Canadian Radio-television and Telecommunications Commission | Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Decision CRTC 2021-341

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Reference: Part 1 application posted on 19 August 2020

Ottawa, 15 October 2021

Canadian Communication Systems Alliance Inc.
Across Canada

Public record for this application: 2020-0496-9

Complaint by the CCSA against Bell Media alleging undue preference and disadvantage

The Commission finds that programming undertakings are not required under the Standstill Rule to authorize new services or functionalities requested by broadcasting distribution undertakings (BDUs) in the context of a dispute. Where a BDU has never distributed the services or functionalities of a programming undertaking and such services or functionalities were not launched during the term of the contract, the Standstill Rule cannot be used by a BDU to impose new obligations on a programming undertaking. Accordingly, the Commission finds that Bell Media Inc. has not violated the Standstill Rule and **dismisses** the CCSA's complaint in that regard.

With respect to the concerns regarding technical surveys, the Commission finds that Bell Media Inc.'s use of technical surveys does not contravene the Commission's regulatory framework. However, the Commission will monitor the situation with respect to technical surveys to ensure that they do not become an obstacle to successful commercial operations and negotiations for smaller BDUs.

Furthermore, and in light of these findings, the Commission **dismisses** the complaint that Bell Media Inc. is granting itself an undue preference and subjecting CCSA members to an undue disadvantage and is in non-compliance with sections 5(e), 5(f) and 12 of the Wholesale Code, as well as with its competitive safeguard condition of licence.

Parties

1. The Canadian Communication Systems Alliance Inc. (CCSA) represents over 100 independent companies that provide Internet, television and telephone services in communities across Canada, generally outside urban markets. CCSA members include community cooperatives, family businesses, municipalities and companies owned by Indigenous People. The CCSA filed this application on behalf of a number of its members.

2. Bell Media Inc. (Bell Media) is the largest multimedia company in the Canadian broadcasting system and the licensee of a number of popular Canadian programming services.

Background

3. The CCSA represents smaller BDUs in the negotiation of master agreements with programming providers. The initial contract setting out the terms and conditions for distribution of Bell Media's discretionary services by CCSA members is the "CCSA/Bell Media Master Affiliation Agreement." The CCSA has also entered into other contractual instruments with Bell Media relating to this agreement, including among other things, agreements for the distribution of multiplatform services and also those extending the terms of the agreements. For the purposes of this decision, the totality of these agreements is referred to as the Master Agreement.

4. Despite these overarching agreements, CCSA members must adopt the Master Agreement individually to be authorized to distribute Bell Media's programming services and associated functionalities via an assumption agreement. In doing so, the BDUs individually identify the services and functionalities they wish to distribute, and the agreement then applies as between Bell Media and that specific BDU in respect only of the specified services and functionalities. Thus, different BDUs can distribute different services and functionalities in accordance with their technological capacity and the needs of their subscribers.

5. Although Bell Media and the CCSA have entered into various agreements to extend the contractual relationship, those agreements have all now expired. Bell Media and the CCSA are currently negotiating a new master agreement.

Regulatory framework

6. Paragraph 10(1)(h) of the *Broadcasting Act* (the Act) authorizes the Commission, in furtherance of its objects, to make regulations for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings.

7. The Commission is also authorized, pursuant to subsection 9(1) of the Act, to issue licences subject to such conditions related to the circumstances of the licensee as it deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1) of the Act.

8. Pursuant to this authority, the Commission has imposed conditions of licence and made a number of regulations relating to dispute resolution and to ensuring that the public interest is protected during negotiations between distribution and programming undertakings.

9. With regard to programming services, BDUs and programming undertakings may avail themselves of the dispute resolution regime by virtue of the provisions set out in applicable conditions of licence and in sections 14 and 15 of the *Discretionary Services Regulations* (the Regulations).

10. The Standstill Rule, set out in section 15 of the Regulations, states that during a dispute between a BDU and a programming undertaking concerning the carriage or terms of carriage of a programming service, the programming undertaking must continue to provide its programming services to the BDU at the same rates and on the same terms and conditions as

it did before the dispute until such time as an agreement settling the dispute is reached by the concerned undertakings or, if no such agreement is reached, the Commission renders a decision concerning any unresolved matter.

11. Section 11 of the Regulations states:

    (1) A licensee shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

    (2) In a 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.

12. Further, the appendix to Broadcasting Regulatory Policy 2015-438 sets out the Commission's Wholesale Code, adherence to which is imposed by condition of licence, which guides certain aspects of commercial arrangements between BDUs and programming services.

13. Bell Media also has a competitive safeguard conditions of licence, which is set out in Appendix 3 to Broadcasting Decision 2017-149 and which states:

    23. The licensee shall not include or enforce any provision in or in connection with an affiliation agreement that is designed to prevent, or is designed to create incentives that would effectively prevent another programming undertaking or broadcasting distribution undertaking from launching or distributing another licensed programming service.

Complaint

14. On 12 August 2020, the CCSA filed an application alleging that, by withholding services and functionalities from CCSA members, Bell Media is conferring an undue preference on Bell Media's affiliated BDUs and an undue disadvantage to those CCSA members, as well as violating its competitive safeguard condition of licence; sections 5(e), 5(f) and 12 of The Wholesale Code; and the Standstill Rule set out in section 15 of the Regulations.

15. The CCSA argued that its members who adopted the Master Agreement in signing an assumption agreement have been unreasonably prevented from or delayed in launching new Bell Media services and functionalities, since Bell Media is refusing to authorize new launches until a new master agreement is finalized. The CCSA specified that this is causing its members substantial economic, reputational and competitive harm. CCSA members have already invested in the facilities and equipment needed to offer the Bell Media services in question.

16. The CCSA argued that the Standstill Rule requires Bell Media, until renewal terms are finalized, to continue respecting the rates, terms and conditions, as well as to continue distributing the discretionary services and functionalities, as set out in the Master Agreement. The CCSA argued that the terms of the Master Agreement are maintained by the Standstill Rule and include the right of CCSA members to launch new Bell Media services, as well as new functionalities for existing services.

17. The CCSA also alleged that Bell Media is contravening subsections 5(e) and (f) of the Wholesale Code by imposing unreasonable terms and conditions that restrict BDUs' ability to provide services and functionalities, which also violates its competitive safeguard condition of licence. In addition, Bell Media is contravening section 12 of the Wholesale Code by failing to meet the requirement that programming services "shall offer reasonable terms based on fair market value to other BDUs for their non-linear multiplatform rights at the same time as their linear rights and provide such content on a timely basis."

18. The CCSA also asserted that Bell Media uses its complex technical survey process as a means of delaying the delivery of competitive programming offerings to BDUs.

19. Therefore, the CCSA requested that the Commission find that Bell Media has conferred upon its affiliated BDUs an undue preference and subjected CCSA members to an undue disadvantage, and that Bell Media has breached its competitive safeguard condition of licence, sections 5(e), 5(f) and 12 of the Wholesale Code, and the Standstill Rule. The CCSA also requested that the Commission direct Bell Media to authorize the distribution of the programming services and functionalities in question without delay.

Bell Media's answer

20. In its answer, Bell Media asserted that the CCSA cannot invoke the Standstill Rule because the CCSA is an independent negotiating body for BDUs and not "a person that is licensed to carry on a distribution undertaking or the operator of an exempt distribution undertaking," as specified in subsection 15(1) of the Regulations.

21. Nevertheless, Bell Media agreed that the Standstill Rule applies to services and functionalities already provided to BDUs in accordance with the terms and conditions of individual assumption agreements before their expiry. Accordingly, its services and functionalities provided to CCSA members prior to the triggering of the Standstill Rule remain available; no existing service or functionality has been cut, diminished or otherwise altered.

22. However, Bell Media argued that the Standstill Rule cannot be used to request new services and functionalities after agreements have expired and dispute resolution has been initiated. Bell Media stated that it should not be required to provide additional services and functionalities at rates that are no longer in force and specified that it expects BDUs to pay fair, market-based rates for these services.

23. With regard to the Wholesale Code and its competitive safeguards, Bell Media asserted that the CCSA provided no evidence to support its claims. The CCSA did not assess the terms and conditions Bell Media is seeking in regard to the services and functionalities in question.

24. In addition, Bell Media argued that its technical survey process is reasonable and in the best interest of all parties. The onus is on BDUs to demonstrate that they undertake appropriate measures to address the rights and security concerns of Bell Media's programming providers. Without this questionnaire, Bell Media could be in breach of its obligations to its program supply partners and be required to cease distribution of their programming.

25. Bell Media noted that the technical survey and review process are the same for all BDUs. It stated that it informs BDUs that the process can take up to six months but that this timeframe is limited to more complex cases and that shorter timeframes are more common. Bell Media added that CCSA members can cause delays in the process by providing incomplete information or by providing information late.

The CCSA's reply

26. With regard to its ability to invoke the Standstill Rule, the CCSA stated that the Commission has recognized the CCSA's authority to act on behalf of its members a number of times for similar cases.

27. In terms of its applicability, the CCSA argued that the Standstill Rule does not distinguish between services and functionalities that its members did and did not distribute before the expiry of the Master Agreement. Rather, it requires licensees to provide its services at the same rates and on the same terms and conditions as it did before the dispute. The terms and conditions for distribution of the services and functionalities are those set out in the Master Agreement.

28. The CCSA claims that the understanding when agreements are negotiated is that members can begin distributing at any time the services included in the agreement by submitting "launch forms." The CCSA argued that when Bell Media prevents members from exercising their contractual rights, Bell Media is withdrawing services covered by the Standstill Rule.

29. With regard to the Wholesale Code and Bell Media's competitive safeguards, the CCSA argued that by refusing to honour its existing contractual obligations, Bell Media has failed to offer reasonable terms for non-linear distribution at the same time that such terms are made available to related BDUs. CCSA notes that it had included in its initial application examples of the ways in which Bell Media has prevented CCSA members from launching or distributing Bell Media services.

30. With regard to the technical survey process, the CCSA acknowledged the need to vet BDUs' security measures. However, the CCSA noted that the Master Agreement includes no mention of technical surveys and therefore does not impose a requirement for CCSA members to complete technical surveys. The CCSA claimed that this requirement has been imposed unilaterally by Bell Media outside the framework of the Master Agreement.

31. The CCSA indicated that Bell Media's assertion that most technical surveys are processed in less than six months does not correspond with the experience of its members. The CCSA added that its members have not experienced such extensive delays as part of the technical survey process with other vertically integrated media companies.

32. The CCSA argued that, because Bell Media has such a large stable of "must have" programming services, CCSA members have no practical option but to undergo the technical survey review process with Bell Media. The CCSA argued that the delays created by Bell Media in the launch of new services and functionalities impair CCSA members' ability to

- offer compelling multi-platform offerings to the Canadians they serve;
- compete with other distributors including Bell Media's affiliated BDUs;
- realize any return on investment in new distribution technologies and platforms; and
- preserve their reputation for the delivery of competitive broadcasting services.

Interventions

33. The Commission received two interventions in support of the CCSA's complaint—one from Hastings Cable Vision (a CCSA member) and one from the Public Interest Advocacy Centre (PIAC). PIAC provided guidance as to how it believes this complaint should be addressed. Namely, PIAC urged the Commission to resolve terminological and regulatory classification questions in order to address any denial of access from Bell Media.

Issues

34. The Commission considers that the issues it must address are the following:

- whether the CCSA can avail itself of the Standstill Rule on behalf of its members;
- whether the Standstill Rule applies;
- the appropriateness of Bell Media's technical survey process;
- whether Bell Media has violated the Wholesale Code or its competitive safeguard condition of licence; and
- whether there is a preference or a disadvantage.

The CCSA's status

35. The Commission acknowledges that the CCSA is not a BDU; the CCSA represents BDUs in negotiations with other broadcasting entities, as well as in proceedings before the Commission. The Commission also acknowledges that the Wholesale Code and other regulations and policies do not specify the role of representative bodies such as the CCSA within the regulatory framework. Nevertheless, the Commission notes that it has previously recognized the CCSA as a party representing its member BDUs as part of dispute resolution proceedings.

36. Smaller scale BDUs may not have the knowledge, financial means or logistical resources to negotiate with larger companies. The CCSA has the resources, knowledge and business experience to represent its members effectively in commercial negotiations and before the Commission. Because of this, members agree to enable the CCSA to enter into commercial agreements on their behalf and to be their representative in Commission proceedings.

37. The CCSA is a bargaining agent on behalf of its members and has been named a party to commercial affiliation agreements between programming services and the BDUs it represents. Although the CCSA is not itself a distribution undertaking, it is the authorized representative of various distribution undertakings (both licensed and exempt) that would be

entitled to avail themselves of the Standstill Rule. In this case, the CCSA is seeking to invoke the Standstill Rule on behalf of those distribution undertakings. Allowing the CCSA to enter into agreements on behalf of the undertakings it represents but not to invoke the Standstill Rule on their behalf could shield programming services from regulatory obligations. This would also increase the administrative burden on the various players in the system, since the effect would be to require CCSA members to submit individual dispute resolution applications.

38. In light of the above, the Commission determines that the CCSA, as a representative of various BDUs, is entitled to invoke the Standstill Rule on behalf of its members.

Applicability of the Standstill Rule

39. The Standstill Rule has a long history grounded in the premise that the withdrawal of programming services during negotiations would be contrary to the public interest. The Standstill Rule was last reviewed in Broadcasting Regulatory Policy 2015-96, in which the Commission reiterated that the intent of the Standstill Rule is to ensure that subscribers are not deprived of services while parties are engaged in negotiations. The Commission also noted that the Standstill Rule should not be invoked lightly, nor be relied upon to grant an effective access right. The Standstill Rule is intended to ensure that Canadians do not lose access to their favourite programming services while BDUs and programmers dispute the terms and conditions of carriage. While the Standstill Rule also aids in leveling the playing field between programming and distribution undertakings during negotiations as noted in Broadcasting Regulatory Policy 2011-601, it is not intended to protect or defend the particular interests of either party.

40. In upholding the Commission's jurisdiction over dispute resolution generally and the Standstill Rule specifically, the Federal Court of Appeal noted that the "very purpose is to maintain the existing balance and thereby protect [the public] interest."[1]

41. The CCSA has argued that Bell Media should be required under the Standstill Rule to provide any service or functionality that was the subject of the Master Agreement, regardless of whether a BDU had included that service in its assumption agreement and distributed it to its subscribers prior to the agreement expiring. In particular, it is requesting that its members be able to launch additional services and functionalities that, although encompassed under the Master Agreement, they had not included in their assumption agreement and did not distribute to their subscribers prior to the expiry of the agreement.

42. Given its purpose, the Standstill Rule was clearly never intended to be used to compel the distribution of services and functionalities that had not been previously authorized under a valid and enforceable contract by the programming undertaking.

43. The wording used in the Regulations is also instructive in this regard. Section 15 of the Regulations states that the provider "must continue to provide its programming services to the distribution undertaking…" The word "continue" implies a continuation and an ongoing

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[1] *Groupe TVA Inc. v. Bell Canada*, 2021 FCA 153 at para. 63

action. Accordingly, section 15 cannot be read as requiring the granting of access to new services and functionalities that were not previously provided pursuant to a valid and binding contract between the parties. If a BDU was not already offering a service or functionality prior to the dispute, there is nothing to "continue to provide" and it cannot be caught by the Standstill Rule. Furthermore, subscribers cannot lose access to something that they were not already receiving.

44. Therefore, the Standstill Rule operates to ensure the continued provision of previously authorized services and functionalities under the contractual agreements in place and in force prior to the dispute in order to maintain the status quo for consumers and does not apply to services and functionalities that a BDU was not providing to its subscribers prior to the dispute.

45. The Standstill Rule does not require a programming undertaking to authorize the distribution of new services or functionalities in the context of a dispute in the absence of an agreement. Where a BDU has never distributed the services or functionalities of a programming undertaking and such services or functionalities were not included during the term of the contract, the Standstill Rule cannot be used by a BDU to impose new legal obligations on programming undertakings. Doing so would grant an effective right to distribute contrary to the purpose of the Standstill Rule.

46. The Commission notes that the terms and conditions outlined in the Master Agreement are only those that **would** apply if a CCSA member included those services and functionalities in its assumption agreement. Accordingly, the Commission finds that in the case of the CCSA and its members, the assumption agreement determines which services and functionalities a particular BDU was authorized to distribute and not the Master Agreement. The terms and conditions of the Master Agreement can be said to have applied at the time of the dispute in respect of an individual BDU only to services and functionalities that form part of an assumption agreement entered into between Bell Media and that particular BDU prior to the expiration of the Master Agreement.

47. The record of this proceeding indicates that Bell Media has continued to provide access to the services and functionalities for each member BDU in accordance with the services and functionalities identified in their respective assumption agreements prior to the dispute. In light of the above, the Commission determines that the Standstill Rule has not been violated.

Bell Media's technical survey process

48. Technical surveys (also referred to as security surveys or questionnaires) are detailed forms that an increasing number of programmers require BDUs to complete prior to entering into a distribution agreement. The purpose of this process is to ensure that the programming sold to BDUs by the provider and its partners will not be exposed or otherwise compromised by the BDU's network, infrastructure or distribution mechanisms. The surveys provide rights holders with assurances that their rights and intellectual property will not be infringed, damaged or otherwise compromised through the distribution process.

49. Technical surveys are commonplace in the broadcasting system. As the quantity of multi-platform programming increases, the need for the protection of such content (e.g., from piracy) also increases. Therefore, the Commission is of the view that Bell Media's technical surveys are not new nor outside the norm.

50. Technical surveys are not, however, standardized across the industry, and some programming undertakings have more complex surveys than others. Generally, the bigger the entity and its array of commercial partners are, the more complex the technical survey can be. Bell Media is the biggest player in the Canadian broadcasting system and purchases programming from a number of high profile Canadian and international content producers who are increasingly demanding more stringent control over the distribution of their content. Consequently, the protections and guarantees required by Bell Media to satisfy the content producers and providers that their programming is being handled in a manner that does not threaten their integrity may be more stringent.

51. Technical surveys are not tailored to individual BDUs and only the BDU itself will have the requisite knowledge to complete the survey. Therefore, smaller scale BDUs may have more difficulty meeting the requirements of the process, and this may cause delays.

52. In light of all of the above, the Commission is of the view that the use of technical surveys does not in itself contravene any part of the Commission's regulatory framework. The Commission also finds that there is insufficient evidence to find that Bell Media's technical survey process in particular is problematic.

53. However, the Commission notes that the CCSA is not the first to raise concerns about the technical survey process.

54. Accordingly, the Commission will monitor the situation with regards to the technical survey process to ensure that they do not become an obstacle to successful commercial operations and negotiations for smaller BDUs. Should the industry practice become too onerous for those smaller BDUs or the industry as a whole, the Commission may conduct a formal, industry-wide review of the surveys and the associated process, as well as their impact on the ability of smaller BDUs to access the programming services of large vertically integrated programming undertakings.

The Wholesale Code and Bell Media's competitive safeguard condition of licence

55. The CCSA's arguments regarding the Wholesale Code and the competitive safeguard condition of licence rest on the assertion that Bell Media is in breach of the Standstill Rule and the alleged unreasonableness associated with requiring a new agreement prior to being able to distribute any new services or functionalities, as well as requiring the completion of Bell Media's technical surveys. Since the Standstill Rule does not apply to previously undistributed services or functionalities, it cannot be said that Bell Media is violating the Wholesale Code or its condition of licence by refusing to launch these additional services and functionalities on the basis of the Standstill Rule. Further, as noted, Bell Media's technical surveys do not contravene any part of the Commission's regulatory framework.

56. Should the CCSA or its members wish to launch additional services or functionalities, they are open to negotiate and conclude an agreement for such new services or functionalities. To invoke Bell Media's competitive safeguard condition of licence and the Wholesale Code, the CCSA needed to provide sufficient evidence showing that the terms and conditions Bell Media is seeking in these cases are unreasonable. The CCSA has not done so. Therefore, its allegations of unreasonable terms and conditions under the Wholesale Code and the competitive safeguard condition of licence cannot be substantiated.

57. In light of the above, the Commission finds that Bell Media has not violated sections 5(e), 5(f) and 12 of the Wholesale Code or its competitive safeguard condition of licence.

Undue preference

58. When the Commission examines a complaint alleging an undue preference or an undue disadvantage, it must first determine whether there is a preference or disadvantage. The preference or disadvantage is generally defined as a dissimilar treatment of comparable entities.

59. If the Commission finds that a preference has been given or that a person has been subjected to a disadvantage, it must then determine whether that preference or disadvantage is undue. Specifically, 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 set out in the Act.

60. The Commission considers that Bell Media should not be obliged to provide services and functionalities that were not already provided prior to the dispute and the expiry of the agreements. Bell Media is within its rights to refuse to provide the services and functionalities in question in the absence of a contract covering those services and functionalities. CCSA members have not been prevented from concluding alternate carriage agreements for new services or functionalities.

61. The Commission notes as well that Bell has not refused to provide the services in question. It indicated that it was prepared to do so but stated that it did not believe it should be required to do so on rates that are no longer in force and that members had never relied on. Bell Media added that members should instead pay for these services on the basis of the rates Bell Media has proposed and deemed commercially reasonable. The Commission notes that paying the rates proposed by Bell Media on an interim basis while the parties are in negotiations would be one way to obtain access to the additional services and functionalities while negotiations are ongoing. The parties also have the option to retroactively adjust the rates to reflect the outcome of those negotiations.

62. In addition, nothing in the Commission's regulatory framework prevents Bell Media from requiring parties to complete the technical survey process before authorizing the distribution of new elements. The Commission recognizes that this step is an important part of ensuring the integrity of the system and protecting the rights of programmers. Although CCSA members had issues with the technical surveys, as noted above, there was insufficient

evidence to demonstrate that Bell Media's technical surveys were problematic. In addition, the Commission considers that Bell Media treats all BDUs the same in regard to its technical survey process. The time needed to complete the process can vary depending on the circumstances of each BDU.

63. In light of all the above, the Commission finds that Bell Media is not conferring a preference on its affiliated BDUs or subjecting CCSA members to a disadvantage.

64. In light of its decision, the Commission does not need to apply the test to determine if a preference or disadvantage is undue.

65. Finally, the Commission considers that the matters raised in this application would have been more appropriately dealt with in the context of the parties' ongoing negotiations, where the parties could have resolved the dispute bilaterally or with the help of staff-assisted mediation. While parties can call on the Commission to facilitate the resolution of complaints, the Commission generally expects parties to make reasonable efforts to resolve their disputes before bringing such matters to the Commission for disposition.

Secretary General

Related documents

- *Bell Media Inc. – Licence renewals for English-language television stations and services*, Broadcasting Decision CRTC 2017-149, 15 May 2017

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

- *Let's Talk TV*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015

- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011