



Broadcasting Decision CRTC 2021-250

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Ottawa, 3 August 2021

Quebecor Media Inc., on behalf of Videotron Ltd.

Across Canada

Public record for this application: 2019-1113-1

Complaint by Quebecor, on behalf of Videotron, against the Canadian Broadcasting Corporation alleging undue preference concerning the service Ici Tou.tv Extra

The Commission considers that the Canadian Broadcasting Corporation (CBC), by offering its pay subscription video-on-demand service Ici Tou.tv Extra (Tou.tv Extra) over the Internet, is not giving an undue preference either to itself or to TELUS Communications Inc. (TELUS). Accordingly, the Commission, by majority decision, **dismisses** the undue preference complaint by Quebecor Media Inc. (Quebecor) regarding the CBC service Tou.tv Extra.

The Commission also considers that the CBC is not contravening the rule relating to exclusivity of programming offerings through the agreement it reached with TELUS in regard to the distribution of Tou.tv Extra to its clients in Quebec. Accordingly, the Commission, by majority decision, **dismisses** the complaint by Quebecor regarding the rule relating to exclusivity.

The parties

1. Videotron Ltd. (Videotron), a subsidiary of Quebecor Media Inc. (Quebecor), operates one of the major broadcasting distribution undertakings (BDUs) in Quebec. Its activities also include mobile telephony and the exempt hybrid video-on-demand undertaking Club illico.
2. Quebecor is the parent company of Videotron. Through Group TVA Inc., it owns television programming undertakings and specialty services; through Videotron, it owns cable companies and an on-demand service.
3. The Canadian Broadcasting Corporation (CBC), the national public broadcaster, is the licensee of various services, including conventional television stations and discretionary services. The CBC also operates Ici Tou.tv (Tou.tv), a free video-on-demand (VOD) service that was launched in 2010 and offers catch-up content, and Ici Tou.tv Extra (Tou.tv Extra), a pay subscription video-on-demand (SVOD) service without advertising that was launched in 2014 and has similarities in particular with

the services Club illico, Crave, Netflix and Amazon Prime Video. The services Tou.tv and Tou.tv Extra are only available online and present different programming.

4. TELUS Communications Inc. (TELUS) is the licensee of BDUs operating mainly in Alberta and British Columbia, and in several small and medium markets in Quebec, and of mobile telephone and Internet services.

The complaint

5. On 30 October 2019, Quebecor, on behalf of Videotron, filed a complaint against the CBC alleging that the CBC is giving itself an advantage by offering its pay SVOD service Tou.tv Extra in a manner that disadvantages BDUs. In its complaint, Quebecor also alleged that the CBC/SRC has contravened the rule relating to exclusivity of programming offerings by entering into an agreement that provides only TELUS subscribers in Quebec with free access to Tou.tv Extra.

Positions of parties

Quebecor

6. In its complaint, Quebecor submitted that the CBC has contravened paragraphs 3 and 5 of the Exemption order for digital media broadcasting undertakings set out in Broadcasting Order 2012-409 (the Exemption order). Quebecor also submitted that, in its view, pursuant to section 3 of the *Broadcasting Act* (the Act), the CBC's mandate must be carried out from a complementary and collaborative perspective and not in competition with the private sector. More specifically, pursuant to section 3(1)(l) of the Act, as the national public broadcaster, the CBC should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains. Further, section 3(1)(n) of the Act sets out that conflicts between the CBC's objectives and the interests of any other broadcasting undertaking of the Canadian broadcasting system shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in sections 3(1)(l) and 3(1)(m) of the Act.
7. In the present case, Quebecor alleged that the CBC has contravened paragraph 3 of the Exemption order by granting itself undue preference through its offer of Tou.tv Extra, to the detriment of BDUs and Canadian taxpayers. Quebecor also alleged that the CBC contravened paragraph 5 of the Exemption order through its agreement with TELUS regarding the offer of Tou.tv Extra.
8. Quebecor submitted that Tou.tv Extra offers exclusive content, series from here and elsewhere, films, first-run programming, and content from other Canadian programming services, both specialty and conventional, in a manner similar to BDUs, as well as exclusive access to Véro.tv. Further, the CBC has entered into agreements to distribute content from conventional television services such as TV5 and Télé-Québec, from discretionary services held by Bell, and from the National

Film Board of Canada.¹ Quebecor stated that since Tou.tv Extra distributes television services,² in particular services that do not belong to the CBC, the service is becoming a BDU, or is assimilating into one. In addition, in Quebecor's view, customers can be misled given that Tou.tv Extra displays the logo of these services on its website.

9. Quebecor further alleged that the CBC, by receiving monthly subscription revenues from Tou.tv Extra, is short-circuiting the Canadian broadcasting system since it also receives tax dollars from the government. Further, Tou.tv Extra subscribers pay to access content that is already funded in large part by taxpayers and BDUs. Quebecor expressed the view that this is inappropriate for a public broadcaster.
10. According to Quebecor, the CBC introduced TELUS as a new competitor to existing BDUs in the French-language market. Quebecor submitted that the agreement entered into with TELUS guarantees the CBC a base consisting of millions of subscribers and as such creates unfair competition for existing BDUs. Quebecor considered that this agreement encourages migration by viewers to unregulated platforms. In addition, TELUS does not hold a licence authorizing it to operate a BDU in the market served by Videotron despite creating competition with it in this market. Quebecor submitted that the CBC/SRC is therefore granting TELUS an undue preference.
11. Quebecor further submitted that the differences between the retail rates constitute an element of the preference. In fact, it submitted that Videotron subscribers who wish to receive services distributed by Tou.tv Extra are at a disadvantage given that they must subscribe to the basic service and to other packages, costing up to \$45, even though they can subscribe directly to Tou.tv Extra for \$6.99 a month.
12. Quebecor expressed the view that the CBC is contributing, in a premediated manner, to the erosion of the Canadian broadcasting system. Quebecor noted that the number of Videotron subscribers has decreased between 2013 and 2018.
13. Quebecor considered that the CBC contravened paragraph 5 of the Exemption order in light of the exclusive offer granted to TELUS. Quebecor stated that, in 2014, the CBC entered into partnerships with TELUS and Rogers so that they may offer Tou.tv Extra to their subscribers free of charge in exchange for compensation. Currently, only TELUS subscribers receive Tou.tv Extra programs free of charge. In Quebecor's view, the current situation of exclusivity outweighs the fact that the exclusivity may be by default due to other parties declining the CBC's offer.

¹ When Quebecor filed its application, Tou.TV Extra was distributing programs of the television services Ici ARTV, Ici Explora, Vie, D, Z, V, TV5, Unis TV and Télé-Québec. It no longer distributes the programs from the Bell speciality services (that is, VRAK, Vie, D and Z).

² Quebecor used the term [translation] "channels".

14. Quebecor therefore specified that this exclusive free offer constitutes an “otherwise preferential basis” prohibited under paragraph 5 of the Exemption order. As noted above, access to Tou.tv Extra’s free offer is dependent on a subscription to TELUS’s services.
15. Quebecor therefore requested that the Commission require the cessation of Tou.tv Extra’s activities given the non-compliance with paragraphs 3 and 5 of the Exemption order and the CBC’s mandate as public broadcaster.

Canadian Broadcasting Corporation

16. In its 18 February 2020 reply to Quebecor’s complaint, the CBC stated that it has not given itself an undue preference and has not subjected any person to an undue disadvantage.
17. Based on the definition of “broadcasting distribution undertaking” in the Act, the CBC refuted Quebecor’s arguments that Tou.tv Extra is a BDU. It indicated that a BDU is an undertaking that distributes signals from a large number of Canadian programming services as well as, generally, a range of foreign programming services, in their entirety and without modification. The CBC noted that Tou.tv Extra is instead a broadcasting programming undertaking that transmits programs only on the Internet. This makes it a VSOD service under the meaning of Commission regulations, like other programming services of the same nature (for example, Netflix, Club illico, Crave and Amazon Prime Video).
18. Further, the CBC specified that over-the-top services, including Netflix and Club illico, offer a content library made up in part of first-run original programs and a vast array of films and programs that are broadcast or have previously been broadcast by various programming services. In addition, given that Tou.tv Extra is offered exclusively over the Internet, it is operated pursuant to the Exemption order.
19. The CBC also expressed the view that BDUs operating in French-language markets are not unduly disadvantaged. Quebecor, in support of its complaint, only invoked the decrease in the number of Videotron subscribers between 2013 and 2018. However, the statistical and financial summaries published by the Commission show that, during this period, cable and Internet Protocol television (IPTV) BDUs serving Quebec collectively experienced increases in subscribers and in total revenues. The CBC submitted that these data show that these BDUs were not subjected to a negative impact.
20. According to the CBC, the loss in Videotron subscribers has nothing to do with the arrival of Tou.tv Extra since there had been overall growth during that period. The CBC indicated that it does not possess information that would prove a negligible impact of its service Tou.tv Extra on Videotron. However, the CBC expressed the view that, according to data published by the Commission in statistical and financial summaries, the decrease in Videotron subscribers can instead be explained by Videotron’s inability to withstand competition, including that from IPTV BDUs. Furthermore, the CBC considered that the impact of Tou.tv Extra is extremely negligible.

21. In regard to exclusive content, the CBC indicated that Tou.tv Extra offers 51.35 hours of exclusive content out of an offering of approximately 3,500 hours, which represents approximately 1.5% of all programs offered by the service.
22. In regard to the complaint pursuant to paragraph 5 of the Exemption order, the CBC maintained that it has not granted exclusivity to TELUS given that it has attempted since 2012 to enter into such agreements with several distribution and mobile television companies, including Videotron. The CBC indicated that Rogers took advantage of the opportunity for a period of time, whereas Videotron declined. The CBC stated that it has never deliberately offered to a single company the same conditions of which TELUS avails itself. The CBC indicated that, on the contrary, it would be more beneficial to it that a greater number of companies accept its offer.
23. Further, the CBC submitted that all Canadians can access Tou.tv Extra over the Internet. According to the CBC, the agreement entered into with TELUS does not in any way call into question the universality of access since access does not depend on a subscription to TELUS's services. Free access made available by TELUS is possible because TELUS assumes the subscription fees.
24. The CBC specified that its agreement with TELUS is limited to subscribers to mobile and high-speed Internet services in Quebec and that not all eligible subscribers take advantage of the opportunity. The CBC added that TELUS's BDUs serve the smaller markets of Baie-Comeau, Montmagny, Rimouski and Sainte-Marie. As such, free access to the service in question is far from being offered to a base of a million subscribers.
25. The CBC submitted that instead of requesting Tou.tv Extra to cease activities, the logical solution to Quebecor's complaint would be to enter into a similar agreement with Videotron and all other interested companies. The CBC submitted that the relief proposed by Quebecor is completely out of proportion. The CBC concluded that Quebecor could have requested similar treatment rather than seek to eliminate a competitor of its service Club illico.
26. The CBC added that it operates Tou.tv Extra pursuant to the Exemption order because its service is only offered via the Internet. It specified that no BDU offers the service, which is offered only by subscription on the Tou.tv website or through an Apple application. It is accessed through the Internet website, applications and connected devices, such as telephones, tablets and smart televisions. The CBC added that Netflix, Amazon Prime Video and CBC Gem are comparable services given that they are also distributed only over the Internet.

TELUS

27. In its 18 February 2020 intervention, TELUS stated that there is no exclusivity in regard to the CBC's offer, or in regard to content. TELUS added that the agreement it entered into with the CBC does not create an advantage given that the CBC made similar offers to other companies. Under the offer reached with the CBC, the service Tou.tv Extra is offered free of charge to a portion of TELUS's mobile telephone and Internet customers in Quebec. According to TELUS, if any preference exists, it is not an undue preference given that conventional and IPTV BDUs together experienced

increases in revenues and subscribers. In support of this, it provided market share information showing that the Tou.tv Extra market share was well below those of Netflix and Club illico. TELUS added that in the case of a disadvantage, Quebecor should seek to enter into an agreement similar to that reached with the CBC rather than try to obtain a termination.

28. TELUS indicated that the CBC's offer is not exclusive to it, and that other distributors, including Videotron, can take advantage of it. TELUS stated that it does not have content exclusivity and that all Canadians can subscribe to Tou.tv Extra. It indicated that the agreement relates to marketing and not to distribution. Following the example of the CBC, TELUS noted that the service Club illico is offered free of charge to some Videotron subscribers.

Interventions

29. The Commission received interventions in regard to Quebecor's complaint from Cogeco Communications Inc. (Cogeco). This intervener shared Quebecor's concerns relating to the disadvantage experienced by BDUs in the French-language market that stemmed from the operation of over-the-top services, which are not subject to any regulatory obligations. Cogeco added that the operation of Tou.tv Extra by the CBC contributes to exacerbating the crisis affecting the Canadian broadcasting system.
30. The Commission also received an intervention from an individual, who indicated that although the service Tou.tv Extra is offered free of charge to some TELUS subscribers, the service is not truly free because subscribers pay for it indirectly in billing for their services. The intervener submitted that no one in its circle chose TELUS's services because of the free offer of Tou.tv Extra. The people in the intervener's circle whose mobile telephone provider is not TELUS indicated that this offer would not influence their choice of provider since they are satisfied with their current over-the-top services. The intervener also submitted that TELUS, as a BDU, serves smaller communities, the largest of which are cities such as Rimouski and Saint Georges, whereas Videotron serves the most significant population base in Montréal and in Québec.

Quebecor's reply

31. In its reply, Quebecor indicated that it had never entirely attributed Videotron's loss of subscribers between 2013 and 2018 to the introduction of Tou.tv Extra, but instead specified that the service contributed to the loss of subscribers. It added that the CBC has not provided any concrete evidence confirming that the offer of IPTV BDUs is the sole reason for the decrease in Videotron subscriptions. Further, according to Quebecor, it is impossible to separate Tou.tv Extra from the full range of competitive threats that weigh heavily on conventional BDUs and on the Canadian broadcasting system as a whole.

32. Quebecor also confirmed that it did not contest Tou.tv, a service that does not include the distribution of services of Quebecor's competitors. Further, Quebecor indicated that it was not opposed to the free availability of content from the public broadcaster on a digital platform. As such, Quebecor stated that it is completely false that the complaint constitutes an attempt to eliminate a direct competitor of its service Club illico. Quebecor further submitted that the total impact of Tou.tv Extra and of other over-the-top services has been damaging for the Quebec broadcasting system. It added that the services Club illico and Tou.tv Extra are not comparable. Club illico is a hybrid VOD service subject to different regulations than Tou.tv Extra, a service operated under the Exemption order. However, Videotron specified that Club illico is offered exclusively to its subscribers.
33. Quebecor explained that it is not calling into doubt the universality of access to Tou.tv Extra. It clarified its arguments regarding exclusivity by submitting that, although it may be by default, the CBC has conceded an exclusive and preferential right to TELUS by allowing it to be the sole television distributor and mobile telephone provider in Quebec to offer Tou.tv Extra free of charge to its clients.

Particulars of the complaint

34. Quebecor raised several concerns regarding the CBC's funding and its role in the digital sphere. In its view, the CBC [translation] "is deviating from its mandate as public broadcaster."
35. In a procedural letter dated 14 January 2020, Commission staff indicated that only issues relating to undue preference and to exclusivity of programming offerings pursuant to paragraphs 3 and 5 of the Exemption order would be examined by the Commission since many concerns of a policy nature lie outside the scope of what the Commission would typically address in the context of undue preference complaints.
36. Subsequent to the procedural letter, in its reply dated 28 February 2020, Quebecor stated the following:

[translation] It is important to recognize that it is not because the Commission indicated in its letter that certain issues raised in our application were of a policy nature that we should exclude the fact that Tou.tv Extra is a service of the public broadcaster. We consider it essential that the Commission takes this into consideration in its analysis of the file in question.

37. Further, Quebecor submitted that since Tou.tv Extra is the public broadcaster's SVOD service, the CBC has deviated from its mandate, which must be carried out from a complementary and collaborative perspective with the private sector, rather than in competition with it. Quebecor also submitted that the service offering is not in the public interest.
38. Quebecor raised a number of concerns in the context of the present proceeding, including the role and mandate of the CBC, its financing and its role in the digital sphere. Although the Commission will only render a decision on issues that fall

under the regulatory framework set out for decisions relating to matters of undue preference, it nevertheless recognizes that several of the issues were raised in the context of the proceeding launched by Broadcasting Notice of Consultation 2019-379.

39. Consequently, the Commission will not examine these arguments in the context of the present decision since they lie outside the scope of the issues that the Commission typically reviews in the context of an undue preference complaint.

Commission's analysis and decisions

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

- Has the CBC given an undue preference to itself and to TELUS by offering its pay SVOD service Tou.tv Extra in a manner that subjects other BDUs, including Videotron, to a disadvantage?
- Has the CBC contravened the rule relating to exclusivity?

Has the CBC/SRC given an undue preference to itself and to TELUS by offering its pay SVOD service Tou.tv Extra in a manner that subjects other BDUs, including Videotron, to a disadvantage?

41. The Commission notes the concerns raised by Quebecor in regard to the nature of the service Tou.tv Extra. However, the Commission considers that Tou.tv Extra, unlike BDUs operated pursuant to the Regulations, distributes a library of programs and not the signals of services in their entirety, despite the fact that Tou.tv Extra promotes programs by displaying the logo of the services in question. The Commission notes that the CBC indicates, just above the logos of the various services, that Tou.tv Extra offers [translation] “a wide range of programs from the [following] channels.” The Commission is therefore of the view that the service Tou.tv Extra does not possess the characteristics of a conventional BDU and, instead, is an SVOD service distributed over the Internet, like other over-the-top services such as Netflix and Club illico, and that the service meets the definition of a digital media undertaking operating pursuant to the Exemption order.
42. In light of the above, the Commission finds that Tou.tv Extra is not a BDU and bears no resemblance to one. Accordingly, the Commission considers that it would be appropriate to examine the complaint pursuant to the framework set out in the Exemption order. Further, as an undertaking operating pursuant to the Exemption order as opposed to BDUs operating pursuant to the Regulations, Tou.tv Extra is not obliged to offer a basic package or to contribute to Canadian programming in the same way as for a BDU.
43. In regard to undue preference or disadvantage, paragraph 3 of the Exemption order sets out the following:

The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not

undue is on the party that gives the preference or subjects the person to the disadvantage.

44. 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. If the Commission finds a preference or disadvantage does exist, it must then determine whether it is undue. To make this determination, the Commission considers whether the preference or the disadvantage has had, or is likely to have, a significant adverse impact on the complainant or on any other person, or an impact on the achievement of the objectives of the broadcasting policy for Canada set out in the Act. The burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the other party to the disadvantage. However, this does not relieve the complainant from the obligation to provide sufficient proof to support its request.
45. In regard to the issue of whether other BDUs are disadvantaged by the CBC's offer of Tou.tv Extra, the Commission notes that the CBC expressed its intention to negotiate similar offers with other companies, including Videotron, and that Rogers has in the past taken advantage of the offer while Videotron has declined. The fact that TELUS is the only company that currently avails itself of this offer does not prove that the CBC has given a preference to TELUS or has subjected Videotron to a disadvantage. Further, since Tou.tv Extra is not a BDU, TELUS, through its offer of the service on the Internet or on mobile, is not operating a BDU without a licence in the territory covered by Videotron. Consequently, the Commission finds that no preference or disadvantage exists in this regard.
46. The Commission notes the arguments by Quebecor according to which Tou.tv Extra is bringing about unfair competition and contributing to the migration of television viewers to unregulated platforms, which would be to the detriment of the conventional distribution system, would disadvantage conventional BDUs, and would weaken the Canadian broadcasting system. However, the Commission considers that at the time the complaint was filed, the offer of the service Tou.tv Extra did not create a disadvantage under the current regulatory framework, the service being instead a competitive offer to the benefit of the Canadian broadcasting system and of Canadians.
47. As set out in Broadcasting Regulatory Policy 2015-86 (Let's Talk TV), the Commission chose to allow a more on-demand and tailored television environment for Canadian companies so that they may compete with non-Canadian over-the-top companies. More specifically, the Commission stated the following:

Over the next several years, Canadians will continue to migrate from scheduled television and packaged programming services to a more on-demand and tailored television environment. Canadians will seek even greater control over the programs they watch and will access video programs on an even wider array of devices. This new environment will require a concerted effort by all players in the broadcasting system,

including governments and the Commission, to find new and innovative approaches to support the creation of compelling and diverse programming.

48. Generally, it is possible that, for a television viewer, SVOD services provided over the Internet may constitute an option other than that of conventional BDUs. Moreover, the public record of the present proceeding tends to show that more and more companies are offering such services in the French- and English-language markets.
49. For these reasons, the Commission finds that the CBC is not giving a preference either to itself or to TELUS, and is not subjecting Videotron or any other BDU to a disadvantage. Consequently, the Commission, by majority decision, **dismisses** the undue preference complaint that was filed by Quebecor pursuant to paragraph 3 of the Exemption order, in regard to the distribution of the service Tou.tv Extra by the CBC.

Has the CBC contravened the rule relating to exclusivity?

50. Paragraph 5 of the Exemption order sets out the following:

Subject to paragraph 6, the undertaking does not offer television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service.

51. In Broadcasting Regulatory Policy 2011-601 (the vertical integration policy), the Commission prohibited the exclusive distribution of television programming under certain circumstances and indicated that:

... [vertically integrated] entities have both the opportunity and incentive to give undue preference by providing themselves with exclusive access, on various distribution platforms, to content that they control. As a result, a consumer would have to subscribe to the distribution platform owned by the [vertically integrated] entity to have access to the exclusive content.

... permitting [vertically integrated] entities to exercise exclusivity with respect to the distribution on new media platforms of programming designed primarily for conventional television, specialty, pay and VOD services would result in harm to consumers and the competitiveness of the industry. The Commission further considers that the same harm would result if industry players that are not [vertically integrated] entities exercised such exclusivity.

52. The prohibition on exclusivity aimed to prevent undertakings operating pursuant to the Exemption order from granting exclusive access to programming designed primarily for conventional television, specialty, pay and VOD services, if access to these programs is dependent on having a subscription to a specific mobile service or a particular retail Internet access service.

53. In the case of Tou.tv Extra, the service is offered by the CBC to all Canadians over the Internet and does not depend on having a subscription to a specific mobile service or a particular retail Internet access service. The notion of exclusivity as set out by the Commission in the vertical integration policy and incorporated into the Exemption order is therefore not called into question.
54. In addition, the Commission notes that Rogers has already taken advantage of the offer and that the CBC confirmed that it presented the offer to Videotron. Although TELUS was the only company to benefit from the offer at the time of the complaint, the Commission considers that it would be inappropriate to penalize the CBC when the service had been offered to other companies, including Videotron.
55. For the above reasons, the Commission finds that the CBC did not contravene the rule relating to exclusivity set out in paragraph 5 of the Exemption order. Consequently, the Commission, by majority decision, **dismisses** Quebecor's complaint regarding the rule relating to exclusivity of programming offerings set out in paragraph 5 of the Exemption order.

Secretary General

Related documents

- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2019-379, 25 November 2019
- *Let's Talk TV – The way forward – Creating compelling and diverse Canadian programming*, Broadcasting Regulatory Policy CRTC 2015-86, 12 March 2015
- *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, Broadcasting Order CRTC 2012-409, 26 July 2012
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011