



## Broadcasting Decision CRTC 2016-82

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Reference: Part 1 application posted on 21 January 2016

Ottawa, 3 March 2016

### Avis de recherche incorporée

Province of Quebec

*Application 2016-0071-8*

### Complaint against Videotron G.P. concerning the distribution of the Category B service Avis de Recherche

*The Commission finds that Videotron G.P. (Videotron) has not conferred a preference upon itself and has not subjected Avis de recherche incorporée to a disadvantage by choosing to cease distributing the Category B service Avis de Recherche. Moreover, had the Commission found a preference or disadvantage in this case, it concludes that such a preference or disadvantage would not have been considered undue. Finally, Videotron has fulfilled its obligations under the Commission's dispute resolution regime.*

*Accordingly, the Commission **dismisses** the complaint, **denies** the requested reliefs and **lifts** the standstill, which means that Videotron 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 Quebec.
2. Videotron G.P. (Videotron)<sup>1</sup> is the largest operator of broadcasting distribution undertakings (BDUs) in Quebec.

#### Background

3. In Broadcasting Regulatory Policy 2013-372, the Commission denied ADR's application to renew an order made under section 9(1)(h) of the *Broadcasting Act* (the Act) requiring the service's distribution on the digital basic service to subscribers in 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.

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<sup>1</sup> Videotron Ltd. and 9227-2590 Québec inc., partners in a general partnership carrying on business as Videotron G.P.

4. On 11 March 2015, Videotron notified ADR of its intent to cease distributing Avis de Recherche as of 1 September 2015. An agreement was subsequently reached between the parties for the distribution of Avis de Recherche until 30 November 2015.
5. On 12 November 2015, ADR filed a notice of dispute with the Commission and requested that Videotron be ordered to continue the distribution of Avis de Recherche on the same terms and conditions pending the outcome of the dispute, in accordance with section 15.01 (the standstill rule) of the *Broadcasting Distribution Regulations* (the Regulations).
6. In a procedural letter to the parties dated 26 November 2015, Commission staff confirmed that the standstill rule applied to the dispute.
7. On 1 December 2015, the parties participated in staff-assisted mediation.

### **The complaint**

8. On 18 January 2016, ADR filed a Part 1 application requesting such relief as the Commission deemed appropriate to ensure the continued distribution by Videotron of Avis de Recherche on reasonable terms and conditions. In support of its application, ADR alleged that Videotron had subjected Avis de Recherche to an undue disadvantage and had conferred an undue preference on its affiliated Category B and C services, including its news service Le Canal Nouvelles (LCN), contrary to section 9(1) of the Regulations.
9. ADR argued that Videotron's decision to cease distributing Avis de Recherche while continuing to carry affiliated Category B and C services was *prima facie* evidence of undue preference. ADR also argued that it had been subjected to a disadvantage as a result of Videotron's continued distribution of various affiliated and unaffiliated services on the basic service and highly penetrated tiers.
10. According to ADR, Videotron has the incentive and opportunity to engage in anti-competitive conduct due to its dominant position as a vertically integrated entity in Quebec. Specifically, ADR argued that Videotron has the leverage to grow the revenues of its affiliated Category B services through increased penetration, increased subscription fees or both, as well as the incentive to cease offering Avis de Recherche. In support, ADR filed a chart comparing the penetration and subscription revenues of Videotron's Category B services over time relative to that of Avis de Recherche. ADR also argued that Videotron has the ability to leverage deals with other BDUs for the distribution of each other's services, further disadvantaging ADR's service.
11. With respect to Videotron's affiliated service LCN, ADR argued that the news service competes at least indirectly with its service as Avis de Recherche's live morning shows constitute an alternative to LCN for viewers of news and information talk-show programming. ADR also noted that the LCN series *Enfants Disparus* is similar to ADR's series *Nos Enfants Disparus* and featured three cases already reported in the latter.

12. ADR further alleged that Videotron’s decision to cease carrying Avis de Recherche was commercially unreasonable and thus contrary to the Wholesale Code.<sup>2</sup> More generally, ADR alleged that Videotron had failed to reasonably consider or negotiate ongoing distribution of ADR and thus failed to adhere to the dispute resolution provisions of the Regulations. In this respect, ADR argued that the mere availability of the standstill rule and dispute resolution to specialty Category B services is evidence that, despite the lack of an access right, BDUs have an obligation to negotiate in good faith with Category B services, especially after such services have launched and been distributed.
13. In light of these alleged breaches and violations, ADR requested that the Commission issue a temporary or transitional order under section 9(1)(h) of the the Act requiring:
- continued distribution of Avis de Recherche under the same terms and conditions through to the expiry of its current broadcasting licence in August 2020;
  - continued distribution of Avis de Recherche under the same terms and conditions until 31 August 2018 to give the service the same opportunity as other independent services to adjust to a lack of access rights; or
  - distribution of Avis de Recherche on such tiers and packages necessary to achieve a commercially reasonable level of penetration of Videotron subscribers at a reasonable rate to be determined.

### **Videotron’s response**

14. Videotron argued that the complaint should be rejected as ADR had not presented *prima facie* evidence of a preference or disadvantage. Videotron further argued that even if the Commission concluded to the contrary, any preference or disadvantage would not be undue since the distribution of Category B services is not mandatory and therefore ceasing to distribute such services cannot *de facto* be construed as constituting undue preference or disadvantage.
15. Videotron disputed the existence of any preference in this case—first on the basis that its affiliated TVA Group services are not comparable to Avis de Recherche, and second, on the basis that ADR is in fact seeking distribution terms that are markedly superior to those of TVA Group services. Specifically, Videotron argued that Avis de Recherche’s penetration or subscription revenues could not be compared to those of TVA Group services because Avis de Recherche’s wholesale rate was set by the Commission as a result of its mandatory carriage by distributors pursuant to a 9(1)(h) order and because TVA Group services have a much higher value to viewers by virtue of their popularity and viewership.

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<sup>2</sup> See Broadcasting Regulatory Policy 2015-438.

16. With respect to LCN, Videotron argued that Avis de Recherche and LCN are not comparable as the latter is a national Category C service with significant investments in programming and the second most watched French-language specialty service, while the former is a socially oriented service that invests little in programming and thus garners very low viewership. Videotron submitted confidential set-top-box data in support of this claim.
17. Videotron also argued that ADR was attempting to revisit the Commission's decision to remove Avis de Recherche's mandatory carriage status and that an undue preference complaint was not the proper forum to do so. Videotron stated that ADR was abusing the Commission's processes by filing the complaint to prolong the application of the standstill rule.
18. Finally, Videotron submitted that it had made offers to ADR that respected the Wholesale Code and the Commission's regulations. It argued that conversely the remedies sought by ADR conflict with certain provisions in the Wholesale Code and are inconsistent with Videotron's business model and the Commission's framework for increasing consumer choice.

### **Bell's intervention**

19. The Commission received an intervention opposing the application by Bell Canada (Bell). The public record for the application can be found on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) or by using the application number provided above.
20. Bell submitted that ADR's complaint was without merit and urged the Commission to dismiss it. Among other things, Bell argued that it was disingenuous for ADR to use its wholesale rate compared to the rates received by Videotron's related services as a basis to urge the Commission to find an undue preference as Avis de Recherche's wholesale rate was set by the Commission as a result of its mandatory carriage status. Bell also questioned the comparisons made by ADR regarding LCN, arguing that a couple of programs do not form a sufficient basis for a determination that two television services are similar in nature.

### **Reply**

21. ADR argued that Videotron had not met its reverse onus obligation. According to ADR, set-top box data is inaccurate and therefore not a valid or relevant criterion for Videotron to use to satisfy the reverse onus burden. ADR stated that Videotron itself had acknowledged that such data was inaccurate. According to ADR, the Commission should make a finding of undue preference because Videotron had failed to meet its reverse onus obligation.
22. ADR also argued that Videotron's failure to reasonably consider or negotiate ongoing distribution of ADR, to conform to the Wholesale Code and to adhere to the dispute provisions of the Regulations present a compelling case for a transitional 9(1)(h) order requiring Videotron to distribute Avis de Recherche on the same terms and conditions until August 2018.

23. Finally, ADR submitted that it would be prepared to accept a net final penetration level of 60% on Videotron's systems, given the BDU's unique packaging model. In ADR's view, this would be consistent with the Commission's objective of a healthy and dynamic wholesale market in which risk and reward are shared between BDUs and programming services, striking a fair balance between allowing BDUs to provide their subscribers with more choice and flexibility and ensuring reasonable and predictable levels of revenue for programming services.

### **Commission's analysis and decisions**

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

- Has Videotron conferred upon itself an undue preference or subjected ADR to an undue disadvantage?
- Has Videotron fulfilled its obligations under the Commission's dispute resolution regime and the Wholesale Code?

### **Is there an undue preference or disadvantage?**

25. 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.

26. 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.

27. If the Commission finds that a preference has been given or a person has been subjected to a disadvantage, it must then determine whether 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.

28. 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 Canadian broadcasting policy set out in the Act.

29. For the purposes of undue preference complaints, the Commission defines preference as dissimilar treatment of comparable entities. In the present case, the Commission finds that LCN and Avis de Recherche are not comparable entities. Avis de Recherche is a Category B service focussed primarily on delivering information on justice and crime. Indeed, Avis de Recherche defines itself as a "public safety service." Additionally, Avis de Recherche garners negligible viewership. LCN, by contrast, is a Category C national headline news service devoted primarily to reporting and updating news and current events throughout the day, which garners

significant viewership. While LCN may carry some programs on the justice/crime theme, the Commission considers that this is insufficient in and of itself to conclude that the LCN service is comparable to Avis de Recherche and thus make a finding that a preference has been conferred.

30. Under the current regulatory framework, Videotron is under no obligation to carry Category B services such as Avis de Recherche. Merely the fact that a distributor ceases to distribute a discretionary service while continuing to distribute other services is not enough 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.
31. In light of all of the above, the Commission finds that Videotron has not conferred a preference on itself and has not subjected ADR to a disadvantage.
32. Finally, in Broadcasting Regulatory Policy 2013-372, the Commission found that it was not appropriate to maintain the 9(1)(h) distribution order for Avis de Recherche as it could no longer conclude that the service contributed in an exceptional manner to Canadian expression, the reflection of Canadian opinions and values and fulfilling the objectives of the Act. Since that time, the Commission has also moved towards a regulatory framework that is more consumer-centric and provides for greater flexibility (see Broadcasting Regulatory Policy 2015-96). Consistent with its determinations in the Let's Talk TV proceeding, the Commission places greater emphasis on establishing the regulatory framework necessary to create compelling programming rather than on protecting individual programming services.
33. Accordingly, should Videotron proceed with its decision to cease carrying Avis de Recherche, the Commission finds that it would not impact the achievement of the objectives of the Act. Indeed, to the extent that this decision can be justified on a valid commercial basis, it would be consistent with the Commission's overall regulatory framework, which seeks to allow BDUs and programming undertakings to be more responsive to consumer choice. Accordingly, had the Commission found a preference or disadvantage in this case, such a preference or disadvantage would not have been considered undue.

#### **Dispute resolution regime and the standstill rule**

34. 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 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 in which negotiations are conducted fairly and in good faith.

35. Similarly, the standstill rule was put in place to level the field during negotiations between programmers and distributors. It is not intended to protect or defend the particular interests of either party. 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. The standstill rule should not be invoked lightly, nor be relied upon to grant an effective access right. In this respect, the Commission has previously stated that it 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.
36. Videotron 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 Videotron has fulfilled its obligations.

## **Conclusion**

37. In light of the above, the Commission **dismisses** the complaint against Videotron G.P., **denies** the reliefs requested by Avis de recherche incorporée and **lifts** the standstill as it applies to Videotron and Avis de Recherche.

## **Additional documents**

38. On 26 February 2016, despite the fact that the record had closed on 3 February 2016, ADR sought to file additional documents in the context of the current Part 1 proceeding. The documents relate to a request filed by Videotron on 12 February 2016 before the Quebec Superior Court seeking homologation of the settlement agreement reached between ADR and Videotron last year before that Court.
39. The Commission varies its procedures and accepts these documents on the record of this proceeding. Having considered the additional material submitted by ADR, the Commission considers that ADR has mischaracterized the scope and impact of Videotron's request to homologate the settlement agreement. Specifically, the matter before the Quebec Superior Court consists of a contractual dispute between ADR and Videotron over their previous contract. Accordingly, the Commission finds that these documents are not relevant to the application at hand.

Secretary General

## **Related documents**

- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015

- *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