



Broadcasting Decision CRTC 2019-429

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Ottawa, 19 December 2019

Bell Media Inc.
Across Canada

Public record for this application: 2019-0274-2

Complaint by Bell Media against Videotron alleging undue preference regarding the packaging of Super Écran

The Commission finds that although Quebecor Media Inc., on behalf of Videotron Ltd., has conferred a preference upon Club illico, its hybrid video on-demand service, and has subjected Bell Media Inc. (Bell) to a disadvantage when it modified the packaging of Super Écran, at this time the preference and disadvantage are not undue.

*Accordingly, the Commission **dismisses** the complaint by Bell.*

Parties

1. Bell Media Inc. (Bell) is a multimedia company with significant assets, including several assets in television. It owns, among other things, discretionary services such as Super Écran.
2. Videotron Ltd. (Videotron), a subsidiary of Quebecor Media Inc. (Quebecor), is one of the largest operators of broadcasting distribution undertakings (BDU) in Quebec. It also operates the exempt hybrid video on-demand service Club illico.

Complaint

3. On 23 April 2019, Bell filed a complaint against Videotron, alleging that Videotron had subjected Bell's discretionary service, Super Écran, to an undue disadvantage and conferred an undue preference upon itself by changing the packaging of the service so that Super Écran is no longer available as a "Premium" option in the custom packages offered to Videotron's subscribers.
4. Bell indicated that, previously, Super Écran was included in the "Premium" selections list along with Club illico, Super Channel and TMN (now Crave), and was available in three theme packages. It noted, however, that in November 2018, Videotron removed Super Écran from the list of "Premium" options. The service is now found in another list called "Other Specialties", which is much less popular and visible. Further, according to Bell, Super Écran is the only French-language service in that list, which includes many third-language services. Bell added that Quebecor is also

conferring an undue preference upon itself by continuing to offer Club illico as one of its “Premium” options.

5. Bell argued that the packaging change has had a negative impact on the achievement of the objectives of the *Broadcasting Act* (the Act), which states, among other things, that the Canadian broadcasting system should encourage the development of Canadian expression and that programming provided by the broadcasting system should be varied and comprehensive. Bell added that the Act states that BDUs should give priority to the carriage of Canadian stations. It submitted that Super Écran makes a significant contribution to the achievement of these objectives of the Act.
6. Moreover, Bell indicated that by removing Super Écran from the list of “Premium” channels, Videotron subscribers have no Canadian French-language option to consider other than Club illico.
7. Bell stated that the packaging change caused significant harm to Super Écran. It submitted that the total number of Super Écran subscribers from Videotron has declined since the change, and that this rate of decline increased in early 2019.
8. Bell therefore requested that the Commission find that Videotron is conferring an undue preference upon its own hybrid video on-demand service, Club illico. It also requested that Videotron be required to reinstate Super Écran as one of the “Premium” options and to offer it in a similar manner as other premium television services, including Club illico.

Quebecor’s answer

9. In its answer on 3 June 2019, Quebecor, on behalf of Videotron, argued that the repackaging was a result of Bell’s proposed rate increase for Super Écran. Quebecor added that Bell had been informed of its concerns regarding the requested rate increase and the impact this could have on the distribution of Super Écran. Although the new rates are not yet in place, Quebecor stated that it had no choice but to change the packaging in light of the retroactivity of the proposed rates.
10. Quebecor also submitted that no advantage accrues to Club illico by being included in the list of “Premium” options since Videotron subscribers who want access to French-language services may choose between Club illico or the Canal+ and Studio Canal suite of non-Canadian channels. Further, Videotron indicated that Club illico is not comparable to Super Écran because the two services have different content.
11. In addition, Quebecor disputed Bell’s description of its “Other specialties” list, in which Super Écran is offered. It indicated that 40% of the services in that list are English-language services and two services are French-language services.
12. In response to Bell’s arguments regarding the objectives set out in the Act, Quebecor submitted that it does not see how the fact that Super Écran is no longer on Videotron’s list of “Premium” channels could hinder the achievement of the objectives. It added that it has not stopped distributing Super Écran; it has only moved

the service to another list of options because of the significant rate increase requested by Bell.

13. Finally, Quebecor stated that Bell's proposed rate increase is not warranted given that the number of subscribers to the service has been declining since 2013, which, according to Quebecor, is due to a general decrease in interest. Quebecor added that the number of subscribers to Super Écran varies depending on the content. For example, the number of subscribers increased when new seasons of *Game of Thrones* became available.

Bell's reply

14. In its reply on 13 June 2019, Bell submitted that the pre-emptive retail price increase for Super Écran by Videotron is part of Videotron's strategy to disadvantage Super Écran. Bell indicated that the final wholesale rates have not yet been established and the parties are still in negotiations. Further, Bell noted that Super Écran was already subject to an extra \$5 fee in Videotron's proposed package prior to November 2018, when Super Écran was moved to the "Other specialties" list. According to Bell, Videotron could have changed these fees rather than the packaging.
15. Bell also argued that, contrary to what Quebecor claimed, the undue preference is not based on programming comparisons between services and that its complaint is not based on such factors. To Bell, the main issue is that the removal of Super Écran eliminated a principal competitor to the selection of Club illico among the options available in the list. As a result, Bell added that most of Videotron's subscribers would choose Club illico as the "Premium" option for their custom package, to the disadvantage of Super Écran.
16. In regard to the decline in subscribers to Super Écran, Bell indicated that while the number of subscribers to most Canadian discretionary services is in decline, the decline in the number of Videotron's Super Écran subscribers has accelerated since the packaging change in November 2018.
17. Bell added that the services in the "Other specialties" list include niche services that are not comparable to Super Écran. Bell also indicated that subscribers continue to be interested in the service and that the decline in Videotron's Super Écran subscribers does not mean that clients are no longer interested in the service.

Regulatory framework

Undue preference test

18. Section 9 of the *Broadcasting Distribution Regulations* (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.

19. 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 or disadvantage is generally defined as a dissimilar treatment of comparable entities.
20. If the Commission finds that a preference has been given or a person has been subjected to a disadvantage, it must then determine whether that preference or disadvantage is undue. Specifically, the Commission considers whether the preference or disadvantage has had, or is likely to have, a material adverse impact on the complainant or on any other person. It also considers the impact the preference or disadvantage has had, or is likely to have, on the achievement of the objectives set out in the Act.

Commission's analysis and decision

21. The Commission considers that the issues it must address are the following:

- Is there a preference or a disadvantage?
- If so, is the preference or the disadvantage undue?

Is there a preference or a disadvantage?

22. Despite Quebecor's arguments that the two services are complementary and not comparable, the Commission considers that the programming offered by both services is similar in many ways. In fact, in both cases, the programming consists of exclusive popular premium advertising-free content in French, such as movies and television series. There is an overlap between the programming of the two services, especially given the limited number of programming service options in the French-language market. To some extent, the way the content is offered is also similar, since subscribers to both services have access to content on demand. Accordingly, in this instance, the Commission finds that Super Écran and Club illico are comparable services.
23. Under the new packaging, Videotron's subscribers can easily find Club illico as one of the "Premium" options because these options appear in many packages, which is no longer the case for Super Écran. Under the previous packaging, Super Écran was as visible as Club illico: it was one of the "Premium" options in four of the seven packages offered by Videotron. Under the new packaging, Super Écran is more difficult to find than Club illico because it is only available in a less discoverable package or as an option from the "Other Specialties" list. To find Super Écran on Videotron's website, one must scroll to "Other Specialties" and then click "See more channels", as Super Écran is in the hidden part of the list.

24. In addition, the services offered in the “Other Specialties” list do not seem comparable to Super Écran. This list includes many niche services and more than half of the services available are in a third language.
25. Accordingly, the changes to the packaging of services has had a significant impact on Super Écran’s visibility, as it is now difficult for potential subscribers to find it. In light of the above, the Commission finds that Videotron has subjected Super Écran to a disadvantage and conferred a preference upon its own service.
26. Further, the Commission notes that by changing Super Écran’s packaging, Videotron may have contravened section 10 of the Wholesale Code, set out in the appendix to *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015, which states that “a programming service shall be given comparable marketing support by the BDU as is given to similar or related services.”

Are the preference and the disadvantage undue?

27. Where it determines that there is a preference and a disadvantage, the Commission examines 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 also examines the impact the preference and disadvantage have had, or are likely to have, on the achievement of the objectives set out in the Act. In the present case, the onus is on Videotron to demonstrate that the preference and the disadvantage have not been undue.
28. Quebecor argued that the loss of subscribers to Super Écran is not due to the repackaging, but part of a longer trend of declining subscriber interest since 2013.
29. The Commission notes that subscription to Super Écran has been declining relatively steadily across Canada since 2014 (with the exception of 2017), although the decline has been more pronounced for Videotron. However, while the number of subscribers decreased more significantly after November 2018, it increased in April 2019, with the airing of the new season of *Game of Thrones*. When Super Écran is airing content that is of interest to Canadians, they subscribe to it.
30. Accordingly, it is difficult to clearly establish the impact of the repackaging on the number of subscribers to Super Écran. It is possible that the packaging change has accelerated the rate of decline in the number of subscribers and that this change will have a more significant impact in the future. However, given that the period covered by the complaint is short, the Commission considers that there is insufficient data to conclusively determine whether or not this decline was due directly to the repackaging of the service or to the more general decline in subscribers.
31. Nevertheless, the Commission acknowledges that the decrease in the number of Videotron’s Super Écran subscribers was more pronounced during the first quarter of 2019 than it was before. However, the Commission considers that the immediate financial impact of the decline is minimal at this time. While revenues have declined between 2014 and 2018, Super Écran continues to exhibit strong profit before interest

and taxes (PBIT) margins. Finally, at this time, Super Écran remains profitable and continues to contribute to the achievement of the objectives of the Act, specifically those relating to the diversity of programming (section 3(1)(i)(i)), and offering appropriate contributions to Canadian programming (section 3(1)(d)(ii)).

32. The Commission considers that the repackaging of Super Écran by Videotron has not had a material adverse impact on Super Écran or on the broadcasting system. Accordingly, the preference and disadvantage are not undue.

Conclusion

33. In light of all of the above, the Commission finds that although Videotron has conferred upon itself a preference by changing the packaging of channels and subjected Bell to a disadvantage, the preference and disadvantage are not undue at this time. Accordingly, the Commission **dismisses** Bell's complaint.
34. The Commission considers that the matters raised in this application would have been more appropriately dealt with in the context of the parties' ongoing negotiations, where the parties could have resolved the dispute bilaterally with the help of staff-assisted mediation.

Secretary General