



## Broadcasting Decision CRTC 2004-188

Ottawa, 20 May 2004

### **Complaint by CTV Television Inc. alleging that Rogers Cable Communications Inc. contravened section 9 of the *Broadcasting Distribution Regulations***

*The Commission does not find that Rogers Cable Communications Inc. has contravened section 9 of the Broadcasting Distribution Regulations, which stipulates that no licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage. The Commission therefore dismisses the complaint by CTV Television Inc.*

#### **The parties**

1. CTV Television Inc. (CTV) is a wholly owned subsidiary of Bell Globemedia Inc. and is the licensee of the specialty service CTV Newsnet (Newsnet). Rogers Cable Communications Inc. is a wholly owned subsidiary of Rogers Cable Inc., and is the licensee of some 90 cable broadcasting distribution undertakings (BDUs) serving approximately 2.3 million customers in Ontario, New Brunswick, Newfoundland and Labrador, and Quebec. The present complaint was filed on 18 August 2003 against Rogers Cable Inc., which at the time was the licensee of most of these BDUs. As a result of an intra-corporate reorganization approved by the Commission, the licences of all of these BDUs came to be held by Rogers Cable Communications Inc. (see *Intra-corporate reorganization*, Broadcasting Decision CRTC 2003-598, 15 December 2003). Rogers Cable Inc. and Rogers Cable Communications Inc. are hereinafter referred to as Rogers.

#### **The complaint**

2. CTV's complaint concerned Rogers' plan to move Newsnet from its position on channel 17 of the cable dial to a higher position (channel 62) on several BDUs in the Toronto area, effective 9 September 2003. CTV alleged that this change would subject Newsnet to an undue disadvantage, contrary to section 9 of the *Broadcasting Distribution Regulations* (the Regulations). CTV further submitted that, by electing to move Newsnet, rather than a service owned by or affiliated with Rogers, such as Sportsnet, The Shopping Channel, Rogers Community Television and Rogers' barker channel, Rogers would also be conferring an undue preference upon itself and its affiliates.
3. In the following sections of this decision, the Commission examines the issue of channel placement, and the circumstances of Newsnet's relocation on the cable dial of several Toronto area BDUs owned by Rogers, in light of the requirements of section 9 of the Regulations.

## **CTV's position**

4. CTV alleged that Rogers, by moving Newsnet from channel 17 to channel 62 on its cable systems in the Toronto area, would undermine the achievement of the objectives set out in sections 3(1)(d)(i) and (ii), of the *Broadcasting Act* (the Act) by making Newsnet less accessible to subscribers of those systems.
5. These sections of the Act state that the Canadian broadcasting system should:
  - (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
  - (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view.
6. CTV stated that Toronto is the key advertising market in Canada. It claimed that Rogers' placement of Newsnet on channel 62 would therefore have a negative financial impact on Newsnet, by reducing viewing of Newsnet on key Toronto-area cable systems and thus reducing advertising revenues for the service.
7. According to CTV, services either owned by or affiliated with Rogers would be largely unaffected by the proposed channel realignment. It noted that, following the channel realignment planned by Rogers, the services of Sportsnet, The Shopping Channel, Rogers Community Television, Rogers' barker channel, and Rogers' OMNI.1 and OMNI.2 would all occupy relatively low channels on the basic service of the Toronto area BDUs. In contrast, the only service owned by or affiliated with CTV that would remain on a low channel of the basic service would be that of CFTO-TV Toronto, as expressly required by the Regulations. The complainant argued that this outcome, together with Rogers' proposal to move Newsnet to channel 62, was evidence of Rogers giving its own services preferential channel carriage, to CTV's detriment.
8. In CTV's view, it would have been consistent with the objectives of the Act for Rogers to move an exempt service such as The Shopping Channel to a higher channel, rather than a fully-licensed service such as Newsnet. CTV added that Newsnet is prepared to continue to accept a low impaired channel such as channel 17, and that rather than replace Newsnet with a U.S. service on channel 17, the U.S. service should instead be moved up the dial.
9. Subsequently, by letters to the Commission dated 12 December 2003 and 13 January 2004, CTV submitted information on the damages it claimed had been caused to Newsnet following the placement by Rogers of Newsnet on channel 62 in September 2003. CTV alleged that this action by Rogers has had three major consequences that have significantly affected Newsnet's competitive viability:

- Viewership in Newsnet's target sales demographic, the 25-54 age group, has dropped by 55% in Metro Toronto;
- Newsnet's 2+ audience in Metro Toronto, according to Rogers' own evidence, has declined by 47%; and
- on an annualized basis going forward, this decline translates into an estimated loss in advertising revenues of 11.8%, or almost \$700,000 per year.

### **Rogers' position**

10. In a letter dated 3 September 2003, Rogers responded to CTV's initial complaint. Rogers submitted that channel placement issues, such as that raised by CTV in its complaint, are commercial matters that the Commission has consistently found to be best resolved without regulatory intervention. Rogers also stated that the complaint was unfounded. It added that it had provided adequate advance notification to customers of the change in Newsnet's channel position, and believed that, as a consequence, the change would have little or no impact on the size of Newsnet's viewership.
11. Rogers noted the large number of television services licensed to serve the Greater Toronto Area, whose signals, in accordance with the Regulations, must be distributed by BDUs on a priority basis, beginning with the basic band. It underscored the increasing demands on its channel capacity and its reduced options as to channel realignment, resulting from the launch of CJMT-TV (OMNI.2) in September 2002, and the then-pending launch of CKXT-TV (Toronto One). According to Rogers, faced with limited channel capacity below the first tier and limited options, it made the decision to move Newsnet to a channel above the discretionary service tiers of its Toronto area BDUs in order to accommodate the signal of CKXT-TV, as expressly required by the Regulations.
12. Rogers stated that, in a letter to CTV on 5 August 2003, it had offered to work with Newsnet to inform subscribers of the new channel location for the service. It added that it had used various methods to notify subscribers about Newsnet's change in channel location, both before and after 9 September 2003. These methods included print ads and television spots aired on a number of services. According to Rogers, it believed that these efforts, together with any additional efforts that might be taken by CTV, would be effective in ensuring that Newsnet's viewership would be unaffected by the channel change, and the service would not be disadvantaged as a result.
13. Rogers, in its further response letter of 23 December 2003, also argued that Newsnet overstated the impact of the channel realignment. In Rogers' view, the size of Newsnet's audience, while smaller than in the previous two years, was not far off the audience figures achieved at the same point in the 2000-2001 season.

14. Rogers noted that there were extraordinary international events occurring in 2001-2002 that may well have led to a temporary increase in the perceived attractiveness of news services. Rogers argued that Newsnet's analysis had included only a few months of data in 2003, and that it would thus be premature to draw any final conclusions about Newsnet's audience among subscribers of Rogers' BDUs in the Toronto area.

### **The Commission's analysis and determinations**

15. The Commission's general position on disputes involving channel placement and realignment can be found in *Access Rules for Broadcasting Distribution Undertakings*, Public Notice CRTC 1996-60, 26 April 1996 (Public Notice 1996-60). In that notice, the Commission concluded that channel placement issues should properly be the subject of negotiation between the parties concerned and that, generally, it would not be prepared to apply its dispute resolution powers in matters that were essentially commercial in nature. Accordingly, provided a Class 1 or Class 2 licensee complies with section 17(2) of the Regulations concerning mandatory channel placement and with the 60-day written notice requirement set out in section 26 of the Regulations, the licensee would generally be permitted to make all reasonable channel realignments it deemed appropriate.
16. A licensee's actions can, however, become subject to review by the Commission where, for example, there is an allegation of undue preference and/or undue disadvantage contrary to section 9 of the Regulations. This possibility of review is heightened in cases such as the present one, where a distributor has an ownership interest in certain programming services and is alleged to be giving preferences to those services over others in which it does not have an ownership interest.
17. In *Ownership of analog discretionary services by cable undertakings*, Public Notice CRTC 2001-66, 7 June 2001, the Commission announced its decision to allow cable companies and their affiliates to purchase interests, including controlling interests, in Canadian analog pay and specialty programming services. Shortly thereafter, in *Ownership of analog discretionary services by cable undertakings – amendment to the Commission's policy*, Public Notice CRTC 2001-66-1, 24 August 2001 (Public Notice 2001-66-1), the Commission expressed the view that the sections of the Regulations setting out the access rules and dealing with undue preference or disadvantage, coupled with the Regulations' dispute resolution mechanisms, provided sufficient and effective tools to respond to such concerns as may from time to time arise with respect to the cable distribution of analog discretionary programming services.
18. In Public Notice 2001-66-1, the Commission decided that the following principles would apply in implementing the change in its policy:
  - All specialty and pay services should be supplied and distributed on fair and equitable terms, including terms related to pricing, packaging, promotion and marketing/promotional costs.

- Unaffiliated undertakings should be accorded terms and conditions that are no less favourable than those accorded to affiliated undertakings, including terms related to pricing, packaging, promotion and marketing/promotional costs.

19. Section 9 of the Regulations reads as follows:

No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

20. In analysing a complaint under section 9, the Commission seeks to determine, first, whether a party has given a preference to any person, or subjected any person to a disadvantage. Second, the Commission considers whether any such preference or disadvantage is undue. In examining this second issue, the Commission considers whether a preference or a disadvantage has had, or is likely to have, a material adverse impact upon the complainant or any other person. It also examines 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.

#### **Preference or disadvantage**

21. The Commission notes that, rather than relocating Newsnet from channel 17 to 62 on several of its Toronto area BDUs, Rogers had the alternative of moving any one of a number of services, including some that it owns or with which it is affiliated. As a result of the realignment, the following Rogers-owned or affiliated services are distributed as part of the basic service, and occupy the analog cable channels as indicated, on Rogers' Toronto-area BDUs: Rogers Sportsnet (channel 22), The Shopping Channel (channel 19), Rogers Community Television (channel 10) and the TV Guide Channel (channel 5). None of these services are priority services under the Regulations. Only one of the channels used for the distribution of these non-priority services, channel 5, appears to be impaired. The Commission also notes that Newsnet indicated it was willing to continue to accept distribution on what it characterized as a "low impaired" channel 17.
22. CTV estimated that Rogers' channel realignment would result in a loss in advertising revenues to Newsnet of almost \$700,000 per year. Based on the 2003 broadcast year, for which Newsnet reported advertising revenues of \$5.9 million and total revenues of \$13.2 million, this would translate into a loss for Newsnet of 11.8% of advertising revenues and 5.3% of total revenues.<sup>1</sup>
23. As to the validity of the Newsnet impact estimate, the Commission notes that many factors may influence the audience numbers and the advertising revenues realized in a given period. For example, as was argued by Rogers, there were extraordinary international events occurring in 2001-2002 that may well have led to a temporary increase in the perceived attractiveness of news services. This leads to uncertainty in determining what portion of the decline in audience noted by Newsnet might have been

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<sup>1</sup> These figures do not take into account the recent maximum wholesale rate increase awarded to Newsnet in *CTV Newsnet – Licence renewal*, Broadcasting Decision CRTC 2004-8, 21 January 2004.

directly attributable to the channel relocation. Moreover, the Commission is unable to conclude with any certainty that the declines cited by Newsnet are likely to continue in the future.

24. At the same time, the Commission considers that at least a portion of the substantial drop in Newsnet's viewership can be attributed to the channel relocation, and that this decrease in viewership will result in a negative financial impact on Newsnet.
25. Accordingly, the Commission considers that Rogers' action subjected Newsnet to a disadvantage.
26. Furthermore, as all of Rogers-owned or -affiliated services were unaffected by the realignment, the Commission considers that Rogers' action also conferred a preference on Rogers itself, as well as on its affiliates.

#### **Undue preference or disadvantage**

27. Notwithstanding the above determinations, the Commission is unable to conclude that either the disadvantage or the preference is undue. As regards materiality, the Commission is unable to determine that the reduction in total Newsnet revenues attributable to the channel relocation has had or will have a material adverse impact on Newsnet. This is due to the difficulty of ascertaining both the precise magnitude of that reduction, as noted above, as well as its duration.
28. As regards the objectives of the Act, CTV had argued that moving Newsnet from channel 17 to channel 62 on cable systems in the Toronto area would undermine the achievement of the objectives set out in sections 3(1)(d)(i) and (ii) of the Act by making Newsnet less accessible to subscribers of those systems. The Commission notes, however, that the new channel remains part of the basic service, and is confident that subscribers who wish to access Newsnet are able to find the service at its new channel location without difficulty.

#### **Conclusion**

29. In light of the above, the Commission does not find that the preference conferred by Rogers upon itself and its affiliates, or the disadvantage to which Rogers subjected Newsnet, are undue.

#### **Rogers' request for confidentiality**

30. In its 3 September 2003 letter responding to CTV's complaint, Rogers submitted that it was filing in confidence with the Commission the information contained in paragraph 37 of that letter. Rogers noted that the information concerned the percentage year over year increases in advertising revenues of Canadian specialty services and television stations,

as had been presented in the June 2003 Television Bureau of Canada (TVB) Combined Network/Spot Time Sales Report – Broadcast year 2002-2003. The report is provided on a confidential basis for the use of the licensees of those specialty services and television stations that provide data on a monthly basis to TVB. It is not intended for publication.

31. CTV did not object to Rogers' request for confidentiality in its reply.
32. It is customary for the Commission to grant such requests for confidentiality in the context of dispute resolution. Included in the material is commercially sensitive information related to advertising revenues. The Commission considers that the harm that could result from disclosure of the terms of such commercially sensitive information outweighs the public interest in disclosure. The Commission therefore grants Rogers' request for confidential treatment of the information in question.

Secretary General

*This decision is to be appended to each licence. It is available in alternative format upon request and may also be examined at the following Internet site: <http://www.crtc.gc.ca>*