



## Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335

**This regulatory policy and this order were quashed by the Supreme Court of Canada in *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66.**

PDF version

Reference: 2016-37

Ottawa, 19 August 2016

### Simultaneous substitution for the Super Bowl

*The Commission issues a distribution order pursuant to section 9(1)(h) of the Broadcasting Act, which, in effect, will remove authorization for simultaneous substitution for the Super Bowl, effective 1 January 2017. Through this order, Canadians will be able to view the U.S. Super Bowl commercials – an integral element of the event – broadcast on U.S. television stations rebroadcast in Canada by television service providers (cable, direct-to-home satellite or Internet Protocol television). Canadians may also choose to watch the Super Bowl on Canadian television stations with Canadian advertisements. Ultimately, Canadians will have the right to choose the stations on which they will watch the Super Bowl. The distribution order is set out in the appendix to this regulatory policy.*

#### Introduction

1. The role of broadcasting distribution undertakings (i.e., cable, direct-to-home satellite or Internet Protocol television) (BDUs) is to provide Canadians with access to broadcasting programming services. Generally, they cannot alter or delete the signals of the programming services that they distribute.
2. An exception to this rule is simultaneous substitution, which occurs when a distributor temporarily replaces the signal of one television channel with that of a local or regional channel showing the same program at the same time. The terms and conditions for simultaneous substitution are currently set out in the [Simultaneous Programming Service Deletion and Substitution Regulations](#) (the Simultaneous Deletion and Substitution Regulations).<sup>1</sup>

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<sup>1</sup> In Broadcasting Regulatory Policy 2015-513, the Commission announced that it had made the Simultaneous Deletion and Substitution Regulations. These regulations came into force on 1 December 2015, and replaced and updated similar provisions in the *Broadcasting Distribution Regulations*.

3. During Phase 1 of the Let's Talk TV proceeding,<sup>2</sup> the Commission sought comments from Canadians in regard to the future of their television system. Several parties raised concerns over the poor quality and timing of simultaneous substitution, which would cause them to miss either the beginning or the end of a program, or advertising content, particularly that broadcast during the Super Bowl (i.e., the championship game of the National Football League (NFL), played annually between the National Football Conference champion and the American Football Conference champion).
4. In Broadcasting Notice of Consultation 2014-190, the Commission announced that it would hold a public hearing to discuss matters relating to its policy approach to the television system, drawing on issues and priorities identified by Canadians in earlier phases of the Let's Talk TV proceeding. Among many issues, it sought comment on the value of simultaneous substitution to the various stakeholders of the Canadian broadcasting system; the benefits and necessity of maintaining the practice; an exploration on any viable alternatives; and how, if necessary, simultaneous substitution could be phased out, in part or completely.
5. In that notice, the Commission indicated that simultaneous substitution had been envisioned as a mechanism that would not be disruptive to viewers (that is, the program substituted is the same on both signals and broadcast simultaneously). However, errors made in performing substitutions and other problems had made it an irritant to viewers and a frequent source of complaints. As an example, in 2013, the Commission received 458 complaints regarding simultaneous substitution. Of these complaints, 20% were related to commercials that were broadcast during the Super Bowl, with viewers preferring to have seen the U.S. commercials instead of the Canadian commercials. The remainder related to improperly done substitutions, especially during or after the broadcast of live event programming that ran long.
6. In Broadcasting Notice of Consultation 2014-190-3, the Commission published a working document setting out various models for discussion regarding the future regulation of the Canadian television system. In regard to simultaneous substitution, two specific options were proposed (both of which would enable Canadians to watch the Super Bowl with U.S. commercials): a) no longer permitting BDUs to perform simultaneous substitution at all; and b) no longer permitting BDUs to perform simultaneous substitution for live event programming (such as sporting events or awards shows). Parties were invited to discuss the above options and, in the event that a party supported an alternative, to provide details on that alternative.
7. During the full Let's Talk TV proceeding, various parties including individuals, programming services, advertising purchasers, and other broadcasting system stakeholders addressed the simultaneous substitution regime and the options the Commission was considering in order to recalibrate the regime. During the oral hearing phase of the proceeding, the Commission discussed with parties issues relating to the benefits and drawbacks of simultaneous substitution. Certain parties

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<sup>2</sup> The Let's Talk TV proceeding was launched with the issuance of Broadcasting Notice of Invitation 2013-563.

actively questioned why Canadian broadcasters should receive additional advertising support. Others questioned why American networks are not permitted to broadcast their programming in Canada without alteration. Some suggested that simultaneous substitution be restricted or banned outright.

8. In Broadcasting Regulatory Policy 2015-25, the Commission noted that given that the simultaneous substitution regime forms an exception to the overall prohibition against altering or deleting a programming service, the burden of proof was on broadcasters and BDUs to show that the regime continues to have merit and that its execution can be seamless for Canadians. The Commission took note of Canadians' increasing frustration with the issue of simultaneous substitution in general and the frequency of errors made during the simultaneous substitution process. It stated that Canadians were rightly dissatisfied when simultaneous substitution errors occur, since subscribers are not receiving the service they have paid for through their subscription, regardless of whether or not they watch the affected programming. The Commission expressed the view that BDUs and broadcasters are not currently meeting the required level of service as it relates to simultaneous substitution.
9. Despite certain reservations, the Commission determined it would continue to allow the practice of simultaneous substitution for local over-the-air stations. It made the policy determination, however, to recalibrate the regime in order to address the concerns expressed by Canadian television viewers.
10. In Broadcasting Regulatory Policy 2015-25, the Commission set out measures to be put in place to recalibrate the simultaneous substitution regime. Among other things, it encouraged the creation of a working group, as proposed by certain parties, to develop industry practices to reduce the quantity of substitution errors. It also set out its intention to amend its regulations in order to a) eliminate the authorization for BDUs to provide simultaneous substitution for specialty services; and b) deal with instances of recurring, substantial simultaneous substitution errors. In addition, given its view that the non-Canadian advertising is integral to the Super Bowl event, the Commission stated that BDUs would no longer be able to perform simultaneous substitution for this event as of the end of the 2016 NFL season.
11. In Broadcasting Notice of Consultation 2015-330, the Commission sought comments on proposed regulations regarding simultaneous programming service deletion and substitution to implement its intention to only allow simultaneous substitution for conventional television stations and to introduce consequences should broadcasters and distributors make substantial recurring errors in the deletion and substitution of programming. It also indicated its intention to implement its policy determination regarding the Super Bowl by an order issued pursuant to section 9(1)(h)<sup>3</sup> of the *Broadcasting Act* (the Act).

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<sup>3</sup> "Subject to this Part, the Commission may, in furtherance of its objects, [...] require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission."

12. In Broadcasting Regulatory Policy 2015-513, taking into account the comments received from interveners, the Commission set out its final decision regarding the issues identified in Broadcasting Notice of Consultation 2015-330, and published the Simultaneous Deletion and Substitution Regulations. Shortly after, the Commission issued Broadcasting Notice of Consultation 2016-37, in which it invited comments on a proposed distribution order that would effectively exclude the Super Bowl from the simultaneous substitution regime.<sup>4</sup>
13. The Commission received 28 interventions in response to the call for comments, the majority of which were from various individuals, either in support of or in opposition to the proposed distribution order. It also received opposing interventions from the Association of Canadian Advertisers and the Canadian Media Directors' Council, BCE Inc. (BCE), Beat The Drum Advertising, the NFL, the Rothenberg Group and Unifor, a national union created in 2013 through the merger of the Communications, Energy and Paperworkers of Canada and the Canadian Auto Workers Union, as well as interventions offering comments from Bragg Communications Inc., carrying on business as Eastlink (Eastlink) and Saskatchewan Telecommunications (SaskTel). The public record for this proceeding can be found on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca).

### **Commission's analysis**

14. The Commission has considered the following issues in regard to the proposed distribution order:
- policy and procedural considerations regarding the exclusion of the Super Bowl from the simultaneous substitution regime;
  - other legal issues regarding the exclusion of the Super Bowl from the simultaneous substitution regime; and
  - proposed changes to language relating to the distribution order.

### **Policy and procedural considerations**

15. In regard to this issue, the Commission has considered whether it should change or maintain its policy decision to exclude the Super Bowl from the simultaneous substitution regime. Specifically, it has focused on the following:
- the reasonableness of the Commission's decision to no longer authorize simultaneous substitution for the Super Bowl; and
  - the potential negative impact of no longer authorizing simultaneous substitution for the Super Bowl.

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<sup>4</sup> BCE Inc. and the NFL applied for and were granted leave to appeal the Commission's policy determinations to no longer authorize simultaneous substitution for the Super Bowl by way of an order issued pursuant to section 9(1)(h) of the Act and the Commission's decision to make the Simultaneous Deletion and Substitution Regulations. The appeals, which were heard by the Federal Court of Appeal on 20 June 2016, are currently under consideration by that court.

## **Reasonableness of the decision**

### ***Positions of parties***

16. According to BCE, the Commission's decision to prohibit simultaneous substitution for the Super Bowl was made without adequate notice that the prohibition of simultaneous substitution for a specific program (as opposed to all programming or live sports programming) was a potential outcome. It stated that it was not given notice of the burden of proof that it would have to meet, but was advised for the first time in Broadcasting Regulatory Policy 2015-25 that parties who support the simultaneous substitution regime had the burden to prove that the regime should be continued. BCE argued that, if anything, the burden should have been on those calling for changes to the longstanding and established simultaneous substitution regime to prove that such a change would be in the public interest. In regard to the order itself, BCE added that Broadcasting Notice of Consultation 2016-37 sought comment only on the wording and structure of the proposed order, and not on the policy merits or jurisdictional validity of prohibiting simultaneous substitution for the Super Bowl.
17. BCE further submitted that the Commission's decision itself is unreasonable given that it does not serve to ensure the cultural enrichment of Canada and the promotion of Canadian content, which it noted has been described by the Supreme Court of Canada (in the value for signal reference case<sup>5</sup>) as the primary purpose of the Act.
18. BCE, echoed by other interveners, argued that the views of a very small number of Canadians who preferred to watch the U.S. advertising was an irrelevant consideration. It submitted that it was not reasonable for the Commission to exclude the Super Bowl from the simultaneous substitution regime based on this factor, which it argued is overstated and irrelevant to the objectives of the Act, and is not reflected anywhere in the broadcasting policy for Canada. Given the lack of any real evidence that simultaneous substitution for the Super Bowl was not meeting the policy objectives for which the regime was created, BCE questioned the reasonableness of the Commission's decision.

### ***Commission's decision***

19. In the context of multiple phases of the Let's Talk TV proceeding, described above, the Commission is satisfied that it provided adequate notice that it was considering changes to the simultaneous substitution regime, including the removal of simultaneous substitution in its entirety or for some types of programming (e.g., live sports). Moreover, BCE's suggestion of placing a "burden of proof" on parties desiring a change from the *status quo* is out of place in the context of a broad policy proceeding. The Commission is not bound by the same rules of evidence as a court, and the notice that was provided was sufficient to ensure that parties understood the case they had to make.

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<sup>5</sup> Supreme Court of Canada Citation: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489

20. While some parties appear to have misinterpreted the Commission's intent in regard to the call for comments on the proposed distribution order, Broadcasting Notice of Consultation 2016-37, in contrast to Broadcasting Notice of Consultation 2015-330, did not contain limits as to its scope. Nevertheless, BCE and the NFL did comment on the policy and legal implications of implementing the Commission's policy determinations as part of this proceeding.
21. BCE's argument regarding reasonableness rests on a narrow interpretation of both the legislative regime and the Commission's actions in this case. While many of the policy objectives of the Act focus on ensuring Canadian cultural enrichment and the promotion of Canadian programming, they also include other objectives, such as ensuring that Canadians have access to local, national and international programming. Moreover, the introduction of section 9(1)(h) into the Act was to clarify the Commission's broad power to regulate the cable industry and impose any conditions necessary to do so.
22. BCE argued that the policy decision to prohibit simultaneous substitution for the Super Bowl was made in isolation, focusing on the preference of a very small number of Canadians to watch American advertising on the Super Bowl. In this regard, the Commission notes that BCE's argument implicitly assumes that simultaneous substitution for the Super Bowl is a right. In fact, it is not a right, but an exception to the general requirement set out in section 7 of the *Broadcasting Distribution Regulations*. As such, the Commission's proposal is a modification to this exception, through which authorization to perform simultaneous substitution for the Super Bowl is removed.
23. In regard to BCE's argument, the Commission's policy decision regarding simultaneous substitution for the Super Bowl was part of much broader policy determinations. In Broadcasting Regulatory Policy 2015-25, the Commission was of the view that the benefits of the simultaneous substitution regime for the Canadian broadcasting system as a whole remained important enough to continue the regime, but only if certain modifications were made to address the concerns of Canadians.
24. As noted in the Act, the Commission's duty is to regulate and supervise the broadcasting system as a whole (which includes programming services, distribution services, and Canadian viewers) to ensure the fulfilment of the policy objectives of the Act. The Commission remains of the view that changes to the simultaneous substitution regime are needed to ensure that the broadcasting system is balanced as a whole in a way that fulfils the policy objectives of the Act. In addition to the making of the Simultaneous Deletion and Substitution Regulations, this includes no longer authorizing simultaneous substitution for the Super Bowl.
25. The limited number of complaints received in regard to simultaneous substitution for the Super Bowl during the Let's Talk TV proceeding can be explained by a number of factors. Although a frustrating experience, missing a portion of a program due to simultaneous substitution is only an inconvenience. Further, although engaging in the

complaint process is relatively simple, it too is somewhat inconvenient as it requires subscribers to provide the Commission with a significant amount of information.

26. During the various phases of the Let's Talk TV proceeding and in comments submitted by interveners in the present proceeding, the Commission heard that the commercials during the Super Bowl were integral to the event itself, which reflected the view expressed by the Commission in Broadcasting Regulatory Policy 2015-25. As such, by not being able to view the U.S. commercials, Canadians are deprived of an integral element of the event.

27. This view is summed up by the following statement from an intervener to this proceeding:

The advertising produced and shown during the Super Bowl is an integral cultural element of the event. The Super Bowl is a global level event each year and a celebration of American culture, which needs to be viewed in its entirety (including the advertising). And because of the cultural significance of this event to our American neighbours and allies it is in fact important that Canadians also be able to view and enjoy this cultural event as a way to better foster relations and dialogue between our countries.<sup>6</sup>

28. In making and now confirming its broad policy decision regarding the simultaneous substitution regime as a whole, the Commission has considered the primary goal of enriching Canadian programming through the preservation of the simultaneous substitution regime, but has decided that it needs to recalibrate that regime to ensure that it is better balanced, and reflects the totality of the policy objectives of the Act. In the broad policy and multi-phase context in which the policy decision to no longer authorize simultaneous substitution for the Super Bowl has been taken, the Commission is satisfied that its determination is reasonable.

#### **Potential negative impact of the decision**

##### ***Positions of parties***

29. Various Canadian companies and associations requested that the Commission reconsider its policy decision to prohibit simultaneous substitution for the Super Bowl, given that they use the event as an opportunity to reach a mass audience in Canada or relevant local markets across the country. These parties stated that marketing opportunities such as those presented by the Super Bowl are essential for many businesses to increase sales and build their companies, which in turn creates jobs and fuels a robust and productive economy. They added that some U.S. advertisements feature services that are not available in Canada.

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<sup>6</sup> See intervention #15.

30. Beat the Drum Advertising questioned the importance to Canadian viewers of the U.S. commercials broadcast during the Super Bowl, noting the large number of Canadians who watched the event even in the absence of those commercials. It cited research carried out by Toronto-based Brainsights, which revealed that 14 of the 20 most engaging ads broadcast during the Super Bowl came from advertisers exclusive to the Canadian broadcast of the event, and that four of the remaining six were advertisers with unique ads targeting Canadians.
31. Other advertisers cited a Nanos survey according to which 69% of Canadians polled considered that supporting Canadian broadcasters was more important than being able to watch U.S. commercials during the Super Bowl. These advertisers added that allowing the broadcast of U.S. commercials during the Super Bowl would expose Canadians to advertising that is prohibited by the *Food and Drug Regulations*, such as that relating to prescription drugs.
32. BCE argued that section 9(1)(h) of the Act was introduced to address the role of cable companies as “gatekeepers” and ensure that they give priority to Canadian stations and networks. In its view, prohibiting simultaneous substitution for the Super Bowl would do the exact opposite by giving priority to U.S. television stations and commercials over their Canadian counterparts. In this regard, BCE expressed the following concerns regarding the potential negative impact of prohibiting simultaneous substitution for the Super Bowl:
  - local television stations: revenue losses would increase by tens of millions of dollars, which would jeopardize their financial viability and put at risk the availability of professional local news in markets across the country;
  - national and local advertisers: they would lose an incomparable opportunity to achieve mass reach with a highly engaged audience;
  - the promotion and discoverability of Canadian content: the opportunity to promote Canadian programming to an unusually large broad television audience through millions of dollars of free promotional air time would be lost;
  - the funding of Canadian content: a significant portion of BCE’s contributions to Canadian programming through Canadian program expenditure requirements would be lost due to the decrease in advertising revenues.
33. BCE added that American companies (such as Wal-Mart and McDonalds) would receive free advertising, at the expense of their Canadian competitors (such as Canadian Tire and Tim Hortons). Further, large multinationals and small businesses in U.S. border markets would get free advertising while freezing out hundreds of Canadian small businesses in border markets that are trying to compete with them.



34. In BCE's view, the decision to prohibit simultaneous substitution for the Super Bowl is contrary to Canada's broadcasting policy and the history and purpose of the relevant provisions of the Act. It stated that the decision undermines the simultaneous substitution regime that, as determined by the Commission, supports the Act's policy objectives. BCE argued that the decision gives priority to American stations over Canadian stations and supports the dissemination of U.S. advertising despite the significant financial damage it does to local television in Canada and to Canadian programming.

***Commission's decision***

35. Concerns expressed by interveners to the present proceeding regarding the elimination of simultaneous substitution for the Super Bowl generally reiterate those expressed by interveners in the various phases of the Let's Talk TV proceeding (i.e., concerns relating to, among other things, revenue losses for local television stations; the ability of Canadian broadcasters to produce and acquire Canadian programming; the loss of advertising opportunities for Canadian companies and the promotion of Canadian programming; and the danger that U.S. commercials being broadcast in Canada are inconsistent with this country's regulatory regime).

36. While opponents of the Commission's proposal regarding simultaneous substitution for the Super Bowl emphasized the unique nature of the event as a significant source of advertising revenue and a national venue for advertising to a wide audience, the potential impacts described above were factors the Commission has taken into consideration in regard to recalibrating the overall simultaneous substitution regime. The Super Bowl is only one example of a program that would be affected by any policy decision to no longer authorize simultaneous substitution (either in total or only for certain programming).

37. No new evidence was provided in the present proceeding to demonstrate that advertisers would not continue to have the ability to reach a mass audience in Canada or relevant local markets during the Canadian broadcast of the Super Bowl. Further, no new evidence was provided to demonstrate that the Canadian broadcaster of the Super Bowl would not continue to benefit from the ability to sell advertising or to promote Canadian programming to a very significant portion of the Canadian audience watching the Super Bowl, or if and how any reduction in audience to the Canadian broadcast of the Super Bowl would negatively affect the various stakeholders in the Canadian broadcasting industry.

38. In arriving at its policy determinations in Broadcasting Regulatory Policy 2015-25, the Commission recognized the importance of the simultaneous substitution regime as a whole to the achievement of many of the Act's policy objectives relating to the support of Canadian programming, while taking into consideration the frustrations of viewers and the objectives of the Act.

39. Although simultaneous substitution has a recognized importance for the achievement of policy objectives set out in the Act, this must be balanced with other policy objectives, such as allowing subscribers to view complete (i.e., unaltered) programming – whether it be regional, national or international – offered by programming services. The potential negative advertising impacts have been recognized by continuing the simultaneous substitution regime as a whole. However, for the Super Bowl, these impacts are outweighed by other policy objectives and concerns.

### **Conclusion**

40. Based on the record for this issue from the Let's Talk TV proceeding to the present proceeding, the Commission finds that simultaneous substitution for the Super Bowl is not in the public interest, and is therefore not convinced that it should change its policy decision to exclude that event from the simultaneous substitution regime.

### **Other legal issues**

#### **Positions of parties**

41. BCE contended that the Commission does not have the jurisdiction to prohibit simultaneous substitution for the Super Bowl by way of an order issued pursuant to section 9(1)(h) of the Act (9(1)(h) order). In its view, this would constitute unlawful administrative discrimination, i.e., the application of a rule to a particular program rather than a class of programs, which is a distinction not contemplated by the Act. BCE submitted that the decision imposes retrospective regulations and interferes with vested rights in regard to its current contract with the NFL. Finally, it argued that the Commission cannot override a general regulation (i.e., the Simultaneous Deletion and Substitution Regulations) by way of a 9(1)(h) order.

42. The NFL also questioned the Commission's jurisdiction to discriminate against the Super Bowl by exempting it alone from the Simultaneous Deletion and Substitution Regulations under section 9(1)(h) of the Act. It argued that that section of the Act permits the Commission to make an order specific to a "programming service" but not to a specific program or television show. It stated that only the Governor in Council has the authority to issue carriage orders in relation to individual programs, pursuant to section 26(2) of the Act. It further argued that the 9(1)(h) order would effectively exempt the NFL from the Simultaneous Deletion and Substitution Regulations, while the Act only permits the Commission to exempt licensees from the application of its regulations under its exemption power (section 9(4) of the Act).

43. Finally, the NFL argued that the Commission's decision is contrary to the Act when understood within the broader legislative context of the *Copyright Act* and Canada's international treaty commitments (e.g., the North American Free Trade Agreement (NAFTA) and the Canada-United States Free Trade Agreement (CUSFTA)). It stated that this context makes clear that Parliament intended the simultaneous substitution regime to be administered as a general regime applicable to all U.S. programming in the same manner.

### **Commission's decision**

44. In regard to other legal issues relating to no longer authorizing simultaneous substitution for the Super Bowl, the Commission determines that it must address the following:

- its jurisdiction to issue the distribution order where regulations exist;
- whether administrative law discrimination has been applied;
- the targeting of a specific program;
- the retrospective application of a regulatory regime, and vested rights; and
- copyright and international trade.

### ***Commission's jurisdiction to issue the distribution order where regulations exist***

45. Section 4(1) of the Simultaneous Deletion and Substitution Regulations sets out circumstances in which a licensee is required to delete and substitute programming, with the explicit provision that this obligation applies “except as otherwise provided under these Regulations or in a condition of its licence.” Section 4(3) goes on to create such an exception, by stating that a licensee “must not delete a programming service and substitute another programming service for it if the Commission decides under subsection 18(3)<sup>7</sup> of the *Broadcasting Act* that the deletion and substitution are not in the public interest.”

46. In light of the Commission's finding above, further to a proceeding initiated by Broadcasting Notice of Consultation 2016-37, that deleting and performing simultaneous substitution for the Super Bowl are not in the public interest, the Commission finds that its decision in this regard falls within section 4(3) of the Simultaneous Deletion and Substitution Regulations. Having made this finding, pursuant to section 4(3), the Commission can use its power under section 9(1)(h) of the Act to implement this decision without conflict with the Simultaneous Deletion and Substitution Regulations. Accordingly, the Commission is of the view that issuing the proposed distribution order is within its jurisdiction.

47. In any event, the Act provides for several overlapping powers of the Commission to impose legally binding requirements, which include regulations, conditions of licence, 9(1)(h) orders and exemption orders. The legislative history indicates that these different powers can be used by the Commission in a complementary manner. The Commission has considered this issue in the past.<sup>8</sup>

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<sup>7</sup> “The Commission may hold a public hearing, make a report, issue any decision and given any approval in connection with any complaint or representation made to the Commission or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.”

<sup>8</sup> See, for example, Public Notice 1999-27, in which the Commission issued a 9(1)(h) order requiring the distribution of TVA Group Inc.'s French-language television station on the basic service in a way that was not provided for in the *Broadcasting Distribution Regulations*.

48. To interpret the Act as permitting the issuance of a 9(1)(h) order only where a regulation does not already exist could render the effect of 9(1)(h) orders virtually meaningless. Moreover, if in making a regulation the Commission was prohibiting itself from issuing a 9(1)(h) order in the future, such a regulation could be viewed as fettering the Commission's discretion to exercise a complementary power. Consequently, the Commission considers that BCE's argument is not convincing in the present case.

***Administrative law discrimination***

49. The principle of administrative law discrimination sets out that an administrative tribunal is not permitted to make its rules applicable to different persons based on a distinction not explicitly authorized by its legislation. In Broadcasting Regulatory Policy 2015-513, in response to arguments based on this principle made by the NFL in the proceeding leading to the issuance of the Simultaneous Deletion and Substitution Regulations, the Commission expressed the view that:

[...] section 9(1)(h) of the Act grants it broad powers to impose any terms and conditions on the distribution of programming services it deems necessary in furtherance of its objects. Unlike the Commission's powers to make regulations pursuant to section 10 of the Act, which are to be exercised with respect to all licensees or classes of licensees, section 9 of the Act relates to conditions which are by definition targeted, including conditions of licence specific to the circumstances of individual licensees.

50. The Commission notes that the principle of administrative law discrimination has been applied primarily in the municipal law context. However, the Commission considers that the conclusion set out in Broadcasting Regulatory Policy 2015-513 remains valid. Further, it notes that in the context of legislation conferring broad powers, discrimination in an administrative law sense can be permitted, unless it is expressly prohibited.

51. Moreover, section 9(1)(h) of the Act states that the Commission may "require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission." This section therefore grants the Commission the power to impose an order and conditions specific to the unique circumstances of a specific programming service (i.e., to discriminate between programming services).

***Targeting a specific program***

52. As mentioned above, BCE and the NFL noted that the proposed distribution order targets a specific program (i.e., the Super Bowl) and submitted that this distinction is not contemplated by the Act. They argued that the primary purpose of the proposed distribution order is not the regulation of the distribution of a service, but the removal of simultaneous substitution rights that would not be permitted under the Commission's more general regulation making powers (which allow distinctions based only on a class of services). The NFL added that a 9(1)(h) order can only affect

a programming service (that is, the entire output of a service), and not an individual program such as the Super Bowl.

53. Paragraph 3.a. of the proposed distribution order reads as follows:

A distribution undertaking subject to this order may only distribute **the programming service** of a Canadian television station that broadcasts the Super Bowl if that distribution undertaking does not carry out a request made by that Canadian television station pursuant to section 3 of the *Simultaneous Programming Service Deletion and Substitution Regulations* to delete **the programming service** of another Canadian television station or a non-Canadian television station and substitute for it **the programming service** of a local television station or regional television station during any period in which the Super Bowl is being broadcast on the requesting Canadian television station. [emphasis added]

54. The proposed distribution order relates to the distribution of “a Canadian television station that broadcasts the Super Bowl,” a distinction contemplated by the Act, and then imposes a condition on that distribution, specifically, that the simultaneous substitution shall not be performed during the Super Bowl. Further, the wording of the proposed order adequately responds to the contention that section 9(1)(h) can only operate with respect to a programming service, as opposed to a particular program (such as the Super Bowl).

55. Moreover, the distribution order reflects the way simultaneous substitution is actually performed. The entire output of a programming service is, for a particular program, deleted and the entire output of another programming service is substituted, until that program ends. The distribution order reflects the notion that the entire output of the programming service of a television station will not be deleted and substituted for the Super Bowl, a particular program.

***Retrospective application of a regulatory regime, and vested rights***

56. The Commission is of the view that it cannot be prevented from changing its regulatory regime, including its rules on simultaneous substitution, simply because of an existing contractual situation relating to broadcast rights. In the present case, although BCE may have negotiated its agreement with the NFL based on assumptions about the amount of revenue it can expect to receive from the subject broadcast rights, the contract itself relates to the transaction between BCE and the NFL, not between BCE and its advertisers. Although the Commission’s actions may affect the parties’ assumptions underlying the contract, such actions do not affect – either directly or retrospectively – a vested contractual right, given that no one has a vested right in the continuance of a regulatory regime as it exists at a given moment.

### **Copyright and international trade**

57. As it did in the proceeding leading to the issuance of Broadcasting Regulatory Policy 2015-513, the NFL raised issues relating to the copyright of its programs and to conflict between the proposed distribution order and Canada's commitments under NAFTA and CUSFTA.
58. In that regulatory policy, the Commission responded by stating that its policy determinations regarding simultaneous substitution do not affect the NFL's copyright in its programs, and that, at most, its determinations would have a secondary impact on the value of the program as they may affect the ability of Canadian broadcasters to obtain revenues from broadcasting this program.
59. In regard to conflicts with NAFTA and CUSFTA, the Commission disagreed with the NFL's position. It stated that trade agreements do not apply directly to the Commission without specific legislation to this effect. It added that even if those treaties were directly applicable to the Commission, they would simply provide Canada with the ability to create a simultaneous substitution regime; they would in no way limit the Commission's ability to modify or even remove this regime.
60. In regard to the present proceeding, the Commission considers that the above responses to the NFL's concerns remain adequate.

### **Proposed changes to language relating to the distribution order**

#### **Introductory paragraph to the distribution order**

61. The first paragraph of the proposed distribution order reads as follows:

Pursuant to section 9(1)(h) of the *Broadcasting Act*, the Commission orders licensees of broadcasting distribution undertakings to distribute the programming services of Canadian television stations that broadcast the Super Bowl on the following terms and conditions: [...]

62. In SaskTel's view, this wording could be interpreted as requiring a BDU to distribute a Canadian television station that broadcasts the Super Bowl, even if it does not already distribute that station. It proposed that this wording be amended so that it apply only to BDUs that choose to carry the station.
63. It was not the Commission's intent to mandate BDUs to distribute a station that broadcasts the Super Bowl, but simply to add a condition that must be fulfilled should a BDU carry the station (whether it is being carried because it is mandated to be carried by regulation as a local television station, or whether it is simply authorized to be carried as a distant signal). Accordingly, SaskTel is correct as to the intent of the distribution order and how the Commission will interpret it in the future.

64. However, given that the amendment proposed by SaskTel would shift the language of the distribution order away from language currently used in section 9(1)(h) of the Act, the Commission finds that it is neither necessary nor appropriate to adopt SaskTel's proposed amendment.

#### **Definition of Super Bowl**

65. Eastlink requested that the proposed definition of Super Bowl included in the distribution order reference the "championship game" but not include specific references to popular pre- and post-game components such as the singing of the national anthem or the trophy presentation ceremonies.

66. Given that advertisements of interest to the public are broadcast during the course of the Super Bowl game, rather than prior to or following the game, Eastlink's request to exclude pre- and post-game shows from the scope of the distribution order is reasonable. Accordingly, the distribution order will not apply to pre- and post-Super Bowl game components.

#### ***Exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers – cross reference with the distribution order***

67. Section 15 of the *Exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*<sup>9</sup> (the exemption order) sets out that if a BDU serves more than 2,000 subscribers, it distributes all programming services that must be distributed pursuant to mandatory distribution orders under section 9(1)(h) of the Act, under the terms and conditions of each mandatory distribution order. In its intervention, Eastlink requested that the proposed distribution order include a reference to section 15 of the exemption order, or that the exemption order specifically cross-reference the distribution order.

68. The Commission agrees with Eastlink that no longer authorizing simultaneous substitution for the Super Bowl should also apply to exempt undertakings; otherwise, subscribers to exempt undertakings may have an incentive to switch to a licensed BDU in order to view the Super Bowl in its entirety. However, the application of this policy decision to exempt services that serve more than 2,000 subscribers falls within section 15 of the exemption order through reference to "mandatory distribution orders under section 9(1)(h) of the *Broadcasting Act*." Consequently, the Commission does not consider it necessary or appropriate to amend the exemption order as requested by Eastlink.

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<sup>9</sup> See Broadcasting Regulatory Policy 2015-543/Broadcasting Order 2015-544.

## Conclusion

69. In light of all of the above, the Commission hereby issues a distribution order pursuant to section 9(1)(h) of the Act through which simultaneous substitution will no longer be authorized for the Super Bowl, effective 1 January 2017. The distribution order is set out in the appendix to this regulatory policy.

Secretary General

## Related documents

- *Call for comments on a proposed distribution order prohibiting simultaneous substitution for the Super Bowl*, Broadcasting Notice of Consultation CRTC 2016-37, 3 February 2016
- *Revised exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Regulatory Policy CRTC 2015-543 and Broadcasting Order CRTC 2015-544, 9 December 2015
- *Regulations to implement policy determinations regarding simultaneous substitution in the Let's Talk TV proceeding*, Broadcasting Regulatory Policy CRTC 2015-513, 19 November 2015
- *Call for comments on the proposed Simultaneous Programming Service Deletion and Substitution Regulations*, Broadcasting Notice of Consultation CRTC 2015-330, 23 July 2015
- *Measures to address issues related to simultaneous substitution*, Broadcasting Regulatory Policy CRTC 2015-25, 29 January 2015
- *Notice of hearing – Let's Talk TV*, Broadcasting Notice of Consultation CRTC 2014-190, 24 April 2014, as amended by Broadcasting Notices of Consultation CRTC 2014-190-1, 20 June 2014; 2014-190-2, 23 June 2014; 2014-190-3, 21 August 2014; and 2014-190-4, 15 September 2014
- *Let's Talk TV: A conversation with Canadians about the future of television*, Broadcasting Notice of Invitation CRTC 2013-563, 24 October 2013
- *Reference to the Federal Court of Appeal – Commission's jurisdiction under the Broadcasting Act to implement a negotiated solution for the compensation for the fair value of private local conventional television signals*, Broadcasting Order CRTC 2010-168, 22 March 2010
- *A group-based approach to the licensing of private television stations*, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010
- *Order respecting the distribution of the French-language television service of TVA Group Inc.*, Public Notice CRTC 1999-27, 12 February 1999



# Appendix to Broadcasting Regulatory Policy CRTC 2016-334

## Broadcasting Order CRTC 2016-335

### Distribution of Canadian television stations that broadcast the Super Bowl

Pursuant to section 9(1)(h) of the *Broadcasting Act*, the Commission orders licensees of broadcasting distribution undertakings to distribute the programming services of Canadian television stations that broadcast the Super Bowl on the following terms and conditions:

1. This order applies to all licensed distribution undertakings, including terrestrial and direct-to-home distribution undertakings, other than a person licensed to carry on (a) a subscription television system; (b) a relay distribution undertaking; or (c) an undertaking that only rebroadcasts the radiocommunications of one or more other licensed undertakings.
2. For the purposes of this order, “Super Bowl” is defined as the championship game of the National Football League, played annually between the National Football Conference champion and the American Football Conference champion for possession of the Vince Lombardi Trophy.
3. Effective 1 January 2017:
  - a. A distribution undertaking subject to this order may only distribute the programming service of a Canadian television station that broadcasts the Super Bowl if that distribution undertaking does not carry out a request made by that Canadian television station pursuant to section 3 of the *Simultaneous Programming Service Deletion and Substitution Regulations* to delete the programming service of another Canadian television station or a non-Canadian television station and substitute for it the programming service of a local television station or regional television station during any period in which the Super Bowl is being broadcast on the requesting Canadian television station.
  - b. For clarity, distributions undertakings subject to this order must not carry out a requested deletion and substitution referred to in 3.a. above even if all of the conditions set out in section 4 of the *Simultaneous Programming Service Deletion and Substitution Regulations* would be met.