



Broadcasting Decision CRTC 2014-346

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Ottawa, 27 June 2014

Leclerc Communication inc.
Québec, Quebec

Application 2014-0093-6

Complaint filed by Leclerc Communication inc. against the Canadian Broadcasting Corporation alleging an undue preference and disadvantage

The Commission finds that the Canadian Broadcasting Corporation granted itself a preference and subjected Leclerc Communication inc. (Leclerc) to a disadvantage, but that the preference and the disadvantage were not undue. Accordingly, the Commission dismisses Leclerc's complaint.

The parties

1. Leclerc Communication inc. (Leclerc) is the licensee of two radio stations in the Québec market, namely, CJEC-FM and CFEL-FM.
2. The Canadian Broadcasting Corporation (the CBC) is the licensee of several radio stations and conventional television stations in Canada. In the Québec market, the CBC is the licensee of CBVX-FM (Espace Musique) and CBV-FM (ICI Radio-Canada Première) and of the conventional television station CBVT-DT.

The complaint

3. In its complaint dated 30 January 2014, Leclerc alleged that the CBC, by way of its conventional television station CBVT-DT Québec, subjected Leclerc to an undue disadvantage and gave an undue preference to its own radio stations. According to Leclerc, the CBC is thus in contravention of section 15(1) of the *Television Broadcasting Regulations, 1987* (the Regulations), which states:
“No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.”
4. Specifically, Leclerc alleged that it attempted to place advertising on CBVT-DT to promote its radio stations CJEC-FM and CFEL-FM in the Québec market. The CBC refused its request, claiming that Leclerc's stations are in competition with its stations in that market (namely, CBV-FM and CBVX-FM). Leclerc therefore alleged that by

denying it the opportunity to advertise its radio stations on CBVT-DT, the CBC has subjected it to an undue disadvantage. Moreover, Leclerc argued that the CBC gave itself undue preference because it advertised its own radio stations on CBVT-DT. Finally, Leclerc claimed that the CBC's actions undermine the ability to achieve the objectives of the broadcasting policy for Canada set out in the *Broadcasting Act* (the Act).

5. In support of its complaint, Leclerc submitted email exchanges it had had with different CBC employees. In one of the email messages, the CBC indicated that the refusal does not target Leclerc specifically, but that it refuses publicity campaigns from all other broadcasting undertakings in Canada.

The CBC's response

6. In its answer dated 6 March 2014, the CBC indicated that it is completely normal and common in the industry for one media group to broadcast advertising for its own programs and not for competing media groups when it considers that it would not be in its own commercial interest to do so. According to the CBC, the fact that CBVT-DT broadcasts advertising for programs on its own radio services and refuses to broadcast advertising for private radio stations is not sufficient to conclude that there was an undue preference or an undue disadvantage in contravention of section 15 of the Regulations.
7. The CBC claimed that it would require strong public interest motives, such as one media group controlling a significant portion of the advertising inventory, to justify imposing limits on licensees' commercial freedom. To this end, the CBC maintained that only 7% of adult viewers of the three local French-language television stations combined (CBC, TVA and V) are exclusive to its station CBVT-DT. Moreover, the CBC's market share of the local advertising inventory (television and radio) is 9.8%. In light of its services' very small share of the local Québec market advertising inventory, the CBC submitted that:
 - there is no reason for the Commission to limit its commercial freedom;
 - one cannot conclude that because Leclerc's stations were not advertised on CBVT-DT or that because the CBC advertises its own radio stations on the latter, that there was a significant negative impact on Leclerc or an impact on the achievement of the objectives of the Act.
8. In light of the above, the CBC argued that Leclerc's claims are unfounded and that the complaint should be dismissed.

Leclerc's reply

9. In its reply dated 14 March 2014, Leclerc again questioned the motives of the CBC's refusal. Specifically, Leclerc questioned why the CBC is so vehemently opposed to advertising Leclerc's stations while arguing that there would truly be no impact if Leclerc were to advertise its stations on CBVT-DT.

10. In reply to the CBC's argument that its services hold a very small share of the local Québec advertising inventory, Leclerc argued that 7% equates to 63,500 viewers, which represents enormous potential for its radio stations. It added that only CBVT-DT offers such a vast audience with a profile so close to that of its radio station CJEC-FM.
11. In reply to the CBC's argument that being required to broadcast advertising for competing media would interfere with its commercial freedom, Leclerc stated that the CBC's mission is not to make a profit, but to "actively contribute to the flow and exchange of cultural expressions," as is set out in the Act.
12. Leclerc argued that the commercial freedom argument cannot be invoked by a public corporation whose unique and wholly Canadian mission is stipulated in the Act.

Commission's analysis and decision

Is there a preference or a disadvantage?

13. When the Commission examines a complaint alleging undue preference or disadvantage, it must first determine whether the complainant was able to demonstrate that the licensee has given preference or disadvantage to any person. In this instance, the Commission must first determine whether the CBC has given itself a preference or has subjected Leclerc to a disadvantage.
14. In its complaint, Leclerc indicated that ICI Radio-Canada Télé frequently broadcasts advertisements for ICI Radio-Canada Première and Espace Musique, and provided two specific examples of these allegations. In that regard, the CBC admitted that it broadcasts advertisements for its own radio stations and does not broadcast local advertisements for private stations. While the CBC does not dispute the facts raised by Leclerc, it argued that its advertising practices have no material adverse impact on Leclerc or on the objectives of the Act.
15. In light of the evidence submitted by Leclerc and the CBC's comments regarding its advertising practices, the Commission concludes that the CBC has given itself a preference and subjected Leclerc to a disadvantage.

Was the preference or the disadvantage undue?

16. Pursuant to section 15(2) of the Regulations, once the applicant has demonstrated the existence of a preference or disadvantage, 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.
17. To determine whether a preference or disadvantage is undue, the Commission considers whether the preference or disadvantage has had or is likely to have a material adverse impact on the complainant or on any other person. It also considers the impact 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 Act.

Material adverse impact on Leclerc or any other person

18. In its reply, the CBC indicated that CBVT-DT holds only 28% of the television market shares and that only 7% of the market's television viewers are exclusive to CBVT-DT. Leclerc did not question the BBM data and considered that those numbers represent an enormous potential of television viewers. The Commission is of the view that the CBC is not subjecting Leclerc to a material adverse impact by refusing to offer advertising opportunities since Leclerc has access to 72% of the local television advertising inventory by advertising on TVA and V and that it can therefore reach 93% of the television viewers in the market.
19. In addition, the Commission notes that the advertising and media market of the city of Québec is large and well-developed, with various platforms. The Commission therefore considers that the impact of not providing advertising time for Leclerc's stations on CBVT-DT is very limited given that the complainant has other options at its disposal to promote its radio stations, both on conventional television and on other platforms (for example, daily newspapers and the local digital media).
20. In light of the above, the Commission considers that the CBC has demonstrated that Leclerc did not experience any material adverse impact as a result of its refusal to broadcast Leclerc's advertising campaign on CBVT-DT.
21. However, the Commission questions the true motives of the CBC, which continues to turn away a client that does not belong to a vertically integrated group on the grounds that it is in competition with its operations. The Commission takes this opportunity to suggest that the CBC focus less on viewing other players in Canada's communications ecosystem as competitors and put more effort into fulfilling its public service mandate.

Impact on the achievement of the objectives of the Act

22. Given the CBC's arguments (particularly those set out in paragraphs 6 and 7 above), the Commission is of the view that the CBC has demonstrated that Leclerc's claim that the CBC failed to meet the objectives of the Act when it refused to broadcast advertisements for Leclerc's stations is unfounded.
23. To find that the CBC acted in a manner contrary to the objective of "actively contribut[ing] to the flow and exchange of cultural expression" by refusing to broadcast advertisements for private radio stations whose programming also contributes to this objective would be excessive. Moreover, the Commission considers that the CBC's refusal is not intended to limit the programming diversity of the Québec local market or any other objective of the Act that the Leclerc stations could potentially achieve.
24. In light of the above, the Commission considers that Leclerc did not experience any material adverse impact and was not unduly restricted in achieving the objectives of the Act as a result of the CBC's actions.

Conclusion

25. In light of all of the above, the Commission finds that the Canadian Broadcasting Corporation gave itself preference and subjected Leclerc Communication inc. to a disadvantage, but that the preference and the disadvantage were not undue. Accordingly, the Commission **dismisses** Leclerc's complaint.

Secretary General