



## Broadcasting Decision CRTC 2011-48

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Ottawa, 26 January 2011

### **Complaint by TELUS Communications Company against Videotron Ltd. under section 6.1 of the *Pay Television Regulations, 1990***

### **Complaint by Bell Canada against Videotron Ltd. under section 6.1 of the *Pay Television Regulations, 1990* and section 9 of the *Broadcasting Distribution Regulations* and against TVA Group Inc. under section 15 of *Television Broadcasting Regulations, 1987***

*In this decision, the Commission sets out its findings on complaints filed by TELUS Communications Company (TELUS) and Bell Canada (Bell). In summary, the Commission finds that:*

- *Videotron Ltd., licensee of the service Illico sur demande, contravened section 6.1(1) of the Pay Television Regulations, 1990, which, pursuant to a condition of licence that incorporates these regulations by reference, prohibits it from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage;*
- *the complaints filed by TELUS and Bell under section 6.1(2) of the Pay Television Regulations, 1990 are dismissed;*
- *TVA Group Inc. contravened section 15 of the Television Broadcasting Regulations, 1987, which prohibits a licensee from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage;*
- *Videotron Ltd. contravened section 9 of the Broadcasting Distribution Regulations, which prohibits a licensee from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage.*

#### **The parties**

1. TELUS Communications Company<sup>1</sup> (TELUS) operates a broadcasting distribution undertaking (BDU) and video-on-demand (VOD) service at Rimouski, parts of Northern Quebec and Western Canada. TELUS also holds a broadcasting licence to operate a national VOD service.

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<sup>1</sup> TELUS Communications Inc., and 1219823 Alberta ULC and Emergis Inc. in partnership with TELUS Communications Inc. in Société TÉLÉ-MOBILE, associated in a general partnership carrying on business as TELUS Communications Company.

2. Bell Canada (Bell) operates two regional BDUs under the name Bell Fibe TV, which serve communities in Ontario and Quebec, and a VOD service on the Bell Fibe TV platform.
3. Quebecor Media Inc. (Quebecor) owns and controls TVA Group Inc. (TVA Group), which holds licences for television programming undertakings and specialty services, and Videotron Ltd. (Videotron), the largest BDU in the province of Quebec. Videotron is also the licensee for a VOD service operating under the name Illico sur demande (Illico).
4. TVA is the largest conventional television network in Quebec.

### **Positions of parties**

5. In a complaint dated 21 June 2010, TELUS alleged that the service Illico holds exclusive rights to popular TVA programs. TELUS indicated that it tried several times, without success, to acquire the rights to offer TVA programs on its own VOD service. According to TELUS, the exclusive distribution of TVA programs by Illico represents an undue preference for Illico and subjects TELUS to an undue disadvantage within the meaning of section 6.1 of the *Pay Television Regulations, 1990* and within the meaning of section 6.1(2) of these regulations as explained by the Commission in Broadcasting Regulatory Policy 2010-190.
6. TELUS argued that given the popularity of the TVA content and the importance accorded by new BDU subscribers to the programming available on the VOD service of that BDU, the exclusivity granted to Illico constituted a disadvantage toward it. According to TELUS, since TVA's share of the Quebec market is about 30%, the absence of TVA programming on its VOD platform [TRANSLATION] "significantly reduces its ability to attract new subscribers."
7. TELUS added that exclusive distribution of Canadian content was inconsistent with the objectives of the *Broadcasting Act* (the Act) and Canadian broadcasting policy.
8. In a complaint dated 23 June 2010, Bell indicated that for three years Illico was acquiring the rights to TVA programs on an exclusive or otherwise privileged basis, contrary to section 6.1(2) of the *Pay Television Regulations, 1990* and to the view taken by the Commission in Broadcasting Regulatory Policy 2010-190. Bell indicated that it tried several times, without success, to acquire the rights to distribute TVA programs on its VOD service. Bell requested that the Commission consider its complaint against Videotron and TVA Group under section 6.1 of the *Pay Television Regulations, 1990*, section 15 of the *Television Broadcasting Regulations, 1987* and section 9 of the *Broadcasting Distribution Regulations*.
9. Given the popularity of TVA's programming and the fact that Bell's Fibe TV VOD service cannot acquire the rights to TVA programs to offer them on its VOD service, Bell submitted that its VOD service was being subjected to an undue competitive disadvantage relative to Illico. Bell noted that TVA was the most popular conventional

network and had the highest viewing share in Quebec. Bell added that the success of its VOD service was essential to the success of its BDU in a competitive market.

10. In addition, Bell submitted that the agreement between TVA Group and Illico for the exclusivity of TVA program rights was not conducive to the achievement of the objectives of the Canadian broadcasting policy, including those set out in sections 3(1)(e) and (f) of the Act, since the agreement does not allow its VOD service to “contribute in an appropriate manner to the creation and presentation of Canadian programming.”

#### **Quebecor’s reply**

11. Quebecor indicated that section 6.1(2) of the *Pay Television Regulations, 1990* did not apply to the programming cited in the complaints because that section applies only to “pay-per-view” programming.
12. Quebecor submitted, among other things, that Illico’s exclusive acquisition of rights did not penalize Canadian viewers for the following reasons:
  - TVA programming is provided by Illico free of charge on VOD;
  - the programs at issue were broadcast previously on a conventional or a specialty network.
13. Quebecor submitted that the onus was on the complainants to demonstrate that an undue preference or disadvantage existed within the meaning of section 6.1(1) of the *Pay Television Regulations, 1990*. According to Quebecor, TELUS and Bell did not provide sufficient proof to allow the Commission to find that there had been an adverse effect on the complainants or on the achievement of the objectives of the Act.
14. Finally, Quebecor rejected the allegations made by Bell under the *Television Broadcasting Regulations, 1987* and the *Broadcasting Distribution Regulations*. According to Quebecor, [TRANSLATION] “the alleged facts concern Videotron in the context of its broadcasting activities and its operations under its VOD licence” and [TRANSLATION] “only section 6.1 of the *Pay Television Regulations, 1990* is actually relevant to the examination of this complaint.”

#### **Issues**

15. The Commission notes that the complaints under consideration in this decision relate to rights for programs that are made available for offering by VOD services.
16. The Commission considers that the issues it must address are the following:
  - Did Videotron benefit from an undue preference with respect to its service Illico and/or were TELUS and Bell subjected to an undue disadvantage within the meaning of section 6.1 of the *Pay Television Regulations, 1990*?

- Did TVA Group benefit from an undue preference and/or was Bell subjected to an undue disadvantage within the meaning of section 15 of the *Television Broadcasting Regulations, 1987*?
- Did Videotron benefit from an undue preference with respect to its BDUs and/or was Bell subjected to an undue disadvantage within the meaning of section 9 of the *Broadcasting Distribution Regulations*?

### **Commission's analysis and determinations**

17. When examining a complaint alleging undue preference, the Commission must first determine whether or not any preference or disadvantage exists. If the Commission finds that a preference or disadvantage exists, it must then determine whether or not, under the circumstances, that preference or disadvantage is undue.
18. In order to conclude whether or not the preference or disadvantage was undue, the Commission usually determines whether the preference or disadvantage had or could have a significant adverse effect on the complainant or any other person. It also examines the effect that the preference or disadvantage had or will have on the achievement of the Canadian broadcasting policy objectives set out in the Act.
19. The provision of the *Broadcasting Distribution Regulations* that relates to undue preference was amended to include a reversal of the burden of proof. Consequently, the onus is on the complainant to demonstrate that a preference or disadvantage exists. Once that demonstration is made, the burden is on the BDU to establish that that preference or disadvantage is not undue.
20. There is no reverse onus provision in the case of a complaint filed under the *Pay Television Regulations, 1990* or the *Television Broadcasting Regulations, 1987*.

### **Section 6.1 of *Pay Television Regulations, 1990* and Illico**

21. Illico is subject to the *Pay Television Regulations, 1990* by virtue of a condition of licence that incorporates those regulations by reference.
22. In examining the complaint alleging undue preference under section 6.1(1) of the *Pay Television Regulations, 1990*, the Commission must first determine whether Illico has given preference to itself or whether it is subjecting the complainants to a disadvantage.
23. The Commission notes that the TVA programs are offered on the Illico service, while TELUS and Bell do not have access to this programming to provide it on their VOD services. As these facts are not disputed by Illico and TVA, the Commission finds that an exclusivity agreement exists between Illico and TVA.
24. In light of this exclusivity agreement, the Commission considers that Illico benefits from a preferential position in the market relative to its competitors. Further, the Commission is of the view that by entering into an exclusivity agreement for the rights to TVA programs in order to provide such programs on VOD, Illico has subjected its

competitors to a disadvantage. Consequently, the Commission finds that a preference and a disadvantage have been demonstrated with respect to these two complaints.

25. With regard to the question as to whether or not the preference and the disadvantage are undue, the Commission considers that the exclusivity agreement between Illico and TVA would place a new entrant in the BDU market at a disadvantage relative to the licensee, which holds exclusive rights to content which is very popular in Quebec.
26. More specifically, the Commission considers that given the emerging role of VOD in the BDU business model and the popularity of TVA's programming in Quebec, it would be difficult for a new BDU seeking to penetrate the Quebec market to attract subscribers if it cannot offer TVA programs on its VOD service. The Commission is of the view that the agreement between Illico and TVA will likely have a significant adverse effect on TELUS and Bell due to their reduced ability to compete in the Quebec distribution market.
27. This adverse effect on competition can also hinder the achievement of certain broadcasting policy objectives. Specifically, the Commission has routinely observed that healthy and viable competition between BDUs is an effective and appropriate means of promoting greater choice for subscribers and spurring innovation with a view to achieving a number of the policy objectives set out in section 3 of the Act. One of the objectives of the Act, as set out in section 3(1)(t)(ii), is that BDUs "should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost."
28. The Commission therefore finds that Videotron, licensee of the VOD service Illico, gave itself an undue preference and subjected TELUS and Bell to an undue disadvantage, contrary to Illico's condition of licence that incorporates by reference section 6.1(1) of the *Pay Television Regulations, 1990*.
29. With regard to the allegations filed under section 6.1(2) of the *Pay Television Regulations, 1990*, the Commission noted in Broadcasting Regulatory Policy 2010-190 that some parties to this proceeding were concerned that section 6.1(2) did not specifically refer to the acquisition of exclusive rights to a VOD program. The Commission indicated that to eliminate ambiguity, it intended to add a prohibition on the acquisition of exclusive rights intended specifically for VOD undertakings in the conditions of licence applicable to the latter.
30. Subsequent to the release of Broadcasting Regulatory Policy 2010-190, the Commission issued Broadcasting Notice of Consultation 2010-702, in which it solicited comments on the standard requirements for VOD undertakings. The proposed standard requirements include, among other things, conditions of licence regarding undue preference, undue disadvantage and the acquisition of exclusive or preferential rights to programming offered by a VOD service.
31. The Commission notes that it must examine the complaints in light of the requirements that currently apply to the undertakings in question. Accordingly, the Commission notes

that the TVA programs available on Illico are not “pay-per-view” programs within the meaning of section 6.1(2) of the *Pay Television Regulations, 1990*. Given the foregoing, the Commission dismisses the complaints filed by TELUS and Bell under section 6.1(2) of the *Pay Television Regulations, 1990*.

#### **Section 15 of *Television Broadcasting Regulations, 1987* and TVA**

32. The Bell complaint was also examined under section 15 of the *Television Broadcasting Regulations, 1987*. To determine whether or not the *Television Broadcasting Regulations, 1987* apply to TVA when it grants rights and makes its programming available to a VOD service, the Commission has taken into consideration the fact the TVA programming offered on Illico was produced or acquired by TVA Group, the conventional television licensee. TVA Group, like other conventional television network licensees, derives revenue from the sale of program broadcast rights. The wording of section 15 is sufficiently broad to include any activity by a licensee intimately related to its television licence resulting in an undue preference or undue disadvantage. In this case, the Commission finds that the *Television Broadcasting Regulations, 1987* apply to TVA Group.
33. Given that TVA and Illico are affiliated services and that TVA Group gives Illico exclusive access to its programming on VOD, the Commission considers that TVA Group has given Illico a preference. For the same reason, the Commission is of the view that in granting exclusive rights to Illico, TVA Group has subjected Bell to a disadvantage. Consequently, the Commission considers that the licensee has demonstrated the existence of a preference and a disadvantage for the purposes of section 15 of the *Television Broadcasting Regulations, 1987*.
34. For the same reasons as those cited above, the Commission considers that the exclusivity agreement between Illico and TVA is likely to have a significant adverse effect on the complainants due to their reduced ability to compete in the Quebec distribution market and on the achievement of the objectives of the broadcasting policy.
35. In light of the foregoing, the Commission finds that undue preference was given by TVA Group to Videotron, licensee of the VOD service Illico, and that Bell was subjected to an undue disadvantage within the meaning of section 15 of the *Television Broadcasting Regulations, 1987*.

#### **Section 9 of *Broadcasting Distribution Regulations* and Videotron**

36. As a BDU licensee, Videotron is subject to the *Broadcasting Distribution Regulations*. Videotron is also the licensee of the VOD undertaking Illico. The Commission considers that when Videotron acquires rights for its VOD undertaking, it is subject to the *Broadcasting Distribution Regulations*, since the BDU chooses, controls and distributes the VOD service. It is also the view of the Commission that the wording of section 9 of the aforementioned regulations is sufficiently broad to include any activity by a licensee intimately related to its BDU licence resulting in an undue preference or undue disadvantage.

37. The Commission notes that the VOD service Illico is not distributed by Bell's BDUs and that Videotron benefits from an exclusivity agreement between Illico and TVA, which places Videotron in a preferential position relative to Bell. The Commission considers that in choosing and distributing its VOD service Illico, Videotron subjected Bell to a disadvantage. The Commission therefore considers that the licensee has demonstrated the existence of a preference and a disadvantage for the purposes of section 9 of the *Broadcasting Distribution Regulations*.
38. As stated earlier, a reverse onus clause applies to complaints filed under the *Broadcasting Distribution Regulations*. In this case, the Commission considers that Videotron has not demonstrated that the preference given within the meaning of the *Broadcasting Distribution Regulations* is not undue. Further, the Commission is not convinced by Videotron's arguments to the effect that exclusivity of content on VOD meets the objectives of the Act.
39. For the same reasons as those cited above, the Commission considers that the advantage that Videotron has given itself with respect to its BDU is likely have a significant adverse effect on the complainants due to their reduced ability to compete in the Quebec distribution market and on the achievement of the objectives of the broadcasting policy.
40. Given the foregoing, the Commission finds that Videotron, as a BDU, gave itself an undue preference and subjected Bell to an undue disadvantage within the meaning of section 9 of the *Broadcasting Distribution Regulations*.

### **Actions required to remedy the violations of the various sections of the regulations**

41. To remedy the violations of different sections of the regulations relating to undue preference, the Commission requires that:
- the TVA programs distributed on VOD be provided **without delay** to TELUS and to Bell;
  - the fees charged for TVA programs be payable and be calculated from the date of service provision;
  - **within thirty days following the date of this decision**, the parties
    - a) negotiate an agreement for the provision of TVA programming by VOD services
- OR
- b) agree on a process for determining a reasonable fee and reasonable terms and conditions for the provision of TVA programming by VOD services.

42. The Commission further requires that Videotron and TVA Group (individually or collectively) file a report by 25 February 2011 confirming that the above requirements have been fulfilled and explaining how they were fulfilled. Copies of the report must be served on TELUS and Bell, who will have 10 days after being served with the report to respond to it.
43. If required, the parties can apply to the Commission, through its mediation services provided under sections 12 to 15 of the *Broadcasting Distribution Regulations*, in order for them to negotiate an agreement on the rights to TVA programming for the purpose of distributing them on VOD services.
44. Should Videotron and TVA Group fail to comply with the requirements set out in this decision, including the obligation to arrive at an agreement or to agree on a process for determining a reasonable fee and reasonable terms and conditions, the Commission intends to summon the parties to a public hearing pursuant to section 12 of the Act in order that they show cause why it should not issue a mandatory order.

Secretary General

**Related documents**

- *Call for comments on standard requirements for video-on-demand undertakings*, Broadcasting Notice of Consultation CRTC 2010-702, 23 September 2010
- *Regulatory framework for video-on-demand undertakings*, Broadcasting Regulatory Policy CRTC 2010-190, 29 March 2010

*\*This decision is to be appended to each licence.*