Broadcasting Decision CRTC 2016-122

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Reference: Part 1 application posted on 5 October 2015

Ottawa, 4 April 2016

VMedia Inc.
Across Canada

Application 2015-1151-9

Addition of QVC to the *List of non-Canadian programming services and stations authorized for distribution*

The Commission ***denies*** *an application to add QVC to the* List of non-Canadian programming services and stations authorized for distribution.

Application

1. VMedia Inc. (VMedia), acting as the Canadian sponsor, filed an application to add the U.S.-based cable television shopping service QVC to the *List of non-Canadian programming services and stations authorized for distribution* (the list).

2. VMedia described QVC as a U.S.-based 24-hour general interest service (100% English-language) that provides live-televised shopping programs and that showcases products that it sells under a lifestyle programming format.

Interventions

3. The Commission received interventions in support of the application from individuals. It also received an intervention in opposition to the application from Rogers Media Inc. (Rogers), to which the applicant replied. The public record for this application can be found on the Commission's website at www.crtc.gc.ca or by using the application number provided above.

4. Rogers submitted that the addition of QVC to the list and its subsequent distribution in Canada would result in QVC carrying on a broadcasting undertaking in whole or in part in Canada without a licence and without authority pursuant to an exemption order, contrary to the *Broadcasting Act* (the Act). It argued that if QVC were added to the list, it would solicit and obtain revenues directly from Canadian consumers and would actively target Canadian audiences through its programming. As a result, QVC would have a substantial level of operation in Canada.

5. Further, Rogers submitted that the list is not the appropriate regulatory tool to authorize the operation of a non-Canadian teleshopping service in Canada. Allowing QVC to enter Canada through its addition to the list would circumvent the proper

regulatory framework that has been established for such services to operate in Canada—namely, the *Exemption Order Respecting Teleshopping Programming Service Undertakings* (the Teleshopping Exemption Order), set out in the appendix to Broadcasting Public Notice 2003-11.

6. It argued that because QVC is not a Canadian undertaking, it is not eligible to operate under the Teleshopping Exemption Order. According to Rogers, if QVC were added to the list, the service would compete with The Shopping Channel (TSC) without making any of the contributions that TSC makes to the Canadian broadcasting system.

7. Rogers also submitted that approval of the application would be contrary to the Commission's long-standing policy of prohibiting the authorization of non-Canadian programming services that are directly competitive with Canadian programming services. While TSC is not a licensed pay or specialty service, the Commission should consider the prejudicial effect that the addition of QVC to the list would have on TSC, in the same way that it considers the competitiveness of other non-Canadian services requesting to be added to the list.

8. Further, Rogers submitted that the Commission must have due regard to the broadcasting policy objectives set out in the Act in considering whether to add QVC to the list. It argued that adding QVC to the list would hinder TSC's ability to play an appropriate role in contributing to the achievement of Canadian broadcasting policy objectives, such as those set out under sections 3(1)(*e*)[1] and 3(1)(*f*).[2] According to Rogers, QVC not only operates under the same genre as TSC, but also sells many of the same products and services. Rogers estimated that for the period from January to September 2015, the overlap between brands sold via TSC and QVC amounted to 42% of TSC's year-to-date revenues.

9. Finally, Rogers submitted that the addition of QVC to the list would harm Canadian consumers and that the Commission should be wary of authorizing any non-Canadian service for distribution in Canada when it could contribute to consumer confusion and financial harm.

VMedia's reply

10. VMedia replied that QVC would not be carrying on a broadcasting undertaking in Canada and that conducting retail business with Canadian residents does not amount to carrying on a broadcasting undertaking in Canada. It listed authorized

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[1] "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming"

[2] "each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources"

non-Canadian services that do business with Canadians, including WWE Network, Baby TV, BabyFirstTV, Big Ten Network and Bloomberg Television, the first three of which Rogers was the sponsor. It also indicated that an operator of a non-Canadian programming service on the list has never been considered by the Commission or the industry to be engaged in broadcasting in Canada because its signal is transmitted in Canada by a broadcasting distribution undertaking (BDU). According to the applicant, a distribution agreement between a non-Canadian service and a Canadian BDU has never been considered to be an indication that the service is carrying on a broadcasting undertaking in Canada.

11. The applicant argued that the list is an appropriate means to authorize the distribution of QVC in Canada. For 30 years, the Commission has authorized the distribution of non-Canadian services in Canada to add diversity to the overall mix of programming services available to Canadians, and the addition of QVC to the list would be entirely consistent with this rationale. VMedia indicated that there has never been a restriction on categories or types of services to be added to the list that would prohibit the addition of QVC. It argued that the existence of an exemption order does not preclude the Commission from adding a service to the list. For example, many third-language services operate pursuant to an exemption order, yet many other third-language services have been added to the list.

12. Further, VMedia submitted that the addition of QVC to the list would add diversity to the programming available to Canadians, consistent with the Act. Specifically, QVC would cater to the economic interests of Canadians with the availability of competition in teleshopping services.

13. VMedia disagrees that TSC, an exempt service, should be entitled to the same treatment and protections as a licensed service. Even if competitiveness were to be taken into account, VMedia argued that QVC is not directly competitive with TSC since QVC offers different programming, shows and hosts, as well as a different viewer experience.

14. Moreover, although there may be some overlap between the products sold, QVC carries a wide range of exclusive products, packages and configurations, as well as models, colours and features within brands, providing Canadians with a wide variety of products to choose from. QVC does not currently deliver products to Canada, but plans to introduce that service should its application be approved.

15. Finally, VMedia submitted that while the Commission is mandated to consider consumer protection matters, it exercises this authority with respect to matters dealt with by the Act. It stated that retail operations and the sale of goods to consumers lie outside the Commission’s mandate and within that of other Canadian regulators.

Commission’s analysis

16. The Commission’s general policy with regard to the entry of non-Canadian services into Canada is to authorize the distribution of services that do not compete in whole

or in part with Canadian pay or specialty services. The objective of this policy is to provide a measure of support to Canadian services so that they can fulfill their commitments and obligations, and to encourage alliances between Canadian and non-Canadian services in similar genres.

17. Section 32 of the Act nonetheless makes it an offense for any person to carry on a broadcasting undertaking in Canada without a licence or without authority pursuant to a valid exemption order. Section 4 of the Act further stipulates that the Act applies in respect of broadcasting undertakings carried on in whole or in part within Canada. Accordingly, for an undertaking to be captured by the Act, it is sufficient that only part of the undertaking's activities takes place in Canada. In such instances, the Act requires that the undertaking either obtain a broadcasting licence or be eligible to operate pursuant to a valid exemption order.

18. Determinations of whether an entity is carrying on business in whole or in part in Canada are contingent upon the existence and extent of any nexus (i.e., a real and substantial connection) between Canada and the undertaking in question. Factors previously examined in determining if such a nexus exists include:

    - the location of the profit-producing elements of the operation in Canada;
    - the intention of a company to do business in Canada;
    - a fixed place of business in Canada;
    - the operation of a Canadian bank account;
    - employees and agents within Canada;
    - continuous business activity in Canada (vs. isolated transaction);
    - the solicitation of advertising in Canada; and
    - the targeting of programming to Canadians or the tailoring of an international feed to fit the Canadian market.

19. Although there is no evidence of QVC establishing any physical premises in Canada or having bank accounts or employees in Canada, it is clear that QVC intends to do business with Canadians located in Canada. Specifically, it intends to sell its products to Canadians on a continuous basis and to ship them directly to Canadians. As well, its toll-free number can be dialed from a Canadian telephone.

20. With respect to VMedia's argument that the sale of products by QVC does not amount to carrying on a retail business in Canada, the Commission is of the view that the sale of products is an integral component of QVC's teleshopping service and cannot be separated from the programming. QVC's activities in Canada would involve the promotion, sale and distribution of products to Canadians on a continuous basis. While there are programming services on the list that sell products to

Canadians, unlike QVC, these are not dedicated to teleshopping services funded primarily by retail sales to viewers.

21. Based on the above, the Commission concludes that if authorized, QVC would be carrying on a broadcasting undertaking in whole or in part in Canada.

22. The lawful distribution of QVC in Canada is therefore contingent upon the undertaking either obtaining a broadcasting licence or being otherwise authorized pursuant to a valid exemption order. The *Direction to the CRTC (Ineligibility of Non-Canadians)* precludes the issuance of a broadcasting licence to non-Canadians. Accordingly, the Commission is unable to issue a broadcasting licence to QVC.

23. Further, only those undertakings that meet the criteria set out in the Teleshopping Exemption Order are eligible to operate pursuant to the related exemption. Conditions of eligibility include the following:

    - the Commission would not be prohibited from licensing the undertaking by virtue of the *Direction to the CRTC (Ineligibility of Non-Canadians)*; and

    - the undertaking's programming originates in Canada, and the undertaking makes predominant use of Canadian creative and other resources in the creation and presentation of programming.

24. In the proceeding that led to Broadcasting Public Notice 2003-11, the Commission denied a request by QVC to remove the requirement that a teleshopping service be Canadian. The Commission determined that there was insufficient evidence on the record to show that removing the condition in question would benefit Canada and Canadian consumers. As these conditions continue to be integral components of the Teleshopping Exemption Order, QVC remains ineligible to operate in Canada pursuant to the related exemption.

Conclusion

25. Based on the information provided on the record, the Canadian distribution of QVC would result in the undertaking being carried on at least in part in Canada. Pursuant to section 32 of the Act, such operations may only be authorized by a broadcasting licence or a valid exemption order. Accordingly, the Commission **denies** the application by VMedia Inc. to add QVC to the *List of non-Canadian programming services and stations authorized for distribution*.

Secretary General

Related documents

- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008

- *Review of exemption orders respecting experimental video-on-demand programming undertakings, video games programming service undertakings and teleshopping programming service undertakings*, Broadcasting Public Notice CRTC 2003-11, 6 March 2003

- *Direction to the CRTC (Ineligibility of Non-Canadians)*, P.C. 1997-486, 8 April 1997, amended by P.C. 1998-1268, 15 July 1998