



## Telecom Decision CRTC 2009-677

Ottawa, 29 October 2009

### **Canadian Association of Internet Providers et al. and Vaxination Informatique – Application to review and vary certain determinations in Telecom Decision 2008-108 related to Bell Canada's Internet traffic management practices**

File numbers: 8662-V42-200907826 and 8662-P8-200907727

*In this decision, the Commission determines that the applications by CAIP et al. and Vaxination do not raise substantial doubt about the correctness of the determination in Telecom Decision 2008-108 that the throttling process Bell Canada relies upon does not engage section 36 of the Telecommunications Act. The Commission also determines that the applications do not raise substantial doubt about the correctness of Telecom Decision 2008-108 with respect to the completeness of the record used to make that decision or to the fettering of the Commission's discretion. The Commission closes the remainder of the applications in light of Telecom Regulatory Policy 2009-657.*

### **Introduction**

1. The Commission received an application by Vaxination Informatique (Vaxination), dated 20 May 2009, requesting that the Commission review and vary certain determinations set out in Telecom Decision 2008-108. Specifically, Vaxination requested that the Commission review and vary its determinations that Bell Canada's application of Internet traffic management practices (ITMP) to Gateway Access Service (GAS) (a) are not in violation of its GAS tariff and sections 24, 25, and 27 of the *Telecommunications Act* (the Act); (b) do not engage section 36 of the Act; and (c) do not violate Commission rules related to privacy.
2. The Commission also received an application by a coalition of consumer groups and independent telecommunications service providers<sup>1</sup> (CAIP et al.), dated 21 May 2009, requesting that the Commission review and vary its determinations in Telecom Decision 2008-108 with regard to Bell Canada's application of ITMP to GAS. In view of the similarity of the issues raised in these applications, the Commission considered the two applications in one proceeding.
3. The Commission received comments from Bell Aliant Regional Communications, Limited Partnership and Bell Canada (the Bell companies), the Canadian Film and Television Production Association, the Canadian Internet Policy and Public Interest Clinic, the Coalition of Internet Service Providers, Distributel Communications, and the Union des Consommateurs, as well as more than 3,300 comments from the general public. With the

<sup>1</sup> The coalition consists of the following organizations: the Public Interest Advocacy Centre (PIAC), the Canadian Association of Internet Providers (CAIP), Acanac Inc., Accelerated Connections Inc., Cybersurf Corp., Execulink Telecom Inc., eagle.ca, Managed Network Systems Inc. (MNSi), Skyway West Business Internet Services, Start Communications, TekSavvy Solutions Inc., Vianet Internet Solutions, and Yak Communications.

exception of the Bell companies, all parties supported the applications. The public record of this proceeding, which closed on 10 August 2009, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings" or by using the file numbers provided above.

## **Issues**

4. The Commission considers that these applications raise the following issues:
  - I. Did the Commission err in Telecom Decision 2008-108 when it determined that the throttling of Bell Canada's GAS does not engage section 36 of the Act?<sup>2</sup>
  - II. Was Telecom Decision 2008-108 based on an insufficient record and did the Commission fetter its discretion?
  - III. How should the Commission dispose of the review and vary applications in view of its determinations in Telecom Regulatory Policy 2009-657?

### **I. Did the Commission err in Telecom Decision 2008-108 when it determined that the throttling of Bell Canada's GAS does not engage section 36 of the Act?**

5. CAIP et al. and Vaxination submitted that, for many reasons, the Commission had erred in Telecom Decision 2008-108 when it determined that Bell Canada's throttling of GAS does not engage section 36 of the Act. According to CAIP et al. and Vaxination, the meaning and purpose of any telecommunications transmission is a subjective matter that can only be determined by the parties involved in the communication. CAIP et al. also submitted that when a peer-to-peer (P2P) download file is delivered at a time other than when a user desires or requires it, its meaning may be lost or simply no longer relevant for that user.
6. CAIP et al. submitted that while Bell Canada claimed that it only throttles non-time-sensitive P2P file-sharing applications, file-sharing software can be used to support a wide variety of live or real-time content streaming services, including live-streaming television services. According to CAIP et al., Bell Canada did not provide sufficient evidence that only non-time-sensitive traffic was subject to throttling. Vaxination made similar arguments.
7. In CAIP et al.'s view, the Commission did not have sufficient information to reach a conclusion that Bell Canada's process does not block traffic and therefore could not conclude that the process does not violate section 36 of the Act. Vaxination submitted that Bell Canada's ITMP involves the dropping of packets, constituting a violation of section 36 of the Act.

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<sup>2</sup> Section 36 of the Act states that "except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public."

### **Commission's analysis and determinations**

8. The Commission notes that in the proceeding that led to Telecom Decision 2008-108, Bell Canada provided evidence that its traffic shaping of GAS applied to P2P file-sharing applications during peak hours. The Commission notes that Bell Canada also indicated in that proceeding that its traffic shaping process did not affect time-sensitive applications. The Commission received no evidence to the contrary in that proceeding.
9. The Commission further notes that, by their nature, file-sharing applications require time for the complete file to be transmitted before an end-user can access them, irrespective of whether traffic shaping is applied. Further, the evidence before the Commission in the proceeding that led to Telecom Decision 2008-108 indicated that, in the circumstances, the telecommunications that were subject to traffic shaping reached their intended recipients with their contents unchanged, although more slowly than if traffic shaping had not been applied. In addition, based on the record of that proceeding, the Commission noted that the traffic shaping Bell Canada carried out did not involve any editorial control over the content of the telecommunications and did not involve blocking any telecommunications.
10. In light of the above, the Commission finds that the applicants have not raised substantial doubt as to the correctness of the determination in Telecom Decision 2008-108 that the throttling process Bell Canada relies upon does not engage section 36 of the Act.

### **II. Did the Commission make a decision based on an insufficient record and did it fetter its discretion?**

11. CAIP et al. submitted that by issuing Telecom Decision 2008-108 and, at the same time, initiating a public process with Telecom Public Notice 2008-19, the Commission had demonstrated that it did not have a sufficient record to make its determinations in Telecom Decision 2008-108.
12. CAIP et al. also argued that the Commission had fettered its discretion in relation to proceedings dealing with the appropriateness of content-, application-, or protocol-based throttling. CAIP et al. submitted that the Commission had pre-judged certain issues raised in the Public Notice 2008-19 proceeding, thereby narrowing the scope of its decision in the Public Notice 2008-19 proceeding even before the decision was made.

### **Commission's analysis and determinations**

13. The Commission notes that its determinations in Telecom Decision 2008-108 were made following a complete process in which many parties had commented. During the proceeding that led to that decision, the Commission reviewed issues related to a particular ITMP that Bell Canada applied to a wholesale service. As the Commission noted in Telecom Decision 2008-108, its review of Bell Canada's ITMP led it to conclude that it should also review the current and potential ITMPs of Internet service providers regarding both retail and wholesale services that were beyond the scope of that proceeding. In light of the above, the Commission considers that the fact that it initiated that broader review cannot support an argument that it had an insufficient record upon which to base Telecom Decision 2008-108.

14. Given the Commission's determinations in Telecom Regulatory Policy 2009-657, the Commission considers that Telecom Decision 2008-108 did not fetter its discretion in the Telecom Public Notice 2008-19 proceeding or possible future proceedings.
15. In light of the above, the Commission finds that CAIP et al. did not raise substantial doubt as to the correctness of Telecom Decision 2008-108 with respect to the completeness of the record used to make Telecom Decision 2008-108 or to the fettering of its discretion.

### **III. How should the Commission dispose of the review and vary applications in view of the determinations in Telecom Regulatory Policy 2009-657?**

16. In Telecom Regulatory Policy 2009-657, the Commission established an ITMP framework that will be applied to the ITMPs of Internet service providers in order to assess the compliance of their ITMPs with the Act, and to determine whether any additional actions are required regarding privacy considerations.
17. The Commission notes that in Telecom Regulatory Policy 2009-657, it directed Internet service providers that are currently applying technical ITMPs to wholesale services, and whose technical ITMPs are not included in a tariff, to, depending on the circumstances, issue or seek approval of revised tariffs that describe these ITMPs within 30 days of the date of that decision.
18. The Commission notes that the technical ITMP of Bell Canada that was the subject of Telecom Decision 2008-108 is subject to this new framework and to the tariff requirements set out in Telecom Regulatory Policy 2009-657.
19. In light of the above, the portions of the review and vary applications of CAIP et al. and Vaxination pertaining to aspects of the Act other than section 36 are closed.

Secretary General

### **Related documents**

- *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, 21 October 2009
- *Review of the Internet traffic management practices of Internet service providers*, Telecom Public Notice CRTC 2008-19, 20 November 2008
- *The Canadian Association of Internet Providers' application regarding Bell Canada's traffic shaping of its wholesale Gateway Access Service*, Telecom Decision CRTC 2008-108, 20 November 2008

*This document 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>*