



Broadcasting Decision CRTC 2013-508

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Route reference: Part 1 application posted on 3 April 2013

Ottawa, 23 September 2013

NB Spring and Manufacturing Ltd.

Across Canada

Application 2013-0501-1

Complaint by NB Spring and Manufacturing Ltd. against Rogers Cable Communications Inc. alleging undue preference and disadvantage

The Commission finds that Rogers Cable Communications Inc. has neither subjected NB Spring and Manufacturing Ltd. to a disadvantage nor given preference to other programming services.

The parties

1. In Broadcasting Decision 2005-102, NB Spring and Manufacturing Ltd. (NB Spring) was authorized to operate Caribbean Circuit Television (CCT), a regional ethnic Category 2 specialty programming service devoted to the Caribbean community. Subsequently, in Broadcasting Decision 2011-501,¹ the Commission approved a second application by NB Spring for a broadcasting licence to operate CCT as a national English-language ethnic specialty Category B service. CCT has not yet launched.
2. Rogers Cable Communications Inc. (Rogers) is a wholly owned subsidiary of Rogers Communications Inc. and one of the largest operators of cable broadcasting distribution undertakings (BDUs) in Canada. Rogers currently carries two Caribbean channels:

CEEN (Caribbean Entertainment Everyday Network) – a non-Canadian entertainment channel targeting the Caribbean community, including popular programming from Jamaica, Trinidad and Tobago, and Guyana, as well as West Indies cricket; and

ATN Caribbean (CBN) – a Canadian English-language ethnic Category 2 (now Category B) specialty service owned by Asian Television Network International Limited (ATN) that features general entertainment programming targeting the

¹ As corrected by Broadcasting Decision 2011-501-1.

Caribbean community in Ontario, including news, entertainment, dramas and sporting events from the Caribbean region and Africa, as well as year-round cricket events from the Caribbean region.²

The complaint

3. NB Spring alleged that Rogers had subjected it to an undue disadvantage and had given other programming services an undue preference, contrary to section 9 of the *Broadcasting Distribution Regulations* (the Regulations).
4. More specifically, NB Spring submitted that a proposal was presented to Rogers in 2004 for a package of Caribbean-based services, including the non-Canadian English-language service CaribVision, and that Rogers subsequently applied to add CaribVision and CEEN to the *List of non-Canadian programming services authorized for distribution* (the List). The complainant argued that Rogers' breached the confidentiality of information, but provided no further details in support of its claim. NB Spring also submitted that the Commission did not seek comment prior to approving CEEN and that this was counter to the protection of the interests of small Canadian businesses.
5. NB Spring further alleged that Rogers acted in a prejudicial way by continuing to deny CCT an opportunity to launch, citing the unavailability of bandwidth.
6. Finally, NB Spring stated that Rogers was "entertaining other non-Canadian broadcasting companies that infringe on the broadcast of CCT."

Rogers' answer

7. Rogers stated that it did not disclose any information to third parties about CCT that NB Spring may have provided to Rogers on a confidential basis, nor did it use any information provided by NB Spring for an improper purpose.
8. Rogers also argued that it had not taken any steps to deny NB Spring the opportunity to launch CCT. It stated that its last communication with NB Spring was in March 2012, when it was approached by NB Spring to launch CCT on Rogers' systems. Rogers indicated that it had requested that NB Spring provide a copy of its business plan and a summary of its content rights, including linear and non-linear platform rights, so that Rogers might fully evaluate the proposed service, but that NB Spring did not respond to the request for more information.
9. Rogers further disputed the complainant's assertion that it had not been provided with an opportunity to comment on the addition of CaribVision and CEEN to the List. In this respect, Rogers noted that the Commission issued a call for comments on the addition of CaribVision to the List in February 2007, in response to which the Commission received no comments. Similarly, Rogers noted that the request to add

² ATN Caribbean was authorized in Broadcasting Decision 2009-363.

CEEN to the List was treated as a Part 1 application and received no opposition. Rogers noted that NB Spring thus had opportunities to comment on the applications. Rogers further noted that ATN did not intervene with respect to either proposal and that consequently the Commission was correct in finding that the addition of CaribVision and CEEN to the List did not present any concerns for existing Canadian services.

10. Based on the above, Rogers was of the view that NB Spring's claims were unfounded and that the complaint should be dismissed.

Commission's analysis and decisions

11. When examining a complaint alleging undue preference or disadvantage, the Commission must first determine if a licensee has given a preference or subjected another person to a disadvantage. If the Commission finds that a preference has been given or a person has been subjected to a disadvantage, it must then determine if that preference or disadvantage is undue.
12. To determine if a preference or disadvantage is undue, the Commission examines if the preference or disadvantage has had or is likely to have a material adverse impact on the complainant or any other person and the effect that the preference or disadvantage has had or is likely to have on the achievement of the Canadian broadcasting policy objectives set out in the *Broadcasting Act*.
13. Under section 9(2) of the Regulations, once a complainant has demonstrated that a preference has been given or that a person has been subjected to a disadvantage, the burden of demonstrating that such preference or disadvantage is not undue rests with the licensee having given the preference or subjected another person to a disadvantage.

Relevant policy framework

14. The Commission has considered NB Spring's complaint in light of the current policy framework. Under this framework, BDUs have no regulatory obligation to carry Category B services. The Commission also notes that its rules regarding the packaging of third-language services do not apply to English-language ethnic services.

Is there a preference or disadvantage?

15. The first issue that the Commission must address is whether Rogers has subjected NB Spring to a disadvantage or has given a preference to operators of other programming services.
16. To date, the Commission has generally applied a rather flexible approach and has not placed a particularly high burden on complainants to demonstrate a preference or disadvantage. With the introduction of reverse onus, however, it is important that applicants provide sufficient information and evidence to support any claim of preference or disadvantage.

17. In the present case, NB Spring has provided very few details to support its undue preference claim. The Commission also notes that the additions of CaribVision and CEEN to the List were approved according to the Commission's normal practices. The applications were published for comment on the Commission's website. NB Spring did not intervene, and CaribVision and CEEN were authorized for distribution in Broadcasting Public Notice 2007-42 and Broadcasting Decision 2012-259. There was no obligation for any party, including Rogers, to notify NB Spring of these applications. Accordingly, Rogers cannot be held responsible for NB Spring's failure to comment.
18. Further, as noted above, Rogers is under no obligation to carry CCT and is operating within the Commission's rules, given that there is no requirement for the carriage of an ethnic Canadian service when a similar non-Canadian one is being offered.
19. Based on all of the above, the Commission finds that Rogers has neither conferred a disadvantage on NB Spring nor a preference on itself or any other party.
20. In light of its decision, the Commission does not need to apply the test to determine if a preference or disadvantage is undue.

Secretary General

Related documents

- *Addition of Caribbean Everyday Entertainment Network to the list of non-Canadian programming services authorized for distribution*, Broadcasting Decision CRTC 2012-259, 30 April 2012
- *Caribbean Circuit Television – Specialty Category B service*, Broadcasting Decision CRTC 2011-501, 16 August 2011, as corrected by Broadcasting Decision CRTC 2011-501-1, 2 September 2011
- *ATN Cricket Channel One – Category 2 specialty service*, Broadcasting Decision CRTC 2009-363, 18 June 2009
- *Addition of CaribVision to the lists of eligible satellite services for distribution on a digital basis*, Broadcasting Public Notice CRTC 2007-42, 20 April 2007
- *Caribbean Circuit Television – Category 2 specialty service*, Broadcasting Decision CRTC 2005-102, 10 March 2005