



## Broadcasting Decision CRTC 2018-145

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Reference: Part 1 application posted on 5 October 2017

Ottawa, 4 May 2018

**Quebecor Media Inc., on behalf of Videotron G.P.**

Various locations in Quebec

*Public record for this application: 2017-0944-5*

### **Complaint by Quebecor Media Inc. against Rogers Communications Canada Inc. alleging a breach of the Wholesale Code**

*The Commission finds that Quebecor Media Inc., on behalf of Videotron G.P. (Videotron), has not demonstrated that the Fixed Fee Cap contained in its affiliation agreements with Rogers Communications Canada Inc. for the pay-per-view packages NHL Centre Ice and NFL Sunday Ticket represents a minimum revenue guarantee, contrary to section 4(g) of the Wholesale Code.*

*Accordingly, the Commission **dismisses** the complaint by Videotron, **denies** the requested relief and lifts the standstill in this matter.*

#### **The parties**

1. Videotron G.P. (Videotron)<sup>1</sup> operates the largest broadcasting distribution undertaking (BDU) in Quebec, as well as the pay-per-view (PPV)<sup>2</sup> service Canal Indigo.
2. Rogers Communications Canada Inc. (Rogers) operates the national, English-language terrestrial general interest PPV service Sportsnet PPV.

#### **Background**

3. In 2016, Rogers offered the PPV packages NHL Centre Ice and NFL Sunday Ticket under its PPV licence. Rogers continues to offer the PPV package NHL Centre Ice.

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<sup>1</sup> In Broadcasting Decision 2017-453, the Commission approved an application by Videotron Ltd. for authority to acquire the assets of Videotron G.P. (Videotron Ltd. and 9227-2590 Québec inc., partners in a general partnership carrying on business as Videotron G.P.).

<sup>2</sup> PPV services are programming services now known as “on-demand services.” An on-demand service is a PPV service, a video-on-demand service or any other programming service that provides programs that are accessed individually at the request of a subscriber.

4. Based on the record of this proceeding, the Super Sports Pak (SportMax in French) is a suite of PPV packages offered by Videotron to its BDU subscribers on a monthly subscription basis. The Super Sports Pak offered by Videotron included NFL Sunday Ticket for the 2016 NFL season and NHL Centre Ice for the 2016-17 and 2017-18 NHL seasons.

### **The complaint**

5. On 27 September 2017, Quebecor Media Inc., on behalf of Videotron, filed an application alleging that Rogers was in breach of section 4(g) of the Wholesale Code (the Code) set out in the appendix to Broadcasting Regulatory Policy 2015-438.
6. Specifically, Videotron alleged that its affiliation agreements with Rogers for NHL Centre Ice for the 2016-17 and 2017-18 NHL seasons and NFL Sunday Ticket for the 2016 NFL season include a minimum revenue guarantee, contrary to section 4(g) of the Code. This section prohibits provisions that set out “minimum penetration, revenue or subscription levels, except where negotiated by an independent programming service,” in any affiliation agreement between a programming undertaking, a BDU or an exempt digital media undertaking.
7. Videotron argued that the dispute meets the criteria for the Commission’s dispute resolution processes. It asked that the Commission determine that Rogers is contravening section 4(g) of the Code and that it order Rogers to offer reasonable rates to Videotron for NHL Centre Ice and NFL Sunday Ticket that do not contain a minimum revenue guarantee.

### **Positions of parties**

#### **Videotron**

8. Videotron submitted that the Code clearly applies in this dispute as the Code applies to programming undertakings and PPV services are defined as such under the *Broadcasting Distribution Regulations*. Videotron added that as a licensed BDU it distributes Rogers’ complete PPV packages, over which it has no control.
9. In support of its allegation in this complaint, Videotron made the following key arguments:
  - the Fixed Fee Cap imposed by Rogers corresponds to the minimum guarantee imposed by Rogers for the 2015-2016 seasons, prior to the implementation of the Code;
  - by imposing the Fixed Fee Cap, Rogers has in effect guaranteed itself a certain level of revenues regardless of Videotron’s revenues and the number of its subscribers for Super Sports Pak, which is the definition of a minimum revenue guarantee;

- the fact that Rogers indicated that a revenue share exists only after the rates reach a given threshold constitutes an admission that there is a minimum guarantee;
  - the number of subscribers that Videotron would need to recover the rates imposed by Rogers is not attainable in a French-language market for the premium English-language services in question;
  - Videotron does not have any alternative to offer the NHL Centre Ice and NFL Sunday Ticket packages as Videotron would be precluded from negotiating directly with the rights holders in light of the licensing requirements applicable to its PPV service Canal Indigo; and
  - by demanding an unreasonable minimum guarantee, Rogers may be indirectly guaranteeing itself content exclusivity, contrary to the standard conditions of licence applicable to PPV services.
10. Videotron also filed as evidence the previous agreement for NHL Centre Ice for the 2015-16 season, which refers to a “Minimum guarantee,” as well as an invoice from Rogers in 2016 for NFL Sunday Ticket, which was labelled “NFL 2016 Minimum Guarantee Prepayment.”
11. Finally, Videotron argued that if no other BDU has contested Rogers’ fee structure, it is because Videotron is distinct from other BDUs as it is the only BDU operating solely in the French-language market. Videotron concluded that it is asking that the risk be shared equitably and reasonably with Rogers, consistent with the Commission’s policy set out in Broadcasting Regulatory Policy 2015-96.

## **Rogers**

12. Rogers submitted that the Commission should dismiss Videotron’s application based on the following key arguments:
- the Code does not apply to the provision of only a portion of a PPV undertaking’s programming, such as NHL Centre Ice and NFL Sunday Ticket, especially in the case of a BDU that holds a licence to operate its own PPV undertaking;
  - even if the Code were to apply, the Commission has already determined that an operator of a PPV service is not obligated to provide that service to a BDU;
  - the fee structure proposed by Rogers is a reasonable volume-based rate card (VBRC) and thus does not require payment of minimum revenue levels; and
  - the standstill rule does not apply in circumstances where the party invoking the standstill (i.e. Videotron) has failed to continue to distribute the programming service at the same rates and on the same terms and conditions as it did before the dispute.

13. Regarding the fee structure itself, Rogers stated that it is a combination of a VBRC (under which per-subscriber rates decrease as penetration increases) and a revenue-sharing arrangement (under which Rogers and Videotron will share in revenues from the packages after the fees payable under the VBRC reach a certain value). Rogers stated that while there was no minimum in the VBRC, there was a maximum since the VBRC fees would not exceed the set amounts specified in the agreements.
14. Rogers further argued that Videotron was trying to supplement the PPV service that it offers to its subscribers without adding the French-language programming that its Canal Indigo licence would require. Rogers argued that if Videotron believes that its current PPV licence is too restrictive, it should apply to the Commission for relief.
15. Rogers also noted that other PPV licensees have been able to negotiate access to NHL Centre Ice from Rogers Media Inc. on terms acceptable to them and argued that it is false to suggest that the fee structure for NHL Centre Ice represents an exercise by Rogers of exclusive rights in the NHL Centre Ice package, given that negotiating directly with the rights holder is an option available to Videotron.
16. Rogers also disagreed with Videotron's broader argument that the rates proposed by Rogers are unreasonable. Rather, Rogers argued that the rates meet all of the fair market value criteria set out in section 6 of the Code and in particular that the rates are consistent with the historical rates that Videotron and other unaffiliated BDUs have consistently agreed to pay. Rogers also noted that all of its other BDU customers for NHL Centre Ice have accepted the fee structure proposed by Rogers and that Videotron is the only BDU that has objected to the fee structure.

## **Interventions**

17. BCE Inc. (Bell) filed an opposing intervention, arguing that the Code does not apply in this case. Bell noted that Videotron is sourcing limited PPV programming from Rogers and not Rogers' entire PPV package. Bell argued that the Code addresses the carriage of services in their entirety and not the carriage of individual programs that a BDU wishes to offer to its subscribers.
18. Bell also argued that the Code would not apply where Videotron had decided instead to obtain NHL Centre Ice and NFL Sunday Ticket directly from a program supplier as program supply relationships do not fall under the scope of the *Broadcasting Act*. In Bell's view, there should not be a distinction in the application of the Code that is dependent on how a BDU sources its PPV programming, such as from a licensed PPV undertaking or directly from a program supplier.
19. TELUS Communications Inc. (TELUS) filed a supporting intervention. Noting that it was not privy to the details of the case, TELUS intervened in support of the enforcement of the Code. In particular, TELUS argued that the Commission must enforce the Code's safeguards so that vertically integrated entities cannot act as gatekeepers with respect to access to content. TELUS submitted that the Code was

designed to prevent anti-competitive behaviour such as that of refusing access to programming services held by vertically integrated entities.

### **Regulatory framework**

20. In support of the objectives relating to a healthy and dynamic wholesale market set out in Broadcasting Regulatory Policy 2015-96, the Code prohibits the imposition of minimum revenue, penetration or subscriber levels by vertically integrated entities.
21. In Broadcasting Regulatory Policy 2015-438, the Commission stated that the intent of this prohibition is to prevent a programming service held by a vertically integrated entity from dictating minimum guarantees and thus being insulated from the effects of consumer choice. The Commission further noted that minimum guarantees could also unduly shift the risk of a programming service's business decisions onto the BDU.

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

22. Having examined the public record for this application in light of applicable policies and regulations, the Commission considers that the issues it must examine are the following:
  - whether the Code applies to the circumstances of this case;
  - whether the Fixed Fee Cap represents a minimum revenue guarantee; and
  - procedural matters, including the scope of the application and out-of-process submissions.

### **Applicability of the Code**

23. The Code governs certain aspects of the commercial arrangements between BDUs, programming undertakings and exempt digital media undertakings. Specifically, it establishes terms and conditions that may or may not be included in the affiliation agreements between contracting parties. BDUs typically enter into affiliation agreements for the purpose of distributing licensed or exempt programming services.
24. The Code is binding on all licensed BDUs. The following condition of licence was imposed on Videotron at its last licence renewal in Broadcasting Decision 2016-458:

Effective 1 December 2016, the licensee shall adhere to the Wholesale Code set out in the appendix to *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015, in its dealings with any licensed or exempt broadcasting undertaking.
25. The Code is also binding on all licensed programming services. Pursuant to Broadcasting Decision 2014-344, Rogers' licensed PPV undertaking is subject to the standard conditions of licence set out in Broadcasting Regulatory Policy 2013-561, as amended by Broadcasting Regulatory Policy 2017-138, including the following:

The licensee shall adhere to the Wholesale Code set out in the appendix to *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015, in its dealings with any licensed or exempt broadcasting undertaking.

26. In this case, all three affiliation agreements specifically describe the two parties to the agreements as (i) a licensed PPV programming undertaking (i.e. Rogers Communications Canada Inc.) and (ii) an “Affiliate” operating a terrestrial BDU (i.e. Videotron).
27. The agreements in question are thus explicitly between the licensee of a PPV undertaking and the licensee of a BDU, both of which are bound by the Code. Further, the terms and conditions in question in this application form part of those aspects of the relationship between distributors and programming undertakings addressed in the Code.
28. Accordingly, the Commission finds that the Code applies to the affiliation agreements in question.

#### **Whether the Fixed Fee Cap represents a minimum revenue guarantee**

29. Having reviewed the terms set out in the three affiliation agreements filed in this complaint, the Commission considers that the fee structure in these agreements is accurately described as a combination of a VBRC (in which per-subscriber rates decrease as subscriber volume increases) and a revenue-sharing arrangement (which allows the BDU and programming services to share revenues when the subscriber level reaches a certain threshold).
30. With respect to Videotron’s specific allegation regarding the minimum revenue guarantee, the Commission considers that the Fixed Fee Cap is a set monetary amount that applies when the revenues calculated in accordance with the rate card attain a set value. Based on the Commission’s assessment of the rate card, Videotron could pay less than the Fixed Fee Cap at various subscriber levels.
31. The Commission is therefore of the view that the Fixed Fee Cap does not constitute a revenue floor because there are circumstances where annual payments from Videotron to Rogers could be lower than the cap. Accordingly, the Commission finds that the Fixed Fee Cap does not represent a minimum revenue guarantee.
32. Moreover, despite the challenges described by Videotron with respect to achieving high subscriber levels for the PPV packages in its linguistic market, the Commission considers that Videotron has not demonstrated that the revenue-sharing component of the Fixed Fee Cap constitutes or contains a minimum revenue guarantee.
33. Finally, regarding the past agreement and invoice filed by Videotron, which refer explicitly to a “Minimum guarantee,” the Commission notes that these documents predate the implementation of the Code and do not form part of the scope of the agreements under consideration in this proceeding.

34. In light of the above, the Commission **dismisses** Videotron's complaint and **denies** the requested relief.
35. The Commission notes Videotron's statement that it would be challenging to reach the much higher subscriber levels required to benefit from the revenue-sharing component of the fee structure, given that Videotron is marketing premium English-language PPV packages in a predominantly French-language market. Further, at lower subscriber volumes there is a substantial difference between the monthly wholesale rates and the actual and suggested retail rates for the PPV packages. The Commission notes that, based on Videotron's application, this process addressed the issue as to whether the fee structure in the affiliation agreements is in violation of section 4(g) of the Code. The Commission reminds Rogers that it must ensure that its affiliation agreements otherwise comply with all sections of the Code.

### **Procedural matters**

36. Rogers requested that the 2016 NFL Sunday Ticket agreement and the 2016-17 NHL Centre Ice agreement be excluded from the scope of this proceeding on the basis that Videotron's failure to proceed with the Part 1 application in late 2016 precludes Videotron from questioning the application of the Code to these agreements.
37. While the standstill rule should not be invoked lightly nor be relied upon to grant an effective access right, it is designed to provide maximum opportunity for the parties to negotiate the matters in dispute, with a view to resolving their dispute without involvement from the Commission.
38. Thus the standstill provision set out under section 15.01 of the *Broadcasting Distribution Regulations* and section 15 of the *Discretionary Services Regulations* specifies that the dispute ends and the standstill is lifted only upon agreement between the parties or upon disposition of the dispute by the Commission. As neither occurred prior to this decision, the standstill rule remained in effect with respect to the disputed matters set out in Videotron's notice of dispute filed on 20 October 2016.
39. Based on the above, the Commission finds that its determinations above apply to the affiliation agreements for NFL Sunday Ticket in the 2016 NFL season and NHL Centre Ice in the 2016-17 and 2017-18 NHL seasons.
40. Finally, the parties each filed submissions outside the normal procedures applicable under the Commission's Part 1 process.<sup>3</sup> Videotron submitted that the Commission should not accept Rogers' additional submissions on the record of the proceeding on the basis that no intervener presented any facts that go beyond Videotron's application and that Rogers was unduly delaying the process.

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<sup>3</sup> Rogers' 21 November 2017 and 6 December 2017 submissions, and Videotron's 1 December 2017 and 8 December 2017 submissions.

41. Given the circumstances of this proceeding, the Commission considers that it is appropriate to include the additional submissions on the record of the proceeding.

Secretary General

### **Related documents**

- *Videotron G.P. – Acquisition of assets (corporate reorganization)*, Broadcasting Decision CRTC 2017-453, 18 December 2017
- *Standard requirements for on-demand services*, Broadcasting Regulatory Policy CRTC 2017-138, 10 May 2017
- *Licence renewal of broadcasting distribution undertakings – Review of practices relating to the small basic service and flexible packaging options and imposition of various requirements*, Broadcasting Decision CRTC 2016-458, 21 November 2016
- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015
- *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
- *Rogers Sportsnet PPV (terrestrial and direct-to-home services) – Licence renewal*, Broadcasting Decision CRTC 2014-344, 25 June 2014
- *Revised regulatory framework for pay-per-view services*, Broadcasting Regulatory Policy CRTC 2013-561, 23 October 2013