



# Broadcasting Decision CRTC 2022-138

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Reference: Part 1 application posted on 31 January 2022

Ottawa, 30 May 2022

**BCE Inc.**  
Across Canada

*Public record: 2021-0860-5*

## **Complaint by BCE against Videotron alleging non-compliance in regard to the offering of its Vrai hybrid video-on-demand service**

### **Summary**

The Commission finds that Videotron Ltd. did not contravene sections 3, 12 and 13 of the exemption order for video-on-demand undertakings or section 9 of the *Broadcasting Distribution Regulations*.

Accordingly, the Commission **dismisses** the complaint by BCE Inc.

### **The parties**

1. BCE Inc. (BCE) offers wireless, Internet, television, smart home and business services through its networks, as well as residential and wireless telephone services. As the second largest broadcasting distribution undertaking (BDU) in Quebec and Canada, it distributes broadcasting services across the country. It also includes the Bell Media Inc. subsidiary, a multimedia company that owns, among other things, several television and online assets, such as the Crave hybrid video-on-demand (HVOD) service.
2. Videotron Ltd. (Videotron), a subsidiary of Quebecor Media Inc. (Quebecor), operates the largest BDUs in Quebec. It also operates the Helix Internet protocol television platform as well as the HVOD services Vrai and Club illico.

### **The complaint**

3. On 17 August 2021, Videotron launched the Vrai HVOD service, which offers lifestyle content and reality shows. Videotron is not currently offering this service to other BDUs. On 15 September 2021, Videotron began offering the Vrai service as an online direct-to-consumer (DTC) service.
4. On 17 November 2021, BCE filed a complaint against Videotron alleging that Videotron was violating section 12 of the exemption order for video-on-demand undertakings (HVOD exemption order), set out in Broadcasting Order 2015-356, and

section 9 of the *Broadcasting Distribution Regulations* (the Regulations) by distributing the Vrai service on an exclusive basis. Section 12 of the HVOD exemption order specifies that all programming of a HVOD service for which rights are held on an exclusive basis must also be distributed and accessible via the Internet, while section 9 of the Regulations addresses undue preference and disadvantage.

5. BCE raised four arguments in support of its complaint:
  - The \$15 price for the online DTC subscription to Vrai is higher than the \$7 price paid by Helix subscribers;
  - Online DTC subscribers can only access content on one device at a time, while Helix subscribers can access the service's content simultaneously on up to five devices at a time;
  - Access to the DTC Vrai service over the Internet is limited to the QUB website and application,<sup>1</sup> while Helix subscribers can access the service directly on their TV; and
  - The experience of online DTC subscribers to the Vrai service is centred on Videotron's BDUs since they are automatically directed to Videotron's websites and to promotional offers for subscribing to its BDUs when they want to subscribe to the Vrai service.
6. According to BCE, by implementing a lower quality offering for consumers that are not subscribed to Helix and directing them to promotional offers for their products, Videotron intends to maintain *de facto* exclusivity for its BDUs and to use the Vrai service to increase the number of subscriptions to its BDUs. BCE argued that Videotron is attempting to create a competitive advantage for its own BDUs.
7. In BCE's view, the differences between the offers violate the Commission's policy and the spirit and intent of the HVOD exemption order. In support of its claim, BCE referred to section 5 of the Exemption order for digital media broadcasting undertakings (DMEO), set out in Broadcasting Order 2012-409. This section refers to situations where television programming is offered on an otherwise preferential (not just exclusive) basis.
8. BCE stated that while there may be differences in service offerings, Videotron has an obligation to comply with the HVOD exemption order and should allow consumers who do not subscribe to Helix to purchase the online DTC Vrai service at a price comparable to that offered by Videotron.

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<sup>1</sup>QUB is a Quebecor-owned digital content aggregator that consolidates Quebecor's current news and entertainment content platforms into one place. QUB includes the Vrai service.

9. Accordingly, BCE requested that the Commission order Videotron to remove the Vrai service from its BDUs until such time as an offer similar to that made to Helix subscribers is made to other Canadian consumers.

### **Quebecor's answer**

10. In its 10 February 2022 response, Quebecor, on behalf of Videotron, stated that the Vrai service operates in accordance with the HVOD exemption order, not the DMEQ. Quebecor also argued that BCE's request is based on a misinterpretation of the regulatory framework.
11. Quebecor stated that the way the Vrai service is offered provides greater flexibility and choice for consumers, who are free to choose the platform that best meets their needs. It added that the content offering is exactly the same for Helix subscribers as it is for online DTC subscribers and that no content is offered exclusively to its Helix subscribers.
12. Quebecor added that BCE's allegations that Videotron is seeking to increase its subscriber base are unfounded as the DTC Vrai service already has a good number of subscribers, and Videotron has even launched a marketing campaign to promote its Internet-based service.
13. In addition, Quebecor specified that the HVOD exemption order does not stipulate that the online marketing terms and conditions must be identical to those offered through terrestrial distribution. Quebecor indicated that Videotron's offer meets the requirement that all programming on a HVOD service be distributed and accessible via the Internet, in a way that is not dependent on a subscription to any specific broadcasting distribution undertaking, mobile service or retail Internet access service.
14. In response to BCE's argument regarding the price difference between the offering to Helix subscribers and that offered to online DTC subscribers, Quebecor stated that BCE is not citing any specific regulatory provision and that BCE itself offers its Crave service at various prices.
15. With respect to watching on multiple devices simultaneously, Quebecor indicated that technical limitations as well as content rights negotiation issues explain the difference between platforms.
16. Quebecor also argued that Videotron does not favour one option over another and that consumers clearly have the choice of subscribing to the Vrai service through Helix or the QUB application, which is free and without commitment. In addition, Quebecor argued that BCE is not justified in invoking section 5 of the DMEQ since the Vrai service is registered as a HVOD service with the Commission and must comply with the requirements of the exemption order for video-on-demand undertakings.
17. Finally, Quebecor indicated that BCE is alleging that Videotron breached the undue preference clause without, however, providing any arguments or evidence to support

this allegation. Accordingly, Quebecor requested that the Commission dismiss the undue preference complaint.

### **Bell's reply**

18. In its 15 February 2022 reply, BCE argued that Videotron had conferred an undue preference on itself while placing competing BDUs at an undue disadvantage. Specifically, BCE stated that the distribution of the Vrai service through BDUs is limited to Videotron and that the retail price set for the online DTC service is much higher. BCE also argued that online DTC subscribers do not receive the same features as Helix subscribers. Thus, according to BCE, Helix subscribers receive an advantage, while other consumers are disadvantaged.
19. In addition, BCE raised the undue preference provision in the HVOD exemption order and stated that in its view, it is intended to cover precisely these types of preferential treatment cases.
20. Finally, BCE reiterated that the differences between the online DTC offering and the Helix offering violate the intent and spirit of the HVOD exemption order. In BCE's view, the exemption order, as established by the Commission, is intended to allow Canadian video-on-demand services to compete with foreign services and not to provide distribution advantages to its own affiliated BDUs. BCE added that the exemption order is also intended to ensure that Canadians can access programming offered by online platforms operating in Canada.

### **Interventions**

21. The Commission received an intervention in support of BCE's complaint from the Public Interest Advocacy Centre (PIAC). PIAC argued that the services offered through the DTC Vrai service are significantly inferior to those offered to Helix subscribers, which violates the spirit and intent of the HVOD exemption order and the undue preference clause. However, in PIAC's view, Videotron should not cease distributing the Vrai service until it modifies its online DTC service offering, since this would be detrimental to current online DTC customers.
22. In its intervention, PIAC indicated that it doubts that the online DTC Vrai service will really compete with the many foreign services available, which are cheaper and offer more features. In PIAC's view, the Vrai service offered on the online DTC service and through the BDU should be sufficiently similar so that the value of the services is comparable in the eyes of consumers. To do otherwise would set a precedent for Canadian companies wishing to take advantage of the HVOD exemption order to present a significantly inferior offering that does not compete with foreign online services, thereby negatively impacting Canadian consumers.

### **Procedural request**

23. PIAC filed its intervention on 11 February 2022, one day after the expedited deadline. PIAC stated that it had inadvertently filed its intervention late and had not seen the

other interventions. PIAC asked the Commission to accept its intervention into the record. In an email to Commission staff, Quebecor objected to the late filing of the intervention.

24. Since the delay in filing the intervention is minimal and PIAC had not seen Quebecor's response before filing its intervention, the Commission considers that the late filing of the intervention is without prejudice to the parties. In addition, the public interest intervention provides a different perspective on the record. As a result, the Commission accepts PIAC's intervention and considers it part of the record of the present proceeding.

## **Issues**

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

- whether Videotron contravened sections 12 and 13 of the HVOD exemption order; and
- whether Videotron is giving an undue preference to its Helix subscribers, and to itself, by providing them with a better offer for Vrai, thereby subjecting other BDUs, including BCE, or consumers not subscribed to Helix, to an undue disadvantage.

### **Has Videotron contravened sections 12 and 13 of the HVOD exemption order?**

26. BCE alleged that Videotron has contravened section 12 of the HVOD exemption order, which states:

12. (...) the undertaking offers its service over a broadcasting distribution undertaking provided that all of the programs for which the rights are held on an exclusive basis are also delivered and accessed over the Internet.

27. The Commission notes that section 13 of the HVOD exemption order is closely related to section 12:

13. Where the service is delivered and accessed over the Internet as described in paragraph 12 above, it shall not be offered in a way that is dependent on a subscription to any specific broadcasting distribution undertaking, mobile service or retail Internet access service.

28. Videotron is the only BDU that distributes the Vrai service and there is no indication on the record that Videotron has offered the service to other BDUs. The Commission notes that exclusive distribution is not prohibited under sections 12 and 13 of the HVOD exemption order, provided that the distribution of the Vrai service complies with the requirements set forth in those sections.

29. Based on the record, the Vrai service is distributed and accessible over the Internet and the content offered is exactly the same as that offered to Helix customers. In

addition, subscribing to the online DTC Vrai service is done independently, without the need to subscribe to a particular BDU, Internet provider or mobile service. Specifically, subscription to the service requires the creation of a QUB account on the website, which is free and without obligation.

30. The Commission notes that the core of BCE's allegations is that by not offering Vrai to other BDUs and by purposely making an offer to non-subscribers to Helix that is very difficult to sell, Videotron is maintaining *de facto* exclusivity on the distribution of Vrai and offering the service in such a way that access is dependent on a subscription to its BDU.
31. Sections 12 and 13 of the HVOD exemption order do not state that the rates or terms and conditions of delivery of the online and BDU must be identical, or even comparable. The terms and conditions of the exemption order require only that consumers be able to access all programming through the online version, without subscribing to a specific BDU, Internet provider or mobile service. The Commission considers that BCE's allegations of *de facto* exclusivity based on the terms and conditions of distribution of the service is more properly considered under the undue preference and disadvantage provisions.
32. Accordingly, given that the content of the online Vrai service is the same as that distributed to Helix customers, and that the online service is offered without a subscription to a specific BDU, mobile or Internet service, the Commission finds that Videotron has not violated sections 12 and 13 of the exemption order.
33. BCE cited section 5 of the DMEQ in support of its argument that the Commission's policy does not only limit exclusive distribution, but also includes preferential distribution. The Commission notes that because Vrai is registered with the Commission as a HVOD service, it operates under the HVOD exemption order. Consequently, the DMEQ does not apply to the Vrai service and the Commission has not considered the DMEQ in its analysis for the present decision.

#### **Is Videotron giving an undue preference to its Helix subscribers and to itself?**

34. In its complaint, BCE also alleged that Videotron contravenes section 9 of the *Broadcasting Distribution Regulations* relating to undue preference and disadvantage, which 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.
35. The Commission notes that HVOD services are subject to the undue preference and disadvantage provisions included in the HVOD exemption order under section 3. This provision states:

3. 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.
36. 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.
37. If the Commission finds that there is a preference or a disadvantage, it 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 *Broadcasting Act* (the Act).

**Is there a preference or disadvantage?**

38. BCE stated that Videotron is giving itself and its Helix subscribers preferential treatment and is putting other BDUs, including BCE, and non-subscribers to Helix at a disadvantage.
39. According to the record of the present complaint, Helix subscribers and online subscribers (which may include both non-Helix subscribers and non-Videotron subscribers) to Vrai have access to the same programming. Helix subscribers can receive the Vrai service free for three months and then pay \$7 per month,<sup>2</sup> while non-subscribers to Helix pay \$15 per month. In addition, Helix subscribers can view the content directly on their TV, as well as on their mobile device and computer, with the ability to watch the service on up to five devices simultaneously. Online subscribers can view content on their mobile device or computer, but are allowed to watch on only one device at a time. They can also view the content on their TV, but only through Chromecast or Airplay. Finally, to access the Vrai service, Helix subscribers must add the service the same way they add a channel to their TV package, while online subscribers must create a QUB account through the QUB website or app.
40. Comparing the offering of the Vrai services to online customers with those offered to Helix customers, it is clear that Helix customers benefit from a better price for the service as well as technical advantages. Accordingly, the Commission considers that Videotron is offering preferential treatment to its Helix subscribers and is thereby giving itself a preference. Online customers and potential customers are subject to a disadvantage, as they have to pay more for the same service and do not have access to all the same features.
41. According to BCE, potential customers who want to subscribe to the Vrai service online are confronted with the Quebecor ecosystem, which shows a preference for BDU subscriptions over online subscriptions. The Commission is of the view that the

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<sup>2</sup> At the moment of the BCE complaint. The current price is now \$5 per month.

online subscription process is straightforward and that there are no technical difficulties that would make the subscription process confusing and penalize consumers who want to subscribe to the service online.

42. In light of the above, the Commission finds that Videotron has given itself and its Helix subscribers a preference and has placed non-subscribers to Helix at a disadvantage.

**Are the preference or disadvantage undue?**

43. If the Commission finds that there is a preference or a disadvantage, it 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. Videotron has the responsibility to demonstrate that the preference and disadvantage were not undue.
44. The Commission recognizes that Videotron is likely seeking to promote its interconnected Helix technology to its own (non-Helix) subscribers and to consumers who do not subscribe to Videotron. The Commission considers that the undue preference clauses in the HVOD exemption order and the Regulations do not prevent BDUs and HVOD services from implementing business strategies to attract subscribers, provided that any preference or disadvantage afforded by these practices is not undue.
45. As stated by Quebecor in its response, there is nothing in the regulatory requirements that specify that the offers must be identical in terms of rates and terms and conditions of distribution. BCE does not consider that the offers must be identical, but still considers that the difference between the offers in this case is unacceptable. Ultimately, whether or not variations in the offers violates the undue preference clause depends on the facts of each case.
46. In the present case, Quebecor stated that the differences between the services offered on the two platforms are due to certain technical limitations as well as issues related to content rights negotiations. Quebecor, however, cited a few advantages that subscribers to the online service have, such as the fact that the QUB app is compatible with Airplay and Chromecast technologies, whereas this feature is not available with Helix. Quebecor also stated that the DTC Vrai service already has a good number of subscribers and that Videotron has even launched a marketing campaign to promote its Internet subscription service. The services offered online also provide the ability to subscribe from anywhere in Canada, and the subscription process on QUB's website is free, with no commitment, and requires no additional equipment.
47. In addition, the Commission considers that the additional monthly cost to non-subscribers to Helix (i.e. \$8 to \$10 more than Helix subscribers) for a French-language service such as Vrai is not unreasonable. In the Commission's view, the price for the Vrai service online is reasonably comparable to those for other Canadian

online streaming services. The consumer has the ability to examine the various offers and make a choice.

48. With respect to the impact on achieving the objectives of the Act, the Commission notes that according to Quebecor's response, the Vrai service provides greater choice for Canadian consumers and a new window of opportunity for Francophone producers and artisans, which benefits the Canadian broadcasting system. Moreover, there is nothing in the record to suggest that Videotron's actions have had, or could have, a negative impact on achieving the objectives of the Act. The Commission concludes that there is little, if any, adverse impact on achieving the objectives of the Act.
49. In light of the above and the specific circumstances of this case, the Commission finds that the preference and disadvantage are not undue.

## **Conclusion**

50. The Commission finds that Videotron did not contravene sections 3, 12 and 13 of the HVOD exemption order or section 9 or the *Broadcasting Distribution Regulations*.
51. Accordingly, the Commission **dismisses** the complaint by BCE.

Secretary General

## **Related documents**

- *Revised exemption order for certain classes of video-on-demand (VOD) undertakings and updated standard conditions of licence for licensed VOD undertakings*, Broadcasting Regulatory Policy CRTC 2015-355 et Broadcasting Order CRTC 2015-356, 6 August 2015
- *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