



## Telecom Decision CRTC 2023-317

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Reference: Part 1 application posted on 20 January 2023

Ottawa, 15 September 2023

*Public record: 8662-T117-202300268*

### **TekSavvy Solutions Inc. – Application to address alleged undue preference arising from off-tariff agreements**

#### **Summary**

The Commission received an application from TekSavvy Solutions Inc. (TekSavvy) to address alleged undue preference by Rogers Communications Canada Inc. (RCCI) and Bell Canada. While the application raised broad policy concerns with respect to wholesale competition, the specific allegations raised by TekSavvy were focused on the narrow legal issue of whether there was an undue preference.

Following an in-depth analysis of the facts, the Commission found that the applicant did not meet the legal test under subsection 27(2) of the *Telecommunications Act*. In the case of agreements between RCCI and Videotron Ltd. (Videotron), the discounts at issue are similar to those available under other existing off-tariff agreements, and Videotron has indicated its willingness to offer the same terms and conditions to TekSavvy and other competitors. With respect to Bell Canada and EBOX Inc. (EBOX), EBOX no longer exists as a separate corporate entity so there is no off-tariff agreement in place to support an analysis of undue preference. Accordingly, the application is **denied**.

TekSavvy's application was filed shortly before the Commission initiated Telecom Notice of Consultation 2023-56. That proceeding focuses on facilitating vibrant and sustainable competition in the retail Internet service market. The Commission will continue to work expeditiously to strike the right balance between lower prices and continued investment in high-quality and reliable networks.

#### **Background**

##### **Evaluating undue preference**

1. Allegations of undue preference are evaluated under subsection 27(2) of the *Telecommunications Act* (the Act), which states the following:

No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

2. The Commission's analysis of an allegation of undue preference under subsection 27(2) of the Act is conducted in two phases:
  - i. it must first determine whether the conduct in question constitutes a preference; and
  - ii. where it so determines, it must then decide whether the preference is undue.
3. Under the Commission's general approach to allegations of undue preference, the party making the allegation must first establish preference. Once this is done, the onus then shifts to the respondent party to establish that the preference is not undue, as required by subsection 27(4) of the Act.

### **Off-tariff agreements**

4. Telecommunications service providers (TSPs) can negotiate off-tariff agreements that establish rates, terms, and conditions for telecommunications services that are different than those in Commission-approved tariffs. The Commission has previously indicated that permitting off-tariff agreements gives incumbent local exchange carriers (ILECs), cable carriers, and competitors greater flexibility in making provisioning arrangements.
5. In addition, the Commission has previously determined that off-tariff agreements can be used for wholesale high-speed access (HSA) services.
6. The Commission retains oversight over off-tariff agreements under subsection 27(2) of the Act.

### **Arrangements between Rogers Communications Canada Inc. and Videotron Ltd.**

7. On 15 March 2021, Rogers Communications Canada Inc. (RCCI) announced that it would be buying Shaw Communications Inc. (Shaw) for \$26 billion.
8. On 12 August 2022, RCCI, Shaw, and Videotron Ltd. (Videotron) entered into an agreement concerning the sale of Shaw's Freedom Mobile Inc. (Freedom Mobile) business to Videotron. Off-tariff agreements between RCCI and Videotron for wholesale HSA services were negotiated as part of Shaw's divestiture of Freedom Mobile.
9. On 29 December 2022, the Competition Tribunal denied the Commissioner of Competition's challenge of the transaction, and the Federal Court of Appeal upheld the decision on 24 January 2023.
10. Innovation, Science and Economic Development Canada approved the transfer of Shaw's wireless spectrum licences to Videotron on 31 March 2023 and the RCCI-Videotron agreements came into effect on 3 April 2023.

## **Bell Canada and EBOX Inc.**

11. On 24 February 2022, Bell Canada announced that it had acquired EBOX Inc. (EBOX), and that Bell Canada would continue to offer residential Internet services to consumers in Quebec and parts of Ontario under the EBOX brand.

## **Application**

12. The Commission received an application from TekSavvy Solutions Inc. (TekSavvy), dated 20 January 2023, in which the company identified two instances of alleged undue preference:
  - The arrangements between RCCI and Videotron, pursuant to which RCCI offers Videotron preferred wholesale HSA service rates, among other preferred treatment, as part of RCCI's merger agreement with Shaw. This arrangement with Videotron is specifically designed to enable Videotron and its wholesale-based affiliate, VMedia Inc. (VMedia), to better compete than they could using tariffed rates.
  - Bell Canada offering its newly acquired affiliate, EBOX, wholesale access to aggregated fibre-to-the-premises (FTTP) that is not made available to competitors and for which there is no wholesale tariff. Based on the retail Internet service prices charged by EBOX, Bell Canada also appears to be providing these services at rates well below tariffed rates for any comparable wholesale disaggregated HSA service.
13. TekSavvy requested that the Commission provide relief from the underlying causes that enable unduly preferential off-tariff agreements and review ILECs' and cable carriers' use of such agreements. TekSavvy requested that the Commission either void the off-tariff agreements between RCCI and Videotron in full or extend to all competitors, on an interim basis, the preferential access and rates that RCCI and Bell Canada have already extended to at least one party each, including access to aggregated FTTP services.
14. In the two cases cited by TekSavvy, the onus is on the company to establish the existence of a preference and, if it is established, then the onus is on RCCI and Bell Canada, respectively, to establish that any preference is not undue.
15. The Commission received interventions from three individuals; Bell Canada; Cogeco Communications inc., on behalf of Cogeco Connexion Inc. (Cogeco); the Community Fibre Company; Competitive Network Operators of Canada (CNOOC); Globalive; OpenMedia; the Public Interest Advocacy Centre (PIAC); Quebecor Media Inc., on behalf of Videotron; RCCI; Shaw; TELUS Communications Inc. (TCI); and Vaxination Informatique.

## **Issues**

16. The Commission has identified the following issues to be addressed in this decision:

- Do the off-tariff agreements between RCCI and Videotron provide an undue preference?
- Does the relationship between Bell Canada and EBOX include wholesale arrangements that provide an undue preference?

**Do the wholesale off-tariff agreements between RCCI and Videotron provide an undue preference?**

**Positions of parties**

***TekSavvy***

17. TekSavvy submitted that the Competition Tribunal made a finding of fact, based on RCCI and Videotron's wholesale arrangements, that Videotron is receiving preferred wholesale access rates and preferred fibre backhaul rates. These preferred rates formed part of the Competition Tribunal's reason for finding that Videotron would be able to offer competitively priced mobile wireless and Internet service bundles. Further, these preferred rates have not been extended to competitors other than Videotron and its affiliate VMedia.
18. TekSavvy argued that competitors are concerned about the unduly preferential off-tariff agreements into which RCCI and Videotron have entered and considered that further investigation into the nature and impact of these preferences is merited.

***Respondents***

19. RCCI submitted that TekSavvy is not acquiring a wireless carrier, is not a wireless carrier, does not participate in wireless service markets, and does not require wireless domestic roaming or wireless backhaul functionality. It argued that TekSavvy is not comparable to Videotron or wireless carriers generally for purposes of establishing a preference within the meaning of subsection 27(2) of the Act and is not affected by the arrangements between RCCI and Videotron.
20. RCCI and Videotron submitted that there is no undue preference. RCCI argued that the impact of the transaction on competition in wireline service markets was not even challenged by the Commissioner of Competition, and that the Competition Tribunal made no determination whatsoever on the ability of reseller Internet service providers (ISPs) to compete. To the extent the Competition Tribunal made any comment on wireline service markets, it found that the merger "would also likely contribute to an increased intensity of competition in those [Alberta and British Columbia] markets."
21. Shaw argued that TekSavvy is inappropriately requesting that the Commission take overbroad and disproportionate remedial action to rectify these alleged violations of the Act, including by modifying existing wholesale HSA service rates and mandating the provision of wholesale aggregated HSA services over FTTP. Further, it submitted that off-tariff agreements are pro-competitive and are contributing to the

telecommunications policy objectives set out in section 7 of the Act (the policy objectives), which the current off-tariff agreement rules were designed to achieve.

22. Shaw and Videotron indicated that they have several off-tariff agreements in place with third-party Internet access (TPIA) customers and that several other carriers have also entered into off-tariff agreements for wholesale HSA services. In Shaw's view, the prevalence of these agreements, paired with the lack of complaints about them, directly contradict any notion that off-tariff agreements are inherently problematic or symptomatic of deep-rooted problems in the market for wholesale HSA services.
23. Videotron submitted that it remains open to considering any form of new agreement with TekSavvy or any other ISP that may be interested. It stated that it is even willing to offer TekSavvy and other interested ISPs the same conditions contained in the off-tariff agreements with RCCI provided that the related requirements are met.

***Other interveners***

24. Benjamin Klass and Vaxination Informatique supported TekSavvy's application. Benjamin Klass argued that by offering Videotron rates for wholesale services that are not available to similarly situated service providers, such as TekSavvy, the RCCI-Videotron off-tariff agreements threaten to redefine the competitive contours of competition in wireline service markets throughout their operating territories by potentially foreclosing competition from parties not privy to the deal. Vaxination Informatique submitted that ILECs and cable carriers should not be able to choose their competitors and that off-tariff agreements should be allowed only when offered to all customers, with reasonable limitations on eligibility.
25. CNOC submitted that the scope of RCCI's off-tariff agreements is largely unknown and could potentially include unduly preferential arrangements involving FTTP services.
26. Cogeco and OpenMedia supported a Commission review of the off-tariff agreements that are the subject of this proceeding and a general review of off-tariff agreements. They argued that unduly preferential off-tariff agreements are deeply harmful to competition and affordability of Internet services and are therefore a major public interest concern. OpenMedia also urged the Commission to grant TekSavvy interim relief as requested in the application.
27. Globalive submitted that the preferential terms and conditions in the off-tariff agreements were not arrived at through negotiations based on legitimate and relevant commercial considerations relevant to the underlying (contemplated) business of Videotron. Rather, they are simply a result of RCCI's efforts to clear a major regulatory hurdle in its acquisition of Shaw. It also indicated its concern with the negative effect these preferential arrangements would have on the development of competition in the wireless service market in Canada and, specifically, the negative effect on Globalive's re-entry into the wireless service market in Canada.

28. PIAC supported the proposal to void the off-tariff agreements between RCCI and Videotron. However, it generally opposed the proposed interim relief because there are numerous outstanding proceedings that directly address the underlying issues. It argued, instead, that the Commission's focus should be on concluding these protracted proceedings, and on phasing out the anti-competitive, opaque off-tariff agreement framework.
29. TCI supported TekSavvy's request to investigate whether the off-tariff agreements between RCCI and Videotron violate subsection 27(2) of the Act because of the potential concerns raised during the Competition Tribunal's RCCI-Shaw merger proceeding. It argued that the Commission should require that the parties produce their agreements for review and should disallow those agreements using its power in paragraph 32(d) of the Act if they do, in fact, violate subsection 27(2).

### **Commission's analysis**

#### ***Phase 1: Determination of preference***

30. All that is required of a complainant to show a preference is to adduce sufficient evidence to establish a *prima facie* case that a preference exists because the necessary evidence is more often than not inaccessible or unavailable to complainants. In this case, TekSavvy has adduced evidence that the Competition Tribunal described the arrangements between RCCI and Videotron as "very favourable" while TekSavvy had no knowledge of the terms and conditions of those agreements.
31. The Commission has considered TekSavvy's allegations of undue preference solely with respect to the wholesale HSA service agreements. While TekSavvy's requested remedies included all the agreements between RCCI and Videotron, its arguments on undue preference were focused almost entirely on the wholesale HSA service agreements.
32. The Commission recognizes that TekSavvy and Videotron are direct competitors in retail Internet service markets. Both parties purchase wholesale HSA services and offer those to retail customers. Further, Videotron has acquired VMedia, a wholesale-based competitor that is also a direct competitor to TekSavvy and purchases those same wholesale HSA services.
33. Accordingly, the Commission finds that TekSavvy has established that there is a preference with respect to the off-tariff agreements between RCCI and Videotron for wholesale HSA services.

#### ***Phase 2: Determination of whether the preference is undue***

34. The Commission must now consider whether the preference has had, or is likely to have, a material adverse impact on the complainant or on any other person. It must also consider the impact the preference has had, or is likely to have, on the achievement of the policy objectives.

35. The Commission has reviewed all the off-tariff agreements filed on the record of the current proceeding, giving particular consideration to the wholesale HSA service rates, terms, and conditions included in the agreements between RCCI and Videotron, as well as those present in other current and recently expired off-tariff agreements.
36. The Commission considers that the RCCI-Videotron off-tariff agreements might constitute discrimination or preference within the meaning in the Act, but that they would not meet the threshold of undue preference, as set out in subsection 27(2), for the reasons identified below.
37. In the past, the Commission has recognized that factors such as reciprocity, timing of the agreement, geographic coverage, and traffic volume would explain some differences in non-tariffed wholesale pricing.<sup>1</sup> In the case of wholesale HSA services, it is a very common industry practice to provide discounts for wholesale services based on conditions such as reciprocity and an established volume.
38. In this instance, it would be most appropriate for the Commission to consider reciprocity, geographic coverage, and traffic volume with respect to the RCCI-Videotron off-tariff agreements, and to examine the other off-tariff agreements filed on the record of the proceeding as points of comparison.
39. Notably, the Commission finds that the discounts associated with the wholesale services being offered pursuant to the identified off-tariff agreements are within the norms found elsewhere in the industry and appear to be justified by the identified factors.
40. The Commission also considers that if a prescribed off-tariff agreement were offered to one provider, and if another provider were denied a comparable off-tariff agreement, then that situation would likely give rise to concerns regarding undue preference.
41. In this case, there is no evidence of a comparable off-tariff agreement being denied to any other party. Videotron indicated its willingness to offer TekSavvy and other interested ISPs the same conditions contained in the off-tariff agreement with RCCI, provided that the related requirements are met.
42. Based on the record of the proceeding, the Commission does not reasonably expect that the existing off-tariff agreements between RCCI and Videotron will have an impact on the achievement of the policy objectives.
43. In light of all the above, the Commission determines that the off-tariff agreements between RCCI and Videotron are not contrary to subsection 27(2) of the Act, and do

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<sup>1</sup> For instance, see Telecom Decision 2014-398.

not constitute an undue preference, with respect to the mutually agreed-upon wholesale HSA service rates.

**Does the relationship between Bell Canada and EBOX include wholesale arrangements that provide an undue preference?**

**Positions of parties**

44. TekSavvy submitted that Bell Canada appears to be offering its newly acquired affiliate, EBOX, aggregated wholesale FTTP services that are not also available to competitors and for which there is no wholesale tariff. The services also appear to be provided at rates well below those in any comparable tariff that Bell Canada has for disaggregated wholesale FTTP services.
45. TekSavvy argued that Bell Canada's self-preferencing conduct should not be shielded by its legal structure. If Bell Canada's conduct would violate subsection 27(2) of the Act if EBOX were a separate entity, then it should be equally problematic now that EBOX is a part of Bell Canada. To find otherwise would ignore the wording of subsection 27(2), which explicitly extends to self-preferencing behaviour.
46. Bell Canada argued that TekSavvy's allegation is completely unfounded, since EBOX has been amalgamated into Bell Canada and is now a division of Bell Canada, not a stand-alone corporate entity. Bell Canada and EBOX are not in a supplier/customer relationship and Bell Canada does not provide EBOX with any wholesale services, telecommunications or otherwise.
47. Cogeco opposed TekSavvy's request for a reduction in tariffed rates for wholesale HSA services, but did not oppose its request for transitional access to aggregated FTTP services. It also stated that the Commission should
  - launch a review of wholesale wireline services, one objective of which should be to correct the regulatory asymmetry that exists between ILECs and cable carriers for the provision of wholesale HSA services, which has unduly penalized cable carriers;
  - more vigorously apply its supervisory powers under subsection 27(2) of the Act with respect to off-tariff agreements entered into between ILECs and cable carriers, or between ILECs and cable carriers and their affiliates; and
  - adopt interim measures that would allow timely competitor access to aggregated FTTP services, under terms, conditions, and rates that, at a minimum, are comparable to those that cable carriers must abide by for the provisioning of faster broadband speeds to wholesale service customers.
48. The Community Fibre Company supported TekSavvy's application for relief in the matter of off-tariff access to aggregated FTTP services on terms equivalent to those offered by Bell Canada to EBOX. Access to wholesale FTTP services at equivalent rates is urgently required to enable smaller carriers like the Community Fibre



Company to compete on an equal footing and gain access to the “ladder of investment” needed to be effective in bringing competition to the Canadian telecommunications market.

49. CNOOC strongly supported TekSavvy’s application and its request for interim relief to address unduly preferential off-tariff agreements. It indicated that its own temporary FTTP resale remedy would be a suitable solution, since it would provide interim relief that goes to the root causes of unduly preferential off-tariff agreements involving FTTP access.
50. PIAC submitted that the Commission should closely investigate whether Bell Canada is indeed providing its affiliate with aggregated FTTP access that is unavailable to other competitors. If this is the case, the Commission must prohibit the practice as a clear case of undue preference, not only for Bell Canada, but for other TSPs that may take advantage of newly acquired wholesale-based affiliates to preference themselves. Though TekSavvy requested that Bell Canada be required to offer wholesale competitors the same aggregated access to FTTP as it has provided to EBOX, PIAC noted that tariffs still do not exist for such fibre access.
51. Shaw submitted that it is inaccurate to characterize the Bell Canada-EBOX arrangement as an off-tariff agreement because the Commission has not mandated the provision of wholesale aggregated HSA service over FTTP. Since there is no requirement for this service to be provided under a tariff, it is incorrect to call any arrangement for its provision an off-tariff agreement.
52. Videotron argued that the Commission must act swiftly and order Bell Canada to make its retail Internet access services provided via fibre-to-the-home access facilities available for resale in an aggregated format at a 25% discount from the lowest retail rate charged to a customer, including discounts or credits.

#### **Commission’s analysis**

53. The Commission confirms that EBOX is today only a brand name operated by Bell Canada, similar to Virgin Plus. Bell Canada purchased EBOX in 2022 and is not currently providing any services to EBOX.
54. On 7 July 2022, 14192052 Canada Inc. was incorporated and, shortly thereafter, renamed as EBOX Telecommunications Inc.
55. In preparation for its dissolution, EBOX assigned certain employment contracts relating to its call centre employees to EBOX Telecommunications Inc. on 21 August 2022. The following day, EBOX Telecommunications Inc. was amalgamated into Bell Canada.
56. EBOX now exists only as a brand name operated by Bell Canada. All EBOX-branded telecommunications operations take place within Bell Canada and not in a separate affiliated company. EBOX Telecommunications Inc. remains a wholly owned

subsidiary of Bell Canada and is not involved in the provision of any EBOX-branded retail services.

57. Therefore, with respect to the allegation that Bell Canada was providing aggregated FTTP to an affiliate, EBOX, the Commission finds that there is no affiliate or off-tariff agreement in place and therefore no preference within the meaning of the Act.
58. Regarding TekSavvy's argument that Bell Canada is preferencing itself by not providing aggregated FTTP access to competitors, the Commission notes that it has only mandated disaggregated FTTP access to date. Mandated access to aggregated FTTP is currently being considered, on an expedited basis, as part of the ongoing proceeding to review the wholesale HSA service framework initiated in Telecom Notice of Consultation 2023-56.
59. In light of the above, the Commission finds that there is no undue preference under subsection 27(2) of the Act with respect to the relationship between Bell Canada and EBOX.

## **Conclusion**

60. As set out above, the Commission finds that, in both cases identified by TekSavvy, there is no undue preference under subsection 27(2) of the Act. Accordingly, the Commission **denies, by majority vote**, TekSavvy's application to void or extend the identified off-tariff agreements.
61. The Commission also notes that TekSavvy's application pre-dates the review of the wholesale HSA service framework initiated in Telecom Notice of Consultation 2023-56. That proceeding focuses on facilitating vibrant and sustainable competition in the retail Internet service market. The Commission will continue to work expeditiously to strike the right balance between lower prices and continued investment in high-quality, reliable networks.
62. With respect to the regulatory framework for off-tariff agreements, the Commission considers that there are benefits to off-tariff agreements. In particular, the Commission has previously indicated that permitting off-tariff agreements gives ILECs, cable carriers, and competitors greater flexibility in making provisioning arrangements. Furthermore, the Commission considers that the use of off-tariff agreements is expected to continue to grow over time and across various services.
63. Given that the off-tariff agreement framework has not been broadly reviewed since its inception, the Commission considers that a review of the framework would be appropriate to ensure that it effectively supports competition and consumers. The Commission intends to conduct such a review following the conclusion of the review of wholesale HSA services.

## 2023 Policy Direction

64. The Commission has made its determinations in this proceeding taking into account the objectives of the 2023 Policy Direction.<sup>2</sup>

Secretary General

### Related documents

- *Notice of hearing – Review of the wholesale high-speed access service framework*, Telecom Notice of Consultation CRTC 2023-56, 8 March 2023; as amended by Telecom Notices of Consultation CRTC 2023-56-1, 11 May 2023; and 2023-56-2, 4 July 2023
- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015; as amended by Telecom Regulatory Policy CRTC 2015-326-1, 9 October 2015
- *Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*, Telecom Decision CRTC 2014-398, 31 July 2014
- *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application for revised filing requirements associated with wholesale negotiated agreements*, Telecom Regulatory Policy CRTC 2012-359, 3 July 2012
- *Bell Canada et al.’s application to review and vary Telecom Decision 2008-17 with respect to negotiated agreements*, Telecom Regulatory Policy CRTC 2009-19, 19 January 2009
- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008

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<sup>2</sup> *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, SOR/2023-23, 10 February 2023