



Telecom Decision CRTC 2005-34

Ottawa, 10 June 2005

Request by MTS Allstream Inc. for interim relief with respect to access to end-users in a multi-dwelling unit

Reference: 8622-M59-200506561

*In this Decision, the Commission **approves** MTS Allstream Inc.'s (MTS Allstream) request for interim relief, pending the Commission's final determination, with respect to preventing Bank Street Investments Inc. from taking any measures that could impede MTS Allstream's access to, or delivery of telecommunications services to, its end-users in a multi-dwelling unit located at 360 Laurier Avenue West, in the City of Ottawa.*

The application

1. The Commission received an application, dated 3 June 2005, from MTS Allstream Inc. (MTS Allstream) filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, requesting that the Commission issue an order requiring Bank Street Investments Inc. (Bank Street Investments) and Bell Canada to comply with the multi-dwelling unit (MDU) access condition and/or other Commission rulings outlined in *Provision of telecommunications services to customers in multi-dwelling units*, Telecom Decision CRTC 2003-45, 30 June 2003 (Decision 2003-45).
2. MTS Allstream requested, among other things, that the Commission issue an interim order, and, if appropriate, a final order, granting MTS Allstream access to end-users in an MDU located at 360 Laurier Avenue West, in the City of Ottawa (the Building) and permission to operate, use, repair and maintain its telecommunications facilities (the Equipment) located in 100 square feet of storage space in the second level of the basement of the Building (the Premises) for that purpose. Bell Canada is a Canadian carrier offering telecommunications services in the Building.
3. In furtherance of the above and in light of the urgent nature of the circumstances, MTS Allstream requested that the Commission issue an interim order preventing Bank Street Investments from:
 - refusing access or taking any measures to prevent MTS Allstream, its employees and agents, from having access to the Building and the Premises;
 - removing the Equipment; and
 - taking any measures that could impede MTS Allstream's access to, or delivery of telecommunications services to, its end-users in the Building.

Process

4. On 3 June 2005, MTS Allstream advised the Commission that the Superior Court of Justice had issued an injunction (the Superior Court Order), dated 3 June 2005 and expiring 13 June 2005, preventing Bank Street Investments from refusing MTS Allstream access to the Building, removing the Equipment or taking any measures that could impede MTS Allstream's delivery of telecommunications service to end-users located in the Building.
5. Bank Street Investments and Bell Canada each filed comments, responding to MTS Allstream's request for interim relief, on 7 June 2005.
6. MTS Allstream filed reply comments on 8 June 2005.

Test for interim relief

7. Before granting a party interim relief, the Commission requires the party requesting the relief to demonstrate that its application meets the criteria for interim relief set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, as modified by the Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 (the RJR-MacDonald criteria). These criteria are that:
 - there is a serious issue to be determined;
 - the party seeking relief will suffer irreparable harm if the interim relief is not granted; and
 - the balance of convenience, taking into account the public interest, favours retaining the status quo until the Commission has disposed of the issues.

Positions of parties

8. MTS Allstream submitted that it had raised a serious issue to be tried, since it involved compliance with the MDU access condition, established by the Commission in Decision 2003-45, and the company's ability to gain access to end-users in the Building under reasonable terms and conditions. MTS Allstream submitted that it was clear that the MDU access condition was not being met and that the rent being demanded by Bank Street Investments greatly exceeded the fees that could have been charged for an alternative use of that space.
9. MTS Allstream submitted that it would suffer irreparable harm if the Commission did not grant the requested interim relief. MTS Allstream noted that Bank Street Investments had indicated on three occasions that it would be "removing and decommissioning" the Equipment, would "immediately retake possession of the Premises" and would "take other actions." MTS Allstream further noted that it was locked out of the Premises by Bank Street Investments on 3 May 2005.

10. In MTS Allstream's view, it required immediate access to operate, maintain, repair and use the Equipment. According to MTS Allstream, if the interim order was not granted, there would be a disruption to MTS Allstream's service to end-users in the Building, which would result in a breach of its contractual obligations with its existing customers. MTS Allstream argued that its investment in building a customer base in the Building would be foregone and it would suffer harm to its goodwill in the Ottawa telecommunications market, including the critical market for Government of Canada business. MTS Allstream submitted that this harm could not be compensated for and would irretrievably damage MTS Allstream's reputation in the Ottawa market, if not also beyond.
11. With respect to the balance of convenience, MTS Allstream submitted that if the interim relief was not granted, it would suffer financial and other losses and would be unable to provide telecommunications services to its end-users in the Building, causing it to breach contractual business arrangements with its customers and threatening the safety of employees of these customers. Further, MTS Allstream submitted that it was in the public interest to grant the interim relief, noting that the Commission had repeatedly identified the issue of access to MDUs as a remaining barrier to entry into the local telecommunications market.
12. MTS Allstream submitted that Bank Street Investments, by contrast, would not suffer any loss if the interim relief was granted.
13. Bank Street Investments submitted that it would comply with the terms of the Superior Court Order, and that in light of this Superior Court Order, it did not dispute the interim relief sought by MTS Allstream. Bank Street Investments expressly stipulated that its acquiescence would expire simultaneously with the Superior Court Order.
14. Bank Street Investments requested that the Commission set a deadline of 13 June 2005 for its comments on the final relief sought by MTS Allstream, noting that this deadline would make the interim relief unnecessary. If the Commission set a deadline beyond 13 June 2005, Bank Street Investments requested that it be informed of the deadline in order to consider the position to assume following the expiration of the Superior Court Order and to be allowed an opportunity to make comments to the Commission.
15. Bell Canada did not object to the Commission granting the interim relief to allow MTS Allstream access to end-users in the Building, and submitted that it did not have an access agreement with Bank Street Investments for the Building.
16. In reply comments, MTS Allstream submitted that Bank Street Investments had not put forward any submissions or evidence to suggest that MTS Allstream had not met the test for an interim order, established in *RJR-MacDonald* and adopted by the Commission, or to otherwise contest the interim order sought.
17. MTS Allstream submitted that Bank Street Investments was incorrect in its submission that granting the interim relief was unnecessary. MTS Allstream submitted that, if the Commission did not rule on the request for interim relief before the expiration of the Superior Court Order, then after that date MTS Allstream and its end-users in the Building would have no legal protection from the extreme actions threatened by Bank Street Investments to remove and decommission the Equipment and thereby terminate service to end-users.

18. MTS Allstream submitted, in response to Bell Canada's statement that it did not have an access agreement with Bank Street Investments for the Building, that this reinforced its point that the MDU access condition was not being observed.

Commission's analysis and determinations

19. In regard to MTS Allstream's request for interim relief, the Commission considers that the company has demonstrated that there is a serious issue to be determined with respect to compliance with the MDU access condition and its ability to gain access to end-users in the Building under reasonable terms and conditions.
20. The Commission also considers that MTS Allstream has demonstrated that it will suffer irreparable harm if the interim relief is not granted. Based on Bank Street Investments' statement that its acquiescence to the interim relief would expire simultaneously with the Superior Court Order, the Commission considers that MTS Allstream's access to the Building may be restricted, and the Equipment may be removed, once the Superior Court Order expires. The Commission agrees that MTS Allstream's inability to gain access to the Building and the Premises limits its ability to repair and operate the Equipment. The Commission also agrees that the removal of the Equipment would disrupt service to MTS Allstream's end-users in the Building. This would cause MTS Allstream to be in breach of contractual obligations, with consequences for its revenues and its ability to negotiate future contracts, as well as harm to its reputation in the Ottawa telecommunications market, including the critical market for Government of Canada business. The Commission considers that this harm cannot be compensated for.
21. With respect to the balance of convenience, the Commission considers that MTS Allstream would suffer greater harm from the refusal of its interim relief request than Bank Street Investments would suffer if the relief were granted. In addition to the harm that MTS Allstream would suffer with respect to its revenues and reputation, the Commission considers that the public interest lies in ensuring that service be adequately maintained to MTS Allstream's end-users in the Building. The Commission notes that Bank Street Investments did not provide any argument that it would be harmed if the interim relief were granted.
22. Accordingly, the Commission considers that MTS Allstream's application for interim relief meets all three of the RJR-MacDonald criteria.
23. In light of the above, the Commission **approves** MTS Allstream's request for interim relief and directs that, pending the Commission's final determination, Bank Street Investments shall not:
 - refuse access or take any measures to prevent MTS Allstream, its employees and agents, from having access to the Building and the Premises;
 - remove the Equipment; and
 - take any measures that could impede MTS Allstream's access to, or delivery of telecommunications services to, its end-users in the Building.

24. In response to Bank Street Investments' request for clarification regarding the process for the Commission's final determination on MTS Allstream's application, the Commission directs:
- Bell Canada to file its comments on MTS Allstream's application by **15 June 2005**. In light of Bell Canada's statement that there is currently no agreement for its access to the Building, Bell Canada is also directed to describe in its answer the terms and conditions upon which it currently accesses the Building;
 - Bank Street Investments to file its comments on MTS Allstream's application, including any comments on Bell Canada's submission, by **27 June 2005**;
 - MTS Allstream to file its reply comments on both Bell Canada's and Bank Street Investments' comments by **5 July 2005**.
25. Each party is reminded to serve copies of any submissions to all other parties by the dates specified. Parties are also reminded that where a document is to be filed or served by a specific date, the document is to be received, not merely sent, by that date.

Secretary General

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