



Broadcasting Decision CRTC 2009-588

Ottawa, 18 September 2009

Complaint by Allarco Entertainment 2008 Inc. against Rogers Cable Communications Inc., pursuant to section 9 of the *Broadcasting Distribution Regulations*

*The Commission finds that Rogers Cable Communications Inc. (Rogers) has subjected Allarco Entertainment 2008 Inc. to an undue disadvantage in regard to the marketing of Super Channel, a general-interest pay television programming service, contrary to section 9 of the Broadcasting Distribution Regulations. The Commission further finds that there is insufficient evidence to establish that Rogers has given an undue preference to Astral Broadcasting Group Inc., licensee of The Movie Network, HBO Canada and MoviePix, in regard to the marketing of Super Channel. The Commission **directs** Rogers to file, by **19 October 2009**, written documentation setting out the steps it will take to ensure that, in future, its marketing of Super Channel does not result in the service being subjected to an undue disadvantage.*

In this decision, the Commission also explains its ruling on confidentiality requests relating to various documents filed in this process, which was communicated to the parties by Commission letter dated 24 August 2009.

Introduction

1. On 13 April 2009, Allarco Entertainment 2008 Inc. (Allarco) filed a complaint against Rogers Cable Communications Inc. (Rogers). Allarco, the general partner, is licensee, together with the limited partner C.R.A. Investments Ltd., carrying on business as Allarco Entertainment Limited Partnership, of the national, English-language general-interest pay television programming undertaking known as Super Channel. Rogers is a wholly-owned subsidiary of Rogers Communications Inc. (RCI) and one of the largest operators of cable broadcasting distribution undertakings (BDUs) in Canada.
2. In its complaint, Allarco alleged that Rogers, in regard to the marketing of Super Channel, contravened section 9 of the *Broadcasting Distribution Regulations* (the Regulations), which states that “[n]o licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.”
3. Specifically, Allarco alleged, among other things, that Super Channel is not being offered by Rogers in a manner comparable with the way it offers the incumbent premium pay television services of Astral Broadcasting Group Inc. (Astral) (The Movie Network (TMN), HBO Canada and MoviePix).¹ It submitted that this conduct has subjected Super Channel to an undue disadvantage and has given an undue preference to the other movie services.

¹ In its submissions, Allarco has referred to those services in various manners, at times, to one, two or all three services.

4. Rogers rejected the allegations of undue disadvantage and undue preference, arguing, among other things, that every reasonable request for accommodation and support for Super Channel has been adopted by Rogers.
5. Rogers further submitted that the complaint relates entirely to issues of a commercial nature and that, consequently, the Commission should not involve itself in this complaint. In this regard, the Commission considers that it has the jurisdiction to rule on the matters raised in this complaint, including the promotion of services by customer service representatives (CSRs), which is discussed below.

Commission's analysis

6. Super Channel was first granted a licence by the Commission in *Applications for new pay television services*, Broadcasting Decision CRTC 2006-193, 18 May 2006 (Broadcasting Decision 2006-193). In that decision, the Commission noted the following:

[...] the new Allarco pay television service will compete directly with the incumbent English-language pay television services offered by Astral [Broadcasting Group Inc.] and Corus [Entertainment Inc.], both of which enjoy the benefits of incumbency, including significant subscriber bases and existing arrangements with [...] content providers. Under such circumstances, the Commission considers that it would be unreasonable to expect the new Allarco service to meet its business plan, including its commitments with respect to expenditures, promotion and exhibition of Canadian programming, and to provide an attractive service, without comparable distribution requirements.
7. In analyzing a complaint of undue preference under the Regulations, the Commission must first determine whether there is a preference or a disadvantage. Where it determines that there is a preference or disadvantage, the Commission must then determine whether, under all the circumstances, it is undue.
8. In order to determine if a preference or a disadvantage is undue, the test applied by the Commission is to examine whether the preference or disadvantage has had, or is likely to have, a material adverse impact on Super Channel or any other person. It also examines the impact that the preference or disadvantage has had, or is likely to have, on the achievement of the objectives of the broadcasting policy for Canada set out in the *Broadcasting Act* (the Act).
9. In this regard, section 3(1)(t)(iii) of the Act states 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.” Further, section 3(1)(d)(ii) of the Act states that the Canadian broadcasting system should:

encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view.

10. In assessing whether Rogers has subjected Allarco to an undue disadvantage or has given an undue preference to Astral, the Commission has reviewed the full range of allegations made by Allarco and the pertinent responses by Rogers to each of those allegations. As set out below, the Commission has focussed on the following two key issues in reference to the marketing of Super Channel that, in its view, are sufficient for the Commission to make a determination in this matter:
 - the packaging of Super Channel by Rogers, as compared to its packaging of other pay movie services; and
 - the manner in which Rogers' CSRs interact with subscribers in the promotion of Super Channel, as compared to how they interact with subscribers when promoting comparable pay movie services.

The packaging of Super Channel by Rogers, as compared to its packaging of other pay movie services

11. As noted above, Allarco submitted that Super Channel is not being offered by Rogers in a manner comparable with the way it offers TMN, HBO Canada and MoviePix, which it offers to its subscribers in various combinations, at significant cost savings, including discounts on an annual basis. Allarco noted, for example, that the combination TMN/HBO Canada is offered in a package called "Rogers Digital VIP" (DVIP) only to people who place calls to Rogers' call centres, whereas Super Channel has not been and currently is not offered in such a package, despite repeated requests by Allarco. Allarco also submitted that Super Channel is not included in the DVIP package on Rogers' website while TMN and HBO Canada are actively promoted. Allarco further noted that the combination TMN/HBO Canada/MoviePix is offered within the "Rogers VIP Ultimate with Movies" package, while Super Channel is not.
12. Furthermore, noting that Rogers encourages subscribers to obtain movie services as part of the various Rogers VIP services, Allarco submitted that each subscriber who is directed to a Rogers VIP package is not provided the option of purchasing Super Channel in a similar package or at a similar monthly discount for the package of channels. Allarco submitted that subscribers have the opportunity to obtain TMN/HBO Canada/MoviePix at an all-inclusive price, but not Super Channel.
13. In reply, Rogers submitted that the terms under which it has distributed Super Channel since its launch in November 2007 have been fair and equitable. It further submitted that there is no obligation on BDUs to provide one pay television service with terms of carriage that are, in every respect, identical to those provided to other television services. Rogers also stated that it does not favour one programming service over another and does not grant preferential terms of carriage to any programming service.

14. Rogers noted that Super Channel is not the only pay television service that must be specifically requested by a subscriber and that no pay television movie services are automatically included in its DVIP package, which includes digitized versions of the basic service, three analog tiers and additional specialty services (i.e., the Top 25). Customers have the choice of subscribing to either VIP with Super Channel, VIP Ultimate with TMN or VIP Ultimate with Movies, the latter of which includes the TMN and MoviePix services and 60 digital specialty services.
15. Rogers submitted therefore that the only material difference in packaging between Super Channel and TMN is that TMN is offered in a package that was launched in 2001. Rogers argued that its customers have therefore had almost eight years to develop an awareness of the package's existence and to consider whether to subscribe to it. Rogers submitted that it has yet to adopt a similar brand or moniker for Super Channel when it is acquired with the DVIP package.
16. Rogers also stated that it is unrealistic and unreasonable for Allarco to expect that it will launch a new service and instantaneously receive marketing and promotional arrangements that are identical, in every respect, to existing service providers. It further submitted that, since the Commission did not prescribe the amount or level of marketing and promotion in its Super Channel licensing decision, it is unreasonable for Allarco to suggest that Rogers should be required to mimic the manner in which other BDUs treat Super Channel.
17. As noted above, when Super Channel was first licensed, the Commission stated that it would be unreasonable to expect the service to compete with incumbent pay television services without having "comparable distribution requirements." While the Commission broadly agrees with Rogers that, in Broadcasting Decision 2006-193, it did not prescribe how these requirements would apply to marketing matters such as packaging and promotion and did not state that the treatment of Super Channel by other BDUs should be identical to that for other pay services, it did note in that decision that comparable distribution requirements are necessary for equitable competition between similar types of programming services.
18. It is the Commission's view that, based on the information filed as part of this process, Rogers packages Super Channel differently than it does TMN/HBO Canada/MoviePix. For example, the record demonstrates that Rogers does not offer Super Channel as part of the VIP Ultimate with Movies package, whereas TMN/HBO Canada/MoviePix are included in this package. Instead, Super Channel is offered as an additional service.

The manner in which Rogers' CSRs interact with subscribers in the promotion of Super Channel, as compared to how they interact with subscribers when promoting comparable pay movie services

19. Allarco submitted that Rogers' CSRs were not promoting Super Channel to the same extent as they were promoting TMN/HBO Canada/MoviePix. In support of this claim, Allarco presented research showing that Rogers' CSRs, in the majority (about 97%) of

320 recorded telephone calls, exhibited a bias towards promoting TMN/HBO Canada/MoviePix and other specialty services as well as services operated by Rogers (such as its own wireless and video-on-demand (VOD) services) over Super Channel. This research revealed that only in 13 calls (about 4%) did CSRs mention Super Channel as one of the pay television movie services available with Rogers. In most calls, the main offering presented to the callers was the Rogers DVIP package plus TMN for one year.

20. Allarco submitted that Rogers does not provide adequate training to its CSRs with respect to the nature of the Super Channel service or the programming contained therein. It further submitted that it has not received the same opportunities as have other programming services in terms of access to CSRs so as to provide information to those CSRs for their promotion of Super Channel to potential customers.
21. In reply, Rogers submitted that the manner in which CSRs are trained is not a term of carriage and falls far outside the scope of section 9 of the Regulations. It claimed that it has consistently provided its CSRs with internal bulletins relating to Super Channel that are designed to promote and inform them about the service. Rogers further submitted that there is no merit in Allarco's allegation that it was denied access to CSRs during the period in question whereas other pay television services were provided such access.
22. The record on how Super Channel is promoted by Rogers' CSRs suggests that Rogers has made some effort to promote the service through various marketing initiatives (such as website enhancements, direct mailings and promotions on the local availabilities of non-Canadian satellite services). However, the Commission considers that Rogers' CSRs are not promoting Super Channel as vigorously as they are promoting TMN, since they are only identifying Super Channel as an alternative movie service in about 4% of the cases (based on a sample of 320 telephone calls) when a customer requests any movie service.

Commission's determinations

23. Based on the above, the Commission finds that Rogers has subjected Allarco to a disadvantage, first, by not including Super Channel in its VIP Ultimate with Movies package or in any other similar package, and second, through the significantly lesser marketing efforts used by its CSRs to promote Super Channel as compared to those used to promote TMN/HBO Canada/MoviePix. In the Commission's view, Rogers' conduct falls short of affording Super Channel comparable distribution.
24. As to whether or not this disadvantage is undue, the Commission notes that Allarco filed penetration rates with the Commission and Rogers, in confidence, which showed a significantly lower penetration rate on Rogers than the average penetration rates for Super Channel on other major BDUs during the same period. Rogers did not contest the penetration rate that it has experienced for Super Channel. The Commission accepts as fact Allarco's contention that Super Channel's penetration on Rogers' systems was significantly lower than on other BDUs during the same period.

25. In the Commission's view, it is reasonable to conclude that Rogers' marketing of Super Channel, including its decision not to offer Super Channel in the VIP Ultimate with Movies package or in any other similar package and the lesser promotion of Super Channel by Rogers' CSRs, have contributed to a lower penetration rate on Rogers' systems compared to other BDUs, resulting in lower revenues for Super Channel than would otherwise be achieved. While the Commission cannot state as fact the amount of revenues that Super Channel would receive from its inclusion in the VIP Ultimate with Movies package and from a promotion of Super Channel by Rogers CSRs comparable to that of other pay movie services, the Commission considers that Super Channel would have received significantly higher revenues than it did in fact receive and that this situation is likely to continue unless Rogers' conduct with respect to the marketing of Super Channel changes.
26. On the issue of whether there has been an impact on the achievement of the objectives of the Act, the Commission notes that the objectives set out in sections 3(1)(t)(iii) and 3(1)(d)(ii), noted above, can only be met when BDUs afford a fair opportunity for a service to compete and succeed in the marketplace. In so doing, services such as Super Channel are able to continue to invest in Canadian programming and continue to add to the diversity of programming choices available to Canadians.
27. In light of all of the above, the Commission is of the view that Rogers' conduct with respect to the marketing of Super Channel has had and is likely to continue to have a material adverse impact on Super Channel. It further considers that Rogers' conduct has had, or is likely to have, a negative impact on the achievement of the objectives of the broadcasting policy for Canada set out in the Act. Accordingly, the Commission finds that Rogers has subjected Allarco to an undue disadvantage with respect to its marketing of this service, contrary to section 9 of the Regulations.
28. In regard to whether Rogers has conferred an undue preference on Astral, the Commission considers that there is insufficient information on the record of this proceeding to establish that this is the case.

Conclusion

29. The Commission **directs** Rogers to file, by **19 October 2009**, written documentation setting out the steps it will take to ensure that, in future, its marketing of Super Channel does not result in the service being subjected to an undue disadvantage.

Other matters

Confidentiality requests

30. In its submission of 12 June 2009, pursuant to section 20 of the *CRTC Rules of Procedure*, Allarco requested confidentiality for Schedule 4, which identifies Super Channel penetration rates for various BDUs. It submitted that disclosure of this information on the public file would reveal commercially sensitive information and would be contrary to the terms of individual affiliation agreements.

31. In a letter dated 30 June 2009, pursuant to section 20 of the *CRTC Rules of Procedure*, Rogers requested that the Commission grant confidentiality with respect to a significant amount of information filed by Rogers, as well as to some information contained in submissions by Allarco. Rogers submitted that the information which should be deemed confidential falls into one or more of the following three categories: i) commercial information that is competitively sensitive; ii) technical information that is competitively sensitive; and iii) information the disclosure of which would interfere with the contractual or commercial negotiations of RCI with third parties.
32. Rogers argued that the disclosure of this information would cause direct and specific material harm to RCI and would significantly disadvantage its cable BDUs. Rogers subsequently provided the Commission with redacted versions of the submissions for which it requested confidentiality.
33. Allarco stated that, although the redactions submitted by Rogers are questionable at law, in the interest of fairness and justice, it would not object to Rogers' confidentiality request, provided that the Commission is granted access to the full "un-redacted" record.
34. The Commission communicated its ruling on confidentiality to the parties by letter dated 24 August 2009. In that letter, the Commission indicated that it considered that the potential harm that could result from disclosure of certain information filed by Allarco and Rogers outweighs the public interest benefit. For instance, the Commission considered that information such as penetration rates, churn rates, wholesale rates, discounts to customers, as well as information related to negotiation, advertising and marketing strategies are commercially sensitive and, accordingly, should not be placed on the public file.
35. Accordingly, the Commission approved Allarco's request for confidentiality of Schedule 4 of its 12 June 2009 submission which provides Super Channel penetration rates of various BDUs in Canada, and approved Rogers' request for confidentiality for the following:
 - Super Channel churn rates;
 - Super Channel discounts to customers;
 - the number of days that Rogers requires to launch a new service;
 - the use of new digital technology (i.e., Switched Digital Video);
 - negotiations with CNN HD (the high definition simulcast of the Cable News Network);
 - the number of hours of subscription VOD programming;
 - the comparison of wholesale rates between Super Channel and TMN;
 - Rogers' advertising and marketing of Super Channel;
 - the percentage of customers subscribing to Rogers VIP packages;
 - CSR training and incentives;
 - employee discounts;
 - the marine fibre project in Newfoundland;

- Rogers' internal sales and marketing bulletins;
- Rogers' pricing (including margins and mark-ups);
- all correspondence between Allarco and Rogers; and
- Super Channel penetration rates.

36. Conversely, the Commission considered that the information submitted by Allarco with respect to its survey of Rogers' CSRs did not appear to be commercially sensitive and that the disclosure of that information would best serve the public interest. Accordingly, the Commission denied Rogers' request for confidentiality for all statistics relative to the CSR telephone survey. In accordance with Commission policy, this information is to be placed on the public file.

Secretary General

This decision 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>.