



Broadcasting Decision CRTC 2023-22

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Ottawa, 3 February 2023

Bell Media Inc.
Across Canada

Public record: 2022-0550-0

Complaint by Bell Media against Videotron alleging undue disadvantage and preference regarding the distribution of VRAK and Z

Summary

The Commission finds that Videotron Ltd. has not conferred upon itself a preference or subjected Bell Media Inc. or its services, VRAK and Z, to a disadvantage.

Accordingly, the Commission **dismisses** the complaint by Bell Media Inc., thereby ending the standstill with regard to the distribution of the VRAK and Z services. The Commission encourages the parties to continue to work towards a resolution.

Parties

1. Bell Media Inc. (Bell Media) is owned by BCE Inc., which operates one of the largest broadcasting distribution undertakings (BDU) in Quebec and Canada. Bell Media owns multiple programming services, including the French-language discretionary services VRAK and Z (the Services).
2. Videotron Ltd. (Videotron) is a subsidiary of Quebecor Media Inc. and operates the largest BDU in Quebec. Videotron also owns multiple French-language programming services in Quebec.

Background

3. On 26 May 2022, Videotron notified Bell Media of its intention to cease distribution of the Services. On 1 June 2022, Bell Media filed a notice of dispute with the Commission and requested that the Commission notify Videotron of its obligations pursuant to the standstill rule (explained at paragraph 10 below) during the dispute resolution process.
4. In a letter dated 6 June 2022, Videotron argued that it was within its rights to cease distribution of the Services. Videotron stated that the parties are not in a dispute and that therefore the standstill rule does not apply.

5. On 10 June 2022, Commission staff issued a letter to the parties confirming that the standstill rule was in effect, established an expedited process for dealing with the dispute, while providing the applicant and respondent an opportunity to resolve their outstanding issues in a collaborative way.
6. On 11 August 2022, Bell Media filed a complaint against Videotron alleging that, in violation of section 9 of the *Broadcasting Distribution Regulations*, Videotron was conferring an undue disadvantage on Bell Media by expressing its desire to cease distribution of the Services while continuing to distribute other comparable services, and an undue preference onto itself, including to services licensed to Videotron's related programming undertaking, TVA Group Inc. (TVA).

Regulatory framework

7. Paragraph 10(1)(h) of the *Broadcasting Act* (the Act) authorizes the Commission, in furtherance of its objects, to make regulations for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings.
8. BDUs and programming undertakings may therefore avail themselves of the dispute resolution regime by virtue of the provisions set out in applicable conditions of licence and in sections 12 to 15.02 of the *Broadcasting Distribution Regulations* and sections 14 and 15 of the *Discretionary Services Regulations* which were enacted pursuant to paragraph 10(1)(h) of the Act.
9. The standstill rule in particular, set out in section 15.01 of the *Broadcasting Distribution Regulations*, states that during a dispute concerning the carriage or terms of carriage, the licensee shall continue to distribute the programming services at the same rates and on the same terms and conditions as it did before the dispute, until an agreement settling the dispute is reached by the concerned undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter. The standstill rule applies automatically upon the filing of a notice of dispute.
10. Furthermore, section 9 of the *Broadcasting Distribution Regulations* provides that:
 - a licensee shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage; and
 - 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.
11. The Commission has the authority, pursuant to subsection 9(1) of the Act, to issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee as it deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1) of the Act, as well as to amend those conditions.

12. The appendix to Broadcasting Regulatory Policy 2015-438 sets out the Commission's Wholesale Code, adherence to which is imposed by condition of licence, which guides certain aspects of commercial arrangements between BDUs and programming services.
13. Finally, in Broadcasting Regulatory Policy 2015-96 (Let's Talk TV), the Commission set out a roadmap to give Canadians more choice when it comes to the selection and packaging of their TV services. In that regulatory policy, the Commission announced that access privileges would be phased out for all discretionary services in recognition of an increased reliance on market forces for the distribution and packaging of such services. In that policy, the Commission acknowledged that with an increased reliance on market forces for the distribution and packaging of services, and in an environment designed to favour consumer choice, some services may not survive.

Complaint

14. In its complaint of 11 August 2022 in which it alleged the Videotron was conferring an undue preference on itself and an undue disadvantage on Bell Media by seeking to cease distribution of the Services while continuing to distribute other services, Bell Media argued that:
 - Given the Commission's previous determination in Broadcasting Decision 2009-590 that Bell ExpressVu Limited Partnership and Videotron are comparable entities because they both distribute programming in Quebec, it follows that the French-language discretionary services that they are distributing are comparable.
 - Videotron is the dominant BDU in Quebec with a 57% share of the distribution market and can essentially dictate the success or failure of unrelated French-language programming services. This gives Videotron the ability to protect its own services by intentionally dropping the Services or other market players.
 - The French-language market is much smaller than the English-language market, not just in terms of subscribers but also in terms of the amount and variety of programming available – for Videotron to cease distribution of Bell Media's services will reduce consumer choice in that market.
 - Viewership data does not support Videotron's decision.
 - Ceasing distribution of the Services will have a material adverse impact on the Services and undermine the achievement of the objectives of the Act.
15. In addition, Bell Media argued that in Broadcasting Decision 2019-429, the Commission suggested that comparability is more pronounced in the French-language market "given the limited number of programming service options" and that the Commission also considered "the way the content is offered" as an indicator of comparability.
16. Bell Media indicated that the preference was undue because it would have a material impact on the Services and in particular, would result in a notable reduction in the

Services' subscriber base, as well as a notable reduction in revenue. Bell Media argued that the viability of the Services would therefore be threatened.

Videotron's answer

17. In its 12 August 2022 response, Videotron expressed the view that Bell Media's complaint represented an abuse of process: Bell Media was seeking to prolong the carriage of the Services for as long as possible rather than actually alleging undue preference.
18. Videotron argued that TVA's services are not comparable to the Services. Videotron noted that as reported in Broadcasting Decision 2020-347, Bell Media itself indicated that no other service can be compared directly with VRAK. As the Services are not comparable, the question of preference or disadvantage is therefore moot.
19. In addition, Videotron argued that providing the Services with *de facto* access rights by forcing Videotron to carry them would run counter to the Commission's Let's Talk TV policy objectives where market forces are meant to push undertakings to remain relevant and improve their programming in innovative ways. Videotron also noted that the Commission previously explained in Broadcasting Decision 2016-82 that merely ceasing to distribute a service while continuing to distribute other services is not enough to establish undue preference.
20. Videotron stated that it is within its rights to cease distribution of the Services and that it has no legal or regulatory obligation to distribute them. Videotron specified that its decision takes into account both the poor performance of the Services and Bell Media's "unreasonable" proposed rates.

Bell Media's reply

21. Bell Media argued that it is not seeking *de facto* access for the Services. It expressed the view that if the alleged undue preference was remedied, Videotron would continue to distribute the Services and drop other underperforming services (i.e. TVA's services).
22. Bell Media provided additional data to demonstrate that the Services are competitive. It specified that VRAK has increased in popularity since it shifted its programming in spring 2022 to focus on procedural dramas and films, more than doubling its audience and market share. Bell Media noted that VRAK's redesign featured a shift to fictional programming, with similar fictional offerings to TVA's addikTV and target a similar audience.
23. Finally, Bell Media stated that Videotron's choice constitutes an undue preference because it would have an impact on the achievement of the Canadian broadcasting policy objectives set out in the Act. In particular, the loss of the Services would result in a reduction in the diversity of voices in the more fragile French-language market. In addition, the loss of these Services would result in the loss of the Canadian content that they provide.

Issues

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

- whether Videotron was conferring upon itself an undue preference and subjecting Bell Media to an undue disadvantage by ceasing to distribute the Services while continuing to distribute other comparable entities; and
- whether to end the dispute, thereby lifting the standstill rule.

Undue preference or disadvantage

25. 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. A preference or disadvantage is generally defined as dissimilar treatment of comparable entities. The Commission considers whether there exists comparable entities as an initial step in examining whether there has been dissimilar treatment, and therefore a preference or disadvantage. In Broadcasting Decision 2019-427, the Commission stated that the term “comparable” should not be strictly defined, as its meaning depends on the context of a dispute and is best assessed on a case-by-case basis.
26. If the Commission finds that a preference has been given or that 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. The Commission 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.
27. The Commission notes that in Broadcasting Decision 2009-590 cited by Bell Media, the Commission was considering whether Videotron, a BDU, was conferring upon itself a preference, particularly as it gave itself sponsorship opportunities on certain TVA programs while it did not give Bell ExpressVu Limited Partnership, also a BDU, such opportunities. The Commission therefore determined that the comparable entities were at the BDU level and, accordingly, considered whether there was dissimilar treatment of the BDUs, not of the specific services provided by those BDUs¹. As result, the Commission considers that the facts of that case are not analogous to those in the present case.
28. As noted above, Videotron argued that VRAK and Z are not comparable to any of its services and pointed to Bell Media’s own arguments that no other service can be compared directly with VRAK. In its application, Bell Media failed to provide relevant evidence regarding the comparability of specific services and their content. Bell Media argued instead that any of TVA’s or Bell Media’s French-language discretionary services

¹ The Commission considers that the current application is more analogous to the comparability assessments made in Broadcasting Decision 2019-427 and Broadcasting Decision 2019-429 in which it considered undue preference complaints with respect to programming services.

as well as other French-language discretionary services distributed in Quebec are comparable entities. Bell Media also noted that TVA's and Bell Media's French-language discretionary services are offered on various multiplatform options including terrestrial and satellite distribution. In its reply, Bell Media submitted that VRAK's programming is now more similar to the programming of TVA's service addikTV. The Commission notes that Bell Media did not provide evidence to support this assertion.

29. The Commission finds that the fact that the Services in question are French-language discretionary services distributed by BDUs is not a sufficient basis to find that they are comparable to TVA's discretionary services or other French-language discretionary services distributed by TVA. Furthermore, Bell Media's general statement regarding the various distribution options for French-language services does not demonstrate the existence of comparable entities in this case.

30. Therefore, the Commission finds that Bell Media has failed to demonstrate that TVA distributes other services that are comparable to VRAK and Z. Given the lack of comparable entities, the Commission is therefore unable to find a preference or disadvantage based on the record of this proceeding. Accordingly, the Commission does not need to determine whether the preference or disadvantage is undue.

31. In light of the above, the Commission dismisses the complaint by Bell Media.

Ending of the dispute and lifting of the standstill rule

32. As noted above, in its 10 June 2022 letter to the parties, Commission staff confirmed that the standstill rule was in effect until the resolution of the current dispute.

33. In Broadcasting Regulatory Policy 2015-96, the Commission noted that the standstill rule should not be invoked lightly, nor be relied upon to grant an effective access right. The standstill rule is intended to ensure that Canadians do not lose access to their favourite programming services while BDUs and programming undertakings dispute the terms and conditions of carriage. It is not intended to protect or defend the interests of either party. The Commission will intervene if it suspects that parties are invoking the standstill rule in such a manner, to thwart good faith negotiations or to insulate a given service from the impacts of greater consumer choice.

34. In analyzing any dispute concerning the standstill rule, the Commission will take into consideration whether the party has demonstrated a valid commercial reason for ceasing distribution of the services, whether the parties have had a fair chance at negotiations, and whether the other party has demonstrated that continued Commission intervention to uphold the standstill rule is warranted.

35. The Commission considers that the evidence supports Videotron's assessment that the Services' popularity and viewership are in decline. Further, the Commission notes Videotron's submission that viewership is not the sole reason for its decision to terminate the Services. Videotron is engaged in a larger commercial rationalization of the services it distributes, which includes an analysis of the services, their financial profitability

including performance and popularity, the added value to Videotron's other offerings and to the Canadian ecosystem, and the cost of the services. Videotron noted that the other French-language services listed by Bell Media have more stable viewership levels and wholesale rates that are lower than VRAK's.

36. Accordingly, the Commission finds that Videotron has demonstrated valid commercial reasons for ceasing to distribute the Services. Additionally, based on this finding, and on the flexibility of the current policy framework which emphasises consumer choice and acknowledges that some services may not survive as a result, it has not been demonstrated that continued Commission intervention is warranted.
37. With regard to whether parties have had a fair chance at negotiations, the Commission notes that both parties are vertically integrated BDUs that are dominant players in the Canadian broadcasting market. Therefore, there is no imbalance in bargaining positions that would call for Commission intervention.
38. In light of the above, the Commission hereby ends the dispute regarding the distribution of VRAK and Z by Videotron. Accordingly, the standstill with regard to the distribution of the Services is no longer in effect.
39. The Commission notes that the lifting of the standstill does not mean that Videotron is now required to cease distribution of the Services. The Commission encourages the parties to continue to negotiate distribution terms, with or without assistance from Commission staff.
40. The Commission considers that the matters raised in this application are of a commercial nature and would have been more appropriately dealt with in the context of the parties' negotiations. While the parties may call on the Commission to facilitate the resolution of complaints, the Commission generally expects parties to make reasonable efforts to resolve their disputes before bringing such matters to the Commission for disposition.

Secretary General

Related documents

- *Final offer arbitration between Cogeco Connexion Inc. and Bell Media Inc. regarding the distribution of VRAK*, Broadcasting Decision CRTC 2020-347, 2 October 2020
- *Complaint by Bell Media against Videotron alleging undue preference regarding the packaging of Super Écran*, Broadcasting Decision CRTC 2019-429, 19 December 2019
- *Complaint by Quebecor, on behalf of TVA, against Bell, represented by BCE, alleging undue preference regarding the packaging of TVA Sports*, Broadcasting Decision CRTC 2019-427, 19 December 2019

- *Complaint against Videotron G.P. concerning the distribution of the Category B service Avis de Recherche*, Broadcasting Decision CRTC 2016-82, 3 March 2016
- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015
- *Let's Talk TV – A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015
- *Complaint by Bell ExpressVu Limited Partnership against Videotron Ltd. and TVA Group Inc. regarding advertising opportunities*, Broadcasting Decision CRTC 2009-590, 22 September 2009