



## Broadcasting Decision CRTC 2019-427

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Reference: Part 1 application posted on 8 March 2019

Ottawa, 19 December 2019

**Quebecor Media Inc.**

Across Canada

*Public record for this application: 2019-0156-2*

### **Complaint by Quebecor, on behalf of TVA, against Bell, represented by BCE, alleging undue preference regarding the packaging of TVA Sports**

*The Commission finds that Bell Canada and Bell ExpressVu Inc. (the general partner) as well as Bell Canada (the limited partner), carrying on business as Bell ExpressVu Limited Partnership, has conferred an undue preference upon RDS, its discretionary sports service, and has subjected the service TVA Sports to an undue disadvantage by packaging the two services in a different manner. The preference and disadvantage are undue since they have caused a material adverse impact on TVA Group Inc. and on the achievement of objectives of the Broadcasting Act.*

*Accordingly, the Commission directs Bell to report back to the Commission, by no later than **5 February 2020** on a new packaging structure that would neither unduly disadvantage TVA Sports nor unduly prefer RDS.*

#### **Parties**

1. Quebecor Media Inc. (Quebecor) owns and controls TVA Group Inc. (TVA), the licensee of television programming undertakings and discretionary services, including TVA Sports and its multiplex services TVA Sports 2 and TVA Sports 3.
2. BCE Inc. (BCE) is the parent company for the broadcasting distribution undertakings (BDU) of Bell Canada and Bell ExpressVu Inc. (the general partner) as well as Bell Canada (the limited partner), carrying on business as Bell ExpressVu Limited Partnership (Bell). BCE controls Bell Media Inc. (Bell Media), which controls Le Réseau des sports (RDS) inc., licensee of the discretionary services Le Réseau des sports (RDS) and RDS2.

#### **Background**

3. TVA Sports is a national, French-language discretionary service devoted to sports, with an emphasis on professional Canadian sports. The service launched in

September 2011 and Bell began distributing the service to its subscribers in December 2011.

4. RDS, for which a broadcasting licence was granted in 1987, is a national, French-language discretionary service devoted to sports. RDS was carried on the basic service of a majority of BDUs in the French-language market until 2015. In October 2011, Bell Media launched RDS2, a second French-language discretionary service devoted to sports. According to an agreement between TVA and Bell, TVA Sports was originally packaged in the same bundle as RDS2.
5. In accordance with Broadcasting Regulatory Policy 2015-96 and the *Broadcasting Distribution Regulations* (the Regulations), which require BDUs to offer a small basic service package, Bell offers a small basic service that does not include RDS or TVA Sports.
6. Since 1 March 2016, RDS has been part of the Bell's Bon, Mieux and Meilleur packages, and is offered on an *à la carte* basis, in build-your-own-packages, and in grandfathered packages (i.e., packages that existed before the implementation of Broadcasting Regulatory Policy 2015-96). TVA Sports is offered in Mieux and Meilleur packages, as well as *à la carte* or in build-your-own-packages.

## **Complaint**

7. On 27 February 2019, Quebecor filed a complaint against Bell, alleging that Bell had subjected TVA Sports to an undue disadvantage and conferred an undue preference upon RDS, in violation of section 9 of the Regulations.
8. Quebecor argued that Bon, the package that includes RDS, is much more highly penetrated than Mieux and Meilleur, the packages that include TVA Sports. Further, RDS continues to benefit from the grandfathering of its previous distribution on the basic service. It submitted that this disadvantages TVA Sports.
9. Quebecor added that this packaging decision has a negative impact on TVA Sports. As a sports service, TVA Sports must count on broad distribution and resulting revenues to be able to acquire the costly rights of sporting events requiring colossal investments. Quebecor considered that its subscriber revenues and, consequently, its advertising revenues, would be significantly higher if its service was included in Bon, along with RDS.
10. Further, Quebecor indicated that, unlike Bell, all other major BDUs in Quebec treat RDS and TVA Sports comparably and equitably. In the English-language markets, the sports services The Sports Network (TSN), owned by Bell, and Sportsnet, owned by Rogers Communications Inc. (Rogers), are both included in the counterpart to Bon. According to Quebecor, this shows that there are no reasons explaining the exclusion of TVA Sports from Bon.

11. Finally, Quebecor indicated that section 3(1)(t)(iii) of the *Broadcasting Act* (the Act) sets out that BDUs should provide reasonable terms for the carriage, packaging and retailing of programming services supplied to them. Quebecor submitted that the terms of carriage offered by Bell for TVA Sports are neither reasonable nor equitable, and that they unduly benefit RDS and unduly disadvantage TVA Sports.
12. Quebecor also submitted that Bell seems to favour the distribution of U.S. stations over Canadian services such as TVA Sports, contrary to section 3(1)(t)(i) of the Act, which states that BDUs should give priority to the carriage of Canadian programming services. Quebecor indicated that in Bon, Bell offers several U.S. television stations.
13. Quebecor therefore requested that the Commission find that Bell is subjecting TVA Sports to an undue disadvantage and is conferring an undue preference upon its own sports service, RDS. It also requested that the Commission require Bell to immediately include TVA Sports in the Bon package to ensure that all subscribers to that package can access TVA Sports just as they can access RDS.

#### **BCE's answer**

14. In its answer on 8 April 2019, BCE stated that the initial affiliation agreement between TVA and Bell obligated Bell to package TVA Sports with RDS2, not RDS. Subsequent agreements granted Bell packaging flexibility with no requirement to package TVA Sports with RDS. BCE added that the packaging is compliant with the Wholesale Code, set out in the appendix to Broadcasting Regulatory Policy 2015-438. BCE submitted that the Wholesale Code does not afford the same packaging protections to vertically integrated entities such as Quebecor as they do for independent services.
15. BCE also indicated that the breadth of sports programming offered by the two services, their respective viewership as well as their respective market shares are significantly different and that, accordingly, the relative value of the two services are not comparable. BCE submitted that TVA Sports has very little programming that is unique to the station, does not hold exclusive rights to the big-ticket events it broadcasts and that the majority of its big-ticket programs are available on widely penetrated English-language channels.
16. According to BCE, repackaging TVA Sports to Bon would be a reversion to micro-regulation. This would have a significant impact on flexibility, affordability and consumer choice, since the cost of Bon would have to be increased, even for subscribers who do not wish to watch TVA Sports. BCE added that subscribers already have several options for accessing TVA Sports: they can add the service *à la carte* or create a custom package to include the service. BCE indicated that a significant number of its subscribers already choose one of these options.

17. In regard to the objectives of the Act, BCE submitted that it has been operating in accordance with the Act, in particular with sections 3(1)(t)(ii) and 3(1)(t)(iii), by providing reasonable terms for the carriage, packaging and retailing of TVA Sports. BCE indicated that its offer complies with the contractual agreements for the service.
18. Finally, BCE indicated that the Commission has already considered the issue at the heart of this complaint, during the 2018 final offer arbitration process regarding the distribution of TVA Sports.<sup>1</sup> BCE submitted that during this process, the Commission examined a number of factors, including penetration levels, volume discounts and the packaging of the service. Therefore, according to BCE, the Commission issued a final and binding determination in Bell's favor in this matter and Quebecor is now trying to achieve what it could not through final offer arbitration.

### **Quebecor's reply**

19. In its reply on 18 April 2019, Quebecor disagreed with BCE's arguments that the two services are not similar. Quebecor indicated that even if, because of its size, Bell has five times the buying power of TVA, TVA Sports allows francophone sports enthusiasts to follow several major sporting events in their own language, and that this serves the public interest. Further, Quebecor has provided viewing evidence demonstrating the increasing value of the service to viewers: TVA Sports' viewing share is said to have increased from 0.3% in 2011 to 2.2% in 2018, whereas RDS' share is said to have decreased from 4.9% to 2.8% during the same period.
20. Further, Quebecor indicated that the subscribers to pre-assembled packages do not necessarily want to access all the services offered in those packages. Therefore, just as some subscribers to Bon might not want TVA Sports, some might not want to pay for RDS either. According to Quebecor, the evolution of viewership to the two services shows that both are must haves for francophone sports fans and that subscribers to Bon are deprived of access to TVA Sports, to the benefit of RDS.
21. In regard to the previous agreement regarding the packaging of TVA Sports with RDS2, Quebecor submitted that it made sense in 2011, when both services were launched. However, it noted that TVA Sports has considerably improved its programming since then and that its viewership has increased, which makes the service more comparable to RDS, not RDS2. Furthermore, in regard to the argument by BCE that TVA Sports does not have the exclusive rights to the sports events it broadcasts, Quebecor noted that its exclusive broadcast rights are and can only be the French-language rights. The exclusive broadcast of big-ticket programs in French fills an important need among francophone sports enthusiasts.
22. Finally, in regard to BCE's argument that the Commission has already considered the issue regarding the packaging of TVA Sports during the 2018 final offer arbitration process, Quebecor submitted that this has no connection with the substance of this

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<sup>1</sup> See Broadcasting Decision 2018-17.

complaint. Quebecor indicated that this complaint relates to undue preference, not to the rates for TVA Sports. Setting rates was the key issue of that final offer arbitration process.

### **Additional filing by Quebecor**

23. On 31 May 2019, Quebecor filed additional information indicating that Bell had changed its website for Fibe TV in Quebec, removing Mieux and Meilleur as packaging options. Only Départ, Bell's small basic service, and Bon were displayed, neither of which included TVA Sports. Quebecor submitted that the removal of Mieux and Meilleur from the website for Fibe TV increased the undue disadvantage tenfold.
24. In its reply on 5 June 2019, BCE acknowledged that changes were made to Bell's website, but stated that these changes were intended to focus marketing efforts on the Départ plus 10 Channels package and were not related to the carriage of TVA Sports. BCE added that Mieux and Meilleur are still available on its website and that they can be found in a few clicks. BCE requested that the Commission not reopen the public record and not consider Quebecor's additional filing.

### **Interventions**

25. The Commission received an intervention in support of the complaint from the Conseil provincial du secteur des communications (CPSC) du Syndicat canadien de la fonction publique. The CPSC considered that Bell offers packaging that does not treat TVA Sports and RDS on equal terms and that, for other BDUs, if a package includes RDS, it also includes TVA Sports. The CPSC added that the same disadvantage does not apply in English-language markets, where Good (the equivalent to Bon) includes both TSN and Sportsnet. Therefore, the CPSC submitted that Bell has conferred upon itself an undue preference and has subjected TVA Sports to an undue disadvantage.
26. In its intervention, the CPSC also argued that the exclusion of TVA Sports from Bon had a negative impact on TVA Sports' viewership and thus on advertising revenues.
27. The Commission also received two interventions from individuals raising concerns over the quality of TVA Sports' programming as well as the value and impact of repackaging the service.

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

28. The Commission considers that the issues it must address are the following:
  - Should Quebecor's additional filing be added to the public record?
  - Has the matter raised by Quebecor already been resolved?
  - Is there a preference or a disadvantage?
  - If so, is the preference or disadvantage undue?

### **Should Quebecor's additional filing be added to the public record?**

29. The information in Quebecor's additional filing is relevant because the removal of Mieux and Meilleur from the main page of Bell's website could make TVA Sports even more difficult to find relative to RDS. The Commission has therefore accepted the additional filing, but notes that it has not had an impact on its decision.

### **Has the matter raised by Quebecor already been resolved?**

30. In its answer to Quebecor's application, BCE stated that the Commission has already examined the issues raised by Quebecor and made determinations on the matter in the last two final offer arbitration processes between the two parties. Therefore, BCE considered that the Commission does not need to further analyze the situation. It added that the Commission had examined several factors to establish fair market value for TVA Sports, including the volume, the penetration and the packaging of TVA Sports, when it determined that the rates proposed by Bell were more reasonable. Accordingly, BCE submitted that the Commission has already issued a final and binding determination in its favour regarding the exact issue at the heart of the dispute.

31. The Commission considers that BCE is confounding the analyses for a final offer arbitration and for an undue preference complaint. The Commission examined distinct factors in each process, and these factors are not comparable. The analysis of a final offer arbitration is conducted on the basis of fair market value factors deemed relevant to the arbitration case. There are no such criteria for analyzing undue preference allegations. Therefore, in the final offer arbitration to which BCE refers, packaging was not a factor considered by the Commission, whereas it is the main issue in the present case.

32. Accordingly, the Commission finds that it has not already addressed the issue raised by Quebecor in its present application.

### **Is there a preference or a disadvantage?**

#### **The undue preference test**

33. Section 9 of the Regulations states:

- (1) No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.
- (2) [...] the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

34. When the Commission examines a complaint alleging an undue preference or an undue disadvantage, it must first determine whether there is a preference or disadvantage. The preference is generally defined as a dissimilar treatment of comparable entities.

### **Are the services comparable?**

35. In Broadcasting Regulatory Policy 2015-438, the Commission indicated that the term “comparable” should not be strictly defined, as its meaning depends on the context of a negotiation or dispute and is best left to an assessment on a case-by-case basis. Accordingly, the factors considered to determine whether the entities are comparable can vary from one case to another.
36. In its comparison of TVA Sports and RDS, the Commission considered it appropriate to compare their programming. The Commission notes that both services offer similar content. In fact, they both have a diverse range of sports programming, as well as French-language broadcast rights for the major sports leagues and popular sporting events. TVA Sports and RDS both broadcast National Hockey League games and share regional rights for the broadcast of Montréal Canadiens games. Both services broadcast tennis and Major League Baseball games. While RDS has broadcast rights for National Basketball Association games, including those of the Toronto Raptors, TVA Sports has the rights for Major League Soccer games, including those of the Montréal Impact. In addition, both services broadcast programs of a similar format, such as sports commentary and news programs.
37. The Commission notes that both services are marketed to the same target audiences, namely, sports fans in general. As mentioned above, TVA Sports and RDS broadcast the same type of programming, and sometimes from the same major leagues. Therefore, it is likely that subscribers consider the services to be similar and that they are therefore competing services.
38. Further, TVA Sports and RDS are discretionary services subject to the same standard conditions of licence applicable for mainstream sports services.
39. To support its view that the two services are not comparable, BCE submitted that the viewership to and market share of the services are substantially different. The Commission considers that it is not necessary, in this case, to take into consideration these two factors, as it is clear from the record for this complaint that TVA Sports and RDS are comparable. Nonetheless, the Commission notes that the gap between viewership to and market share of the two services, although favourable to RDS at the moment, seems to have narrowed considerably.
40. In light of the above, the Commission finds that TVA Sports and RDS are comparable services.

### **Is there dissimilar treatment?**

41. BCE submitted that the initial affiliation agreement between the parties obligated Bell to package TVA Sports with RDS2, and that subsequent agreements had no requirement to package TVA Sports with RDS.
42. Quebecor confirmed there is no longer an obligation to package TVA Sports with RDS2. Since 2015, the packaging of TVA Sports is at the discretion of Bell. Quebecor expressed the view that TVA Sports is more comparable to RDS than RDS2, which is now comparable to TVA Sports 2.

43. The Commission considers that packaging TVA Sports with RDS2 may have made sense when the service was launched in 2011, but notes that TVA Sports has since diversified its programming and gained popularity. While BCE asserted that Bell's practice is in compliance with the Wholesale Code, the increased packaging flexibility does not absolve Bell of its responsibilities under section 9 of the Regulations.
44. As mentioned above, RDS is included in all of Bell's discretionary packages, including Bon, Bell's most popular package with the highest penetration. Further, TVA Sports is included in Mieux and Meilleur, which are more expensive and have a penetration which is much lower than that of Bon.
45. Accordingly, having concluded that the two services are comparable, the Commission considers that, given significant differences in packaging, the treatment of TVA Sports by Bell is dissimilar from that of RDS.
46. Further, the Commission notes that, in its intervention, the CPSC stated that it had examined the distribution offerings of other BDUs serving the Quebec market, including Cogeco Inc., Shaw Communications Inc., Telus Communications Inc. and Videotron. According to the CPSC, these BDUs offer the same packaging conditions for TVA Sports and RDS. Moreover, the CPSC noted that in English-language markets, Bell packages TSN, the English-language equivalent of RDS, with Sportsnet, the sports channel owned by Rogers.

#### **Conclusion**

47. In light of the above, the Commission finds that Bell has subjected TVA Sports to a disadvantage, while conferring a preference upon its own service, RDS.

#### **Is the preference or the disadvantage undue?**

48. Having concluded that Bell has subjected TVA Sports to a disadvantage and conferred a preference on RDS, the Commission must determine whether the preference and disadvantage are undue. Specifically, the Commission must examine whether the preference and disadvantage have had or are likely to have a material adverse impact on the complainant or on any other person. It must also examine the impact that the preference and disadvantage have had, or are likely to have, on the achievement of the objectives set out in the Act.
49. Pursuant to section 9(2) of the Regulations, in the present case, the onus is on BCE to demonstrate that the preference and disadvantage have not been undue.

#### **Financial impact**

50. The Commission has carefully reviewed and taken into consideration all information provided by the parties. However, most of the data filed by the parties on the record of this proceeding cannot be disclosed in the decision since it is confidential.



51. The Commission notes that since the introduction of Bon in March 2016, its subscriber numbers have continued to grow to the point where it is Bell's most highly penetrated package, whereas Mieux and Meilleur are more costly and have extremely low penetration.
52. Quebecor considers that by excluding TVA Sports from Bon, Bell deprived TVA Sports of a significant number of subscribers and several millions of dollars per year of subscription and advertising revenues, resulting in a significant loss of income. Quebecor evaluated these losses based on the additional subscribers its service would have obtained, and on the advertising revenues that the broader distribution of TVA Sports would have generated, had TVA Sports been included in Bon rather than only in Mieux or Meilleur.
53. The Commission notes that BCE had an obligation to demonstrate that the preference and disadvantage have not been undue. To that extent, the Commission notes that BCE did not provide data that the Commission could have used to refute Quebecor's estimates regarding TVA Sports' shortfalls in subscription and advertising revenues. It did, however, provide information on the number of subscribers to Bon who also subscribed to TVA Sports, and this data is consistent with estimates submitted by Quebecor. Specifically, BCE indicated that a large number of Bon subscribers choose TVA Sports *à la carte* or in a build-your-own package, while the remainder choose not to do so. The proportion of subscribers to Bon who choose not to take TVA Sports as an additional channel represents hundreds of thousands of dollars per month in unrealized subscriber revenues alone. However, the proportion of Bon subscribers who automatically have access to RDS represents additional revenue for Bell.
54. The Commission notes that sports services rely on revenues resulting from broad distribution to be able to acquire costly sports rights. Therefore, the additional revenues RDS enjoys from subscribers to Bon, who might not otherwise want the service, grant Bell a competitive advantage, in particular to secure distribution rights for sports programs.
55. In this regard, the Commission considers that the exclusion of TVA Sports from Bon, in contrast to RDS, has had, and continues to have, a material adverse impact on TVA's operations.

**Impact on the objectives of the *Broadcasting Act***

56. BCE noted that it is in compliance with section 3(1)(t)(ii) of the Act, which relates to efficient delivery of programming at affordable rates, as well as section (3)(1)(t)(iii), which relates to reasonable terms for the carriage, packaging and retailing of programming services.
57. In turn, Quebecor noted that TVA Sports makes an important contribution to Canadian programming, whether in Canadian programming expenditures or by broadcasting Canadian content. Quebecor added that Bell, through its actions, is neither giving priority to the carriage of Canadian programming services, nor providing reasonable terms for their carriage, packaging and retailing, which is in contravention to sections 3(1)(t)(i) and 3(1)(t)(iii) of the Act.

58. BCE further indicated that many big-ticket events broadcast by TVA Sports are also broadcast by English-language services, such as the Canadian Broadcasting Corporation and Citytv, which proves, according to BCE, that English-speaking subscribers in Quebec do not need to subscribe to TVA Sports. In this regard, Quebecor argued that TVA Sports meets an important need since without the service, French-speaking sports fans would be deprived of the broadcast in French of several major sporting events, which contravenes the public interest.
59. As evidenced in the Commission's remarks above, it appears in the record of this proceeding that TVA Sports meets the needs of sports fans by broadcasting diverse Canadian programming of interest to Canadians. To this effect, the Commission is of the view that the undue disadvantage prevents TVA Sports from fully contributing to the objectives of the Act relating to the development and broadcast of Canadian programming.
60. Moreover, the Commission considers that given TVA Sports' contribution to the broadcasting system and the impact that the inequitable distribution of this service has had on the French-language market it serves, the preference and disadvantage have had an adverse impact on the achievement of the objectives set out in sections 3(1)(c) and 3(1)(t)(i) and (iii) of the Act.

## **Conclusion**

61. In light of all of the above, the Commission finds that Bell has subjected TVA Sports to an undue disadvantage and has conferred an undue preference upon RDS.
62. Accordingly, the Commission directs Bell Canada and Bell ExpressVu Inc. (the general partner) as well as Bell Canada (the limited partner), carrying on business as Bell ExpressVu Limited Partnership, to remedy the situation and include TVA Sports in the same program offering as RDS, and report back to the Commission on a new packaging structure that would neither unduly disadvantage TVA Sports nor unduly prefer RDS, by no later than **5 February 2020**.

Secretary General

## **Related documents**

- *Final offer arbitration request by Quebecor Media inc. regarding the distribution of TVA Sports by Bell TV*, Broadcasting Decision CRTC 2018-17, 17 January 2018
- *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