



Broadcasting Decision CRTC 2016-38

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Route reference: Part 1 application posted on 8 December 2015

Ottawa, 4 February 2016

Avis de recherche incorporée

Province of Quebec

Application 2015-1326-8

Complaint against Bell Canada concerning the distribution of the Category B service Avis de Recherche

Avis de recherche incorporée (ADR) submitted a complaint against Bell Canada (Bell) concerning the distribution of the Category B service Avis de Recherche.

The Commission finds that Bell has not conferred a preference upon itself and has not subjected ADR to a disadvantage by ceasing the distribution of Avis de Recherche. Moreover, Bell has fulfilled its obligations under the Commission's dispute resolution regime and has not breached its conditions of licence.

*Accordingly, the Commission **dismisses** the complaint, **denies** the requested reliefs and **lifts** the standstill, which means that Bell is no longer required to distribute Avis de Recherche.*

The parties

1. Avis de recherche incorporée (ADR) is the licensee of the national, French-language specialty Category B service Avis de Recherche. The service is distributed exclusively in the province of Quebec.
2. Bell Canada (Bell) is one of the largest operators of broadcasting distribution undertakings (BDUs) in Canada.

Background

3. In Broadcasting Regulatory Policy 2013-372, the Commission denied ADR's application to renew the 9(1)(h) order mandating the service's distribution on the digital basic service to subscribers in the province of Quebec. The Commission stated that the mandatory distribution requirement for this service would be phased out over a two-year period (by 31 August 2015) to allow the licensee time to adapt its business plan in light of the change.

4. On 29 June 2015, Bell first notified ADR of its intent to cease the distribution of Avis de Recherche effective 31 August 2015. On 14 August 2015, ADR filed a request for dispute resolution with the Commission. As a result of a staff-assisted mediation, Bell and ADR reached an agreement which provided for Avis de Recherche's continued distribution until 30 November 2015.
5. ADR was subsequently notified of Bell's intention to cease the distribution of Avis de Recherche effective 1 December 2015. On 17 November 2015, ADR requested that Bell be ordered to continue the distribution of Avis de Recherche on the same terms and conditions pending the outcome of its dispute with Bell, in accordance with section 15.01 of the *Broadcasting Distribution Regulations* (the Regulations) (the standstill rule).
6. Finally, on 26 November 2015, ADR filed the current application with the Commission requesting "such relief as the Commission deems appropriate to ensure its continued distribution by Bell."
7. In a procedural letter to the parties dated 7 December 2015, Commission staff confirmed that the standstill rule as set out in section 15.01 of the Regulations applies to this dispute and that Bell must continue to distribute Avis de Recherche on the same terms and conditions pending resolution of the dispute.

The complaint

8. ADR argued that failure by a BDU to carry an independent Category B service that is similar to an affiliated Category B service creates a *prima facie* case of undue preference. Specifically, Bell's decision to cease distributing Avis de Recherche while continuing to carry its affiliated service Canal D/Investigation (Investigation) constitutes a *prima facie* case of undue preference. Similarly, by virtue of continuing to distribute various affiliated and unaffiliated services on the basic service and highly penetrated tiers, Bell has subjected ADR to a disadvantage.
9. ADR argued that Avis de Recherche and Investigation, while both in the crime and justice genre, have a different approach to content. Whereas Investigation relies on advertising revenue to finance some of its programming, Avis de Recherche does not. Whereas Investigation has some foreign content, Avis de Recherche has none. As a result, Investigation can be expected to receive far greater viewing than Avis de Recherche. ADR contended that Avis de Recherche's success can be better measured by factors such as reach and ability to solve crimes.
10. ADR also alleged that Bell has not respected certain provisions of the Wholesale Code¹ and has not complied with two of its conditions of licence. The conditions, set out in Appendix 2 to Broadcasting Decision 2013-310, prohibit Bell from requiring that a party with whom it is contracting accept terms or conditions for the distribution

¹ In its application, ADR referred to the Code of Conduct which has since been superseded by the Wholesale Code.

of programming that are commercially unreasonable (condition of licence 1.b) and require that Bell refer disputes to the Commission in circumstances where affiliation agreements have not been renewed and the other contracting party has confirmed its intention to renew the agreement (condition of licence 4).

11. In light of these various breaches and violations, ADR requested the following reliefs:

- the issuance of a temporary or transitional order under section 9(1)(h) of the *Broadcasting Act* (the Act) requiring continued distribution of Avis de Recherche on current terms and conditions, to give ADR the same opportunity as other independent services to adjust to a lack of access rights; or
- the issuance of an order under section 9(1)(h) of the Act requiring Bell to provide Avis de Recherche on the basic service through to 31 March 2016 at current rates and access on Bell's second most highly penetrated tier (after the small basic) at a reasonable rate to be determined, thereafter; or
- a finding of undue preference or disadvantage against Bell and the issuance of a commensurate 9(1)(h) order requiring continued distribution of Avis de Recherche on the same terms and conditions for the remainder of ADR's licence term.

Bell's response

12. Bell was of the view that ADR's claims are unfounded and that the complaint should be dismissed in its entirety. Bell disputed ADR's assertion that a preference or disadvantage exists and contended that, in the alternative, if they do exist, they are not undue.

13. Bell argued that Avis de Recherche and Investigation are dissimilar services (and therefore not comparable) in terms of genre, content and viewership. According to Bell, Avis de Recherche is largely based on short clips and video surveillance footage showing criminals in action or information on missing or wanted persons, akin to a "Crimestoppers channel," while Investigation is an entertainment service offering documentaries, dramas and reality television shows related to justice and forensic science. It also stated that Avis de Recherche's viewership is considerably smaller than that of Investigation.

14. Bell stated that it is fully compliant with the Wholesale Code and its conditions of licence. It argued that it has the right to remove a Category B service from distribution, especially after having engaged in good faith negotiations and having participated in staff-assisted mediation. Moreover, the decision to cease the distribution of Avis de Recherche is commercially reasonable in light of the very low viewership the service garners. Bell argued that ADR has had two years to adjust to the lack of access rights, but has failed to do so.

15. Bell also noted that ADR has known since 24 September 2015 that its service would no longer be distributed by Bell on 1 December 2015, and yet waited two months to file this application. In Bell's view, ADR is abusing the Commission's process and using the standstill rule as a remedy to ensure access rights for its service.
16. Finally, Bell was of the view that ADR's application is simply another attempt to have the Commission extend the 9(1)(h) order requiring mandatory distribution of the service, a proposal that the Commission has already rejected.

Interventions

17. The Commission received a number of interventions in support of this application, most of which came from police and law enforcement agencies as well as other community agencies. It also received an intervention opposing the application from Videotron. The public record for this application can be found on the Commission's website at www.crtc.gc.ca or by using the application number provided above.
18. The majority of supporting interventions expressed their support for ADR in fulfilling a public interest mandate.
19. Videotron submitted that where a BDU has clearly notified a Category B service within the proper timeframe of its intention to cease distributing a given service, applying the standstill rule is effectively granting a mandatory distribution right to a service that in reality does not have that right. In its view, the standstill rule should only be applied when both the Category B service and the BDU intend to continue distribution and are solely negotiating the terms of the agreement.

Reply

20. ADR argued that the remedies it seeks should not be inextricably linked to the Commission's finding of undue preference, in that, even if the Commission finds that there is no undue preference or disadvantage, it could and should still grant continued distribution.
21. It further argued that Bell has adduced no evidence that would allow the Commission to conclude that ceasing the distribution of Avis de Recherche 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.

Commission's analysis and decisions

22. ADR advanced a number of grounds in support of its application: undue preference and disadvantage, violations of the Wholesale Code and non-compliance by Bell with certain conditions of licence. While there are a number of policies and obligations invoked, the crux of the dispute is one of distribution: ADR wants Bell to distribute Avis de Recherche, preferably on the basic service at a Commission-mandated rate, and Bell does not want to continue distributing the service. Irrespective of the

grounds argued, ADR's ultimate request is that the Commission grant a mandatory distribution order pursuant to section 9(1)(h) of the Act ordering Bell to distribute Avis de Recherche for a set period.

23. The Commission therefore considers that the issues it must address are as follows:

- Is there a preference or disadvantage?
- Has Bell fulfilled its obligations under the Commission's dispute resolution regime?
- Has Bell breached certain conditions of licence?

Is there a preference or a disadvantage?

24. Section 9 of the Regulations states that no licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

25. When the Commission examines a complaint alleging undue preference or disadvantage, it must first determine whether the complainant was able to demonstrate that the other party has given preference to any person, including itself, or has subjected any person to a disadvantage.

26. If the Commission finds that a preference has been given or a person has been subjected to a disadvantage, it must then determine whether, under the circumstances, that preference or disadvantage is undue. In any proceeding 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.

27. 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.

28. ADR claims that failure by a BDU to distribute an independent Category B service that is similar to an affiliated Category B service creates a *prima facie* case of undue preference. It also claims Bell has subjected ADR to a disadvantage by ceasing to distribute Avis de Recherche while maintaining various affiliated and unaffiliated services on the basic service and highly penetrated tiers.

29. Under the current regulatory framework, Bell is under no obligation to carry Category B services such as Avis de Recherche. Merely ceasing to distribute a discretionary service and continuing to distribute other services is not, in and of itself, sufficient to establish undue preference. Indeed, in Broadcasting Regulatory Policy 2015-96, the Commission announced that access privileges will be phased out for all discretionary services in recognition of an increased reliance on market forces for the distribution

and packaging of such services. In such a market, programming services are expected to innovate and improve their programming if they are to continue to appeal and remain relevant to Canadian viewers.

30. For the purposes of undue preference complaints, the Commission defines preference as dissimilar treatment, by a licensee, of comparable entities. In this respect, Investigation and Avis de Recherche cannot be said to be comparable entities. While both are Category B services and have justice and crime as a common theme, Investigation is more of an entertainment service and Avis de Recherche an information service. By ADR's own admission, they approach the genre very differently. ADR contends that Avis de Recherche's success can be better measured by factors such as reach and ability to solve crimes. However, its reach appears to be uniquely attributable to the service's distribution on the basic service, rather than to actual viewership to the service, which is extremely low. While ability to solve crimes is immaterial to the case at hand, the applicant's evidence supporting its ability to solve crimes is very limited at best.
31. Therefore, the Commission finds that Bell has not conferred a preference on itself and has not subjected ADR to a disadvantage by continuing to distribute Investigation and other affiliated and unaffiliated services and ceasing to distribute Avis de Recherche.

Dispute resolution regime and the standstill rule

32. In Broadcasting Regulatory Policy 2015-96, the Commission put in place a new regulatory framework to ensure that Canadians have access to a diverse range of content through a healthy, dynamic television market. It also stated that it is prepared to intervene where it finds that parties are acting in an anti-competitive manner. Such targeted intervention may be necessary to ensure a retail market that maximizes consumer choice and flexibility and provides Canadians with access to a diverse range of programming. The dispute resolution regime, including the Wholesale Code, is designed to ensure a healthy and dynamic wholesale market, one in which negotiations are conducted fairly and in good faith. Similarly, the standstill rule was put in place to level the field during negotiations between programmers and distributors.
33. Since the 9(1)(h) order mandating Avis de Recherche's distribution on the digital basic service expired on 31 August 2015, ADR has filed two requests invoking the standstill rule to maintain its carriage on the same terms and conditions. The standstill rule should not be invoked lightly nor be relied upon to grant an effective access right. The intent of the rule is to ensure that Canadians do not lose access to their favourite programming services while BDUs and programmers negotiate the terms and conditions of distribution. It is not intended to protect or defend the particular interests of either party.
34. The Commission will intervene if it suspects that parties are invoking the standstill rule in such a manner as to thwart good faith negotiations or to insulate a given service from the impact of greater consumer choice.

35. In this case, Bell has participated in negotiations with ADR and has provided commercially based evidence, specifically the service's extremely low viewership, to substantiate its reasons for ceasing the distribution of the service. Accordingly, the Commission finds that Bell has fulfilled its obligations. It therefore **lifts** the standstill as it applies to Bell and Avis de Recherche.

Alleged breach of Bell's conditions of licence

36. With respect to ADR's argument that Bell has breached two of its conditions of licence, the Commission finds that Bell is not contracting with ADR and therefore, condition of licence 1.b does not apply in this case. With respect to condition of licence 4, while Bell did not request dispute resolution 120 days before the expiry of the agreement, ADR filed a request for dispute resolution and parties engaged in negotiations and staff-assisted mediation. The intent of this condition of licence is to help ensure fair commercial negotiations. While Bell did not specifically comply with the letter of the condition of licence, it complied with the spirit of the condition. Additionally, the fact that Bell has already participated in mediation renders the argument moot in light of the specific circumstances of this case.

Conclusion

37. In light of the above, the Commission **denies** the reliefs requested by Avis de recherche incorporée and **dismisses** the complaint against Bell Canada.

Secretary General

Related documents

- *Let's Talk TV: A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015
- *Applications for mandatory distribution on cable and satellite under section 9(1)(h) of the Broadcasting Act*, Broadcasting Regulatory Policy CRTC 2013-372, 8 August 2013
- *Astral broadcasting undertakings – Change of effective control*, Broadcasting Decision CRTC 2013-310, 27 June 2013