



Broadcasting Decision CRTC 2011-371

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Ottawa, 10 June 2011

Complaint by The Cave against Bell Canada alleging undue preference and disadvantage

The Commission finds that Bell Canada's (Bell) plan to repackage The Cave, while continuing to distribute a service wholly owned by Bell and a comparable foreign service as currently packaged, would constitute a preference and a disadvantage. Further, the Commission finds that there is clear evidence that the repackaging would have a material adverse impact on The Cave. As a broadcasting distribution undertaking subject to the reversal of onus provision set out in section 9(2) of the Broadcasting Distribution Regulations, Bell must demonstrate that this preference and disadvantage would not be undue. In this case, the Commission finds that Bell did not file sufficient evidence to allow the Commission to conclude that the repackaging would have been justifiable in terms of certain broadcasting policy objectives set out in the Broadcasting Act, including in particular the provision of "reasonable" packaging terms, the granting of priority to Canadian programming services and affordability to consumers. Accordingly, the Commission finds that Bell has not met its onus of demonstrating that its plan to repackage The Cave would not result in an undue preference and disadvantage. The Commission therefore makes a finding of undue preference and disadvantage.

The parties

1. The Cave (formerly known as Men TV) is a Category 1 specialty service controlled by TVA Group Inc., a subsidiary of Quebecor Media Inc. (QMI), and is licensed to Shaw Television G.P. Inc. (the general partner) and Shaw Media Global Inc. (the limited partner), carrying on business as Shaw Television Limited Partnership, and TVA Group Inc., partners in Men TV General Partnership (collectively Men TV GP).
2. Bell Canada (Bell) is the licensee of two regional broadcasting distribution undertakings (BDUs) serving communities in Ontario and Quebec. Bell also operates a national direct-to-home satellite distribution undertaking licensed to Bell ExpressVu Inc. (the general partner) and Bell Canada and Bell ExpressVu Inc., partners in BCE Holdings, G.P. (the limited partner), carrying on business as Bell ExpressVu Limited Partnership.

The complaint

3. On 14 December 2010, QMI filed a complaint on behalf of Men TV GP alleging undue preference pursuant to section 9 of the *Broadcasting Distribution Regulations* (the Regulations). The complaint stated that Bell had notified The Cave on 2 November 2010 that it would be repackaged from the *Lifestyle 2* package to the *Variety 3* package. The Cave has been distributed by Bell in the *Lifestyle 2* package

for the past eight years. Men TV GP alleged that the repackaging would subject it to an undue disadvantage and confer an undue preference on Fashion Television Channel, a Category 1 specialty service then owned and controlled by CTVglobemedia Inc.,¹ as well as on the U.S. service Spike TV. These services are distributed by Bell in its *Lifestyle 2* and *Lifestyle 1* packages respectively.

4. Men TV GP submitted that Bell's repackaging of The Cave would cause it significant financial harm as it would put the service in deficit and impact its viability. In support of this claim, Men TV GP provided specific data estimating its projected loss of Bell subscribers following the packaging change and the resulting annual losses in subscription and advertising revenues.² In addition, Men TV GP argued that the repackaging would not benefit consumers since the retail price of the revised *Lifestyle 2* package would remain the same, despite its including one less service.
5. Men TV GP requested that the Commission make a finding of undue preference and disadvantage and that it order Bell to keep The Cave in the same package or guarantee it a similar penetration rate if moved to another package. Men TV GP also requested that the Commission direct Bell to maintain the *status quo* while the complaint was under consideration.
6. In reply, Bell submitted that there had been no preference or disadvantage, noting that its plan to repackage The Cave was one of many such changes contemplated or undertaken as it sought to align theme packages more closely with the appropriate demographics of the services' audiences and their themes and bring value to subscribers while reducing costs in a competitive broadcasting distribution market.
7. Concerning the alleged preference conferred on Spike TV, Bell responded, among other things, that the *Lifestyle 1* package was not part of its repackaging initiative and that in any event it had contractual obligations to Spike TV that precluded it from repackaging the service.
8. Bell submitted that if there was any preference or disadvantage in this case, which it denied, it was not undue since, among other things, The Cave was given "equitable treatment," including having been provided proper notice. Bell further argued that the repackaging was a "commercially reasonable business decision." Specifically, it stated that The Cave was the best fit for the *Variety 3* package as this package attracts a male demographic by having the strongly male-oriented service Military Channel, while *Lifestyle 2* skews more strongly toward women. In addition, Bell argued that

¹ At the time of the filing of this complaint, Fashion Television Channel was owned by CTV Limited, a wholly owned subsidiary of CTVglobemedia Inc. (CTVgm), in which BCE Inc. held 15% of the voting interest. Since then, the Commission has approved an application by BCE Inc. to acquire effective control of CTVgm (Broadcasting Decision [2011-163](#)), giving BCE Inc. the remaining 85% of the voting interest in the capital of CTVgm. As a result, Fashion Television Channel is now a service wholly owned by BCE Inc.

² Confidentiality was granted for this data following a designation to this effect by Bell.

The Cave has no legal, regulatory or contractual rights over its packaging. Finally, Bell requested confidentiality for certain information filed in the complaint.

9. In a letter dated 25 February 2011, the Commission requested that Bell maintain the *status quo* until a decision was rendered on this complaint. The Commission also sought further clarification from Bell so as to provide it with a fuller record upon which to decide the matters raised in the complaint. Specifically, the Commission requested that Bell address the impact of the packaging change on consumers, as well as on the contribution to Canadian programming and the quality and diversity of programming available. The Commission also requested that Bell provide supporting evidence for its argument that its plan to repackage of The Cave was justifiable as a business decision and that it had “reasonable commercial grounds” for repackaging The Cave.
10. Bell responded in a letter dated 16 March 2011, in which it stated, among other things, that:
 - The impact of the repackaging on consumers would be minimal as consumers would retain the ability to change their channel selections and The Cave would continue to be available to them, either by subscribing to *Variety 3* or on an *à-la-carte* basis. It argued that combining The Cave with Military Channel in the *Variety 3* package would result in a package that “better met male consumers’ needs and interests.”
 - The impact of the repackaging on contributions to Canadian programming would not be significant since The Cave’s expenditures on Canadian programming in 2009 represented less than 0.08% of total expenditures in that year.
 - The repackaging would improve the diversity of voices in the packages by resulting in less concentration of Shaw-owned services in the *Lifestyle 2* package and more diversity of ownership in the *Variety 3* package.
 - The repackaging of The Cave was strictly a business decision, as it sought to reduce its costs and improve affordability and efficiency. Bell submitted that it sought to reduce its overall wholesale costs and to better balance its wholesale fees between the *Lifestyle 2* and *Variety 3* packages.
 - Bell treated the service “equitably” since the realignment would cut across different ownership groups and The Cave’s penetration rate in the new package would be consistent with the penetration rate that it garners from its packaging by Bell’s BDU competitors. Bell also noted that The Cave could adopt measures to increase its penetration rate, such as offering a free preview of its service.

11. In its 28 March reply, Men TV GP argued, among other things, that:

- Bell was unable to demonstrate that its packaging change was beneficial to consumers.
- The impact of the packaging change on The Cave's viability would inevitably affect its ability to contribute to Canadian programming, since it would result in a reduction in its revenues.
- Bell was unable to demonstrate that its packaging was justifiable as a reasonable commercial decision. In particular, Men TV GP argued that Bell did not demonstrate that its repackaging of The Cave was to skew to a male audience since in the *Variety 3* package only Military Channel skews to a male audience.

Commission's analysis

12. Section 9 of the Regulations states:

(1) No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

(2) In any proceedings before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

13. In analyzing a complaint under section 9 of the Regulations, the Commission determines if a party has given a preference to any person or subjected any person to a disadvantage. It then determines whether any preference or disadvantage conferred is undue. In examining these questions, the Commission takes into account whether a preference or a disadvantage has had or is likely to have a material adverse impact upon the complainant or any other person and it 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 *Broadcasting Act* (the Act).

14. Further, as of 31 August 2009, the undue preference provision of the Regulations includes a reversal of the burden of proof, as set out in section 9(2) of the Regulations above. Consequently, the onus is on the complainant to demonstrate that a preference or disadvantage exists. Once that demonstration is made, the burden is on the BDU to establish that the preference or disadvantage conferred is not undue.

Relevant policy framework

15. In this case, relevant policy objectives include:

- Section 3(1)(t)(i) of the Act, which states that “distribution undertakings should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations.”

- Section 3(1)(t)(ii) of the Act, which states that “distribution undertakings should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost.”
 - Section 3(1)(t)(iii) of the Act, which 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.”
16. The Commission notes that matters of packaging have generally been left to market negotiations between BDUs and programming services. In *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory policy*, Broadcasting Public Notice CRTC 2008-100, 30 October 2008, the Commission decided to further liberalize matters of packaging by eliminating the 1:1 and 1:5 packaging rules,³ along with certain other distribution and linkage rules. This amendment was designed to give BDUs broader discretion to respond to consumer demand by exercising packaging flexibility.

Preference or disadvantage

17. The Commission notes that Men TV GP has alleged that Bell is giving preference to Fashion Television Channel, a Category 1 specialty service now wholly owned by Bell, and to the U.S. service Spike TV, which is broadly comparable to The Cave in terms of its nature of service. The Commission considers that Fashion Television Channel benefits from remaining in the *Lifestyle 2* package since this package has a higher penetration rate than *Variety 3*. Accordingly, the Commission finds that Bell has conferred on Fashion Television Channel a preference over The Cave by deciding not to repackage it, while repackaging The Cave.
18. Similarly, the Commission finds that The Cave would be disadvantaged as a result of the packaging change, since its new package would have a significantly lower penetration rate and associated revenues than its existing package. In this respect, the Commission considers that Men TV GP filed sufficient evidence to demonstrate material disadvantage in the form of projections of approximate decreases in yearly subscriber revenues and potential decreases in advertising revenues. The Commission further notes that the foreign service Spike TV, a service broadly comparable to The Cave, would remain in its current package, which includes such popular services as HGTV and Food Network.
19. Based on the above, the Commission considers that there is adequate proof of preference to another person and disadvantage to the complainant. The Commission also finds that there is clear evidence that the repackaging would have a material adverse impact on The Cave.

³ These rules specified that for every non-Canadian specialty service offered in a package, there must be one Canadian specialty service (the 1:1 rule) and that for every five non-Canadian pay services offered in a package, there must be one Canadian pay service (the 1:5 rule).

20. The Commission notes Bell's statement that The Cave could adopt measures to increase its penetration rate in the new package, such as offering a free preview of its service, to lessen the harm resulting from the packaging change. Similarly, the Commission considers that Bell could have made efforts to lessen the projected harm to The Cave by providing it, for example, with some measure of financial, marketing or promotional assistance.
21. The Commission notes that the steps proposed by a BDU to lessen the harm to a programming service may be taken into consideration in its assessment of whether a preference or disadvantage has been conferred and whether the actions of a BDU are undue.

Undue preference or disadvantage

22. As to whether the preference or disadvantage is undue, the Commission has examined if Bell sufficiently demonstrated that its plan to repackage The Cave is not against the broadcasting policy objectives set out in the Act. In this respect, the Commission notes that generally speaking even if a packaging decision is likely to result in material adverse impact on a programming service, it would not necessarily result in an undue preference finding if the change is consistent with the achievement of broadcasting policy objectives set out in the Act.
23. As noted earlier, section 3(1)(t)(iii) of the Act seeks to ensure that BDUs negotiating contractual terms with programming services provide such services with "reasonable" packaging terms (along with carriage and retailing terms). In this case, Bell failed to provide supporting evidence sufficiently adequate to permit the Commission to conclude that the terms afforded to The Cave are "reasonable" in the sense understood in section 3(1)(t)(iii) of the Act. Specifically, Bell did not provide evidence that clearly establishes the business or public policy criteria it used to make its decision to repackage The Cave. For instance, Bell argued that its repackaging of The Cave sought to align theme packages more closely with the appropriate demographics of the services' audiences and that combining The Cave with Military Channel in the *Variety 3* package would result in a package that "better met male consumers' needs and interests." However, Bell provided little or no evidence to support these arguments. In particular, the Commission agrees with The Cave that Bell did not demonstrate that its repackaging of the service was to skew to a male audience since only Military Channel skews to a male audience in the *Variety 3* package.
24. The Commission notes that Bell could have provided, for example, consumer studies, focus group results or audience demographics to support the above-noted arguments, which might have allowed the Commission to assess if Bell's repackaging met the objective set out in 3(1)(t)(iii) of the Act.
25. Section 3(1)(t)(i) of the Act sets out the broadcasting policy objective of giving priority to the carriage of Canadian programming services. In this case, the Commission is not persuaded by Bell's argument that its alleged contractual

arrangement with the U.S. service Spike TV precludes it from repackaging the service as a rationale to justify its treatment of the Spike TV and The Cave services. Specifically, the Commission considers that Bell did not adequately demonstrate that its decision to repackage The Cave rather than Spike TV was not against the broadcasting policy objective of giving priority to the carriage of Canadian programming services. The Commission also notes that a licensee cannot contract its way out of a statutory or regulatory requirement.

26. Section 3(1)(t)(ii) sets out the policy objective of encouraging efficient delivery of programming at affordable rates. In this respect, the Commission considers that Bell did not sufficiently demonstrate the impact that the repackaging would have in terms of the affordability to consumers or efficiency of delivery by Bell, as envisioned under this section of the Act. For instance, Bell indicated that its repackaging sought to bring value to subscribers while reducing costs in a competitive broadcasting distribution market, but provided insufficient evidence of any benefit to consumers. In addition, the Commission notes that while Bell provided some evidence relating to wholesale fees to support its argument of reducing costs, it provided insufficient evidence to demonstrate that the packaging change would result in increased efficiency.

Conclusion

27. Taking into account all of the above, the Commission concludes that Bell has not met the onus of demonstrating that its actions in repackaging The Cave would not be undue, i.e. not contrary to broadcasting policy objectives set out in the Act. The Commission accordingly makes a finding of undue preference and disadvantage in this case.
28. The Commission notes that this finding, which was based primarily upon a lack of supporting evidence, should not be taken as necessarily reducing BDU flexibility in repackaging services. Based on the limited evidence available to it, the Commission was not able to conclude that the repackaging would have been justifiable in terms of certain broadcasting policy objectives set out in the Act, including in particular the provision of “reasonable” packaging terms, the granting of priority to Canadian programming services and affordability to consumers. Since the onus is on Bell to demonstrate that its actions were not undue, in the absence of such a demonstration the Commission must make a finding of undue preference and disadvantage.
29. The Commission notes that The Cave requested that the Commission direct Bell to keep The Cave in the *Lifestyle 2* package or guarantee it a similar penetration rate if moved to another package. The Commission further notes that, as requested in its letter of 25 February 2011, Bell has not proceeded to make the packaging change pending the Commission’s decision in this complaint. Having made a finding of undue preference and disadvantage, the Commission notes that if Bell proceeds with the packaging change, it would be disposed to proceed to a mandatory order hearing to enforce its finding of undue preference and disadvantage.

Bell's designation of confidentiality

30. The Commission notes that Bell designated certain details of its distribution agreement with The Cave, subscribership to various packages, penetration rates and wholesale rates as confidential. Bell's designation of confidentiality was granted by letter dated 1 June 2011. Accordingly, abridged documents of the submissions made in this complaint have been placed on the public record.

Secretary General