution Regulations* (the Regulations), which reads as follows:

Except as otherwise provided under a condition of its licence, a licensee shall — for each Category 2 service [...] of a related programming undertaking that it distributes in a licensed area — distribute at least five Category 2 services [...] of any unrelated programming undertakings in the licensed area.

5. Although it conceded that this regulation does not seem to apply on a linguistic basis, ADR considers that not applying this regulation on a linguistic basis restricts the opportunities for digital French-language Category 2 services not linked to a BDU to gain access to distribution in the service's primary linguistic market.
6. Furthermore, according to ADR, imposing distribution conditions requiring the payment of a monthly rate to Videotron for carriage of Avis de Recherche on the basic digital service of Videotron's BDUs is contrary to the objective of the broadcasting policy for Canada, as set out in section 3(1)(t)(iii) of the *Broadcasting Act* (the Act). Section 3(1)(t)(iii) stipulates that "distribution undertakings should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services."
7. ADR was of the view that by paying Prise 2 a monthly wholesale rate while refusing to do the same for an unrelated specialty service, Videotron is giving an undue preference to Prise 2. Further, according to ADR, by requiring the payment of a monthly fee for the distribution of its service, Videotron is imposing an undue disadvantage on Avis de Recherche.
8. ADR also alleged that since it must comply with section 10.1 of the *Specialty Services Regulations, 1990*, the wording of which is similar to that of section 9 of the Regulations, the agreement reached with Videotron prevents it, for all practical purposes, from having its service distributed by a BDU belonging to another licensee. According to ADR, in order to avoid subjecting another BDU to an undue disadvantage vis-à-vis Videotron, and in order to respect current regulation, ADR would have to pay any other BDU that agreed to distribute its service, which would consequently force it into bankruptcy.
9. ADR noted that the agreement provides for an increase in the rate charged by Videotron to distribute Avis de Recherche, which rose from a maximum monthly subscriber rate of \$0.03 in 2002 to \$0.07 in 2004, an increase of 133% in two years. According to ADR, because Videotron has consistently maintained that there is no reason for the Commission to increase the monthly wholesale rates that distributors are required to pay Canadian analog specialty services when they are carried on the basic service, it is paradoxical and ironic, to say the least, for Videotron to consider a 133% increase in two years to be warranted when it is Videotron that is paid to distribute the service.
10. ADR submitted that Videotron gave Prise 2 an undue preference and subjected Avis de Recherche to an undue disadvantage by using its market power to impose on ADR a distribution agreement that reflects the standard clauses of the distribution agreements governing Videotron's relationships with services exempted from licensing (such as Télé-Achat or Télé-Annonces), which benefit from being able to broadcast 60 minutes of advertising per hour.

Videotron's position

11. Videotron submitted that the distribution of the Category 2 service Avis de Recherche is not mandatory.¹ It added that it agreed to carry this service on digital basic, subject to specific distribution terms established by both parties so that it would not incur additional expenses in distributing Avis de Recherche – hence the monthly charge to Avis de Recherche. According to Videotron, this initial agreement was negotiated in good faith by the parties and was agreed on before the service was launched. Further, despite the initial agreement between the two parties, ADR has not always fulfilled its obligations and Videotron has consistently tried to resolve these problems in good faith. Videotron argued that it should not be responsible for ADR's misfortunes, particularly when ADR has not even adhered to the agreement entered into by the two parties.
12. Videotron stated that it was not convinced that the service would be sufficiently attractive to consumers. Furthermore, according to Videotron, no distributor expressed an interest in distributing Avis de Recherche free of charge on the basic service at that time, and no Canadian distributor has expressed an interest since then. Videotron did not want to bill consumers for the service and noted that ADR insisted on having its service distributed on digital basic “[translation] based on the model agreed upon via the verbal assurances of sponsorship by the various police forces.” Videotron added that the pricing model agreed to by both parties shows that ADR was counting exclusively on advertising revenues, and not on subscription revenues, to ensure the viability of its service.
13. In view of the circumstances, Videotron submitted that ADR filed a complaint with the Commission in an attempt to eliminate its debt to Videotron and, more importantly, to have the agreement amended to relieve it of the requirement to pay Videotron in the future. According to Videotron, ADR wants to convince the Commission that this is a regulatory issue, when instead it is strictly a contractual issue that would be better addressed before the appropriate courts.
14. According to Videotron, section 18(14) of the Regulations does not apply on a linguistic basis, making ADR's argument unfounded and completely false. Videotron deemed that it is adhering to the current regulations since it offers a total of 41 Category 2 services for a lone related service. Moreover, Videotron noted that, at the present time, three French-language Category 2 specialty services are in operation, namely cinépop, Prise 2 and Avis de Recherche. Videotron therefore argued that, given the limited number of French-language Category 2 services, the Commission decided to regulate without regard to language.

¹ In Broadcasting Decision 2007-246, the Commission approved in part an application by ADR for Avis de Recherche to be designated for mandatory distribution by all direct-to-home satellite distribution undertakings as well as Class 1 and Class 2 BDUs, excluding multipoint distribution undertakings, as part of their digital basic services in the province of Quebec.

15. Videotron maintained that when it applied for a Category 2 licence, ADR was well aware of the rules applicable to the licence and consequently should have known that distribution undertakings are not in any way responsible for the viability of this category of service. Videotron added that ADR was and remains free to enter into any agreement whatsoever with a distributor and that the Commission “[translation] has never intended to intervene in the affiliation agreements between Category 2 programming undertakings and distribution undertakings.”
16. According to Videotron, even assuming for analysis purposes that it may have involuntarily given itself an undue preference, which it categorically denied, it could not under any circumstances be qualified as an undue preference within the meaning of the regulations. Videotron contended that it would be patently unreasonable in this instance to require it to pay penalties or even assign it blame for ADR’s inability to achieve its business plan and to bear the risks of operating its licence.
17. Videotron maintained that the amounts that ADR has paid to date were paid under an agreement negotiated in good faith by the parties with a mutual respect for the rights of each party.

Commission’s analysis and determinations

Preference or disadvantage

18. Section 9 of the Regulations reads as follows:

No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.
19. In analyzing a complaint under section 9 of the Regulations, the Commission first seeks to determine whether a party has given a preference to any person or subjected any person to a disadvantage. The Commission then considers whether any such preference or disadvantage is undue. In examining this second issue, the Commission takes into account whether a preference or a disadvantage has had, or is likely to have, an adverse material impact upon the complainant or any other person. It also examines the impact the preference or disadvantage has had, or is likely to have, on the achievement of the objectives of the broadcasting policy set out in the Act.
20. In Broadcasting Decision 2005-527, the Commission approved the application by TVA Group for a licence to operate the Category 2 specialty service now known as Prise 2. At that time, the Commission noted that “any refusal by a distributor to distribute a non-affiliated Category 2 service in favour of an affiliated Category 2 service could be subject to review pursuant to section 9 of the *Broadcasting Distribution Regulations*.”

21. In Public Notice 2000-6, the Commission set out a licensing framework for new Canadian digital programming services. It noted in that public notice that it would “not consider the viability of Category 2 services, their business or marketing plans, or the rates to be charged by them” so as to “ensure that highly experimental or innovative services will not be excluded due to a lack of perceived viability.”
22. Further, in Broadcasting Public Notice 2004-24, the Commission decided that “it would be consistent with an open-entry licensing approach to allow BDUs to assess the appeal that a Category 2 service would have among their subscribers in determining whether or not to distribute the service.”
23. In the present case, the Commission notes that Videotron did not deny ADR’s allegations that it does not charge distribution fees to the other Canadian Category 2 specialty services it carries. The Commission is of the view that by treating Avis de Recherche differently from the other Canadian Category 2 specialty services carried by its BDUs, Videotron is giving a preference to these other services and is subjecting Avis de Recherche to a disadvantage.

Undue preference or disadvantage

24. The Commission notes that Avis de Recherche has been distributed by Videotron since 21 October 2004 under an agreement that today seems to have become a disadvantage for the complainant. As ADR itself noted, it agreed to pay distribution fees to Videotron and was counting on advertising revenues to ensure the viability of its service. The Commission considers that this agreement was negotiated by both parties in good faith, despite ADR’s lack of experience, and that it was the terms of this agreement that made it possible for Avis de Recherche to be carried on Videotron’s digital basic service. Without this agreement, Avis de Recherche would not have been carried by Videotron.
25. The Commission considers that the affiliation agreements between Videotron and the Category 2 digital services it distributes are commercial in nature and that the Commission should not intervene unless the agreement between the parties is not in the public interest or contravenes the Commission’s regulations.
26. Although the agreement between Videotron and ADR is unique because it involves a Category 2 specialty programming service that is paying Videotron for carriage, the Commission considers that the approach set out in Public Notices 2000-6 and 2004-24 can be applied and therefore it will not intervene. Consequently, for the reasons and facts stated above, the Commission concludes that Videotron did not subject ADR to an undue disadvantage by billing it for distribution fees and that Videotron did not give an undue preference to the other Category 2 services it distributes, including the related service *Prise 2*.

Section 18(14) of the Regulation

27. The Commission notes that, according to Videotron, as of 17 October 2007, there were 76 English-language Category 2 services in operation and three French-language services (cinépop, Prise 2 and Avis de Recherche). Further, Videotron reported that it distributes a total of 41 Category 2 services, including the three French-language services.
28. Like the parties in question, the Commission considers that section 18(14) of the Regulations does not apply on a linguistic basis. Accordingly, it is the Commission's view that by offering approximately 40 unrelated Category 2 services for one related Category 2 service, Videotron is complying with section 18(14) of the Regulations. The Commission notes that no distinction was made in Public Notice 2000-6 or in section 8(14) of the Regulations in order that this access rule be applicable on a linguistic basis. Videotron decided to distribute the affiliated French-language service Prise 2 with approximately 40 English- or third-language services. The Commission notes that, at the present time, the decision as to whether or not to distribute a Category 2 service in operation in the main language market of a BDU is left to the discretion of the BDU.

Conclusion

29. In light of all of the above, the Commission concludes that the evidence filed by ADR is insufficient to sustain a finding of undue preference or undue disadvantage. The Commission therefore **dismisses** the complaint by Avis de recherche inc.

Secretary General

Related documents

- *Nostalgie – Category 2 Specialty Service*, Broadcasting Decision CRTC 2004-24, 21 October 2005
- *Revised procedures for processing applications for new digital Category 2 pay and specialty television services*, Broadcasting Public Notice CRTC 2004-24, 8 April 2004
- *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000

This decision is to be appended to the licence. It is available in alternative format upon request and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>