



## Broadcasting Decision CRTC 2020-191

PDF version

Reference: 2018-80

Ottawa, 15 June 2020

**VMedia Inc.**  
Across Canada

*Public record for this application: 2018-0077-2*

### **Reconsideration of the decision relating to the addition of QVC to the *List of non-Canadian programming services and stations authorized for distribution***

*The Commission **confirms** with additional reasons Broadcasting Decision 2016-122, in which it denied the application to add QVC to the List of non-Canadian programming services and stations authorized for distribution (the list). However, in light of the Direction to the Canadian Radio-television and Telecommunications Commission Respecting the Implementation of the Canada–United States–Mexico Agreement issued by the Governor in Council, the Commission nonetheless adds QVC to the list.*

#### **Introduction**

1. On 29 September 2015, VMedia Inc. (VMedia) filed an application to add the U.S.-based cable television shopping channel QVC to the *List of non-Canadian programming services and stations authorized for distribution* (the list).
2. The Commission's general policy is to authorize the distribution of non-Canadian English- and French-language services that do not compete in whole or in part with Canadian discretionary services. The objective of this policy is to provide a measure of support to Canadian services so that they can fulfill their commitments and obligations.
3. Section 32 of the *Broadcasting Act* (the Act) makes it an offence for any person to carry on a broadcasting undertaking in Canada without a licence or without being exempt from the requirement to hold a licence. Section 4 of the Act further specifies that the Act applies to broadcasting undertakings carried on in whole or in part within Canada.

4. In Broadcasting Decision 2016-122, based on the record of that proceeding, the Commission found it appropriate to examine whether QVC would be carrying on business in whole or in part in Canada based on certain factors set out in the decision. The Commission determined that because the sale of products is an integral component of QVC's teleshopping service and because its activities in Canada would involve the promotion, sale and distribution of products to Canadians on a continuous basis, it would be carrying on a broadcasting undertaking at least in part in Canada. As a result, the Commission found that the lawful distribution of QVC in Canada required the issuance of a broadcasting licence or authorization pursuant to an exemption order.
5. The Commission's decision noted that while there are programming services on the list that sell products to Canadians, unlike QVC, these are not dedicated to teleshopping services funded primarily by retail sales to viewers. Accordingly, the Commission denied the application by VMedia to add QVC to the list.
6. VMedia applied for and was granted leave to appeal the Commission's decision to the Federal Court of Appeal (FCA). In a 15 September 2017 decision, the FCA referred the matter back to the Commission for reconsideration.<sup>1</sup> More specifically, the FCA determined that the Commission's decision failed to provide sufficient reasons and analysis to support (a) a requirement, contrary to its general policy, for VMedia to demonstrate that QVC would not be carrying on a broadcasting undertaking in Canada and (b) how the retail sale of products to Canadians would result in QVC's carrying on a programming undertaking within Canada since the definition of "programming undertaking" in the Act is restricted to the "transmission of programs."
7. In a letter dated 28 December 2017, VMedia stated that it wished to proceed with the application to add QVC to the list. VMedia also provided a legal opinion of the same date in support of its application from Dentons Canada LLP (Dentons).

## **Issues**

8. In Broadcasting Notice of Consultation 2018-80, the Commission called for comments on VMedia's request to add QVC to the list, as well as on the following issues:
  - whether, if added to the list, QVC would be carrying on a broadcasting undertaking in part in Canada; and
  - in light of the nature of teleshopping services, whether (and if so, how) the Commission should apply the competitiveness test or otherwise assess a request to add a non-Canadian teleshopping service to the list.

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<sup>1</sup> See 2017 FCA 186.

9. The Commission received interventions supporting VMedia's application. The Commission also received opposing interventions from two individuals that were outside the scope of this proceeding, as well as an opposing intervention from Rogers Media Inc. (Rogers),<sup>2</sup> licensee of the exempt Canadian teleshopping service The Shopping Channel (TSC), to which the applicant replied.

## **Whether QVC would be carrying on a broadcasting undertaking in Canada**

### **Positions of parties**

#### **VMedia**

10. According to VMedia, QVC intends to provide its unaltered U.S. signal for distribution in Canada and sell its products and begin shipping directly to Canadians. The applicant also noted that QVC had no intention of establishing any physical premises or having any bank accounts or employees in Canada.
11. VMedia argued that QVC would not be carrying on a broadcasting undertaking in Canada for the following reasons:
- An operator of a non-Canadian programming service on the list has never been considered by the Commission or the industry to be engaged in broadcasting in Canada when its signal is transmitted in Canada by a broadcasting distribution undertaking (BDU), nor has a distribution agreement between a non-Canadian service and a Canadian BDU ever been considered to be an indication that the service is carrying on a broadcasting undertaking in Canada.
  - Doing retail business with Canadian residents does not amount to carrying on a broadcasting undertaking in Canada since retail activities are outside the scope of the definitions of "broadcasting" and "broadcasting undertaking" under the Act. These retail activities are separate and apart from the retransmission of the unaltered QVC U.S. broadcast signal in Canada.
  - To the extent that QVC's activities do not involve the transmission of programs, it does not operate as a broadcasting undertaking with respect to those activities.
12. Similarly, the legal opinion provided by Dentons argued that nothing in the Act or in the case law extends the scope of broadcasting or a broadcasting undertaking to include the sale of goods to the public, whether those sales are made by Canadian or foreign businesses. The opinion also noted that where it has had to determine if a person is carrying on a broadcasting undertaking in Canada, the Commission has refused to consider business activities that do not constitute broadcasting activities. Therefore, according to Dentons, QVC's retail activities should not now be a factor in a Commission decision on whether QVC would be carrying on a broadcasting undertaking in Canada.

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<sup>2</sup> Rogers also opposed the previous application by VMedia to add QVC to the list.

## **Rogers**

13. Rogers argued that QVC would be operating a broadcasting undertaking in Canada and provided a legal opinion from Fasken Martineau DuMoulin LLP in support of its position.
14. Among other things, Rogers submitted that teleshopping services are unique since, unlike discretionary services that monetize their programming through advertising, teleshopping services integrate programming and advertising into a seamless product for the sole purpose of selling goods and services. Rogers argued that QVC's programming and retail activities are inextricably linked and that neither would be provided by QVC without the other. Rogers added that contrary to discretionary services, teleshopping services pay BDUs for carriage.
15. Rogers further argued that while a broadcasting undertaking may engage in activities that are not related directly to the transmission of programs, the Commission has consistently treated services that are integral to the operation of a broadcasting service as part of the undertaking. For example, Rogers noted that the Commission has consistently acknowledged that activities vital to the operation of the broadcasting service, such as employment equity, transfers of ownership and control, building access, contributions to production funds, staffing and consumer codes, are part of the undertaking.

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

16. The Commission's general policy relating to the list is to authorize the addition of non-Canadian English- and French-language programming services provided they are not competitive with any Canadian discretionary services. The Commission uses a case-by-case approach to determine whether a given non-Canadian service would be competitive with a Canadian service.
17. While the Commission cannot licence foreign services in light of the *Direction to the CRTC (Ineligibility of Non-Canadians)*, the Commission can authorize their distribution in other ways. To this end it has used the list as a means of authorizing the distribution of non-Canadian programming services that are simply passed through unaltered and do not target Canadian audiences. Where a service does target Canadian audiences, the Commission has required the service to be licensed or to operate pursuant to an exemption. In the present case, Rogers submitted that QVC would not simply be passed through without targeting Canadians and would therefore be carrying on a broadcasting undertaking in Canada in a manner which requires a licence.
18. To address the allegation that QVC would be a broadcasting undertaking carried on in whole or in part within Canada if it were distributed in Canada, the Commission considers that there are two elements that must be determined: (1) whether QVC is a broadcasting undertaking and (2) whether QVC would be carrying on its undertaking in whole or in part in Canada.

### **Whether QVC is a broadcasting undertaking**

19. The Act's definition of a "broadcasting undertaking" includes a "programming undertaking," which is further defined as "an undertaking for the transmission of programs either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus." The Commission considers that Parliament chose to use the noun "transmission" rather than the verb "to transmit" for a purpose. Specifically, it is reasonable to interpret this element as being satisfied by an undertaking that is not itself actively initiating the transmission of programs if there is nonetheless a transmission of those programs to the public. In this regard, as reflected in the *Exemption Order Respecting Teleshopping Programming Service Undertakings* (the Exemption Order) set out in the appendix to Broadcasting Public Notice 2003-11, current Commission policy classifies teleshopping services as programming services, and neither VMedia nor Rogers challenged that characterization.
20. Further, under the Act, an integral activity of distribution undertakings is the retransmission of broadcasting, which includes transmitting programs. Accordingly, reading the relevant definitions in the Act together, it is reasonable to conceive a signal travelling from a programmer through the BDU to the audience as being part of a single transmission of a program.
21. Based on the record of this proceeding, QVC plans to engage in the transmission of programs indirectly through distribution undertakings for reception by the public. The Commission considers that this is sufficient to satisfy the definitions of "programming undertaking" and "broadcasting undertaking" set out in the Act.

### **Whether QVC would be carrying on its undertaking in whole or in part in Canada**

22. The intent of the Commission's policy regarding additions to the list is to enhance the diversity of programming and choice of services available to Canadians. The list cannot serve as a means to circumvent the requirement to hold a licence where it is determined that a person is carrying on a broadcasting undertaking in whole or in part in Canada.
23. In Broadcasting Decision 2016-122, the Commission stated that determinations as to whether an entity is carrying on a broadcasting undertaking in whole or in part in Canada are contingent upon the existence and extent of a real and substantial connection between Canada and the undertaking in question. The Commission then listed factors previously examined in determining if such a connection exists.
24. The Commission notes that the FCA's decision did not determine that the Commission could not take QVC's retail activities into account, but rather that the Commission did not adequately explain why such activities were relevant to its analysis given the focus of the Act's definition of programming undertaking on the transmission of programs.

25. In order to emphasize that it is principally concerned with the broadcasting aspect of the undertaking and, where the subject of the decision is a programming undertaking, with the transmission of programs, the Commission has adapted the factors set out in paragraph 18 of Broadcasting Decision 2016-122 as follows:
- The “undertaking”—physical connection to Canada:
    - Who owns or controls the undertaking?
    - Does the undertaking have broadcasting facilities in Canada?
    - Does the undertaking have employees or agents (whose roles relate to programming) in Canada?
  - The “transmission to the public”—connection to Canada:
    - Is the transmission of the undertaking’s programming receivable in Canada?
    - Does the undertaking solicit subscribers/affiliates in Canada?
    - Does the undertaking have an intention to transmit programming in Canada?
  - The “programming”—connection to Canada:
    - Does the undertaking’s programming originate from Canada?
    - Does the undertaking solicit advertising or otherwise seek to monetize its programming in Canada?
    - Does the undertaking hold program rights for Canada (versus for instance relying on the distant signal compensation regime of the Copyright Board)?
    - Does the undertaking actively target Canadian audiences with its programming?
26. In regard to the above-noted factors, while QVC is owned and controlled by an American entity and there is no evidence that QVC has physical premises, employees or agents in Canada, it has demonstrated its intention to be engaged in the transmission of programs in Canada by cooperating with the present application, as well as stating its intention to solicit Canadian BDUs for carriage. Further, while QVC’s programming is produced in the U.S., would not be altered for the Canadian market and would not solicit advertisements in Canada, it would be at least in part targeted to Canadian audiences for the following reasons:

- the undertaking holds programming rights for Canada and would monetize its programming in Canada through the direct sale of products to Canadian viewers; and
  - it would change its behaviour by shipping products offered in its programming to Canadians.
27. In this regard, the Commission is of the view that a service whose programming is devoted entirely to the marketing of products that Canadians may readily and directly purchase from the undertaking would be targeting Canadians to a greater extent than the services currently on the list.
28. Moreover, the Commission has long considered the soliciting of advertising in Canada to be a key indicator of whether a service was carrying on a broadcasting undertaking in Canada. While QVC would not solicit advertising in Canada, its teleshopping programming, which represents all of its schedule, would have a similar effect in that it would primarily advertise products for purchase by Canadians.
29. Based on the preceding, the Commission considers that if added to the list and distributed by BDUs, QVC would be carrying on a broadcasting undertaking in whole or in part in Canada. The lawful distribution of QVC in Canada is therefore contingent upon the issuance of a broadcasting licence or authorization pursuant to an exemption.

**Whether and how the Commission should apply the competitiveness test or otherwise assess a request from a sponsor to add a non-Canadian teleshopping service to the list**

**Positions of parties**

**VMedia**

30. VMedia submitted that the list was the appropriate means to authorize the distribution of QVC in Canada. Specifically, VMedia argued that if teleshopping services are customized or designed for Canada, they should enter the market via the Exemption Order but that if, like all other services on the list, the feed being provided for distribution in Canada is identical to the foreign feed, the service should be authorized under the list. VMedia further submitted that the existence of an exemption order does not preclude the Commission from approving the addition of a service to the list. For example, it noted that many Canadian-based third-language services are exempted and that the Commission has nevertheless approved the addition of several foreign third-language services to the list.
31. Moreover, VMedia argued that its application is about the programming available to Canadians and that QVC would add to the diversity of programming available to Canadians by offering programming that is different than that already available. In this respect, VMedia submitted that QVC's hosts, U.S. and international events, daily programming and overall personality are all unique.

32. On the issue of competitiveness, VMedia submitted that QVC would not be competitive with TSC for the following reasons:
- since the Commission eliminated genre protection, the fact that both QVC and TSC have the same nature of service is irrelevant;
  - product brands are presented in unique and individual contexts by each of the services (i.e. the details of individual product selection, configuration and presentation change the programming significantly) and therefore the fact that both channels may sell the same brands should not be used to assess the degree to which there is programming overlap;
  - QVC's ability to feature diverse faces and places differentiates and defines its shopping experience (e.g. many of the programs focus on U.S. regional and national locations, cultures and experiences not featured on TSC); and
  - the amount of brand overlap was overstated by Rogers as it inappropriately counted programs and hosts that appear on Home Shopping Network, a teleshopping service owned by QVC but operated as a separate and distinct business (i.e. of the overlaps alleged by Rogers, only one of the eight programs is broadcast on both QVC and TSC, 70% of the hosts do not appear on QVC and more than half the brands are not identical).
33. VMedia further submitted that QVC's entry would not cause TSC material financial harm as TSC's focus on the Canadian market would give it an advantage over QVC. In this respect, VMedia noted that Rogers highlighted potential challenges for QVC, such as U.S. dollar pricing, shipping costs and duties on QVC products and services. VMedia also noted that certain products offered by QVC will not be available in Canada.

#### **Rogers**

34. Rogers argued that the list was designed to authorize the distribution of foreign specialty services and stations that increase the diversity of the programming available to Canadians, not foreign teleshopping services whose sole purpose is to sell products and services to consumers. Rogers submitted that the appropriate mechanism for authorizing the distribution of QVC in Canada would instead be the Exemption Order. Rogers noted that the Exemption Order specifies a set of terms and conditions to ensure that each service makes a contribution to Canadian programming, many of which are different than those that apply to other discretionary services, such as a requirement that each service's programming originates in Canada and makes predominant use of Canadian creative and other resources in the creation and presentation of its programming. Rogers argued that the Exemption Order is the only mechanism that the Commission has to ensure that this unique category of programming service is able to contribute to furthering the objectives of the Act.



35. Rogers further emphasized that the Commission has no obligation to use its policy relating to the list to assess if QVC's teleshopping service would be eligible for inclusion on that list.
36. Notwithstanding the above, Rogers submitted that QVC would fail the competitive test used by the Commission to determine whether a non-Canadian service is eligible to be added to the list since QVC is either totally or partially competitive with the Rogers service TSC in the following respects:
- both operate in the same language and offer the same genre of programming, namely live merchandise-focused television shopping programs promoting and marketing products grouped in almost identical categories (Health and Beauty, Jewelry, Home/Lifestyle, Fashion/Accessories and Electronics);
  - both promote and market many of the same products (Rogers listed over 75 brands, as well as 5 programs and 29 guests, common to both services); and
  - both target the same audience of tele-shoppers (i.e. Rogers noted that QVC's annual report for 2017 indicated that 48% of its U.S. customers are women aged 35 to 64 and submitted that 49% of TSC's customers fit that demographic).
37. Given the above, Rogers argued that the addition of QVC's teleshopping service to the list would have a material adverse impact on TSC and would undermine its ability to contribute to the Canadian broadcasting system without providing any corresponding benefit. Rogers further noted that QVC's teleshopping service already has an annual revenue base significantly greater than that of TSC and submitted that if QVC were allowed to enter the Canadian market, it would use its scale and buying power to prohibit TSC's access to existing program and product suppliers currently shared by both services. Rogers argued that this alone would have an irreparable impact on TSC and threaten its viability.
38. Finally, Rogers expressed concern that the addition of QVC to the list could confuse and harm Canadian consumers. For example, Rogers submitted that the application does not make it clear how QVC would ensure that its programming complies with established industry codes, how it intends to ship products to Canadian consumers and how the U.S. retail prices for the products promoted and marketed through its service in Canada would be converted to Canadian dollars. Rogers argued that if QVC were allowed to have its programming distributed in Canada by BDUs, there would be no mechanisms in place for the Commission to protect Canadian consumers who receive the service.

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

39. One of the purposes of the list is to authorize the distribution in Canada of foreign specialty services and television stations with the aim of furthering the objectives of the Act, in particular section 3(1)(i), which specifies that the programming provided by the Canadian broadcasting system should among other things: (i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes and (ii) be drawn from local, regional, national and international sources.
40. While there is no evidence that QVC would contribute to the Canadian broadcasting system to the same extent as TSC, the Commission considers that the original programming presented on QVC would contribute to furthering these objectives of the Act in a similar manner to the programming of other non-Canadian services on the list.
41. Accordingly, the Commission considers that it would be reasonable to apply its policy governing the addition of non-Canadian programming services to the list to teleshopping services such as QVC. In the Commission's view, this approach reflects a number of policy objectives set out in section 3 of the Act, including that it gives priority to the distribution of Canadian services while recognizing the choice, diversity and differing perspectives that can be added to the system through the availability of non-Canadian programming and programming services. For this reason, the Commission eliminated its genre exclusivity policy for Canadian programming services in the Let's Talk TV proceeding but maintained it with respect to non-Canadian services (see paragraph 51 of Broadcasting Regulatory Policy 2015-96).
42. In applying the competitiveness test, the Commission measures the extent and significance of any overlap (for instance, due to nature of service, language of operation, target audience and genres of programming) between the services. Where there is a significant overlap, the Commission generally denies the addition of the service to the list. This is due to a concern that programming overlap will lead to audience fragmentation and a reduction in revenues for the Canadian service, which could prevent the service from fulfilling its commitments and obligations.
43. In this case, both QVC and TSC describe themselves as leaders in the field of television retailing who offer a variety of consumer products, including exclusive products and brands. Moreover, Rogers noted that the two services would clearly target the same audience since 48% of QVC's U.S. customers are women aged 35 to 64, while 49% of TSC's customers fit that demographic. Accordingly, the Commission is of the view that audience fragmentation is an issue.

44. With regard to the degree of programming overlap, the Commission notes that the programming of the two services does not have to be identical for the competitiveness test to be met. In the case of TSC and QVC, while much of the specific programming is different in that both services use live programming, the format of the programming is very similar. Generally, a product is presented during an hour-long program that features a host and a guest representing the product company. The record shows that QVC and TSC often promote and market the same products and may on some occasions use the same on-air guests. Moreover, the sale of products to consumers is the sole source of revenue for both QVC and TSC, such that this activity is inextricably linked to the type of programming they provide.
45. The Commission considers that because both services target the same audience and derive their revenues from programming that has the same purpose, the distribution in Canada of QVC has the potential to cause TSC revenue losses. Any revenue loss will make it more difficult for TSC to contribute to the Canadian broadcasting system. In this respect, based on the record of this proceeding, the programming of QVC and TSC promotes many of the same products and services, and the value of the revenues derived from these programs represents a significant percentage of TSC's total revenues. Further, the Commission considers that QVC's scale and buying power relative to TSC is also cause for concern with regard to the latter's profitability.
46. Based on the preceding, the Commission considers that QVC would be competitive with TSC and that the potential harm of adding QVC to the list outweighs the potential benefit to the Canadian broadcasting system and Canadians.
47. Accordingly, even if QVC were found not to be operating a broadcasting undertaking in whole or in part in Canada, the Commission is of the view that it would not be appropriate to authorize QVC for distribution in Canada under its policy governing the addition of non-Canadian programming services to the list.

### **Direction to the CRTC**

48. On 30 November 2018, Canada, the United States of America and the United Mexican States (the Parties) signed a Protocol for the new Canada-United-States-Mexico Agreement (CUSMA) to replace the North American Free Trade Agreement (NAFTA).
49. CUSMA makes certain pronouncements relating to areas that fall within the Commission's jurisdiction. One of those pronouncements relates to access by U.S. programming services specializing in home shopping (U.S. home shopping services) to the Canadian broadcasting system. Specifically, paragraph 4 of Annex 15-D to Chapter 15 of the Protocol sets out the following:

### *Home Shopping Programming Services*

4. Canada shall ensure that U.S. programming services specializing in home shopping, including modified versions of these U.S. programming services for the Canadian market, are authorized for distribution in Canada and may negotiate affiliation agreements with Canadian cable, satellite, and [Internet Protocol Television] distributors.
50. CUSMA will enter into force on 1 July 2020. Legislation bringing the obligations set out in the agreement into domestic law received Royal Assent on 13 March 2020 and, pursuant to the *Order Fixing the Date of Entry into Force of the Agreement between Canada, the United States of America and the United Mexican States as the Day on Which that Act Comes into Force*,<sup>3</sup> will come into force on 1 July 2020 as well. Under this legislation, Parliament makes a consequential amendment to section 27 of the Act authorizing the Governor in Council to give directions to the Commission in respect of CUSMA. On 29 April 2020, the Governor in Council issued the *Direction to the Canadian Radio-television and Telecommunications Commission Respecting the Implementation of the Canada–United States–Mexico Agreement*<sup>4</sup> (the Direction) directing the Commission to implement, by appropriate means, paragraph 4 of Annex 15-D of the agreement. The Direction comes into force on the same day as the legislation.

### **Conclusion**

51. In light of all of the above, the Commission **confirms** with additional reasons its determinations in Broadcasting Decision 2016-122, in which it denied the application to add QVC to the list. However, in light of the Direction to the Commission issued by the Governor in Council, the Commission nonetheless adds QVC in its unmodified form to the list. This addition will be effective on the day on which the *Direction to the Canadian Radio-television and Telecommunications Commission Respecting the Implementation of the Canada–United States–Mexico Agreement* comes into force.

Secretary General

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<sup>3</sup> See SI/2020-33.

<sup>4</sup> See SOR/2020-77.

## Related documents

- *Reconsideration of the decision relating to the addition of QVC to the List of non-Canadian programming services and stations authorized for distribution*, Broadcasting Notice of Consultation CRTC 2018-80, 27 February 2018
- *Addition of QVC to the List of non-Canadian programming services and stations authorized for distribution*, Broadcasting Decision CRTC 2016-122, 4 April 2016
- *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
- *Review of exemption orders respecting experimental video-on-demand programming undertakings, video games programming service undertakings and teleshopping programming service undertakings*, Broadcasting Public Notice CRTC 2003-11, 6 March 2003