



Broadcasting Decision CRTC 2022-346

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Reference: Part 1 application posted on 5 May 2022

Ottawa, 21 December 2022

Quebecor Media Inc., on behalf of TVA Group Inc. and Videotron Ltd.
Province of Quebec

Public record: 2022-0199-5

Quebecor's application to revoke Hill Valley's exempt broadcasting distribution undertaking status

Summary

The Commission **denies** Quebecor Media Inc.'s (Quebecor) request to revoke the exempt status of the Coopérative de câblodistribution Hill Valley (Hill Valley). The Commission also **denies** Quebecor's request to remove Hill Valley from the list of exempted broadcasting distribution undertakings. Finally, the Commission **denies** Quebecor's request to sanction Hill Valley.

Application

1. On 19 April 2022, Quebecor Media Inc. (Quebecor), on behalf of TVA Group Inc. (TVA Group) and Videotron Ltd. (Videotron), filed an application regarding the Coopérative de câblodistribution Hill Valley (Hill Valley). In its application, Quebecor alleged that Hill Valley, together with its affiliates Konek Technologies Inc. (Konek) and Libéo Inc. (Libéo), retransmitted TVA and TVA Sports without rights in hotel rooms.
2. Quebecor indicated that as early as August 2020, Videotron had undertaken various investigations in the hotels served by Hill Valley and Konek, allowing it to establish that TVA and TVA Sports are provided using an Internet connection. Quebecor noted that it sent a formal notice to Hill Valley on 25 January 2021 to cease the retransmission without rights of its programming.
3. Quebecor argued that prior to 3 February 2021, the date of Hill Valley's registration as an exempt terrestrial broadcasting distribution undertaking (BDU) with the Commission, Hill Valley's activities were not lawful pursuant to section 32 of the *Broadcasting Act* (Act) with respect to the unlawful or improper operation of a business as required by the *Copyright Act* (CCA). Quebecor also noted that the

Federal Court confirmed, in its 24 February 2022 decision,¹ that prior to 3 February 2021, neither Konek nor Hill Valley qualified as a retransmitter within the meaning of section 31 of the CCA.

4. According to Quebecor, although Hill Valley can now distribute TVA, it continues to illegally benefit from TVA Sports' programming without paying compensation to the TVA Group, thereby gaining hotel customers at the expense of Videotron. Quebecor argued three things:
 - Hill Valley and Konek exhibit a concerning corporate behaviour;
 - the actions, if left unpunished by the Commission, would set a dangerous precedent for the Canadian broadcasting system; and
 - the presence of businesses that can pirate content is worrisome and creates a climate of distrust.
5. Consequently, Quebecor requested that the Commission revoke Hill Valley's status as a BDU, remove Hill Valley from the list of exempt BDUs and sanction Hill Valley for the violations committed.

Interventions

6. The Commission received an intervention in support of Quebecor's application from BCE Inc. (Bell). The Commission also received five interventions in opposition to the application from individuals representing hotels, hotel associations and a media company.
7. Overall, individuals opposing the application argued that Hill Valley's technology is more advanced than that of other cable providers and is provided at a reasonable cost. One intervener added that Videotron and other cable companies do not offer comparable services and that they have not introduced innovations in the services they offer to the hotel industry in decades. Another intervener noted that if Hill Valley's BDU status is revoked, its media company will no longer be able to do dynamic display directly on hotel room televisions and will have to go back to printing paper guides.
8. For its part, Bell fully supported Quebecor's application and stated that its support stems not only from the facts surrounding the illegal distribution of Quebecor's copyrighted content, but also from its own experience with the illegal activities of Hill Valley.
9. Bell stated that, as with Quebecor, Hill Valley's retransmission of broadcast signals includes Noovo, CTV and the Réseau des sports (RDS). Bell acknowledged that Hill

¹ *Vidéotron Ltée v. Technologies Konek inc.* - 2022 FC 256

Valley has since registered as an exempt BDU, allowing it to distribute the over-the-air stations CTV and Noovo. However, Bell alleged that there is evidence that Hill Valley continues to illegally distribute RDS, a signal not covered by the CCA, to its hotel customers,² despite three cease and desist letters from Bell.

10. Bell submitted that Hill Valley cannot avail itself of the Commission's staff-assisted mediation given the egregious and repeated copyright violations. Bell stated that it would be unreasonable to create a situation that would require broadcast licensees to make their copyrighted content available to someone who is not trustworthy and that this would place Bell Media Inc. and any other broadcaster at an undue disadvantage.

Hill Valley's response to Quebecor's request

11. In regard to Quebecor's application, Hill Valley argued that the Commission should reject it on the following grounds:

- any violations of the CCA by Hill Valley have been or are being addressed in Federal Court. Therefore, these are not issues for the Commission to concern itself with;
- as an exempt BDU, Hill Valley is required to distribute TVA;
- TVA Sports is distributed by Hill Valley pending the signing of a distribution agreement with Quebecor; and
- Quebecor's refusal to negotiate a distribution agreement with Hill Valley for its discretionary services is evidence of anti-competitive and bad faith conduct constituting an undue advantage to its affiliated BDU activities and represents an undue disadvantage to Hill Valley.

12. Hill Valley noted that the undertaking was officially founded on 15 January 2020, and it immediately set up its own head-end with its own equipment, allowing it to be in full control at all times of its BDU operations.

13. Hill Valley added that to demonstrate good faith, its directors have deposited in a trust account an amount equivalent to the estimated royalty for the TVA Sports discretionary service.

14. Hill Valley indicated that the Commission had invited the parties to engage in staff-assisted mediation, which it accepted, but that Quebecor refused. Hill Valley questioned why Quebecor did not contact it in June 2020 to rectify the situation and alleged that this strategy was intended to increase the amount of the lawsuit and damages.

² Bell indicated that it confirmed that Hill Valley is still carrying RDS as of 9 April 2022.

15. Consequently, Hill Valley requested that the Commission find that it expects Quebecor to engage in expedited and good-faith negotiations with Hill Valley regarding the terms of carriage of TVA Sports and its other discretionary services, and that if an affiliation agreement is not reached within 90 days, that the issue automatically be referred to the Commission through a dispute resolution process.

Hill Valley's response to Bell's intervention

16. Hill Valley noted that it first contacted Bell, by phone and in writing, in March 2020, to enter into agreements for its discretionary services, but received no answer. Hill Valley added that on 17 March 2021, after several follow-ups, Bell sent it a letter explaining that to protect Quebecor, it refused to sign a distribution agreement. Hill Valley stated it filed a request for staff-assisted mediation in December 2021, but instead of responding to that request, Bell sent Hill Valley a new demand letter.
17. Hill Valley stated that, contrary to the facts set out by Bell, it has paid distant signal royalties to the Canadian Broadcasters Rights Agency. Hill Valley added that its directors have placed in trust an amount equivalent to the royalties payable to Bell for the distribution of RDS.
18. Hill Valley and its directors considered that Bell's conduct constitutes an undue advantage to its affiliated BDU activities and an undue disadvantage to Hill Valley. The latter requested that the Commission find that it expects Bell to engage in expedited and good-faith negotiations with Hill Valley regarding the terms of carriage of RDS and its other discretionary services, and that if an affiliation agreement is not reached within 90 days, that the issue automatically be referred to the Commission through a dispute resolution process.

Quebecor's final response

19. In its final reply, Quebecor pointed out that the interventions of third parties in opposition to its application do not provide any evidence as to the lawfulness of Hill Valley's actions. According to Quebecor, by opposing the application, these interveners are condoning Hill Valley's illegality and its unacceptable actions.
20. Quebecor stated that Hill Valley's response leaves no doubt that it continues to illegally distribute programming services despite the demand letters it has received and the Federal Court ruling of 24 February 2022.
21. In response to Hill Valley's accusations that Quebecor is engaging in an "anti-competitive conduct," Quebecor noted that the TVA Group has agreements for the distribution of its services, including TVA Sports, with more than a hundred BDUs that distribute them in a compliant manner. Quebecor also noted that Hill Valley does not pay any royalties for the retransmission of distant signals. Quebecor argued that Hill Valley's response that it pays these royalties is false.

22. In addition, Quebecor stated that the dispute resolution process set out in section 16 of Broadcasting Order 2017-320 (Exemption Order) cannot be used by an offending organization to regularize an ongoing situation of illegal distribution and that it is unthinkable that the Commission would grant mediation or a dispute resolution process to an undertaking that is knowingly illegally distributing programming services.
23. Quebecor is of the view that Hill Valley's illegal actions would set a dangerous precedent for the Canadian broadcasting system if the Commission were to condone rather than sanction them.

Regulatory framework

24. Pursuant to subsection 9(4) of the Act, the Commission may, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in order from any or all the requirements of Part II of the Act where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the Canadian broadcasting policy.
25. Subsection 32(1) of the Act provides that every person who, not being exempt from the requirement to hold a licence, carries on a broadcasting undertaking without a licence therefor is guilty of an offence punishable on summary conviction and is liable:
 - (a) in the case of an individual, to a fine not exceeding twenty thousand dollars for each day that the offence continues; or
 - (b) in the case of a corporation, to a fine not exceeding two hundred thousand dollars for each day that the offence continues.
26. The Exemption Order allows BDUs serving fewer than 20,000 subscribers to enter and compete in markets with licensed BDUs without having to obtain a licence.
27. For an undertaking operating in a market with one or more licensed BDUs, the undertaking must file a registration form with the Commission no later than three months before commencing operations in a new service area.

Issues

28. The Commission considers that it must address the following issues:
 - Does Hill Valley qualify for an exemption in accordance with the criteria set out in the Exemption Order?
 - Should Hill Valley be allowed to retain its exempt status and remain on the list of exempted BDUs?

- Can Hill Valley distribute TVA and TVA Sports?

Does Hill Valley qualify for an exemption in accordance with the criteria set out in the Exemption Order?

29. On 30 December 2020, Hill Valley filed an application to operate an Internet Protocol Television (IPTV) BDU under the Exemption Order. In its application, Hill Valley indicated, among other things, that it agreed to comply with the terms and conditions set forth in that order.
30. The Commission processed the application by verifying that Hill Valley met all the criteria for exemption, including the technical criterion in relation to the private management network.
31. From the information provided by Hill Valley, including its responses and diagram, it would appear that the service is distributed over private networks to the subscriber's premises, that the digital set-top box is not nomadic, and that the service in question is not distributed over the Internet.
32. Accordingly, on 3 February 2021, the Commission sent a letter to Hill Valley indicating that, according to the information provided, it appears that Hill Valley may operate the businesses registered in Quebec and Ontario according to the Exemption Order.
33. Neither applicants nor interveners of the present application have suggested that Hill Valley does not currently meet the conditions of the order from a technical standpoint, and nothing suggests that Hill Valley is a BDU that cannot be exempted.
34. In light of the above, the Commission remains of the view that, as per the information provided by Hill Valley in its application for registration, it would appear that Hill Valley is still eligible to operate under the Exemption Order.

Should Hill Valley be allowed to retain its exempt status and remain on the list of exempted BDUs?

Compliance with the Exemption Order

35. As indicated in the Exemption Order, if an exempt BDU fails to comply with a term or condition of that order, the Commission may require it to obtain a broadcasting licence and may require it to cease operating until it obtains such a licence or is able to operate in accordance with the terms and conditions of the Exemption Order.
36. In addition, the Commission could initiate proceedings for the operation of a broadcasting undertaking without a licence or without having been exempted from the requirement to hold a licence (subsection 32(1) of the Act) or may summon the operator of the undertaking to a hearing to investigate the matter and impose an order requiring the licensee to comply at all times with the obligations under the Exemption Order or to cease broadcasting (subsection 12(2) of the Act).

37. However, the Commission's usual practice is to first determine whether the undertaking can achieve and maintain compliance. In this case, and as per the information provided, the Commission considers that Hill Valley currently meets the conditions for exemption. It serves fewer than 20,000 subscribers, appears to comply with the technical requirements of the Department of Industry, and would not be precluded from being licensed by virtue of any Act of Parliament or by the Governor in Council's direction. In addition, Hill Valley is in compliance with the Commission's regulatory requirements as set out in the Exemption Order.
38. In light of the above, the Commission finds that Hill Valley may retain its exempt status and that its exempted BDUs may remain on the exempted BDU list.

Can Hill Valley distribute TVA and TVA Sports?

The applicable regulatory framework

39. Pursuant to the Exemption Order, Hill Valley is required to carry TVA since it is a local over-the-air station. However, although the TVA Sports discretionary service is authorized for distribution, it is not required to be. In general, unless they are mandatorily distributed under paragraph 9(1)(h) of the Act, discretionary services are normally negotiated between a BDU and a programming service and are provided under an agreement between the two parties.
40. The Commission notes that Quebecor has raised issues relating to the CCA. Although not related to the Commission's jurisdiction, subsection 31(2) of the CCA provides as follows:

- (2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if
- (a). the communication is a retransmission of a local or distant signal;
 - (b). the retransmission is lawful under the *Broadcasting Act*;
 - (c). the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;
 - (d). in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act.

Dispute resolution

41. As explained in paragraph 52 of Broadcasting and Telecom Information Bulletin 2019-184, a "dispute exists the moment one party provides the Commission with a written notice of the dispute and serves that notice of dispute on the other undertaking involved. A notice of dispute can, for example, take the form of the filing of an undue

preference application, a complaint under the Wholesale Code, a request for final offer arbitration, a request for staff-assisted mediation, or a simple notification to the Commission of the existence of the dispute.”

42. As set out in Broadcasting Information Bulletin 2022-140, any party may utilize the Commission’s dispute resolution mechanisms with reference to the applicable regulations or exemption orders.

43. The *Discretionary Services Regulations* provides as follows:

14(1) If there is a dispute between a licensee and the operator of a licensed distribution undertaking or an exempt distribution undertaking concerning the carriage or terms of carriage of programming that originates from the licensee, including the wholesale rate and the terms of any audit referred to in section 15.1 of the *Broadcasting Distribution Regulations*, one or both of the parties to the dispute may refer the matter to the Commission for dispute resolution.

(2) If the Commission accepts a referral of a matter for dispute resolution, the parties to the dispute shall participate in a mediation with a person who is appointed by the Commission.

Distribution of TVA

44. In regard to the distribution of TVA, the Commission notes that Hill Valley is required to carry this local station under the Exemption Order without having to obtain its consent. As for royalty payments to the Canadian Broadcasters Rights Agency for the carriage of remote television stations, this issue is outside the Commission’s jurisdiction.

45. The Commission recognizes that Hill Valley was founded in early 2020 and was operating without a licence in certain localities until its service was registered as an exempt BDU on 3 February 2021. Since that time, Hill Valley has been operating as an exempt BDU and must distribute TVA’s services to comply with the criteria of the Exemption Order.

46. The Commission also recognizes that Hill Valley was operating its BDU without authorization prior to that date. As noted above, this is a violation of the Act. In any event, the Commission’s general practice is to bring undertakings back into compliance rather than prosecute them. Furthermore, the fact that TVA was distributed prior to that date is a copyright issue that is not within the Commission’s jurisdiction.

47. In light of the above, the Commission finds that Hill Valley, as an exempt BDU, is currently authorized to distribute TVA. According to its usual practice of determining whether an undertaking can achieve and maintain compliance before applying more stringent measures, the Commission finds that no measures should be imposed for Hill Valley’s distribution of TVA during the period of operation prior to 3 February 2021, since Hill Valley is now in compliance.

Distribution of TVA Sports

48. In regard to TVA Sports, Hill Valley appears to be distributing this service contrary to what is permitted by the CCA, given that it is being distributed without the authorization of Quebecor. The Commission notes that this is a copyright issue and does not fall within the Commission's jurisdiction.

Dispute resolution

49. Given that the programming service declined to participate in a staff-assisted mediation, Hill Valley proposed as an alternative that the Commission indicate in its decision that it expects Quebecor to engage in expedited and good-faith negotiations.

50. The Commission notes that there is no regulatory requirement to distribute discretionary services, including TVA Sports.

51. Despite this, the Commission notes that Hill Valley is a small business that offers an innovative alternative to the hotel industry. Accordingly, and given the conclusions set out above, the Commission encourages the parties to negotiate a mutually acceptable agreement.

52. The Commission also encourages Bell, which had the same concerns as Quebecor, to negotiate an agreement with Hill Valley for the distribution of its discretionary services. The Commission's staff remains available to assist the parties in staff-assisted mediation.

53. The Commission wishes to explicitly clarify that, notwithstanding its conclusions and encouragements in this decision, it does not condone any conduct that would be inconsistent with the CCA.

54. The Commission notes that there are Commission dispute resolution mechanisms available to Hill Valley and Quebecor, including staff-assisted mediation.

Conclusion

55. In light of the above, the Commission **denies** Quebecor's request to revoke Hill Valley's exempt status. The Commission also **denies** Quebecor's request to remove Hill Valley from the list of exempted BDUs. Finally, the Commission **denies** Quebecor's request to sanction Hill Valley.

Secretary General

Related documents

- *Interpretation of the Wholesale Code*, Broadcasting Information Bulletin CRTC 2022-140, 1 June 2022

- *Practices and procedures for dispute resolution*, Broadcasting and Telecom Information Bulletin CRTC 2019-184, 29 May 2019
- *Revised exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Regulatory Policy CRTC 2017-319 and Broadcasting Order CRTC 2017-320, 31 August 2017