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

Broadcasting Regulatory Policy CRTC 2013-578

PDF version

Route references: 2011-791 and 2011-791-1

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Standard clauses for non-disclosure agreements

The Commission has put in place standard clauses for non-disclosure and will require undertakings negotiating or engaged in a distribution arrangement to execute non-disclosure agreements that include these clauses. The Commission intends to amend its regulations to this effect.

The Commission considers that standard non-disclosure clauses will provide appropriate safeguards against the misuse of competitively sensitive information, thereby fostering an appropriate environment for the positive negotiation of reasonable terms for the distribution, packaging and retailing of programming services.

Introduction

1. In the regulatory framework on vertical integration (Broadcasting Regulatory Policy 2011-601),[1] the Commission determined that strong measures needed to be in place to prevent the growing potential for inappropriate use of competitively sensitive information by programming undertakings and broadcasting distribution undertakings (BDUs), particularly in the case of vertically-integrated entities. The Commission further determined that a properly framed non-disclosure agreement was the appropriate means to protect against the misuse of confidential information and to minimize the level of intrusion in the business functions of vertically-integrated entities.

2. Accordingly, in Broadcasting Notice of Consultation 2011-791, the Commission sought comments on the wording for a standard form non-disclosure agreement and to whom such agreements should apply. Subsequently, in Broadcasting Notice of Consultation 2011-791-1, the Commission called for comments on a series of proposed standard non-disclosure clauses. The Commission also invited comments on whether the non-disclosure clauses should apply where at least one party is a vertically-integrated entity and whether such clauses should cover all aspects of the relationship between a programming undertaking and a BDU. Finally, the

[1] "Vertical integration" refers to the ownership or control by one entity of both programming services (such as conventional television stations or pay and specialty services) and distribution services (such as cable systems or direct-to-home satellite services). Vertical integration also includes ownership or control by one entity of both programming undertakings and production companies.

Commission indicated that it would determine the method by which these provisions would be implemented.

3. The Commission received a number of interventions in response to Broadcasting Notices of Consultation 2011-791 and 2011-791-1. The public record for this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

4. With the exception of Quebecor Media Inc. (Quebecor) and Shaw Communications Inc. (Shaw), interveners were generally supportive of adopting standard non-disclosure clauses. However, parties expressed varying views on the following:

    - the application of the standard non-disclosure clauses;
    - the definition of confidential information; and
    - the manner in which the clauses should be implemented.

5. Parties also proposed changes to wording or the addition of clauses. These issues and the Commission's decisions are discussed in greater detail below.

Application of standard non-disclosure clauses

Positions of parties

6. Most interveners argued that non-disclosure clauses were equally relevant to vertically-integrated and non vertically-integrated entities and that there was no public policy rationale for an asymmetrical application of those clauses. In addition, these parties argued that having such clauses apply to all undertakings would ensure consistent practices and safeguards across the industry. Bell Canada (Bell) also submitted that an asymmetrical application would be anomalous when viewed in the context of nearly all of the Commission's other regulatory measures relating to the regulatory framework on vertical integration.

7. Rogers Communications Inc. (Rogers) submitted that there was no public policy reason to impose restrictions on the use and disclosure of confidential information if both parties were vertically-integrated entities. Rogers argued that such parties might have a mutual desire to share information with other related entities and that they should be permitted to negotiate their own non-disclosure agreements or dispense with them altogether. Shaw supported Rogers' proposal, while MTS Inc. noted that it was not opposed to it.

8. Further, Bell, Quebecor, Rogers and Shaw proposed that parties be allowed to waive the non-disclosure agreement in whole or in part by mutual agreement. However, some parties, including the Independent Broadcast Group (IBG), took the position that waiving the standard clauses should not be permitted. MTS Inc. also submitted that care must be taken that an independent BDU or programming undertaking cannot

be coerced by a vertically-integrated entity into accepting changes to the standard non-disclosure clauses.

9. Some parties, including Bell and Pelmorex Communications Inc. (Pelmorex), suggested that any non-disclosure clauses adopted by the Commission should apply regardless of whether or not an affiliation agreement had been signed by the parties. No parties opposed this proposal.

Commission's analysis and decisions

10. As noted above, the Commission has determined in a number of regulatory policies that strong measures need to be in place to prevent the growing potential for the inappropriate use of competitively sensitive information, particularly in the case of vertically-integrated entities. As such, the Commission considers that it would require compelling evidence and argument to the effect that it is in the public interest to depart from its preliminary view that non-disclosure agreements should apply where at least one of the parties is a vertically-integrated entity.

11. In this regard, the Commission considers that standard non-disclosure clauses provide appropriate safeguards against the misuse of competitively sensitive information. When incorporated in a formal non-disclosure agreement, these clauses provide parties with the protection they need to conduct negotiations in a commercially reasonable manner. The imposition of non-disclosure clauses fosters the environment required for the positive negotiation of reasonable terms for the distribution, packaging and retailing of programming services. They are therefore of utmost importance to ensuring that the programming provided by the Canadian broadcasting system continues to be varied and comprehensive.[2] They also ensure that distribution undertakings are able to provide efficient delivery of programming at affordable rates.[3]

12. With respect to the issue of waiver, the Commission is not convinced that allowing entities to waive non-disclosure requirements is consistent with the above-noted objectives. In this regard, the Commission considers that an imbalance in negotiating power can occur and the potential for misuse of information exists even amongst vertically-integrated entities. The Commission considers that certain parties, by reason of their significant negotiating power, have the ability to put considerable pressure on the other party to waive the agreement in whole or in part.

13. Moreover, should one party possess more information about the offerings and rates of competitive services, the process by which reasonable terms are negotiated for the distribution, packaging and retailing of programming services by BDUs could be severely distorted, putting at risk the viability and programming contributions made by these programming services and their programming suppliers. Finally, allowing

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[2] See section 3(1)(*i*)(i) of the *Broadcasting Act.*

[3] See section 3(1)(*t*)(ii) of the *Broadcasting Act.*

vertically-integrated entities to share information may give these entities the kind of information they need to devise mutually beneficial agreements, but not agreements that are necessarily commercially reasonable.

14. The Commission therefore proposes to adopt the standard clauses set out in the appendix to this policy in such a way that they apply to all undertakings, including vertically-integrated entities. However, as set out below, parties will have further opportunity to comment on whether an obligation to enter into agreements containing the adopted baseline non-disclosure provisions should be imposed if both parties involved are vertically-integrated.

15. Similarly, the Commission agrees with those parties that submitted that important confidential information could be obtained in the absence of a formal affiliation agreement between parties. The Commission considers that protecting this information may help parties in their negotiations and enhance the process by which reasonable terms are negotiated for the carriage, packaging and retailing of programming services. The Commission therefore confirms its preliminary view in Broadcasting Notice of Consultation 2011-791-1 to the effect that the standard non-disclosure clauses should apply to all stages of the relationship between the parties, including during negotiations and where the provision and distribution of programming services is accomplished without a formal affiliation agreement.

Definition of confidential information

Positions of parties

16. In Broadcasting Notice of Consultation 2011-791-1, the Commission proposed a definition of confidential information that consisted of a list of specific verbal or written information or data and included any other information or data that is provided by a party and designated as confidential by that party. Excluded from the Commission's proposed definition was all information or data that was in the public domain or explicitly excluded by written agreement between the parties.

17. Bell argued that the definition proposed by the Commission was overly broad. Specifically, it submitted that confidential information should be restricted to verbal or written information or other data not in the public domain or that is specifically identified as such that is provided or otherwise disclosed by one party to another party, including information developed or derived by either party, but only where such information was developed or derived through the use of or reliance upon other confidential information. Bell argued that if the BDU independently developed or derived data concerning a programming service without any input from that service, this data should not fall within the definition of confidential information. Bell also proposed that the list of information specified by the Commission in its definition be preceded by the phrase "may include." Shaw expressed support for Bell's position.

18. In response to Bell's proposal, the IBG expressed concern that exclusion of viewership or subscriber data would enable a BDU to develop and mine information of competitive programming services in its capacity as a BDU and share that

information with its own programming services. The IBG added that if appropriate safeguards were not put in place to ensure that such data was only used for the express purpose of facilitating the distribution of programming to the distributor by the programming undertaking, then programming services would be placed at a substantial disadvantage in comparison to BDUs and undertakings affiliated with BDUs. Furthermore, the IBG, with the support of other parties such as the Canadian Broadcasting Corporation (CBC) and Pelmorex, disagreed with Bell's proposal to qualify the proposed list of confidential information, stating that the use of "may include" was too ambiguous and permissive.

19. Finally, Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink), and the IBG proposed that the definition of confidential information be revised to include information exchanged during negotiations and information that would be understood by the parties, exercising reasonable business judgment, to be confidential.

Commission's analysis and decisions

20. The Commission notes that many of the comments received on the type of information that should qualify as confidential were in relation to the inclusion of viewership or subscriber data, such as that obtained through a set-top box. The Commission agrees with the parties that argued that the use of viewership or subscriber data to the advantage of a BDU's own programming services is inappropriate in a competitive business environment as it may negatively impact the process by which reasonable terms are negotiated for the carriage, packaging and retailing of programming services by BDUs. The Commission considers that this potential competitive disadvantage might undermine the achievement of the objectives of the *Broadcasting Act* by lessening the programming diversity provided by smaller or independent programming entities. However, the Commission is concerned that including viewership or subscriber data obtained from set-top boxes or by similar means could have unintended consequences on the broadcasting system and will accordingly seek additional comment on whether this data should be included within the definition of confidential information to be included in the standard non-disclosure clauses.

21. With respect to Bell's proposal that the list of information specified by the Commission be preceded by the phrase "may include," the Commission considers that such a change could lead to ambiguities in the application of the standard non-disclosure clauses and has accordingly declined to proceed with this change.

22. With respect to the suggestion that the definition of confidential information be made to include information that would be understood by the parties, exercising reasonable business judgment, to be confidential, the Commission considers that this proposal would create uncertainty with respect to what information would qualify as confidential. In light of this and given that the Commission's proposed definition allows parties to specifically designate information as confidential, the Commission has not retained this proposal.

23. In light of the above and subject to the additional comments that the Commission may receive on the appropriateness of including viewership or subscriber data in the definition of confidential information, the Commission has maintained its proposed definition of confidential information.

Changes to wording or addition of clauses

24. In the revised clauses for non-disclosure agreements set out in the appendix to this policy, the Commission has also taken into consideration the suggestions made by parties for changes to the wording of certain clauses, as follows:

- the Commission has revised clause 2.1.2 under "Permitted Purposes" to clarify that this clause relates to facilitating the distribution of programming provided to the BDU by the programming service;

- the Commission has similarly deleted the phrase "as appropriate" from the proposed clause 2.2.2 to make it more precise;

- the Commission has revised clause 2.2.4 such that the persons listed in clause 2.2.3 (i.e. parent company, directors, officers, auditors and legal advisors) are required to sign a confidentiality agreement with the party disclosing confidential information pursuant to clause 2.2.3;

- the Commission has revised clause 3.2 requiring the return or destruction of confidential information such that that confidential information must be returned or destroyed "upon request"; and

- the Commission has adopted a definition of "person" (clause 1.3) and as a result has proceeded with related changes to clause 2.2.1 to ensure that proper safeguards are in place to address the sharing of confidential information within an organization.

25. Parties also suggested the following new clauses :

- Bell proposed a clause that would prevent parties from using confidential information in regulatory or judicial proceedings, including final offer arbitration and undue preference proceedings before the Commission;

- certain parties proposed the addition of clauses dealing with the availability of remedies in case of a breach of confidentiality obligations and dispute resolution procedures;

- several parties argued that a survival clause should be included to provide that the restrictions on disclosure continue to apply indefinitely;

- several parties suggested that if disclosure is required by law, as contemplated by clause 2.2.5(a), the disclosing party should be required to notify the other party; and

- Eastlink and Rogers further proposed that if disclosure is required by law, the disclosing party should be required to take steps to limit disclosure and maintain confidential treatment of the information by the relevant judicial or administrative body.

26. With respect to the first proposal by Bell, the Commission is of the view that it would not be appropriate for it to impose measures pertaining to the admissibility of evidence before the civil courts or administrative tribunals. In this regard, the Commission notes that there are a number of established principles of law and equity that find application where information obtained in confidence is sought to be put in evidence.

27. As regards the suggestion that a "remedies" clause be included, the Commission notes that that the remedy to be applied in any given circumstance is determined by the relevant court in accordance with the laws of general application. The Commission also considers the inclusion of a dispute resolution clause unnecessary given that dispute resolution mechanisms already exist within the Commission's own regulations.

28. With respect to the inclusion of a survival clause, the Commission notes that the current clauses do not contain any expiry date and that consequently the rights and obligations flowing from these clauses are meant to operate in perpetuity. Accordingly, the Commission deems the addition of a survival clause unnecessary.

29. Finally, the Commission sees merit to a notice requirement and considers that its inclusion would not represent an undue burden on the parties. Accordingly, the Commission has added the following notice requirement in a new clause:

    2.3.3 A party that is required by law to disclose Confidential Information shall, unless it is prohibited from doing so by a court or other lawful authority, promptly give written notice to the party to whom the confidential information relates or to its designated representative.

30. The Commission reminds parties that the non-disclosure clauses adopted by the Commission are meant to provide baseline provisions. As such, these provisions may be supplemented with additional provisions and details upon agreement.

Implementation

31. Certain parties, such as Allarco Entertainment 2008 Inc., Bell and TELUS Communications Company, were of the view that the non-disclosure requirements should be implemented by way of regulations. The CBC initially proposed that they be part of the *Code of conduct for commercial arrangements and interactions* (the Code) attached to the regulatory framework on vertical integration and then revised

its position in favor of adopting a regulation. Finally, the IBG submitted that the clauses should be either implemented through regulations or included in the Code.

32. The Commission considers it appropriate to adopt regulations requiring undertakings negotiating or engaged in a carriage relationship to execute non-disclosure agreements containing the standard clauses set out in the appendix to this policy. The Commission considers that proceeding in this manner constitutes the most efficient means of ensuring that undertakings are bound by the standard clauses.

33. However, as previously indicated, the Commission considers it appropriate to request further comment on the two following issues:

    - whether viewership or subscriber data obtained from set-top boxes or by similar means should be included within the definition of confidential information to be included in the baseline non-disclosure provisions; and

    - whether the obligation to enter into agreements containing the adopted baseline non-disclosure provisions should be mandated where both parties involved are vertically-integrated.

34. Accordingly, the Commission will shortly be issuing a notice of consultation calling for comments on proposed amendments to certain of its regulations to implement the determinations announced in this policy. In that notice, the Commission will also call for additional comment on the above-identified policy issues.

35. With respect to exempt digital media broadcasting undertakings, the Commission notes that it does not intend to amend the exemption order for such undertakings at this time. However, the Commission expects such undertakings to enter into agreements with other broadcasting undertakings that include clauses comparable to those adopted as a result of the present proceeding.

Secretary General

Related documents

- *Call for comments on proposed standard clauses for non-disclosure agreements and provisions for the conduct of audits,* Broadcasting Notice of Consultation CRTC 2011-791-1, 10 August 2012

- *Call for comments on audit provisions for broadcasting distribution undertakings and on a standard form non-disclosure agreement*, Broadcasting Notice of Consultation CRTC 2011-791, 19 December 2011

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

Appendix to Broadcasting Regulatory Policy CRTC 2013-578

Standard clauses for non-disclosure agreements

1. DEFINITIONS

1.1 Confidential Information

"Confidential Information" means all of the following verbal or written information or data that is not in the public domain or specifically excluded by written agreement between the parties:

a) the terms and conditions of any contract between the parties;

b) the number of subscribers to or penetration achieved by any programming service, package or tier of services;

c) viewership or subscriber data, including such data obtained through a set-top box or by similar means;

d) technological information and planned technological developments regarding a programming service or distribution undertaking;

e) marketing and programming information;

f) proposed new programming services or changes to existing programming services; and

g) any other data or verbal or written information that is provided by a party and designated as confidential by that party.

1.2 Public Domain

"Public Domain" means all information and data that is generally known to the public.

1.3 Person

"Person" includes any individual, corporation, partnership, firm, joint venture, syndicate, association and trust.

2. USE, DISCLOSURE AND PROTECTION OF CONFIDENTIAL INFORMATION

2.1 Permitted Purposes

To enable the parties to enter into contractual or other arrangements regarding the provision and distribution of programming services and as a result of such contractual or other arrangements, Confidential Information will be disclosed and/or developed by one or both parties. In order to protect the parties against disclosure or misuse of Confidential

Information it is understood and agreed that the party in possession of Confidential Information pertaining to the other party shall exclusively make use of that Confidential Information subject to the following:

2.1.1 – If the party is contracting in the capacity of a Canadian programming undertaking or network, solely for the purpose of facilitating the provision of its programming to the distributing party, whether as a broadcasting distribution undertaking or video-on-demand undertaking; and

2.1.2 – If the party is contracting as a Canadian broadcasting distribution undertaking or video-on-demand undertaking, solely for the purpose of facilitating its distribution of programming provided to it by the programming undertaking for distribution on its undertaking.

2.2 Restrictions on Disclosure

2.2.1 Subject to 2.2.3 and 2.2.5, the parties will not disclose Confidential Information to any persons outside those necessarily involved for the permitted purposes set out in 2.1. Where disclosure occurs within a party's business entity, such disclosure will, subject to 2.2.3, be restricted to those individuals necessarily involved for the permitted purposes set out in 2.1.

2.2.2 A party that discloses Confidential Information relating to another party to any person who is not bound by the terms of this agreement – such as outside advisors – shall ensure that such person does not disclose or use the Confidential Information otherwise than in furtherance of the permitted purposes set out in 2.1.

2.2.3 A party that discloses Confidential Information to persons outside those necessarily involved for the permitted purposes set out in 2.1 shall do so strictly for the purposes of normal reporting and review to its parent company, directors, officers, auditors and legal advisors.

2.2.4 Any person to whom Confidential Information will be provided for the purposes contemplated in 2.2.3, other than an outside advisor, and who is not otherwise subject to confidentiality obligations owed to the party to whom the Confidential Information relates, must sign a confidentiality agreement with the party that discloses pursuant to 2.2.3 in order to receive Confidential Information for those limited purposes.

2.2.5 A party shall not be liable for disclosure or use of Confidential Information where:

a) such disclosure or use is required by law;

b) it has obtained express written approval for the disclosure or use from the other contracting party or parties; or

c) the Confidential Information is lawfully obtained from a third party or parties without a breach of this agreement.

2.3 Protection of Confidential Information

2.3.1 Subject to 2.2, the parties shall hold all Confidential Information in strict confidence and protect this Confidential Information with the same degree of care as that with which they protect their own confidential information, which must not be less than a reasonable degree of care.

2.3.2 A party that discloses Confidential Information in accordance with 2.2.1 or 2.2.3 to any persons who are not bound by the terms of this agreement shall be responsible for any unauthorized disclosure or use of the Confidential Information by such persons.

2.3.3 A party that is required by law to disclose Confidential Information shall, unless it is prohibited from doing so by a court or other lawful authority, promptly give written notice to the party to whom the confidential information relates or to its designated representative.

3. REPORTING AND DISPOSAL OF CONFIDENTIAL INFORMATION

3.1 A party shall promptly report to the other party any unauthorized disclosure or other occurrence which would reasonably be understood to compromise the continued confidential treatment of Confidential Information pertaining to the other party.

3.2 A party shall take all reasonable steps to return or destroy the Confidential Information upon request.

4. NON-WAIVER

Any failure by either party to enforce the other's strict performance of any provision of this Agreement will not constitute a waiver of its right to subsequently enforce such provision or any other provision of this Agreement. Similarly, no failure or delay in the performance of any obligation hereunder shall absolve the parties from the continued requirement to abide by all obligations resulting from this Agreement.